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 REPLY 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

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Federal Statutes

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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

INTRODUCTION

The DOI chose not to brief the merits of this case—whether the Gun Lake Band was "under Federal jurisdiction" in 1934 (DOI Br. 52–58)—and with good reason. As the administrative record makes clear, the Band broke off all relations with the federal government in the 1800s, which is the antithesis of being "under federal jurisdiction":

- In 1839, the Band placed itself under the protection of an Episcopalian mission to avoid dealing with the federal government. Trust Application, p. 4, A.R. at 001988, R. 22 (J.A. __).
- In 1855, the Episcopalian bishop declared he held the Band's lands in trust. *Id.* p. 5, A.R. at 001989 (J.A. __).
- In 1870, the Band violated its last treaty with the United States and received its final annuity payment. Proposed Finding for Federal Acknowledgment of the Gun Lake Band, 62 Fed. Reg. 38,113 (June 23, 1997).
- And it is undisputed that the Band had no further interaction as a group with the United States from 1870 until 1993, when the Band applied for federal recognition. DOI Technical Assistance Letter, p.2, referenced in Summ. Under the Criteria and Evid. for Proposed Finding of Acknowledgment, p. 5, A.R. at 002013, R. 22 (J.A. __).

Because the Band was not "under federal jurisdiction" in 1934, the DOI's land-in-trust acquisition is *void ab initio*.

Attempting to insulate its *ultra vires* action from judicial review, the DOI invokes standing and the Quiet Title Act, as it did below. But neither of those doctrines is a barrier to this Court's consideration of the merits.

With respect to standing, the DOI misapprehends the central lesson of the Supreme Court's decision in *Carcieri*: that Congress enacted the IRA as a *limit* on the DOI's authority to take land in trust. As a future neighbor of the Band's proposed gambling complex, Patchak has an interest in enforcing that limit, satisfying prudential standing. *E.g.*, *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (parties who were not beneficiaries of a federal statute were nonetheless within the "zone of interests" when the government's failure to honor the statutory limit caused direct injury).

As for the Quiet Title Act ("QTA"), it is a mechanism for resolving a plaintiff's claim of interest in government property, one that waives government immunity except in cases involving trust or restricted Indian lands. 28 U.S.C. § 2409a(a). But Patchak does not claim title to the subject property; he is asserting an APA claim that the DOI exceeded its authority under the IRA, and the APA independently waives sovereign immunity. It is inappropriate for the DOI to invoke the QTA, defensively, where this Court's subject-matter jurisdiction is not based on the QTA. *See City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 471–72 (D.D.C. 1978) (allowing lawsuit challenging federal government's land-in-trust decision because the QTA is inapplicable when a plaintiff does not claim a right in the property that is the subject of the suit).

Accordingly, Patchak respectfully requests that this Court reverse.

REPLY ARGUMENT

I. As the Supreme Court made clear in *Carcieri*, one of the interests "arguably . . . to be protected" by the IRA is a limit on the DOI's authority to take land in trust. Because Patchak has an interest in enforcing that limit, he has prudential standing.

The DOI and the Gun Lake Band rely on a flawed premise in advancing their prudential standing arguments. The DOI and the Band begin by asserting that Congress only enacted the IRA to encourage tribes to revitalize their self-government, to take control of their business and economic affairs, and to assure a solid territorial base. (DOI Br. 30–31; Intervenor Br. 20–21.) The DOI and the Band then spend the balance of their standing argument explaining why Patchak's litigation interest—enforcing the statutory limit governing when the DOI can take land in trust—is not even arguably within the zone of those interests. (DOI Br. 31–38; Intervenor Br. 21–26.)

But the IRA encompasses another, completely different interest. As the Supreme Court held in *Carcieri*, the IRA expressly limits the DOI's authority to take land in trust. Congress drafted the statutory language so as to apply only "to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

This limit was intentional. An early draft of the IRA defined "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe," with no temporal limitation. In response to Senators' concerns, the

Commissioner of Indian Affairs, John Collier, proposed the "now" limitation that Congress ultimately adopted. *See* S. 2755 et al.: A Bill to Grant to 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). Thus, one of the interests the IRA advances is to limit the DOI's authority to take land in trust only for those tribes that fall within the IRA's statutory scope.

Patchak shares that interest. First, as a resident of the rural township where the casino is being constructed, Patchak has a direct interest in preventing the opening of a massive gambling operation that will bring more than 3.1 million visitors annually to a 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. __). Second, the DOI's decision affects that interest by allowing the Tribe to start building a casino in violation of the IRA provisions that govern the underlying land acquisition.

The Supreme Court's standing jurisprudence requires nothing more. For example, in *National Credit Union Administration v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998), the Court considered whether financial institutions had prudential standing to challenge the National Credit Union Administration's approval of certain credit-union applications that allegedly violated the Federal Credit Union Act's membership limits. The Court began by reemphasizing that for

a plaintiff to have prudential standing under the APA, "the interest sought to be protected by the complainant must be **arguably** within the zone of interests to be protected or regulated by the statute in question." *Id.* at 488 (quotation omitted, emphasis added). Moreover, for a plaintiff to be arguably within a statute's "zone of interests," there does **not** have to be an "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 492 (quotation omitted, emphasis added).

Turning to the Federal Credit Union Act, the Court concluded that "one of the interests 'arguably . . . to be protected' . . . is an interest in limiting the markets that federal credit unions can serve." *Id.* at 493. As competitors of federal credit unions, the plaintiff-financial-institutions "clearly have an interest in limiting the markets that federal credit unions can serve," and the agency's "interpretation has affected that interest by allowing federal credit unions to increase their customer base." *Id.* at 493–94. The plaintiffs therefore had standing. *Id.*[1]

Likewise here, it is legally irrelevant that Congress did not intend to benefit citizens like Patchak specifically in enacting the IRA. One of the interests

[1] *Accord id.* at 495 ("So too, in *Arnold Tours* and *Data Processing*, although in enacting the National Bank Act and the Bank Service Corporation Act, Congress did not intend specifically to benefit travel agents and data processors and may have been concerned only with the safety and soundness of national banks, one of the interests 'arguably . . . to be protected' by the statutes was an interest in preventing national banks from entering other businesses' product markets. As competitors of national banks, travel agents and data processors had that interest, and that interest had been affected by the Comptroller's interpretations opening their markets to national banks.").

"arguably . . . to be protected" by the IRA was to prevent the DOI from taking land in trust on behalf of tribes who were not recognized or not under federal jurisdiction in 1934. Given Patchak's proximity to the casino location, Patchak has the same interest, and that interest is affected by the DOI's *ultra vires* actions. Patchak is thus a person "who in practice can be expected to police the interest," *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998), and there is no reason to assume that Congress intended to prohibit his suit. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987). Indeed, Patchak is the **only** party to this litigation seeking to enforce the plain, statutory limit.

Through its land-in-trust regulations, the DOI reaffirmed this Congressional interest in limiting when the DOI can take land in trust. 25 C.F.R. § 151.1 *et seq.* Those regulations require the Secretary to consider certain issues before taking land in trust for a tribe, including "the purposes for which the land [proposed to be taken in trust] will be used" and the "conflicts of land use which may arise." 25 C.F.R. § 151.10(c), (f). That is precisely the interest that Patchak raises. The regulations demonstrate that the DOI considers conflicting land uses relevant to whether land should be taken in trust for a tribe. These regulations, if valid and reasonable, authoritatively construe the statute itself. *Chevron U.S.A. Inc. v.*

Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). So the DOI's interpretation of the IRA is entitled to *Chevron* deference.[2]

Notably, neither the DOI nor the Gun Lake Band cite a single case, from any jurisdiction, where a plaintiff who alleged adverse effects from a proposed tribal casino was denied standing to challenge the DOI's actions in taking the underlying land in trust. In contrast, at least two courts have reached the conclusion Patchak advocates.

In *Butte County v. Hogen*, 609 F. Supp. 2d 20 (D.D.C. 2009), a county filed suit against the DOI after the DOI took land in the county into trust under the IRA so a tribe could construct a casino on it. (The county also sued the National Indian Gaming Commission for approving the tribe's gaming ordinance.) Like the Gun Lake Band, the tribe intervened and argued that the county lacked standing "because its challenge lies beyond the zone of interests protected under the statutes." *Id.* at 26. The district court had no difficulty accepting the county's argument "that its challenge lies within the zone of interests protected by the IRA and the IGRA." *Id.* Specifically:

> The County sets forth a host of possible injuries ranging from environmental effects, to zoning conflicts, to safety hazards. All are concrete, particularized, and imminent considering that, throughout

[2] Patchak does not seek to enforce these regulations, but rather to show that even the DOI recognizes that there are other interests inherent in the IRA besides tribal self-governance and land acquisition. (*Contra* DOI Br. 38.) In an authoritative interpretation, the DOI has agreed.

> the administrative record and the briefing in this court, the Tribe has made crystal clear that it will commence gaming activities on the Chico Parcel, and those activities likely will have an adverse effect on the County.

Id. at 27.

Similarly, in *TOMAC v Norton*, 193 F. Supp. 2d 182 (D.D.C. 2002), an organization of taxpayers against casinos—including residents who lived nearby a proposed casino location—brought suit to challenge the DOI's decision to take the land in trust. The district court recognized that standing for TOMAC's APA claims required "a showing that its members' interests arguably fall within the zone of interests to be regulated by the underlying substantive law, *i.e.*, the Indian Gaming Regulatory Act **and** the Department's land-in-trust regulations," *id.* at 190 (citation omitted, emphasis added), the same regulations discussed above. Although the district court in *TOMAC* acknowledged that the regulations do not create a cause of action for private parties, they do "provide for consideration of land use conflicts." *Id.* Moreover, "TOMAC members are precisely the type of plaintiffs who could be expected to police these interests." *Id.* Accordingly, TOMAC had standing. *Id.* This Court summarily affirmed, stating that "[t]here is no serious question about TOMAC's standing that warrants further discussion by this court." *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006).

Tellingly, the DOI argues that the State of Michigan is the only proper party to "police" the DOI's decision to acquire land in trust in violation of the IRA,

because the State stands to lose some of its regulatory authority as a result of the trust acquisition. (DOI Br. 36–37.) What the DOI ignores is that Patchak also stands to lose something as a result of the acquisition—his rural lifestyle. Just like the plaintiff in *National Credit Union*, Patchak has a clear interest in policing the statutory limitation on the DOI's authority. And Patchak's private interest fulfills the purpose of the "zone of interests" test: to ensure that a plaintiff will be "a reliable private attorney general to litigate the issues of the public interest in the present case." *Ass'n of Data Process Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). This Court should hold that Patchak has prudential standing.

II. Patchak brought this litigation under the APA. Accordingly, it is the APA that waives the DOI's sovereign immunity. The DOI cannot invoke the Quiet Title Act as a shield against suit when the Act does not provide a jurisdictional basis for Patchak's claims in the first instance.

The DOI argues alternatively that Patchak must establish an applicable waiver of sovereign immunity, and the Quiet Title Act does not qualify because the Act's limited waiver of sovereign immunity "does not apply to trust or restricted Indian lands." (DOI Br. 39–40 (quoting 28 U.S.C. § 2409a(a)).) That argument misses the point.

Patchak brought suit under the APA. And APA § 702 waives sovereign immunity for suits against federal officers or agencies in which the plaintiff seeks

non-monetary relief. 5 U.S.C. § 702. In other words, the applicable waiver of the DOI's sovereign immunity is the APA, not the QTA.

That leaves only one remaining question. Does the QTA take away the waiver of sovereign immunity that the APA provides? The answer is no. The QTA is a separate statute which does not provide the basis for this Court's subject-matter jurisdiction. And Patchak does not claim any interest in the subject property. Accordingly, the QTA is no bar to this action. *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*, 519 U.S. 919 (1996).

Legislative history confirms the QTA's limited scope, as the court in *City of Sault Ste. Marie* explained. The House Judiciary Committee indicated that the bill's purpose was "to allow the United States to be made a party to the actions in the United States District Court to quiet title to lands in which the United States claims an interest." H. Rep. 92-1559, 92d Cong., 2d Sess. 1 (Oct. 10, 1972), as reprinted in (1972) U.S. Code Cong. & Admin. News, p. 4547. Congress felt the provision would be applicable to those actions based on the English bill of quia

timet,[3] and that its most common application would involve suits to settle boundary disputes or to allow a plaintiff to assert less than a fee simple absolute interest in the subject property. *Id.* at 4551–52. That is why a complaint invoking the QTA must state "with particularity the nature of the right, claim, or interest **which the plaintiff claims in the real property**." 28 U.S.C. § 2409a(c) (emphasis added). Patchak has no interest in the subject property here; he seeks only to enforce the statutory limits on the DOI's authority under IRA. Accordingly, the QTA is inapplicable.

The contrary cases that the DOI and the Band cite on this issue can all be traced to the 11th Circuit's decision in *Florida v. U.S. Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985). The *Florida* court began its analysis with *Block v. North Dakota*, 461 U.S. 273 (1983). 768 F.2d at 1254. But in *Block*, the plaintiff asserted title to a riverbed the United States claimed, a paradigm QTA action. The *Florida* court then turned to the QTA itself, and concluded that allowing suit would interfere with the United States-tribe trust relationship. *Id.* The court failed to acknowledge that under the QTA's plain language and the legislative history noted above, the QTA's reach is limited to classic title disputes like *Block*, whether in the trust context or otherwise. Next, the *Florida* court considered the IRA and

[3] Quia timet means "because he fears or apprehends." A bill in quia timet is the technical name given to a bill filed by a person fearing some injury to his rights or interests. Black's Law Dictionary 1247 (6th ed. 1990).

the fact that under it the DOI has such unlimited discretion to take land in trust for a tribe that any decision is essentially unreviewable. *Id.* at 1256–57. The court failed to note the temporal limit that *Carcieri* recognizes, i.e., that tribes eligible for trust land are those under federal jurisdiction as of 1934. Finally, the *Florida* court failed to consider 28 U.S.C. § 2409a(c) altogether, ignoring that the QTA requires a claimant to state a right, claim, or interest in the subject real property. As a result of these four errors, the *Florida* court came to the wrong conclusion.

Once *Florida* was on the books, however, it began to take on a life of its own without a critical reexamination of its underlying assumptions. The 10th Circuit first followed *Florida* in *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004), describing the 11th Circuit's reasoning as "compelling." *Id.* at 962–63. The 10th Circuit then followed *Neighbors* in *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), and again in *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008).

This narrow line of cases must be reevaluated in light of *Carcieri*'s limits on the DOI's land-in-trust authority. (Indeed, in *Carcieri*, the litigation all took place **after** "the Secretary notified petitioners of his acceptance of the Tribe's land into trust," 129 S. Ct. at 1062, yet the Supreme Court still addressed the merits of the land-in-trust decision.) But the cases should also be reexamined based on the thoughtful analysis in *City of Sault Ste. Marie*, including the right, claim, or

interest requirement of § 2409a(c) and the legislative history, all of which make plain the types of claims that Congress anticipated would fall within the QTA's scope. Because Patchak's claim seeks to enforce a statutory limit on the DOI's authority, and does so without asserting any underlying interest in the subject property, the QTA does not bar judicial review.

III. This Court can and should resolve the merits issue based on *Carcieri* and the existing record. There is no need for a remand, and numerous reasons counsel strongly in favor of immediate resolution.

A. Resolution of the merits does not require a remand for additional fact finding, nor for resolution of the Band's affirmative defenses.

The DOI does not address the *Carcieri* issue in any meaningful way. The Band does address the issue, primarily by arguing that the Band has continuously existed as a distinct Indian community (a fact that cannot, on its own, establish federal jurisdiction), and by trying to discredit the dispositive language in the DOI's Technical Assistance Letter as non-record evidence. The latter argument is of no persuasive force because the Assistance Letter (1) was specifically referenced in the administrative record, Summ. Under the Criteria and Evid. for Proposed Finding of Acknowledgment, p. 5, A.R. at 002013, R. 22 (J.A. __), and (2) merely provides a summary of what the administrative record reveals, namely, that the Tribe sought refuge from the federal government in the 1800s and aligned itself with the Episcopal mission and its bishop. (Appellant's Br. 7-9.)

That history is particularly problematic, because it looks remarkably similar to that of the intervening tribe in *Carcieri*. There, members of the tribe, in the early 20th century, sought economic support and other assistance from the federal government. But, in correspondence from 1927 to 1937, the federal officials declined those requests because the tribe "was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." 129 S. Ct. at 1061. The Gun Lake Band's decision to turn its back on the federal government and instead affiliate itself with the Episcopal mission similarly eliminates any argument, under any test, that the Band was somehow "under federal jurisdiction" in 1934.

Of course, the most logical way to define "under federal jurisdiction" is as federally recognized. (Appellant's Br. 23 (citation omitted).) The Gun Lake Band argues that to do so would render superfluous the former part of the phrase "of any recognized tribe now under Federal jurisdiction." (Intervenor Br. 46.) But that is incorrect. As noted above, in the context of the *Carcieri* case, there were tribes in 1934 who were and always had been under the jurisdiction of states rather than the federal government. So when Congress enacted IRA in 1934, it would have been entirely logical to distinguish between recognized tribes who were under state

jurisdiction and those under federal jurisdiction.[4] A "recognized tribe" "under Federal jurisdiction" would necessarily be one that the federal government recognized. And the administrative record and the parties' concessions in this litigation make it clear that the Gun Lake Band was **not** federally recognized in 1934. *E.g.*, 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); Gun Lake Band Br. on Appeal, p. 3., R. 24-1 (J.A. __) ("[T]he federal government withheld formal acknowledgment beginning in 1870"). That is why the Band sought 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.

The Band is also wrong to argue that only Congress had the power to terminate the Band's status as a recognized tribe. As the Sixth Circuit explained in *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the Western Dist. of Michigan*, 369 F.3d 960 (6th Cir. 2004), the Band was one of a number of tribes whose "government-to-government relationship" was severed in 1872 by then-Secretary of the Interior Columbus Delano, who ceased treating the parties to the 1855 Treaty with the Ottawas and Chippewas as federally

[4] In a later part of its brief, even the Band concedes that federal jurisdiction and recognition are two separate concepts, describing tribes "whose federal jurisdictional status was recognized." (Intervenor Br. 50.)

recognized tribes. *Id.* at 961. "Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments 'tribal relations will be terminated.'" *Id.* at 961 n.2 (citing Letter from Secretary of the Interior Delano to Comm'n of Indian Affairs 3 (Mar. 27, 1872)). Because the DOI ceased recognizing these tribes, *id.*, they were forced to seek federal recognition, resulting in the Band's application here for recognition under 25 C.F.R. § 83.7.[5]

The only other arguments that the Band raises against merits resolution involve laches and claim preclusion. (Intervenor's Br. 42–43.) Neither has merit. Laches only applies where a plaintiff's (1) "unexcused delay" is (2) "prejudicial" to the defendant. *Major v. Shaver*, 187 F.3d 211, 213 (D.C. Cir. 1951) (citing *Russell v. Todd*, 309 U.S. 280, 287 (1940)). The Band cannot demonstrate either here.

[5] The Sixth Circuit in *Grand Traverse Band* adopted Professor Cohen's two-part test for federal recognition, i.e., a legal basis for recognition (Congressional or Executive action), **and** empirical indicia of recognition ("continuing political relationship with the group"). 369 F.3d at 968, citing Cohen, Handbook of Federal Indian Law 6 (1982). Under this view, whether the Gun Lake Band was legally recognized in 1934 (it appears it was not, *see* Appellant's Br. at 23-24) is ultimately irrelevant, because there are no empirical indicia of recognition from 1934. To the contrary, in 1872, all "government-to-government relationship between the Band and the United States" was severed, and the United States "ceased to treat the Band as a federally recognized tribe." *Grand Traverse Band*, 369 F.3d at 961.

To begin, Patchak did not engage in unexcused delay. Until *Carcieri*, no federal court had ever interpreted the IRA's land-in-trust provisions as applying only to tribes that were under federal jurisdiction in 1934. In the *Carcieri* litigation itself, the district court, First Circuit panel, and *en banc* First Circuit all rejected Rhode Island's argument and held that there was no temporal limit in the statute. In fact, the DOI trumpeted the lack of any such contrary authority when it filed its brief opposing Rhode Island's cert. petition. *Carcieri v. Kempthorne*, DOI Br. in Opp'n to Cert. 5 (stating that the First Circuit's interpretation of the IRA "is consistent with this Court's precedents and does not conflict with the decision of any other circuit.").

On August 1, 2008, less than six months after the Supreme Court granted certiorari in *Carcieri* on February 25, 2008, Patchak became aware of the grant of certiorari and filed the present suit. Compl. ¶. 10, R. 1, (J.A. __). Patchak did not even wait for the Supreme Court's final decision, which was not issued until February 24, 2009. In sum, Patchak did not engage in "unexcusable delay" by declining to file litigation based on a legal theory that even the DOI acknowledged was universally rejected before *Carcieri*. The Supreme Court's decision in *Carcieri* changed the legal landscape, and as soon as Patchak saw a non-frivolous ground to raise the issue, he did so.

In addition, there is no "prejudice" to either the DOI or the Gun Lake Band as a result of any modest delay in the filing of Patchak's suit. Since the Supreme Court granted certiorari in *Carcieri* on February 25, 2008, the DOI and the Band have been on notice that a court could determine that the Band is ineligible for an IRA land-in-trust acquisition. If they wanted resolution of that issue sooner, they could have obtained it. The plaintiff in the *Michigan Gambling Opposition v. Kempthorne* litigation (*see* Appellant's Br. 14), filed a motion on March 7, 2008, to supplement the issue presented for review in this Court. Rather than stipulating to the issue's resolution, both the DOI and the Band filed responses opposing the plaintiff's motion, presumably because they did not want the *Carcieri* issue to be decided on the merits, and this Court denied the motion. The DOI and the Band adopted the same tactics by adamantly opposing a decision on the merits at the beginning of this litigation. Any further delay in resolving the *Carcieri* issue is therefore attributable solely to the DOI and the Band, not to Patchak. There is no laches problem that this Court (or the district court) need resolve.

The *MichGO* litigation has no claim preclusive effect here either. The Supreme Court recently disapproved the doctrine of preclusion by "virtual representation." *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 2167 (2008). A person like Patchak, who was not a party to the *Michigan Gambling Opposition* suit, has not had a "full and fair opportunity to litigate" the claims and issues

settled in that suit. *Id.* at 2171. Accordingly, application of claim and issue preclusion to Patchak runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

The Supreme Court in *Taylor* appropriately rejected the "heavily fact-driven" and "equitable" inquiry that the Band urges here, *id.* at 2175 (*contra* Intervenor's Br. 43), observing that such an approach "would likely create more headaches than it relieves." *Id.* at 2176. The Court reached that conclusion despite the risk that, under the Court's ruling, "it is theoretically possible that several persons could coordinate to mount a series of repetitive lawsuits." *Id.* at 2178.

Finally, *Taylor* cautions lower courts about reaching to find preclusion on the basis that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. *Id.* at 2179. "[P]reclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication." *Id.* Such control has not been alleged here, nor could it. Accordingly, preclusion principles do not stand in the way of this Court's full and complete resolution of the litigation.

B. There are prudential reasons that militate strongly in favor of this Court's immediate resolution of the merits.

The outcome of this litigation will determine whether the DOI had the authority to take the subject land in trust for the Band. If the DOI lacked authority,

as Patchak contends, the land must be taken out of trust, and the Tribe will be unable to use the land for Class III casino gaming. Despite the fact that Patchak filed this lawsuit before the land was taken in trust, the Tribe has moved forward with groundbreaking and construction of its multi-million-dollar Class III casino gaming facility, which the Band expects to open by the end of the summer.[6] Time is now of the essence for both Patchak and the Band. Moreover, given the undisputed nature of the Tribe's status as of 1934, it would also conserve precious judicial and party resources to resolve the merits issue now.

Ironically, the Band argued in the District Court that Patchak was engaging in gamesmanship by **not** seeking a decision on the merits of his claim at the beginning of this litigation. *See* 1/26/09 Hr'g Tr. 17-18 (J.A. __), *Patchak v. Salazar*, No. 08-1331 (D.D.C.). The Band and the DOI also argued that the United States and the Band would be injured by any further delay in the judicial process. (*Id.* at 18.) Yet now that this Court is presented with an opportunity to decide the merits, and eliminate any further delay, the DOI and the Band object. This Court should reject those litigation tactics and decide the merits issue now.

CONCLUSION

One of the core interests behind the IRA's enactment was to limit the tribes eligible for land-in-trust acquisitions. That is precisely the interest Patchak

[6] See http://www.gunlakecasino.com/news.php?action=expand&ID=22.

advances here. Accordingly, Patchak falls within the "zone of interests" necessary to meet his minimal standing burden.

The Quiet Title Act does not bar Patchak's suit either. Patchak's claim is based on the APA; he does not seek title to the subject real property, making the QTA inapplicable. Accordingly, the DOI cannot use the QTA to divest this Court of subject-matter jurisdiction over Patchak's APA claim.

Finally, this Court can and should address this case on the merits. During all relevant times, the Band had no relationship or communication with the federal government. That is because the Secretary of the Interior decreed that all government-tribal relations were ceased in 1872. *Grand Traverse Band*, 369 F.3d at 961. Because the Band was not federally recognized or "under federal jurisdiction" in 1934, *Carcieri* holds that the Band is ineligible for a land-in-trust acquisition, and the DOI's actions here violate the IRA's restriction.

Patchak therefore 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.

Dated: May 24, 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 5,362 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 24th day of May, 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