

THE SUPREME COURT ERECTS A FENCE AROUND INDIAN GAMING

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I. INTRODUCTION

On June 18, 2012, the United States Supreme Court established an almost insurmountable boundary for American Indian tribes seeking to establish Indian gaming on lands newly taken into trust by the Secretary of the Interior. In *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, the Supreme Court allowed a private suit to proceed against the Government, in which a party challenged the Secretary of the Interior's decision to take land into trust on behalf of an Indian tribe.¹ While the Supreme Court's decision has implications beyond Indian gaming, its holding focused directly on gambling and illustrated the Court's continued concerns about the growth of this activity in Indian Country. In particular, the Court's opinion created a previously unknown private right of action that permits a private citizen to sue the Government in an effort to stop it from complying with its trust obligations to an Indian tribe. This decision expanded the Court's holding in *Carcieri v. Salazar*² as well as continued the Court's balkanization of Indian tribes by using the Indian Reorganization Act of

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1. *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2202–03 (2012).

2. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009) (holding that the Secretary of the Interior's authority to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when Congress enacted the Indian Reorganization Act (IRA) in June 1934).

1934³ as the line of demarcation. Further, the Court effectively extended the statute of limitations from 30 days to 6 years for trust-transfer challenges⁴—a decision that could impact potential projects across the country.⁵ Finally, the decision highlighted the Court's restrictive view of the Government's trust obligations to Indian tribes.

II. THE DEVELOPMENT OF THE BRADLEY TRACT

A. *The Gun Lake Tribe*

The Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians (Gun Lake Tribe)⁶ is a federally recognized Indian tribe.⁷ Both tribal culture and tradition consider the members to be descendants of Match-E-Be-Nash-She-Wish (Bad Bird), a significant historical figure who fought alongside Tecumseh at the Battle of Fallen Timbers in 1794 against the Americans, who were led by General "Mad" Anthony Wayne. Later, Bad Bird was one of the Treaty-of-Greenville signatories, a treaty that ceded to the United States much of what is now known as Ohio and Indiana, including the area encompassing the modern city of Chicago.⁸ On October 14, 1998, the United States government formally recognized the Gun Lake Tribe as an American Indian tribe within the meaning of federal law, and this recognition became effective in 1999.⁹

Today, the Gun Lake Tribe's government is situated in Dorr,

3. 25 U.S.C. §§ 461–494(a) (2012).

4. *Patchak*, 132 S. Ct. at 2217 (citing 25 C.F.R. § 151.12 (2011); 61 Fed. Reg. 18,082, 18,082–83 (Apr. 24, 1996)).

5. See Press Release, *Fitch: Supreme Court Decision in Patchak Case Has Mixed Credit Implications for Gaming Sector*, BUSINESS WIRE (June 19, 2012, 6:19 PM), <http://www.businesswire.com/news/home/20120619007051/en/Fitch-Supreme-Court-Decision-Patchak-Case-Mixed> [hereinafter Fitch Press Release] (noting that the decision will likely cause difficulty for Native Americans who seek to raise capital for casino-building projects since probable investors will be less willing to invest because they will not have confidence in the land-into-trust decisions).

6. Gale Courey Toensing & Rob Capriccioso, *From Carcieri to Worse*, INDIAN COUNTRY TODAY, July 18, 2012, at 22 (noting that the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indian Tribe is also known as the Gun Lake Tribe).

7. *Patchak*, 132 S. Ct. at 2203 (citing Final Determination to Acknowledge the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians of Michigan, 63 Fed. Reg. 56,936 (Oct. 14, 1998) [hereinafter Final Determination]).

8. Treaty with the Wyandot, etc., 1795, U.S.-Tribes of Indians, Aug. 3, 1795, 7 Stat. 49, 49–50.

9. See Final Determination, *supra* note 7.

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Michigan, not far from Bad Bird's former home of Kalamazoo.¹⁰ "The Bradley Indian Mission, located less than [three] miles from the Casino site, is the historic residential and cultural center point of the tribal community."¹¹ The Gun Lake Tribe offers cultural workshops on fire-making, sugaring, creating traditional "snowsnakes," making cordage, and weaving black-ash basketry.¹²

B. Acquisition of the Bradley Tract

Shortly after the Gun Lake Tribe had received official federal recognition in 1999, it purchased a 165-acre tract of land known as the Bradley Tract in rural Wayland Township, Allegan County, Michigan, where "it wished to construct and operate a casino."¹³ At that time, the Bradley Tract was zoned for light industrial and commercial use; the area in which the Gun Lake Tribe intended to open its casino was an abandoned, blighted area littered with a rail line, a highway, shuttered factories, and empty warehouse buildings.¹⁴

In 2001, the Gun Lake Tribe requested that the Secretary of the

10. See History-News Archive, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, <http://www.mbpi.org/History/archive.asp> (last visited Mar. 7, 2014) (reproducing an apparently original version of an article from the Kalamazoo Gazette titled "Bad Bird, Indian Chief Early Bird in Kalamazoo," dated March 21, 1937).

11. About Gun Lake Tribe, *Gun Lake Tribe Responds to U.S. Supreme Court's Patchak Decision*, GUN LAKE TRIBE (June 18, 2012), <http://turtletalk.files.wordpress.com/2012/06/pr-patchak-decision-6-18-121.pdf>.

12. See Administration—Language/Culture, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, <http://www.mbpi.org/Administration/languageculture.asp> (last visited Jan. 20, 2014).

13. Brief for Respondent David Patchak at 2–3, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (No. 11-246 & 11-247). The parties apparently disputed the size of the Bradley Tract. Compare Brief for the Federal Petitioners at 3, *Patchak*, 132 S. Ct. 2199 (No. 11-246 & 11-247) (stating that "United States acquire[d] in trust for the Band about 147 acres of land in Wayland Township, Michigan (the Bradley Property)"), and Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners at 1, *Patchak*, 132 S. Ct. 2199 (No. 11-246 & 11-247) (referring to a "147-acre tract of land[] known as the 'Bradley Tract'"), and Notice of Determination, 70 Fed. Reg. 25,596 (May 13, 2005) ("On April 18, 2005, the Associate Deputy Secretary decided to accept approximately 147 acres of land into trust for the Match-E-Be-Nash-She-Wish Band."), with Brief for Respondent David Patchak at 2–3, *Patchak*, 132 S. Ct. 2199 (No. 11-246 & 11-247) (stating that "the Band acquired [the Bradley Tract,] a 165-acre site in rural Wayland Township").

14. *Mich. Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1, 10 n.13 (D.D.C. 2007), *aff'd on other grounds*, *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

Interior exercise her discretion pursuant to 25 U.S.C. § 465, a provision of the Indian Reorganization Act (IRA), to take the Bradley Tract into trust on behalf of the Gun Lake Tribe.¹⁵ “The [Tribe]’s application explained that [it] would use the property for gaming purposes, with the goal of generating the revenue necessary to promote tribal economic development, self-sufficiency, and a strong tribal government capable of providing its members with sorely needed social and educational programs.”¹⁶ “The application thus requested the Secretary to take the action necessary for the Band to open a casino.”¹⁷ In fact, the Gun Lake Tribe could not operate Class II or III Indian gaming on the Bradley Tract unless the United States government held the tract in trust on behalf of the Gun Lake Tribe.¹⁸

Upon receipt of the request, the Secretary notified the local and state agencies whose tax and regulatory authority would be impacted by the Bradley Tract’s transfer from the Gun Lake Tribe’s fee simple ownership to the United States government’s trust ownership.¹⁹ Wayland Township, Allegan County, Allegan Area Educational Service Agency, Wayland Union Schools, City of Wayland, Dorr Township, Martin Township, Hopkins Township, and Yankee Springs Township all responded enthusiastically because they were “engaged in cooperative efforts to foster economic development in an area that include[d] the Bradley Tract.”²⁰

The Secretary undertook a lengthy administrative review of the Gun Lake Tribe’s application, which included a gaming-eligibility determination under the Indian Gaming Regulatory Act (IGRA).²¹ In May of 2005, following the conclusion of her review, the Secretary of the Interior issued a public notice “announc[ing] her decision to acquire

15. Brief for the Federal Petitioners, *supra* note 13, at 3.

16. *Patchak*, 132 S. Ct. at 2203 (citations omitted) (internal quotation marks omitted).

17. *Id.* at 2203 n.1.

18. 25 U.S.C. § 2719 (2012). Section 2719(b)(1)(A) required that the Secretary “consult with the tribe, the state, local officials, and officials of nearby tribes to determine that gaming on the newly acquired lands would be in the best interests of the tribe and its members and would not be detrimental to the surrounding community.” Steven Andrew Light & Kathryn R.L. Rand, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 *DRAKE L. REV.* 413, 438–39 (2009) (citing 25 U.S.C. § 2719(b)(1)(A) (2006)).

19. See 25 C.F.R. § 151.10 (2013).

20. Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners, *supra* note 13, at 1.

21. Notice of Determination, 70 Fed. Reg. 25,596 (May 13, 2005).

the Bradley [Tract] in trust for the [Gun Lake Tribe].”²² The notice clearly stated that the Bradley Tract would be “used for the purpose of construction and operation of a gaming facility.”²³ Before the Secretary could take the Bradley Tract into trust, however, “applicable regulations” committed the Secretary to wait 30 days before transferring title “so that interested parties could seek judicial review” of her decision.²⁴

C. Litigation Over the Bradley Tract

Within that 30-day statute of limitations, an anti-gaming interest group called Michigan Gambling Opposition (MichGO) sued the Secretary of the Interior in district court to enjoin her from making the title transfer.²⁵ MichGO alleged that the trust acquisition violated both the National Environmental Policy Act of 1969²⁶ and the IGRA, and it further claimed that the IRA’s § 5 amounted to an unconstitutional delegation of congressional power.²⁷ No other suit was filed during the 30-day window.

The court’s stay kept the Secretary from taking the Bradley Tract into trust while litigation with MichGO continued.²⁸ In 2007, the district court denied MichGO’s claims,²⁹ and the circuit court affirmed the district court in 2008.³⁰ In August 2008, shortly after the circuit court had ruled, David Patchak,³¹ a non-Indian who was living near the Bradley Tract, filed suit against the Department of the Interior in an attempt to forestall the title transfer.³² MichGO, during the course of its litigation,

22. *Patchak*, 132 S. Ct. at 2203; *see also* Notice of Determination, 70 Fed. Reg. 25,596 (May 13, 2005).

23. Notice of Determination, 70 Fed. Reg. 25,596 (May 13, 2005).

24. *Patchak*, 132 S. Ct. at 2203 (citing 25 C.F.R. § 151.12(b) (2011)).

25. *Id.*

26. 42 U.S.C. §§ 4321–4370(h) (2006 & Supp. 2011).

27. *Mich. Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1, 3, 20 (D.D.C. 2007), *aff’d on other grounds*, *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

28. Brief for Respondent David Patchak, *supra* note 13, at 4. The Supreme Court characterized the stay in the following manner: “The Secretary held off taking title to the property while [the MichGO] litigation proceeded.” *Patchak*, 132 S. Ct. at 2203.

29. *Norton*, 477 F. Supp. 2d at 3.

30. *Kempthorne*, 525 F.3d at 33.

31. Patchak “is either a member of MichGO or is closely affiliated with MichGO.” Declaration of Chairman David K. Sprague in Support of Opposition to Plaintiff’s Motion to Stay at 5, *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009), *rev’d*, 632 F.3d 702 (D.C. Cir. 2011) (No. 1:08-CV-01331).

32. *Patchak*, 132 S. Ct. at 2203–04.

had originally advanced the claim that the Secretary of the Interior lacked the authority to take the land “into trust because the Gun Lake Tribe was not under federal jurisdiction in 1934,” but apparently the court “refused to consider” this argument.³³ As such, when Patchak began his lawsuit he employed this same claim, which had failed in both *Carcieri v. Norton*³⁴ and *Carcieri v. Kempthorne*.³⁵ Patchak and MichGO probably knew, however, that the Supreme Court had granted certiorari in *Carcieri v. Kempthorne* on February 25, 2008,³⁶ thus there was a chance that this last-minute challenge might succeed—the longshot would pay off.

First, Patchak claimed that the Administrative Procedure Act (APA)³⁷ prevented the Secretary from taking the Bradley Tract into trust because the Secretary lacked authority under the IRA to effectuate the transfer.³⁸ Second, Patchak asserted standing to file his suit on grounds that

he [would] be exposed to and injured by the negative effects of building and operating a gaming facility, including changes in the alleged rural character of the area, loss of aesthetic and environmental qualities, increased property taxes, weakening of the family atmosphere of the community, and other aesthetic, socioeconomic, and environmental problems.³⁹

Specifically, Patchak alleged that he had moved to the area “because of

33. Brief for Respondent David Patchak, *supra* note 13, at 4.

34. *Carcieri v. Norton*, 398 F.3d 22, 28 (1st Cir. 2005), *rev'd sub nom* *Carcieri v. Salazar*, 555 U.S. 379 (2009).

35. *Carcieri v. Kempthorne*, 497 F.3d 15, 21 (1st Cir. 2007) (en banc), *rev'd sub nom* *Salazar*, 555 U.S. 379.

36. SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-526.htm> (last visited Jan. 20, 2014).

37. 5 U.S.C. §§ 701–706 (2012).

38. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 75 (D.D.C. 2009), *rev'd*, 632 F.3d 702 (D.C. Cir. 2011) (“Plaintiff alleges that the Tribe was not under Federal jurisdiction in June 1934, when the IRA was enacted, and therefore Interior lacks authority to take the Bradley Property into trust for the Tribe under section 5 of the IRA.” (citation omitted)). This was the same claim that the Supreme Court had ruled on in *Carcieri v. Salazar* months before the district court ruled on *Patchak v. Salazar*. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009).

39. Brief for Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians at 8, *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199 (2012) (No.11-246 & 11-247) [hereinafter Brief for Petitioner Band] (internal quotation marks omitted).

its unique rural setting,” and he asserted that he “values the quiet life he leads in Wayland Township.”⁴⁰ He predicted “that a casino would irreversibly change the area’s rural character, depriving him of the enjoyment of the agricultural land.”⁴¹ Interestingly, Patchak chose not to include the Gun Lake Tribe in his lawsuit,⁴² but the Tribe ultimately intervened as a defendant at the district court.⁴³

In January 2009, the Supreme Court denied certiorari in *Michigan Gambling Opposition v. Kempthorne*.⁴⁴ That same month, the stay expired on the Bradley Tract transfer, so the Secretary of the Interior took it into trust for the Gun Lake Tribe and transferred title to the United States.⁴⁵ “That action mooted Patchak’s request for an injunction to prevent the acquisition, and all parties agree[d] that the suit . . . effectively [sought] to divest the Federal Government of title to the land.”⁴⁶ On February 24, 2009, the Supreme Court issued the *Carcieri v. Salazar* opinion, in which the Court considered the nature of transfers from fee to trust status pursuant to the IRA.⁴⁷ The Narragansett Tribe wanted to develop housing on 31 acres of its fee lands; however, after chafing under the yoke of local regulation, the Tribe sought to increase its sovereignty and decrease the State of Rhode Island’s regulatory authority by asking the Secretary of the Interior to take the land into trust.⁴⁸ Within the 30-day window, the State challenged the ability of the Secretary to do so under the APA.⁴⁹

In an opinion authored by Justice Thomas, the Court drew a line between tribes that were already recognized when Congress originally enacted the IRA and those tribes whose recognition came after, like the Narragansetts.⁵⁰ The Court concluded that 25 U.S.C. § 479 limited the trust-acquisition process “to those tribes that were under the federal

40. Brief for Respondent David Patchak, *supra* note 13, at 5 (internal quotation marks omitted).

41. *Id.* (internal quotation marks omitted).

42. Such a decision is consistent with a long line of federal cases, dating back at least to *Johnson v. M’Intosh*, involving title to Indian lands in which the Indians themselves are omitted from the litigation. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

43. Brief for Petitioner Band, *supra* note 39, at 9.

44. *Mich. Gambling Opposition v. Kempthorne*, 555 U.S. 1137 (2009).

45. Brief for Respondent David Patchak, *supra* note 13, at 5.

46. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012).

47. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1060 (2009) (citing 25 U.S.C. § 465 (2006)).

48. *Id.* at 1062 (citations omitted).

49. *Id.* (citation omitted).

50. *Id.* at 1068 (citing 48 Fed. Reg. 6177–78 (Feb. 10, 1983)).

jurisdiction of the United States when the IRA was enacted in 1934,” and that the Secretary had no authority to take land into trust for the Narragansett Tribe, which had not been recognized until 1983.⁵¹ As a result of this decision, Patchak’s lawsuit changed into a very serious case almost overnight.

D. The Gun Lake Casino

In April 2009, after the stay had been lifted and the Government had taken the tract into trust on behalf of the Gun Lake Tribe, the Secretary of the Interior, pursuant to 25 U.S.C. § 2719, approved a gaming compact negotiated and entered into between the Gun Lake Tribe and the State of Michigan,⁵² thus allowing the Gun Lake Tribe and the local community to begin preparations for the casino. In August, the district court dismissed Patchak’s case, holding that he had no prudential standing under the APA to invoke the court’s jurisdiction to make his *Carcieri* claim,⁵³ and Patchak appealed to the D.C. Circuit Court of Appeals.⁵⁴ In September 2009, the Gun Lake Tribe broke ground on the Gun Lake Casino.⁵⁵

[A]pproximately 750 skilled workers—including plumbers, electricians, carpenters, and sheet metal workers—were employed during the construction of the \$165 million facility. Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs. The creation of new jobs has resulted in an expanded tax base for local governments and increased demand for goods and services provided by local businesses.⁵⁶

The Gun Lake Tribe also used portions of the Bradley Tract for services necessary to the Tribe’s way of life, such as water treatment facilities, a

51. *Id.* (citations omitted).

52. *See* 74 Fed. Reg. 18,397–98 (Apr. 22, 2009).

53. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 78 (D.D.C. 2009), *rev’d*, 632 F.3d 702 (D.C. Cir. 2011).

54. *See generally Patchak*, 632 F.3d 702.

55. Fitch Press Release, *supra* note 5 (providing a timeline of the case and discussing probable issues the case could cause).

56. Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners, *supra* note 13, at 8 (footnotes omitted).

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waste water plant, and government facilities.⁵⁷

The United States Court of Appeals for the D.C. Circuit, however, reversed the district court in January 2011.⁵⁸ In particular, the circuit court held that Patchak had prudential standing and that the Quiet Title Act (QTA)⁵⁹ did not operate to bar Patchak's action pursuant to the APA.⁶⁰ Thus, the circuit court remanded Patchak's case to the district court.⁶¹

On February 10, 2011, the Gun Lake Casino opened.⁶² The Casino was immediately and enormously popular: "Media reports indicated that after opening, the parking lots at the casino were so full and traffic [was] so heavy along US 131 [that police] closed the northbound and southbound exits to the highway."⁶³

The economic effect of the Gun Lake Casino was almost as immediate as the automobile traffic. In fact, "[t]he economic development of the Bradley Tract created 900 new jobs in 2011."⁶⁴

The [Gun Lake Tribe also] estimate[d] that, as a result of its development of the trust lands, it [would have] spen[t] approximately \$30 million annually to purchase vendor goods and services. Most of those purchases [would have] be[en] made from businesses in southwest Michigan, providing a further substantial boost to the local economy.

In addition, the [Tribe] estimate[d] that the gaming facility [would have] create[d] 60,000 new guest stays per year at area hotels, generating an additional \$4.4 million in revenues for hotel operators. Other local businesses, such as restaurants, gas stations, drycleaners, and landscapers, [could have] expect[ed]

57. Brief for Petitioner Band, *supra* note 39, at 7.

58. *Patchak*, 632 F.3d at 712.

59. 28 U.S.C. § 2409a (2012).

60. *Patchak*, 632 F.3d at 712.

61. *Id.* at 712–13.

62. See Chris Knape, *Gun Lake Casino Opens, Brings Gambling on U.S. 131 Between Kalamazoo, Grand Rapids*, MLIVE (Feb. 10, 2011, 7:39 AM), http://www.mlive.com/business/west-michigan/index.ssf/2011/02/gun_lake_casino_opens_brings_g.html.

63. Brief for Respondent David Patchak, *supra* note 13, at 8 (second alteration in original) (citation omitted) (internal quotation marks omitted).

64. Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners, *supra* note 13, at 7 (footnote omitted).

similar increases in demand for their services.⁶⁵

Indeed, one notable feature of the gaming compact between the Gun Lake Tribe and Michigan is the Revenue Sharing Agreement.⁶⁶ Based on the Agreement, the Gun Lake Tribe would have paid “a percentage of the revenues from the gaming facility to local government entities located in close proximity to the trust lands.”⁶⁷ Moreover, the Gun Lake Tribe and various public agencies created a Local Revenue Sharing Board, which had a duty to establish the criteria by which gaming revenue would be distributed to the local governments every six months.⁶⁸

The distributions were significant. In the first payment, after just two months of operation, “[l]ocal governments received \$514,871, and the State of Michigan received more than \$2 million.”⁶⁹ By the time of briefing before the Supreme Court, over \$10.3 million had been distributed pursuant to the Revenue Sharing Agreement.⁷⁰ To cash-strapped local governments that have been exiled in the financial desert of rural Michigan during the Great Recession and politically unable to raise taxes, the revenue sharing must have seemed like manna from heaven.

The laundry list of small town initiatives reads like a Christmas list with some otherwise postponed initiatives finally given the green light through gaming money. For example, Wayland Township added two additional patrol deputies;⁷¹ Wayland School District cut preschool tuition by one-third, eliminated a \$100 “pay-to-play” fee for high school athletes, painted the gym ceiling, developed a scholarship fund for graduating seniors, and funded “capital and maintenance projects, thereby freeing funds for academic services;”⁷² Martin Township contemplated a new fire truck;⁷³ Dorr Township planned playgrounds

65. *Id.* at 8–9 (footnotes omitted).

66. *See id.* at 9.

67. *Id.*

68. *Id.* at 10.

69. *Id.*

70. Brief for Petitioner Band, *supra* note 39, at 7 (footnote omitted).

71. Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners, *supra* note 13, at 10.

72. *Id.* at 10–11 (footnotes omitted); *see also* Matthew L.M. Fletcher, *Ironies of the Patchak Decision*, TURTLE TALK (June 26, 2012), <http://turtletalk.wordpress.com/2012/06/26/ironies-of-the-patchak-decision/> (discussing the *Patchak* Court’s reasoning).

73. Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners, *supra* note 13, at 12 (footnote omitted).

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and parks;⁷⁴ and Allegan County shored up its general fund, undertook road maintenance projects, created a veterans' relief fund, and negotiated the funding of an intergovernmental contract between the County and Wayland Township to provide law enforcement coverage to the Township.⁷⁵ Without the Gun Lake Tribe's development of the Bradley Tract, "critical infrastructure projects" would not have been planned by the local governments, including a major water and sewage treatment system in Wayland Township.⁷⁶ But the specter of the *Patchak* litigation still hovered above the money tree, and the Gun Lake Tribe and Government filed a petition for a writ of certiorari in the Supreme Court on August 25, 2011.

III. THE SUPREME COURT RESET

A. *The Majority Opinion*

Justice Kagan authored the 8–1 majority opinion in which the Court addressed two questions presented by the Gun Lake Tribe and the Government: First, did the QTA confer sovereign immunity to the Government? Second, did Patchak have prudential standing to challenge the acquisition of the Bradley Tract into trust by the Secretary?⁷⁷

1. Sovereign Immunity

Patchak made his claim pursuant to the APA, which effectively waives the federal government's immunity from a suit in which the challenging party seeks "relief other than money damages and [states] a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority."⁷⁸ Patchak's claim asserted that 25 U.S.C. § 465 did not, in fact, grant the Secretary of the Interior the power to take the Bradley Tract into trust because, based on the Court's recent holding in *Carciere v. Salazar*, the federal government had not recognized the Gun Lake Tribe until after 1934.⁷⁹

74. *Id.* at 12–13 (footnote omitted).

75. *Id.* (footnote omitted).

76. *Id.* at 11–12 (footnote omitted).

77. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2203 (2012).

78. *Id.* at 2204 (quoting 5 U.S.C. § 702 (2006)).

79. *Id.* at 2203 (citation omitted).

The Court quickly and repeatedly accepted that Patchak sought no money damages and noted that he sought “only [the] non-monetary relief” of “strip[ping] the United States of title to the land.”⁸⁰ Without discussion, the Court also accepted as a fact that Patchak’s *Carciari* claim was an objection to an official act by the Secretary.⁸¹ The Court simply noted that the APA waiver seemed to apply. However, the Court also observed that the APA had not been designed to allow a plaintiff to exploit the APA waiver of sovereign immunity in an effort “to evade limitations on [a] suit contained in other statutes.”⁸² The Gun Lake Tribe and the Government both argued that the QTA contained such a limitation on Patchak’s suit.⁸³

Like the APA, the QTA waives sovereign immunity and authorizes a specific kind of action against the Government, “known as a quiet title suit.”⁸⁴ These cases arise when a plaintiff asserts a “‘right, title, or interest’ in real property that conflicts with a ‘right, title, or interest’ the United States claims.”⁸⁵ The QTA’s waiver of sovereign immunity and “authorization of suit ‘does not apply to trust or restricted Indian lands.’”⁸⁶ Thus, the Gun Lake Tribe and the Government argued that the QTA exception provided full sovereign immunity for the Government from suits challenging title or otherwise impairing the Government’s interest in Indian land.⁸⁷

The Court acknowledged that the QTA would bar Patchak’s suit if he owned or claimed some interest in the Bradley Tract.⁸⁸ In comparison, the Court stated that the QTA would not bar a suit under the APA based on environmental harm emanating from Indian lands.⁸⁹ Although Patchak’s claim contested the Secretary’s title, he asserted no competing interest in the Bradley Tract and therefore was not an adverse claimant.⁹⁰ As such, because Patchak was not seeking to quiet title between himself

80. *Id.* at 2204, 2207.

81. *Id.* at 2204.

82. *Id.* at 2204–05.

83. *Id.* at 2205.

84. *Id.*

85. *Id.* (quoting 28 U.S.C. § 2409a(d) (2006)).

86. *Id.* (quoting 28 U.S.C. § 2409a(a) (2006)).

87. *Id.*

88. *Id.*

89. *Id.* After all, abating an environmental nuisance is a far different cry from divesting the sovereign of title.

90. *Id.* at 2206.

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and the Government, the QTA did not apply.⁹¹

In rebutting the dissent as well as the arguments of the Government and the Gun Lake Tribe, the Court conceded that it was construing the QTA narrowly and limiting the holding solely to adverse claims against the Government.⁹² Similarly, it brushed aside the suggestion that the QTA impliedly barred all claimants, regardless of their claims, from bringing suit against the Government if they involve the Government's property ownership.⁹³ Finally, the Court considered whether Patchak should still be viewed as an adverse claimant under the QTA because his suit challenged the viability of the QTA's Indian-lands exception.⁹⁴ The Court found this argument was "not without force," but it was nevertheless an issue for Congress to resolve if it wanted.⁹⁵ Consequently, under this narrow construction of the QTA, Patchak's claim fell within the APA's waiver of sovereign immunity.⁹⁶

2. Prudential Standing

The Supreme Court has held that one must prove prudential standing in cases that invoke the APA.⁹⁷ In addition to the ordinary standing requirements necessary for Article III jurisdiction, a plaintiff invoking the APA must also assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute' that he says was violated."⁹⁸ The Government and the Gun Lake Tribe argued that 25 U.S.C. § 465 does not apply to the contemplated use of the property once it is in trust but rather only to its acquisition because § 465 authorizes property to be taken into trust specifically "for the purpose of providing land for Indians."⁹⁹ Patchak's allegations supporting standing, they maintained, only went to the *use* of the property and not to his allegations that the Secretary exceeded authority in taking the Bradley Tract into trust status.¹⁰⁰

91. *Id.*

92. *Id.* at 2208.

93. *Id.* at 2209.

94. *Id.*

95. *Id.*

96. *Id.* at 2210.

97. *Id.*

98. *Id.* at 2200 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

99. *Id.* at 2210 (quoting 25 U.S.C. § 465 (2006)).

100. *Id.*

The Court disagreed with the Government's interpretation of the statute, and it noted that the prudential standing test "is not meant to be especially demanding."¹⁰¹ Indeed, the Court noted that Congress intended to make agency action "presumptively reviewable."¹⁰² Thus, a plaintiff lacks prudential standing only when the interests claimed are so attenuated from or inconsistent with statutory purposes that it cannot be reasonably assumed Congress contemplated such an action.¹⁰³

Applying the prudential standing test to Patchak's lawsuit, the Court found the argument of the Government and the Gun Lake Tribe to be disingenuous.¹⁰⁴ The Court determined the ultimate use of trust properties to be inextricably linked to the acquisition process: "So when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development."¹⁰⁵ Additionally, the Court noted that internal regulations of the Department of the Interior required the Secretary to consider the purposes for which the trust property is to be used.¹⁰⁶ Finally, when there is off-reservation property, not contiguous to land already owned by the tribe in fee, sought for business purposes, the regulations require the tribal applicant to submit a plan demonstrating the projected economic benefits from the use of the property.¹⁰⁷ In the case of the Bradley Tract, that use was for gambling.¹⁰⁸

Thus, "from start to finish," the Secretary's decision-making process with regard to the Bradley Tract "involved questions of land use."¹⁰⁹ With that in mind, Patchak's claim fell within the zone of interests necessary to invoke prudential standing.¹¹⁰ Indeed, the Court openly suggested that people living near proposed Indian trust lands are "predictable[]challengers" to the Secretary's decision-making process, and the Court casually observed that such peoples' economic, environmental, or aesthetic interests would fall within "§ 465's

101. *Id.* (quoting *Clarke v. Sec. Ind. Ass'n*, 479 U.S. 388, 399 (1987)).

102. *Id.* (quoting *Clarke*, 479 U.S. at 399).

103. *Id.* (citing *Clarke*, 479 U.S. at 399).

104. *See id.* at 2211–12.

105. *Id.* at 2211.

106. *Id.* (citing 25 C.F.R. § 151.10(c) (2011)).

107. *Id.* (citing 25 C.F.R. § 151.11(c)).

108. *Id.* (citations omitted).

109. *Id.*

110. *Id.*

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regulatory ambit.”¹¹¹ The Court remanded the case, found no bar to the litigation under the QTA, and concluded that Patchak had prudential standing¹¹²—Patchak lived to fight another day.

B. Justice Sotomayor’s Dissent

Justice Sotomayor was the sole dissenter. She argued that the QTA’s provision was definitive when it stated that the Government may be named as a defendant in an action “to adjudicate a disputed title to real property in which the United States claims an interest.”¹¹³ In this case, Patchak sought to do just that.¹¹⁴ However, since the QTA’s right to sue does not apply to Indian trust land, Patchak sought to divest the Government of title rather than seek money damages.¹¹⁵ Since Patchak had no interest in the Bradley Tract, Justice Sotomayor found the QTA to bar his suit.¹¹⁶

Justice Sotomayor reasoned that the majority ruling had created the “highly implausible” result where Patchak’s aesthetic claim may go forward but a different plaintiff with a constitutional interest in the real estate, under the Due Process Clause, would remain barred by sovereign immunity.¹¹⁷ She explained that this anomaly, created by the majority’s result, leads to the inescapable conclusion that Patchak would be allowed to maintain his suit even if he actually had some property interest in the Bradley Tract “so long as his complaint did not assert it.”¹¹⁸ Pronouncing this standard as potentiality absurd and likely to lead to mischief, Justice Sotomayor concluded that Congress could not have intended such a result.¹¹⁹

111. *Id.* at 2212.

112. *Id.*

113. *Id.* (Sotomayor, J., dissenting) (quoting 28 U.S.C. § 2409a(a) (2006)).

114. *Id.* at 2215 (“In any event, the ‘grievance’ Patchak asserts is no different than that asserted in *Block*—a case in which we unanimously rejected a plaintiff’s attempt to avoid the QTA’s restrictions by way of an APA action or the similar device of an officer’s suit.” (citations omitted)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 2217.

119. *Id.* at 2218. Given her conclusion that the QTA applied and barred Patchak’s suit, Justice Sotomayor would not have reached the prudential standing issue. *Id.* at 2217 n.6.

IV. THE SUPREME COURT'S FENCE

A. *New Cause of Action*

In *Patchak*, the Supreme Court recognized a new cause of action. While the decision is rightly seen as an extension of *Carcieri*, it is also something very different.¹²⁰ Although both claims are premised upon 5 U.S.C. § 702, *Carcieri* involved litigation between two sovereign entities—a state and the federal government—while *Patchak* involved a private right of action between a citizen and the federal government.¹²¹ While the reasoning in *Carcieri* is certainly debatable, it seems clear that Rhode Island had legitimate state interests that it advanced as the *sine qua non* for its lawsuit: tax and regulatory authority.¹²² By contrast, Patchak's interests appear to be of the "not in my back yard" variety, yet the majority found them sufficient to maintain his suit. Not only was there a difference between the interests that gave rise to the causes of action in these two cases, but the relief sought in *Patchak* was also vastly distinct from that which had been sought in *Carcieri*. *Carcieri* sought to block the acquisition of trust property by the Government.¹²³ *Patchak* sought to divest the Government of title to property already held in trust for the Gun Lake Tribe,¹²⁴ an extraordinary proposition.

Until *Patchak*, the only way for a private entity to challenge a trust acquisition was pursuant to 25 U.S.C. § 465 as part of the Secretary's decision-making process. Indeed, *Carcieri* began that way, linking § 465 to the APA.¹²⁵ As a result of *Patchak*, however, that link is now decoupled. Now, private individuals—indeed apparently anyone—can advance a seemingly limitless threshold of claims, such as loss to aesthetics, economic issues, or environmental quality degradation, and

120. Compare *Addressing the Costly Administrative Burdens and Negative Impacts of the Carcieri and Patchak Decisions: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 17 (2013) [hereinafter *Hearings*] (statement of John Echohawk, executive director, Native American Rights Fund) (characterizing *Patchak* simply as another brand of the *Carcieri* problem), with *id.* at 26 (statement of Colette Routel, Associate Professor, William Mitchell College of Law) (discussing how *Patchak* is actually a *magnification* of the problem created by *Carcieri*).

121. Compare *Carcieri v. Salazar*, 129 S. Ct. 1058, 1060–61 (2009), with *Patchak*, 132 S. Ct. at 2202.

122. *Salazar*, 129 S. Ct. at 1061–62.

123. *Id.* at 1060.

124. *Patchak*, 132 S. Ct. at 2202.

125. See *Carcieri v. Norton*, 290 F. Supp. 2d 167, 169, 171 (D.R.I. 2003).

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maintain standing for a *Carciari* action.¹²⁶ And not just a *Carciari* action, for as Justice Sotomayor noted, “[a]fter today, any person may sue under the [APA] to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land.”¹²⁷ By eliminating the Indian-lands exception to the QTA’s sovereign-immunity waiver in cases where no property interest is claimed, the Court overturned “30 years of lower court decisions to the contrary.”¹²⁸ Moreover, it did away with “the widely[]held understanding that once land was held in trust by the United States for the benefit of a tribe, the QTA prevented a litigant from seeking to divest the United States of such trust title.”¹²⁹

B. New Statute of Limitations

As Justice Sotomayor warned, the *Patchak* decision has effectively created a new statute of limitations for fee-to-trust acquisitions.¹³⁰

Before the *Patchak* decision, the Secretary’s decision to place a parcel of land into trust only could be challenged *prior* to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisition process which ensured that interested parties had an opportunity to seek judicial review. It was the Department’s general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department’s regulations. This allowed all

126. *Hearings, supra* note 120, at 28 (statement of John Echohawk, Executive Director, Native American Rights Fund) (“Anyone who is unhappy with the acquisition of land by a Tribe in trust has up to six years after the land has been acquired to bring a lawsuit for any reason whatsoever, a *Carciari* reason or any other reason.”); *see also Patchak*, 132 S. Ct. at 2217 (Sotomayor, J., dissenting).

127. *Patchak*, 132 S. Ct. at 2212.

128. *Hearings, supra* note 120, at 26 (statement of Colette Routel, Associate Professor, William Mitchell College of Law); *see also id.* at 5 (statement of Donald “Del” Laverdure, Acting Assistant Secretary, Indian Affairs, United States Department of the Interior) (citing *Florida v. Dep’t of the Interior*, 768 F.2d 1248 (11th Cir. 1985); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004)).

129. *Id.* at 5 (statement of Donald “Del” Laverdure, Acting Assistant Secretary, Indian Affairs, United States Department of the Interior) (footnote omitted).

130. *See Patchak*, 132 S. Ct. at 2217 (Sotomayor, J., dissenting).

interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed. Following the *Patchak* decision, tribes, Indian homeowners, neighboring communities, and the Department will be forced to wait for six years or more to achieve that finality.¹³¹

Before the *Patchak* decision, the Department's own administrative procedures governed objections to the fee-to-trust-acquisition process with a 30-day statute of limitations.¹³² Now, such objections enjoy the general six-year statute of limitations that applies when the United States is a party.¹³³ Such a lengthy new statute of limitations injects incredible uncertainty into what was once a fairly straightforward but already lengthy process.

Certainty of title provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors, and to promote tribal economies.¹³⁴

C. *The Uncertainty Spreads*

The uncertainty from *Patchak*'s holding extends into commercial relations as well: financing has never been easy in Indian Country, but *Patchak* disrupts it even more.¹³⁵ The status of Indian tribes as extraconstitutional, dependent sovereign nations with commensurate

131. *Hearings*, *supra* note 120, at 7–8 (statement of Donald “Del” Laverdure, Acting Assistant Secretary, Indian Affairs, United States Department of the Interior).

132. 25 C.F.R. § 151.12(b) (2013).

133. 28 U.S.C. § 2401 (2012) (providing that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues”).

134. *Hearings*, *supra* note 120, at 8 (statement of Donald “Del” Laverdure, Acting Assistant Secretary, Indian Affairs, United States Department of the Interior).

135. *See* Toensing & Capriccioso, *supra* note 6, at 22 (“This makes lending to tribal borrowers much, much more expensive in terms of interest rates, and maybe eliminates the ability of many tribes to borrow money until the six years has [passed].” (quoting Professor Matthew L.M. Fletcher)).

immunity introduces enough risk to often prevent the use of an ordinary business model in a development project, including the construction of a casino. Historically, this has left tribes to fend for themselves with “non-traditional sources of financing” at high interest rates in order to initiate business plans, purchase real property, and negotiate the administrative fee-to-trust acquisition process.¹³⁶ It is only once the United States holds tribal land in trust that credit markets become more receptive and allow tribes “to access the bond market to obtain the capital needed.”¹³⁷ After successful operations over time, “tribes could seek to refinance their debt through conventional bank loans.”¹³⁸ Put simply, as a tribe’s risk diminishes, its access to cheaper capital increases. But the *Patchak* decision turns this process on its head “because it allows the largest risk (land status and jurisdiction) to linger for years following the Secretary’s decision.”¹³⁹ While the Department’s previous process was cumbersome and expensive, at least it was understood. In the wake of *Patchak*, the process is now more cumbersome, doubtlessly more expensive, and certainly more unclear.¹⁴⁰

This unpredictability is only part of the blow to the Government’s trust responsibilities. In a series of decisions over the last decade, the Supreme Court has demonstrated a crabbed and narrow view of the Government’s trust obligations to Indian tribes.¹⁴¹ In particular, the Court has proven to be very suspicious of tribes that attempt to reconstitute some part of their original aboriginal land outside of an existing reservation.¹⁴² The Court has offered varying reasons for its doubts as to

136. *Hearings*, *supra* note 120, at 27 (statement of Colette Routel, Associate Professor, William Mitchell College of Law).

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.* (“Shortly after the *Patchak* decision was released, Fitch Ratings . . . noted that raising capital for Indian economic development projects ‘could become more difficult/expensive, as investors are likely to have heightened concern about potential challenges regarding land-into-trust decisions.’” (footnote omitted)); *see also* Fitch Press Release, *supra* note 5 (expressing uncertainty as to when the statute of limitations begins to run).

141. *See, e.g.*, *United States v. Tohono O’Odham Nation*, 131 S. Ct. 1723 (2011) (finding a substantial overlap in the operative facts of two suits brought by the tribe and holding that this precluded the Court of Federal Claims from exercising jurisdiction during the case’s pendency); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (rejecting the fiduciary exception to attorney–client privilege where the federal government acted as an official trustee of Indian funds).

142. *See, e.g.*, *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 (2005) (“Given the longstanding, distinctly non-Indian character of the area and its

this process, including the passage of time, the ironic need for certainty,¹⁴³ and the dubious demarcation of certain tribes in the IRA.¹⁴⁴ Yet, this vision carves out a subset of “Johnny-come-lately” tribes from the lucky originals.¹⁴⁵ In the Supreme Court’s departure from precedent, tribes that have lost significant portions of their land (and most have, in fact, suffered such a loss) now face a significant roadblock in their efforts to expand their trust lands.¹⁴⁶ The problems are worse for those who were either marginalized early during the Contact Era or simply ignored to the point that they did not come under the authority of the IRA.

But *Patchak* reveals that the Court is also quite concerned with the expansion of Indian gaming. While Justice Sotomayor’s dissent points out that the ramifications of the Court’s decision are extremely broad, Justice Kagan’s majority opinion focuses exclusively on gambling.¹⁴⁷ The marriage of gambling to an off-reservation property perhaps can be said to have propelled the decision.¹⁴⁸ A reader of the Court’s opinion is left wondering whether the result would have been the same had the economic development in question been a super Wal-Mart or a sawmill. After *Patchak*, non-gaming commercial development in the fee-to-trust acquisition process is just as risky as gambling itself.

inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas’ long delay in seeking judicial relief against parties other than the United States, we hold that the tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.”)

143. See *id.* at 215–19 (citations omitted).

144. See *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063–68 (2009).

145. See *id.* at 1068.

146. See DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 244 (6th ed. 2011); see also FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 16–22 (2009).

147. *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2203 n.1, 2210–11 (2012).

148. On the other hand, the following consideration may have troubled the Court:

At the time the IGRA was enacted, Congress contemplated that most tribal casinos would be owned and operated by tribes on reservation lands. At the very least, the alternative seemed unlikely. To oversimplify, the idea that a tribe or tribal member could simply purchase land in the middle of New York City or Miami and set up a casino seemed both hugely undesirable and highly unfair to non-Indian city and state residents, and would put commercial gaming interests at a massive competitive disadvantage.

Light & Rand, *supra* note 18, at 437 (footnote omitted).

The threats to Indian gaming created by the decision reach beyond neighbor disputes—it affects the world of international gaming too. “Antitribal gaming interests can now file any old frivolous lawsuit to challenge trust acquisitions within six years of the acquisition. . . . Any—and I do mean any—anti-tribal interest [can now sue].”¹⁴⁹ Tribes are now squarely in the crosshairs of litigation if their off-reservation gaming operations could threaten other corporations’ potential profits. The same is true for tribes with proposed operations that might affect casinos run by other tribes.¹⁵⁰ According to Fitch Ratings, the following tribes have notable potential projects that could be impacted by *Patchak*: (1) the Cowlitz Tribe in Washington; (2) the Shinnecock Tribe in New York; (3) the Mashpee Wampanoag Tribe in Massachusetts; and (4) the Graton Rancheria and the North Fork Rancheria of Mono Indians in California.¹⁵¹ In fact, the Confederated Tribes of the Grand Ronde Community of Oregon have already sued the Cowlitz Tribe in an attempt to block the construction of a 134,140-square-foot casino and 250-room hotel.¹⁵² Clark County and the City of Vancouver, Washington, have also joined the efforts to vacate the land acquisition.¹⁵³

The Shinnecock Tribe’s federal recognition process was bankrolled by “Gateway Casino Resorts, [a] Detroit-based developer . . . with the aim of opening casinos in [New York].”¹⁵⁴ Gateway estimates that the primary facility will generate annual gaming revenue of \$ 1 billion,¹⁵⁵ but this facility is now at risk in the wake of *Patchak*. On July 30, 2012, Governor Deval Patrick of Massachusetts signed a “Resolve Relating to the Tribal-State Compact Between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts.”¹⁵⁶ The agreement would funnel

149. Toensing & Capriccioso, *supra* note 6, at 22 (second alteration in original) (quoting Professor Matthew L.M. Fletcher).

150. See Special Report, Fitch Ratings, *Native American Gaming Insights—Off-Reservation Gaming: Three Years into the Obama Administration* (Feb. 10, 2012), available at <http://www.standupca.org/reports/Native%20American%20Gaming%20Insights%20-%20Fitch%20Feb%202012.pdf> [hereinafter Fitch Special Report].

151. Fitch Press Release, *supra* note 5.

152. See Fitch Special Report, *supra* note 150.

153. *Id.*

154. Mark Harrington, *Shinnecock Tribe Sacks 4, Cites Secret Business Deal*, NEWSDAY (Aug. 13, 2012), <http://www.newsday.com/long-island/suffolk/shinnecock-tribe-sacks-4-cites-secret-business-deal-1.3903009>.

155. *Id.*

156. Press Release from Governor Deval Patrick, Governor Patrick Signs Gaming Compact with Mashpee Wampanoag Tribe (July 30, 2012). *But see* Letter from Kevin K. Washburn, Assistant Sec’y, Indian Affairs, to Deval Patrick, Governor, Commonwealth

21.5% of gross gaming revenue from a proposed casino in Taunton, Massachusetts, to the Commonwealth over 15 years.¹⁵⁷ But, this agreement is also at risk because the land has not yet been taken into trust.¹⁵⁸

In a June 2012 letter to nearby residents, Station Casinos, a Las Vegas gaming giant, confidently reported that construction of the Graton Rancheria Resort and Casino Project in California was under way¹⁵⁹ even though “opponents of the casino [were] continuing their fight.”¹⁶⁰ One opponent, Pastor Chip Worthington, leader of a group named Stop the Casino 101 Coalition, trumpeted the *Patchak* decision in a press release: “When you remove federal protection, the land comes under law once again, and in states like Michigan and here in California, Class III casinos are illegal on state-governed land . . . Patchak has the potential to kill virtually every tribal casino in California.”¹⁶¹ On August 31, 2012, California Governor Jerry Brown approved the proposal of the North Fork Rancheria to build a casino on Highway 99 in Madera County, 36 miles from the reservation border.¹⁶² The North Fork Rancheria Indians had only just begun the land-acquisition process for the Station Casinos project when a consortium of local churches and the Chukchansi Tribe, all of which likely feared possible competition with their own operations, immediately threatened litigation.¹⁶³

of Mass. (Oct. 12, 2012) (finding that the compact was in violation of the IGRA and disapproving it).

157. Press Release from Governor Deval Patrick, *supra* note 156.

158. *Id.*; see also Gale Courey Toensing, *BLA Approves Mashpee's Tribal-State Gaming Compact in 'Historic and Epic Moment,'* INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/01/08/bia-approves-mashpees-tribal-state-gaming-compact-historic-and-epic-moment-153014> (“There are two more steps before the tribe can put shovels in the ground—the federal approval of a Final Environmental Impact Statement (FEIS) and the Interior Department’s approval of the tribe’s land into trust application.”).

159. Letter from Bob Finch, Senior Vice President of Native Am. Operations, Station Casinos (June 21, 2012), available at http://www.gratoneis.com/Project_Update_Letter.pdf.

160. Jud Snyder, *Questions Linger for RP Casino*, COMMUNITY VOICE, June 21, 2012, at 1.

161. *Id.* (alteration in original) (internal quotation marks omitted).

162. Marc Benjamin, *Brown OKs Off-Reservation Casino for North Fork Indians*, STAND UP FOR CAL. (Aug. 31, 2012), <http://www.standupca.org/news/2012/brown-oks-off-reservation-casino-for-north-fork-indians/>.

163. *Id.*

V. CONCLUSION

Patchak is a fence constructed by the Supreme Court around Federal Indian Gaming law because it provides the almost unlimited right of “not in my backyard” locals or competitors to sue the Government for the divestiture of Indian trust lands. When compared with an earlier ruling by the Supreme Court, which held Indian tribes do not have the authority to sue a state to enforce statutory rights contained within IGRA, a true paradox exists—tribes are foreclosed from suing states to protect their IGRA rights but are subject to being sued by anyone who objects to a proposed gaming operation.¹⁶⁴ Seen in this light, Indian gaming has never been more restricted than it is today.

After all, Indian gaming in the 21st century seems beset on all sides by market saturation,¹⁶⁵ internet gambling,¹⁶⁶ and financial distress in the face of the Great Recession.¹⁶⁷ However, these factors hemming Indian gaming are venture-related factors that can be corrected by the market or through regulation. The Supreme Court’s restriction of Indian gaming in *Patchak* is something more fundamental—it impacts the existence, sovereignty, and destiny of American Indian tribes. The Supreme Court is, by design, the slowest of our branches of Government to adapt to change. One commentator has suggested that the Court remains stuck in an earlier time of federal Indian policy—the Termination Era, which began in the late 1940s, when federal recognition of many tribes ended and a formal push to assimilate Indians into the melting pot of America became the official policy of the United States until the Nixon administration.¹⁶⁸ Yet, tribal nations and official congressional policy

164. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996), with *Match-E-BE-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2203 (2012); see also JOHN PAUL STEVENS, *FIVE CHIEFS* 194–95 (2011) (characterizing the consequences of *Seminole Tribe of Florida* as “extraordinary”).

165. See Editorial, *Tribal Casino Market Already Saturated in Wisconsin*, INDIANZ.COM (Oct. 11, 2012), <http://www.indianz.com/IndianGaming/2012/025539.asp>.

166. See Suzanne Gamboa, *Some Tribes Seek Federal Rules on Internet Gaming*, PHYS.ORG (July 26, 2012), <http://phys.org/news/2012-07-tribes-federal-internet-gaming.html>.

167. Corina Rocha Pandeli, Note, *When the Chips are Down: Do Indian Tribes with Insolvent Gaming Operations Have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?*, 2 UNLV GAMING L.J. 255, 256 n.5 (2012).

168. See Kevin Sobel-Read, *Still Punching Holes in Tribal Sovereignty: How Modern Supreme Court Policy Is to Indian Jurisdiction What Allotment Was to Tribal Land 1* (Fall 2007) (unpublished paper, on file with author) (arguing the “Supreme Court’s current Indian policy is both a direct continuation of the policies of allotment and a

have moved forward from the Termination Era into a Self-Determination Era and, according to some commentators, now into a new era of nation-building.¹⁶⁹ The executive branch has tried to go along with these changes but it continues to be stymied by Supreme Court fiats.

As such, only the plenary authority of congressional action can reverse the damage to Indian gaming inflicted by the *Patchak* decision. Indeed, in the absence of congressional action, the Supreme Court's decision is a kind of legislation; the Court has, once again, publicly invited Congress to step in if it does not approve.¹⁷⁰ Congress should accept the Court's offer.

The Senate Committee on Indian Affairs conducted a hearing on September 13, 2012, entitled "Addressing the Costly Administrative Burdens and Negative Impacts of the *Carciari* and *Patchak* Decisions."¹⁷¹ Senate Bill 676, introduced in the 112th Congress and "unanimously approved by the Senate Committee on Indian Affairs,"¹⁷² would have removed the impediment created by *Carciari*.¹⁷³ The Bill would have made the IRA applicable to all federally recognized Indian tribes regardless of when they were recognized.¹⁷⁴ Additionally, the Bill would have ratified and confirmed all land-to-trust decisions made by the Secretary of the Interior pursuant to the IRA for any Indian tribe that had been federally recognized *at the time of the action*.¹⁷⁵ Similarly, House Bill 1234 would have also fixed the *Carciari* decision by ratifying and confirming prior land-into-trust decisions.¹⁷⁶

reincarnation of those policies in the guise of attacks on jurisdiction instead of attacks on real property"). Perhaps the Court is only stuck in 1988, where the possibility of off-reservation gaming "appeared wildly unrealistic in terms of state public policy." Light & Rand, *supra* note 18, at 437.

169. See POMMERSHEIM, *supra* note 146, at 270–72; see also GETCHES ET AL., *supra* note 146, at 367 ("In recent decades, Indian tribes have exercised this sovereignty by engaging in the difficult, arduous, and rewarding process of nation-building.").

170. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2209 (2012) ("Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call.").

171. *Hearings*, *supra* note 120, at I.

172. *Id.* at 12 (statement of President Jefferson Keel of the National Congress of American Indians).

173. See S. 676, 112th Cong. (2012), available at [http://beta.congress.gov/bill/112th/senate-bill/676/text?q={%22search%22:\[%22s%20676%22\]}](http://beta.congress.gov/bill/112th/senate-bill/676/text?q={%22search%22:[%22s%20676%22]}).

174. *Id.*

175. *Id.*

176. *Hearings*, *supra* note 120, at 12 (statement of President Jefferson Keel of the National Congress of American Indians).

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House Bill 1234 has been reintroduced in the 113th Congress as House Bill 666.¹⁷⁷ Congress should approve it. However, it still does not address the broad concerns raised by Justice Sotomayor. If Congress envisions a trust relationship with the Indian tribes, other than the relationship established by the Supreme Court's decision, it must act broadly—not narrowly—in defining that responsibility with specificity. In particular, Congress should use its plenary power over Indian affairs to declare that Indian tribes may reconstitute their lost lands and may build gaming facilities on them. To do otherwise is to continue to cede this sovereignty-defining aspect of federal Indian policy to a Supreme Court that remains stuck cobbling federal common law with principles plucked from an era long abandoned by the other two branches of Government.

177. H.R. 666, 113th Cong. (2013), available at [http://beta.congress.gov/bill/113th-congress/house-bill/666?q={%22search%22%3A\[%22HB+666%22\]}](http://beta.congress.gov/bill/113th-congress/house-bill/666?q={%22search%22%3A[%22HB+666%22]}).