UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASHPEE WAMPANOAG TRIBE, Plaintiff, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, and U.S. DEPARTMENT OF THE INTERIOR Defendants and DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; DEBORAH CANARY; VERONICA CASEY; PATRICIA COLBERT, VIVIAN COURCY; DONNA DEFARIA; KIM DORSEY; FRANCIS LAGACE; WILL COURCY; ANTONIO DEFARIA; KELLY DORSEY; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; ROBERT LINCOLN; CHRISTINA MCMAHON; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY; LOUISE SILVIA; FRANCIS CANARY, JR.; MICHELLE LEWRY; RICHARD LEWRY, Proposed Intervenor-Defendants.	Civil Action No. 1:18-cv-02242-RMC

THE *LITTLEFIELD* PLAINTIFFS' MOTION TO INTERVENE AND
MEMORANDUM IN SUPPORT

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MOTION TO INTERVENE

Each of the twenty-five named plaintiffs in *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016) ("*Littlefield* Plaintiffs")[1] hereby moves this Court for leave to intervene in this action as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). As grounds therefore, the *Littlefield* Plaintiffs state as follows:

1. The District Court in *Littlefield* issued a decision on July 28, 2016 declaring that the Secretary of the Interior lacked authority under the Indian Reorganization Act of 1934 ("IRA") to take land into trust for the Tribe—applying the so-called "second definition" of "Indian" in the IRA.[2] (For the Court's convenience, a copy of the reported decision in *Littlefield* is attached as Exhibit 1 to the Declaration of David H. Tennant, dated February 12, 2019, in Support of the *Littlefield* Plaintiffs Motion to Intervene ("Tennant Decl.").)

2. The *Littlefield* decision determined that the Secretary had acted without statutory authority when it acquired trust lands for the Tribe in Massachusetts, including 151 acres located in East Taunton, Massachusetts.

3. The Tribe intends to construct and operate a billion-dollar Las Vegas-style casino/resort on the lands in East Taunton. (See *Littlefield* Amended Complaint, Exhibit 2 to

[1] David Littlefield, Michelle Littlefield, Tracy Accord, Francis Canary, Jr., Deborah Canary, Veronica Casey, Patricia Colbert, Will Courcy, Vivian Courcy, Antonio Defaria, Donna Defaria, Kim Dorsey, Francis Lagace, Jill Lagace, Kelly Dorsey, David Lewry, Kathleen Lewry, Michele Lewry, Richard Lewry, Robert Lincoln, Christina McMahon, Carol Murphy, Dorothy Pierce, David Purdy, Louise Silvia.

[2] The three definitions of "Indian" are set out in Section 479 of the IRA:

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

Tennant Decl.) The *Littlefield* Plaintiffs are homeowners and long-time residents of East Taunton who are directly impacted by development on the purported trust lands. The *Littlefield* Plaintiffs have Article III standing to sue to challenge the Secretary's decision to take the land into trust.

4. In this action, the Tribe challenges the Secretary's decision on remand from *Littlefield,* which determined that the Secretary does not have authority to take land into trust for the Tribe under the so-called "first definition" of "Indian" in the IRA. The Secretary reviewed the parties' submissions on remand and concluded that Interior lacked authority to take the lands in question into trust, including the lands in East Taunton. (A true and correct copy of the Secretary's September 7, 2019 decision is included as Exhibit 3 to the Tennant Declaration.)

5. The *Littlefield* Plaintiffs seek to intervene in this action as defendants (to become "Intervenor-Defendants") to protect their interests in not having a billion-dollar casino wedged into their quiet, semi-rural neighborhood.

6. The *Littlefield* Plaintiffs' motion is timely because this litigation is still in a very early stage. The Tribe filed its complaint on September 27, 2018. The Federal Defendants have yet to respond to the Tribe's Complaint.

7. Intervention by the *Littlefield* Plaintiffs will not create any delay, nor will it prejudice the existing parties. The government is obligated to respond to the Tribe's Complaint by February 20, 2019. Proposed Intervenor-Defendants are prepared to file an answer now, in accordance with Federal Rule of Civil Procedure 24(c) and Local Rule 7(j). (*See* Exhibit A attached hereto.)

8. Intervention will enable the *Littlefield* Plaintiffs to protect their substantial legal interests in the outcome of this lawsuit—i.e., whether 151 acres of land in East Taunton, Massachusetts, adjacent to their residential neighborhood, is lawfully held in trust, declared a reservation, and deemed eligible for Indian gaming. If the Tribe obtains the outcome it seeks, it will

move forward with its plans to build an enormous casino-resort that will permanently alter the neighborhood to the extreme prejudice of each *Littlefield* Plaintiff.

9. The factual and legal issues presented in this case are the same as in *Littlefield,* and pertain to the very same lands in East Taunton.

10. The *Littlefield* Plaintiffs' interests are not adequately protected by the existing parties to the litigation.

11. The *Littlefield* Plaintiffs are adverse to the Tribe in this action.

12. The *Littlefield* Plaintiffs are nominally aligned in interest with the Federal Defendants here, but the Federal Defendants may not adequately protect the interests of the *Littlefield* Plaintiffs in this action. Interior owes trust responsibilities and fiduciary obligations to tribes that creates mixed motives in resolving legal disputes involving tribes.

13. The history of the *Littlefield* litigation demonstrates that the federal government's interests are more closely aligned with the Tribe than the proposed intervenors. Interior resisted the timely adjudication of the *Littlefield* Plaintiffs' claims, even as the Tribe broke ground to begin construction of its casino/resort. In *Littlefield*, the Federal Defendants delayed producing the administrative record (prompting judicial intervention) and resisted attempts to allow the case to be decided on an expedited basis through cross-motions for summary judgment on the legal question of whether the Secretary had statutory authority to take land into trust for the Tribe. The Federal Defendants only relented and signed a stipulation to permit an immediate "trial" on the Secretary's statutory authority because they could not meet the district court's production deadline for the administrative record. Tennant Decl. ¶ 10

14. On remand from *Littlefield*, the federal government's dilatory tactics grew worse—unnecessarily and unreasonably delaying resolution of the remand inquiry for more than a year, which benefitted the Tribe. Tennant Decl. ¶ 11; Tennant Decl. Exh. 4, at 2-4.

15. The only way for the *Littlefield* Plaintiffs to protect their interests in this litigation is to intervene as defendants on an equal footing with the other parties.

16. The *Littlefield* Plaintiffs also satisfy the requirements for permissive intervention because the Tribe's claims against the Federal Defendants involve the same property in East Taunton, Massachusetts, and raise questions of law and fact in common with the claims and facts at issue in the *Littlefield* action.

17. Pursuant to Local Rule 7(m), counsel for the *Littlefield* Plaintiffs conferred with counsel for the Tribe by telephone and email on February 1, 2019 concerning the *Littlefield* Plaintiffs' motion to intervene. Counsel for the Tribe stated that the Tribe would not oppose the *Littlefield* Plaintiffs' request for intervention. Tennant Decl. ¶ 17. Counsel for the *Littlefield* Plaintiffs also consulted with the Government, which stated that it had no position on the *Littlefield* Plaintiffs' Motion at this time. Tennant Decl. ¶ 16.

18. As further support for this Motion, the *Littlefield* Plaintiffs respectfully refer the Court to the following Memorandum of Law.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Proposed Intervenor-Defendants obtained a judgment against the Department of Interior in *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016), overturning Interior's decision to take land into trust for the Mashpee Wampanoag Tribe in Massachusetts—the Plaintiff in this action. The U.S. District Court in Boston, Massachusetts issued that judgment two-and-a-half years ago. Since then, the *Littlefield* Plaintiffs have been deprived of the remedy they seek and are entitled to receive: Removal of the land in trust in keeping with the district court's declaration that Interior lacked authority under the Indian Reorganization Act of 1934 to take land into trust for the Tribe.

The Tribe appealed the *Littlefield* decision in 2016, while the federal government abandoned its appeal in the face of the clear statutory bar preventing Interior from taking land into trust for the Tribe. The Tribe has not prosecuted its appeal in the First Circuit—instead seeking and obtaining several stays until recently asking for an indefinite stay—so that this newly filed Administrative Procedure Act ("APA") action could leapfrog to the front of the judicial line and proceed to a final judgment, while the *Littlefield* Plaintiffs still seek finality on their APA action commenced more than three years ago.

The *Littlefield* Plaintiffs move to intervene as of right (or, alternatively, permissively) to protect their interests in this action, and upon intervening, will move to transfer this action back to its point of origin in Massachusetts, to permit the district court in Boston, well-versed in the legal issues and familiar with the parties and the dispute, to finish what was started there. (The proposed intervenors' motion to transfer venue is filed concurrently with this Motion.)

Regardless of whether this Court decides to transfer venue to the District of Massachusetts, Proposed Intervenor-Defendants meet the standards for intervention as of right. Intervention will enable them to participate in the defense of Interior's ruling on remand from *Littlefield*, issued September 7, 2018, in which Interior determined the Secretary of the Interior does not have authority under the IRA to take land into trust for the Tribe. That remand decision reinforces the correctness of Judge Young's decision in *Littlefield*. In contrast, a decision by this Court to overturn Interior's remand decision would effectively erase the *Littlefield* Plaintiffs' hard-fought legal victory against Interior in the District of Massachusetts. It would subject the *Littlefield* Plaintiffs to the very harms their lawsuit in Massachusetts was designed to prevent, namely, the construction and operation of a billion-dollar tribal casino that would forever change their quiet, semi-rural residential community and harm their way of life.

PROCEDURAL HISTORY

The Tribe filed its Complaint on September 27, 2018. ECF No. 1. In accordance with this Court's minute order dated January 25, 2019, the answer of Defendants Ryan Zinke (the "Secretary") and the Department of Interior (the "Department" or "Interior," and together with the Secretary, the "Federal Defendants") is due on February 20, 2019. The Federal Defendants have not yet filed a response to the Complaint.

ARGUMENT

I. THE *LITTLEFIELD* PLAINTIFFS SATISFY THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Federal Rule of Civil Procedure Rule 24(a)(2) provides that, upon timely application, anyone shall be permitted to intervene in an action who:

> claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Under circuit law, the right to intervene under Rule 24(a) rests on four factors: (1) whether the motion to intervene is timely; (2) whether the applicant claims an interest relating to the property or transaction that is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (citations omitted); *see also Jones v. Prince George's Cty.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003) (listing the four elements of Rule 24(a) as "timeliness, interest, impairment of interest, and adequacy of representation"). In addition, an applicant seeking to intervene as of right under Rule 24(a) must possess Article III standing to participate in the lawsuit. *See Town of Chester v. Larve Estate Inc.*, 137 S. Ct. 1645, 1651 (2017); *Fund for Animals*, 322 F.3d at 731-32.

Here, the *Littlefield* Plaintiffs' motion to intervene satisfies the requirements of Rule 24(a)(2) for intervention as of right, including Article III standing. The *Littlefield* Plaintiffs had previously demonstrated Article III standing in the District of Massachusetts in the *Littlefield* litigation based on the impact of the Tribe's planned casino/resort on the East Taunton neighborhood and the residents' way of life. This "no doubt" constituted "an injury in fact fairly traceable to the Secretary's fee-to-trust decision." *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) (holding homeowner in rural area in Western Michigan established Article III and prudential "zone of interest" standing to challenge Secretary's land into trust decision to enjoin operation of tribal casino that would impair way of life), *aff'd*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). The Supreme Court in *Patchak* agreed with the D.C Circuit that the plaintiff-landowner had standing under the APA to sue to enjoin the Secretary from taking land into trust for a tribe where the land acquisition was designed to support a tribal casino. The Court observed that the landowner "allege[d] economic, environmental, and aesthetic harms from the casino's operation" and concluded those interests satisfied prudential standing. *Patchak*, 567 U.S. at 211, 223-228.

Given the rulings in *Patchak*, neither the Secretary nor the Tribe argued the plaintiffs in *Littlefield* lacked standing. Those very same "economic, environmental, and aesthetic harms" are present in this case because the Tribe continues to pursue its goal of building and operating a tribal casino in East Taunton and is seeking to overturn Interior's remand decision so that it can move forward with those plans. The *Littlefield* Plaintiffs thus have standing to intervene in this case just as they had standing to sue Interior in the District of Massachusetts.

A. The *Littlefield* Plaintiffs' Motion to Intervene is Timely.

The timeliness of a motion to intervene "is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). To assess whether a motion to intervene is timely, "courts should take into account (a) the time elapsed since the inception of the action, (b) the

probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights." *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (quoting *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 12 (D.D.C. 2010)).

This motion is timely because it has been filed before the federal defendants have had an opportunity to answer the Complaint. *See Fund for Animals*, 322 F.3d at 730 (motion to intervene is timely given that it was filed "before the defendants filed an answer"). Neither party will be prejudiced, and the party adverse to the *Littlefield* Plaintiffs' interests, the Tribe, has already indicated it will not oppose the *Littlefield* Plaintiffs' intervention.

B. The *Littlefield* Plaintiffs Have a Substantial, Legally Protectible Interest.

A party seeking intervention must also show that it has a "legally protected interest in the action." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). This requirement and the related requirement that "the action must threaten to impair the putative intervenor's proffered interest in the action," *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008), "operates in large part as a practical guide, with the aim of disposing of disputes with as many concerned parties as may be compatible with efficiency and due process." *WildEarth*, 320 F.R.D. at 36.

The *Littlefield* Plaintiffs' Article III and prudential standing in relation to the 151 acres in East Taunton under the controlling authority of *Patchak* —then and now—satisfies Rule 24(a)'s requirement of a legally protectable interest. *See Jones*, 348 F.3d at 1018; *Fund for Animals*, 322 F.3d at 735; *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (observing that satisfying constitutional standing requirements demonstrates the existence of a legally protected interest for purposes of Rule 24(a)). The *Littlefield* Plaintiffs' status as adjacent landowners to the purported trust lands in East Taunton and interest in preserving their community and way of life, is a legally protectable interest for purposes of satisfying Rule 24(a).

C. Interest That May Be Impaired As a Result of This Litigation.

The *Littlefield* Plaintiffs' legally protectible interest will be impaired if the Tribe succeeds in its lawsuit against Interior. A victory for the Tribe would render illusory the *Littlefield* Plaintiffs' victory in overturning Interior's 2015 decision. Should this Court overturn the Secretary's September 7, 2018 decision, that ruling would enable the Tribe to move forward with its casino development and thereby permanently harm the *Littlefield* Plaintiffs' property interests and way of life. The *Littlefield* Plaintiffs seek to participate here to vigilantly protect their community and way of life.

D. The Existing Parties Do Not Adequately Represent the *Littlefield* Plaintiffs' Interests.

The fourth and final element required to establish intervention of right is inadequate representation of the proposed intervenor's interest by existing parties to the litigation. This element is satisfied if the proposed intervenor "shows that representation of his interest 'may be' inadequate and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also Fund for Animals*, 322 F.3d at 735-36; *Cayuga Nation v. Zinke,* 324 F.R.D. 277, 283 (D.D.C. 2018) ("Significantly, the putative intervenor's burden here is *de minimis*, and extends only to showing that there is a possibility that its interests may not be adequately represented absent intervention."); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing this element as "not onerous"); *see also United States v. Am. Tel. and Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (stating that an applicant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'" (quoting 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 (1st ed. 1972))). "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenor because it allows the court to resolve all related disputes in a single action." *Lloyd v. Ala. Dep't of Corrs.*, 176 F.3d 1336, 1341 (11th Cir. 1999).

Courts in this circuit generally recognize that governmental entities may not adequately

represent the interests of a private party seeking to intervene in a lawsuit against a federal agency. *See Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors."); *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 305 (D.D.C. 2018) (recognizing this divergence of interests in a case involving tribal gaming).

One reason that interests diverge between federal defendants and private parties is the fact that the federal government has an "'overarching obligation . . . to represent the interests of the American people,' while the intervenor's obligation is to represent its own interests." *Connecticut*, 344 F. Supp. 3d at 305 (quoting *Fund for Animals*, 322 F.3d at 736). That basic divergence expands substantially when a lawsuit challenges a decision by the Secretary of the Interior involving an Indian tribe. In the tribal lawsuit context, this Court recognizes that "[the Secretary's] duty to serve the public *and its trust obligations to the Tribes* are distinct from [the private party's] commercial considerations, which could lead to different positions in litigating this case." *Id.* (emphasis added). For example, in another case involving a tribe suing Interior to obtain trust lands, the federal defendants resisted asserting a clearly meritorious statute of limitations defense (the action being time-barred by more than 40 ears), when a normally incentivized defendant would have asserted that defense at the outset of the case and moved immediately to dismiss. Tennant Decl. ¶ 15.

The fact that a private party and federal defendants agree on a litigation posture at the outset of the case does not mean that federal defendants necessarily will adequately represent the private party's interests throughout this action. *Connecticut*, 344 F. Supp. 3d at 305; *100reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 280 (D.D.C. 2014) (finding inadequate representation when, "although there are certainly shared concerns, it is not difficult to imagine how the interests of [the intervenor] and the other [federal] defendant[ ] might diverge during the course of litigation" (citation and internal quotation marks omitted)).

Here, the Federal Defendants may not adequately protect the interests of the *Littlefield* Plaintiffs. To the extent past is prologue, they will not. As an initial matter, Interior only applied the rule of law on remand because: (i) the *Littlefield* Plaintiffs had prevailed in the Massachusetts District Court, which determined that Interior's reading of the IRA, on the basis of which Interior had taken land into trust for the Tribe, was "not a close call," *Littlefield*, 199 F. Supp. 3d at 396; and (ii) the *Littlefield* Plaintiffs vigorously represented their interests on remand in a persistent effort to persuade the Secretary not to issue a second flawed decision in favor of the Tribe. Courts recognize that where (as here) the proposed intervenor sues the federal government to force it to take action, "the governmental defendant's interest[s] in defending that action are presumed to be less strong than the intervenor's interest." *See Picayune Rancheria of Chukchansi Indians v. U.S. Dep't of the Interior*, No. 16-cv-950, 2016 WL 6217047, at *4 (E.D. Cal. Oct. 24, 2016) (citing *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011)). That presumption certainly holds true here. The *Littlefield* Plaintiffs have a much stronger interest in defending the Secretary's remand decision—protecting their community and way of life—than does the Secretary, who resisted finding against the Tribe for a full 18 months on remand, before finally acknowledging that the Department lacked statutory authority to help the Tribe.

All that is required to meet the fourth required element of intervention as of right is the possibility that the intervenor's rights will not be adequately represented by the existing parties. *Trbovich*, 404 U.S. at 538 n.10; *Fund for Animals*, 322 F.3d at 735-36. Here, there is much more than a possibility of inadequate representation.

II. THE *LITTLEFIELD* PLAINTIFFS MEET THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Federal Rule of Civil Procedure 24(b) provides an alternative basis for the *Littlefield* Plaintiffs' intervention in this action. Rule 24(b) states, in relevant part:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact... In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As discussed above, the *Littlefield* Plaintiffs' motion to intervene rests on the near identity of facts and law between the *Littlefield* litigation and the Tribe's present challenge to Interior's decision on remand from *Littlefield*. This nearly complete overlap more than satisfies the requirement of a common question of law or fact. Moreover, the intervention motion is timely, and the participation of the *Littlefield* Plaintiffs as intervenor-defendants would not unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties.

In addition, the *Littlefield* Plaintiffs (and their counsel) would bring to this action substantial knowledge concerning the Tribe's history in Massachusetts, the IRA, caselaw construing the IRA (including *Carcieri v. Salazar*, 555 U.S. 379 (2009) and its progeny), Interior's land-into-trust regulations and decisions, and more generalized knowledge and experience in federal Indian law that may benefit the Federal Defendants and the Court.

CONCLUSION

The *Littlefield* Plaintiffs have demonstrated their statutory right to intervene as defendants in this action to protect their interests. In the alternative, they have established grounds for permissive intervention. Accordingly, the *Littlefield* Plaintiffs respectfully request that their motion to intervene be granted under Rule 24(a), or, alternatively, under Rule 24(b).

Dated: February 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2019, I electronically filed the foregoing Motion to Intervene and Memorandum in Support and accompanying documents with the Clerk of the Court of the U.S. District Court for the District of Columbia by using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Andrew Kim
Andrew Kim