ORAL ARGUMENT NOT YET SCHEDULED

Docket No. 09-5324

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK,

Plaintiff-Appellant,

v.

KENNETH L. SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,

Defendants-Appellees,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:08-CV-01331-RJL, HON. RICHARD J. LEON

APPELLANT'S BRIEF

John J. Bursch
Daniel P. Ettinger
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, Michigan 49503-2487
616.752.2000
jbursch@wnj.com
Attorneys for David Patchak

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

The parties to this appeal are: David Patchak, Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior, and Larry Echo Hawk, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is the intervenor-defendant. There are no *amici*.

Rulings Under Review

This appeal arises from the district court's decisions and orders entered on August 20, 2009, by Hon. Richard J. Leon, denying Plaintiff/Appellant's Motion for Temporary Restraining Order, denying Plaintiff/Appellant's Emergency Motion for Temporary Restraining Order, denying Plaintiff/Appellant's Motion for Summary Judgment, and granting Intervenor/Defendant's Motion for Judgment on the Pleadings and Defendants Kempthorne's and Artman's Motion to Dismiss for Lack of Jurisdiction. Order, R. 57, (J.A. __). The Hon. Richard J. Leon's supporting memorandum opinion, dated August 19, 2009, may be found at 646 F. Supp. 2d 72 (D.D.C. 2009). Plaintiff David Patchak respectfully requests that the D.C. Circuit reverse the district court's rulings and remand for entry of an order that

(1) grants summary judgment in Mr. Patchak's favor, and (2) directs the government to remove the subject property from trust.

Related Cases

This case was not previously before this court. There are no related cases currently pending of which counsel is aware.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal involves important recurring issues of broad application under the Indian Reorganization Act, the Administrative Procedures Act, and the Quiet Title Act. The record in the trial court is voluminous, and the parties have invested considerable time and money in litigating the case and framing the issues for appeal. The Court's ultimate decision will be momentous, not only for David Patchak and the residents of the rural community surrounding the site of the Gun Lake Band's proposed casino complex, but also for the Gun Lake Band and the federal agencies charged with implementing the Indian Reorganization Act. Accordingly, Patchak respectfully requests an opportunity to address the Court orally and to respond to the Court's questions.

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GLOSSARY

APA	Administrative Procedures Act
Bradley Tract	165-acre site in rural Wayland Township
DOI	Department of the Interior
EA	Environmental Assessment
Gun Lake Band	Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
LOS	Level of Service
MichGO	Michigan Gambling Opposition
NEPA	National Environmental Policy Act
QTA	Quiet Title Act
Trust Application	Fee-to-Trust Application

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Patchak's claims arise under the Constitution, laws, or treaties of the United States.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 3(a). The appeal is from the order of the district court entered on August 20, 2009, which disposed of all claims with respect to all parties. Order, R. 57 (J.A. __). Patchak filed a timely Notice of Appeal with the district court clerk on September 15, 2009.

STATUTES AND REGULATIONS

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating 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 shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 707. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

28 U.S.C. § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any

existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

> **(1)** by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
>
> **(2)** by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

STATEMENT OF THE ISSUES

1. Sections 5 and 19 of the Indian Reorganization Act ("IRA") authorize the Secretary of the Interior to take land in trust for an Indian tribe that was under federal jurisdiction as of June 1, 1934. *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). Invoking the IRA, Defendants/Appellees took the subject land in trust for the Intervening Tribe, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, even though it is undisputed that the Tribe was not federally recognized from 1870 until the 1990s. Did the district court err by failing to hold Defendants/Appellees' actions *void ab initio*?

Appellant answers: Yes.
Appellee answers: No.
The district court failed to reach this issue.

2. Defendants/Appellees' *ultra vires* actions in taking the subject land in Trust for the Tribe will cause Plaintiff/Appellant David Patchak imminent, concrete, and particularized injury that will be redressed by a favorable court decision. Nonetheless, the district court held that Mr. Patchak lacked standing because he did not fall within the IRA's "zone of interests," as he is not an intended beneficiary of the IRA. Did the district court err by concluding that Mr. Patchak did not fall within the IRA's zone of interests when Mr. Patchak's claim is that the IRA does not authorize Defendants-Appellees to take the subject land in trust?

Appellant answers: Yes.
Appellee answers: No.
The district court answered: No.

3. The Quiet Title Act, 28 U.S.C. § 2409a, generally forecloses collateral attacks on title to lands that the federal government takes in trust for Indians. But the Act does not foreclose a challenge that the Secretary of the Interior acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land. *See, e.g., South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 881 n.1 (8th Cir. 1995), *vacated on other grounds*, 519 U.S. 919 (1996) (citing *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1255 n.9 (11th Cir. 1985)); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 471–72 (D.D.C. 1978). Does Defendants-Appellees' taking of the subject property in trust divest the federal courts of jurisdiction to determine whether Defendants/Appellees acted beyond their statutory authority, particularly when Plaintiff/Appellee David Patchak filed his claim **before** the federal government took title to the subject property?

Appellant answers: No.
Appellee answers: Yes.
The district court failed to reach this issue.

INTRODUCTION

Plaintiff-Appellant David Patchak lives in a small farming community of roughly 3,000 residents. Final Environmental Assessment, ch. 3, p. 3-29, A.R. at 000064, R. 22 (J.A. __) [hereinafter "Final EA"]. Intervenor-Defendant-Appellee the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Band") is building a casino complex in Patchak's community. *Id.* pp. 2-1, 2-2, A.R. at 000022–23 (J.A. __). As proposed for purposes of the land-in-trust acquisition, the casino complex would be open 24 hours a day, 365 days a year, with 8,500 visitors each day—over 3.1 million visitors annually. *Id.* p. 4-10, A.R. at 000094 (J.A. __); *id.*, Appendix H, p. 6, A.R. at 000657 (J.A. __). The casino will have more parking spaces—3,330—than Patchak's community has residents. *See id.* pp. 2-1, 2-2, A.R. at 000022–23 (J.A. __); *id.*, Appendix D, A.R. at 0000458, (J.A. __). With this suit, Patchak attempts to protect his community's idyllic nature by preventing the invasion of this mammoth gambling operation.

The validity of the proposed casino turns on whether the Gun Lake Band was eligible to have the underlying land taken in trust under the Indian Reorganization Act (the "IRA"), 25 U.S.C. § 465. As the Supreme Court recently confirmed, the IRA empowers the Department of Interior (the "DOI") to take land in trust only on behalf of those tribes that were "under federal jurisdiction" in 1934. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009); 25 U.S.C. §§ 465, 479. But the

Gun Lake Band was not under federal jurisdiction in 1934, under any definition of the term. The Band had no contact with the federal government from 1870 to 1993, as the DOI has already specifically determined: "Since 1870, the Federal government has dealt with band members as individual Indians entitled to attendance at BIA schools, etc., but has not dealt with the band as an entity." Formal DOI Technical Assistance Letter from Joann Sebastian Moore, Director of Office of Tribal Services, to D.K. Sprague, Gun Lake Band, p. 2 (May 5, 1995), *available at* http://64.38.12.138/adc20/Mbp%5CV001%5CD004.PDF (attached as Exhibit A) [hereinafter "DOI Technical Assistance Letter"]; *see also* Summ. Under the Criteria and Evid. for Proposed Finding of Acknowledgment, p. 5, A.R. at 002013, R. 22 (J.A. __) (referring to letter).[1] In 1870, the Gun Lake Band formally terminated its relationship with the federal government by violating the 1855 Treaty of Detroit. DOI Technical Assistance Letter, p. 2. Furthermore, the Gun Lake Band had previously placed itself under the protection of an Episcopalian Mission in order to **avoid** dealing with the federal government. Fee to Trust Application, p. 4, A.R. at 001988, R. 22 (J.A. __) [hereinafter "Trust Application"]. Indeed, the Episcopalian church took land into trust for the Band during

[1] Patchak requests this Court to take judicial notice of this DOI letter under Federal Rule of Evidence 201. *See Nebraska v. Envtl. Prot. Agency*, 331 F.3d 995, 998 (D.C. Cir. 2003) (taking judicial notice of government agency's data); *The Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of newspaper articles).

this period. *Id.* p. 5, A.R. at 001989 (J.A. __). Such conduct is the antithesis of a relationship with the federal government, as confirmed by the fact that the Gun Lake Band does not appear on the list of IRA-eligible tribes that the then-Commissioner of Indian Affairs prepared shortly after the IRA's enactment. Pl.'s Mot. for Summ. J., p. 14, R. 52 (J.A. __) (noting Gun Lake Band's absence from the list); Letter from John Collier, Comm'r of Indian Affairs, to Elmer Thomas, Chairman of Senate Comm. on Indian Affairs (Mar. 18, 1937) (attached as Exhibit B) [hereinafter "Collier List"]. Accordingly, the Band is ineligible for trust acquisitions under the IRA, and the DOI's decision to take the Band's land into trust to build the casino is *ultra vires* and *void ab initio*.

Nonetheless, the district court dismissed this lawsuit, holding that Patchak lacked standing because he is not an Indian whom the IRA is intended to benefit. 8/19/09 Mem. Op., p. 10, R. 56 (J.A. __). Therefore, the court reasoned, Patchak does not fall within the IRA's "zone of interests." *Id.* But Patchak seeks to enforce an IRA limitation, and there is nothing in this Court's standing jurisprudence suggesting that only statutory **beneficiaries** may sue to enforce a statute. To the contrary, this Court has held that a statute's zone of interests includes those individuals who are most likely to police the interests the statute protects. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998) (the test's focus is

"on those who in practice can be expected to **police** the interest that the statute protects" (emphasis added)). Patchak therefore has standing.

In *dicta*, the district court also suggested that the Quiet Title Act (the "QTA"), 28 U.S.C. § 2409a, bars Patchak's suit, because after Patchak filed this complaint, the DOI placed the subject land in trust. But the QTA does not apply here because Patchak does not seek to quiet title to federal lands in himself; he merely challenges the DOI's administrative actions. *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 471–72 (D.D.C. 1978). And even if Patchak were seeking to quiet title, it is dispositive that the DOI had not yet taken title to the land when Patchak filed this suit. The DOI cannot defeat this Court's jurisdiction by its post-complaint actions. *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981) (The government should not be permitted "to manipulate its position subsequent to the filing of a complaint so as to present a situation that falls between the cracks of applicable waiver [of sovereign immunity] statutes.") Accordingly, this Court should address the merits of Patchak's claims and should hold that the subject land is ineligible for trust status under *Carcieri*.

STATEMENT OF THE FACTS

The Gun Lake Band terminates its relationship with the federal government in 1870

When Congress enacted the IRA in 1934, the Gun Lake Band was not federally recognized. Proposed Finding for Federal Acknowledgment of the Gun Lake Band, 62 Fed. Reg. 38,113, 38,113 (June 23, 1997). Up until 1870, the Band had ongoing relations with the United States government; it was a party to various treaties and received payments from the United States government. *Id.* In 1839, to avoid the federal government and its plan to move Indians west, the Gun Lake Band placed itself under the protection of an Episcopalian mission and occupied lands in Allegan County, Michigan. Trust Application, p. 4, A.R. at 001988, R. 22 (J.A. __). The Episcopalian bishop, Samuel A. McCoskry, formerly declared that he held the mission lands in trust for the Gun Lake Band in 1855. *Id.* p. 5, A.R. at 001989 (J.A. __). During this period, a portion of the Band remained in Oceana County, Michigan, in compliance with the 1855 Treaty of Detroit, which required Band members to reside in Oceana County. DOI Technical Assistance Letter, p. 2. However, in 1870, the entire Band moved to the Allegan County mission, flagrantly violating the Treaty and formally breaking off all relations with the United States government. *Id.* Consequently, in 1870, the Gun Lake Band received its final annuity payment under the 1855 Treaty of Detroit. Proposed Finding for

Federal Acknowledgment of the Gun Lake Band, 62 Fed. Reg. at 38,113. The Band had no further interaction with the United States government as a group until it applied for recognition in 1993.

In fact, the DOI specifically determined that "[s]ince 1870, **the Federal government has dealt with band members as individual Indians** entitled to attendance at BIA schools, etc., **but has not dealt with the band as an entity**." DOI Technical Assistance Letter, p. 2 (emphasis added). In other words, the government has already concluded that it had no relationship whatsoever with the Gun Lake Band from 1870 onward.

The Gun Lake Band's application for federal recognition in 1993

The Gun Lake Band applied for recognition in 1993 under 25 C.F.R. Part 83. In so doing, the Gun Lake Band explicitly acknowledged its lack of federal recognition, because Part 83 applies only to tribes that are not acknowledged or recognized by the federal government at the time of application. 25 C.F.R. § 83.7. The Gun Lake Band and federal government consistently acknowledged this position until the United States Supreme Court issued its opinion in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). *E.g.*, Gun Lake Band Br. on Appeal, p. 3, R. 24-1 (J.A. __) ("[T]he federal government withheld formal acknowledgment beginning in 1870. . . . Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue commercial self-determination and

self-sufficiency."); Decl. of George T. Skibine, Acting Deputy Assistant Secretary, Department of Interior, ¶ 8, R. 29-1 (J.A. __) (noting the Gun Lake Band's recognition was terminated). The DOI granted the Band's application for recognition in 1999. *See* Final Determination to Acknowledge the Gun Lake Band, 63 Fed. Reg. 56,936, 56,936 (Oct. 14, 1998) (determination final 90 days from publication).

The Gun Lake Band seeks trust lands to build a casino

Ironically, the Band sought federal recognition under the pretence that "there would never be casinos in our Tribe," as the Band represented to the Assistant Secretary of Indian Affairs. Trust Application, p. 79, A.R. at 002106, R. 22 (J.A. __). The Band's constitution, which it submitted along with its Trust Application, further stated that the Gun Lake Band is "the only Indian Tribe in the State of Michigan which has decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." *Id.*; *accord id.* p. 113 n.194, A.R. at 002140 (J.A. __).

Despite these assurances, the Gun Lake Band soon changed its mind and began seeking to build a casino immediately upon receiving federal recognition. The Band considered several sites in Allegan County, Michigan before deciding on a 165-acre site in rural Wayland Township (the "Bradley Tract"). Trust Application, p. 9, A.R. at 001993, R. 22 (J.A. __). On August 9, 2001, the Gun Lake Band submitted an application requesting that the United States acquire the

Bradley Tract in trust for the Band to enable the Band to construct and operate a casino complex (the "Trust Application"). *See* Trust Application, A.R. at 001984–2002, R. 22 (J.A. __).

In its application, the Gun Lake Band acknowledged that the Band "was ineligible to organize under the Indian Reorganization Act of 1934." *Id.* p. 5, A.R. at 001989 (J.A. __). This concession was echoed by Band members during the application process:

> GP220. Trial History and Needs: For approximately 150 years, my Tribe has suffered due to the United States' government's failure to recognize us as an Indian Tribe. In 1992, my tribal community decided to pursue federal acknowledgment by filing a petition with the Branch of Acknowledgment and Research of the BIA. In August of 1999, the tribe was finally acknowledged as a federally recognized Indian Tribe.

Final EA, Appendix Q, p. 124, A.R. at 001185, R. 22 (J.A. __).

As part of the application process, with the help of its paid consultants, the Gun Lake Band prepared a proposed environmental assessment ("EA") describing the casino project. The EA proposed a gambling complex of nearly 200,000 square feet, including 99,000 square feet of gaming space, two sit-down restaurants, a café, two fast-food outlets, four retail shops, a sports bar, entertainment lounge, office space, and parking for more than 3,330 cars, buses, and RVs. *Id.* pp. 2-1, 2-2, A.R. at 000022–23 (J.A. __); *id.*, Appendix D, A.R. at 000458, R. 22 (J.A. __). The proposed casino has more parking spaces than the surrounding

community has residents. *Id.* p. 3-29, A.R. at 000064 (J.A. __). The proposed casino complex would be open 24 hours a day, 365 days a year, drawing 8,500 visitors a day—over 3.1 million visitors annually—to a farming community of only 3,000 residents. *Id.*, Appendix H, p. 6, A.R. at 000657 (J.A. __); *id.* p. 3-29, A.R. at 000064 (J.A. __). The impact on the surrounding community is forecasted to be substantial, with the casino expected to generate 4,900 new jobs, attract 1,420 new residents, and induce construction of more than 500 new homes in the area. *Id.*, Appendix H, pp. 6–8, 39, A.R. at 000657–59, 000635 (J.A. __).

The DOI adopted the Gun Lake Band's EA and submitted it for public comment. *See id.*, Notice of Availability & Comment Period, A.R. at 002933–34 (J.A. __). During the comment period, the local community submitted voluminous comments pointing out the casino's many potential impacts on the environment and community, and urged the DOI to reject the Trust Application. *See id.*, Appendix P, A.R. at 000934–36, 000943–998 (J.A. __). Members of Congress also submitted comments opposing the Trust Application, including Congressmen Vern Ehlers and Pete Hoekstra, whose constituents live in the areas most affected by the proposed casino. *See id.*, Appendix P, A.R. at 000930–33, 000940 (J.A. __).

In December 2003, DOI issued a final EA. *See id.* A.R. at 000007, (J.A. __). The EA concedes that the heavy traffic volume from the casino—which it estimates would be **1,110 cars per hour** during peak hours—would cause two

critical intersections near the casino to flunk traffic-rating tests. *Id.* p. 4-26, A.R. at 000110, (J.A. __).[2]

The comments established that the casino project was large and controversial, with significant impacts that required mitigation measures. Even so, on February 27, 2004, DOI issued a finding of "no significant impact." Finding of No Significant Impact, pp. 1–3, A.R. at 000003–05, R. 22 (J.A. __). Defendants did not finally resolve the matter at that time, however, but continued to study the casino's impact, *see* Internal DOI Memoranda, A.R. at 001336, 6997, 7004, 7018, 7064, 7103, 7135–56, 7159–66, 7440, R. 22 (J.A. __), until issuing their notice of intent to take the land into trust on May 13, 2005, *see* Notice of Determination, A.R. at 000001–02, R. 22 (J.A. __).

The DOI's asserted authority to take land into trust for the Gun Lake Band is Section 465 of IRA. Section 465 authorizes the Secretary of Interior to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. IRA defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe **now** under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). In *Carcieri*, the Supreme Court interpreted these provisions to mean that

[2] The EA admits similar impacts to the nearby Village of Hopkins, conceding that increased traffic from the casino would cause traffic at an intersection near the Hopkins' schools to operate at LOS E during afternoon peak hours. Final EA, ch. 4, pp. 4-31, 4-32, A.R. at 000115–116, R. 22 (J.A. __). Despite this admission, the EA does not offer any mitigation measures for those impacts. *Id.* pp. 5-5, 5-6, A.R. at 000189–190 (J.A. __).

the DOI may only take land into trust for "a tribe that was under federal jurisdiction at the time of the statute's enactment" in 1934. 129 S. Ct. at 1061 (reversing the First Circuit's opinion holding that the DOI could take land in trust for any tribe presently under federal jurisdiction). Thus, DOI may only take the Bradley Tract into trust for the Gun Lake Band if the Gun Lake Band was "under federal jurisdiction" in 1934. However, as noted above, from 1870 until 1993, the federal government had no relationship with the Gun Lake Band as an entity, but rather dealt only with individual members of the tribe. *See* DOI Technical Assistance Letter, p. 2.

MichGO challenges the DOI's decision to take the Bradley Tract into Trust

A nonprofit organization of concerned citizens, Michigan Gambling Opposition ("MichGO"),[3] challenged the DOI's right to take the Bradley Tract into trust, *Michigan Gambling Opposition v. Kempthorne*, No. 1:05-CV-01181-JGP (D.D.C.), on several grounds, including noncompliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and IRA. Compl. ¶ 11, R. 1 (J.A. __); 8/19/09 Mem. Op. p. 3, R. 56 (J.A. __). In its complaint, MichGO did not argue that taking the land into trust was improper because the Gun Lake Band was not under federal jurisdiction in 1934; when MichGO filed its complaint, *Carcieri* had not been decided, and the courts rejected MichGO's attempts to have the issue considered after the Supreme Court granted certiorari in *Carcieri*.[4] The MichGO litigation resulted in a stay preventing the DOI from taking the Bradley Tract into trust. But, eventually, the MichGO suit was dismissed and the stay lifted.

[3] MichGO is a Michigan non-profit corporation that seeks to protect the citizenry and quality of life in its community by opposing the proliferation of gambling venues. Its members reside in West Michigan and own the businesses and homes that will be most affected if the Gun Lake Band is successful in its attempt to bring 3.1 million casino visitors a year to a rural community of only 3,000 residents. Final EA, ch. 3, p. 3-29, A.R. at 000064, Appendix H, p. 6, A.R. at 000657, Appendix P, Letter B, A.R. at 000831, Appendix P, Letter G, A.R. at 000836–37, R. 22 (J.A. __).

[4] The First Circuit had held, consistent with the body of precedent, that the DOI could take land in trust for **any** tribe presently under federal jurisdiction. Court watchers determined that the only reason for the Court to grant certiorari in *Carcieri* would be to reverse this long-standing interpretation of IRA.

Patchak files suit

Before the MichGO stay was lifted, Patchak filed this suit on August 1, 2008. Compl. p. 10, R. 1, (J.A. __). Patchak seeks judicial review, under the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 702, 706,[5] of the DOI's claimed authority, under IRA, to take the Bradley Tract into trust for the Gun Lake Band. As noted above, the DOI may only take land into trust under IRA for a tribe where that tribe "was under federal jurisdiction at the time of the statute's enactment" in 1934. *Carcieri*, 129 S. Ct. at 1061. Because the Gun Lake Band was not under federal jurisdiction in 1934, the DOI has no power to take land into trust for the Band under IRA. Thus, Patchak requests the following relief:

> (A) That the Court find the action of [the DOI] unlawful and reverse the decision to take the Property into trust for the Gun Lake Band;
>
> (B) That the Court issue a declaratory judgment declaring that [the DOI's] decision to take the Property into trust violates Sections 5 and 19 of the Indian Reorganization Act, 25 U.S.C. §§ 465, 479, and is *ultra vires*;
>
> (C) That the Court issue an order staying the action of [the DOI] and/or issuing a preliminary injunction prohibiting the acceptance or transfer of any land into trust for the benefit of the Gun Lake Band, effective immediately and pending litigation of the issues raised in this Complaint;

[5] The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, to judicial review thereof." 5 U.S.C. § 702. A court presented with an APA claim "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

> (D) That the Court issue a permanent injunction prohibiting [the DOI] from accepting or transferring any land into trust for the benefit of the Gun Lake Band;
>
> (E) That the Court award to Plaintiff all of his costs and reasonable attorney fees; and
>
> (F) That the Court award such other relief as it deems proper to effectuate the purposes of this action.

Compl. p. 9, R. 1 (J.A. __).

At the time Patchak filed this Complaint, the DOI had not yet taken the Bradley Tract into trust for the Gun Lake Band, Compl. ¶ 11, R. 1 (J.A. __); the Supreme Court had granted certiorari in *Carcieri*; and the *MichGO* court had refused to consider the *Carcieri*-based, under-federal-jurisdiction argument. Patchak filed his Complaint to ensure that the courts considered the merits of the *Carcieri*-based, under-federal-jurisdiction argument, Patchak Aff. ¶ 11, R. 26-1 (J.A. __), and also because the Gun Lake Band's casino would destroy Patchak's way of life. Compl. ¶ 9, R. 1 (J.A. __).

Patchak lives near the Bradley Tract. He moved to the area "because of its unique rural setting, and [he] values the quiet life he leads in Wayland Township." *Id.* The planned construction and operation of a casino complex on the Bradley Tract would destroy that quiet lifestyle. *Id.* In fact, it is difficult to envision any other possible outcome of bringing 3.1 million visitors annually to a farming community of only 3,000 residents. *See* Final EA, ch. 3, p. 3-29, A.R. at 000064,

Appendix H, p. 6, A.R. at 000657, R. 22 (J.A. __). Patchak anticipates the following negative effects:

> (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

Compl. ¶ 9, R. 1 (J.A. __).

Fearing the expiration of the *MichGO* stay, Patchak filed a motion for a temporary restraining order or a preliminary injunction on January 8, 2009. Emergency Mot. for TRO/Prelim. Inj., R. 36 (J.A. __). In support of this motion, Patchak argued that if the *MichGO* stay expired and the DOI took the Bradley Tract into trust, the DOI would attempt to argue that the QTA, 28 U.S.C. § 2409a, prevented the court from hearing the merits of Patchak's claims. Mem. in Supp. of Pl.'s Mot for a TRO/Prelim. Inj. 6, R. 36 (J.A. __). On January 26, 2009, the trial court denied Patchak's motion for a temporary restraining order and took the motion for a preliminary injunction under advisement. 1/26/09 Docket Minute Entry (J.A. __). A few days later, on January 30, 2009, following the expiration of the

MichGO stay, the DOI took the Bradley Tract into trust for the Gun Lake Band. Notice, R. 49 (J.A. __).[6]

Supreme Court issues Carcieri decision

Twenty-five days later, on February 24, 2009, the Supreme Court issued its decision in *Carcieri*. As Patchak predicted, the Supreme Court reversed the First Circuit and held that the DOI may only take land into trust under IRA for a tribe where that tribe "was under federal jurisdiction at the time of the statute's enactment" in 1934. *Carcieri*, 129 S. Ct. at 1061.

The trial court dismisses Patchak's suit on prudential-standing grounds

Despite the clear holding in *Carcieri*, the trial court refused to consider the merits of Patchak's complaint, dismissing it for lack of prudential standing because Patchak was not within the IRA's zone of interests. *See* 8/19/09 Mem. Op., p. 10, R. 56 (J.A. __). The trial court acknowledged that the zone-of-interests test is "'not meant to be especially demanding,' it only excludes plaintiffs whose interests are 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 6–7 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)).

[6] Despite this pending suit, the Gun Lake Band has moved forward with its construction of a multi-million-dollar casino, with crews working 12-hour days, six days a week. News Release, Gun Lake Casino Construction Underway, http://www.gunlakecasino.com/news.php?action=expand&ID=21 (Oct. 21, 2009), last visited 3/28/10.

Nonetheless, the court held that Patchak did not meet this test. The court noted that Congress enacted IRA to benefit Indians: to provide Indians with "self-determination and economic independence." *Id.* at 7–8. Because Patchak is not an Indian and does not seek to promote the Indians' interests, according to the district court, he does not fall with IRA's zone of interests, and so does not have standing. *Id.* at 8. Under this analysis, any party attempting to police the IRA's limitations would be unable to do so, contrary to this Court's precedent. Patchak now appeals and respectfully requests that this Court not only reverse the district court's erroneous ruling regarding standing, but that it address the merits of the *Carcieri* issue as well.

STANDARD OF REVIEW

The Court reviews the district court's determinations regarding standing and questions of statutory construction *de novo*. *Affum v. United States*, 566 F.3d 1150, 1158 (D.C. Cir. 2009) (standing); *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008) (statutory construction).

SUMMARY OF THE ARGUMENT

The IRA authorizes the DOI to take land into trust only for Indian tribes who were under federal jurisdiction in 1934. *Carcieri*, 129 S. Ct. at 1061. The Gun Lake Band was not "under federal jurisdiction" in 1934, under any definition of the term. The Gun Lake Band was not a federally recognized tribe. *E.g.*, Proposed

Finding for Federal Acknowledgment of the Gun Lake Band, 62 Fed. Reg. at 38,113. The Gun Lake Band also had no interaction with the federal government as a group. *E.g.*, DOI Technical Assistance Letter, p. 2 ("Since 1870, **the Federal government has dealt with band members as individual Indians** entitled to attendance at BIA schools, etc., **but has not dealt with the band as an entity**." (emphasis added)). Indeed, to **avoid** the federal government, the Gun Lake Band placed itself under the protection of an Episcopalian mission. Trust Application, p. 4, A.R. at 001988, R. 22 (J.A. __). The Episcopalian church even took land in trust for the Band. *Id.* p. 5, A.R. at 001989 (J.A. __). And in 1870 the Band deliberately violated the 1855 Treaty of Detroit, terminating its relationship with the federal government. DOI Technical Assistance Letter, p. 2. Accordingly, the Gun Lake Band was not under federal jurisdiction in 1934; the DOI exceeded its authority when it took land into trust for the Gun Lake Band; and that land must therefore be removed from trust.

Defendants attempt to prevent the courts from addressing the merits of Patchak's claims by arguing that (1) Patchak has no prudential standing; and (2) the QTA bars Patchak's suit. These attempts fail.

First, Patchak has standing because he has a concrete, particularized injury that the government's actions caused and that this Court can redress with a favorable ruling. The district court held that Patchak lacked standing because he did not

fall within the IRA's zone of interests, as he was not seeking to protect Indians. 8/19/09 Mem. Op. 7–8, R. 56 (J.A. __). But Congress did not enact the IRA's under-federal-jurisdiction provision to protect Indians; the restriction is intended to protect citizens like Patchak who may be harmed by the DOI's excessive taking of lands in trust for Indians. *See* S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong. 2d Sess., pt. 2, pp. 264–66 (1934) (discussing plan to add under-federal-jurisdiction restriction to prevent new tribes from coming within IRA's scope). As such, Patchak meets the zone-of-interests test. After all, the zone-of-interests test is "not meant to be especially demanding." *Clarke*, 479 U.S. at 399–400. And the test's focus is "on those who in practice can be expected to **police** the interest that the statute protects." *Mova Pharm. Corp.*, 140 F.3d at 1075 (emphasis added). Here, Patchak and similarly situated plaintiffs are the only ones who have an interest in policing IRA's under-federal-jurisdiction restriction. Patchak therefore has standing.

Second, the QTA does not bar Patchak's claim. The QTA prevents collateral attacks on the United States' title to Indian trust lands, where the plaintiff seeks to enforce a "right, title, or interest . . . in the real property." 28 U.S.C. § 2409a(d). Patchak does not seek an interest in the casino land; he challenges the

DOI's administrative actions under the APA. Therefore, the QTA does not apply. *City of Sault Ste. Marie*, 458 F. Supp. at 471–72. Furthermore, the QTA cannot defeat Patchak's claim because when Patchak filed his complaint, the DOI had not yet taken title to the property. *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."). The DOI should not be allowed to avoid review of its actions by altering the situation after a complaint is filed. *Bank of Hemet*, 643 F.2d at 665 (The government should not be permitted "to manipulate its position subsequent to the filing of a complaint so as to present a situation that falls between the cracks of applicable waiver statutes."). Thus, this Court should reach the merits of Patchak's suit and grant him the relief he requests.

ARGUMENT

I. The DOI cannot take land into trust for the Gun Lake Band, under IRA, because the Gun Lake Band was not "under federal jurisdiction" in 1934.

The DOI's sole assertion of authority to take the Bradley Tract into trust is Section 465 of the IRA. Section 465 allows the DOI to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. The IRA defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. These provisions

mean that the DOI may only take land into trust for "a tribe that was under federal jurisdiction at the time of the statute's enactment" in 1934. *Carcieri*, 129 S. Ct. at 1061. Therefore, the DOI may only take the Bradley Tract into trust for the Gun Lake Band if the Gun Lake Band was "under federal jurisdiction" in 1934.

The Gun Lake Band was not "under federal jurisdiction" in 1934, under any definition of the term. "Under federal jurisdiction" is most sensibly defined as federally recognized. *See* William W. Quinn, Jr., *Federal Acknowledgment of Indian Tribes*, 34 Am. J. Legal Hist. 331, 333, 356 (1990) (equating recognition with jurisdiction). Only federally recognized tribes are in any sense "under the jurisdiction" of the United States; they are the only tribes whom the United States protects and to whom the United States provides benefits and services. *E.g.*, 25 U.S.C. § 450 *et seq.* (providing education benefits to recognized tribes). The Gun Lake Band was not federally recognized in 1934, as the Band and the DOI have repeatedly acknowledged. Proposed Finding for Federal Acknowledgment of the Gun Lake Band, 62 Fed. Reg. at 38,113 ("1870, has been used as the date of the latest federal acknowledgment . . . ."); Decl. of George T. Skibine, Acting Deputy Assistant Secretary, Department of Interior, ¶ 8, R. 29-1 (J.A. __) (noting the Gun Lake Band's recognition was "terminated"); Trust Application, p. 5, A.R. at 001989, R. 22 (J.A. __); Gun Lake Band Br. on Appeal, p. 3, R. 24-1 (J.A. __). ("[T]he federal government withheld formal acknowledgement beginning in 1870.

. . . Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue commercial self-determination and self-sufficiency."). Indeed, the Gun Lake Band regained federal recognition under 25 C.F.R. Part 83, which is only available to tribes who are not acknowledged or recognized by the federal government. 25 C.F.R. § 83.7. During the federal recognition process, the DOI correctly determined that 1870 was the last year of previous federal recognition. Final Determination to Acknowledge Gun Lake Band, 63 Fed. Reg. at 56,936. Accordingly, the Gun Lake Band is ineligible to have its land taken in trust by the federal government.

But even if "under federal jurisdiction" in 1934 means something less than federal recognition, at a bare minimum it must require some formal relationship with the federal government in 1934. *See Carcieri*, 129 S. Ct. at 1069–71 (Breyer, J., concurring) (arguing that "under federal jurisdiction" includes those tribes with a 1934 relationship with the federal government). And the Gun Lake Band had no such interaction. From 1870 to 1993 when the Gun Lake Band applied for federal acknowledgment, the Band had no contact whatsoever with the federal government as a group. The DOI specifically determined that "[s]ince 1870, **the Federal government has dealt with band members as individual Indians** entitled to attendance at BIA schools, etc., **but has not dealt with the band as an entity**." DOI Technical Assistance Letter, p. 2 (emphasis added). In other words, the DOI has

already determined that the Gun Lake Band had no relationship with the federal government from 1870 to 1993. Indeed, in 1839, to **avoid** the federal government and its plan to move Indians west, the Gun Lake Band purposely placed itself under the protection of an Episcopalian Mission and occupied lands in Allegan County, Michigan. Trust Application, p. 4, A.R. at 001988, R. 22 (J.A. __). The Episcopalian church even went so far as to take land into trust for the Gun Lake Band. *Id.* p. 5, A.R. at 001989 (J.A. __). Further, in 1870, the Gun Lake Band terminated its compliance with the 1855 Treaty of Detroit, formally breaking off all relations with the United States government. DOI Technical Assistance Letter, p. 2 (emphasis added). Such conduct is the antithesis of a relationship with the federal government.

A 1937 list of tribes eligible under IRA confirms this fact. John Collier, Commissioner of Indian Affairs, compiled a list of tribes who were under federal jurisdiction in 1934, and so eligible for IRA benefits. Pl.'s Mot. for Summ. J. p. 14, R. 52 (J.A. __); Collier List (attached as Exhibit B). Although the Collier list includes eight pages of tribes under the IRA, the Gun Lake Band does not appear among them. Pl.'s Mot. for Summ. J. p. 14, R. 52 (J.A. __); Collier List (attached as Exhibit B). That fact should come as no surprise, given that the Tribe deliberately had rejected any relationship with the federal government only a few decades earlier.

In sum, the Gun Lake Band had no relationship with the federal government in 1934. The federal government did not recognize the Gun Lake Band as a tribe, nor did the federal government interact with the Gun Lake Band as a group. DOI Technical Assistance Letter, p. 2. There is no contrary evidence. Thus, under any definition of the phrase, the Gun Lake Band was not "under federal jurisdiction" in 1934. The DOI's decision to take the Bradley Tract into trust for the Gun Lake Band was therefore unlawful and beyond the DOI's authority. *See Carcieri*, 129 S. Ct. at 1061. Accordingly, this Court should reverse and remand this matter with instructions to the trial court (1) to enter a declaratory judgment declaring the DOI's decision *ultra vires* and void *ab initio*; (2) to order the Bradley Tract taken out of trust; and (3) to enjoin the DOI from taking land into trust for the Gun Lake Band in the future.[7] *See Carcieri*, 129 S. Ct. at 1058 (reversing court of appeals because the tribe was not under federal jurisdiction in 1934).

[7] The district court failed to address this question, instead, disposing of this matter on standing grounds. Nonetheless, in the interest of judicial economy, this Court should resolve this question on appeal. This Court has the power to decide a case on grounds the trial court did not rule upon where the question is one of law. *Liberty Prop. Trust v. Republic Props. Corp.*, 577 F.3d 335, 341 (D.C. Cir. 2009); *United States v. Microsoft Corp.*, 253 F.3d 34, 109 (D.C. Cir. 2001); *see also* Appellant's Response to Intervenor Defendant-Appellee's Mot. to Dismiss 1–6. Indeed, the Gun Lake Band and the DOI have repeatedly stated the Band is injured by delays in the judicial process. (*E.g.*, 1/26/09 Hr'g Tr. pp. 17–18 (J.A. __)).

II. Patchak has standing.

Constitutional standing has three requirements: (1) the plaintiff must have suffered a concrete, particularized injury-in-fact; (2) the injury must be fairly traceable to the defendant; and (3) it must be "likely," rather than "speculative," the court can redress that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Here, no one disputes that Patchak meets these requirements. The proposed casino will destroy his quiet way of life; the DOI's action to take the Bradley Tract into trust is what enables the Gun Lake Band to build the casino; and this Court's order that the Bradley Tract be removed from trust will prevent the harm that Patchak alleges.

Ignoring *Lujan*, the DOI and the Gun Lake Band argue that Patchak does not meet the prudential-standing requirement that he, the plaintiff, fall within the zone of interests of the statute he seeks to enforce. *Clarke*, 479 U.S. at 399–400. This prudential-standing requirement, often referred to as the zone-of-interests test, "is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Id.* at 399. The zone-of-interests test is "not meant to be especially demanding." *Id.* It only excludes plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the

suit." *Id.* at 399. The focus of the test is "not on those who Congress intended to benefit, **but on those who in practice can be expected to police the interest that the statute protects**." *TOMAC v. Norton*, 193 F. Supp. 2d 182, 189 (emphasis added) (quoting *Mova Pharm. Corp.*, 140 F.3d at 1075), *aff'd* 193 F. Supp. 2d 182 (D.C. Cir. 2002) (There is "no serious question" that citizen-plaintiffs have standing to challenge the DOI's decision to take land into trust for tribe); *accord Clarke*, 479 U.S. at 399–400.

For example, in *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), this Court considered whether private citizens living near a proposed Indian casino had prudential standing to challenge the DOI's decision, under IGRA, to take land into trust for the Nottawaseppi tribe as the tribe's initial reservation, thus enabling the construction of a casino on the property. *Id.* at 464–65. Under IGRA, trust land acquired after 1988 cannot be used for gaming, unless an exception applies. One exception is if the trust land is the tribe's "initial reservation." *Id.* at 462. The tribe argued that the citizen-plaintiffs were not within the initial-reservation exception's zone of interests, because the exception "was intended to ensure that tribes not recognized in 1988 were not disadvantaged relative to tribes with established land bases in their ability to conduct gaming, and it is not concerned with the impacts on surrounding communities." *Id.* at 464. The Band emphasized the lack of regulations or statutory provisions

requiring the DOI to consider the impact of the casino on the surrounding community. *Id.*

This Court disagreed. The citizen-plaintiffs were members of precisely the group who could be expected to enforce the requirements of the initial-reservation exception; they had an interest in preventing the casino from operating and in forcing the DOI to consider the impact of the casino on the surrounding community by taking the land into trust under another provision of IGRA. *See id.* at 465. Thus, the citizen-plaintiffs had standing. *Id.*

Similarly, here, Patchak is a citizen living near a proposed casino, seeking to enforce a limitation on the DOI's authority to take land into trust for that casino. The proposed casino's operation will destroy his quiet rural lifestyle, bringing more than 3.1 million visitors annually to a farming community of only 3,000 residents. Final EA, ch. 3, p. 3-29, A.R. at 000064, Appendix H, p. 6, A.R. at 000657, R. 22 (J.A. __).

The IRA limits the DOI's ability to take land into trust for Indians, restricting DOI jurisdiction to those tribes that were "under federal jurisdiction" in 1934. *Carcieri*, 129 S. Ct. at 1061. Patchak and similarly situated persons are the only persons who can be expected to police this statutory limit. *Mova Pharm. Corp.*, 140 F.3d at 1075 (The focus of the test is "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interest that the

statute protects."). The tribes themselves have no interest in constraining the DOI's ability to benefit them, and the DOI has no incentive to rein in its own authority. Only Patchak and others negatively impacted by the Indian-casino construction have any incentive to enforce IRA's under-federal-jurisdiction restriction. *See Citizens Exposing Truth about Casinos*, 492 F.3d at 464–65 ("Inclusion of this provision demonstrates that Congress could not have intended to preclude efforts to enforce it, even if enforcement might prevent a landless tribe from gaining the benefits of IGRA."). Patchak meets the zone-of-interests test.

Indeed, IRA's regulations acknowledge the interests of local municipalities and citizens in preventing unlawful DOI trust acquisitions. The regulations require the DOI to "publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of [its] decision to take land into trust," and to delay taking the land in trust for 30 days following the notice. 25 C.F.R. § 151.12(b). The DOI enacted this regulation to allow challenges to the DOI's decisions to take land into trust. United States' Resp. to Pl.'s Mem., p. 6, R. 53 (J.A. __). Further, the DOI must notify the state and local governments affected and take into account their interests. 25 C.F.R. § 151.10. The DOI must also consider the following when determining whether to take land in trust under IRA: "The purposes for which the land will be used; . . . the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls";

and "[j]urisdictional problems and potential conflicts of land use which may arise." *Id.* These regulations enabled Patchak to challenge the DOI's decision and identify precisely one of the harms he suffers: a conflict in land use. The Gun Lake Band seeks to build a bustling casino in the middle of a rural community of only 3,000 residents. Final EA, ch. 3, p. 3-29, A.R. at 000064, R. 22 (J.A. __).

The district court mistakenly held that because Congress enacted IRA to benefit Indians, and Patchak is not an Indian and does not seek to promote the Indians' interests, he does not fall within IRA's zone of interests. 8/19/09 Mem. Op., pp. 7–8, R. 56 (J.A. __). *Contra Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 n.23 (D.C. Cir. 1983) (standing to sue may exist where "the plaintiff's interests diverge from the interests of those who a statute is designed to protect"). But, as noted above, Congress did not enact the jurisdictional restriction to **protect** Indians. The restriction is designed to **limit** the DOI's authority to take land into trust for a tribe's benefit. *See* S. 2755 et al.: A Bill to Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong. 2d Sess., pt. 2, pp. 264–66 (1934) (discussing desire to prevent new tribes from coming within the IRA's scope). In other words, the restriction is intended to protect those, like Patchak, who would be harmed by the DOI's taking of land in trust. Thus, Patchak is squarely within

the zone of interests protected by the under-federal-jurisdiction restriction, and Patchak has standing. *See Clarke*, 479 U.S. at 404 (security-broker trade association was within the zone of interests of statute preventing banks from creating securities brokerages).

The trial court principally relied on two 1978 cases in support of its holding: *City of Tacoma v. Andrus*, No. 77-1423 (D.D.C. Jan. 20, 1978), Mem. in Opp'n to Mot. for J. on the Pleadings, R. 30, Ex. 1 (J.A. __) (providing the *Tacoma* opinion) [hereinafter *Tacoma*]; and *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978). Both are inapposite. *Sault Ste. Marie* summarily relies on *Tacoma* without any independent analysis. 458 F. Supp. at 465. In *Tacoma*, the city and several taxpayers challenged the DOI's right to take land into trust where the Indians already owned the land, arguing that the IRA did not allow the DOI to take such lands into trust because the IRA only permitted land to be taken into trust to "provide" for Indians; these Indians were already provided for. *Tacoma*, 2–3. The court eventually dismissed this claim as meritless. *City of Tacoma v. Andrus*, 457 F. Supp. 342, 346 (D.D.C. 1978). The taxpayers alleged only two injuries: taking the land into trust would (1) reduce the city's tax base and (2) prevent the enforcement of the city's laws on the trust land. The court first held that the taxpayers failed to meet the constitutional-standing requirement of an injury in fact; they did not allege any personal harm, only generalized grievances. *Id.* at 3–4. In *dicta*, the

court went on to note that these generalized grievances did not meet the zone-of-interests test because these interests were not those IRA sought to protect. *Id.*

The *Tacoma* plaintiffs are very different from Patchak, because they alleged harm to very different interests. The *Tacoma* plaintiffs failed to allege any sort of personal harm. Here, Patchak's quiet neighborhood is going to be destroyed. The casino will draw 3.1 million visitors annually to a town of 3,000 residents. During peak hours, 1,110 cars per hour will drive down nearby streets. Final EA, ch. 4, p. 4-26, A.R. at 000110, R. 22 (J.A. __). The casino will cause all of the following harmful effects:

> (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

Compl. ¶ 9, R. 1 (J.A. __). In sum, the casino is going to ruin Patchak's way of life, providing more parking spaces than his small community has residents. Final EA, ch. 2, pp. 2-1, 2-2, A.R. at 000022–23, Appendix D, p. 6, A.R. at 000458, R. 22 (J.A. __). Patchak has standing to prevent this incursion; there is no one else to enforce IRA's restrictions.

Furthermore, to the extent that these two 1978 cases, *Tacoma* and *Sault Ste. Marie*, suggest a contrary result, they have been superseded by the more practical approach to the zone-of-interests test taken in cases like *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, and *Clarke v. Securities Industry Association*, 479 U.S. 388. After all, the modern focus of the zone-of-interests test is "not on those who Congress intended to benefit, but on those who in practice can be expected to **police** the interest that the statute protects." *Mova Pharm. Corp.*, 140 F.3d at 1075 (emphasis added). And the zone-of-interests test is "not meant to be especially demanding." *Clarke*, 479 U.S. at 399. Here, Patchak and similarly situated plaintiffs are the only persons who can be relied upon to police IRA's under-federal-jurisdiction restriction. Patchak has standing.

III. The Quiet Title Act does not bar Patchak's claim.

The APA waives the sovereign immunity of the United States for challenges to agency action. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). The only exception is where another federal "statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* But such a prohibition is "not lightly to be inferred." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). "Judicial review of such administrative action is the rule, and non-reviewability an exception

. . . [which must be shown by] 'clear and convincing evidence of a contrary legislative intent.' " *Id.* at 166–67 (citation omitted). The QTA, 28 U.S.C. § 2409a, provides no such clear exception here.

A. The QTA does not govern this action because Patchak does not seek to quiet title to lands owned by the United States in himself.

The QTA provides that the United States may be sued "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The plaintiff's complaint against the United States must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). This waiver of sovereign immunity does not apply to "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). Thus, subsection (a) bars claims asserting a property interest in Indian trust lands.

Here, however, Patchak does not assert a property interest in Indian trust lands. He does not claim a "right, title, or interest" in real property owned by the United States, as the QTA requires. 28 U.S.C. § 2409a(d). The QTA would not provide Patchak permission to bring his suit, in the absence of the Indian-trust-land exception. He seeks only judicial review of agency action under the APA. Compl. ¶¶ 25–33, R. 1 (J.A. __). Accordingly, the bar on QTA suits to recover Indian trust lands does not affect Patchak's claim. *City of Sault Ste. Marie*, 458 F. Supp. at 471–72 (QTA did not prevent review of DOI's decision to take land into trust for

tribe); *South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878, 881, n.1 (8th Cir. 1995) ("We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States acquires title [to Indian trust lands]."), *vacated on other grounds by* 519 U.S. 919 (1996). As Judge Murphy of the Eighth Circuit recognized, "It would distort the meaning of the QTA to interpret it as impliedly forbidding all suits seeking to divest the United States of title to Indian trust land, including those in which judicial review of the agency decision to acquire trust lands is invoked." *South Dakota*, 69 F.3d. at 889–91 (Murphy, J., dissenting on other grounds) (the QTA did not bar APA challenge to DOI's decision to take land into trust for tribe).

Indeed, the IRA's regulations are designed to allow review of DOI trust decisions. United States' Resp. to Pl.'s Mem. Concerning the Court's Continuing Subject Matter Jurisdiction, p. 6, R. 53 (J.A. __). The regulations oblige the DOI to "publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of [its] decision to take land into trust," and to delay taking the land in trust for 30 days following the notice. 25 C.F.R. § 151.12(b); *see Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 964 (10th Cir. 2004) (regulations support position that DOI's decisions may be challenged).

Cases to the contrary take a myopic view of two Supreme Court cases: *United States v. Mottaz*, 476 U.S. 834 (1986), and *Block v. North Dakota*, 461 U.S.

273 (1983). *E.g.*, *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974–78 (10th Cir. 2005). In both *Mottaz* and *Block*, the plaintiffs sought title to land owned by the United States. The *Mottaz* plaintiff claimed title to land owned by the United States under an Indian allotment. 476 U.S. at 836. The *Block* plaintiff asserted title to a riverbed claimed by the United States. 461 U.S. at 277–78. Both, through artful pleading, sought to escape the statute of limitations the QTA imposed on quiet-title claims against the United States. *Mottaz,* 476 U.S. at 838; *Block*, 461 U.S. 277–78. The Court refused to allow the claims, stating that "Congress intended the Quiet Title Act 'to provide the exclusive means by which **adverse claimants** [can] challenge the United States' title to real property.'" *Mottaz*, 476 U.S. at 846 (quoting *Block*, 461 U.S. at 286) (emphasis added). The Court applied the QTA statute of limitations to bar both plaintiffs' claims. *Id.* at 836; *Block*, 461 U.S. at 276.

But *Block* and *Mottaz* do not subject all challenges to the title of the United States to the QTA. They only apply the QTA to all "adverse claimants" seeking title claimed by the United States; in other words, only to true quiet-title actions. *Mottaz*, 476 U.S. at 846 (quoting *Block*, 461 U.S. at 286) (emphasis added). This limitation actually supports Patchak's position. *Block* and *Mottaz* interpret the QTA as focusing on the nature of the suit, i.e., a suit that seeks to quiet title in the plaintiff to land claimed by the United States; they hold that the QTA governs all

true quiet-title actions, however styled. Here, Patchak has not brought a quiet-title action. He claims no interest in the Bradley Tract. Thus, the QTA neither governs nor prohibits Patchak's APA suit.

B. In the alternative, the QTA does not bar suits filed before the United States acquired title.

Patchak filed this suit before the DOI took title to the Bradley Tract. Compl. ¶ 11, R. 1 (J.A. __). Patchak sought to enjoin the DOI from doing so. Emergency Mot. for a TRO/Prelim. Inj., R. 36 (J.A. __). The trial court refused to issue the injunction. 1/26/09 Docket Minute Entry (J.A. __). And, disregarding the consequences of this suit, the DOI took the Bradley Tract into trust. The DOI's *ultra vires* actions cannot divest this Court of the power to hear the merits of Patchak's claims. Federal jurisdiction is determined at the time the complaint is filed. *Freeport-McMoran, Inc.*, 498 U.S. at 428 ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.").

For example, in *Delta Savings & Loan Association, Inc.*, 847 F.2d 248, 429 n.1 (5th Cir. 1988), the plaintiff-bank sued the Internal Revenue Service for tendering an inadequate amount to redeem real property under 26 U.S.C. § 7425, seeking to quiet title to the property itself. The QTA's waiver of sovereign immunity allowed the suit. *Id.* But, before the court reached the suit's merits, the IRS sold the property. *Id.* The IRS argued that the QTA no longer waived the United

States' sovereign immunity, and, consequently, the court should dismiss for lack of subject matter jurisdiction. *Id.* The Fifth Circuit disagreed, holding that "the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed." *Id.* (quoting *Bank of Hemet*, 643 F.2d at 665). The court refused to allow the IRS to defeat the court's jurisdiction by post-complaint actions. *Id.*; *accord Bank of Hemet*, 643 F.2d at 665 (This approach "restrains any tendency on the part of the government to manipulate its position subsequent to the filing of a complaint so as to present a situation that falls between the cracks of applicable waiver statutes."); *F. Alderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983) (holding that government's post-complaint award of a public contract did not defeat the court's jurisdiction).

Similarly, here, no one disputes that the trial court had jurisdiction of Patchak's claims at the time Patchak filed his complaint. The APA waived the United States' claim to sovereign immunity; the courts had jurisdiction to hear Patchak's challenge to the DOI's decision to take the Bradley Tract into trust. *See* 5 U.S.C. §§ 702, 706. The Gun Lake Band and the DOI only claim that the DOI's later taking of title to the Bradley Tract destroyed the courts' jurisdiction. But the DOI cannot so easily circumvent Congress' mandate that citizens may seek review of the DOI's actions. *See Barlow*, 397 U.S. at 166 ("Judicial review of such administrative action is the rule, and non-reviewability an exception . . . .").

In the district court, the Gun Lake Band and the DOI cited several cases holding that the QTA bars APA challenges to the DOI's decisions to take land into trust for Indians. However, in all of these cases, except one unpublished District of Kansas opinion, the plaintiff challenged the DOI's decision **after** the DOI had taken the land into trust. Thus, they are easily distinguished. *E.g.*, *Neighbors*, 379 F.3d at 958–59, 966. The unpublished District of Kansas opinion, *Sac & Fox Nation of Missouri v. Kempthorne*, No. 96-4129-RDR, 2008 WL 4186890 (D. Kan. Sept. 10, 2008), is merely mistaken. Indeed, the court ignored a Tenth Circuit judge's concurrence in a related case. There, Judge Briscoe stated that the trial court should consider the plaintiff's claim on the merits by reopening the action plaintiffs filed before the DOI took the land into trust. *Governor of Kansas v. Kempthorne*, 516 F.3d 833, 847 (10th Cir. 2008) (Briscoe, J., concurring). Judge Briscoe admonished:

> Absent vacatur of that judgment, manifest injustice will likely result; plaintiffs, through no fault of their own, will be prohibited from pursuing to conclusion the serious challenges they have raised regarding the propriety of the Secretary's decision to take the land into trust. At the same time, the public's broad interest in ensuring that the Secretary has fairly and adequately carried out his obligations will be stymied.

Id. This Court should prevent the same "manifest injustice" from occurring here. Patchak filed his complaint before the DOI took the Bradley Tract into trust; his claims deserve to be heard. The DOI should not, through post-complaint

maneuvering, be allowed to defeat judicial review of its actions. *See Bank of Hemet*, 643 F.2d at 665 (The government should not be permitted "to manipulate its position subsequent to the filing of a complaint so as to present a situation that falls between the cracks of applicable waiver statutes."); *cf. Byrd v. U.S. Envtl. Prot. Agency*, 174 F.3d 239, 244–45 (D.C. Cir. 1999) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953))).

CONCLUSION

Under the IRA, the DOI has no power to take the subject land into trust for the Gun Lake Band, because the Gun Lake Band was not "under federal jurisdiction" in 1934 under any definition of that phrase. In 1839, the Gun Lake Band purposely placed itself under the protection of an Episcopalian Mission so as to **avoid** dealing with the federal government. The Episcopalian church even took title to lands in trust for the Band. Then, in 1870, the Gun Lake Band formally terminated its relationship with the federal government by violating the 1855 Treaty of Detroit. Such conduct is the antithesis of a relationship with the federal government, confirmed by the fact that the Gun Lake Band does not appear on the

list of IRA-eligible tribes that the then-Commissioner of Indian Affairs prepared shortly after the IRA's enactment.

In addition, Patchak has standing to enforce this clear limit on the IRA's authority. As a nearby neighbor of the proposed casino complex, there is no question that Patchak will suffer an injury in fact. And because Patchak falls squarely within the class of citizens that would be expected to police the IRA's limitations, he falls easily within this Court's definition of the so-called "zone of interests."

Finally, the QTA does not bar Patchak's claims. The QTA applies only to parties that seek to quiet title in themselves to land that the federal government holds in trust, and Patchak does not claim title to the subject lands. Moreover, the QTA does not and should not apply when a party seeks to challenge the federal government's decision to take land in trust in the first instance, where the suit is filed before the land is taken in trust.

Accordingly, Patchak respectfully requests that this Court reverse and remand this matter with instructions to the trial court (1) to enter a declaratory judgment declaring the DOI's decision *ultra vires* and void *ab initio*; (2) to order that the Bradley Tract be removed from trust; and (3) to enjoin the DOI from taking land into trust for the Gun Lake Band in the future. *See Carcieri*, 129 S. Ct. at 1058 (reversing Court of Appeals because Tribe was not under federal jurisdiction in 1934).

Dated: April 9, 2010

/s/ John J. Bursch

John J. Bursch
Daniel P. Ettinger
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, Michigan 49503-2487
616.752.2000
jbursch@wnj.com
Attorneys for David Patchak

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The foregoing brief, including footnotes, contains 10,640 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

/s/ John J. Bursch
John J. Bursch

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2010, a copy of the foregoing was filed with the D.C. Circuit Clerk of the Court using CM/ECF. The electronic filing prompted automatic service of the filing to counsel of record in this case who have obtained CM/ECF passwords.

/s/ John J. Bursch
John J. Bursch

DESIGNATION OF DOCUMENTS

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
PLEADINGS				
Docket sheet of District Court Case # 1:08-cv-01331-RJL	08/01/08 to 02/26/10	--	--	
Complaint	08/01/08	1	--	
Notice of Administrative Record Filing	10/6/08	21	--	
Administrative Record	10/06/08	22	--	
From: Plaintiff's Memorandum of Points and Authorities in Response to Intervenor-Defendant's Motion for Judgment of the Pleadings and In Response to Defendant United State's Motion to Dismiss • Ex. 1: Brief for Defendant-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians	10/17/08	24	--	
Notice of Filing of Exhibit 4 to Memorandum in Opposition [R. 24] by David Patchak	10/21/08	26	--	
From: Memorandum in Opposition to Motion to Stay • Ex. 1: Declaration of George T. Skibine	10/27/08	29	--	
Reply to Opposition to Motion for Judgment and Ex. 1	10/27/08	30	--	

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
Motion for Temporary Restraining Order /Preliminary Injunction with Attachments and Exhibits	01/08/09	36	--	
Minute Entry on Motion for Temporary Restraining Order	01/26/09		--	
Transcript of Temporary Restraining Order Conference [Cover page, pp. 17 and 18]	01/26/09		--	
Notice By Dirk Kempthorne, Carl J. Artman	01/31/09	49	--	
Motion for Summary Judgment and Exhibits	04/02/09	52	--	
Response Memorandum and Exhibits	04/06/09	53	--	
Memorandum Opinion	08/20/09	56	--	
ORDER denying Motion for TRO; denying Motion for Order; denying Motion for TRO; denying Motion for Summary Judgment and granting Motion for Judgment on the Pleadings and granting Motion to Dismiss for Lack of Jurisdiction	08/20/09	57	--	
ADMINISTRATIVE RECORD				
Notice of Final Agency Determination to take land into trust published in Federal Register	10/06/08	--	AR 1-2	
Finding of No Significant Impact	10/06/08	--	AR 3-5	
Final Environmental Assessment	10/06/08	--	AR 7	

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
From: Final Environmental Assessment – Chapter 2.0	10/06/08	--	AR 21-23	
From: Final Environmental Assessment – Chapter 3.0	10/06/08	--	AR 35, 64	
From: Final Environmental Assessment – Chapter 4.0	10/06/08	--	AR 84, 94,110, 115-16	
From: Final Environmental Assessment – Chapter 5.0	10/06/08	--	AR 184, 189-90	
From: Final Environmental Assessment – Appendix D	10/06/08	--	AR 441, 458	
From: Final Environmental Assessment – Appendix H	10/06/08	--	AR 593, 635-59	
From: Final Environmental Assessment – Appendix P	10/06/08	--	AR 825, 831, 836-37, 930-36, 940, 943-98	
From: Final Environmental Assessment – Appendix P	10/06/08	--	AR1061, 1185	
From: Final Environmental Assessment – June 25, 2004, Match-E-Be-Nash-She-Wish Band of Potawatomi Indians letter regarding EPA designation of Allegan County. MI as a non-attainment area for ozone air quality standards	10/06/08	--	AR1333-38	

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
From: Final Environmental Assessment – Letter dated 8/9/01 from M. Johnson to G. Skibine regarding Request of the Match-E-Be-Nash-She-Wish Band of Potawatomi Indians for the Acquisition of Land into Trust for Gaming with attached Gun Lake Fee-To-Trust Application	10/06/08	--	AR 1984-2002	
From: Final Environmental Assessment - Resolution 01-343 of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, A/K/A Gun Lake Tribe	10/06/08	--	AR 2004-07	
From: Final Environmental Assessment – Summary under the Criteria and Evidence for Proposed Finding Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan	10/06/08	--	AR 2009, 2013	
From: Final Environmental Assessment – Historical Technical Report on the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan	10/06/08	--	AR 2028, 2106, 2140	
From: Final Environmental Assessment - Notice of Availability & Comment Period	10/06/08	--	AR 2933-34	

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
Internal DOI Memoranda	10/06/08	--	AR 1336, 6997, 7004, 7018, 7064, 7103, 7135-56; 7159-66, 7440	