ORAL ARGUMENT NOT YET SCHEDULED

No. 09-5324

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK,

Plaintiff-Appellant,

v.

KENNETH LEE SALAZAR, in his official capacity as Secretary of the United States Department of 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

INTERVENOR DEFENDANT-APPELLEE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS' ANSWER BRIEF

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DISCLOSURE STATEMENT

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

All parties, intervenors, and amici that have appeared to date before the district court and in this Court are listed in the Brief for Appellant David Patchak.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellant David Patchak.

C. RELATED CASES

This case was not previously before this Court or any other court apart from the court below and, to counsels' knowledge, there are no cases currently pending involving substantially the same parties and the same or similar issues. As described further below, a case involving the same or closely related parties and the same administrative decision, but different legal issues, was resolved in favor of the Secretary and the intervening defendant-appellee Tribe in *Michigan Gambling Opposition* (*MichGO*) *v. Norton*, 477 F.Supp.2d 1 (D.D.C. 2007), *aff'd, MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 1002 (2009).

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REGULATIONS

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GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
BIA	Bureau of Indian Affairs
The Bradley Tract	The Parcel of Land Taken Into Trust as The Gun Lake Tribe's "Initial Reservation"
EA	Environmental Assessment
Gun Lake Tribe	Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act of 1934
JA	Joint Appendix
MichGO	Michigan Gambling Opposition
NEPA	National Environmental Policy Act
QTA	Quiet Title Act
Secretary	Secretary of the Interior
Tribe	Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

COUNTER STATEMENT OF JURISDICTION

The Tribe accepts Patchak's statement as to initial jurisdiction, with the qualification that the courts now lack ongoing jurisdiction because the United States has acquired trust title to the property at issue and has retained federal sovereign immunity in cases involving Indian trust lands. *See* 28 U.S.C. § 2409a(a); Argument Part II, *infra*.

STATEMENT OF THE ISSUES

In 2005, the Secretary of the Interior agreed to acquire a parcel of light-industrial land immediately adjacent to the highway between Grand Rapids and Kalamazoo, Michigan, in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe" or "Tribe"), a federally-recognized Indian tribe, under Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. The Secretary's decision contemplated that the Tribe would raise funds for self-government by operating a casino on the trust land in accordance with the Indian Gaming Regulatory Act ("IGRA"). In 2008, this Court affirmed the rejection, on the merits, of a suit by casino opponents raising environmental, IGRA, and constitutional challenges to the trust acquisition. Later in 2008, Appellant David Patchak belatedly filed this separate action, arguing that the Tribe

is not an "Indian tribe" within the meaning of Section 5 of the IRA because it was not "under Federal jurisdiction" in 1934, *see* 25 U.S.C. § 479.

On August 19, 2009, the district court dismissed Patchak's action, determining that Patchak was not within the IRA's "zone of interests" and, thus, lacked prudential standing. *See Patchak v. Salazar*, 646 F.Supp.2d 72, 78 (D.D.C. 2009). This appeal followed and the questions presented are:

1. Whether the district court correctly determined that Patchak lacks standing to challenge the Tribe's eligibility for benefits under the IRA because he falls outside the zone of interests protected by that Act.

2. Whether, in any event, the completed acquisition of the land in trust now bars this suit because the Quiet Title Act, 28 U.S.C. § 2409a(a), preserves the sovereign immunity of the United States with respect to any claim that would call into question federal title to "trust or restricted Indian lands."

3. If Patchak has standing and the claim is not barred, whether his "under Federal jurisdiction" argument should be addressed in the district court in the first instance, or whether the existing record is sufficient to sustain the Secretary's action.

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are set forth in the Addendum.

INTRODUCTION

The Gun Lake Tribe has been under federal jurisdiction since it signed its first treaty with the fledgling United States in 1795. Most recently, in 1999 the Secretary formally acknowledged that the Tribe has continuously maintained its communal identity and is a "historic tribe . . . entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a); 63 Fed. Reg. 56,936 (Oct. 23, 1998) (effective Jan. 20, 1999).

In 2005, the Secretary agreed to acquire, under Section 5 of the Indian Reorganization Act, trust title to a parcel of land adjacent to the federal highway linking Grand Rapids and Kalamazoo, Michigan, so that the Tribe could generate jobs and governmental revenue by developing a casino in accordance with the Indian Gaming Regulatory Act. A local group closely affiliated with the current plaintiff, David Patchak, promptly challenged the acquisition, raising claims under IGRA, the National Environmental Policy Act ("NEPA"), and the Constitution. For three years, Patchak stood by while those challenges were litigated in, and rejected by, the district court and this Court. *Michigan Gambling Opposition* (*MichGO*) *v. Norton*, 477 F.Supp.2d 1 (D.D.C. 2007), *aff'd, MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 1002 (2009).

In 2008, after this Court denied rehearing *en banc* in *MichGO*, Patchak filed this separate suit, questioning the Tribe's eligibility for land acquisitions (or other benefits) under the IRA. He alleges injuries that are largely recycled verbatim from the complaint in *MichGO* (litigated by the same attorneys who now represent Patchak on appeal). *Compare* Compl.¶ 9, R.1, (J.A.___) *with* Compl. ¶ 14, *MichGO v. Norton*, No. 05-CV-01181 (D.D.C) (attached hereto as "Attachment A"). Unlike *MichGO*, however, this case does not challenge decisions about a particular parcel or project in light of statutes (IGRA and NEPA) that, among other goals, specifically seek to protect local communities. *Id.* Claims that were sufficient to establish standing in that context are inadequate here, and the district court correctly held that Patchak's interests in this case fall well outside the zone regulated or protected the by IRA.

Even if Patchak had standing to bring this suit, the Secretary has since acquired title to the land at issue, and the suit is now barred by the sovereign immunity of the United States. Alternatively, the Court should remand the case so that the district court can address the laches and preclusion defenses raised by the Tribe and, if necessary, consider Patchak's IRA claim in the first instance, unless the Court deems it clear on the face of the existing record that the Gun Lake Tribe was "under Federal jurisdiction" in 1934.

STATEMENT OF FACTS

I. The Match-E-Be-Nash-She-Wish Band

The Gun Lake Tribe descends from a band of Pottawatomi Indians that lived in a village near the present-day City of Kalamazoo, Michigan. Declaration of D.K. Sprague ("Sprague Decl.") at ¶ 7, R.13-2, (J.A.__). In 1795 the band's Chief, Match-E-Be-Nash-She-Wish, signed the Treaty of Greenville, which "acknowledge[d] [the signatory tribes] to be under the protection of the said United States and no other power whatever." Treaty of Greenville, 7 Stat. 49, 52 (1795). The Tribe obtained its first federally-protected reservation in 1821, when Chief Match-E-Be-Nash-She-Wish signed the Treaty of Chicago, 7 Stat. 218 (1821). By 1836, through treaties to which the Gun Lake Tribe was not a signatory, all of the Tribe's land was purportedly ceded to the United States, leaving the Tribe landless. Treaty of September 26, 1833, 7 Stat. 431 (1833); The Ottawa Treaty of 1836, 7 Stat. 491 (1836).

The existing record shows that the Tribe continued to receive federal Indian services well into the twentieth century, and received payments under the 1855 Treaty with the Ottowas and Chippewas until at least 1870. *See* 11 Stat. 621 (1855); Summary of Criteria, AR 2015, (J.A.__); Historical Technical Report, AR 2058-59, (J.A.__). In 1939, an erroneous BIA administrative decision precluded nearly all tribes in Lower Michigan, including the Gun Lake Tribe, from formally

reorganizing under the IRA. As the United States has made clear in this litigation, that decision was made "because the United States had no funding left to purchase land or provide services, *not* because [the tribes] did not fit the definition of Indian under the IRA." United States' Reply in Support of Motion to Dismiss ("US MTD Reply") at 3-4 & n.2 (emphasis added), R.28, (J.A.__). The Tribe nonetheless maintained its own communal identity, and its status as a tribe was never terminated by Congress.

Some sixty years later, the Secretary formally re-acknowledged the Tribe's status under administrative acknowledgement regulations first adopted in 1978. *See* 25 C.F.R. Part 83; 59 Fed. Reg. 9280 (Feb. 25, 1994) (discussing history of regulations); 62 Fed. Reg. 38,113 (July 16, 1997) (Proposed Finding regarding Gun Lake Tribe); 63 Fed. Reg. 56,936 (Oct. 23, 1998) (Final Determination).[1] As part of that process, the Secretary found that the Tribe had continuously existed as a distinct Indian community. *See* 25 C.F.R. §§ 83.7-83.8; 63 Fed. Reg. 56,936. Formal acknowledgement confirmed the Tribe's legal status as "a historic tribe … entitled to the privileges and immunities available to other federally-recognized

[1] Patchak asserts (Appellant's Br. (hereinafter "Br.") 9) that in seeking formal acknowledgement, the Tribe represented it would not engage in gaming. The purported tribal constitution he quotes (*id.*) was an "unratified, undated" document. Tribe Reply at pp.7-8 n.7, R.30, (J.A.__); Proposed Finding at p.113, AR 2140; (J.A.__). The Secretary's acknowledgment decision makes no reference to any representation concerning gaming, 63 Fed. Reg. 56,936-01, which would not be relevant under the applicable regulations, *see* 25 C.F.R. Part 83.

historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a).

II. The Land-Acquisition Process

Once formally re-acknowledged, the Tribe sought to pursue economic development, self-sufficiency and employment for tribal members through the development of a gaming enterprise, as permitted by the Indian Gaming Regulatory Act and the Secretary's regulations. *See, e.g.*, 25 U.S.C. § 2702 (1); 25 C.F.R. Parts 151, 501. After examining several local sites, it selected one less than three miles from the Tribe's historical settlement. Sprague Decl. ¶¶ 6-7, R.13-3, (J.A.__). The "Bradley Tract" featured an abandoned manufacturing facility that could be redeveloped, and was ideally located, directly adjacent to the four-lane federal highway that connects Grand Rapids and Kalamazoo, Michigan, and at the existing interchange between that highway and State Route 179. *See* Sprague Decl. at ¶¶ 6, 9 and Ex. A, AR 13-2 and 13-3, (J.A.__). In 2001, the Tribe filed a "fee-to-trust" application asking the Secretary to accept the Bradley Tract into trust for the Tribe in connection with the restoration of its formal acknowledgment and as its "initial reservation" for purposes of IGRA. *See* 25 U.S.C. §§ 467, 2719; Fee-to Trust Application, AR 1438-1452, (J.A.__); Sprague Decl. at ¶ 10, R.13-2, (J.A.__).

The Secretary's Bureau of Indian Affairs ("BIA") considered the Tribe's application and oversaw the development of an extensive NEPA Environmental Assessment ("EA"). Final EA, AR 6 to 213, (J.A.__). The EA explained that the project's "main purpose" was to provide an economic base for the Tribe to support governmental activities and become economically self-sufficient. Chapter 1.0 at p.1-3, Final EA, AR 18, (J.A.__). As the EA documented, without such a base the landless Tribe was struggling to provide governmental services, infrastructure, administrative facilities, employment and housing for its members. *Id.* As of 2003, for example, the tribal unemployment rate was around 27% (compared to 4.1% for Allegan County generally), and only 26% of tribal members owned their own homes (compared to 82.9% for the county). *Id*. The EA concluded that development of a gaming facility would enable the Tribe to decrease dependence on federal and state funds while improving living and working conditions for its members. *Id.* In addition to providing revenue for housing, education and other needs, developing and operating the facility would create jobs for tribal members (and for others in the local community). *Id*.; *cf.* Appendix P, Comment Letters, AR 833; 834; 841-42; 884; 886; 892; 893; 894; 895; 904-05; 906; 923; 924-26; 928; 937-38; 941; 1024-29; 1055-56, (J.A.__). The project would thus serve IGRA's statutory purpose of using "gaming by Indian Tribes as a means of promoting tribal

economic development, self-sufficiency, and strong tribal governments . . . ." 25 U.S.C. § 2702(1).

In examining potential environmental effects, the EA explained that the project site was located in an area already zoned for light industrial and commercial use and that the Tribe's project would be consistent with past, present, and projected future land uses. The site and its existing buildings were previously used to manufacture lawn products such as mulch and hydroseed mix. Chapter 2.0 at p.2-10, AR 31, (J.A.__). The site is bordered by US Highway 131 to the west, railroad tracks to the east, and 129th Avenue (State Route 179) to the south, and is adjacent to other commercial and industrial properties. Chapter 3.0 at p.3-1, AR 36, (J.A.__); Chapter 3.0 at Figure 3-3, AR 40, (J.A.__).

Not surprisingly, local government officials overwhelmingly supported the project, and determined the proposed use satisfied Wayland Township's Zoning Ordinances and the Wayland Township Land Use Plan. *See* Appendix P at Letter E, AR 834, (J.A.__). The Tribe secured agreements with local authorities for the provision of law enforcement and emergency services on the Bradley Tract, *see* Chapter 1.0, at p.1-2, AR 17, (J.A.__), negotiated a gaming compact with Michigan's Governor, and secured approval of the compact by the Michigan Legislature. The Secretary of the Interior approved the compact, 74 Fed. Reg. 18,397-98 (2009), as required by federal law, 25 U.S.C. § 2710(d)(8).

Patchak and some others, however, opposed the Tribe's project from the start. In March 2001, for example, Patchak submitted the following comment to the Secretary:

> What happened hundreds of years ago is the past, these treaties were made between a fledgling nation and groups of people who lived here, but had no rights. Today this is the United States of America, and those tribes of Indians are full citizens. I personally feel that I do not owe the Indians or any other group of American citizens anything other than what we are guaranteed in the Constitution of the United States and the Bill of Rights.

Comment Letter, AR 011529, (J.A.__). In December 2002, he submitted similar comments to the BIA Midwest Regional Office: "These Indians are no longer a sovereign nation, as they are all American citizens, just like any other American." Comment Letter, AR 011324, (J.A.__).

On May 13, 2005, after an extensive administrative process, the Secretary published notice that he had decided to accept the Bradley Tract into trust. 70 Fed. Reg. 25,596 (2005). The notice provided that the Secretary would not act for at least 30 days, providing interested parties an opportunity to seek judicial review. *Id*.; *see* 25 C.F.R. § 151.12(b).

III. *MichGO v. Norton*

On June 13, 2005, Michigan Gambling Opposition ("MichGO"), an organization purporting to represent concerned citizens including local residents

such as Patchak, sued the Secretary to prevent the trust acquisition. *MichGO v. Norton*, 477 F.Supp.2d 1, 4 (D.D.C. 2007). MichGO raised statutory claims under NEPA and IGRA, and a constitutional claim. The Tribe intervened. On February 23, 2007, the district court granted summary judgment for the United States and the Tribe, rejecting MichGO's claims on the merits. *Id.*

MichGO appealed, and the case was briefed and argued in this Court. More than four months after oral argument, MichGO moved to "supplement the issues" on appeal with the question of whether the Secretary's land-acquisition authority under the IRA was limited to tribes that were "under Federal jurisdiction" in 1934—a question never previously raised in the case, but on which the Supreme Court had granted certiorari in *Carcieri v. Kempthorne*, 128 S. Ct. 1443 (2008). This Court denied the motion to supplement, affirmed the district court's judgment, and denied rehearing *en banc*, and the Supreme Court denied review. *See Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 1002 (2009).

IV. Patchak's Belated Litigation

Patchak, although certainly aware of the *MichGO* case, neither sought to intervene nor filed a timely suit of his own. After this Court denied the motion to supplement and the *en banc* petition in *MichGO*, however, Patchak filed this purportedly new suit, seeking to raise the *Carcieri* issue—whether the Gun Lake

Tribe is an "Indian tribe" within the meaning of the IRA, which the Supreme Court has now held depends, as a statutory matter, on whether the Tribe was "under Federal jurisdiction" in 1934. *See Carcieri v. Salazar*, 129 S.Ct. 1058 (2009).

Patchak's eleventh-hour complaint alleges that he lives "in close proximity" to the Bradley Tract and fears a variety of ill effects—many drawn from the *MichGO* complaint—from the construction and operation of a casino on the land. Compl. ¶ 9, R.1, (J.A.__). These include, for example, "increased traffic," "increased crime," and "loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site." *Id.*[2] The legal claim raised by Patchak's suit, however, is entirely different from the NEPA and IGRA claims raised in *MichGO*. Patchak does not challenge the adequacy of the Secretary's consideration of possible environmental effects of the project or whether IGRA permits gaming on the land without consideration of effects on the

[2] In fact, Patchak's residence is some distance from the Bradley Tract and not on a major road that casino patrons would typically use. *Compare* E.A. Chapter 3.0 at 3-1, AR 36, (J.A. __) (describing location of land at intersection of US 131 and 129th Avenue (State Route 179)), *with* Compl. p.1, R.1, (J.A. __) (listing Patchak's address as 2721 6th Street, Shelbyville, Michigan, which is some distance from the project site and then about one-half mile off Route 179). The EA estimated that in its first year of operation, the casino would increase traffic on Route 179 to and from the east (the direction of Patchak's house) by less than one car per minute at the morning peak and less than two cars per minute at the evening peak. *Compare* EA Appendix D at Figures 3, AR 454, (J.A.__), *with* EA Appendix D at Figure 14, AR 467, (J.A.__).

community, but rather whether the Tribe is legally eligible for land acquisition (or other benefits) under the IRA in the first place.

The Tribe intervened as a defendant, and both the United States and the Tribe moved to dismiss or for judgment on the pleadings. *See Patchak v. Salazar*, 646 F.Supp.2d 72, 74 (D.D.C. 2009). Both argued that Patchak lacked standing to challenge the Tribe's status under the IRA because he does not fall within the statute's "zone of interests." *Id*. at 76. The Tribe also argued that the suit was barred by laches, because Patchak was well aware of the Tribe's proposal, the Secretary's decision, the *MichGO* lawsuit, and the availability of the *Carcieri* argument, but made a strategic decision not to take his own legal action until 2008, to the prejudice of the Secretary and the Tribe. *See* Tribe Mot. for J. on the Pleadings at pp.12-16, R.19, (J.A.__).[3]

While the dismissal motions were pending, Patchak sought to restrain the Secretary from taking the land into trust for the Tribe. In doing so, he noted that once the United States took title to the land, the Indian lands exception to the Quiet Title Act, 28 U.S.C. § 2409a(a), would preclude review and therefore his claim would be "irrevocably lost." Compl. ¶ 12, R.1, (J.A__); Mem. Supp. Mot. to Stay

[3] In addition, the Tribe supplied evidence strongly suggesting that Patchak is a member of or otherwise closely affiliated with MichGO, Sprague Decl. ¶¶ 18-21, R.13-2, (J.A.__), and that his suit should therefore be barred by claim preclusion, *see* Tribe Answer at p.7, R.14, (J.A.__).

at 9, R.23-1, (J.A.__); Mot. for TRO at 6, R.36-2, (J.A.__); Emergency Mot. at 3, R.46, (J.A.__); TRO Hr'g Tr. 5:14-25, 11:13-17, (J.A.__). Finding Patchak's likelihood of success on the merits "conjectural and questionable," however, the district court denied a restraining order and took the motion for a preliminary injunction under advisement. TRO Hr'g Tr. Jan. 26, 2009 at 35:14-20, (J.A.__). On January 30, 2009, after the Supreme Court denied review in *MichGO* and this Court's mandate issued in that case, the Secretary took the land into trust. *Patchak*, 646 F.Supp.2d at 76 n.10; *see Michigan Gambling Opposition v. Kempthorne*, 129 S.Ct. 1002 (Jan. 21, 2009) (denying Petition for Writ of Certiorari.

After the United States took title, the district court ordered the parties to address "whether this Court retains any subject matter jurisdiction in this case in light of the Quiet Title Act." Order, R.50, (J.A._). Notwithstanding that order and the pending motions to dismiss, Patchak moved for summary judgment on the merits. The district court promptly stayed any further briefing on that motion. Apr. 9, 2009 Minute Order, (J.A.__).

On August 19, 2009, the district court granted the motions to dismiss or for judgment on the pleadings. *Patchak*, 646 F.Supp.2d at 78-79. The court held that "at a minimum, [Patchak] lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA." *Id.* at 76. It reasoned that "[t]he

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,'" while noting that "[p]laintiff's alleged injuries could not be further divorced from these objectives." *Id.* at 77. Because any interest Patchak might have in "ensuring that only qualified tribes receive benefits under the IRA" would be "indistinguishable from the general interest every citizen or taxpayer has in the government complying with the law," Patchak did not "fall within the group of those 'who in practice can be expected to police the interests' protected by the IRA, but rather is one whose 'suit[] [is] more likely to frustrate than to further statutory objectives.'" *Id*. at 78 (citations omitted; alterations by district court).

The court noted that its "continuing subject matter jurisdiction … [was] also seriously in doubt" under the Quiet Title Act. *Id*. at 79 n.12. In light of its dismissal for lack of standing, however, the court did not resolve that issue. *Id*. Likewise, it did not reach the Tribe's arguments based on laches or claim-preclusion. Finally, the court denied Patchak's motion for summary judgment as moot, without receiving opposing briefs or discussing the merits. *Id.* at 79 n.13.

After the district court's decision, the Tribe began construction of its gaming facility, which is expected to open in the fall of 2010.

SUMMARY OF ARGUMENT

1. The district court properly dismissed Patchak's case because he lacks prudential standing to assert that the Tribe does not qualify for recognition as an Indian tribe within the meaning of the Indian Reorganization Act. As the court recognized, Patchak is neither regulated by nor an intended beneficiary of the IRA. His interests and alleged injuries "could not be further divorced" from the statute's objectives of enabling tribal self-government and self-sufficiency and reversing previous policies that had deprived tribes of economically productive lands. *Patchak*, 646 F.Supp.2d at 77. Nor is Patchak a party who, in "seek[ing] to vindicate only his own environmental and private economic interests" (*id*. at 77), incidentally also advances the statute's objectives in a manner sufficient to confer standing. Rather, allowing suits from parties in Patchak's position would be more likely to frustrate than to advance the Act's objectives. His interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987).

2. In addition, although the district court did not reach this issue, Patchak's action is now barred by the United States' sovereign immunity from suit. Waivers of immunity must be unequivocally expressed and are construed strictly in favor of the sovereign. While the Administrative Procedure Act generally waives

immunity for challenges to administrative action, that waiver does not apply where another statute "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. In this case, the Indian lands exception to the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, expresses Congress's decision not to waive immunity from claims that would call into question the United States' title to Indian trust lands or interfere with the trust relationship between the United States and a tribe with respect to such lands.

Patchak argues that the QTA and the Indian lands exception do not apply here because he does not claim a property interest in the Bradley Tract. That argument improperly discounts Supreme Court precedent holding that all claims touching the United States' interests in land must be analyzed under the QTA in order to prevent evasion of its limitations, including the reservation of immunity in the Indian lands exception. Patchak ignores extensive appellate precedent uniformly holding that that exception prohibits courts from entertaining APA challenges to decisions by the Secretary to acquire land in trust for tribes.

Patchak also argues, alternatively, that his action may be maintained because the United States did not hold title at the time he filed his complaint. That argument fails, however, because assertions of sovereign immunity are not subject to a time-of-filing rule.

3. If the Court concludes that Patchak has standing to claim that the Tribe was not "under Federal jurisdiction" in 1934 within the meaning of the IRA, 25 U.S.C. § 479, and that the courts retain jurisdiction over this case despite the Indian lands exception, it should either remand the case for further proceedings in the district court or affirm on the present record. Remand would allow the district court to address the Tribe's additional threshold arguments of laches and claim preclusion, which the Tribe is entitled to have resolved before any court addresses the merits. If necessary, it would also permit the district court to consider Patchak's novel IRA claim in the first instance, including managing any necessary factual development. In that regard, the existing record, although not developed to address Patchak's claim, is adequate on its face to establish the existence of federal jurisdiction. The United States asserted jurisdiction over the Tribe in a series of treaties beginning in 1795; Congress, which alone has the power to terminate tribal status, never did so with respect to the Tribe; and, the Tribe's re-acknowledgement proceedings conclusively established that the Tribe has continuously maintained its existence as a tribe up to the present day. If, however, there were any doubt on the issue, the only proper course would be to remand for further proceedings.

ARGUMENT

I. The District Court Properly Determined That Patchak Lacks Standing To Challenge The Tribe's Status As An "Indian Tribe" Within The Meaning Of The IRA

A party challenging agency action must have both constitutional and prudential standing to assert its particular claim. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Nat'l Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1041 (D.C. Cir. 1989). The district court correctly held that Patchak lacks prudential standing to challenge the Secretary's decision to take land into trust for the Gun Lake Tribe on the threshold ground that the Tribe is not properly recognized as an "Indian tribe" within the meaning of the IRA. *See* 25 U.S.C. §§ 465, 479; *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).[4]

To demonstrate prudential standing, "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."

[4] Contrary to Patchak's assertion (Br. 27), the Tribe made clear below that it does "not concede that Plaintiff meets the standard for constitutional standing . . . ." Tribe's Mot. J. Pleadings at 8 n.9; R.19; (J.A.__). Moreover, as discussed in Part II, the United States' acquisition of trust title to the Bradley Tract has divested the courts of jurisdiction over this suit. Nonetheless, it makes sense for this Court to consider and affirm on the same ground addressed by the district court, which likewise disposes of the entire case. *See, e.g.*, *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (no "unyielding jurisdictional hierarchy" governs the order of considering dispositive threshold issues, quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999)).

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990); *Bennett*, 520 U.S. at 176. In contrast, there is no standing where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Industry Ass'n*, 479 U.S. 388, 399 (1987). The test reflects "a presumption that Congress intends to deny standing to 'those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

The IRA was enacted in 1934 "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong.2d Sess., 6 (1934)); *Feezor v. Babbitt*, 953 F. Supp. 1, 4-5 (D.D.C. 1996); *Patchak*, 646 F.Supp.2d at 77. The Supreme Court has emphasized that the Act was intended to "give the Indians the control of their own affairs and of their own property; to put it in the hands of either an Indian council or in the hands of a corporation to be organized by the Indians." *Mescalero*, 411 U.S. at 152 (quoting 78 Cong. Rec. 11125); *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of [the IRA] was to [ensure that] Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").

Through the IRA, Congress repudiated the General Allotment Act, *compare* 25 U.S.C. § 461, *with* 25 U.S.C. §§ 331 *et seq*., and sought to enable tribes to reestablish their territorial land bases by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero*, 411 U.S. at 151. In authorizing the Secretary to acquire land in trust "for the purpose of providing land for Indians," IRA § 5; 25 U.S.C. § 465, Congress contemplated that the Secretary would "'build up Indian landholdings until there is sufficient land for all Indians who will beneficially use it,'" *City of Tacoma v. Andrus*, 457 F. Supp. 342, 345 (D.D.C. 1978) (quoting legislative history).

Patchak scarcely disputes (*see* Br. 27-34) the district court's conclusion that he "is not an intended beneficiary of the IRA," and indeed that his alleged injuries—*i.e.*, his opposition to the Tribe's proposed use of its land for economic development (Br. 29, 33)—"could not be further divorced" from the IRA's objectives. *Patchak*, 646 F.Supp.2d at 77. On the contrary, he argues that his very hostility to the Tribe's intentions makes him an appropriate plaintiff to "police" any statutory limitations imposed by the IRA. *E.g.*, Br. 29-30 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998)).

The district court correctly rejected that contention. 646 F.Supp.2d at 78. In *Mova*, this Court discussed *National Credit Union Administration v. First National Bank & Trust Co. (NCUA)*, 522 U.S. 479 (1998), in which the Supreme Court held

that banks, as competitors of credit unions, had standing to enforce a "common bond" requirement in the federal statute delineating whom the credit unions could serve. *See Mova*, 140 F.3d at 1075. As this Court explained (*id.*), *NCUA* carefully parsed the credit-union statute and determined that the banks' interest in limiting the market for credit unions coincided with the important purposes of the common-bond requirement in promoting the safety, soundness, and availability of credit unions. Thus, there was "an 'unmistakable' link" between the banks' suit, the common-bond limitation, and the core statutory goals. *Id*. (quoting *NCUA*, 522 U.S. at 493 & 493 n.6).

Similarly, in *Mova*, a pioneering drug company had standing to seek enforcement of a statutory provision protecting against competition from generic manufacturers in general—but only because its interest in that regard was functionally identical to a core statutory interest in protecting the *first* generic competitor to challenge the pioneer's patent. 140 F.3d at 1075-1076. The *Mova* court found the *NCUA* analysis, allowing a plaintiff to show an "inevitable congruence" between "its interest and the interest served by the statute" in question, "very similar" to the Court's own "suitable challenger" test, under which "a plaintiff must demonstrate that its interests are sufficiently congruent with those of the intended beneficiaries [of the statute] that the litigants [accorded standing]

are not more likely to frustrate than to further . . . statutory objectives." *Id*. at 1075 (internal quotation marks omitted) (omission in original).

Finally, Patchak repeatedly invokes *Citizens Exposing Truth About Casinos v. Kempthorne (CETAC)*, 492 F.3d 460, 464-465 (D.C. Cir. 2007). *See* Br. 28, 30, 34. *CETAC* held that a citizens group had standing to seek enforcement of a specific IGRA provision requiring consideration of community impacts under certain circumstances. That legal claim was "sufficiently congruent with congressional purpose" to support the standing of a community group, "*because* it [sought] to enforce the provision that Congress included [in IGRA] regarding affected communities." *Id*. at 464 (emphasis added); *see also id*. at 465 (distinguishing standing under "an entirely different statutory scheme that did not include a provision for community protection comparable to that in IGRA"); *Patchak*, 646 F.Supp.2d at 78 n.11 (distinguishing standing cases involving IGRA and NEPA).[5]

Unlike the interests at issue in *NCUA*, *Mova*, and *CETAC*, Patchak's personal interest in challenging the Gun Lake Tribe's status as an Indian tribe

[5] Patchak mistakenly cites (Br. 31) *Int'l Ladies' Garment Workers' Union v. Donovan (ILGWU)*, 722 F.2d 795, 810 n.23 (D.C. Cir. 1983), for the proposition that plaintiffs may have standing even where their interests diverge from those of a statute's intended beneficiaries. On the contrary, *ILGWU* likewise found standing based on plain congruence between the plaintiffs' interests and the goals of the statute at issue. *Id.*

under the IRA does not have any "inevitable congruence" with statutory goals. Whatever the meaning or purpose of the IRA's definitional provision, there is no "unmistakable link" or "inevitable congruence" between that definition, Patchak's alleged interest in a "quiet rural lifestyle" (Br. 29), and achievement of the IRA's goals of Indian self-determination and economic self-sufficiency. Indeed, Patchak's stated interest would inevitably conflict with any non-agrarian economic development, by an IRA tribe or anyone else. Certainly, there is no basis for concluding that the IRA was "intended to protect those, like Patchak, who [claim to] be harmed" by a particular Secretarial action in favor of an Indian tribe (Br. 31).

Rather, to the extent that Patchak claims "a general interest in ensuring that only qualified tribes receive benefits under the IRA," that interest is "indistinguishable from the general interest every citizen or taxpayer has in the government complying with the law" and is insufficient to establish standing. *Patchak*, 646 F.Supp.2d at 78. To the extent he relies instead on alleged private grievances arising from the Tribe's acquisition or use of trust land, his interests "not only [do] not fall within the IRA's zone-of-interests, but actively run contrary to it," making him "one whose 'suit[] [is] more likely to frustrate than to further statutory objectives.'" *Id*. (alterations in original) (quoting *HWTC*, 885 F.2d at 922); *see also City of Sault St. Marie v. Andrus*, 458 F. Supp. 465, 468 (D.D.C.

1978) (individual taxpayers lacked standing to challenge tribe's status under IRA); *City of Tacoma et al. v. Andrus*, No. 77-1423, slip op. (D.D.C. Jan. 20, 1978), found and discussed at Reply in Supp. of Mot. for J. on Pleadings at p.6 and at Exhibit A thereto, R.30, 30-2, (J.A.___); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1054 (10th Cir. 1993).[6]

Patchak's alleged aesthetic, environmental, and economic injuries fall far outside the zone of interests protected by the Indian Reorganization Act's definitional and land-acquisition provisions. Indeed, his personal interests in frustrating the Tribe's effort to acquire trust land (and to be eligible for other benefits) run directly counter to the Act's core purposes of promoting Indian self-determination and self-sufficiency and restoring the tribal land base. His claim cuts to the heart of the Tribe's communal identity and legal status and seeks to interfere with the government-to-government relationship between the Tribe and the United States. *Cf., e.g.*, Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, Tit. I, § 103, 25 U.S.C. § 479a note (congressional findings acknowledging relationship between recognized tribes and the United States and

[6] In *Western Shoshone*, a law firm challenged the Secretary's refusal to review a contract for legal services under 25 U.S.C. § 81. 1 F.3d at 1054. The court held that although the law firm was "regulated" by Section 81 and had "an interest that is arguably threatened by the [Secretary]'s" actions, the firm lacked standing because the statute's only purpose was to protect Indians. *Id.* at 1055-56.

providing that tribes formally recognized by Congress or the Secretary "may not be terminated except by an Act of Congress"). As one court observed in the context of another federal Indian statute, "to give legally enforceable rights to parties having interests that compete with the tribes' would be to impose a duty on the Secretary that is inconsistent with the statute's purpose of protecting tribal interests and resources." *Utah v. United States Dep't of the Interior,* 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (non-Indian parties not within zone of interests of Indian Long-Term Leasing Act). Under these circumstances, "it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

II. The United States Has Not Waived Its Immunity From Suits Questioning Its Title To Indian Trust Lands

Even if Patchak had standing, this suit still must be dismissed because the United States has accepted trust title to the Bradley Tract.[7]

A. The Indian Lands Exception

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Waiver "must be unequivocally expressed in

[7] The district court requested briefing on this question but did not reach it, noting only that acquisition of the land placed continuing jurisdiction "seriously in doubt." 646 F.Supp.2d at 78 n.12. Because the question is jurisdictional and does not turn on any disputed fact, this Court may appropriately address it. Alternatively, the Court could remand for consideration of this and other threshold issues, such as laches and claim preclusion, by the district court in the first instance.

statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996), and purported waivers are construed "strictly in favor of the sovereign," *United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (internal quotations omitted), resolving any ambiguity "in favor of immunity," *United States v. Williams*, 514 U.S. 527, 531 (1995).

As Patchak acknowledges (Br. 34), the Administrative Procedure Act's general waiver of immunity for suits challenging administrative action does not apply where "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). Here, the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(a), bars declaratory or injunctive relief that would call into question the United States' title to land held in trust for the Tribe or otherwise interfere with the trust relationship between the United States and the Tribe.

The QTA waives the United States' immunity from civil actions "to adjudicate a disputed title to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), subject to specified limits and exceptions. The consent to suit "does not apply," however, "to trust or restricted Indian lands." *Id*. During consideration of the QTA, the Solicitor of the Interior explained the reasons for this exception:

> 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 and formal 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.

H.R. Rep. No. 92-1559, at 13 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-57; S. Rep. No. 92-575, at 21 (1971) (same). At bottom, the exception is intended to prevent "interfer[ence] with the United States' obligations to the Indians." *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 962 (10th Cir. 2004); *see Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1254 (11th Cir. 1985) (exception "prohibit[s] third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes").

In two cases, *Block v. North Dakota*, 461 U.S. 273 (1983), and *United States v. Mottaz*, 476 U.S. 834 (1986), the Supreme Court has emphasized both the centrality of the QTA in determining what suits touching on federal lands may be permitted and the importance of the Indian lands exception as a limitation on the sovereign's consent to suit. First, in *Block*, the court held that a plaintiff could not evade the "carefully crafted provisions" of the QTA by suing a government officer instead of the United States itself. 461 U.S. at 284-85. The court explained that to "allow claimants to try the Federal Government's title to land" under other legal theories would permit evasion of provisions "deemed necessary for the protection of the national public interest," such as the Indian lands exception. *Id.* at 284-85.

It concluded that the "precisely drawn, detailed" statutory remedy afforded by the QTA "preempts more general remedies" and provides the "exclusive means" to challenge the title of the United States to real property. *Id.* at 285-86; *see also e.g.*, *Rosette v. United States*, 141 F.3d 1394, 1396-97 (10th Cir. 1998) (QTA provides "exclusive remedy" and is the "only recourse for haling the United States into court on the issue of *ownership* of geothermal resources" (emphasis in original)); *Alaska* v. *Babbitt (Albert)*, 38 F.3d 1068, 1073 (9th Cir. 1994) ("[W]hen the United States has an interest in … property, the waiver of sovereign immunity [necessary to challenge that interest] must be found, if at all, within the QTA.").[8]

Similarly, in *Mottaz* the court held that the QTA provided the framework for analyzing claims for declaratory and monetary relief (the fair value of land held by the government), despite the plaintiff's disclaimer of any interest in actual transfer of title (476 U.S. at 838, 842) and her efforts to invoke another ground for jurisdiction (*id*. at 844, 849-850). Moreover, although the Indian lands exception did not apply, in discussing it, the Court reaffirmed that "when the United States

[8] *Block* forecloses Patchak's suggestion (Br. 38) that the immunity analysis should change because he contends the Secretary's acquisition of trust title was "*ultra vires*." *See Block*, 461 U.S. at 284-85; *accord Alaska v. Babbitt (Foster)*, 75 F.3d 449, 453 (9th Cir. 1996) (*Block* "proscribe[s] officer's suits, including '*ultra vires*' suits, as a means of divesting the government's sovereign immunity in quiet title actions relating to trust or restricted Indian land"); *Alaska (Albert)*, 38 F.3d at 1076 (plaintiff cannot evade Indian lands exception by alleging that actions of executive department, agency, or officer are *ultra vires*).

claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *Id*. at 843; *see id*. at 842 (QTA "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians.").

Relying upon *Block* and *Mottaz*, courts of appeals have repeatedly held that challenges to trust acquisitions by the United States must be analyzed under the QTA, and that the Indian lands exception "expressly or impliedly forbids" such actions under the APA, 5 U.S.C. § 702(2), because "the relief which is sought" (*id*.) necessarily calls into question the legitimacy of the government's title and would, if granted, interfere directly with the trust responsibilities undertaken by the United States with respect to the land. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 842-43 (10th Cir. 2008) (APA claim "plainly presents a direct challenge to the United States' title for [land] held in trust for [an Indian tribe] and therefore falls within the scope of suits the Indian trust land exemption in the Quiet Title Act sought to prevent") (internal quotation marks omitted); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-77 (10th Cir. 2005) (Indian lands exception forbids relief on APA claim challenging Secretary's "decision to take . . . property into trust" for a tribe); *Neighbors for Rational Dev.*, 379 F.3d at 961-65 (Indian lands exception bars APA challenge to Secretary's acquisition of land in

trust); *Florida*, 768 F.2d at 1253-55 (Indian lands exception impliedly forbids APA challenge to Secretary's decision to acquire title to land for an Indian tribe); *see also Alaska (Albert)*, 38 F.3d at 1074 (Indian lands exception applies where plaintiff "might potentially affect the property rights of others through successfully litigating their claims"); *Metropolitan Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987) (per curiam) (Indian lands exception forbids APA challenge where the "*effect* of a successful challenge" to federal title to Indian land "would be to quiet title in others than the Tribe." (emphasis added)). No court of appeals has reached a contrary conclusion.

B. Patchak's Claim Is Barred Even Though He Does Not Seek To Quiet Title In Himself

Patchak argues (Br. 35, 38) that the QTA is irrelevant because he "claims no interest in the Bradley Tract" and thus "does not assert a property interest in Indian trust lands." That narrow approach to the Indian lands exception cannot be reconciled with *Block*, *Mottaz*, or the numerous appellate decisions barring challenges like Patchak's.

Whatever his own interests and stated cause of action, Patchak clearly seeks to prevent the United States from holding title to land in trust for the Tribe. His complaint alleges that the Secretary "unlawfully approved" the Tribe's fee-to-trust application (Compl. ¶ 8, R.1, (J.A.__)), had "no authority to place the Property into

trust" (Compl. ¶ 10, R.1, (J.A.__)), and acted "*ultra vires*" (Compl. ¶ 28, R.1, (J.A.__)). He asks the Court to declare the decision to take title unlawful and to "reverse the decision to take the Property into trust" (Compl. at p.9, R.1, (J.A.__)). *See also* Mem. Supp. Summ. J. at p.3, R.52-1, (J.A.__) (seeking an "order setting aside the Federal Defendants' decision to take the property into trust"). Indeed, his appellate brief expressly asks this Court to remand with directions to the district court "to order the Bradley Tract taken out of trust." Br. 26. Accordingly, any decision in favor of Patchak would inevitably require the Court to examine the validity of the trust title held by the United States and intrude directly into the trust relationship relating to the land. Any claim that would lead to such relief must be analyzed under the QTA and is barred by the federal sovereign immunity reserved by the Indian lands exception. *See, e.g.*, *Governor of Kansas*, 516 F.3d at 843; *Shivwits Band*, 428 F.3d at 976; *Neighbors for Rational Dev.*, 379 F.3d at 964-965; *Florida*, 768 F.2d at 1254-1255; *see also Nevada v. United States*, 731 F.2d 633, 636 (9th Cir. 1984) (Property Clause claim covered by QTA because in order to succeed State "would have to show that the United States lacked title" to land). To hold otherwise would, in effect, permit circumvention of Congress's specific reservation of immunity in this limited but important field. *See, e.g.*, *Block*, 461 U.S. at 285 ("If we were to allow claimants to try the Federal Government's title to land under an [alternative] theory, the Indian lands exception to the QTA would be

rendered nugatory."); *Shawnee Trail Conservancy v. U.S.D.A.*, 222 F.3d, 383 388 (7th Cir. 2000) ("To allow claimants to avoid the QTA by characterizing their complaint as a challenge to the federal government's regulatory authority would be to allow parties to seek a legal determination of disputed title without being subject to the limitations placed on such challenges.").

Patchak's contrary argument discounts *Block* and *Mottaz* and essentially ignores the decisions of every court of appeals that has addressed the question presented here. Br. 36-38. He relies instead on comments in the opinions in a case that did *not* reach the issue (and, in any event, was vacated by the Supreme Court) and on an early district court decision. Br. 35-36 (citing *South Dakota v. Dep't of the Interior*, 69 F.3d 878, 881 n.1 (8th Cir. 1995) (reserving issue), *vacated and remanded on other grounds*, 519 U.S. 919 (1996), and *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 471-472 (D.D.C. 1978)). The former lack any force, and the latter has long since been superseded by contrary appellate authority.

In *City of Sault Ste. Marie*, the district court concluded that the QTA and its Indian lands exception should be construed narrowly in the context of the APA, reasoning that the QTA was "designed to remedy specific problems" and that "[i]t appear[ed] . . . that Congress did not intend to foreclose relief in other types of suits involving United States property interests." 458 F. Supp. at 471. The Supreme Court, however, later rejected that narrow approach to the QTA in *Block*

and *Mottaz*. *See, e.g.*, *Block*, 461 U.S. at 284-285 (if plaintiff were permitted to invoke an alternative cause of action, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted"); *Neighbors for Rational Dev.*, 379 F.3d at 965 ("The validity of [*Sault Ste. Marie*'s] reasoning is undercut by the Supreme Court's subsequent opinions."). Under uniform authority developed since *Sault Ste. Marie*, the QTA is the "exclusive means" for challenging the United States' title to real property, *Block*, 461 U.S. at 285-86; *Mottaz*, 473 U.S. at 846, and its limitations apply "any time a party seeks a title determination regarding real property in which the United States asserts an interest," even "where parties do not seek to quiet title in themselves," *Shawnee Trail Conservancy*, 222 F.3d at 387-388 (collecting cases).[9]

In particular, it is now "well-settled law" that the QTA's "prohibition of suits challenging the United States' title in Indian trust land may prevent suit even when a plaintiff does not characterize its action as a quiet title action." *Neighbors for Rational Dev.*, 379 F.3d at 961. That the plaintiff does not attempt to quiet title

[9] In *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 3 (D.D.C. 1995), the district court concluded that the QTA applied to a claim for a declaratory judgment that the Secretary lacked authority to levy grazing fees on certain public lands in New Mexico, even though the county did not seek to quiet title to the lands in itself, because the claim would require the court "to decide who owns the [disputed lands]." In a non-precedential decision, this Court affirmed "[f]or substantially the reasons stated by the district court." *Hat Ranch, Inc. v. United States*, 102 F.3d 1272 (D.C. Cir. 1996).

in himself is "immaterial." *See id.* The Indian lands exception "prohibit[s] third parties from interfering with the [trust obligations] of the United States," even where a plaintiff does not seek to have title "quieted in them" or, indeed, "recognition of any property interest" in the land. *Florida*, 768 F.2d at 1254. That a party does not assert an adverse claim of title to the land "does not lessen the interference with the trust relationship a divestiture would cause." *Id.* Indeed, "[i]f Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land." *Neighbors for Rational Dev.*, 379 F.3d at 962; *accord Shivwits Band*, 428 F.3d at 975; *Florida*, 768 F.2d at 1254-55 ("It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.").

Patchak's APA action challenges the validity of the United States' acquisition of trust title to the Bradley Tract and seeks direct judicial interference in the trust relationship between the United States and the Gun Lake Tribe with respect to that land. The Indian lands exception to the QTA "expressly or impliedly forbids th[at] relief," 5 U.S.C. § 702, and Patchak's action must be dismissed.[10]

[10] Any doubt about this conclusion would have to be resolved in favor of the United States' retention of sovereign immunity and the protection of the Tribe.

C. Sovereign Immunity Is Not Subject To A Time-Of-Filing Rule

Alternatively, Patchak argues (Br. 38-41) that sovereign immunity does not bar this case because it was filed before the United States acquired trust title to the Bradley Tract and "jurisdiction is determined at the time the complaint is filed" (Br. 38). In a case involving sovereign immunity, that is incorrect.

In *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857), the plaintiff brought suit in state court upon bonds issued by the State of Arkansas under an Arkansas statute that consented to suit. *Id.* at 528. While the suit was pending the Arkansas legislature amended the law, "requiring the bonds to be filed in court, or the suit to be dismissed." *Id.* The plaintiff refused to file the bonds, and the court dismissed the lawsuit. *Id.* at 529. Rejecting an argument that this change in ability to enforce the bonds impaired contractual obligations in violation of the federal Constitution, the U.S. Supreme Court explained that a "sovereign cannot be sued in its own courts, or in any other, without its consent and permission," and further that it "may withdraw its consent whenever it may suppose that justice . . . requires it."

See, e.g., *United States v. Williams*, 514 U.S. at 531 ("Our task is to discern the 'unequivocally expressed' intent of Congress [with respect to waiver], construing ambiguities in favor of immunity."); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (Indian canon arises from principles of equitable obligation "applicable to the trust relationship between the United States and the Native American people").

Id. Indeed, the State "might have repealed the prior law altogether, and put an end to the jurisdiction of [its] courts in suits against the State, if [it] had thought proper to do so . . . ." *Id*. at 530. The State's unilateral post-filing act of imposing an additional condition on its waiver of immunity "merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred," and the plaintiff's failure to comply with the newly-imposed condition permissibly divested the state court of jurisdiction. *Id.* at 529-30. These principles apply equally to a post-filing change of circumstances affecting the United States' waiver of its immunity from suit in federal court. *Cf. Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49-50 (1st Cir. 2003) (time-of-filing rule inapplicable to State's assertion of sovereign immunity after substitution of immune agency for non-immune original defendant); *Dotson v. Griesa*, 398 F.3d 156, 179 n.18 (2d Cir. 2005) (noting frequent parallels between federal and state immunity).[11]

Patchak's reliance on *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991), for a contrary rule (Br. 38) is misplaced. *Freeport-McMoran* was

[11] The Supreme Court has similarly declined to apply a time-of-filing rule with respect to another federal jurisdictional prerequisite, the existence of a live case-or-controversy between parties with a sufficient personal stake in the litigation. *See e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("'[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"); *Gollust v. Mendel*, 501 U.S. 115, 126 (1991) ("[T]he plaintiff must maintain a 'personal stake' in the outcome of the litigation throughout its course.").

a diversity case, and its analysis speaks only to that context. The Court reasoned that "[d]iversity jurisdiction, once established, is not defeated" because "[a] contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be a lengthy litigation." *Freeport-McMoran*, 498 U.S. at 428. The same policy concerns do not apply in federal-question cases. *See ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 93 (1st Cir. 2008) (concerns over promoting "certainty" while "minimizing the risk of . . . strategic behavior" are "indigenous to diversity cases" but "largely absent in federal question cases"). And they certainly do not support applying a time-of-filing rule in cases involving sovereign immunity, where "[t]he basic rule . . . is that the United States cannot be sued at all without the consent of Congress," and a "necessary corollary" is that any conditions Congress attaches to a waiver of immunity "must be strictly observed." *Block*, 461 U.S. at 287; *cf. Maysonet-Robles*, 323 F.3d at 49-50 (finding analogy between diversity cases and cases involving state sovereign immunity "unconvincing"). The Supreme Court has never suggested that a time-of-filing rule would be appropriate to determine an issue of sovereign immunity.

The lower-court cases Patchak cites likewise do not justify application of a time-of-filing rule here. The issue in *F. Alderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476, 1480-1481 (Fed. Cir. 1983) (Br. 39) was not sovereign immunity but rather which court—the Claims Court or United States District Court

for the Western District of Texas—had jurisdiction. *Delta Savings & Loan Ass'n v. IRS*, 847 F.2d 248, 249-250 (5th Cir. 1988), and *Bank of Hemet v. United States*, 643 F.2d 661, 663 (9th Cir. 1981), were Quiet Title Act cases, but they involved disputes over property proceeds and continuation of jurisdiction after the United States sold the property in question. They did not involve Congress's specific reservation of immunity through the Indian lands exception, or a situation where the facts changed to make that reservation applicable to protect the trust relationship and constrain the court's remedial power after the commencement of the suit.

Indeed, it was largely on such grounds that the district court distinguished these same cases in *Sac and Fox Nation of Missouri v. Kempthorne*, No. 96-4129, 2008 WL 4186890, **7-8 (D. Kan. Sept. 10, 2008), *appeal pending*, *Sac and Fox Nation of Missouri v. Salazar*, No. 08-3277 (10th Cir.) (argued and submitted November 18, 2009). In that case, as here, the plaintiffs challenged a decision to accept a parcel of land into trust; the United States acquired the land in trust while the case was pending; the Secretary moved to dismiss the case based on the Indian lands exception to the QTA, and the plaintiffs countered by relying on the time-of-filing rule. *Id.* at **1-2. The court dismissed the case. *Id*. at *9. It reasoned that—as here—once the United States acquired the land, the remedial posture of the case changed because any relief would necessarily affect the trust status of the

land. *Id*. at **3-4. That shift, it reasoned, required reconsideration of the immunity question (*id*. at **4-5), and distinguished the case from *Bank of Hemet* and *Delta Savings*, because it made the QTA and Indian lands sovereign immunity analysis relevant for the first time after the filing of the complaint (*id*. at **7-8). *See also id*. at *9 ("in those cases, the facts at the time of filing supported the jurisdiction of the court *for the relief that was being requested at that time*" (emphasis added)).[12] In addition, specific QTA provisions prescribing methods for disclaiming interests and terminating jurisdiction, potentially at issue in *Hemet* and *Delta*, distinguished those cases from an Indian lands case. *Id*. at **7-8.

Finally, Patchak raises the specter of "post-complaint maneuvering . . . to defeat judicial review." Br. 40-41; *see also Sac & Fox*, 2008 WL 4186890, at *9. Even assuming, however, that such a concern could "trump settled principles of sovereign immunity," *id*. at *9, there is no basis for invoking it on the facts of this case. The Secretary announced his decision to take the Bradley Tract into trust in May 2005. Other plaintiffs took advantage of the 30-day window for challenge provided by the Secretary's regulations (*see* Patchak Br. 36), and the Secretary refrained, voluntarily or based on judicial stays, from further action for almost four years while that litigation was resolved. Patchak, in contrast, waited until August

[12] This focus on the nature of the available relief corresponds to the text of the APA, which expressly withholds waiver of sovereign immunity when another statute "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

2008 to file his purportedly separate case. In January 2009, the district court in this action, after repeated briefing and a hearing, refused to grant a further restraining order. After the previous judgment in favor of the United States and the Tribe became final, and in the absence of any other restraint, the Secretary finally implemented his 2005 decision. That is not "maneuvering" or manipulation but regular (indeed, in the Tribe's view, long overdue) administrative process. That the result is the termination of jurisdiction over Patchak's belated legal challenge is not a "manifest injustice" (Br. 40), but simply a consequence of the basic principle of sovereign immunity and the fact that Congress has chosen not to waive immunity in cases involving Indian trust lands.

III. This Court May Not Render Judgment For Patchak On His Claim That The Gun Lake Tribe Was Not "Under Federal" Jurisdiction" in 1934

If the Court concludes that Patchak has standing to claim that the Tribe was not "under Federal jurisdiction" in 1934 within the meaning of the IRA, 25 U.S.C. § 479, and that the courts retain jurisdiction over this case despite the Indian lands exception, it should either remand the case for further proceedings in the district court or affirm on the existing record. Remand would allow the Tribe to pursue its additional threshold defense of laches and claim preclusion, which the Tribe is entitled to have resolved before any court addresses the merits. If necessary, remand would also permit the district court to consider Patchak's novel IRA claim

in the first instance, entertaining full briefing and supervising the development of any additional factual record that might be required. While the existing record is, alternatively, adequate on its face to permit rejection of Patchak's claim, it was not developed with that claim in mind and would not be adequate to sustain a conclusion adverse to the Tribe.

A. This Court Should Not Address The Merits Of Patchak's Tribal Status Claim In The First Instance

The district court stayed briefing on Patchak's motion for summary judgment and never reached the merits of Patchak's "under Federal jurisdiction" claim. *Patchak*, 646 F.Supp.2d at 79 n.13; Apr. 9, 2009 Minute Order, (J.A.__). This Court should not address that claim in the first instance.[13]

First, in its motion for judgment on the pleadings, the Tribe argued in the alternative that Patchak's claim is barred by laches. Patchak had full notice both of the Secretary's action and of the availability of his current claim (which was being pressed by other parties in the *Carcieri* case) in May 2005, and yet he did not file his complaint until August 2007, to the severe prejudice of the Tribe. *See* pp.12-15, *supra*; Mot. J. on Pleadings at pp.12-16, R.19, (J.A.___). In addition, the

[13] At the outset of this appeal, the Tribe moved to dismiss in part on the ground that this issue, not having been briefed or passed upon below, was not ripe for review. *See* Document 1214675 (Nov. 6, 2009). On January 8, 2010, the Court referred that motion to the merits panel and directed the parties to address the issues presented by the motion in their briefs. *See* Document 1224629.

Tribe's answer raises a defense of claim preclusion, based on facts known to the Tribe strongly suggesting that Patchak is a member of or otherwise closely affiliated and in privity with MichGO, the local group that brought the first litigation challenging the trust acquisition of the Bradley Tract. *See* pp.12-15 & n.3, *supra*; Tribe Answer at p.7, R.14, (J.A.__); Sprague Decl. ¶¶ 18-21, R.13-2, (J.A.__). Both arguments would be best addressed by the district court in the first instance, and the preclusion claim would require some factual development. And both are threshold issues, properly raised, that the Tribe is entitled to have considered and resolved before any court addresses Patchak's tribal status claim on the merits.

Second, this Court has repeatedly emphasized that it generally "does not consider an issue not passed upon below." *Piersall v. Winter*, 435 F.3d 319, 325 (D.C. Cir. 2006) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). That rule applies with particular force to cases involving complex or novel legal issues, because those issues are better first addressed in the district court, "the forum in which Congress vested original jurisdiction . . . ." *Int'l Union, United Automobile, Aerospace & Ag. Implement Workers of Am. v. Broc*k, 783 F.2d 237, 253 (D.C. Cir. 1986).

Here, the district court not only declined to reach the issue Patchak seeks to present, but entered a stay forestalling any response to Patchak's motion for

summary judgment, including any exploration of whether there are relevant factual issues not addressed by the current administrative record. Although Patchak contends the meaning of "now under Federal jurisdiction" in 25 U.S.C. § 479 is settled after *Carcieri v. Salazar*, __ U.S. __, 129 S. Ct. 1058 (2009), that is not correct. On the contrary, the Supreme Court's holding was confined to the meaning of the word "now." *Id*. at 1063-1067, 1068. The Court made quite clear that it was not addressing the meaning of "under Federal jurisdiction" because "[n]one of the parties or *amici*, including the [tribe at issue] itself, ha[d] argued that the [t]ribe was under federal jurisdiction in 1934." *Id*. at 1068; *see also id*. at 1070 (Breyer, J. concurring); *id.* at 1071 (Souter and Ginsburg, JJ., dissenting in part) (arguing that case should be remanded for consideration of the "jurisdiction" issue).[14] Where the issue is contested, the meaning of "under Federal jurisdiction" remains an open question.

Here, both the Tribe and the United States have maintained that the Gun Lake Tribe was clearly "under Federal jurisdiction" in 1934, but neither had an opportunity to fully brief that question before the district court. Moreover, the

[14] Moreover, the Court related an unusual history in which the tribe in question had been "placed under formal guardianship by the Colony of Rhode Island in 1709," and federal officials had concluded, "in correspondence spanning a 10-year period from 1927 to 1937, . . . that the [t]ribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." 129 S.Ct. at 1061.

Carcieri issue first entered this case long after the Secretary made his decision to accept the Bradley Tract into trust. Even assuming that it is appropriate to review that decision in light of the Supreme Court's later interpretation of the IRA, there has been no consideration of whether an administrative record that was not developed with that question in mind is an adequate basis for that review; if not, of whether any additional development would be best accomplished in the district court or by remand to the Secretary; and, if the latter, on what terms the remand should be made. These issues would be best explored in the district court in the first instance—if they were properly presented in this case, which, as the Tribe has explained, they are not.

B. The Present Record Would Be Adequate To Reject Patchak's Argument, But Not To Sustain It

On the merits, the statutory language and the existing or public record demonstrate that the Gun Lake Tribe was "under Federal jurisdiction," within the meaning of 25 U.S.C. § 479, when the IRA was passed in 1934. As discussed below, the United States asserted jurisdiction over the Tribe in a series of treaties beginning in 1975; Congress, which alone has the power to terminate tribal status, never did so with respect to the Tribe; and the Tribe's re-acknowledgment proceedings conclusively established that the Tribe has continuously maintained its existence as a tribe up to the present day. Should the Court have any doubt on that

issue, however, the only proper course would be to remand the case for further development of the relevant arguments and facts. Patchak's claim is based on a remarkable series of errors and mischaracterization, largely relying upon materials outside the record.

Patchak begins with the assertion (Br. 23-24) that "under Federal jurisdiction" must mean exactly the same thing as "federally recognized"—by which he means "recognized" in a very modern legal sense, as in formally acknowledged by the Secretary under the regulations now at 25 C.F.R. Part 83 and listed on the official list now maintained by the Secretary under the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, Tit. I, § 104, 25 U.S.C. § 479a-1. That argument is both textually foreclosed and ahistorical in the extreme. The IRA provision at issue, 25 U.S.C. § 479, defines an "Indian" as a member "of any recognized tribe now under Federal jurisdiction." Elementary principles of statutory construction dictate that the term "recognized" in that phrase means something *different from* "under Federal jurisdiction," not that the two terms are synonymous; and the word "now" clearly modifies only the "jurisdiction" requirement, not the requirement of "recogni[tion]." *See also Carcieri*, 129 S. Ct. at 1069-1070 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."); *id*. at 1071 (Souter and Ginsburg, JJ., concurring in

part) (agreeing on this point). Moreover, as to "recognized," an Act passed in 1934 could not have had specific reference to a set of formal acknowledgment procedures (those now in Part 83 of the Secretary's regulations) that were first proposed in 1977 and adopted in 1978, *see* 42 Fed. Reg. 30,647 (June 16, 1977) (Procedures Governing Determination that Indian Group is Federally Recognized Indian Tribe); 43 Fed. Reg. 23,743 (June 1, 1978) (Procedures for Establishing that an American Indian Group Exists as an Indian Tribe).[15]

Patchak next argues that "under Federal jurisdiction" must at least require "some formal relationship with the federal government in 1934," and then asserts as a factual matter that the Gun Lake Tribe "had no such interaction." Br. 24; *see id*. at 24-26. The legal premise of that argument is wrong, at least to the extent that Patchak's version of a "formal relationship" would require something beyond the longstanding treaty and legal trust relationship, never terminated by Congress (which alone has that authority), clearly reflected by the present record. The factual assertion is also demonstrably false even on the current record (which, of

[15] For the same reason, there is no force to Patchak's repeated assertions (*e.g.*, Br. 23-24) that the Tribe and the United States have previously conceded lack of formal recognition in 1934. All the statements he cites relate only to whether the Tribe's status was properly acknowledged by the Secretary at various times—not to whether it was "under Federal jurisdiction." There has never been any dispute that for an extended period the Secretary erroneously failed to accord the Tribe full *recognition*. *See e.g.*, pp. 5-6, *supra*; pp. 49-51 & n.18, *infra*. That is the mistake the Secretary corrected when he formally re-acknowledged the Tribe, under the modern Part 83 regulations, in 1998. *See* pp. 6-7, *supra*.

course, was not developed to address this question), and finds no support in the extra-record material that Patchak repeatedly mischaracterizes in his brief.

What the existing administrative and public records show is that the United States asserted "Federal jurisdiction" over the Gun Lake Tribe no later than 1795, when the new Nation signed and ratified the Treaty of Greenville with, among others, Chief Match-E-Be-Nash-She-Wish. That treaty "acknowledge[d] [the signatory tribes] to be under the protection of the said United States and no other power whatever." 7 Stat. 49, 52 (1795). Jurisdiction was reaffirmed in other treaties throughout the nineteenth century. *See, e.g.*, Treaty of Detroit, 7 Stat. 105, 1-6 (1807) ("acknowledge themselves to be under the protection of the United States"); Treaty With The Wyandot, Etc., 7 Stat. 131, 131 (1815) ("agree again to place themselves under the protection of the United States"). In 1821, Chief Match-E-Be-Nash-She-Wish signed the Treaty of Chicago, 7 Stat. 288 (Aug. 29, 1821), in which the United States granted the Tribe federally-protected reservation land. The Tribe signed its last treaty in 1855. Treaty with the Ottawa and Chippewa, 11 Stat. 633 (July 31, 1855).[16]

[16] The Tribe was also a party to treaties in 1827, 1829, 1832 and 1833, and received benefits under yet another treaty in 1836. *See* Treaty with the Potta-watomie, 7 Stat. 305 (1827); Treaty with the Chippewa, 7 Stat. 320 (1829); Treaty with the Pottawatomie, 7 Stat. 399 (1832); Treaty with the Chippewa, 7 Stat. 431 (1833); and Treaty with the Ottawa and Chippewa Nations of Indians, 7 Stat. 491 (1836).

The United States' specific treaty obligations to the Tribe appear to have lapsed—or been broken or neglected—by 1870, when the United States made its final payment under the treaty of 1855. *See* 62 Fed. Reg. 38,113.[17] Nonetheless, as the Secretary expressly found during the course of the Tribe's formal re-acknowledgment proceedings, Congress never terminated the Tribe's jurisdictional status or dissolved the trust relationship between the United States and the Tribe. *See* 62 Fed. Reg. 38,113 (Jul. 16, 1997) (Proposed Finding); 63 Fed. Reg. 56,936 (Oct. 23, 1998) (Final Determination).[18]

That is especially significant because "once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when

[17] The 1855 treaty obligated the United States to provide the signatory tribes "land in Oceana and Mason Counties, Michigan." Final EA, AR 2059, (J.A.__). "Implementation of these provisions by the Federal Government was seriously delayed and never completed." *Id*. The Office of Indian Affairs agent initially responsible for implementing the 1855 treaty was evidently "thoroughly rotten and corrupt." Final EA, AR 2119, (J.A.__).

[18] At one point there was some confusion over whether the 1855 treaty terminated or dissolved the signatory tribes, of which there were many. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney*, 369 F.3d 960, 961-962 (6th Cir. 2004). Both the Secretary and the courts, however, have concluded that the only entity "dissolved" by that treaty was an artificial conglomeration of Ottawa, Chippewa, and Pottawatomi tribes that had been amalgamated into a single organization for payment and other purposes related to the treaty itself. None of the individual tribes was terminated. *See id*. at 961-962 & n.2 (reciting history); Final EA, AR 2067 (same), (J.A.__); *see also Carcieri*, 129 S.Ct. at 1070 (Breyer, J., concurring) (discussing history of Grand Traverse Band of Ottawa and Chippewa Indians).

its guardianship shall cease"—and "any withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). Likewise, only Congress can limit a recognized tribe's sovereign powers, or otherwise modify its jurisdictional status. *See e.g., United States v. Nice*, 241 U.S. 591, 598 (1916) (only Congress may "determine when and how" the "tribal relation may be dissolved"). Indeed, in 1994, Congress expressly directed that once a tribe has been formally recognized by any of the three methods in current use—special statute, secretarial acknowledgment (as in the case of Gun Lake), or judicial decision—that recognition "may not be terminated except by an Act of Congress." Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(3)-(4), 108 Stat. 4791, 25 U.S.C. § 479a (note). The same principle applies to tribes whose federal jurisdictional status was recognized, in an earlier era, through the conclusion of treaties. *Cf. e.g., Tiger v. Western Investment Company*, 221 U.S. 286, 315 (1911) ("[I]t may be taken as the settled doctrine of this Court that Congress . . . has a right to determine for itself when the guardianship . . . over the Indian shall cease."). Accordingly, there should be no question that, for purposes of the IRA, the Gun Lake Tribe was "under the federal jurisdiction of the United States . . . in 1934." *Carcieri*, 129 S. Ct. at 1068.

In support of his contrary position, Patchak argues repeatedly that the Secretary determined, during the formal re-acknowledgment process, that the Tribe was last acknowledged in 1870. *E.g.*, Br. 24. That determination, however, related to recognition, not federal jurisdiction; and, in any event, it was carefully framed as only a determination of the last date of "*unambiguous* Federal acknowledgment" for purposes of determining what showings the Tribe was required to make concerning its continuous historical existence as a tribe. *See* 63 Fed. Reg. 56,936 (emphasis added); 25 C.F.R. § 83.8(a). The Secretary's ultimate finding, of course, was that the Tribe has continuously maintained its existence "as an American Indian entity," including as a "distinct community" and "autonomous entity," throughout the history of the United States. *See* 62 Fed. Reg. 38,113; 63 Fed. Reg. 56,936.

Patchak likewise points repeatedly to a preliminary technical assistance letter addressing the "unambiguous Federal acknowledgment" issue—not in the present administrative record but attached as Exhibit A to his brief—for the proposition that in 1870 the Tribe "formally br[oke] off all relations with the United States government." *E.g.*, Br. 25. Even leaving aside, however, the fact that the cited letter contains only "preliminary" conclusions for a limited purpose, "not intended to reflect conclusions concerning successorship in interest to a particular treaty or other rights" (Letter p.2), it says nothing of the kind. The letter

recites that unambiguous federal acknowledgment continued through 1870, at which point the Tribe returned to its home in Michigan, where the United States continued to deal with its members "as individual Indians." *Id*. It draws (and could have drawn) no conclusion that the United States ever disclaimed *jurisdiction* over the Tribe—and it says nothing at all about the Tribe "formally breaking off all relations with the United States" (Br. 25).

The other non-record document submitted by Patchak with his brief (as Exhibit B) does no more to support his case. At most, that document—purportedly a 1937 letter from the Commissioner of Indian Affairs listing tribes "under the Indian Reorganization Act" (Ex. B at 1), although of course its meaning, context, and significance have never been explored on this record—is of a piece with other administrative determinations from that period that have proven notoriously unreliable and incomplete. In 1939, for example, Interior Department officials decided not to allow landless tribes in Lower Michigan to organize under the IRA. As the United States explained to the district court in this case, however, that decision was reached "because the United States had no funding left to purchase land or provide services, *not because [the tribes] did not fit the definition of Indian under the IRA*." US MTD Reply at 3, R.28, (J.A.__) (emphasis added); *see TOMAC v. Norton*, 433 F.3d 852, 855-856 (D.C. Cir. 2006) (noting same 1939 decision and describing "misguided assumption that residence on trust lands held

in common for the Band was required for reorganization and the fact that appropriations to purchase such lands had run out").[19] Likewise, Justice Breyer's concurrence in *Carcieri* cites several examples of erroneous initial administrative determinations. 129 S. Ct. at 1069-1070 (Breyer, J., concurring). Even leaving aside the distinction between recognition and "jurisdiction," Patchak's untested, extra-record document can carry no significant weight when, as Justice Breyer observed, "We know … that following the Indian Reorganization Act's enactment, the [Interior] Department compiled a list of 258 tribes covered by the Act; and we know that it wrongly left certain tribes off the list." *Id*. at 1069.

Finally, if it were necessary to look beyond the legal jurisdictional status established by the Gun Lake Tribe's treaty history and the absence of any congressional termination, it would still be wrong for Patchak to argue, even on the present record, that the Tribe had "no interaction" with the United States in 1934 (Br. 24). Although the existing administrative record was not developed with this

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[19] *See also Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705 (W.D. Mich. 1999); 25 U.S.C. § 1300j(6) ("Agents of the Federal Government in 1939 made an administrative decision not to provide services or extend the benefits of the [IRA] to any Indian tribes in Michigan's lower peninsula); *id.* §§ 1300k(5) & 1300k(8) (same 1939 BIA decision denied IRA benefits to the Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians "[d]ue to a lack of Federal appropriations"); H.R. Rep. No. 110-794, 2008 WL 2925132, at *2 (July 29, 2008) (although IRA was enacted to "assist landless bands," Secretary lacked funds to purchase land and therefore did not extend benefits to landless tribes in Michigan).

issue in mind, it reveals, for example, that the Tribe's children attended the federal Mount Pleasant Indian School until 1934, and area children attended federal boarding schools until at least 1939. *See* Final EA, AR 2029-30 and 2087, (J.A.__). There is no evidence that any Gun Lake child was ever denied admission for alleged lack of tribal status. And the Interior Department continued to monitor and distinctly identify the Tribe in its reports during the IRA period, including in its 1939 Report on Indians in Michigan. Final EA, AR 2016 (noting the "Bradley group"), (J.A. __). These circumstances support the United States' representation to the district court in this case that Patchak "is incorrect in stating that the Gun Lake Band did not have a relationship with the federal government in 1934." Federal Defs.['] Reply in Supp. of Mot. to Dismiss at 4, R.28, (J.A.__).

Under these circumstances, based on materials in the current administrative record and on public-record materials such as treaties and statutes, this Court could properly conclude, if it chooses to reach the issue, that in 1934 the Gun Lake Tribe was plainly "under Federal jurisdiction" within the meaning of the Indian Reorganization Act. Should the Court entertain any doubt on that score, however, the only proper course would be to remand the case for further proceedings, first on the Tribe's remaining threshold defenses of laches and preclusion and then, if necessary, on the merits, after full briefing and whatever further development of the record may prove appropriate on further consideration by the district court.

CONCLUSION

The district court's judgment dismissing this case for lack of standing should be affirmed, or the case should be dismissed for lack of subject matter jurisdiction. Alternatively, the case should be remanded for further proceedings, unless the Court determines that the Secretary's decision may be affirmed on the record already before the Court.

Dated: May 10, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th 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.

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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 13,698 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2007.

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INTERVENOR-APPELLEE'S
COUNTER-DESIGNATION OF DOCUMENTS

Designation of Entry	Date Entered	Docket Entry No.	AR Cite	Joint Appendix Page No.
PLEADINGS				
Tribe's Motion to Intervene Ex. 2 Declaration of D.K. Sprague	08/19/08	13-2	--	--
Ex. A to Sprague Decl.	8/19/08	13-3	--	--
Tribe's Answer to Complaint	08/28/08	14	--	--
Tribe Motion for Judgment on the Pleadings	10/06/08	19	--	--
Patchak's Mem. Supp. Motion to Stay	10/17/08	23-1	--	--
Affidavit of David Patchak in Support of Opposition to Motion to Dismiss	10/21/08	26	--	--
United States' Reply to Opposition to Motion to Dismiss	10/27/08	28	--	--

Tribe's Reply in Support of Motion for Judgment on the Pleadings	10/27/08	30	--	--
Ex. A *City of Tacoma v. Andrus*	10/27/08	30-1	--	--
Patchak's Emergency Motion for Temporary Restraining Order	01/23/09	46	--	--
Transcript of Temporary Restraining Order Conference (Cover page, pp.5, 11, 35)	01/26/09	--	--	--
Order	03/02/09	50	--	--
David Patchak's Memorandum in Support of Motion for Summary Judgment	04/02/09	52-1	--	--
Minute Order	04/09/09		--	--
Transcript of Temporary Restraining Order	01/26/09	--	--	--

ADMINISTRATIVE RECORD

Final Environmental Assessment	10/6/08	--	000006-000213	

Final Environmental Assessment, Appx. D	10/6/08	--	000454 000467	
Final Environmental Assessment, Appx. P	10/6/08	--	000833 000834 000841-42 000884 000886 000892 000893 000894 000895 000904-05 000906 000923 000924-26 000928 000937-38 000941 001024-29 001055-56	
Gun Lake Tribe's Fee-to-Trust Application	10/6/08	--	001438-52	
Summary of Criteria	10/6/08	--	002016	
Summary of Critera	10/6/08	--	002029-30, 002087	
Historical Technical Report	10/6/08	--	002087-88	
Final Environmental Assessment	10/6/08	--	002059 002119 002067	

Proposed Finding	10/6/08	--	002140	
December 2002 Patchak comments to the Bureau of Indian Affairs Midwest Regional Office	10/6/08	--	011324	
March 2001 Patchak comments to the Secretary and the President of the United States regarding the proposed casino	10/6/08	--	011529	