

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants.

Civil Action No. 1:16-cv-10184-WGY

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO RESTORE ADMINISTRATIVELY-CLOSED COUNTS, REOPEN CASE FOR NEW
FILINGS AND FOR LEAVE TO AMEND**

In February 2016, Plaintiffs filed this Administrative Procedure Act (APA) suit challenging the Department of Interior's Record of Decision dated September 18, 2015 ("2015 ROD"). The Court granted summary judgment in favor of Plaintiffs on count one of Plaintiffs' complaint, keeping the remaining counts "administratively closed" until resolution of the first count. [ECF No. 49](#). The Court invited Plaintiffs to file a motion to reopen when appropriate. Now, the Secretary has issued a new decision "confirm[ing] the 2015 decision" in many respects. *See* Dec. 22, 2021 Record of Decision ("2021 ROD"), attached hereto as Exhibit C-1 and C-2 (2015 ROD as an appendix to 2021 ROD) to the Declaration of David H. Tennant in Support of Motion to Reopen Case, Restore Administratively-Closed Counts and For Leave to Amend. Because the flaws giving rise to certain of the remaining "administratively closed" counts have been reaffirmed by the Secretary are now ripe for this Court's decisionmaking, Plaintiffs respectfully request that this Court reopen the case and restore the administratively closed counts and grant leave to file an amended complaint that addresses the 2021 ROD.

At several points throughout this case (including after disposition), the Court made clear that Plaintiffs may seek to reopen the administratively closed counts. In its initial order administratively closing all other counts beyond the First Cause of Action, the Court stated: “All remaining counts are administratively closed. Counts to be reopened upon conclusion of proceedings on first cause of action. A motion to reopen may be filed.” 6/29/2016 Minute Order, [ECF No. 49](#). Later, during a status conference held March 29, 2018, the Court stated that Plaintiffs have a right to return to this Court: “The Courts doors are open if there is something for the Court to adjudicate.” (A true and correct copy of the transcript is attached as Exhibit E to the Declaration of David H. Tennant in Support of Plaintiffs’ Motion to Restore Administratively-Closed Counts, Reopen Case for New Filings and Leave to Amend, dated December 31, 2021 (“Tennant Decl.”)).

The time for adjudication is now. Plaintiffs respectfully request this Court to restore the administratively closed counts— specifically the Second, Third and Eighth Causes of Action¹— and otherwise reopen the case to permit additional filings for adjudication, including but not limited to Plaintiffs’ Second Amended Complaint. Plaintiffs intend to pursue three pending causes of action challenging the 2015 ROD, which remain viable inasmuch as the 2021 ROD, expressly confirms and incorporates by reference the 2015 ROD. Tennant Decl., Exh. C-1. Plaintiffs also intend to challenge the Secretary’s claimed statutory authority to take the lands into trust under the first definition of “Indian” in the Indian Reorganization Act, as set forth in the December 22, 2021 ROD. Those counts are set forth in Plaintiffs’ Second Amended Complaint, attached as Exhibit E to the Tennant Declaration, as to which leave to amend is sought.

¹The Second Cause of Action challenges the findings that the Mashpees have an historical connection to Taunton; the Third Cause of Action challenges the finding that two physically distant parcels could be a single reservation; and the Eighth Cause of Action seeks an order compelling the removal of the land from trust.

As this Court is aware, the Secretary previously failed in this Court to ground her authority under the second definition. Tennant Decl., Exh. C-2 (2015 ROD appended to 2021 ROD). On remand from this Court, the Department of the Interior first concluded that the Mashpees were ineligible to receive trust land under the first definition. Tennant Decl. ¶ 5, Exhs. A (June 19, 2017 draft ROD) and B (September 7, 2018 ROD). But most recently, with a new administration in Washington, the Secretary abruptly reversed course and determined the Mashpees qualified, despite no changes in the facts or law. Tennant Decl. ¶ 9, Exhs. C-1 and C-2.

I. LEAVE TO AMEND SHOULD BE GRANTED

Plaintiffs' Second Amended Complaint addresses the 2021 Record of Decision, which incorporates by reference and attaches as an appendix the 2015 ROD that is still before this Court. Venue is proper in this District inasmuch as the Plaintiffs reside here, the subject land is located here, and the Mashpees are based here.

Leave to amend is to be freely granted. *See U.S. ex rel. D'Agostino v. EV3, Inc.*, [802 F.3d 188, 192](#) (1st Cir. 2015) (“court should ‘freely give’ leave to amend where the interests of justice so requires”); *Nat'l Wildlife Fed. v. U.S. Army Corps of Engineers*, [2001 WL 34045735](#) (D. Or. Aug. 21, 2001) (granting leave to amend following issuance of agency decision on remand). Accordingly Plaintiffs respectfully request that they be permitted to file their Second Amended Complaint, which is attached as Exhibit E to the Tennant Declaration.

Respectfully submitted,

/s/ David H. Tennant

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Dated December 31, 2021

CERTIFICATE OF SERVICE

I, David H. Tennant, hereby certify that this document was filed through the Court's ECF system on December 31, 2021 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
David H. Tennant