The *Patchak* Problem: How Two Recent Supreme Court Cases Have Drastically Altered the Future of Tribal Gaming

By Justin Allsop[1]

I. Introduction

The recent holding in the case of the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) ("*Patchak* ") has been labeled a "game changer"[2] by many in the Indian gaming industry. The holding, coupled with the holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), has effectively created a significant barrier to future tribal gaming expansion.[3] This note seeks to discuss the implications of those holdings and the probability of success for the tribe upon remand of *Patchak*.

Of particular importance are the following relevant issues: the applicability of sovereign immunity under the Quiet Title Act[4] and the Act itself; whether the APA was properly applied and allowed as a mechanism to sue the government in *Patchak*; the harsh implications for any of the tribes that now exist and are recognized but weren't in 1934 under the Indian Reorganization Act ("IRA")[5] per the holding in *Carcieri*; and the likelihood of any success on the merits for the tribe at the remand of *Patchak*.

Beyond the issues in *Patchak* though are the implications the case has on any potential interference with the IRA and the Indian Gaming Regulatory Act ("IGRA"). These acts were

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[2] Heidi Staudenmeier, *Life After Patchak: What Does It Mean For Tribal Gaming?,* CASINO LAWYER, Fall 2012 16.

[3] *See generally Id.* at 17.

[4] In its opening lines, the Quiet Title Act (28 USC § 2409a(a)) states that "[t]his section does not apply to trust or restricted Indian lands . . ." thus providing a right of sovereign immunity in title disputes where such lands are at stake.

[5] *See generally* the holding of *Carcieri v. Salazar*, 555 U.S. 379 (2009).

passed, largely, to help establish self-reliance and economic self-sufficiency[6] among the tribes. With the choke-hold now in place a la *Patchak*, there is concern that the tribes' rights under these acts have been impacted negatively, with the road looking forward more bumpy than ever for tribal gaming.

Despite the 8-1 majority, the most convincing piece of the decision was not the decision itself, but the dissent. Dissenting Justice Sotomayor (the lone dissenter) pointed out that the court's reasoning in *Patchak* would now effectively block actual landowners from disputing the Secretary of the Interior's land-into-trust actions under the APA, but would provide for that same right of action to those whose connections to the property were more tenuous[7]. For this reason alone the decision seems to have produced the type of absurd result Justice Marshall warned of back in 1805[8], with far-reaching consequences for the future of tribal gaming expansion.

II. Historical Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("tribe") is from the rural area of southwestern Michigan; near Kalamazoo with a history dating all the way back to the Treaty of Greenville in 1795[9]. Despite this long history, the federal government didn't formally recognize them until 1999[10]. Shortly after formal recognition the tribe petitioned the Secretary of the Department of the Interior ("Secretary") to take some land into trust via § 465 of the IRA[11]. David Patchak ("Patchak"), the respondent at the Supreme Court level, lives near the land.

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[6] *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 32 (D.C. Cir. 2008), *hereinafter* "*MichGO II*"
[7] Heidi Staudenmeier, *Life After Patchak: What Does It Mean For Tribal Gaming?,* CASINO LAWYER, Fall 2012 16.
[8] *See generally U.S. v. Fisher*, 2 Cranch 358, 6 U.S. 358, 400 (1805).
[9] http://www.mbpi.org/PDF/kazoonews2.pdf
[10] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2203 (2012) *hereinafter "Patchak III"*; *See* 63 Fed. Reg. 56936 (1998).
[11] *Patchak III*, 132 S.Ct. at 2203.

Patchak came as a result of the Secretary of the Interior's taking of that land into trust for the tribe[12]. The land in question is located in southwestern Michigan, and is the current site of the Gun Lake Casino (run by the tribe) also known as the "Bradley property"[13]. Previous to the acquisition the tribe had indicated to the Secretary their desire to use the land for gaming[14].

Prior to 1995, the Secretary's actions were not open to judicial review, but since 1995 there has been a 30-day window whereby the public or those concerned can contest the decision through the courts[15]. Unsurprisingly, an anti-gaming group in Michigan contested the decision in a series of lawsuits[16] ("MichGO cases"). Nevertheless, those cases were unsuccessful[17] and the Secretary took title to the land shortly thereafter.

Patchak brought his suit on the heels of the MichGO cases. At the district court level Patchak sought an injunction barring the Secretary from taking the Bradley property into trust[18]. He brought his suit pursuant to § 702 of the APA, the general right of action provision of the Act[19]. His claim rested upon the assertion that the tribe was not under federal jurisdiction in 1934, thus negating their inclusion and protection in the IRA[20]. Additionally he claimed injury in fact stating that the proposed gaming site at the Bradley property would attract over 3 million visitors a year destroying the air, water, and noise quality of the otherwise rural landscape[21].

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[12] The Secretary may do so pursuant to 25 USC § 465, which states that the Secretary can "acquire lands . . . for the purpose of providing land for Indians."
[13] *Patchak v. Salazar*, 646 F.Supp.2d 72, 74 (D.D.C. 2009) *hereinafter "Patchak I"*.
[14] *Patchak III*, 132 S.Ct. at 2211.
[15] Heidi Staudenmeier, *Life After Patchak: What Does It Mean For Tribal Gaming?,* CASINO LAWYER, Fall 2012 16.
[16] *See generally Michigan Gambling Opposition ("MichGO") v. Norton*, 477 F.Supp.2d 1 (D.D.C. 2007) *hereinafter "MichGO I"*; *MichGO II*, 525 F.3d 23 (D.C. Cir. 2008).
[17] *Patchak III*, 132 S. Ct. at 2203.
[18] *Patchak v. Salazar*, 646 F.Supp.2d 72, 74 (D.D.C. 2009) *hereinafter "Patchak I"*.
[19] 5 USC § 702
[20] *Patchak I*, 646 F.Supp.2d at 74.
[21] *Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011) *hereinafter "Patchak II"*.

Regardless of his claims, the district court ruled that Patchak did not have standing to bring the suit and his complaint was dismissed for lack of subject matter jurisdiction[22].

Upon appeal, the D.C. Circuit reversed and remanded[23], stating that Patchak did have standing to bring the suit under the APA[24]. Relying heavily on a broad interpretation of the "zone of interests" test[25] the circuit found that Patchak's claims were sufficiently related to the IRA to give him the standing[26] he needed to proceed. Also of significance was the holding of *Carcieri,* which ruled that the IRA only applied to tribes under federal jurisdiction in 1934[27]. That holding gave effect to Patchak's original claim under the IRA (which arose as a result of the *Carcieri* case; apparently Patchak could see the future!).

At the Supreme Court level the majority decided with the D.C. Circuit, affirming their holding and remanding the case[28].

III. Redefining The Quiet Title Act

Except for a few exceptions, including the Indian lands trust acquisitions, the QTA provides a right of action where real property disputes involving the government take place[29]. Nevertheless, suits that might not normally qualify as quiet title actions under the common law of property can be brought under the QTA[30]. Generally speaking though, the Act has applied

[22] *Patchak I*, 646 F.Supp.2d at 78.
[23] *Patchak II*, 632 F.3d at 712.
[24] *Id.*
[25] *Id.* at 704 citing *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).
[26] *Id.* at 706.
[27] *Id.* at 705 citing *Carcieri v. Salazar*, 129 S.Ct. 1058, 1066 (2009).
[28] *Patchak III*, 132 S.Ct. at 2212.
[29] *Id*.
[30] *See U.S. v. Bedford Associates*, 657 F.2d 1300 (2nd Cir. 1981).

where there is a need for a plaintiff to clear a cloud on his own title when the U.S. takes title to the same land[31].

However, the QTA does not apply to lands held in trust for Indians[32]. By expressly excluding Indian lands from the reaches of the QTA, Congress declined to waive the sovereign immunity of the United States against actions to quiet title to Indian lands[33]. As a result, the federal courts do not have jurisdiction to hear any complaint brought against the United States to quiet title to Indian lands[34].

Therefore, among the possible defenses to Patchak's claims was the affirmative defense of sovereign immunity afforded by the Quiet Title Act ("QTA")[35]. However, the Supreme Court was not convinced that the QTA even applied to this suit[36], thus barring the applicability of sovereign immunity under the Act. Regardless, the court's reasoning for their basis was, at times, a bit confusing and shortsighted.

Stating that the case at hand did not involve a disputed title[37] the Court found that Patchak's interests were not the same as those they deemed pertinent to the Act[38]. Under the Act, a plaintiff must assert (where the action isn't barred by sovereign immunity) "with particularity the nature of the right, title, or interest which the plaintiff claims in the real property."[39] Here Patchak was not actually claiming any right or title to the land *per se* but he was certainly claiming some interest in the land when he initially asked for an injunction against

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[31] *Knapp v. U.S.*, 636 F.2d 239 (10th Cir. 1980).
[32] 28 USC § 2409a(a)
[33] *See U.S. v. Mottaz,* 476 US 834 (1986).
[34] *See Ducheneaux v. Secretary of the Interior of the U.S.*, 837 F.2d 340 (8th Cir. 1988).
[35] 28 USC § 2409a(a)
[36] *Patchak III*, 132 S.Ct. at 2208.
[37] *Id.* at 2206.
[38] *Id.* at 2207.
[39] 28 USC § 2409a(a).

the Secretary taking title[40] and further asserted his claims for injury. Regardless, on appeal the injunction was a moot point[41] and at the Supreme Court level it was noted as such.[42]

Although the court noted that Patchak was not making any claim to the title of the Bradley property, there is some support for applying the QTA to his facts. For example, in the case of *Governor of Kansas v. Kempthorne*[43] the court noted the Act should be applied based on the "relief sought by the plaintiffs"[44]. Thus it made sense to the Tenth Circuit to apply the QTA in that case, and in the case of *Neighbors for Rational Development Inc. v. Norton*[45] ("Neighbors"), because the relief sought by the plaintiffs was to strip the U.S. of title to the lands taken into trust for Indians[46]. In *Neighbors*, the relief sought was to declare the trust acquisition as "null and void" and to enjoin the Secretary from taking the land into trust[47]. The holding in Neighbors said specifically, "In sum, we conclude the APA cannot waive the United State's sovereign immunity because the QTA precludes Neighbors' suit to the extent it seek[s] to nullify the trust acquisition."[48]The Tenth Circuit then says matter-of-factly, "we think these requests fall within the scope of suits the Indian trust land exemption in the Quiet Title Act sought to prevent"[49]. The reasoning for this conclusion was based on a statement made by the Solicitor for the Department of the Interior to Congress when pressing for the Indian lands exemption in the QTA:

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[40] *Patchak I,* 646 F.Supp.2d at 74.
[41] *See generally Patchak II*, 632 F.3d at 704.
[42] *Patchak III*, 132 S.Ct. at 2204.
[43]*Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008) *hereinafter "Kansas"*.
[44] *Id.* at 842.
[45] *Neighbors for Rational Development Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) *hereinafter "Neighbors"*.
[46] *See Kansas*, 516 F.3d at 842; *Neighbors*, 379 F.3d at 956.
[47] *Neighbors*, 379 F.3d at 961.
[48] *Id.* at 965.
[49] *Id.* at 962.

> "The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians."[50]

This same rationale was also applied by the Ninth and Second Circuits prior to *Patchak*[51].

Despite this distinction by the Tenth Circuit, the Supreme Court's decision in *Patchak* abrogated the holding of *Neighbors*[52]. The D.C. Circuit noted, "a common feature of quiet title actions is missing from this case . . . [that] the plaintiff would seek to establish his rightful title to the real property[53]." Likewise, a previous ruling of the Supreme Court bolstered the majority opinion, stating that the Act was "the exclusive means by which adverse claimants can challenge the United States' title to real property"[54]. As a result this decision has effectively ended the ability of the U.S. to claim immunity under the QTA where an adverse claimant wasn't actually claiming title to the same land the government's title applied to. Thus it seems clear, that at least to the Supreme Court, the QTA will only cover actual quiet title actions where there are adverse claimants[55] despite the lower level courts' case history to the contrary.

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[50] *Neighbors*, 379 F.3d at 962; *See also* H.R. Report No. 92-1559, at 13 (1972) (letter from Mitchell Melich, Solicitor for the Dep't of the Interior).
[51] *See Patchak III*, 132 S.Ct. at 2204.
[52] *See Id.*
[53] *Patchak II*, 632 F.3d at 709.
[54] *Block v. North Dakota*, 461 U.S. 273, 286 (1983).
[55] *See Patchak III*, 132 S.Ct. at 2207 (2012).

Despite the persuasive authority of the Second, Ninth, and Tenth circuits applying the QTA to cases that weren't traditional quiet title actions, the Supreme Court became the final voice on how to apply the QTA and reversed their positions. Perversely, the Supreme Court reversed its own precedent in making the determination. The cases of *Block v. North Dakota ex rel Bd. of Univ. & Sch. Lands*[56], and the case of *U.S. v. Mottaz*[57] both held contrary to the decision in *Patchak*[58]. Quoting Justice Sotomayor's dissent, "In any event, the 'grievance' Patchak asserts is no different from that asserted in *Block* – a case in which we unaminously rejected a plaintiff's attempt to avoid the QTA's restrictions by way of an APA action . . ."[59]. And in a crueler twist of fate, the court noted in *Mottaz* that the relief sought didn't include the U.S. losing title, but it nonetheless held the QTA applicable[60].

Moreover, the court reasoned that the language of the Act was clear, in that it only pertained to "quiet title actions" because those words were "specifically and repeatedly" within the statute[61]. Oddly enough, upon reading the entirety of the statute the words "quiet title" appear only in the title.[62] Ironically, the D.C. Circuit noted that the "[w]e recognize that the title of a statute cannot alter the meaning of its operative language[63]." Nevertheless the text of the Act seems to speak of actions that don't seem to be anything other than "quiet title actions".

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[56] *Block*, 461 U.S. at 273.
[57] *U.S. v. Mottaz*, 476 U.S. 834 (1985).
[58] *See Neighbors*, 379 F.3d at 961 citing *Mottaz*, 476 U.S. at 841-42 and *Block*, 461 U.S. at 284-85.
[59] *Patchak III*, 132 S.Ct. at 2215.
[60] *See Mottaz*, 476 US at 834.
[61] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2206 (2012).
[62] *See generally* 28 USC § 2409a.
[63] *Patchak II*, 632 F.3d at 709.

Regardless, to say that those words are “specifically and repeatedly”[64] within the text is more than just a stretch of statutory interpretation.

Additionally, the Court gave a hypothetical situation applying the QTA and discussing the applicability of the APA to Patchak’s claims so as to dismiss the applicability of the QTA[65]. There the court described a situation where Patchak might actually claim that he owned the Bradley property but sued under the APA[66]. In that situation then, the QTA would bar the suit since the QTA is the vehicle by which quiet title actions occur. The court goes on to say that they feel suit would have been within the general waiver of sovereign immunity provision of the APA, but sovereign immunity would still apply because of the QTA[67]. The opinion then states succinctly, “a plaintiff cannot use the APA to end-run the QTA’s limitations[68]” but by negating the QTA in this case, it is nearly this exact strategy the court used to grant Patchak the standing he needed to proceed with his case.

The QTA will no longer be a shield available to tribes and the government when lands are taken into trust for Indians and someone wants to challenge their acquisition, so long as that person doesn’t claim title to the same land. Assuming that real property interests are superior to non-property interests where a title is concerned, the court has basically granted a preference to those with the lesser, non-property interest. Justice Sotomayor cautioned in her dissent about this problem with the majority holding:

> “First it will render the QTA’s limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of

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[64] *Patchak III*, 132 S.Ct at 2206.
[65] *Id.* at 2205.
[66] *See Id.*
[67] *Id.*
[68] *Patchak III*, 132 S.Ct. at 2205.

Block, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an "aesthetic" interest in the land but seeking an identical practical objective – to divest the Government of title and possession. §2409a(a)-(b). Nothing will prevent them from obtaining relief that the QTA was designed to foreclose."[69]

IV. The Misapplication of the APA

Regardless of the majority's application of the QTA in *Patchak*, the court cast the wide net of the APA in an especially wide fashion. Congressional intent under the APA was to make federal agency action "presumptively reviewable."[70] Arguably, that presumption comes from the language of the statute itself.[71] First, as expressed in § 702 and second, from § 704, the statute allows for court access when there is no other form of relief from a final agency action.[72] Because of this presumption, Justice Douglas of the Supreme Court began the doctrine that "judicial review is the norm, and that non-reviewability was merely the exception."[73] Justice O'Connor echoed this sentiment, stating that Congress had "entrusted to the courts" judicial review of agency action through the APA.[74]

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[69] *See Patchak III*, 132 S.Ct. at 2217.
[70] *Id.* at 2210.
[71] Colin A. Olivers, *Has the Federal Courts Successive Undermining of the APA's Presumption of Reviewability Turned the Doctrine Into Fool's Gold,* 38 Envtl. L. 243, 256 (Winter 2008).
[72] 5 USC § 702 states in part, "[a] person suffering a legal wrong because of an agency action, or adversely affected or aggrieved by an agency action within the meaning of a relevant statute, is entitled to judicial review thereof; 5 USC § 704.
[73] Olivers *supra* note 71 at 258.
[74] Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States,* 27 Wm. & Mary L. Rev 643, 651 (Summer, 1986).

However, the Court duly noted that to have standing to sue under the APA, a plaintiff must not only have Article III standing[75] but also must pass the "zone of interests" test.[76] This test for prudential standing started in 1970[77] and has been applied by assuring that the claims of the plaintiff are "arguably within the zone of interests to be protected or regulated by the statute" the plaintiff alleges was violated.[78] Conversely, where a plaintiff's interests are only "marginally related . . . or inconsistent with the purposes in the statute" then that plaintiff's claim will be excluded from judicial review.[79] Thus, in determining reviewability of claims brought pursuant to the APA, the court will refer to the "interests protected by the underlying statute."[80] In the case of *Patchak*, the interests asserted were made in reference to § 5 of the IRA.[81]

The key question is then, what are those protected interests under § 5 of the IRA? The district court judge's analysis seems to make it apparent that Patchak's interests had no relation to the statute whatsoever.[82] Consider the following excerpt of his reasonable and logical analysis:

> "Plaintiff, without a doubt, is not an intended beneficiary of the IRA. The purpose and intent of the IRA is to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of "a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (citing H.R. Rep. No. 1804, 73d Cong. 2d Sess., 6 (1934)). As the Supreme Court itself noted, "[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes

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[75] US Constitution, Article III standing requires: injury in fact, a causal relationship between the injury and alleged conduct, and a likelihood that the injury will be fixed by a favorable decision.
[76] *Patchak III*, 132 S. Ct. at 2210.
[77] *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).
[78] *Patchak III*, 132 S. Ct. 2199, 2210 (2012).
[79] *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399-400 (1987).
[80] *Patchak I*, 646 F.Supp.2d at 77.
[81] *Patchak III*, 132 S. Ct. 2199, 2210 (2012).
[82] *Patchak I*, 646 F.Supp.2d at 77 (2009).

would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see also MichGO II*, 525 F.3d at 32 (overall purpose of the IRA is to "advance[e] economic development among American Indians"); *Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996). In addition, Section 5's grant of authority to the Secretary to take land into trust at his discretion for Indians and Indian tribes serves the specific purpose of reversing the consequences of the federal government's previous allotment policy, which had resulted in many tribal lands being lost. *See MichGO II*, 525 F.3d at 31-32 (discussing section 5's role as part of a "broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies"). In short, both the IRA as a whole, and section 5 in specific, operate to protect, and promote, tribal self-determination and economic independence."[83]

It is painfully clear given the case history of the IRA that Patchak is not within the zone of interests under § 5 of the IRA. So how did the D.C. Circuit and the Supreme Court get it wrong? First, the D.C. Circuit relied heavily on the word "arguably" as it is used in the "zone of interests" test which states that an "adversely affected or aggrieved plaintiff must be trying to protect an interest of his that is *arguably* within the zone of interests to be protected by the relevant statutory provisions".[84] Using previous circuit court opinion, the D.C. Circuit cited that Patchak didn't have to prove that the IRA was intended to benefit those in his situation.[85] Ratcheting up this notion, the D.C. Circuit then said that the zone of interests analysis doesn't

[83] *Patchak I*, 646 F.Supp.2d at 77.
[84] *Patchak II*, 632 F.3d at 704 (internal quotations omitted).
[85] *Id.* citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060 (1998).

need to focus on those who Congress meant to benefit, but also those who could be expected to "police the interests the statute protects".[86] Despite this radical expansion of judicial review under the APA, the Supreme Court agreed with the D.C. Circuit's analysis when they affirmed the circuit's holding.[87]

Second, the D.C. Circuit read land use as a consideration under § 5. This was a crucial distinction in *Patchak* ; Patchak's interests were based on interpreting the statute to pertain to land use, while the tribe argues that the statute is only relevant for land acquisition purposes.[88] Section 5 states quite plainly that the Secretary of the Interior is granted authority to acquire land to be provided for Indians.[89] A cursory review of the statute provides no hint that the statute could apply to land use, especially when the heading specifically reads "[a]cquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption".[90] There is nothing in the heading to imply rules about land use, and the language of the statute itself is also void of any relevance to land use.[91] Regardless, the circuit court decided that Patchak's claimed injuries, namely "the negative effects of building and operating a casino", were sufficient to grant standing. In fact, the court goes on to say that Patchak's standing to sue should be assessed "in light of the intended use of the property."[92] But this consideration seems a far cry from the protections of a statute aimed exclusively at granting the Secretary of the Interior the right to

[86] *Patchak II,* 632 F.3d at 705.
[87] *See Patchak III*, 132 S. Ct. at 2210-2211.
[88] *Id.*
[89] 25 USC § 465 (2012).
[90] *See Id.*
[91] The statute reads: "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." 25 USC § 465 (2012).
[92] *Patchak II*, 632 F.3d at 706.

acquire lands for Indians. There simply isn't a logical path to be taken from the statute to include land use as a factor under the APA's zone of interests.

Emphasizing this land use analysis, the circuit court held that among the considerations the Secretary makes when taking land into trust, the consideration of "further economic development . . . among the Tribes" necessarily implies the consideration of potential Indian gaming sites.[93] Accordingly, Patchak's concerns over the supposed negative effects of a gaming site near his home were *arguably* within the zone of interests. Building on the circuit court's rationale, the Supreme Court majority agreed that § 5 has "more to do with land use" than the tribe and Government acknowledged.[94] Citing what they believed to be relevant, but merely persuasive, authority[95] on the IRA the Court believed that the Secretary could not take land into trust for the tribes without considering land use because the land use supports economic development.[96] From there the Court then interestingly cites the Department of Interior's own regulations about the land use which indicate the Secretary will consider the purposes for which the land will be used by the tribe.[97] Oddly enough, the court makes no mention whatsoever of another one of the Department's regulations concerning the same trust acquisitions. That regulation states that the Secretary will publish notice to the public of his intent to take the land into trust, and thereby grant the public 30 days to challenge the acquisition[98] -- Patchak's challenge did not occur within the allotted 30 day window.[99]

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[93] *See Patchak II*, 632 F.3d at 706.
[94] *Patchak III*, 132 S.Ct. at 2210-2211.
[95] Here the court began to use a treatise to support their rationale. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1507[1][a], p. 1010 (2005 ed.)
[96] *Patchak III*, 132 S.Ct. at 2211.
[97] *Id.* at 2211 (2012) citing 25 CFR § 151.3(a)
[98] 25 CFR § 151.12(b) (2013).
[99] The Department of the Interior announced its intention to take the land into trust in May of 2005 but Patchak didn't file any claims within the 30 day window, instead he filed his complaint

Even more astonishing is the fact that the Court also ignored the process of approving trust lands for tribal gaming under the Indian Gaming Regulatory Act of 1988 ("IGRA"). Under the IGRA, the Secretary of the Interior has to consider two factors for allowing gaming on trust lands: (1) that it will be in the best interest of the tribe, and (2) that it will not be detrimental to the surrounding community.[100] Additionally, the Governor of the state needs to concur in the findings of the Secretary under IGRA.[101] There is obviously a crucial overlap between the IRA and IGRA in Patchak, but Patchak could not have sued under the APA using IGRA since he would have been unable to clear the hurdles presented by these two factors, and *arguably* his interests weren't protectable under IGRA.

The court dealt tribes a significant blow by reading land use issues into the statute. Arguably they even took on the role of Congress by adding their take on the intent of the IRA and vastly enlarging the grasp of the APA's zone of interests. In fact, the court has offered up a new method of litigation to fight the expansion of Indian lands where they are used for gaming, and perhaps any other purpose too. Unfortunately for the tribes this expansion of interests under the IRA via the APA is likely to tie up future Indian casinos in legal affairs for years and years.

V. The IRA and *Carcieri* Problem

The IRA was passed in 1934, and its primary purpose was "to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of a 'century of oppression and paternalism'"[102]. Giving more weight to this proposition, the Supreme Court has also stated "the overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be

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years later in 2008. Luckily for Patchak this delay granted him the ability to use the controversial holding in *Carcieri* to his advantage.

[100] 25 USC § 2719(b)(1)(A) (2013).

[101] 25 USC § 2719(b)(1)(A) (2013).

[102] *Patchak I*, 646 F.Supp.2d at 77 citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

able to assume a greater degree of self-government, both politically and economically."[103] This purpose has been said to "revers[e] the consequences of the federal government's previous allotment policy, which had resulted in many tribal lands being lost."[104]

As discussed previously, the primary concern in *Patchak* and *Carcieri* is Section 5 of the IRA (25 USC § 465) and Section 19 (25 USC § 479). Section 5 states that:

> "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."[105]

Patchak asserted his right to sue under the APA challenging Section 5 by raising his injury claims. However, the real issue upon remand and the one in *Carcieri* is in Section 19. There the entire case was decided on the definition of one word, "now", and its usage in Section 19. Section 19 reads, in part "[t]he 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"[106] (emphasis added).

At trial the plaintiff argued that "now" was meant to mean only those tribes federally recognized at the time of the Act, and thus Section 5 could not apply to any other tribe(s)[107]. The district court, disagreeing with the plaintiff's interpretation, stated, "The plain language of § 479 does not impose such a limitation. The statute includes within the definition of "Indian,"

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[103] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
[104] *Patchak I*, 646 F.Supp.2d at 77.
[105] 25 USC § 465.
[106] 25 USC § 479.
[107] *Carcieri v. Norton*, 290 F.Supp.2d 167, 179 (D.R.I. 2003) *hereinafter "Carcieri I"*.

members of tribes in existence in 1934."[108] Along those lines, the Secretary argued that Section 19 could be applied to "permit[] trust acquisitions for tribes recognized and under federal jurisdiction at the time the request for a trust acquisition is made."[109] Since the tribe in *Carcieri*, the Narragansett, was recognized in 1983[110] and their request for the trust acquisition was years later, this interpretation would mean they were "now" under federal jurisdiction. On appeal, this reading was affirmed when the First Circuit granted the Secretary the *Chevron* deference[111].

The First Circuit noted that in reading the text of Section 19, a permissible interpretation of the word "now" could be, on first blush, at the time of enactment as the plaintiff argued[112]. However, the Circuit quickly diminished that argument when "now" was additionally interpreted to "refer to a time other than enactment".[113] Citing relevant case history[114] the court went on to determine that "now" must be interpreted based on its context in the Act[115].

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[108] *Carcieri I*, 290 F.Supp.2d at 179.
[109] *Carcieri v. Kempthorne*, 497 F.3d 15, 26 (1st Cir. 2007) *hereinafter "Carcieri II"*.
[110] 48 Fed. Reg. 6177
[111] The *Chevron* deference is a judicial principle the courts use to defer to an executive agency's interpretation of Congressional law where Congress is either silent or ambiguous on how the law is to be applied. The first step is to determine if the statute is ambiguous or unclear, if so, then the court will determine if the agency's interpretation is permissible. Generally speaking, the doctrine is highly deferential to the agency where Congressional intent is unclear. The doctrine stems from the infamous case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[112] *Carcieri II*, 497 F.3d at 26.
[113] *Id* at 27.
[114] *Id.* (*See Difford v. Sec'y of Health & Human Servs.,* 910 F.2d 1316, 1320 (6th Cir.1990) (interpreting the word "now" in a disability benefits termination provision to refer to the time of the hearing); *see also Pierce v. Pierce,* 287 N.W.2d 879, 882 (Iowa 1980) (noting that the phrase "now hav[ing] jurisdiction" in the Uniform Child Custody Jurisdiction Act "refers to the time of the filing of the petition"); *cf. Williams v. Ragland,* 567 So.2d 63, 65-66 (La.1990) (declining to interpret "now serving" in a mandatory judicial retirement provision to refer to the date of enactment).
[115] *Carcieri II*, 497 F.3d at 27.

Looking to its context, the court noted that "now" was used equivocally,[116] giving credence to both sides' arguments, both using different sections of the Act to interpret "now"[117]. The usage of "now" in Section 12 was the basis for the plaintiffs, reading "positions maintained, now or hereafter, by the Indian Office"[118] was meant to be read as at the time of enactment, otherwise Congress would have added "or hereafter" in Section 19[119]. Conversely, the Secretary cited Section 19 as specifying the date of "June 1, 1934"[120] as the pertinent date for finding eligibility based on "residing within the present boundaries of any Indian reservation."[121] Thus the Secretary maintained that if Congress wanted to require recognition on the date of enactment, it would have specified that date, instead of using the term "now."[122] Summing it up, the Circuit said, "[h]ence, "now" might mean "now or hereafter" or it might mean "June 18, 1934"; either would be consistent with some other part of the statute.[123]

Since it seemed that "now" was ambiguous the Circuit then decided to consider the policy implications of each interpretation, and how each side advocated their policy positions.[124] The plaintiffs suggested that since the Act had ended federal allotments to the tribes, the Act was only meant to remedy prior wrongs under previous allotment policy and therefore only applicable to tribes recognized at the time of enactment.[125] But the Secretary indicated that the Act was broader in scope, that it was not just backward looking but also a future tool to promote

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[116] *Carcieri II*, 497 F.3d at 27.
[117] *Id.*
[118] 25 USC § 462.
[119] *Carcieri II*, 497 F.3d at 27.
[120] 25 USC § 479.
[121] *Id.*
[122] *Carcieri II,* 497 F.3d at 27 (1st Cir. 2007).
[123] *Id.*
[124] *Id.*
[125] *Id.*

the "strength and stability" of the tribes.[126] This view is supported by the fact that the Act itself has provisions that have nothing to do with land.[127]

Of little to no value to the court was the legislative history of the Act, which the court noted simply "suggests a reading of the phrase "now under federal jurisdiction" different from that offered by any of the parties, and is thus another source of ambiguity."[128] Looking at the history the court noted that "now under federal jurisdiction" was added to the definition "Indian" but not "tribe" in response to concerns about persons claiming to be Indians despite their ancestry indicating otherwise and thus trying to falsely establish rights under the Act.[129] Looking at this application of "now" simply provided a third alternative to how "now" was to be interpreted.[130] Considering this third alternative, the court went on to reason, convincingly, as follows:

> "Thus, although none of the parties have raised this, it may well be that the phrase "now under federal jurisdiction" was intended to modify not "recognized Indian tribe," but rather "all persons of Indian descent." So interpreted, the purpose of the phrase might well have been to grandfather in those *individuals* already receiving federal benefits, but to otherwise insist that in the future, only individuals with at least one-half Indian blood would qualify. In that case, the limitation may well have been a temporal one, but the limitation, temporal or not, may have been intended to affect only the Secretary's authority to act for the benefit of an "individual Indian," not an "Indian tribe." . . . After

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[126] *Carcieri II*, 497 F.3d at 27.
[127] *Id.*; *See* 25 USC § 472 (Indian Employment Preference) and 25 USC § 476 (Indian Tribal Organization).
[128] *Carcieri II*, 497 F.3d at 28.
[129] *Id.* citing testimony from *To Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S.2755 and S.3645 Before the S. Comm. on Indian Affairs,* 73d Cong. 266 (1934).
[130] *Carcieri II*, 497 F.3d at 28.

all, while Congress may have been concerned about misdirecting resources to individuals who were only Indians in name, the same concern would not apply to federally recognized tribes, regardless of the date of federal recognition. In any event, this piece of legislative history amply supports the view that the statute is at least ambiguous and leaves room for administrative interpretation.[131]

Having established that "now" was ambiguous, the court then moved on to find if the Secretary's construction was permissible under *Chevron*.[132] Since the Secretary's interpretation seemed "rational and consistent"[133] with the language, intent and legislative history of the Act, the court reasoned that the Secretary's application of "now" was permissible.[134]

Despite the detailed analysis of the First Circuit, the Supreme Court decided that "now" was not ambiguous at all.[135] The Supreme Court gave only a slight mention of the Circuit's analysis, deciding for itself that "now" was not ambiguous at all, and therefore the tribe was not under federal jurisdiction and without the protection of the IRA.[136]

Utilizing an originalist method of statutory interpretation the court began its analysis with the definition of "now" in 1934 in the dictionary.[137] That definition said that "now" meant "at the present time; at this moment; at the time of speaking."[138] The court also looked to Black's Law Dictionary, which suggested that "now," when used in a statute, "ordinarily refers to the date of

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131 *Carcieri II*, 497 F.3d at 29.
132 *Id.* at 30.
133 *Id.* citing *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987).
134 *Carcieri II*, 497 F.3d at 30.
135 *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) *hereinafter "Carcieri III"*.
136 *Id.* at 396-97.
137 *Id.* at 389.
138 *Id.*

its taking effect."[139] But this definition certainly begs the question of what "ordinarily" should mean; is "now" ordinarily at the "date of its taking effect" when "now" is understood to be unambiguous? What then of those times that "now" could be ambiguous; shouldn't the definition of "now" not be construed "ordinarily"? Given the reasonable interpretations of both sides, and even the third alternative suggested by the Circuit, isn't it clear that "now" in the context of Section 19 is anything but unambiguous?

Despite these questions, the Court went on to mercilessly reject those very assertions. Speaking of the notion that "now" was used differently in the Act itself, the Court said that "[h]ad Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472, or it could have omitted the word "now" altogether."[140] But, by raising the idea that Congress could have eliminated the word altogether completely disregards the reasoning for its placement per the legislative history as discussed by the First Circuit.[141]

Beyond the definitional arguments for what "now" meant in the statute, the Court also gave short shrift to the purpose of the IRA and how that might apply to how "now" should be interpreted. While the Secretary argued that the Act "was intended to strengthen Indian communities as a whole, regardless of their status in 1934," the petitioner argued that it was only to reverse "loss of lands" under previous federal policies.[142] The Supreme Court's answer to these competing policy views was simplistic and strict: "We need not consider these competing policy views, because Congress' use of the word "now" in § 479 speaks for itself and "courts

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[139] *Carcieri III,* 555 U.S. at 389.
[140] *Id.* at 391.
[141] *See Carcieri II,* 497 F.3d at 28, citing testimony from *To Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S.2755 and S.3645 Before the S. Comm. on Indian Affairs,* 73d Cong. 266 (1934).
[142] *Carcieri III,* 555 U.S. at 392.

must presume that a legislature says in a statute what it means and means in a statute what it says there.'"[143]

In his concurring opinion, Justice Breyer suggested an interpretation of "now" that matched the First Circuit's.[144] There he qualified his concurrence with the statement, "I cannot say that the statute's language by itself is determinative. Linguistically speaking, the word "now" in the phrase "now under Federal jurisdiction," 25 U.S.C. § 479, may refer to a tribe's jurisdictional status as of 1934. *But one could also read it to refer to the time the Secretary of the Interior exercises his authority to take land "for Indians*"[145] [emphasis added]. Furthermore, he even conceded that the Secretary's position should have been given more consideration given their expertise of the circumstances for why a statute is enacted.[146]

Beyond these concurring statements, which seem more like a dissent, Justice Breyer suggested the Court's opinion might be "less restrictive than at first appears."[147] His position was that it was possible for a tribe to be under Federal jurisdiction in 1934 even though the Federal government didn't believe the tribe was under Federal jurisdiction.[148] His support for this position was that at the time of enactment, the Department of Interior had a list of 258 tribes recognized and covered by the Act, but that "we also know that it wrongly left certain tribes off the list."[149] He went on to give examples of tribes not under federal jurisdiction in 1934, like the

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[143] *Carcieri III*, 555 U.S. at 392 (2009) citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).
[144] *Carcieri III*, 555 U.S. at 396.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 397.
[148] *Id.*
[149] *Id.* at 398; *See* Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22-24; Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 356-59 (1990).

Stillaguamish tribe, and how they were still able to benefit under the Act.[150] Justice Breyer noted that in the case of the Narragansett tribe, the tribe involved in *Carcieri*, there was no argument that they were under federal jurisdiction in 1934, nor was there an argument suggesting that any member of the tribe satisfied "one-half or more Indian blood" requirement of Section 19.[151]

Given Justice Breyer's suggestions, it seems only appropriate that Justice Ginsuburg and Souter would also concur, but also dissent.[152] Agreeing with Justice Breyer's idea that a tribe could have been under jurisdiction without the Federal government's knowledge, the justices suggested that the Secretary and the tribe should advance that argument on remand.[153] Justice Souter and Ginsburg noted in their dissent that "reverse and remand" was not the disposition of the majority, which, unfortunately, only reversed the case.[154]

In his lone dissent, Justice Stevens suggested an altogether different application of the Act and the word "now" with no "temporal limitation on the definition of Indian tribe."[155] As he sees it, Section 5 of the Act gives the Secretary broad authority to take land into trust for tribes *and* for individual Indians.[156] In interpreting Section 19, he suggested that the definition of Indian could include "members of any recognized Indian tribe *now* under Federal jurisdiction" and "all other persons of one-half or more Indian blood" (emphasis added).[157] This reading of "now" gives it much less importance, as it creates only one part of how an individual may qualify for benefits under the Act. Importantly, Justice Stevens' point makes Section 19 more procedural than substantive. Under his reading, Section 19 serves only to help define how those

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[150] *Carcieri III,* 555 U.S. at 398.
[151] *Id.* at 399.
[152] *Id.* at 400.
[153] *Id.* at 401.
[154] *Id.*
[155] *Id.* at 402.
[156] *Id.* at 404 (2009), *See also* 25 USC § 465.
[157] *Carcieri III*, 555 U.S. at 405.

individuals can benefit under Section 5, which grants the Secretary authority to take land into trust "for the purpose of providing land for Indians."[158]

This distinction makes the terms "Indians" and "tribe" separates, each with their own definition, and in Justice Stevens' opinion, "is essential for the administration of IRA benefits."[159] He believed that this reading of the terms is the proper reflection of Congressional intent, citing sections of the Act that were obviously intended for just Indian individuals.[160] With this understanding, it seems apparent then that Congressional design was to make those benefits available to tribes and Indian individuals alike, therefore diminishing the court's application of "now under Federal jurisdiction" provision.[161]

To prove the point, Justice Stevens cites to the original draft of the IRA to back up his reasoning.[162] He iterates that the original version of the IRA was given to Congress with the Secretary only able to take trust lands for tribes, and not as it reads as enacted which provides for tribes and individuals.[163] Accordingly, he discusses a series of post-1934 opinions of the Secretary discussing the ability of the Interior Department to take trust lands for individuals.[164] Using those opinions of the Secretary and the Department's solicitor Justice Stevens asserts, "Unless and until a tribe was formally recognized by the Federal Government and therefore

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[158] *See generally Carcieri III*, 555 U.S. at 405-06.
[159] *Carcieri III*, 555 U.S. at 405.
[160] *Id.*; *See also* 25 USC § 471 (loans to Indian students) and 25 USC § 472 (hiring preferences to Indians seeking federal employment).
[161] *See generally Carcieri III*, 555 U.S. at 406.
[162] *Carcieri III*, 555 U.S. at 406.
[163] *Id.*; Here Justice Stevens compared H.R. 7902, 73rd Cong., 2d Sess., 30 (1934) which included only tribes, not individuals.
[164] *Carcieri III*, 555 U.S. at 407 citing 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974, pp.706-07, 724-25, 747-48 (1979).

eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold."[165]

Justice Stevens then convincingly discusses how the majority holding that one word, "now," controls the Act's application is in spite of the Act's "clear text and historical pedigree of the Secretary . . .".[166] For example, "now" is only in one clause of multiple clauses of definitions within § 479. To Justice Stevens, this is "curious and harsh."[167] Quoting him:

> "[C]urious because it turns "now" into the most important word in the IRA, limiting not only some individuals' eligibility for federal benefits but also a tribe's; harsh because it would result in the unsupportable conclusion that, despite its 1983 administrative recognition, the Narragansett Tribe is not an Indian tribe under the IRA."[168]

This conclusion has substantial merit; considering that reasonable parties have had differing opinions on the terms it seems that at the least there is some ambiguity. Furthermore, it is apparent that the majority's reading of "now" is in stark contrast to the purpose of the Act itself. When there is some ambiguity, Justice Stevens contends "the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context,"[169] and that the "proper course of action is to widen the interpretive lens and look to the rest of the statute for clarity."[170]

Had the majority applied Justice Stevens' interpretive methods they would have noted that § 465 indicates the Secretary can take land into trust "for the Indian tribe or the individual

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165 *Carcieri III*, 555 U.S. at 407.
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 410 citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).
170 *Carcieri III*, 555 U.S. at 410.

Indian for which the land is acquired."[171] Thus Congressional intent is apparent; the Act was not meant to apply *only* to tribes "now under Federal jurisdiction"[172]. Given this principle it seems understandable that Justice Stevens would conclude his dissent by criticizing the majority for their "cramped reading of a statute Congress intended to be "sweeping" in scope".[173] He admonishes that the Court overlooked a bedrock principle of Indian jurisprudence, whereby "statutes are to be construed liberally in favor of the Indians."[174]

Regardless of how the Supreme Court applied the APA to *Patchak*, their application of the IRA in *Carcieri* is a major hurdle for the tribe. The decision in *Carcieri* is controversial, and perhaps even devastating, with the ability to spawn a multitude of litigation involving tribal gaming[175]. Looking ahead to the remand of *Patchak*, the case will hopefully shed new light on the arguments that were never considered in *Carcieri* but raised in Justice Stevens' dissent. Absent a reversal of *Carcieri* though, there is a political push to create a *Carcieri* "fix" in Congress[176]. As of yet though this legislation has not been voted on, further complicating the efforts of the tribes moving forward.

VII. A Strategy for Success On Remand

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[171] *Carcieri III*, 555 U.S. at 410; 25 USC § 465.

[172] 25 USC § 479.

[173] *Carcieri III*, 555 U.S. at 413 citing *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

[174] *Id.* at 414 (2009) citing *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985).

[175] Richard Anderson, Laura Hill, Patchak & Carcieri – Effects on Trust Land Acquisitions, Paper presented at the The Seminar Group's 10th Annual Northwest Gaming Summit, December 12-13, 2012, 1 citing Gale Courey Toensing, *Gun Lake Tribe Ruling Challenged*, Indian Country Today Media Network (Feb. 9, 2011), http://indiancountrytodaymedianetwork.com/2011/02/09/gun-lake-tribe-ruling-challenged-16356.

[176] Heidi Staudenmeier, *Life After Patchak: What Does It Mean For Tribal Gaming?,* CASINO LAWYER, Fall 2012 16.

While it may be that the decisions of *Patchak* and *Carcieri* have dealt major setbacks to tribal gaming, it bears mentioning that upon remand in *Patchak*, the tribe may still have some good arguments up their sleeve. First, it they will need to discuss the possible interpretations of the IRA discussed in the concurring and dissenting opinions in *Carcieri*. Then it may be possible to also defer heavily to the facts and documents used in the *MichGO* cases as they directly relate to Patchak's asserted injuries. So it is possible, that on the merits, the tribe might have a fighting chance to continue operating their casino in southwestern Michigan.

The Supreme Court holding in *Carcieri* reversed the Court of Appeals stating that "now" applied to tribes recognized in 1934[177], but what the Court didn't do was restrict the ability to argue that a tribe was under federal jurisdiction without the government knowing it.[178] The failure of the Narragansett tribe to argue that they were either federally recognized or under federal jurisdiction was critical to the holding in *Carcieri*[179]. In their dissent, Justice Souter and Justice Ginsburg also added that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content."[180] That means the tribe in *Patchak* can rely on their extensive history to imply that they were indeed under federal jurisdiction at the time of the IRA regardless of when they were recognized.

Building on that strategy it is imperative the tribe establish their history of dealings with the US government. The government has known the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians since at least 1795.[181] At that time the tribe was part of tribal confederacy

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[177] *Carcieri III*, 555 U.S. at 396-97.
[178] *Id.* at 395; *see also Id.* at 397 (J. Breyer, concurring opinion).
[179] *Id.* at 395, stating that "the petition for writ of certiorari . . . specifically represented that in 1934 the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." (internal quotations omitted).
[180] *Carcieri III*, 555 U.S. at 400.
[181] https://www.gunlakecasino.com/Casino/History

containing other tribes present at the signing of the Treaty of Greenville with the United States Government.[182] In 1821 the tribe again signed another treaty, the Treaty of Chicago, ceding land to the US and leaving them a small reservation.[183] The tribe continued in their interactions with the US, even successfully suing the government over unpaid treaty annuities in 1890, although the government didn't distribute the payments until 1904.[184] Then, in response to the IRA of 1934 the tribe attempted to gain recognition but the Bureau of Indian Affairs refused recognition of all tribes in the Lower Great Lakes region.[185] It wasn't until 1999 that the tribe was finally federally recognized.[186]

Considering this history, it seems the tribe has a very good case to be made for being under federal jurisdiction. Through no fault of their own they were denied recognition in response to the IRA by a summary decision of the Bureau of Indian Affairs. This particular fact gives credence to Justice Breyer's statement in his concurrence of *Carcieri* that "we also know that it [the IRA] *wrongly* left certain tribes off the list" (emphasis added).[187] More telling than anything else is that the government acknowledged that it had wrongly assumed other tribes in the area were no longer in existence.[188] There is a strong body of evidence suggesting that the tribe has always been under federal jurisdiction and it would seem very harsh for a court to decide anything but, especially given the fact that the tribe wanted recognition. It also seems plausible that the tribe was under federal jurisdiction given their lengthy history of signing

[182] https://www.gunlakecasino.com/Casino/History; The tribal confederacy was made up of the Pottawatomi, Chippewa, and Ottawa tribes. Chief Match-E-Be-Nash-She-Wish signed the Treaty of Greenville on behalf of the tribes.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Carcieri III*, 555 U.S. at 398.
[188] *See Carcieri III*, 555 U.S. at 398-99 (J. Breyer, concurring).

treaties and moving in accord with the US government's requests.[189] To quote Justice Breyer, "this possibility – that later recognition reflects earlier Federal jurisdiction – explains some of early Department administrative practice"[190] implies federal jurisdiction existed prior to the IRA for the Match-E-Be-Nash-She-Wish.

The second strategic argument the tribe will need to make at remand will be to fight Patchak's asserted injuries head on. Patchak claims injury based on economic, environmental, and aesthetic grounds resulting from the operation of the casino[191]. This is perhaps the weakest point of all of Patchak's arguments because the tribe has the *MichGO* cases in its favor for precisely these claims.

The *MichGO* cases were filed prior to Patchak's complaint but asserted similar injuries.[192] They also sought to overturn the Secretary's decision to take the land into trust by challenging them under the IGRA[193] and various environmental statutes.[194] As mentioned earlier, the application of IGRA in this case has relevance to the injuries asserted by Patchak[195].

Under IGRA, the Secretary must consider two factors when taking trust land for Indian gaming. Those factors, as previously mentioned[196] are (1) that the acquisition is in the best interests of the tribe, and (2) that the gaming operation will not be detrimental to the surrounding community. It is the findings of this second factor that weigh in favor of the tribe.

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[189] *See https://www.gunlakecasino.com/Casino/History*
[190] *Carcieri III*, 555 U.S. at 399.
[191] *Patchak III*, 132 S.Ct. at 2203.
[192] *Michigan Gambling Oppposition (MichGo) v. Norton*, 477 F.Supp.2d 1, 11 (D.D.C. 2007) *hereinafter "MichGO I"*.
[193] *Id.* at 4.
[194] *Id.*; for purposes of this note there will be no substantive discussion of the environmental statutes and their application in the *MichGO* cases.
[195] 25 USC § 2719(b)(1)(A) (2013).
[196] *Id*.

Through the Bureau of Indian Affairs ("BIA"), a department known as the Office Indian Gaming Management ("OIGM") is charged with making suitability findings for lands acquired (and to be used for gaming purposes) under the IRA.[197] The OIGM has a checklist of documents and procedures that must be followed prior to land-into-trust for gaming purposes.[198] Among those items on the checklist is a requirement to give notice to state and local governments "for the purpose of inviting comments on potential impacts."[199] After these conditions are met, it goes to the BIA Regional Director who then consults with the tribe and government officials and provide for a month or longer to take comments on the acquisition.[200] To satisfy the condition that the acquisition will not be detrimental to the surrounding community the OIGM Checklist requires the following information:

> (1) Evidence of the environmental impact and plans for mitigating this adverse impact (if any); (2) Reasonably anticipated impact on social structure, infrastructure, services, housing, community charter, and land use patterns of the surrounding community; (3) Income and employment of the surrounding community and the impact on the economic development of the community; (4) costs of the impact to the surrounding community and sources of revenue to accommodate them; (5) proposed programs for compulsive gamblers and source of funding; and (6) any other information showing that the acquisition is not detrimental to the surrounding community.[201]

Given the broad requirements to prevent detriment to the surrounding community it would seem that Patchak would have a problem proving up his injuries. In fact, in an amici brief

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[197] Heidi Staudenmeier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 Nev. L.J. 301, 303 (Winter 2003/2004).
[198] *Id.* at 304.
[199] *Id.*
[200] *Id.* at 305.
[201] *Id.*

to the court that contradicts Patchak's claims of injury, the following parties asserted their desire to have the tribe operate the casino in the region: The Wayland Township (where the casino is located), the Deputy Sheriff's Association of Michigan, the Barry County Chamber of Commerce, and Friends of the Gun Lake Tribe.[202] In their brief the parties asserted they are the parties directly affected by the proposed casino and that they were in support of the casino, finding no negative impacts to the community or environment.[203]

Supporting the statements of the amici brief, the district court judge in *MichGo* found that the government's "exhaustive analysis" contradicts any injury claim based on environmental or social impacts.[204] In fact, the judge stated specifically that there was "no convincing evidence" to support the claims made by *MichGO.*[205] Finding the district court's analysis sound the D.C. Circuit affirmed the holding.[206]

By utilizing the findings of the *MichGO* cases, the tribe will be able to counter Patchak's claim of injuries. The vast array of documentation regarding the suitability of the site and the support that the site will not be to the detriment of the community only help to reinforce the decision to take the land into trust. Furthermore, by using the distinctions Justices Breyer, Ginsburg and Souter provided in *Carcieri,* the tribe will be able to successfully argue against the harsh majority opinion in that same case. By relying on their history and political interactions with the government, not too mention the faulty practices of the government for federal

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[202] *See* Joint Amicus Curiae Brief of Wayland Township, Deputy Sheriff's Association of Michigan, Barry County Chamber of Commerce, and Friends of the Gun Lake Indians; *MichGO v. Norton*, 2006 WL 644928 (D.D.C.) (2007).
[203] *Id.*
[204] *MichGo I*, 477 F.Supp.2d at 13.
[205] *Id.*
[206] *See* generally *MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

recognition, the tribe will have a very strong argument to support that they were indeed under federal jurisdiction.

VIII. Conclusion

It may be that the decisions of *Carcieri* and *Patchak* will be “game-changers” drastically altering the rights of tribes. However, with some clever lawyering, and some help from ample history and documentation, the Match-E-Be-Nash-She-Wish Tribe of Pottawatomi Indians should be able to successfully defend against Patchak’s loosely asserted claims of injury. Unfortunately, other tribes may not have such information in their favor and it may ultimately rest on Congress to fix the conundrum presented by *Carcieri*.[207]

[207] As of the writing of this note there is presently a bill to do exactly this before Congress; *See* http://indiancountrytodaymedianetwork.com/2013/02/14/another-shot-clean-carcieri-fix-house-147674