MISADVENTURES IN INDIAN LAW: THE SUPREME COURT'S *PATCHAK* DECISION

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"After today, any person may sue under the Administrative Procedure Act . . . to divest the Federal Government of title to and possession of land held in trust for Indian tribes . . . so long as the complaint does not assert a personal interest in the land."[1] - Justice Sotomayor, dissenting in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.

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Ever since European colonization of the Americas began in the fifteenth century, there has been friction between the new arrivals and the native inhabitants. The United States has dealt with its "Indian problem" through assimilation, reservations, and eventually, self-determination for Indian tribes. But Indian tribes have never truly lost their sovereignty. Over the years, the United States has developed a vast body of Indian law to try and find a place for tribal sovereignty in a legal and political system created by the conquerors. In a recent case, the Supreme Court created a new rule that will allow non-Indians to sue the Federal Government to divest the government of title to land held in trust for Indian tribes. The decision has dealt a blow to tribal sovereignty by rendering the trust status of tribal lands uncertain. That uncertainty should be removed by legislative action.

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1. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2212 (2012) (Sotomayor, J., dissenting).

INTRODUCTION

The Gun Lake Casino opened in February 2011.[2] It is the product of a long campaign by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band) to pursue economic development as a sovereign.[3] The casino is located on tribal trust land in Wayland County, Michigan. It shares millions of dollars of revenue with the state of Michigan[4] and is a major contributor to local charities.[5] Despite the economic benefits that the Band's casino brings to the community,[6] the casino's future is at risk. Litigation brought by neighboring landowner David Patchak threatens the trust status of the land beneath the casino. Patchak is using the Administrative Procedure Act (APA) to challenge the authority of the Secretary of the Interior

2. Garret Ellison, *Gun Lake Casino in Wayland to Open February 11*, MLIVE (Jan. 22, 2011, 12:13 AM), http://www.mlive.com/business/west-michigan/index.ssf/2011/01/gun_lake_casino_to_open.html.

3. Gale Courey Toensing, *Experts Urge Congressional* Carcieri *Fix— Again*, INDIAN COUNTRY TODAY (Sept. 18, 2012), http://indiancountrytodaymedianetwork.com/article/experts-urge-congressional-%3Ci%3Ecarcieri%3C/i%3E-fix%E2%80%94again-134595.

4. *See* Garret Ellison, *Gun Lake Casino Pays out $7.8 Million to State, Local Governments*, MLIVE (Nov. 28, 2011, 2:17 PM), http://www.mlive.com/news/grand-rapids/index.ssf/2011/11/gun_lake_casino_pays_out_78_mi.html.

5. *See, e.g.*, Gale Courey Toensing, *Gun Lake Casino Raises $36K for Breast Cancer Awareness Month*, INDIAN COUNTRY TODAY (Nov. 14, 2012), http://indiancountrytodaymedianetwork.com/article/gun-lake-casino-raises-36k-breast-cancer-awareness-month-145665.

6. *See* Brief of Wayland Township et al. as Amici Curiae Supporting Petitioners at 7, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) (Nos. 11-246 & 11-247), *available at* http://turtletalk.files.wordpress.com/2012/02/wayland-twp-et-al-amicus-brief.pdf ("The Band's development of the trust lands is providing significant and much-needed economic benefits to local governments, businesses, and community residents.").

(the Secretary) to take the land into trust for the Band.[7] He asserts no ownership interest in the land at stake, but has concerns about how the casino will affect his rural community.[8] In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Supreme Court considered whether someone in Patchak's position may sue to divest the federal government of title to land that it has taken into trust for an Indian tribe.[9] The Court's recent decision will affect the Gun Lake Casino as well as the viability of tribal economic development projects across the country.

The Supreme Court decided the issue in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* on June 18, 2012.[10] An eight-justice majority handed down two administrative law holdings that will have profound effects on Indian law as well as on the ground in Indian Country. The Court in *Patchak* considered whether there existed any legal barrier to a suit brought under the APA that threatened the trust status of land held by the federal government as trustee for an Indian tribe.[11] The Court first held that the Quiet Title Act, which waives sovereign immunity in many quiet title actions against the federal government but expressly exempts challenges to the government's title to Indian trust lands,[12] did not bar suit.[13] Second, the Court held that a neighboring landowner had standing to challenge the Secretary's decision to take the land into trust.[14]

The *Patchak* decision allows increased litigation to delay an already protracted fee-to-trust process,[15] yet promises only speculative benefits. Judicial review of agency action is

7. NIMBY (Not In My Backyard) is an acronym popularized in the 1980's by Thatcherite politician Nicholas Ridley. It is often used pejoratively to describe opposition to development projects (like the Gun Lake Casino). The phrase also captures the tension between particularized, local interests and the greater good of the community.

8. *See Patchak*, 132 S. Ct. at 2202–03, 2207.

9. *Id.* at 2203.

10. *Id.* at 2199.

11. *Id.* at 2203.

12. 28 U.S.C. § 2409a (2012).

13. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2206 (2012).

14. *Id.* at 2212.

15. The fee-to-trust process is the mechanism by which the federal government takes title to land into trust for an Indian tribe. *See* discussion *infra* Part I.C.

necessary to ensure that the interests of landowners like the challenger in *Patchak* are considered during the fee-to-trust process. However, such consideration should take place before title to the land has vested in the United States. Allowing suits after that point creates uncertainty and increases transaction costs. The threat of litigation leads to uncertainty in the federal government's title to the land and can make it difficult for a tribe to finance much-needed development projects.[16] *Patchak* thus frustrates Congress's policy of encouraging Indian self-determination while providing little additional benefit to neighboring landowners, whose interests have already been considered before title to the trust land vests in the United States.

The rule of *Patchak* therefore cannot stand; it rests on dubious legal conclusions and will have deleterious effects on Indian Country. The most efficient way to remedy the situation would be for the Supreme Court to reverse its position on the existence of sovereign immunity under the Quiet Title Act. Before the Court's decision in *Patchak*, a persuasive body of case law supported the position that the Quiet Title Act bars suits that seek to divest the federal government of title to Indian trust land, regardless of whether the plaintiff has an ownership interest in the land at stake.[17] But because eight justices agreed with the *Patchak* ruling, the chances of the Court overruling its holding are vanishingly slim. Therefore, the most effective solution to *Patchak* is a legislative fix. The fact that *Patchak* adds to the problems caused by another contentious, recently-decided Indian law case, *Carcieri v. Salazar*,[18] might provide the impetus for congressional fixes to both. However, the disappointing results in both cases suggest that something has gone seriously amiss with the Supreme Court's recent Indian law jurisprudence. In both cases, the

16. *See* Gale Courey Toensing & Rob Capriccioso, *Supremes' Ruling Opens Floodgates to Challenges of Indian Land Trust Acquisition*, INDIAN COUNTRY MEDIA NETWORK (June 19, 2012), http://indiancountrytodaymedianetwork.com/article/supremes%E2%80%99-ruling-opens-floodgates-to-challenges-of-indian-land-trust-acquisition-119342.

17. *See, e.g.*, Fla. Dep't of Bus. Regulation v. Dep't of Interior, 768 F.2d 1248, 1254–55 (11th Cir. 1987).

18. 555 U.S. 379, 382 (2009). In *Carcieri*, the Court held that the Secretary's authority to take land into trust extends only to tribes that were recognized by the federal government when the IRA was passed in 1934. *Id.* at 382. *See infra* Part I.C. for a discusssion of the case and its consequences.

Justices abandoned the Indian law canons of construction[19] and discounted the federal government's trust obligations toward Indian tribes.

Accordingly, this Casenote argues that Congress should overrule the *Patchak* and *Carcieri* decisions. Congress should pass legislation that protects the fee-to-trust process from dilatory litigation while preserving a mechanism for balancing the interests of other members of the community. This legislation should require challengers to a land acquisition to file suit within thirty days of the Secretary's declaration of intent to take land into trust.

Part I discusses *Patchak*, including an explanation of the fee-to-trust process, which provided the basis for Patchak's challenge. Part II discusses the consequences of *Patchak* and argues that private citizens should not be allowed to challenge land acquisitions already consummated by the Secretary. Part III proposes a legislative fix to the problem.

I. BACKGROUND

American Indian law, charged with historical tensions and influenced by extra-constitutional notions of sovereignty, is complex and unique in American jurisprudence. No brief exposition can do justice to the federal common law and the four volumes of the United States Code Annotated that attempt to define it.[20] Nevertheless, before analyzing *Patchak*, this Casenote discusses two aspects of Indian law critical to that decision: (1) the trust relationship, and (2) the Indian law canons of construction. These concepts are discussed in Part I.A. and Part I.B., respectively. Part I.C. then explains the administrative process through which the Secretary takes land into trust for tribes, and takes note of a thicket of legal issues that plague this process, including those caused by the *Carcieri* decision. Part I.D. describes the pre-*Patchak* circuit split concerning non-owner plaintiffs' ability to sue the Secretary to divest the federal government of title to Indian trust land. Part I.E. shows how the Supreme Court resolved this split in its *Patchak* decision.

19. *See infra* Part I.B. for an explanation of the Indian law canons of construction.

20. *See* Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 37 (2003–04).

A. The Trust Relationship

The Supreme Court defined the unique relationship between the federal government and Indian tribes in the historic case of *Cherokee Nation v. Georgia.*[21] There, the Court held that Indian tribes were "nations" but not "foreign nations" within the meaning of the Constitution.[22] Writing for the majority, Chief Justice John Marshall stated that Indian tribes are "domestic dependent nations":

> They occupy a territory to which [the United States] assert[s] a title independent of their will . . . . Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[23]

The "wardship" that Chief Justice Marshall described has come to be known as the "trust doctrine."[24] As the doctrine has evolved over the years, it has shed its more paternalistic turns of phrase.[25] Yet the assumption remains that history has given rise to a special relationship between the United States and Indian tribes, a relationship that imposes obligations on the United States as a trustee. The trust doctrine includes both a general trust relationship, which imposes a duty of "fairness and protection," and a stricter fiduciary relationship when certain conditions are met.[26] Because the dispute in *Patchak* involves an asset (land) held in trust for the Band by the federal government, it implicates those fiduciary obligations.

21. 30 U.S. (5 Pet.) 1 (1831).

22. *Id.* at 16–18.

23. *Id.* at 17.

24. John Fredericks III, *Indian Lands: Financing Indian Agriculture*, 14 AM. INDIAN L. REV. 105, 107–108 (1989).

25. For example, in 1942, the Court put it this way: "[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

26. Fredericks, *supra* note 24, at 109; *see also* United States v. Mitchell, 463 U.S. 206, 225–26 (1983). *Mitchell* held that a fiduciary obligation on the part of the federal government arose where, through extensive statutes and regulations, the government assumed control over a tribe's timber resources. *Mitchell*, 463 U.S. at 224.

B. Indian Law Canons of Construction

The historical relationship between Indian tribes and the federal government provides the basis for judicial use of the Indian law canons of construction.[27] Using these canons, courts have required that the language of treaties, statutes, executive orders, and other sources of positive law:

> [B]e liberally construed in favor of the Indians and . . . all ambiguities . . . be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[28]

The Indian law interpretive canons serve as tools of linguistic interpretation, but they also support important structural features of Indian law.[29] For example, the canons protect tribal self-governance and treaty rights from all but the clearest manifestations of Congress's plenary power to abrogate Indian treaties, by requiring a "clear statement of congressional intent" to take away a tribe's treaty rights.[30] One commentator has therefore characterized the Indian law canons of construction as a way to counteract the effects of colonialism on inherent tribal power.[31] Because "[t]he 'Courts of the conqueror' cannot realistically be expected to invalidate even harsh colonial measures in the name of the very constitution established by the colonizers," policy-based interpretive techniques provide needed protection to tribal sovereignty.[32]

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27. Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.").

28. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1) (Nell Jessop Newton ed., 2012) (citations omitted).

29. *Id.* § 2.02(2) (citations omitted).

30. *E.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (declining "to construe the Termination Act as a backhanded way of abrogating [treaty] rights" where there was no explicit statement to that effect from Congress).

31. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 417 (1993).

32. *Id.* at 416–17.

The Indian law canons of construction favor the preservation of tribal rights. They encumber the government's ability to renege on its treaty obligations—Congress must clearly manifest its intent to abrogate an Indian treaty[33]—and should, in theory, facilitate the passage of legislation that is meant to restore tribal rights. For the Indian law canons of construction to perform their functions, however, they must act on some positive law. In the *Patchak* case, for example, the application of the canons of construction to the Quiet Title Act[34] and the Indian Reorganization Act[35] would have produced a result more consistent with tribal rights.

C. Taking Land Into Trust

Congress passed the Indian Reorganization Act (IRA) in 1934 to reverse the effects of allotment-era policies and further Indian self-determination and economic development.[36] Section 5 of the IRA authorizes the Secretary of the Interior "to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians."[37] This provision allows the Secretary to give the acquired land trust status, ensuring benefits like exemption from state and local taxation.[38] The Secretary can then add the land to an existing reservation or use it as the land base for a new reservation.[39]

The fee-to-trust process proceeds according to an elaborate set of regulations originally promulgated by the Bureau of Indian Affairs of the Department of the Interior in 1980.[40] The current regulations reflect adjustments made during a spate of litigation in the 1990s over the availability of judicial review of

33. *Menominee Tribe of Indians,* 391 U.S. at 413.

34. 28 U.S.C. § 2409a(a) states that the Quiet Title Act's waiver of sovereign immunity "does not apply to trust or restricted Indian lands[.]" 28 U.S.C. § 2409(a) (2009).

35. 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire real property interests "for the purpose of providing lands for Indians." Indian Reorganization Act § 5, 25 U.S.C. § 465 (2012).

36. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (describing the legislative history of the IRA).

37. 25 U.S.C. § 465 (2012).

38. *Id.*

39. *Id.*; *see also* Donahue v. Butz, 363 F. Supp. 1316, 1323 (N.D. Cal. 1973).

40. *See* 25 C.F.R. §§ 151.1–15 (2012).

land acquisitions by the Secretary.[41] The regulations detail the "authorities, policy, and procedures governing the acquisition of land by the United States in trust for individual Indians and tribes."[42] They set forth the factors that the Secretary is required to consider in evaluating prospective acquisitions[43] and mandate a thirty-day waiting period before any final determination is made.[44]

The waiting-period rule was promulgated in response to the Eighth Circuit's decision in *South Dakota v. U.S. Department of the Interior* [hereinafter *South Dakota I*].[45] The court in *South Dakota I* was concerned that Section 5 "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present."[46] The court thus held, in part because judicial review of the Secretary of the Interior's decision to take land into trust was unavailable, that Section 5 of the IRA unconstitutionally delegated legislative authority to the Secretary.[47] While a petition for a writ of certiorari was pending with the Supreme Court, the Department of the Interior established a procedure for judicial review of the Secretary's fee-to-trust decisions under Section 5.[48] Under the revised rule, the Secretary may not actually take land into trust until notice to the public has been published for at least thirty days.[49] It is Interior's policy to consummate a fee-to-trust acquisition only after claims brought under the regulations have been resolved.[50] The background to

41. *See, e.g.*, Dep't of Interior v. South Dakota, 519 U.S. 919, 920–21 (1996) [hereinafter *South Dakota II*] (Scalia, J. dissenting) (explaining the procedural history of a challenge to the Secretary's authority to take land into trust as an unconstitutional delegation of legislative power).

42. 25 C.F.R. § 151.1 (2012).

43. *See* 25 C.F.R. §§ 151.10–11 (2012). Before taking the land into trust, the Secretary must consider (among other things) "[t]he purposes for which the land will be used[,]" and the tribe must provide a business plan that sets out "the anticipated economic benefits associated with the proposed use." *Id.* §§ 151.10(c), 151.11(c).

44. 25 C.F.R. § 151.12 (2012).

45. South Dakota v. U.S. Dep't of Interior, 69 F.3d 878, 882 (8th Cir. 1995).

46. *Id.* at 882.

47. *Id.* at 884. *But see South Dakota II*, 519 U.S. 919, 921–22 (1996) (Scalia, J., dissenting) (stating that the availability of judicial review has nothing to do with the delegation question and noting that the Eighth Circuit's decision was arguably not based on this factor).

48. *South Dakota II,* 519 U.S. at 920 (Scalia, J., dissenting).

49. 25 C.F.R. § 151.12(b) (2012).

50. Donald "Del" Laverdure, Acting Assistant Secretary–Indian Affairs, U.S. Dep't of the Interior, Testimony before the Senate Committee on Indian Affairs on

the final rule states that the rule allows for judicial review of an agency decision before a transfer of title occurs, but that the Quiet Title Act[51] bars review once title has been transferred.[52] Shortly after the final rule was enacted, the Supreme Court granted certiorari in *South Dakota I*, vacated the Eighth Circuit's decision, and remanded the case to the Secretary for reconsideration.[53] Thus, the Court appeared to accept the Department of the Interior's position that the Quiet Title Act would bar challenges to a finalized fee-to-trust acquisition.[54] By using a grant-vacate-remand, however, the Court avoided an explicit ruling to that effect.[55]

This uneasy truce on the judicial review front remained until the Supreme Court revisited the issue in *Patchak*. In the meantime, however, the Court's resolution of a different challenge to the IRA had the effect of further constraining the fee-to-trust process. In *Carcieri v. Salazar*, the Court decided that the Secretary's authority under Section 5 is limited to acquiring land for those tribes that were "federally recognized" in June of 1934, when Congress passed the IRA.[56] The case arose when, after the Secretary announced that he intended to take a parcel of land in Charleston, South Carolina into trust for the Narragansett Tribe, the state and local governments objected at the agency level and then in federal court.[57] Writing for the majority, Justice Thomas narrowly construed the phrase, "now under Federal jurisdiction," holding that it applied only to tribes that were federally recognized when the IRA was passed in June of 1934.[58] The Narragansett Tribe did

Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak* Decisions (Sept. 13, 2012) [hereinafter Laverdure Testimony], *available at* http://www.indian.senate.gov/hearings/upload/Donald-Laverdure-testimony091312.pdf.

51. 28 U.S.C. § 2409a(a) (2012) (stating that the Quiet Title Act's waiver of sovereign immunity "does not apply to trust or restricted Indian lands").

52. Land Acquisitions, 61 Fed. Reg. 18,082, 18,082 (Apr. 24, 1996) (to be codified at 25 C.F.R pt. 151).

53. *South Dakota II*, 519 U.S. 919, 919–20 (1996).

54. *See id.* at 920–22 (Scalia, J., dissenting) (criticizing the grant-vacate-remand in response to the agency's "about-face" and taking issue with the sufficiency of judicial review available only as a matter of agency discretion, implying that judicial review would otherwise be barred by the Quiet Title Act).

55. *Id.* at 919–20.

56. Carcieri v. Salazar, 555 U.S. 379, 395–96 (2009).

57. *Id.* at 382.

58. *Id.* at 395.

not receive federal recognition until 1983.[59] Therefore, the Court held that the Secretary had exceeded his authority by taking the land into trust for the tribe.[60] By restricting the Secretary's authority to take land into trust, the *Carcieri* decision has impeded economic development in Indian Country.[61] More important for this Casenote, in the *Patchak* case the plaintiff disputed the Band's status as a federally-recognized tribe as part of his challenge to the Secretary's acquisition of the Bradley property for the Band.[62] This shows that the risk of lawsuits capable of divesting the federal government of title to Indian trust lands is immanent in the confluence of *Carcieri* and *Patchak*.

*D. Challenging a Fee-to-Trust Acquisition Pre-*Patchak

The viability of challenges like Patchak's, which potentially divest the United States of title to land that the federal government has already acquired as trustee for an Indian tribe, has been considered by several circuits over the last four decades. The Ninth,[63] Tenth,[64] and Eleventh[65] Circuits all ruled that the Quiet Title Act maintained the federal government's immunity from such suits. This interpretation stood unchallenged until the D.C. Circuit's decision in *Patchak*. The D.C. Circuit held that the Indian lands exception to the Quiet Title Act's waiver of sovereign

59. *Id.* at 382–84.

60. *Id.* at 382–83.

61. *Carcieri* causes two main problems for a tribe planning a development project. First, the tribe may have to prove that it was "federally recognized" in 1934, which wastes tribal resources. Second, a tribe's financing costs may increase if lenders perceive a risk that the tribe was not "federally recognized" in 1934. *See* Matthew L.M. Fletcher, *Fixing Carcieri for Michigan*, TURTLE TALK (June 15, 2012), http://turtletalk.wordpress.com/2012/06/15/fixing-carcieri-for-michigan/; Matthew L.M. Fletcher, *Carcieri Chart*, TURTLE TALK (Nov. 30, 2012), http://turtletalk.files.wordpress.com/2012/11/carcieri-chart.pdf.

62. The Supreme Court did not reach the merits of this "*Carcieri* challenge" in *Patchak*. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2204 n.2 (2012).

63. Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139 (9th Cir. 1987).

64. Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004); Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005); *see also* Governor of Kan. v. Kempthorne, 516 F.3d 833 (10th Cir. 2008).

65. Fla. Dep't of Bus. Regulation v. U.S. Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985).

immunity applied only to quiet title actions—cases in which the plaintiff claims an ownership interest adverse to the federal government's in property held in trust for a tribe.[66] This construction of the law means that the statutory reservation of sovereign immunity does not apply to cases like *Patchak*, where the plaintiff seeks to divest the federal government of title to Indian trust land without himself asserting an ownership interest in the land.[67] The following paragraphs examine the circuit split in more detail by considering each court's reasoning in chronological order.

In 1985, the Eleventh Circuit was the first to address the role of the Quiet Title Act in challenges to the Secretary's fee-to-trust land acquisitions.[68] In *Florida Department of Business Regulation v. Department of the Interior*, Florida sued the Secretary to divest the United States of title to land that it had recently acquired in trust for the Seminole tribe.[69] Although Florida initially acceded to the acquisition, the State began to protest the Secretary's decision after the Seminole Tribe began selling (tax-free) cigarettes on the land.[70] The substance of the State's complaint was that the Secretary had abused his discretion in failing to comply with some of the Department of the Interior's regulations.[71] While the court recognized that Florida's suit was not technically a quiet title action, it held that the Quiet Title Act's reservation of sovereign immunity with respect to Indian trust lands nevertheless applied.[72] The court's reasoning emphasized practicalities, such as the functional equivalence of the relief sought in the case before it to that sought in a quiet title action (divestiture). It also noted that such lawsuits would potentially interfere with the trust relationship between tribes and the federal government.[73] Moreover, the court pointed out that "[i]t would be anomalous to allow others, whose interest might be less than that of an

66. Patchak v. Salazar, 632 F.3d 702, 710 (D.C. Cir. 2011).

67. Presumably, if Patchak's challenge is successful, title to the Bradley Property will revert to the tribe, which owned the land in fee before the Secretary acquired it. This would effectively condemn Gun Lake Casino by subjecting the property to Michigan state law.

68. *See Fla. Dep't of Bus. Regulation*, 768 F.2d at 1248.

69. *Id.* at 1250–51.

70. *Id.* at 1250.

71. *Id.* at 1252.

72. *Id.* at 1254.

73. *Id.*

adverse claimant, to divest the sovereign of title to Indian trust lands."[74]

Two years later, in *Metropolitan Water District of Southern California v. United States*, the Ninth Circuit took up the issue on facts similar to those in *Florida Department of Business Regulation*.[75] *Metropolitan Water District* involved a secretarial order that changed the boundaries of the Fort Mojave Reservation and the subsequent dispute over water rights that resulted from the changed boundaries.[76] Like the court in *Florida Department of Business Regulation*, the Ninth Circuit recognized that, although the Metropolitan Water District did not seek to quiet title in itself, "[t]he effect of a successful challenge would be to quiet title in others than the Tribe."[77] The federal government's trust obligations toward the tribe were also an important factor in the decision.[78] The court, citing the legislative history of the Indian lands exception to the Quiet Title Act, held that allowing suits capable of divesting the federal government of title in trust lands would interfere with the discharge of the government's trust responsibilities.[79] The court reasoned that the Quiet Title Act's reservation of sovereign immunity in cases of Indian trust land was premised on the federal government's obligation to restore Indian tribes' historic land base.[80] Allowing third parties like Metropolitan Water District (or Patchak) to obstruct this process would be inconsistent with the trust relationship and the idea of a government-to-government relationship between tribes and the United States.[81]

In *Neighbors for Rational Development, Inc. v. Norton*, the Tenth Circuit joined the Ninth and Eleventh Circuits in holding that the Quiet Title Act prohibited ex post challenges to the Secretary's fee-to-trust acquisitions.[82] Neighbors for

74. *Id.* at 1254–55.

75. Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139 (9th Cir. 1987).

76. *Id.* at 141.

77. *Id.* at 143.

78. *Id.* at 144.

79. *Id.* at 144 (citing H.R. Rep. No. 1559, at 4557–58 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547).

80. *Id.*

81. *Id.* at 144.

82. Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004).

Rational Development, a group of local land and business owners, sued the Secretary under the APA to divest the federal government of title to land held in trust for nineteen Indian Pueblos.[83] On appeal, the Tenth Circuit held that the Quiet Title Act preserved the federal government's sovereign immunity in the face of such challenges.[84] The court stated that "[i]t is well settled law" that the Quiet Title Act's Indian lands exception may be invoked even in cases where the plaintiff does not claim an ownership interest in the property—in other words, in suits that are not, strictly speaking, actions to quiet title.[85] Like the courts in *Florida Department of Business Regulation* and *Metropolitan Water District*, the *Neighbors* court stated that its focus was on the effect the challenge might have on the federal government's title to Indian trust land, not on the plaintiff's characterization of its property interest.[86] *Neighbors* stood for the idea that the Quiet Title Act impliedly precluded the challengers from requesting that the trust acquisition be declared null and void.[87]

Thus, at the turn of the century, all three federal circuits to consider the question held that the Quiet Title Act blocked suits that could take title to Indian trust land away from the federal government.[88] The Ninth, Tenth, and Eleventh Circuits all reasoned that suits by plaintiffs like Patchak, who do not assert any ownership interest in the land but seek to divest the federal government of title for some other reason,[89] are functionally and legally equivalent to quiet title actions by plaintiffs who seek to quiet title in themselves.[90] Both types of suit interfere with the United States' fulfillment of its trust

83. *Id.* at 958–59.

84. *Id.* at 960–61. The district court had held that the Secretary had not acted arbitrarily or capriciously in taking the land into trust. *Id.*

85. *Id.* at 961.

86. *Id.* at 965.

87. *Id.* at 956.

88. *Id.* at 960–61; Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 143 (9th Cir. 1987); Fla. Dep't of Bus. Regulation v. U.S. Dep't of the Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

89. The paradigmatic example is a suit under the APA that seeks to set aside a land acquisition as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). *See, e.g.*, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2203 (2012).

90. *Neighbors*, 379 F.3d at 962; *Metro. Water Dist. of S. Cal.*, 830 F.2d at 144; *Fla. Dep't of Bus. Regulation*, 768 F.2d at 1254.

obligations to Indian tribes and create uncertainty in the federal government's title to Indian trust land.[91] The courts rejected the alternative interpretation—that the Quiet Title Act's reservation of sovereign immunity applies only to quiet title actions—because it was based on a formalistic distinction.[92] Despite the weakness of this myopic approach to the Quiet Title Act's reservation of sovereign immunity, it is the interpretation that the D.C. Circuit and the Supreme Court ultimately adopted in *Patchak*. The next Part analyzes the procedural history of *Patchak* and the decisions of both the D.C. Circuit and Supreme Court in the case.

E. The Patchak *Litigation*

In *Patchak v. Salazar*, the D.C. Circuit rejected the rationales of the Ninth, Tenth, and Eleventh Circuits discussed in the prior Part.[93] The controversy began in the spring of 2005, when the Secretary decided to take about 147 acres of land known as the "Bradley property" into trust for the Band.[94] The Band wanted to build a casino on the parcel, which it already owned in fee simple.[95] Michigan Gambling Opposition (MichGO) sued the Secretary during the thirty-day waiting period, alleging that her actions violated the National Environmental Policy Act and the Indian Gaming Regulatory Act.[96] The district court issued a stay of final action by the Secretary while the issues were being litigated.[97] The stay expired after the D.C. Circuit affirmed the district court's

91. *See, e.g.*, *Neighbors*, 379 F.3d at 962.

92. *Id.* at 963; *Metropolitan Water District*, 830 F.2d at 143; *Florida Dep't of Bus. Regulation*, 768 F.2d at 1254–55.

93. Patchak v. Salazar, 632 F. 3d 702, 711 (D.C. Cir. 2011).

94. 70 Fed. Reg. 25596–02, 25596 (May 13, 2005).

95. *Patchak*, 632 F.3d at 703; Mich. Gambling Opposition v. Norton, 477 F. Supp. 2d 1 (D.D.C. 2007). Although the Band owned the land, it could not operate a casino on the parcel while subject to Michigan state law. *See* MICH. COMP. LAWS ANN. § 432.203 (2012). Once the federal government holds the land in trust for the Band, the land is "Indian Country" on which the casino can operate as long as it is in compliance with the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2701 (2012).

96. *Patchak*, 632 F.3d at 703. Apparently, Patchak was part of this suit as well. Matthew L.M. Fletcher, *Ironies of the Patchak Decision*, TURTLE TALK (June 26, 2012), http://turtletalk.wordpress.com/2012/06/26/ironies-of-the-patchak-decision/.

97. *Patchak*, 632 F.3d at 703.

dismissal of MichGO's suit[98] and the Supreme Court denied certiorari.[99]

During the stay (but after the thirty-day window had closed), Patchak, who owned land near the Bradley property, initiated his own suit under the APA.[100] Patchak alleged that the planned casino would effect "an irreversible change in the rural character of the area;" increase property taxes and decrease property values; lead to an increase in crime; and cause "other aesthetic, socioeconomic, and environmental problems . . . ."[101] Patchak argued that the Secretary did not have authority to take the Band's land into trust because the Band was not federally recognized when Congress enacted the IRA in 1934.[102] When the stay expired, Patchak filed an emergency motion to prevent transfer of the Bradley property, but the district court denied the motion, and the Secretary took the Bradley property into trust for the Band in January 2009.[103] The district court dismissed Patchak's suit, holding that he did not have prudential standing to sue the Secretary over Section 5 because he was not within the IRA's zone of interests.[104] The district court did not reach the effect of the

98. *Id.*

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

100. *Id.*

101. Brief for Respondent at 6, Match-E-Be-Nash-She-Wish Band of Pottawatomi v. Patchak, 132 S. Ct. 2199 (2011) (Nos. 11-246 & 11-247) (citing Complaint at ¶9, Match-E-Be-Nash-She-Wish Band of Pottawatomi, 132 S. Ct. 2199 (Nos. 11-246 & 11-247)).

102. Two years later, in *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), the Supreme Court would agree with this line of argument; however, the merits of Patchak's challenge to the Band's status as a federally recognized tribe have yet to be adjudicated. *Patchak*, 632 F.3d at 703.

103. *Patchak*, 632 F.3d at 703–04 (D.C. Cir. 2011). This means that, although Patchak originally filed suit before title to the Bradley property had passed to the United States, his success on the merits will divest the United States of title acquired years ago. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2204 (2012) ("[A]ll parties agree that the suit now effectively seeks to divest the Federal Government of title to [the Bradley Property].").

104. Patchak v. Salazar, 646 F. Supp. 2d 72, 76 (D.D.C. 2009), *rev'd*, 632 F.3d 702 (D.C. Cir. 2011), *aff'd sub nom.* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). In deciding whether a plaintiff has standing under the APA to challenge agency action, the Court applies the relatively lenient "zone of interest" test and asks whether the plaintiff's interest is so tangential to the challenged action "that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

Quiet Title Act on Patchak's claim.[105]

Patchak appealed to the D.C. Circuit, which reversed the district court and held that Patchak did have prudential standing to sue under the APA. The court explained that Patchak's "stake in opposing the Band's casino [was] intense and obvious."[106] If Patchak could prove that the Band was not federally recognized in 1934—and thus that, under *Carcieri*, the Secretary's acquisition of the Bradley Property for the band was unauthorized by the IRA—then the IRA's limitations on secretarial authority would operate to protect his interests as a neighboring landowner.[107] Thus, according to the court, Patchak was a proper party to challenge the Secretary's authority under the IRA to take land into trust for the Band.[108]

As to the applicability of the Quiet Title Act, the D.C. Circuit held it to simply not apply because the case did not involve an action to quiet title.[109] Moreover, the court was unconvinced by the argument that the Quiet Title Act's reservation of sovereign immunity for cases in which a plaintiff asserts an ownership interest in Indian trust land prevented, by negative implication, a plaintiff with a lesser property interest from going forward under the APA's general waiver of sovereign immunity.[110] The court pointed out that the Congress that passed the Quiet Title Act in 1972 was not thinking about plaintiffs like Patchak because, at that time, the APA's general waiver of sovereign immunity did not exist.[111] Of course, the Quiet Title Act's Indian-lands exception evinces an intent to protect those lands from divestiture even if, in 1972, Congress did not anticipate challengers like Patchak. Nevertheless, the court dismissed legislative intent and focused on the label of the plaintiff's claim rather than the effect the action could have on the United States' title to Indian trust land.[112] In other words, under the court's analysis, the Quiet Title Act bars only quiet title actions, not APA claims, like Patchak's. The court

105. *Patchak*, 646 F. Supp. 2d at 78 n.12.
106. *Patchak*, 632 F.3d at 707.
107. *Id.* at 706.
108. *Id.*
109. *Id.* at 710–11.
110. *Id.* at 711.
111. *Id.*
112. *Id.* at 712 ("[W]e need not decide between 'these competing policy views.' . . . [I]t is enough that the terms of the Quiet Title Act do not cover Patchak's suit.") (quoting *Carcieri*, 555 U.S. 379, 392 (2009)).

also denied the relevance of the trust relationship between tribes and the federal government, finding that it simply did not "alter [the] analysis."[113]

On certiorari, the Supreme Court affirmed the D.C. Circuit's holding and resolved the circuit split regarding the government's immunity from suits, other than quiet title actions, with the potential to divest the government of title to Indian trust land.[114] The Court began by considering whether sovereign immunity protected the United States from Patchak's suit under the APA.[115] Section 702 of the APA provides a general waiver of sovereign immunity in suits seeking injunctive relief against officials acting or failing to act in their official capacities.[116] However, the statute also expressly reserves sovereign immunity "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[117] Thus, the question for the Court was whether Patchak's suit fell within the scope of the Indian lands exception to the Quiet Title Act's waiver of sovereign immunity.[118] The Court answered that it did not and characterized Patchak's suit as a "garden-variety APA claim," holding that the Secretary's decision to take the land into trust violated federal law.[119] Because Patchak did not claim title to the Bradley property, his suit lacked an essential feature of a quiet title action governed by the Quiet Title Act.[120] Thus, the Quiet Title Act could not prevent Patchak's suit because that Act "[wa]s not addressed to the type of grievance which [Patchak sought] to assert."[121]

Next, the Supreme Court dispatched the Band's argument that Patchak lacked prudential standing to sue the Secretary for allegedly violating Section 5 of the IRA.[122] The APA imposes a heightened standing requirement on plaintiffs, requiring that a potential challenger be "arguably within the zone of interests

113. *Id.*
114. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2203 (2012).
115. *Id.* at 2204.
116. 5 U.S.C. § 702 (2012).
117. *Id.*
118. *Patchak*, 132 S. Ct. at 2205.
119. *Id.* at 2208.
120. *Id.* at 2207–08.
121. *Id.* at 2205 (quoting H.R. Rep. No. 94-1656, at 28 (1976)).
122. *Id.* at 2212.

to be protected or regulated by the statute" that has allegedly been violated.[123] The Band argued that there was an insufficient nexus between Section 5 of the IRA, which concerns land acquisition, and Patchak's claim, which involves land use.[124] However, the Court noted that the Secretary is required, by regulation, to consider "[t]he purposes for which the land will be used" when she exercises her discretion to take that land into trust.[125] The Court thus found enough of a connection between land use and land acquisition to satisfy the (relatively lenient) standing requirement.[126] In fact, the Court noted that "neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions."[127] Compared to the sovereign immunity question, the standing requirement imposed a low barrier for would-be challengers to satisfy. Nevertheless, the practical effect of both holdings taken together is to open the door to a proliferation of challenges to the Secretary's fee-to-trust acquisitions.[128]

In a lone dissent, Justice Sotomayor argued that the Quiet Title Act should bar Patchak's suit. In large part, she adopted the position of the Ninth, Tenth, and Eleventh circuits that the practical effect of Patchak's APA suit brought his claim within the reservation of sovereign immunity in the Quiet Title Act.[129] Justice Sotomayor alone considered the effects that the Court's decision would have on Indian Country—and the deleterious consequences she predicted would result from the majority's rule were a significant part of her reason for dissenting.[130] This unique approach to an Indian law case has led one commentator to name her "Indian Country's best friend."[131] Her dissent is explored in more detail in Part II.A.

123. *Id.* at 2210 (quoting Ass'n of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

124. *Id.*

125. *Id.* at 2211 (listing some of the criteria that the Secretary is to consider in evaluating requests to take land into trust (quoting 25 C.F.R. § 151.10(c) (2012))).

126. *Id.* at 2211–12.

127. *Id.* at 2212.

128. *Id.* (Sotomayor, J., dissenting).

129. *See id.* at 2212–16.

130. *See id.* at 2217–18.

131. Gale Courey Toensing & Rob Capriccioso, *Supremes' Ruling Opens Floodgates to Challenges of Indian Land Trust Acquisition*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 19, 2012), http://indiancountrytodaymedianetwork.com/article/supremes'-ruling-opens-floodgates-to-challenges-of-indian-land-trust-acquisition-119342 (quoting Professor Matthew L.M. Fletcher).

II. LIFE AFTER *PATCHAK*: WHAT DOES THE DECISION MEAN FOR INDIAN COUNTRY?

This Part looks at the probable consequences that the *Patchak* decision will have on Indian law as well as its tangible effects in Indian Country. Justice Sotomayor explained in her dissent that the majority's holding allows a plaintiff to make an "end run" around the Quiet Title Act's reservation of sovereign immunity where the federal government's title to Indian trust lands is at stake.[132] The resulting litigation is likely to frustrate the Secretary's implementation of Section 5 of the IRA and create substantial uncertainties.[133] Part II.A. deals specifically with this and other issues that Justice Sotomayor discussed in her dissent. Part II.B. points to other deficiencies in the *Patchak* Court's analysis.

A. Justice Sotomayor's Three Consequences

Justice Sotomayor pointed to three deleterious consequences that the *Patchak* decision will have for the federal government and tribes.[134] First, she noted that the majority's holding opens the door to artful pleading that will evade the Quiet Title Act's reservation of sovereign immunity.[135] For example, if a plaintiff need only avoid asserting an ownership interest in the land at stake, he can easily "recruit a family member or neighbor" to assert an "aesthetic" interest in the land and still achieve the same result—divestiture of the federal government's title.[136] The majority discounted the likelihood of a "suit that omits mention of an adverse claimant's interest in property yet somehow leads to relief recognizing that very interest."[137] However, the fact that such a suit can now be brought overshadows the slim chances of its success. A multiplication of claims raises costs and increases uncertainty in the fee-to-trust process. That the claims are likely to be unsuccessful only highlights the fact that they are unnecessary.

132. *Patchak*, 132 S. Ct. at 2212 (Sotomayor, J., dissenting).
133. *Id.* at 2218.
134. *Id.* at 2217–18.
135. *Id.* at 2217.
136. *Id.*
137. *Id.* at 2209 n.6 (majority opinion).

Second, Justice Sotomayor argued that the majority rule serves only to needlessly distend the Secretary's fee-to-trust process.[138] Suits under the APA that allege violations of federal laws, like the National Environmental Policy Act or the Indian Gaming Regulatory Act, are subject to the APA's six-year statute of limitations.[139] Thus, a plaintiff can now sue the Secretary over her trust acquisition anytime within six years of the government taking title, and is therefore not constrained by the Department of the Interior's thirty-day waiting period that would otherwise govern challenges to the Secretary's decision.[140] By extending the window during which suits may be brought, the majority's rule frustrates the IRA's purpose of promoting the economic development of tribes.[141] A tribe must now wait for the APA's statute of limitations to run before it can develop the land with any certainty.[142]

In the wake of *Patchak*, tribes are concerned about the potential for dilatory litigation.[143] For example, Professor Matthew L.M. Fletcher, a member of the Grand Traverse Tribe of Chippewa and Ottawa Indians, believes that the six-year statute of limitations will make it difficult for tribes to finance development on converted trust land.[144] The uncertainty of the tribes' claim to the land will lead to high interest rates and may prevent some tribes from getting financing until the statute of limitations has lapsed.[145]

Third, Justice Sotomayor voiced concern that the rule in *Patchak* left unclear what kinds of plaintiffs are barred by the Quiet Title Act from bringing APA claims.[146] She noted two possible readings of the majority's holding. Under the first, a plaintiff like Patchak could sue under the APA even if he did have an interest in the land at stake, as long as he did not assert that interest in the complaint.[147] Under the second, such a plaintiff would be barred from suit, creating an incentive for potential plaintiffs to conceal their property claims and plead

138. *Id.* at 2217 (Sotomayor, J., dissenting).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Toensing & Capriccioso, *supra* note 131.
144. *Id.*
145. *Id.*
146. *Patchak*, 132 S. Ct. at 2217 (Sotomayor, J., dissenting).
147. *Id.*

only aesthetic or environmental injury.[148] Thus, the burden will be on the government to sleuth out the plaintiff's property interest before it can assert sovereign immunity.[149]

In sum, Justice Sotomayor's decision focused on the effects that the decision will have on Indian Country, rather than on the empty formalities that distracted the majority.[150] The particularities of Indian law and the unique situation presented by Indian Country only complicated the thorny administrative law issues before the Court in *Patchak*, and it is notable that Justice Sotomayor alone wrote about the practical consequences for Indian Country.

B. "Something Has Gone Seriously Amiss"

Interestingly, neither the majority nor the dissent in *Patchak* addressed the trust relationship or applied any of the Indian law canons of construction. Instead, the majority focused exclusively on administrative law and standard statutory interpretation techniques.[151] Although Justice Sotomayor's dissent mentioned that the federal government has made special "'commitments'" to Indian tribes, she did not dwell on the implications of the majority's holding on the trust relationship.[152] The majority merely suggested that the Band address its arguments with Congress.[153] Notably absent from the decision is the idea that the courts would construe any ambiguity in favor of the tribes to counteract Congress's plenary power over Indian affairs. Indian tribes have become proficient lobbyists in the recent years,[154] but, as a minority, they are inherently disadvantaged in politics. Thus, courts play an important role in protecting tribal rights and have developed and used the Indian law canons of construction and enforced the federal government's trust obligations to protect those rights.

148. *Id.* at 2217–18.

149. *Id.* at 2218.

150. *See* Toensing & Capriccioso, *supra* note 131 ("Sotomayor is Indian [C]ountry's best friend.").

151. *See Patchak*, 132 S. Ct. at 2207–08.

152. *Id.* at 2213 (Sotomayor, J., dissenting) (quoting Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 283 (1983)).

153. *Id.* at 2209.

154. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 261–63 (2005).

The *Patchak* case is not the first time in which the Court has disregarded Indian law presumptions.[155] At the turn of the millennium, Professor David Getches noted the Rehnquist Court's shift away from established Indian law principles towards a "subjectivist" approach to Indian law.[156] He meant that the modern Court often focuses on achieving an outcome that protects mainstream values instead of considering the trust relationship and applying the canons of construction to reach a decision in an Indian law case.[157] This tendency is evident in *Patchak*, where the Court's solicitude for Patchak's "garden-variety" APA claim trumped any consideration of both the Indian law canons of construction and the trust relationship.[158] There may be good reasons to treat Indian law cases differently today than they were treated in the past. For example, the canons are a product of the treaty-making era, when language barriers and unequal bargaining power justified resolving ambiguities in favor of tribes.[159] Today, by contrast, legislation that affects Indian Country is often created with the input of tribes.[160] Nevertheless, modern courts continue to apply the canons as a safeguard against encroachments on tribal sovereignty, a structural purpose divorced from the idea that Indians, as a powerless minority, need judicial protection.[161] Thus, if the canons of construction are to be abandoned because of changed circumstances, the Court should explicitly acknowledge and defend the shift. In *Patchak*, the application of the Indian law canons of

155. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that the tribe did not have criminal jurisdiction over a non-Indian who committed crimes on the reservation).

156. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001).

157. *Id.*

158. *Patchak*, 132 S. Ct. at 2208.

159. *See* COHEN'S HANDBOOK, *supra* note 28, § 2.02(2); *see also* Michael C. Blumm & James Brunberg, *"Not Much Less Necessary . . . Than the Atmosphere They Breathed": Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and its Enduring Significance*, 46 NAT. RESOURCES J. 489, 519 (2006) (describing the canons as "interpretive devices employed by the judiciary to compensate for the tribes' unequal bargaining power at the time of the treaties").

160. *See, e.g.*, 16 U.S.C. § 1371(b) (2012), providing an exemption to the moratorium on takings of marine mammals for subsistence use by Alaska Natives.

161. COHEN'S HANDBOOK, *supra* note 28, § 2.02(2).

construction to either the Quiet Title Act or the IRA might have changed the outcome of the case by tipping the balance in favor of protecting tribal trust lands from divestiture. The Court should have stated its reasons for ignoring the canons and ruling as it did.

Another likely problem is the effect *Patchak* will have on the already contentious issue of Indian gaming. Patchak himself recited a litany of injuries attributable to the Band's casino, a list which future plaintiffs will find easy to replicate:

> (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical services; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.[162]

The Court seems to have considered and approved of this result, stating that a neighboring landowner like Patchak was a "reasonable—indeed, predictable—challenger" of a fee-to-trust acquisition.[163] Gaming operations are actually a less significant part of tribal economies than is commonly believed.[164] Much land is taken into trust for housing and various other business projects.[165] However, frivolous suits alleging non-specific economic, environmental, and aesthetic

162. Brief for Respondent David Patchak in Opposition at 6, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247), 2011 WL 5548714, at *6 (citing Patchak's complaint).

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

164. *See* WILKINSON, *supra* note 154, at 337–38.

165. *Oversight Hearing on Addressing the Costly Administrative Burdens and Negative Impacts of the* Carcieri *and* Patchak *Decisions Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (statement of Colette Roulet, Associate Professor of Law, William Mitchell College of Law), *available at* http://www.indian.senate.gov/hearings/upload/Colette-Routel-testimony091312.pdf; *see also* Toensing, *supra* note 3 (noting that the controversy in *Carcieri* arose out of the Narragansett Tribe's plan to build housing for its elders).

harm in order to impede casino construction anytime the Secretary proposes to take land into trust for a tribe seems a tempting strategy for the anti-gaming front.[166] The resulting increase in the cost of casino development likely will spill over into other forms of tribal business development. The likelihood that a large number of *Patchak*-style suits will survive the pleading stage could make any economic development prohibitively expensive for tribes.

The interaction of *Patchak* with *Carcieri* is likely to compound these problems.[167] Patchak's underlying claim, after all, was that the Secretary exceeded her authority in taking the Bradley property into trust for the Band because the Band was not federally recognized in 1934.[168] The Secretary took the property into trust about a month before the Supreme Court decided *Carcieri*,[169] but now Patchak's suit is moving forward on its merits. A trial court will now review whether the Secretary had authority to take the Bradley property into trust for the Band. Thus, Patchak is the first, but surely not the last, private citizen to litigate a tribe's history in order to ascertain whether the tribe was federally recognized in June of 1934 and, therefore, whether the IRA authorizes the Secretary to take land into trust for it.[170] In the *Patchak* case, it appears that the Band was "federally recognized" through agency action only in 1998, meaning the Secretary would not have had authority to acquire the land for the Band.[171] Although the Band signed treaties with the United States and may still win on the merits,

166. Toensing & Capriccioso, *supra* note 131. When land is to be used for a "business purpose" (such as a casino), the tribe must submit a plan explaining the anticipated economic benefits of the proposed use. 25 C.F.R. § 151.11(c) (2013). Furthermore, the Secretary must decide that the acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(3) (2013). Accordingly, by the time a parcel of land has been taken into trust for a tribe, the tribe and the Department of Interior have agreed on a beneficial proposed use for the land that challengers should be able to object to within the thirty-day window.

167. Toensing & Capriccioso, *supra* note 131.

168. *Patchak*, 132 S. Ct. at 2203.

169. When it decided *Carcieri*, the Court adopted the argument that Patchak had made in his complaint: the IRA gives the Department of the Interior authority to take land into trust only for tribes that were federally recognized in June, 1934. *See* Patchak v. Salazar, 632 F.3d 702, 704 (D.C. Cir. 2011).

170. *See* Carcieri v. Salazar, 129 S. Ct. 1058, 1061 (2009).

171. *See* Notice of Final Determination, 63 Fed. Reg. 56936 (Oct. 23, 1998) (stating in a Notice of Final Determination by the Bureau of Indian Affairs that the Band "exists as an Indian tribe within the meaning of Federal law").

it has had a chaotic history that will be expensive to litigate.[172] In the wake of *Patchak*, tribes have intensified their calls for a legislative fix to *Carcieri*.[173]

Congress should overturn *Patchak* and *Carcieri* and implement legislation that limits the potential for litigating the trust status of land that the federal government holds in trust for an Indian tribe. The next Part expands on this proposal. A legislative fix to *Patchak* and *Carcieri* seems to be Indian Country's best chance at a complete and expeditious reversal of these dubious decisions. Stare decisis stands in the way of a judicial solution, which, in any event, would be constrained by the facts of the case before the Court. A legislative solution crafted in Indian Country can be tailored to the situation on the ground and would have more latitude to balance the interests of Indian tribes, state and local governments, and non-Indian community members.

III. WHERE DO WE GO FROM HERE?

There are a number of alternatives to the regime that the Court endorsed in *Patchak* that allow neighboring landowners to bring suit to divest the federal government's title to Indian trust land. Any alternative involves balancing the interests of neighboring landowners, who may have legitimate concerns about the tribes's intended use for the trust land, and tribes' interests in self-sufficiency through development of the trust land. Part III.A. begins by addressing the arguments against changing the rule of *Patchak*. Part III.B. then evaluates two alternative regimes that would limit the availability of a judicial remedy to plaintiffs like Patchak.

172. Toensing & Capriccioso, *supra* note 131 (quoting Professor Fletcher on the dangers of a "Carcieri II type case"); *see also* Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 26 (D.C. Cir. 2008) (discussing the Band's early history).

173. Toensing & Capriccioso, *supra* note 131.

A. The Best of All Possible Worlds?[174]

Patchak defines the state of the world today. Before evaluating alternatives to the *Patchak* rule, it is therefore worthwhile to consider why any change is necessary. First, *Patchak* was a procedural decision, and the Court expressed no opinion as to the merits of Patchak's case.[175] Thus, the dispute will now return to a trial court for a determination of whether the Band was a tribe at the time of the IRA's enactment, and, therefore, whether the Secretary had authority to take the Bradley property into trust for the Band.[176] The Band intends to fight this battle.[177] Second, it is unfair simply to assume that the Band's interests in the Gun Lake Casino are weightier than Patchak's interests as a neighboring landowner. If the judicial system can be trusted to balance these interests fairly and accurately, it should not matter who brings the lawsuit or how long he waits before doing so; these would be factors for the deciding court to consider.

In addition, keeping plaintiffs like Patchak out of court seems at odds with the purposes of Section 702 of the APA. Section 702 waives the federal government's sovereign immunity in order to "ensure that courts [can] review 'the legality of official conduct that adversely affects private persons.'"[178] In this sense, the Court was correct in describing Patchak's argument that the Secretary exceeded her authority under Section 5 of the IRA by taking land into trust for the Band as a "garden-variety APA claim."[179] From the perspective of Patchak and similar potential plaintiffs, singling out agency decisions that involve Indian Country seems anomalous.

However, these arguments do not take into account the

174. *See* VOLTAIRE, CANDIDE, OU L'OPTIMISME 169 (Boni & Liverwright 1919) (1759), *available at* http://www.gutenberg.org/files/19942/19942-h/19942-h.htm ("There is a concatenation of events in this best of all possible worlds: for if you had not been kicked out of a magnificent castle for love of Miss Cunegonde: if you had not been put into the Inquisition: if you had not walked over America: if you had not stabbed the Baron: if you had not lost all your sheep from the fine country of El Dorado: you would not be here eating preserved citrons and pistachio-nuts.").

175. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2204 n.2 (2012).

176. *See id.* at 2212.

177. Toensing & Capriccioso, *supra* note 131.

178. Patchak v. Salazar, 632 F.3d 702, 712 (D.C. Cir. 2011) (quoting H.R. Rep. No. 94-1656, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6125).

179. *Patchak*, 132 S. Ct. at 2208.

fact that the relationship between tribes and the federal government is special, even if the Court fails to treat it as such. Even unsuccessful suits have the potential to disrupt the federal government's execution of its obligations imposed by this trust relationship. A procedural mechanism that opens the door to increased litigation will allow individuals and states to obstruct the fee-to-trust process. Although citizens like Patchak often feel slighted by what seems like special treatment for Indians, this is due to general misunderstanding of the government-to-government relationship between tribes and the United States.[180] Moreover, allowing the anti-gaming front to use the APA to gum up economic development in Indian Country does not serve the purposes of the APA's waiver of sovereign immunity.

Thus, when tribal interests conflict with those of other citizens, the tribes' retained inherent sovereignty always should affect the calculus. This is why the Indian law canons of construction often take precedence over general canons of construction[181] and why the purposes of the APA should yield to the purpose of Section 5 of the IRA and the Quiet Title Act's reservation of sovereign immunity. Tribal interests in land development will not always trump the interests of neighboring landowners. But preventing such landowners from suing to divest the United States of title to Indian trust land does not mean that the Secretary can ignore these landowners' rights. On the contrary, the controversies created by these competing interests are already the subjects of long administrative and court battles.[182] A congressional fix that limits the ability of private individuals to disrupt the fee-to-trust process is therefore needed. The next Part expands on this idea by considering two possible limitations on suits with the potential

180. In *Morton v. Mancari*, the Supreme Court held that Congress could discriminate in favor of tribal members as long as the discrimination is rationally tied to "the fulfillment of Congress' unique obligations toward the Indians." 417 U.S. 535, 555 (1974).

181. *See* COHEN'S HANDBOOK, *supra* note 28, § 2.02(3), at 119; *see also* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.").

182. For an example of the legal and administrative hurdles a proposed casino must overcome, see Andy Balaskovitz, *Lansing Casino: A Closer Look*, CITY PULSE (Mar. 18, 2013), http://www.lansingcitypulse.com/lansing/article-6927-lansing-casino-a-closer-look.html. The piece quotes Professor Fletcher describing a trust acquisition that took almost ten years to finalize.

to divest the federal government of title to Indian trust land.

B. A Congressional Fix

Rather than acquiesce to the rule of *Patchak*, Congress should enact legislation that protects tribal trust lands from divestiture while balancing the interests of the community surrounding the contested trust land. As trustee of the acquired lands, the federal government has a fiduciary duty to protect them from litigation like Patchak's.[183] The most obvious alternative to *Patchak* is to revert back to the "well-settled law"[184] that existed prior to the circuit split that the Supreme Court resolved in *Patchak*.[185] Under the considered opinions of three circuits, the Quiet Title Act maintained the federal government's sovereign immunity from suits seeking to divest the United States of title to land held in trust for Indian tribes, even if the plaintiffs in those suits did not seek to quiet title in themselves.[186] Under this system, plaintiffs who wanted to challenge the Secretary's fee-to-trust acquisitions as unlawful could do so within the thirty-day window provided by regulation.[187] This opportunity was open to any who wished to challenge the Secretary's decision to take the Bradley property into trust.

Michigan Gambling Opposition (MichGO) sued the Secretary on June 13, 2005, thirty days after the Secretary published her decision to take the Bradley property into trust for the Band.[188] MichGO alleged that the Secretary had violated the National Environmental Policy Act and the Indian Gaming Regulatory Act, and that Section 5 of the IRA was an unconstitutional delegation of legislative authority.[189] The district court granted summary judgment to the Secretary and

183. *See* Cobell v. Norton, 392 F.3d 461, 470–71 (D.C. Cir. 2004) (explaining that the government must have "full responsibility" over the property in order for a fiduciary duty to arise).

184. Neighbors for Rational Dev. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004).

185. *See* Patchak v. Salazar, 632 F.3d 702, 711 (D.C. Cir. 2011).

186. *See Neighbors*, 379 F. 3d at 958; Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 144 (9th Cir. 1987); Fla. Dep't of Bus. Regulation v. U.S. Dep't of Interior, 768 F.2d 1248, 1254–55 (11th Cir. 1985).

187. 25 C.F.R. § 151.12(b) (2013).

188. Mich. Gambling Opposition v. Norton, 477 F. Supp. 2d 1, 4 (D.D.C. 2007).

189. Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 27–28 (D.C. Cir. 2008).

the court of appeals affirmed.[190]

The district court in the MichGo litigation addressed many allegations that would eventually provide the basis of Patchak's claims several years later. For instance, Patchak alleged that the casino would cause increased traffic and environmental damage.[191] The district court in *Michigan Gambling Opposition v. Norton* found that the Secretary had complied with the National Environmental Policy Act and had appropriately considered the effects that the planned casino would have on area traffic.[192] Thus, even under a system where post hoc suits are barred by the Quiet Title Act, the environmental and aesthetic issues that affect the public receive due consideration as long as an interested party files suit within the thirty-day window.[193] Despite the district court's decision in the MichGo litigation, Patchak filed his suit on August 1, 2008, more than three years after the Secretary published notice of her intent to take the Bradley Property into trust for the Band.[194] He likely was encouraged by the Supreme Court's grant of certiorari in the *Carcieri* case earlier that year[195] (whose argument he adopted in his complaint).[196]

Another possible alternative to the current scheme under *Patchak* is to allow only state, and possibly local, governments to bring actions against the Secretary after a fee-to-trust acquisition is consummated. This option provides more protection for the interests of neighboring landowners, while placing limits on the multiplication of litigation that now threatens the Department of the Interior. Private individuals like Patchak would be prevented from bringing suit once title has vested in the federal government. Courts still could consider such complaints, however, if individuals exerted enough pressure on their local political representatives. The

190. *Mich. Gambling Opposition*, 525 F.3d at 33.

191. Brief for Respondent David Patchak in Opposition at 6, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247), 2011 WL 5548714, at *6 (citing Patchak's complaint).

192. *See Mich. Gambling Opposition*, 525 F.3d at 28–30.

193. *Cf.* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (stating that Patchak's claim is of potentially greater importance than a quiet title action because it "implicates public interests").

194. Patchak v. Salazar, 646 F. Supp. 2d 72, 75 (D.D.C. 2009).

195. Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (granting the petition for writ of certiorari on February 25, 2008).

196. Patchak v. Salazar, 646 F. Supp. at 74 (citing Patchak's complaint).

Secretary argued for such a scheme before the D.C. Circuit in *Patchak v. Salazar*.[197] In the context of arguing that Patchak did not have standing to sue under the APA, the Secretary urged that a state or local government would be a more appropriate APA plaintiff.[198] In addition to the environmental and aesthetic interests that Patchak asserted, a local government's regulatory and taxing authority over the potential trust land would be at stake.[199] A local government therefore could make out a stronger case of prudential standing than a private individual like Patchak because it would have a greater interest in the litigation. The D.C. Circuit rejected this argument.[200] It held that Patchak's complaint had alleged sufficient harm to bring him within the IRA's zone of interests and, thus, that Patchak had prudential standing to sue for a violation of the IRA.[201]

Since a legislative fix is needed, Congress might consider restricting the right to sue for violations of the IRA to state and local governments. In a pre-*Patchak* world, suits by state officials seemed to be the norm.[202] Such a restriction likely would prevent proliferation of frivolous suits while allowing parties with the greatest stake in the decision to police the Secretary's decision-making. The downside to this approach is that it would not completely remove the uncertainty created by the APA's six-year statute of limitations. New trust acquisitions still would be subject to a risk of divestiture, albeit a smaller risk than under current law. Moreover, under such a rule, whether any particular individual's interests were vindicated through a suit by a local government would depend on the individual's political clout. While the weightiness of the interests involved generally may be correlated with a local government's willingness to sue, this may not always be the case, especially where local governments are short on

197. 632 F.3d at 707.
198. *Id.*
199. *Id.*
200. *See id.*
201. *Id.*
202. *E.g.*, Neb. *ex rel.* Bruning v. U.S. Dep't of Interior, 625 F.3d 501, 507 (8th Cir. 2010) (reviewing a challenge brought by Iowa and Nebraska); Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1254 (10th Cir. 2001) (considering a suit by the governor of Kansas and the Sac and Fox Nation); Carcieri v. Norton, 290 F. Supp. 2d 167, 169 (D.R.I. 2003) (deciding a suit brought by a town in Rhode Island, as well as the State and its governor).

resources.

The best solution, therefore, would be a total bar to suits that would divest the federal government of title to Indian trust land. This could be achieved by legislation that reserves the government's sovereign immunity from suits that are brought outside the thirty-day window for judicial review established by regulation. Under this regime, both private individuals and local governments could challenge the Secretary's land acquisitions as long as the challenge was brought in a timely manner. By the time a trust acquisition is consummated, all interested parties are on notice of the Department of Interior's decision. Before taking any action, the Secretary must inform the state and local governments with jurisdiction over the land and request their input.[203] In addition, as soon as the Department of Interior decides to take land into trust for a tribe, a Notice of Determination published in the Federal Register puts the public on notice of the pending acquisition.[204] Thus, any potential challenger should be able to act within the thirty-day window. This would ensure both that the interests of the affected community are vindicated and that Indian tribes are allowed to pursue economic development on their trust lands without the looming threat of divestiture.

CONCLUSION

Economic self-sufficiency for Indian tribes should be a priority for Congress. Indian tribes have a unique and extra-constitutional relationship with the United States government. They are sovereign entities, whose status as domestic dependent nations once was informed by notions of international law.[205] Out of this unique government-to-government connection has arisen the trust relationship, under which the federal government owes Indian tribes a duty of "fairness and protection."[206] In the twenty-first century, this means that the federal government should support Indian

203. 25 C.F.R. § 151.11(d) (2013).

204. *E.g.*, Notice of Determination, 70 Fed. Reg. 25596, 25596 (May 13, 2005) (stating that the federal government would take the Bradley Property into trust on April 18, 2005).

205. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

206. Fredericks, *supra* note 24, at 108.

tribes' pursuit of economic development on their lands as sovereigns, free from state regulation and taxation. In order to fulfill this historic obligation, Congress should pass legislation that protects tribal lands by reserving sovereign immunity in suits that contest the government's title to land held in trust for an Indian tribe.

As of this writing, *Patchak*'s future is uncertain. First, the decision is young and untested. Although this Casenote describes what appear to be the most logical consequences of the decision, it will take time before these predictions are borne out by data. It is possible that they never will be. Second, Indian Country has wasted no time in mobilizing against the decision. On September 13, 2012 (less than three months after *Patchak* was decided) the Senate Committee on Indian Affairs heard testimony urging the passage of a legislative fix to both *Patchak* and *Carcieri*.[207] Hopefully, such efforts will be successful, and the congressional fix that this Casenote advocates will be passed expeditiously.

207. Toensing, *supra* note 3.