IN THE 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

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO RESTORE ADMINISTRATIVELY-CLOSED COUNTS, REOPEN CASE FOR NEW FILINGS AND FOR LEAVE TO AMEND

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INTRODUCTION

Plaintiffs David Littlefield et al. seek to reopen the above-captioned case, which concerned a challenge to a September 18, 2015, Record of Decision ("2015 ROD"), issued by then-Assistant Secretary–Indian Affairs Kevin K. Washburn, approving a request by the Mashpee Wampanoag Tribe ("Tribe") to accept in trust approximately 151 acres of land in the City of Taunton, Massachusetts and approximately 170 acres of land in the Town of Mashpee, Massachusetts ("Property") for the Tribe's benefit, based on the Indian Reorganization Act's, 25 U.S.C. § 5101 *et seq.* ("IRA") second definition of the term "Indian." The 2015 ROD, however, has since been superseded and replaced by a new decision, issued by Assistant Secretary–Indian Affairs Bryan Newland ("Assistant Secretary") on December 22, 2021 ("2021 Decision"),[1] based on the IRA's first definition of "Indian," following a remand ordered by the United States District Court for the District of Columbia. Plaintiffs' challenge to the 2015 ROD is therefore moot. Plaintiffs try to obscure this fact by claiming they want to "return" to the claims they advanced in their Amended Complaint (ECF 12), but there is nothing to return to—all of the claims Plaintiffs now seek to advance concern the 2021 Decision, not the superseded 2015 ROD. *See* ECF 151-7.

Moreover, Plaintiffs' effort to amend the complaint would be futile or would serve no legitimate purpose, providing another basis for the Court to deny their motion. The 2021 Decision—the sole basis of Plaintiffs' new challenge—reflects the culmination of an *entirely separate* proceeding unrelated to the 2015 ROD, concerning whether the Tribe falls within the first definition of "Indian" in the IRA. As this Court is aware, the 2015 ROD relied on the second definition of "Indian" in that statute, and whether that definition incorporated the "under

[1] *Available at* https://www.bia.gov/as-ia/oig/departmental-gaming-decisions. *See also* ECF 151-5; ECF 151-6.

Federal jurisdiction" requirement of the first definition into it. *Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016). This Court held that the phrase "such members" in the second definition "unambiguously incorporates the entire antecedent phrase—that is, 'such members' refers to 'members of any recognized Indian tribe now under Federal jurisdiction.'" *Id.* at 399-400. The Court subsequently clarified that on remand, Interior could properly evaluate whether the Tribe satisfied the requirements of the first definition of "Indian" in the IRA. ECF 121 at 3. Plaintiffs participated fully in the remand Interior subsequently commenced, including the litigation that arose from it. *See Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (D.D.C. 2020) (vacating and remanding 2018 Record of Decision ("2018 ROD") concluding that the Tribe was not "under Federal jurisdiction" in 1934 within the meaning of the IRA). As detailed herein, Plaintiffs' proposed amended complaint makes plain their effort to use this case to advance arguments that contradict the representations they made to the D.D.C., and to further produce rulings that contravene the remand directives of that court. The Court should reject Plaintiffs' flagrant attempt to play "fast and loose" with the courts in this way.

Accordingly, Interior; Deb Haaland, in her official capacity as Secretary of the Interior ("Secretary"); the Bureau of Indian Affairs; Bryan Newland, in his official capacity as Assistant Secretary;[2] and the United States of America (collectively, "the United States"), hereby respectfully request that the Court deny Plaintiffs' motion and, pursuant to the United States' *Motion to Transfer Venue* filed concurrently herewith, transfer this case to the D.D.C.

[2] Pursuant to Fed. R. Civ. P. 25(d), Secretary Haaland is automatically substituted for former Secretary Sally Jewell, and Assistant Secretary Newland is automatically substituted for former Acting Assistant Secretary–Indian Affairs Lawrence S. Roberts.

BACKGROUND

Following this Court's ruling and subsequent clarification concerning Plaintiffs' First Cause of Action in the Amended Complaint (ECF 12), Interior commenced, on remand, an evaluation of the Tribe's eligibility under the first definition of "Indian" in the IRA, *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 211, while the Tribe pursued an appeal of this Court's ruling on the second definition of "Indian," *Littlefield v. U.S. Dep't of Interior*, 951 F.3d 30 (1st Cir. 2020). Plaintiffs participated in both proceedings. *See Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 206, 211 (noting Plaintiffs' intervenor status as well as its participation in the remand proceedings; *Littlefield*, 951 F. 3d at 34-36 (discussing and rejecting Plaintiffs' arguments seeking dismissal of the appeal). The First Circuit affirmed this Court's ruling on the second definition of "Indian." *Littlefield*, 951 F. 3d at 41.

I. The Tribe's Successful Challenge to the 2018 ROD

In 2018, while the Tribe's appeal was pending in the First Circuit, Interior issued the 2018 ROD, concluding that the Tribe was not "under Federal jurisdiction" in 1934 for IRA purposes, and thus the Secretary lacked authority to acquire land in trust for it under that statute. *See Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 205, 212. *See also* ECF 151-4. The Tribe then filed suit in the D.D.C., challenging the 2018 ROD on the basis that Interior failed to properly evaluate evidence of the Tribe's 1934 jurisdictional status consistent with Interior's established framework for such inquiry, set forth in the Interior Solicitor's M-Opinion, M-37029.[3] *Id.* at 212.

M-37029 includes Interior's formal interpretation of the first definition of "Indian" in the IRA, and sets forth a two-part test for evaluating whether an Indian tribe was "under Federal

[3] *Available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf.

jurisdiction" in 1934. *Id.* at 208-10. Interior's interpretation also concludes that "now" modifies "under Federal jurisdiction" and not "recognized Indian tribe," and thus, the applicant Indian tribe only need to be federally recognized at the time the Secretary acquires the subject property in trust to satisfy the "recognized Indian tribe" component of the definition. *See Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d 552, 559-63 (D.C. Cir. 2016), *cert denied sub. nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) (upholding such interpretation). Interior's interpretation of the first definition of "Indian," including with respect to recognition and "under Federal jurisdiction," has been upheld by every court to consider it. *See County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012 (9th Cir. 2017), *cert denied*, 139 S. Ct. 64 (2018); *Upstate Citizens for Equal, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016), *cert denied*, 140 S. Ct. 2587 (2017); *Confederated Tribes of Grand Ronde Cmty. of Ore.*, 830 F.3d at 559-66.

M-37029 includes Interior's two-part test for evaluating whether an Indian tribe was "under Federal jurisdiction" in 1934. The first part of the test examines whether in or before 1934, the Indian tribe had come under federal jurisdiction as a result of one or more actions taken by the United States, "through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 208-09. The second part examines "whether the tribe's jurisdictional status remained intact in 1934." *Id.* at 209. The 2018 ROD used this framework to evaluate the Tribe's 1934 jurisdictional status. *Id.* at 217-18.

Plaintiffs intervened in the D.D.C. suit in support of the 2018 ROD, arguing that Interior properly considered evidence pertaining to the Tribe's history consistent with M-37029 to find

that the Tribe was not "under Federal jurisdiction." *Id.* at 217. At that time, Plaintiffs sought to transfer the Tribe's case to this District, but the D.D.C. court rejected such effort. *Mashpee Wampanoag Tribe v. Zinke*, No. 18-CV-2242, 2019 WL 2569919 (D.D.C. June 21, 2019). The D.D.C. court concluded that all of the relevant factors weighed against transfer, including that the Tribe's suit involved a different question not considered by this Court—namely, the reasonableness of Interior's evaluation of the Tribe's "under Federal jurisdiction" status; that this District was more congested than the D.D.C.; and that the suit raised issues of national importance and was thus not simply a "localized controversy." *Id.* at *7-9.

When briefing the merits, Plaintiffs did not challenge Interior's reliance on or application of M-37029 to the Tribe in the D.D.C. Instead, Plaintiffs argued that the 2018 ROD was neither arbitrary nor capricious because Interior properly considered the Tribe's evidence consistent with M-37029. *See* Intervenor-Defendants *Littlefield* Plaintiffs' Memorandum of Points and Authorities in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11-19, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Sept. 13, 2019) (Interior's application of M-37029 and evaluation of the Tribe's evidence in the 2018 ROD was neither arbitrary nor capricious).

In 2020, while the Tribe's challenge to the 2018 ROD was pending, then-Solicitor Daniel Jorjani withdrew M-37029 and issued a new framework for evaluating whether an Indian tribe satisfies the requirements of the first definition of "Indian." *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 217. The D.D.C. then directed the parties to address certain questions about this development, including the relevance of such new framework to the merits issues pending before it. *See* Memorandum Opinion and Order, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. May 1, 2020). In response, Plaintiffs characterized the differences between M-

37029 and the new framework as "more cosmetic than substantive," and further reiterated their position that M-37029 was the proper framework Interior should use to analyze the Tribe's 1934 jurisdictional status. *See* Intervenor-Defendants *Littlefield* Plaintiffs' Supplemental Brief in Response to This Court's May 1, 2020 Memorandum Opinion and Order at 2, *Mashpee Wampanoag Tribe. v. Bernhardt*, No. 18-CV-2242 (D.D.C. May 4, 2020).[4]

In deciding the merits, the D.D.C. court issued a detailed opinion concluding that, in the 2018 ROD, Interior misapplied M-37029 when evaluating historical evidence relevant to the Tribe's 1934 jurisdictional status. *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 217-35. In rejecting Interior's and Plaintiffs' arguments defending the 2018 ROD, the D.D.C. court thoroughly reviewed how Interior considered each category of evidence, including the education of Mashpee children at federal government boarding schools; the enumeration of Mashpee tribal members on federal censuses, including census that were specifically for "Indians" or otherwise identified those enumerated as having a tribal affiliation; and federal reports and surveys, in which federal officials identified the Tribe and considered whether federal programs or policies should apply to them, including a report from 1825 recommending against forcibly removing the Tribe from its ancestral homeland. *Id.* at 217-234.

The D.D.C. court found that in the 2018 ROD, Interior either improperly limited the significance of certain evidence or viewed it in isolation, rather than in concert with other relevant evidence, or both, which the court concluded was inconsistent with M-37029 as well as

[4] In 2021, Solicitor Robert Anderson reinstated M-37029 as Interior's controlling framework for the "under Federal jurisdiction" inquiry. *See* M-37070, *Withdrawal of Certain Solicitor M-Opinions, Reinstatement of Sol. Op. M-37029*, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act*, and Announcement Regarding Consultation on "Under Federal Jurisdiction" Determinations* (Apr. 27, 2021), *available at* https://www.doi.gov/sites/doi.gov/files/m-37070.pdf.

other Interior decisions evaluating the "under Federal jurisdiction" status of other Indian tribes. *Id.* Based on these conclusions, the D.D.C. court held that the 2018 ROD was "arbitrary, capricious, an abuse of discretion, and contrary to law," and remanded the matter to Interior "for a thorough reconsideration and re-evaluation of the evidence before [the Secretary] consistent with [the court's opinion], . . . M-37029—its standard and the evidence permitted therein—and the Department's prior decisions applying the M-Opinion's two-part test." *Id.* at 236. Plaintiffs first appealed the D.D.C. court's remand order, *see* Notice of Appeal, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (July 31, 2020), but then later voluntarily dropped such appeal, *see* Mandate of the United States Court of Appeals for the District of Columbia Circuit at 2, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (Feb 19, 2021) (noting Plaintiffs' voluntary dismissal of the appeal). Thereafter, the remand the D.D.C. court ordered proceeded forward. *See* Federal Defendants' Status Report Regarding Remand, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (June 25, 2021).

The 2021 Decision reflects Interior's compliance with the D.D.C.'s remand mandates. On this point, Plaintiffs agree. The parties to the D.D.C. proceeding, including Plaintiffs, filed a joint status report on December 30, 2021, representing to the Court that Interior had issued the 2021 Decision, which "confirms the previous acquisitions of parcels in Mashpee and Taunton, Massachusetts in trust for the Tribe, and explains that the Department of the Interior will retain this land in trust as the Tribe's reservation." *See* Joint Status Report at 2, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Dec. 30, 2021). The parties further represented to the D.D.C. court that "no further proceedings were necessary" and that the "case should be closed." *Id.* (citing *Nat. Res. Def. Council v. U.S. Nuclear Def. Council v. U.S. Nuclear Regul. Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982) (corrective action by an agency can moot an

action); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F. 3d 66, 79 (D.C. Cir. 2011) (superseded agency decision was moot)). Based on such representations, which signaled that the parties agreed the 2021 Decision conformed with the Court's remand order, the D.D.C. court closed the case. *See* Order, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Dec. 30, 2021).

II. Plaintiffs' Motion to Reopen this Suit and Advance New Claims Challenging the 2021 Decision

One day later, on December 31, 2021, Plaintiffs moved to reopen this suit, seeking leave to amend their complaint to advance three new claims—all related to the analysis in the 2021 Decision, and having nothing to do with the 2015 ROD. *See* ECF 151; ECF 151-7. With respect to Plaintiffs' proposed first cause of action, Plaintiffs seek to challenge the 2021 Decision *and* M-37029—the same framework Plaintiffs asserted before the D.D.C. court was the proper framework for evaluating the Tribe's 1934 status. Plaintiffs now seek to argue that such framework misinterprets the IRA and its legislative history, and is inconsistent with *Carcieri*; assert that the Tribe must have been "federally recognized" in 1934; and further argue that the IRA and its legislative history forecloses a finding that an eastern tribe like Mashpee could fall within its scope. ECF 151-7 at 4-7 (¶¶ 7-17). Plaintiffs further allege that the 2018 ROD is "consistent with *Carcieri* and the IRA's plain meaning and legislative history," *id.* at 11 (¶ 39), even though the D.D.C. Court flatly concluded that the 2018 ROD was "arbitrary, capricious, an abuse of discretion, and contrary to law." *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 236. Plaintiffs also take issue with how Interior reevaluated and reconsidered the Tribe's historical evidence in the 2021 Decision, *id.* at 7-9 (¶¶ 18-26), even though such reevaluation and reconsideration was mandated by the D.D.C. decision to which they were a party. *See Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 236 (ordering Interior to conduct, on remand, "a thorough

reconsideration and reevaluation of the evidence before him consistent with this Opinion . . . M-37029 – its standard and the evidence permitted therein – and the Department's prior decisions applying the M-Opinion's two-part test."). Plaintiffs are noticeably silent as to these remand mandates, choosing instead to repeat arguments in support of the 2018 ROD that the D.D.C. court rejected and further alleging that the 2021 Decision is arbitrary, capricious, an abuse of discretion, and contrary to law. ECF 151-7 at 11-12 (¶¶ 35-43). *See also id.* at 26-28 (¶¶ 129-52).

Plaintiffs' proposed second and third causes of action challenge the analysis in the 2021 Decision that the Property is eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"). Plaintiffs point to language in the 2021 Decision that incorporates the 2015 ROD by reference, s*ee* ECF 151-7 at 3 (¶ 2), in an apparent effort to link these IGRA-related claims to those they included in the Amended Complaint (ECF 12). But, as Plaintiffs acknowledge, their proposed claims only pertain to determinations that were *entirely replaced* by the 2021 Decision. *See* ECF 151-7 at 3 (¶ 2); *id.* at 28-31 (¶¶ 154-64; 166-70) (challenging Interior's analysis in the 2021 Decision that the Property is eligible for gaming under IGRA).

Plaintiffs' Amended Complaint asserts eight causes of action in connection with the 2015 ROD. ECF 12. In 2016, the parties only proceeded to the merits of Plaintiffs' First Cause of Action, concerning the statutory interpretation of the phrase "such members" in the second definition of "Indian" contained in the IRA. *See* ECF 87 at 2.[5] While the United States moved to dismiss several of Plaintiffs other claims, *see* ECF 16, the Court never ruled on such motion; the Court instead stayed the motion and the remaining claims pending resolution of Plaintiffs' First Cause of Action. ECF 49. Such resolution came in 2020, when the Court's ruling on

[5] The 2021 Decision does not rely on the second definition of "Indian" in the IRA as the basis for the Secretary's authority.

Plaintiffs' First Cause of Action was affirmed by the First Circuit. ECF 148-50. Thus, with respect to the remaining claims in the Amended Complaint, there are no "proceedings" to reopen or to which the Court and the parties need to return.

ARGUMENT

I. The Court Should Deny Plaintiffs' Motion on Mootness Grounds

Plaintiffs' challenge to the 2015 ROD is moot and their proposed new claims make clear that Plaintiffs only seek to challenge the 2021 Decision. Plaintiffs' proposed new claims object to Interior's determination that it possesses the requisite IRA authority to acquire the Property in trust for the Tribe, and its determination that the Property is eligible for gaming under IGRA. The portions of the 2015 ROD that reached such conclusions have been superseded and replaced by the 2021 Decision. Plaintiffs do not challenge any aspect of the remainder of the 2015 ROD. Thus, because the relevant portions of the 2015 ROD at issue in this litigation have been superseded and replaced by the 2021 Decision, this case is moot.

Article III, § 2 of the Constitution grants jurisdiction to federal courts to adjudicate only live cases or controversies. U.S. Const., art. III, § 2, cl. 1. "A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the controversy." *Thomas R.W. v. Mass. Dept. of Educ.,* 130 F.3d 477, 479 (1st Cir.1997) (internal quotation marks omitted). Analogous to the circumstances here, when an agency promulgates new regulations or amends existing regulations, challenges to the regulation's original form become moot. *Gulf of Maine Fisherman's Alliance v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002)). And where a challenged regulation is not entirely replaced but is nonetheless substantially altered as to the issues before the court, no live case or controversy remains because invalidating the superseded regulations would provide no effectual relief to the plaintiff. *Oceana, Inc, v. Evans*, No. 03-CV-10570, 2004 WL 1730340, *3-*4 (D. Mass. July 20,

2004) (citing *Conservation Law Foundation v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004)) (finding moot an initial challenge to a regulatory framework amended to incorporate new data and revised management strategies although portions of the original framework were left intact)).

As Plaintiffs' acknowledge, *see* ECF 151-7 at 2 (¶ 2), Interior's 2021 Decision provides an unequivocal repeal and replacement of the portions of the 2015 ROD provisions at issue in this case. 2021 Decision at 2 ("This decision incorporates the 2015 ROD *except for the analyses contained in Sections 8.3 and Section 7.0* which are *replaced* by the analyses contained herein.") (emphasis added). Sections 8.3 and 7.0 of the 2015 ROD contain the entirety of Interior's analysis, at the time, concluding that the Property is eligible for gaming under IGRA and that the Secretary possessed the requisite IRA authority to acquire the Property in trust. *See* ECF 151-6 (2015 ROD) at 56-81, 83-124. Plaintiffs' Amended Complaint only challenged these determinations, ECF 12, and it was only Plaintiffs' First Cause of Action—concerning the Secretary's IRA authority vis-à-vis the second definition of "Indian"—that proceeded beyond the pleading stage. ECF 87. Reopening the case serves no purpose, as the rescission and replacement of Sections 8.3 and 7.0 by the 2021 Decision prevents the Court from providing any effectual relief to Plaintiffs related to the 2015 ROD.[6]

In order to shift focus away from these consequential changes to the 2015 ROD and avoid the constitutional deficiency in their motion, Plaintiffs' attempt to fold the 2015 ROD and 2021 Decision into one another. ECF 151-1 at 2 (asserting that "the 2021 ROD expressly

[6] To be sure, Plaintiffs also request that the Court allow them to amend their complaint to address the 2021 Decision. For the reasons stated herein, and in the United States' *Motion to Transfer Venue* filed concurrently herewith, however, equitable principles, as well as judicial efficiency, weigh against reopening this case and allowing Plaintiffs to amend their complaint. As a practical matter, the parties must start at "square one" in litigating the claims Plaintiffs seek to advance, and thus there is no basis to conclude that reopening and proceeding in this case serves judicial economy or efficiency.

confirms and incorporates by reference the 2015 ROD"), ECF 151-7 at 4 (describing the 2015 and 2021 RODs as one "conjoined" decision). However, Plaintiffs' proposed amended complaint, ECF 151-7, fails to challenge any portion of the 2015 ROD that was incorporated into the 2021 Decision. Plaintiffs instead challenge only the new analysis contained in the 2021 Decision, including that portion of the 2021 Decision that was prepared pursuant to and consistent with the D.D.C. court's remand decision. Thus, Plaintiffs' framing downplays the substantial nature of the changes promulgated through the 2021 Decision, in an attempt to mask their moot claims as a live controversy. Plaintiffs' attempt to diminish the repeal and replacement of all relevant portions of the 2015 ROD plainly runs afoul of Article III of the Constitution and should be rejected.

What's more, Plaintiffs agree with this understanding of mootness—having previously argued to the First Circuit that the issuance of the 2018 ROD mooted the 2015 ROD and, as such, the Tribe could not challenge the 2015 ROD on appeal:

> This case was a live controversy three years ago when the District Court's decision was first appealed to this Court. . . . During the pendency of this matter, Interior's 2015 ROD, which had been at issue before the District Court, has been superseded by a new 2018 decision by Interior (the "2018 Determination"). Interior's abandonment of its earlier decision, which had been rejected by the District Court, in favor of the 2018 Determination, which is in sync with the District Court's 2015 decision, has mooted this appeal.

Brief of Appellees at 45-47, *Littlefield v. Mashpee Wampanoag Tribe*, No. 16-2484, (1st Cir. Dec. 11, 2019). Now that Interior has issued the 2021 Decision—which the Plaintiffs seek to challenge despite the fact that they agreed it comports with the D.D.C. court's remand directives—Plaintiffs ignore the clear mootness issues that are present here.[7] Under circuit

[7] While the First Circuit ultimately rejected Plaintiffs' arguments because the 2018 ROD specified that it did not "revise or alter" the 2015 ROD, *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 34-35 (1st Cir. 2020), that is not the case here. The 2021 Decision

precedent and Plaintiffs' own logic, this case is now moot. Accordingly, Plaintiffs' motion should be denied.

II. Plaintiffs' Request for Leave to Amend Should be Denied as Futile, or Denied on the Basis that the Court Will Transfer this Suit to the D.D.C.

Plaintiffs' Motion seeks leave from the Court to replace the Amended Complaint with three new claims challenging the 2021 Decision. Plaintiffs' proposed first cause of action seeks to challenge the conclusion, in the 2021 Decision, that the Tribe was "under Federal jurisdiction" in 1934 for IRA purposes, and thus the Secretary possesses the requisite authority to acquire land in trust for its benefit. ECF 151-7 at 26-28 (¶¶ 129-52). The second and third proposed causes of action challenge the conclusion, also in the 2021 Decision, that the Property is eligible for gaming under IGRA. *Id.* at 28-31 (¶¶ 154-170).

Rule 15 of the Federal Rules of Civil Procedure recognizes that a court "should freely give leave [to amend] when justice so requires." But when amending "would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters." *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183, 191 (1st Cir. 2006). *See also U.S. e rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009). When, as here, the proposed claims are subject to summary dismissal under Fed. R. Civ. P. 12(b), amending is considered futile. *Abernathy v. Hewey*, 277 F. Supp. 3d 129, 136 (D. Mass. 2017) (citing *Hatch v. Dep't of Children, Youth & Their Families*, 274 F.3d 12, 19 (1st Cir. 2001)). Because equitable doctrines, including waiver and laches, bar Plaintiffs from advancing their proposed first cause of action, the Court should deny Plaintiffs' request to amend their complaint to add such claim.

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explicitly replaces the provisions of the 2015 ROD concerning the Secretary's IRA authority and the Property's eligibility for gaming under IGRA. ECF 151-5 at 3 (confirming that the 2021 Decision replaces Sections 7.0 and 8.3 of the 2015 ROD).

Waiver is demonstrated by an "'intentional,' and therefore permanent, abandonment of a position." *United States v. Torres-Rosario*, 658 F.3d 110, 115 (1st Cir. 2011) (citing *United States v. Walker*, 538 F.3d 21, 22 (1st Cir. 2008)). *See also Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 10 (1st Cir. 2007) ("Waivers come in various shapes and sizes. Some are express; others are inferable from conduct or language consistent with and indicative of an intent relinquish voluntarily a particular right such that no other reasonable explanation . . . is possible.") (brackets and quotations omitted). Laches is shown by (1) an "unreasonable delay in pursuing a claim," and (2) "prejudice to the opposing party resulting from that delay." *Cranberry Commons, Ltd. v. Bimbo Bakeries USA, Inc.*, No. 11-CV-11654, 2012 WL 2914403, at *1 (D. Mass. July 18, 2012) (quoting *USL Capital v. New York 30*, 975 F. Supp. 382, 386 (D. Mass. 1996)).

As set forth in the Background section above, Plaintiffs intervened in the Tribe's lawsuit concerning the 2018 ROD to assist Interior in defending such decision. To that end, Plaintiffs never disputed the appropriateness of Interior applying the framework set forth in M-37029 to the Tribe—indeed, Plaintiffs repeatedly asserted such framework was the appropriate standard to apply. *See* Intervenor-Defendants *Littlefield*. Plaintiffs' Memorandum of Points and Authorities in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11-19, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Sept. 13, 2019) (Interior's application of M-37029 and evaluation of the Tribe's evidence in the 2018 ROD was neither arbitrary nor capricious); *see also* Intervenor-Defendants *Littlefield* Plaintiffs' Supplemental Brief in Response to This Court's May 1, 2020 Memorandum Opinion and Order at 2, *Mashpee Wampanoag Tribe. v. Bernhardt*, No. 18-CV-2242 (D.D.C. May 4, 2020) (reiterating position that M-37029 is the proper framework for Interior to apply).

Such framework includes Interior's interpretation of the first definition of "Indian" in the IRA in light of the Supreme Court's holding in *Carcieri* and sets forth a two-part test for examining whether an Indian tribe was "under Federal jurisdiction." *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 208-10. The framework also explains why the applicant Indian tribe only need to be federally recognized at the time the Secretary invokes her IRA authority to satisfy the first definition of "Indian," as "now" only modifies the phrase "under Federal jurisdiction" contained in the first definition. *See Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d at 559-63 (upholding such interpretation).

Plaintiffs had a full and fair opportunity to advance all arguments related to the IRA and the Tribe before the D.D.C. when they intervened fully in that case. They chose instead to accede to the application of M-37029 to the Tribe, only asserting that the Tribe's historical evidence failed to meet the standards set forth in M-37029. *See* Intervenor-Defendants *Littlefield* Plaintiffs' Memorandum of Points and Authorities in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 11-19, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Sept. 13, 2019). On that issue, Plaintiffs' arguments failed.

The D.D.C. court found that Interior failed to properly evaluate, consistent with M-37029, the evidence pertaining to the enrollment of Mashpee children in federal government boarding schools; the inclusion of tribal members on federal censuses, including censuses specifically enumerating "Indians"; as well as numerous federal reports identifying the Tribe and evaluating whether to extend certain federal policies—including forced removal from ancestral territory—to the Tribe. *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d at 217-35. The D.D.C. court then directed Interior to "thoroughly" reconsider and reevaluate that same

evidence, consistent with its opinion, M-37029, and other Interior determinations evaluating the "under Federal jurisdiction" status of other Indian tribes. *Id.* at 236.

In the D.D.C. proceeding, Plaintiffs intentionally chose to forego any challenge to Interior's interpretation of the first definition of "Indian" as contained in M-37029; any challenge to the application of M-37029 to the Tribe; any challenge to the D.D.C. court's determination that, in the 2018 ROD, Interior failed to properly evaluate the Tribe's historical evidence consistent with M-37029; any challenge to the D.D.C. court's remand directives; and any challenge to the sufficiency of the 2021 Decision after it was issued. Indeed, Plaintiffs represented that no further proceedings were necessary in the D.D.C. following the issuance of the 2021 Decision—an implicit acknowledgment that the 2021 Decision comports with the D.D.C. court's remand directives. *See* Joint Status Report at 2, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Dec. 30, 2021). Certainly, the D.D.C. court was left with this impression when it received the parties' joint status report and closed the case. *See* Order, *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C. Dec. 30, 2021). The time for Plaintiffs to object to M-37029, its application to the Tribe, and the D.D.C. court's remand directives, has come and gone.

Plaintiffs' positions before the D.D.C. reflected agreement among the parties in that case that M-37029 was the proper framework to apply to the Tribe and that the 2021 Decision satisfied the D.D.C.'s remand directives. Plaintiffs had the opportunity to advance the arguments they want to raise here at any time during the D.D.C. proceeding, including through seeking reconsideration or by pursuing their appeal of the D.D.C.'s remand order, but Plaintiffs chose not to do so. The necessary result of Plaintiffs' actions meant that the D.D.C. court and the parties to that proceeding had no occasion to address Plaintiffs' objections to M-37029, resolve any dispute

about M-37029's application to the Tribe, or resolve any dispute about the sufficiency of the 2021 Decision. Any issues Plaintiffs had with respect to M-37029, its application to the Tribe, or the D.D.C.'s remand order should have been raised and resolved by that court or by Interior as part of its remand. By remaining silent as to these objections, but lying in wait to raise them in front of this Court, Plaintiffs risk placing Interior in the position of having spent significant time and resources to produce the 2021 Decision that complies with the D.D.C.'s remand order, only to have to litigate a host of new issues Plaintiffs want to raise for the first time here. Plaintiffs have waived those arguments and they should therefore be precluded from advancing them. At bottom, Plaintiffs are asking this Court to review and hold arbitrary and capricious that which the D.D.C. court mandated. Plaintiffs plainly seek to collaterally attack the rulings from the D.D.C., and this Court should not entertain such effort.

Accordingly, the Court should deny Plaintiffs' motion and deny their request to amend their complaint. Plaintiffs' proposed first cause of action is precluded by the inconsistent positions they took before the D.D.C., and thus any amendment to the complaint to add such claim would be futile. Should the Court disagree, then the proper course is for the Court to transfer this case to the D.D.C. to allow that court to evaluate whether Interior complied with the remand ordered there, together with Plaintiffs' other challenges to the 2021 Decision.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to reopen this suit and to amend their complaint (ECF 151), as the 2021 Decision has mooted this suit, and equitable doctrines bar Plaintiffs from advancing arguments related to the Secretary's IRA authority that contravene the positions they took in the D.D.C. At best, Plaintiffs' new challenge

to the 2021 Decision is properly heard in the D.D.C., and thus if the Court is not inclined to deny Plaintiffs' motion, it should transfer this suit to that court.

DATED: January 14, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that, on January 14, 2022, the foregoing UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO RESTORE ADMINISTRATIVELY-CLOSED COUNTS, REOPEN CASE FOR NEW FILINGS AND FOR LEAVE TO AMEND will be sent electronically to the following registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*
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