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# “Perhaps Congress Would, Perhaps Congress Should” — Why *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak* and *Carcieri v. Salazar* Must Be Legislatively Overridden to Protect the IRA Trust Acquisition Authority

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**“PERHAPS CONGRESS WOULD, PERHAPS CONGRESS SHOULD”—WHY *MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS v. PATCHAK AND CARCIERI v. SALAZAR* MUST BE LEGISLATIVELY OVERRIDDEN TO PROTECT THE IRA TRUST ACQUISITION AUTHORITY**

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*Introduction*

Land ownership allows for the preservation of distinct nationhood, making it central to the sovereignty of Indian tribes.<sup>1</sup> Tribes have certain rights as distinct nations due to their legal status as separate governments that pre-exist the Constitution.<sup>2</sup> They have inherent sovereignty as self-governing peoples.<sup>3</sup> But because Indian tribes are “domestic dependent nations” that have protectorate relationships with the United States, they do not have all attributes of sovereignty.<sup>4</sup> Due to this state of dependency, Congress has plenary power over the affairs with and of the Indian tribes, and Congress uses that power to decide the “metes and bounds of tribal sovereignty,” exclusive of the states.<sup>5</sup> This plenary power also gave rise to the federal-tribal trust relationship, which dictates, among other things, that the federal government must protect tribal property.<sup>6</sup>

Treaties served as the earliest negotiating tool between Indian tribes and the United States, and special canons of construction arose from that tradition.<sup>7</sup> These canons, when applied, serve to rectify the inequality inherent in these early agreements, which were not “arm’s-length transaction[s]” but compacts which tribes had “imposed upon them [with] no choice but to consent.”<sup>8</sup> Therefore, any treaty or statute relating to

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1. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.01, at 965 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN].

2. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

3. *Id.*

4. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

5. *United States v. Lara*, 541 U.S. 193, 202 (2004).

6. Sarah Washburn, *Distinguishing Carciery v. Salazar: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA’s Trust-Land Provisions*, 85 WASH. L. REV. 603, 605 (2010).

7. COHEN, *supra* note 1, § 1.03[1], at 26.

8. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970).

Indians must be liberally construed for the benefit of the Indians, interpreted “so far as possible” as the Indians would have understood it, and read with all ambiguities resolved in their favor.<sup>9</sup> These canons are “rooted in the unique trust relationship between the United States and the Indians” and are essential to the protection of tribal rights.<sup>10</sup>

When the Supreme Court ignores the Indian canons and disregards the federal trust obligation, there are devastating consequences for Indian Country, especially in the tribal property arena. In the 2012 case of *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak* (“*Patchak I*”),<sup>11</sup> the Court considered whether an individual had standing to divest the federal government of its title to Indian trust land.<sup>12</sup> David Patchak, a neighbor to a parcel of land that was taken into trust for the Match-E-Be-Nash-She-Wish Band, challenged the acquisition under the Administrative Procedure Act by alleging “economic, environmental, and aesthetic harms” from the parcel’s use for gaming.<sup>13</sup> The government argued that the Quiet Title Act, which retained the sovereign immunity of the United States concerning land it already held in trust for tribes, barred the suit.<sup>14</sup> The Supreme Court held that the Quiet Title Act was not applicable when the challenging plaintiff did not assert its own title to the land.<sup>15</sup> It further held that a neighboring landowner did have standing to challenge an already completed trust acquisition and remanded Patchak’s suit for further proceedings.<sup>16</sup> *Patchak I* further unsettled the fee-to-trust process, which had already been rocked by the 2009 decision of *Carcieri v. Salazar*.<sup>17</sup> In *Carcieri*, the Supreme Court limited the use of the Indian Reorganization Act<sup>18</sup> authority to take land into trust by restricting the avenue to only tribes under federal jurisdiction in 1934, the year the Act was passed.<sup>19</sup>

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9. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 174 (1973); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918).

10. *Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985).

11. 567 U.S. 209 (2012).

12. *Id.* at 214.

13. *Id.* at 212 (citing Administrative Procedure Act, 5 U.S.C. §§ 701-706).

14. *Id.* at 215 (citing Quiet Title Act, 28 U.S.C. § 2409a (2018)).

15. *Id.* at 215-24.

16. *Id.* at 224-28.

17. 555 U.S. 379 (2009).

18. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-5129 (2018)).

19. *Carcieri*, 555 U.S. at 394.

Application of the Indian canons likely would have resulted in victories for tribal interests, or at least fewer negative consequences.<sup>20</sup>

The Supreme Court provided a narrow remedy for its prior meddling in Indian property rights when it decided *Patchak v. Zinke* (“*Patchak II*”)<sup>21</sup> in 2018. While Patchak’s initial suit was on remand, Congress passed the Gun Lake Trust Land Reaffirmation Act,<sup>22</sup> requiring dismissal of any pending federal action relating to the land at issue in *Patchak I*.<sup>23</sup> By plurality opinion, the Supreme Court affirmed the power of Congress to enact such legislation, holding that it did not violate Article III of the Constitution.<sup>24</sup> The Supreme Court explained that the Gun Lake Act did not impermissibly compel a certain result under old law but instead changed the law via a valid exercise of legislative power.<sup>25</sup> As a result, Patchak’s suit was dismissed for lack of jurisdiction.<sup>26</sup>

Although the *Patchak II* remedy seems to lessen the barriers created by *Carcieri* and *Patchak I*, it presumes that tribes are able to exercise enough political influence on Congress to pass special laws each time a trust acquisition is challenged.<sup>27</sup> Such piecemeal legislation is expensive, inefficient, and ineffectual, as it likely provides relief to very few, if any, tribes. This Note argues that because the remedy provided by *Patchak II* does not go far enough, Congress must instead override the *Patchak* and *Carcieri* decisions. Part I provides a brief history of Indian property rights. Part II outlines *Patchak* as it twice made its way through the Supreme Court. Part III analyzes the confluence of *Patchak I* and *Carcieri*, the implications of the remedy provided by *Patchak II*, and the reasons for a larger legislative fix.

### *I. History of Indian Property Rights*

Since the founding of the United States, Congress has variously used its plenary power to restrict tribal sovereign authority or to relax previous

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20. Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, FED. LAW., Apr. 2013, at 35, 38-39.

21. 138 S. Ct. 897 (2018).

22. Pub. L. No. 113-179, 128 Stat. 1913 (2014).

23. *Id.* at 902-03.

24. *Id.* at 906.

25. *Id.* at 908 (referencing Gun Lake Trust Land Reaffirmation Act § 2(b), 128 Stat. at 1913).

26. *Id.* at 904.

27. *Id.* at 910.

restrictions, leading to cognizable eras in the federal-tribal relationship.<sup>28</sup> These Indian policies, which were “applicable to numerous tribes . . . [and] affect[ed] billions of acres of land,” necessarily shifted with the needs of the United States.<sup>29</sup> This is especially apparent regarding tribal property interests.<sup>30</sup> Under the controlling property regime of the United States, tribal property interests are split between the federal government, which holds ultimate title, and the Indian tribes, which retain aboriginal title and a right of occupancy subject to alteration or complete divestment at the will of the federal government.<sup>31</sup> As national Indian policies have fluctuated over the centuries, so too has the strength (and even the existence) of tribal property rights.

*A. Federal Indian Policy Eras, 1789 to Present*

During the period of treaty-making following the adoption of the Constitution in 1789, tribes were required to trade large tracts of their ancestral territories for goods, services, and the right to continue self-governance under the protection of the United States.<sup>32</sup> But as the United States’ population grew, so did the demand for land in the South and East Coast regions.<sup>33</sup> Forced removal became the dominant strategy to extinguish Indian title.<sup>34</sup> In exchange for relinquishing their rights to the entirety of their eastern homelands, removed tribes were given new territories in the west.<sup>35</sup> Following many acts of brutality, coercion, and fraud, most tribes had been removed from the eastern states by 1850.<sup>36</sup> To exact further control and isolation, the reservation system developed, whereby tribes were concentrated onto small sections of land and provided animals, tools, and an education in an effort to civilize and prepare them for assimilation.<sup>37</sup>

By the late nineteenth century, the national policy of segregating entire tribes onto reservations shifted to allotting those reservation lands to tribal

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28. *See* *United States v. Lara*, 541 U.S. 193, 202 (2004).

29. *Id.*

30. *Id.*

31. *See* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823).

32. COHEN, *supra* note 1, § 1.03[1], at 29.

33. *Id.* § 1.03[4][a], at 45-48.

34. *Id.*

35. *Id.* § 1.03[4][a], at 45-48, 54.

36. *Id.* § 1.03[4][a], at 54.

37. *Id.* § 1.03[6][a], at 64-65.

members individually.<sup>38</sup> The General Allotment Act, also known as the Dawes Act, was passed in 1887.<sup>39</sup> Its basic objectives were to “extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”<sup>40</sup> Each individual Indian was allotted a parcel, usually 160 acres of grazing land or eighty acres of agricultural land, the patent to which was held by the United States in trust for that individual allottee for a period of twenty-five years.<sup>41</sup> Following that period, the patent was discharged of the trust, and the allottee received the land in fee.<sup>42</sup> Any reservation land not allotted was declared surplus and opened for non-Indian settlement, which permanently reshaped and diminished Indian Country.<sup>43</sup> At enactment, Indian landholdings across the lower forty-eight states totaled 140 million acres.<sup>44</sup> During the fifty years that the General Allotment Act was the foundation of federal action, that number plunged to fifty-two million acres—a staggering loss of ninety million acres from Indian control.<sup>45</sup>

The passage of the Indian Reorganization Act (IRA)<sup>46</sup> in 1934 was a landmark change in federal policy.<sup>47</sup> The IRA “put a halt to the loss of tribal lands” by repudiating the prior policies of allotment and assimilation.<sup>48</sup> It also allowed tribes “a greater degree of self-government, both politically and economically” by establishing procedures for organizing governments and chartering business corporations.<sup>49</sup> The keystone of the IRA is section 5, which empowers the Secretary to “acquire . . . any interest in lands . . . for the purpose of providing land for Indians,” which allowed for the creation, expansion, or restoration of Indian reservations.<sup>50</sup> Importantly, “Indian” is defined in section 19 to include (1) “all persons of Indian

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38. *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992).

39. *Id.* at 254 (citing General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (repealed 2000)).

40. *Id.*

41. *Squire v. Capoman*, 351 U.S. 1, 3 (1956).

42. *Id.*

43. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 43 (2005).

44. *Id.*

45. *Id.*

46. *See* Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101-5129) (reclassified from 25 U.S.C. §§ 461-479).

47. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

48. *Id.*

49. *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

50. Indian Reorganization Act § 5, 25 U.S.C. § 5108.

descent who are members of any recognized Indian tribe now under Federal jurisdiction,” (2) “all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation,” and (3) “all other persons of one-half or more Indian blood.”<sup>51</sup> The *Carcieri* decision later qualified the first definition, holding that the statutory “term ‘now under Federal jurisdiction’ . . . unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”<sup>52</sup> Accordingly, when a tribe is found not to have been under federal jurisdiction in 1934, it is not “Indian” for the purposes of section 19, and the Secretary lacks section 5 authority to take land into trust for its benefit.<sup>53</sup> Notwithstanding the IRA and other legislation that brought about better and more efficient uses of tribal resources, poor economic conditions for tribes continued as before.<sup>54</sup>

This attempt to foster tribal development was interrupted by another period of congressional efforts to sever ties between the federal government and Indian tribes in hopes of a “future in which Indians would disappear as a distinctive group within the United States.”<sup>55</sup> Termination became the controlling national policy in 1953 with the passage of House Concurrent Resolution 108, which mandated the end of the federal trustee relationship.<sup>56</sup> Later, specific termination legislation allowed for greater state involvement in the form of criminal and civil jurisdiction, and for some tribes, the liquidation of tribal assets (including reservation landholdings) and the end of federal recognition and services.<sup>57</sup> By the time termination was renounced in the 1970s, more than 100 tribes had been terminated, affecting 11,000 people and 1.3 million acres—a diminishment of 2.5 percent of Indian trust land.<sup>58</sup>

Indian policy shifted into its modern form during the 1960s in response to growing civil rights concerns.<sup>59</sup> This new perspective recognized tribal self-determination and self-governance as the exercise of inherent sovereign powers.<sup>60</sup> Acknowledgement of the nation-to-nation relationships between

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51. *Id.* § 10, 25 U.S.C. § 5129.

52. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

53. *Id.* at 394-95.

54. COHEN, *supra* note 1, § 1.05, at 88.

55. FREDERICK E. HOXIE, *THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE PLACE THEY MADE* 320 (2012).

56. *Id.* at 327.

57. WILKINSON, *supra* note 43, at 82-84.

58. *Id.* at 81.

59. COHEN, *supra* note 1, § 1.07, at 98.

60. *Id.*

the federal government and the individual Indian tribes has brought about greater tribal involvement in federal policy development.<sup>61</sup> Such collaboration has allowed for legislation and programs that emphasize tribal decision-making, cultural preservation, and economic development.<sup>62</sup> How long this respect for self-governance will last is unclear, however, as the unique standing of tribes remains open to legislative—and increasingly judicial—alteration.

*B. The Fee-to-Trust Statutory Process Prior to Patchak I*

The Secretary of the Interior's section 5 authority to take land into trust under the Indian Reorganization Act is implemented by Department of the Interior (DOI) regulations at 25 C.F.R. Part 151.<sup>63</sup> Land may be taken into trust for an Indian tribe when: (1) the land is either already within the exterior boundaries of the tribe's existing reservation or adjacent to it, (2) the tribe "already owns an interest in the land," or (3) the land acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing."<sup>64</sup> Once the land is held in fee by the tribe, it submits an application to the Bureau of Indian Affairs (BIA) to formally begin the fee-to-trust process; this application requires a legal land description, an explanation of why the acquisition is needed, the purpose for which the property would be used, and if the property is located off-reservation, a business plan or the location of the property relative to state and reservation boundaries.<sup>65</sup> The BIA then gives notice to affected state and local governments and allows a thirty-day comment period regarding possible impacts to "regulatory jurisdiction, real property taxes, and special assessments."<sup>66</sup> Once a final determination is made to take the land into trust, notice of the determination is published and if no challenge arises, the land comes under tribal jurisdiction, with the United States retaining ultimate title.<sup>67</sup>

The entire land-into-trust process was called into question in *South Dakota v. United States Department of Interior*.<sup>68</sup> In that case, the Secretary

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61. *See id.* § 1.07, at 99.

62. *Id.* at 112.

63. 25 C.F.R. §§ 151.1-.15(2019).

64. *Id.* § 151.3(a).

65. BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS 67-68 (2016).

66. 25 C.F.R. §§ 151.10, 151.11(d) (2019).

67. COHEN, *supra* note 1, § 15.07[1][b], at 1012.

68. 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).



asserted before the Eighth Circuit that because a section 5 land acquisition was an “agency action [that] is committed to agency discretion by law,”<sup>69</sup> it was not open to judicial review.<sup>70</sup> This caused the circuit court to consider whether the provision violated the nondelegation doctrine, which states that Congress cannot delegate its legislative power to any other branch of government.<sup>71</sup> The circuit court explained that although it is permissible for Congress to obtain assistance from the other branches, it must first provide legislative standards or boundaries that govern the exercise of such a delegated power.<sup>72</sup> Because the language of section 5 provided no boundary or guiding principle except that the acquisition be “for Indians,” courts had no ascertainable standard against which to test whether that delegated discretion had been exercised in a way that furthered congressional intent.<sup>73</sup> After concluding that the Secretary had an “unrestricted, unreviewable power” to take land into trust, the court held the power invalid as a violation of the nondelegation doctrine.<sup>74</sup>

In response to this decision, and while awaiting a grant of certiorari from the Supreme Court, the DOI promulgated a new rule stating that the Secretary could not take land into trust until at least thirty days following publication of the final agency determination in the Federal Register.<sup>75</sup> This set window of time permitted judicial review of the Secretary’s decision under the Administrative Procedure Act (APA) before “formal conveyance of title to land to the United States.”<sup>76</sup> The DOI specifically established this rule on its understanding that the Quiet Title Act (QTA), which “does not apply to trust or restricted Indian lands,”<sup>77</sup> would preclude judicial review once the United States held title to the land at issue. The Eighth Circuit decision was later vacated and remanded to the Secretary for reconsideration by the Supreme Court, which, although it gave no definite ruling, seemed to signal its agreement that the QTA would act as such a

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69. 5 U.S.C. § 701(a)(2) (2018).

70. *South Dakota*, 69 F.3d at 881-82.

71. *Id.* at 881.

72. *Id.*

73. *Id.* at 883-85.

74. *Id.* at 884-85.

75. 25 C.F.R. § 151.12(b) (2011) (amended in 2013).

76. Land Acquisitions, 61 Fed. Reg. 18082-01, 18082 (Bureau of Indian Affairs Apr. 24, 1996) (codified at 25 C.F.R. § 151.12(b)) (amended in 2013).

77. 28 U.S.C. § 2409a (2018).

bar.<sup>78</sup> Indeed, this agency understanding that sovereign immunity barred judicial review and title challenges after the land had been taken into trust found support in decisions made by the Ninth, Tenth, and Eleventh Circuits.<sup>79</sup>

## II. *Statement of the Patchak Cases*

Both *Patchak* cases center around the decision of the DOI to take land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (“the Band”), also known as the Gun Lake Tribe, consists of 277 citizens and is headquartered in central Michigan.<sup>80</sup> Despite having existed in that area continuously since the turn of the nineteenth century, the Band was only formally recognized by the DOI in 1999.<sup>81</sup> Two years later, after acquiring 147 acres of land (“Bradley Property”) in Wayland Township, a rural farming community thirty miles from Grand Rapids, the Band petitioned the Secretary to take the land into trust under section 5 of the IRA.<sup>82</sup> The application included the Band’s intention to construct and operate a casino on the property.<sup>83</sup>

In 2005, the Secretary issued a formal notice of decision to take the land into trust, and pursuant to agency rule, held off completing the transaction for thirty days to allow interested parties to seek judicial review.<sup>84</sup> During that period, the Michigan Gambling Opposition (“MichGO”) brought suit in the D.C. District Court alleging violations of the Indian Gaming Regulatory

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78. Anna O’Brien, Casenote and Comment, *Misadventures in Indian Law: The Supreme Court’s Patchak Decision*, 85 U. COLO. L. REV. 581, 590 (2014) (discussing taking land into trust).

79. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004), *abrogated by Patchak I*, 567 U.S. 209 (2012); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987), *abrogated by Patchak I*, 567 U.S. 209; *Fla. Dep’t of Bus. Regulation v. Dep’t of Interior*, 768 F.2d 1248 (11th Cir. 1985), *abrogated by Patchak I*, 567 U.S. 209.

80. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008).

81. *Final Determination to Acknowledge the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan*, 63 Fed. Reg. 56936-01 (Bureau of Indian Affairs Oct. 23, 1998).

82. *Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011).

83. *Id.*

84. *Notice of Final Agency Determination to Take Land into Trust Under 25 CFR Part 151*, 70 Fed. Reg. 25596-02 (Bureau of Indian Affairs May 13, 2005).

Act and the National Environmental Policy Act.<sup>85</sup> Although the district court initially issued a stay of the agency action, it later dismissed the suit, with the D.C. Circuit affirming in April 2008.<sup>86</sup> Shortly after the dismissal, some three years after publication of the Secretary's intent to take the land into trust, David Patchak filed his own challenge to the trust decision under the APA and sought an injunction to bar the acquisition.<sup>87</sup>

Patchak alleged that because the Band was only recognized in 1999, it was not under federal jurisdiction in 1934 and the Secretary therefore had no authority to take land into trust for its benefit.<sup>88</sup> To establish standing, Patchak argued that taking the Bradley Property into trust for gaming purposes would adversely impact him as a neighbor of the parcel by bringing millions of visitors into the area each year, increasing crime, traffic, and pollution, and decreasing property values.<sup>89</sup> Patchak made no personal claim to the Bradley Property.<sup>90</sup> The request for injunction was mooted in January 2009 when the Secretary took the land into trust after the Supreme Court denied certiorari in the MichGO case.<sup>91</sup> On February 24, the Supreme Court decided *Carcieri v. Salazar*, agreeing with Patchak that Secretarial authority under IRA section 5 was limited to tribes that had been under federal jurisdiction in 1934.<sup>92</sup> Regardless of the relevance of *Carcieri*, the district court dismissed the suit for lack of prudential standing, as Patchak's interests "actively r[a]n contrary to" the IRA's zone-of-interests.<sup>93</sup>

Although it recognized the opinions of its sister circuits, the D.C. Circuit reversed, holding the QTA to be inoperative as Patchak made no personal claim to the Bradley Property.<sup>94</sup> Absent the immunity provided by the QTA, the APA controlled, and Patchak's suit could move forward for further

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85. *Mich. Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 3 (D.D.C. 2007) (citing Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2018); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (2018)).

86. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

87. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 74 (D.D.C. 2009).

88. *Id.*

89. *Patchak I*, 567 U.S. 209, 213 (2012).

90. *Id.*

91. *Id.* at 214.

92. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

93. *Patchak*, 646 F. Supp. 2d at 78.

94. *Patchak v. Salazar*, 632 F.3d 702, 712 (D.C. Cir. 2011).

proceedings.<sup>95</sup> The court further held that Patchak's "intense and obvious" interests satisfied the requirements of prudential standing.<sup>96</sup>

#### A. Patchak I

##### 1. *Majority Decision*

Acknowledging the circuit split, the Supreme Court granted certiorari and, in a near unanimous decision, affirmed the conclusion of the D.C. Circuit.<sup>97</sup> The Supreme Court concerned itself with two separate issues: first, whether the sovereign immunity arising from the QTA shielded the United States from Patchak's suit; and second, if it did not, whether Patchak had prudential standing to allow his challenge to proceed.<sup>98</sup> Since Patchak brought his suit under the APA's general waiver of sovereign immunity, the Supreme Court considered that issue first.<sup>99</sup>

The APA general waiver of sovereign immunity exposes the United States to suits—like Patchak's—that seek non-monetary relief to address the action or inaction of a federal agency or its employee under color of legal authority.<sup>100</sup> The waiver does not apply whenever "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the claimant.<sup>101</sup> Because the Secretary continued to argue that the Indian lands exception of the QTA became operative after the United States acquired title to the Bradley Property, thus fulfilling the APA "carve-out," the Supreme Court shifted its focus to the QTA.<sup>102</sup>

The QTA waives immunity when the plaintiff brings a quiet title suit against the government by asserting a "right, title, or interest" in real property that conflicts with the claimed ownership or interest of the United States.<sup>103</sup> This suit authorization, however, "does not apply to trust or restricted Indian lands."<sup>104</sup> When this exception applies, it works to "retain the United States' immunity from suit."<sup>105</sup> The question then became

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95. *Id.*

96. *Id.* at 707.

97. *Patchak I*, 567 U.S. 209, 228 (2012).

98. *Id.* at 212.

99. *Id.* at 215.

100. *Id.*

101. 5 U.S.C. § 702 (2018).

102. *Patchak I*, 567 U.S. at 215.

103. 28 U.S.C. § 2409a(d) (2018).

104. *Id.* § 2409a(a).

105. *United States v. Mottaz*, 476 U.S. 834, 842 (1986).

whether Patchak had indeed brought a quiet title suit as stipulated by the QTA, thereby barring his demand for relief.<sup>106</sup>

Although Patchak's suit did attempt to "strip the United States of title to the land," the Supreme Court determined that the QTA Indian lands exception applied only to actions in which the plaintiff claimed a private interest in the property.<sup>107</sup> The Supreme Court found justification for this determination in two of its prior decisions: *Block v. North Dakota ex rel. Board of University & School Lands*<sup>108</sup> and *United States v. Mottaz*.<sup>109</sup> In *Block*, the Supreme Court held that North Dakota, as an adverse claimant to the United States, could not bypass the QTA's statute of limitations by seeking alternative statutory remedies, including the APA.<sup>110</sup> In *Mottaz*, the Supreme Court held that when plaintiffs themselves assert title to the property in question, the QTA governs the suit.<sup>111</sup> Therefore, the "defining feature of a QTA action" is for the plaintiff to seek to protect a claim antagonistic to a property interest of the federal government.<sup>112</sup> Patchak, unlike the *Block* and *Mottaz* plaintiffs, never raised an argument that he personally held claim to the land or had any actual right to possess it.<sup>113</sup> Because he only argued that the taking of the land into trust violated the IRA, his suit is a "garden-variety APA claim," and the QTA's waiver of sovereign immunity applies.<sup>114</sup>

The Supreme Court analysis then turned to whether prudential standing grounds should bar Patchak's suit.<sup>115</sup> To bring suit under the APA, Patchak must fall within its "aggrieved" standard, meaning that Article III injury-in-fact requirements are satisfied and the "interest he asserts [is] 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated."<sup>116</sup> In keeping with the APA's "generous review provisions," the zone-of-interests test favors judicial review and allows for all benefit of the doubt to go to the plaintiff.<sup>117</sup> It only bars a suit when the

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106. *Patchak I*, 567 U.S. at 215.

107. *Id.* at 232.

108. 461 U.S. 273 (1983).

109. 476 U.S. 834 (1986).

110. *Block*, 461 U.S. at 277.

111. *Mottaz*, 476 U.S. at 841-42.

112. *Patchak I*, 567 U.S. at 220.

113. *Id.*

114. *Id.* at 220-21.

115. *Id.* at 224.

116. *Id.* (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

117. *Id.* at 225 (citing *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

interest of the plaintiff is “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.”<sup>118</sup>

The Secretary contended that section 5 of the IRA—with its stated purpose of providing land for tribes—focuses on land *acquisition*, making Patchak’s interests in the land’s *use* as a casino insufficient for purposes of standing.<sup>119</sup> The Supreme Court disagreed, saying that when considered in context of the IRA’s overarching goal to “rehabilitate the Indian’s economic life,”<sup>120</sup> section 5 “functions as a primary mechanism to foster Indian tribes’ economic development.”<sup>121</sup> Furthermore, because DOI regulations require the Secretary to consider the “purposes for which the land will be used”<sup>122</sup> and the “potential conflicts of land use which may arise,”<sup>123</sup> whenever land is taken into trust, it is done “with at least one eye directed toward how tribes will use those lands to support economic development.”<sup>124</sup>

Because section 5 land-into-trust decisions are “closely enough and often enough entwined with considerations of land use to make that difference immaterial,” the Supreme Court concluded that the interests of neighbors who may suffer “economic, environmental, or aesthetic” harm are within the zone of interests to be protected or regulated by the IRA and are open to judicial review under the APA.<sup>125</sup> After holding that neither the QTA sovereign immunity nor the doctrine of prudential standing worked to bar Patchak’s suit, the Court remanded the case to the United States District Court for the District of Columbia for consideration on the merits.<sup>126</sup>

## 2. Dissent

Justice Sotomayor filed the only dissenting opinion and argued that the QTA should bar Patchak’s suit. She contended that allowing a plaintiff to strip the government of title to Indian land held in trust using the APA effectively nullified the QTA, which Congress and the executive branch intended to be the sole process to resolve property disputes with the United

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118. *Id.*

119. *Id.*

120. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

121. *Patchak I*, 567 U.S. at 226.

122. 25 C.F.R. § 151.10(c) (2018).

123. *Id.* § 151.10(f).

124. *Patchak I*, 567 U.S. at 226.

125. *Id.* at 227-28.

126. *Id.* at 228.

States.<sup>127</sup> Such divestment is relief that has been specifically prohibited by the QTA.<sup>128</sup> That Congress did not expressly exclude suits like Patchak's—which asserts only a weak interest in the disputed property rather than an ordinary quiet title action—is of no issue, as the APA carve-out is satisfied even if the relief Patchak seeks is only impliedly forbidden.<sup>129</sup>

Unlike the majority, Justice Sotomayor considered the real-world consequences to be suffered by Indian Country. She first recognized that the Indian land exception reflects congressional acknowledgement of the “specific commitments” and “solemn obligations” the government has made with and to the Indians via treaty and other agreements.<sup>130</sup> She then chided the majority for obliterating the thirty-day regulatory window for judicial review, as extending that window to the APA six-year statute of limitations only frustrates the IRA's central goal of encouraging tribal economic development.<sup>131</sup>

#### *B. The Gun Lake Trust Land Reaffirmation Act*

One secretarial argument put forward in *Patchak I* seemed to garner the slim support of the Supreme Court; the DOI urged that Patchak's suit should be treated like that of an adverse claimant because both pose an equal risk of harm to tribal interests, which the Indian land exception purposefully seeks to protect.<sup>132</sup> While the Supreme Court conceded that the argument was persuasive, it only said that “perhaps Congress would—perhaps Congress should” decide that the harms be treated exactly the same under the QTA.<sup>133</sup> While the case was on remand, Congress spoke—at least partially—on the issue by passing the Gun Lake Trust Land Reaffirmation Act (“Gun Lake Act”).<sup>134</sup> It stated that:

(a) IN GENERAL. —The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians . . . is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

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127. *Id.* at 231 (Sotomayor, J., dissenting).

128. *Id.* at 228.

129. *Id.* at 236 (Sotomayor, J., dissenting).

130. *Id.* at 229 (Sotomayor, J., dissenting).

131. *Id.* at 237 (Sotomayor, J., dissenting).

132. *Id.* at 223.

133. *Id.* at 224.

134. Pub. L. No. 113-179, 128 Stat. 1913 (2014).

(b) NO CLAIMS. —Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.<sup>135</sup>

Over Patchak’s objection that the Gun Lake Act impermissibly infringed on the Article III power of the judicial branch, the district court dismissed his suit for lack of jurisdiction and held that there existed “no constitutional obstacle” to stop the Act’s enforcement.<sup>136</sup> The D.C. Circuit Court affirmed the dismissal, holding that the plain language of the Gun Lake Act did strip federal courts of subject matter jurisdiction regarding the Bradley Property.<sup>137</sup> It further held that because Congress had supplied new law rather than “direct[ing] the result of pending litigation” as prohibited by Article III, the Gun Lake Act was constitutionally sound and the dismissal appropriate.<sup>138</sup>

### C. Patchak II

#### 1. Majority Decision

The Supreme Court again granted certiorari, and in a plurality opinion written by Justice Thomas and joined by Justices Breyer, Alito, and Kagan, affirmed the decision of the D.C. Circuit Court.<sup>139</sup> It began by first distinguishing between “permissible exercises of the legislative power and impermissible infringements of the judicial power.”<sup>140</sup> The Constitution created three branches of government, giving “[t]o the legislative department . . . the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.”<sup>141</sup> This separation of powers works to keep Congress from exercising judicial power properly vested in the judiciary under Article III.<sup>142</sup> Congress oversteps these bounds whenever it “usurp[s] a court’s power to interpret and apply the law to the

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135. *Id.* § 2(a)-(b), 128 Stat. at 1913.

136. *Patchak v. Jewell*, 109 F. Supp. 3d 152, 165 (D.D.C. 2015).

137. *Patchak v. Jewell*, 828 F.3d 995, 1001 (D.C. Cir. 2016).

138. *Id.* at 1002.

139. *Patchak II*, 138 S. Ct. 897, 903 (2018) (plurality opinion).

140. *Id.* at 905.

141. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

142. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .”).



[circumstances] before it.”<sup>143</sup> However, because the legislative power is the power to make law, Congress does have the authority to “make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins.”<sup>144</sup>

The rule, then, is that Article III is violated whenever Congress forces a particular result or finding under an old law, but is not violated when Congress chooses instead to change the law.<sup>145</sup> A jurisdiction-stripping statute addresses “a court’s competence to adjudicate a particular category of cases,”<sup>146</sup> and for purposes of Article III, constitutes a change in the law within Congress’s permissible legislative authority.<sup>147</sup> Section 2(b) of the Gun Lake Act removes from all federal courts the jurisdiction to hear any action that relates to the Bradley Property, includes no exceptions, and forces dismissal as its single judicial consequence.<sup>148</sup> Because section 2(b) only addresses “a court’s competence to adjudicate a particular category of cases,” it can only be read and understood as a jurisdiction-stripping statute.<sup>149</sup>

The ability to create a jurisdiction-stripping statute is a result of Article I,<sup>150</sup> which grants to Congress the great power to establish lower federal courts and inherently includes the “lesser power to ‘limit the jurisdiction of those Courts.’”<sup>151</sup> Jurisdiction is the “power to declare the law,” so jurisdiction-stripping statutes do not themselves involve “the exercise of judicial power” or constitute “legislative interference with courts in the exercising of continuing jurisdiction.”<sup>152</sup> Moreover, in most instances, a grant of jurisdiction from Congress is required before the exercise of judicial power, meaning that an Act of Congress can “restrain[ ] the courts from acting at certain times, and even restrain[ ] them from acting permanently regarding certain subjects.”<sup>153</sup> Consequently, stripping federal courts of jurisdiction is a valid power of Congress on par with declaring

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143. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016).

144. *Patchak II*, 138 S. Ct. at 905.

145. *Id.*

146. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

147. *Patchak II*, 138 S. Ct. at 905.

148. *Id.* (citing Gun Lake Trust Land Reaffirmation Act § 2(b), 128 Stat. at 1913).

149. *Id.* at 906.

150. U.S. CONST. art. I, § 8, cl. 9 (“To constitute Tribunals inferior to the supreme Court”).

151. *Patchak II*, 138 S. Ct. at 906 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812)).

152. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514-15 (1868).

153. *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 101 (1998).

war, laying taxes, and coining money.<sup>154</sup> The power is plenary unless it violates some other constitutional provision.<sup>155</sup>

Patchak did not dispute that Congress had the power to remove jurisdiction from federal courts.<sup>156</sup> He countered, however, that even if section 2(b) did permissibly strip courts of jurisdiction, it violated Article III on other grounds—firstly, because it “flatly directs” dismissal without allowing federal courts to interpret or apply any new law, and secondly, because it interfered with the Supreme Court’s decision in *Patchak I*.<sup>157</sup> The Supreme Court quickly dispensed with both arguments.

Section 2(b) does not direct dismissal under old law; instead, it is a newly created law for challenges “relating to” the Bradley Property, and the District Court did correctly interpret and apply that standard to Patchak’s suit.<sup>158</sup> Even the mandatory language of section 2(b)—“shall be promptly dismissed”—does not direct an outcome but rather imposes dismissal as the consequence of a court’s determination that it does not have jurisdiction to hear a suit related to the Bradley Property.<sup>159</sup> The Supreme Court found Patchak’s reliance on *United States v. Klein* unpersuasive.<sup>160</sup> In *Klein*, the estate of a former Confederate soldier brought suit to recover property seized by the federal government during the Civil War, but a statute required claimants to prove their loyalty in order to reclaim.<sup>161</sup> The soldier received a pardon prior to death, which the Supreme Court previously held proved loyalty under the statute.<sup>162</sup> After the estate received a favorable judgment, Congress passed a second statute declaring pardons proof of disloyalty.<sup>163</sup> The second statute mandated that when a claimant has accepted a pardon, the jurisdiction of the court hearing his suit ceased, and his suit must be dismissed.<sup>164</sup> Even in settled suits, the statute instructed the Supreme Court to dismiss for lack of jurisdiction.<sup>165</sup> The Supreme Court in *Klein* held the second statute to be an infringement of both the executive

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154. *Patchak II*, 138 S. Ct. at 906.

155. *Id.*

156. *Id.* at 908.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*; *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

161. *Patchak II*, 138 S. Ct. at 908.

162. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869).

163. *Patchak II*, 138 S. Ct. at 908.

164. *Id.* at 908-09.

165. *Id.* at 909.

and judicial powers.<sup>166</sup> Unlike the impermissible statute in *Klein*, section 2(b) does not exercise a power vested in another branch of government nor does it strip jurisdiction selectively.<sup>167</sup> Instead, section 2(b) removes the Bradley Property wholly from federal jurisdiction, which is entirely within the legislative power of Congress.<sup>168</sup>

As to Patchak's second argument, while Article III does forbid Congress from "retroactively commanding the federal courts to reopen final judgments,"<sup>169</sup> section 2(b) does not disturb a final judgment, as *Patchak I* did not provide one; it only remanded the suit back to the district court for further proceedings on the merits.<sup>170</sup> "Congress has the power to 'apply newly enacted, outcome-altering legislation in pending civil cases,'" even when it seems to unfairly target specific cases like it does here.<sup>171</sup> As Patchak's suit lacks a final judgment, section 2(b)'s reference to "pending" cases applies, and Article III is not implicated.<sup>172</sup> Because the Gun Lake Act did not violate Article III of the Constitution, the Supreme Court affirmed the dismissal of Patchak's suit.<sup>173</sup>

## 2. Concurrences

In his concurrence, Justice Breyer stated that when read in context with section 2(a), which reaffirms the property as trust land, application of section 2(b) brings about the "same real-world result" as the first section: keeping the Bradley Property in trust.<sup>174</sup> Section 2(b) "simplifies judicial decisionmaking" by making the only determination of the court whether the lawsuit before it relates to the Bradley Property.<sup>175</sup> Accordingly, the whole statute "need not be read to do more than eliminate the cost of litigating a lawsuit that will inevitably uphold the land's trust status."<sup>176</sup>

Justice Ginsburg's concurrence, joined by Justice Sotomayor, begins simply: "What Congress grants, it may retract."<sup>177</sup> While Congress must

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

170. *Patchak I*, 567 U.S. 209, 212 (2012).

171. *Patchak II*, 138 S. Ct. at 910 (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016)).

172. *Id.* at 909.

173. *Id.* at 911.

174. *Id.* (Breyer, J., concurring).

175. *Id.*

176. *Id.*

177. *Id.* at 912 (Ginsburg, J., concurring).

first give consent to suit, which the Supreme Court concluded it did in *Patchak I* under the APA general waiver of sovereign immunity,<sup>178</sup> Congress may also reinstate its sovereign immunity at any time.<sup>179</sup> This is true even when litigation is pending.<sup>180</sup> Because the Gun Lake Act operated as an effective restoration of immunity, Justice Ginsburg argued, the Supreme Court need not look further to resolve Patchak's suit.<sup>181</sup>

While Justice Sotomayor agreed with several aspects of the dissent—namely, that Congress may not direct an entry of judgment for a particular party, and that removing jurisdiction over a single suit is not enough to constitute a change in the law—she, like Justice Ginsburg, would read the Gun Lake Act as restoring federal sovereign immunity.<sup>182</sup> The majority of *Patchak I* (Sotomayor reminds us she was the single dissenter) recognized that Congress could bar lawsuits pertaining to the government's ownership of the land at issue.<sup>183</sup> Because the Gun Lake Act is “most naturally read” as restoring sovereign immunity, Justice Sotomayor would affirm on that basis alone and avoid the separation-of-powers analysis regarding jurisdiction-stripping statutes.<sup>184</sup>

### 3. Dissent

Chief Justice Roberts filed a dissenting opinion, joined by Justices Kennedy and Gorsuch, which scolded the plurality for giving Congress the unqualified authority to decide the outcome of a single pending case “in favor of the litigant it preferred, under a law adopted just for the occasion.”<sup>185</sup> He explained that the Framers’ explicitly established the judiciary separate from the legislature and the executive, dividing power and authority amongst the three because of a “concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.”<sup>186</sup> When the Gun Lake Act was passed in 2014, there were no other pending suits relating to the Bradley Property, and no other challenges could be filed as the APA six-year statute of limitations had expired.<sup>187</sup> That

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178. *Patchak I*, 567 U.S. 209, 215-25 (2012).

179. *Patchak II*, 138 S. Ct. at 912 (Ginsburg, J., concurring).

180. *Id.*

181. *Id.* at 913 (Ginsburg, J., concurring).

182. *Id.* at 914 (Sotomayor, J., concurring).

183. *Patchak I*, 567 U.S. at 224.

184. *Patchak II*, 138 S. Ct. at 914 (Sotomayor, J., concurring).

185. *Id.* at 922 (Roberts, C.J., dissenting).

186. *I.N.S. v. Chadha*, 462 U.S. 919, 962 (1983).

187. *Patchak II*, 138 S. Ct. at 916-17 (Roberts, C.J., dissenting).

Congress sought to “target [Patchak] for adverse treatment and direct the precise disposition of his pending case” is obvious.<sup>188</sup>

Moreover, Chief Justice Roberts argued, nothing in the language of section 2(b) suggests it even is a jurisdiction-stripping statute. The Supreme Court in other cases set out a clear rule, requiring Congress to have plainly stated its intention that a statutory limitation further poses a jurisdiction restriction; without a plain statement, the Supreme Court has treated it as non-judicial.<sup>189</sup> Even if section 2(b) is jurisdictional, when, as here, Congress uses its power to manipulate jurisdictional rules to direct the outcome of pending litigation, it has impermissibly assumed the role of judge and violated Article III.<sup>190</sup> More egregious is that with the dismissal of his federal case, Patchak is left with no alternative means of review, as state courts cannot exercise civil jurisdiction over trust land unless the tribe gives its consent.<sup>191</sup>

Chief Justice Roberts ends his dissent by disagreeing with Justices Ginsburg and Sotomayor that section 2(b) should be read as restoring sovereign immunity, as Congress did not express an “unambiguous intention to withdraw” a remedy as required, nor did the Gun Lake Act use any language (“immunity,” “consent to be sued,” “United States,”) that suggests an intention to restore immunity.<sup>192</sup> He also dismissed Justice Breyer’s approval of section 2(b) for making judicial determinations simpler and eliminating litigation costs as “cavalier euphemisms for exercising the judicial power.”<sup>193</sup> Such an exercise works by “relieving the Judiciary of its job,” making section 2(b) a transgression of the proper allocation of powers under the Constitution.<sup>194</sup>

### III. Analysis

#### A. *The Convergence of Patchak I and Carcieri Unduly Delays Economic Development of Newly Acquired Tribal Lands*

*Patchak I* and *Carcieri* amount to a double-failure of the Supreme Court to support and enforce the ultimate purpose of the IRA: to give tribal

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188. *Id.*

189. *Id.* at 918 (Roberts, C.J., dissenting); see *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).

190. *Patchak II*, 138 S. Ct. at 919-20 (Roberts, C.J., dissenting).

191. *Id.* at 921 (Roberts, C.J., dissenting); see 25 U.S.C. § 1322(a) (2018).

192. *Patchak II*, 138 S. Ct. at 921-22 (Roberts, C.J., dissenting).

193. *Id.* at 922 (Roberts, C.J., dissenting).

194. *Id.*

nations more control over their own economic well-being. While the *Carcieri* decision was bad enough, it appeared to apply only to parcels that received an affirmative final determination but had not yet been formally taken into trust. This is evidenced by the fact that the Supreme Court in its decision did not disturb nor even consider a previous 1800-acre parcel that was taken into trust for the Narragansett Tribe in 1988.<sup>195</sup> But *Patchak I* takes *Carcieri* a step further and leaves what would have otherwise been a settled trust decision open to collateral attack and possible retroactive divestment.<sup>196</sup>

*Patchak I* also allows for a wider group of plaintiffs to challenge a trust decision and significantly extends the time in which those plaintiffs can file a challenge. Prior to *Patchak I*, a plaintiff with “aesthetic” or “environmental” concerns surrounding trust land use could bring suit under other applicable statutes, such as the Indian Gaming Regulatory Act or the National Environmental Policy Act, which were subject to the APA six-year statute of limitations.<sup>197</sup> After *Patchak I*, any plaintiff may challenge the government’s decision to take land into trust subject to the APA, so long as he does not make a personal claim of an interest in the land.<sup>198</sup>

In an effort to limit the uncertainties brought about by the *Patchak I* decision, the BIA released its own “*Patchak Patch*,” a series of significant amendments to its 25 C.F.R. Part 151 fee-to-trust regulations.<sup>199</sup> The final rule, published in November 2013, eliminated the prior thirty-day waiting period, meaning land is immediately taken into trust after the final determination to acquire land.<sup>200</sup> Secondly, the final rule established that any “interested parties” in an acquisition must make themselves known to the BIA in writing prior to the final decision so that they may later receive written notice of the final decision.<sup>201</sup> It further required the BIA to publish notice in a newspaper of general circulation in the affected area to inform

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195. *Carcieri v. Salazar*, 555 U.S. 379, 385 (2009).

196. *Patchak I*, 567 U.S. 209, 228 (2012) (Sotomayor, J., dissenting).

197. *Id.* at 237 (Sotomayor, J., dissenting); see Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2018); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (2018)

198. *Patchak I*, 567 U.S. at 228 (Sotomayor, J., dissenting).

199. Heidi McNeil Staudenmaier & Harsh P. Parikh, *The BIA Proposes Patchak Patch Regulations for Fee-to-Trust Land Acquisitions*, CASINO LAWYER, Autumn 2013, at 24, [https://www.imgl.org/sites/default/files/media/publications/biaproposespatchakpatchregulationsfeetotrustlandacquisitions\\_heidimcneilstaudenmaier\\_harshparikh\\_cl\\_fall\\_2013.pdf](https://www.imgl.org/sites/default/files/media/publications/biaproposespatchakpatchregulationsfeetotrustlandacquisitions_heidimcneilstaudenmaier_harshparikh_cl_fall_2013.pdf).

200. Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013) (to be codified at 25 C.F.R. pt. 151).

201. *Id.*

unknown interested parties and specified that the APA statute-of-limitations began to run upon first publication of such newspaper notice.<sup>202</sup> Thirdly, the final rule distinguished between decisions issued by BIA officials and the Assistant Secretary of Indian Affairs. If a BIA official issues the decision, interested parties have thirty days following in which they must exhaust all administrative remedies before seeking APA review; if they fail to do so, judicial review is unavailable to them.<sup>203</sup> If the decision is instead issued by the Assistant Secretary, the decision is final and not subject to administrative review.<sup>204</sup> While this regulatory fix is helpful, it is not itself a solution, as tribes still must wait six years and hope that a challenge does not arise that divests the United States of title.

Although *Patchak II* does provide a better remedy to *Patchak I* and *Carcieri*, having each individual tribe attempt to persuade Congress to pass specific legislation every time it seeks to protect trust property is at best an incomplete solution, if not a nearly useless one. It unduly burdens tribes that have already endured the years or decades long fee-to-trust process to even convince the government to take the land into trust in the first place. Even if a tribe had favorable legislation introduced each time, the process to then have that legislation passed is protracted and the chance of success unknown.

*B. The Patchak II Remedy Fails to Solve the Problems of Patchak I and Carcieri*

That the *Patchak II* remedy provides no real finality is evidenced in *Littlefield v. United States Department of Interior*,<sup>205</sup> which involved a dispute regarding a trust acquisition for the Mashpee Wampanoag Tribe (“the Mashpee”). The Mashpee Tribe, located on the southeast coast of Cape Cod, Massachusetts, was federally recognized by the DOI in 2007.<sup>206</sup> Having no federal reservation, the Mashpee filed its fee-to-trust application soon after, seeking to place into trust a 170-acre parcel in the town of Mashpee and a second 150-acre parcel in the nearby town of Taunton.<sup>207</sup>

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202. *Id.*

203. *Id.*

204. *Id.*

205. 199 F. Supp. 3d 391 (D. Mass. 2016).

206. Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 22, 2007).

207. U.S. Dep’t of the Interior, Record of Decision: Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe 4 (Sept. 2015),

The Taunton site was intended for economic development in the form of a “400,000 [square-foot] gaming-resort complex.”<sup>208</sup> The generated revenue would be used to aid tribal members directly and fund cultural preservation efforts and other vital tribal programs.<sup>209</sup>

On September 25, 2015, the DOI published notice of its final decision to take both parcels into trust, making it the “initial reservation” of the Mashpee.<sup>210</sup> The DOI premised its decision on extensive recorded history that showed the Mashpee had existed continuously in the area set aside for it by the colonial government and that both the United States and the State of Massachusetts recognized its ownership and control of the land.<sup>211</sup> This history caused the DOI to treat the area as a “‘reservation’ for purposes of the IRA”, making the Mashpee qualified to take land into trust “under the second definition of ‘Indian.’”<sup>212</sup> Consequently, the DOI did not determine whether the Mashpee also met the first definition as qualified by the *Carcieri* decision.<sup>213</sup> Both parcels were taken into trust November 10, 2015.<sup>214</sup> The Mashpee quickly began development on Massachusetts’s first full-scale resort casino, at an estimated cost of \$1 billion.<sup>215</sup>

Residents of Taunton (“the Littlefields”) filed suit under the APA to challenge the decision in February 2016.<sup>216</sup> They specifically challenged the DOI’s interpretation and application of the second IRA definition of “Indian.”<sup>217</sup> Whether the Mashpee met the second definition as “descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation” turned on further definition of the term “such members.”<sup>218</sup> The Littlefields argued that “such members” plainly referred to the phrase “all persons of Indian descent

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<https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031724.pdf> [hereinafter 2015 Record of Decision].

208. *Littlefield*, 199 F. Supp. 3d at 393.

209. 2015 Record of Decision, *supra* note 207, at 121-22.

210. Land Acquisitions; Mashpee Wampanoag Tribe, 80 Fed. Reg. 57848 (Sept. 25, 2015).

211. 2015 Record of Decision, *supra* note 207, at 79.

212. *Id.*

213. *Id.*

214. *Littlefield v. U.S. Dep’t of Interior*, 199 F. Supp. 3d 391, 393 (D. Mass. 2016).

215. Sean Murphy, *Mashpee Tribe Speeds Up Timetable for Taunton Casino Opening*, BOSTON GLOBE (Mar. 14, 2016), <https://www.bostonglobe.com/metro/2016/03/14/mashpee-wampanoag-tribe-prepares-unveil-schedule-for-massive-casino-taunton/eHpal5nQfslYyNgaSuFBJ/story.html>.

216. *Littlefield*, 199 F. Supp. 3d at 393.

217. *Id.* at 394.

218. *Id.* at 395-96.



who are members of any recognized Indian tribe now under Federal jurisdiction” in the first definition.<sup>219</sup> This interpretation would, in line with the *Carcieri* decision, also limit the second definition to those tribes under federal jurisdiction in 1934.<sup>220</sup> The DOI countered that because “such members” is ambiguous, the Secretary did reasonably interpret it to refer only to “all persons of Indian descent who are members of any recognized Indian tribe,” making the temporal limitation absent in the second definition.<sup>221</sup>

The court sided with the Littlefields and concluded that the word “such” in the second definition clearly referred to the “members” described in the first definition, integrating the 1934 restriction into both.<sup>222</sup> It based its conclusion on the plain meaning of the word “such” (defined as “of the character, quality, or extent previously indicated or implied”) and found there to be no language in the IRA that would suggest it referred only to a portion of the antecedent phrase.<sup>223</sup> It dismissed the DOI argument that such a reading rendered the second definition “entirely surplus.”<sup>224</sup> The court explained that the two definitions remained distinct.<sup>225</sup> The first definition requires actual membership in a tribe that was under federal jurisdiction in 1934.<sup>226</sup> The second definition encompasses the descendants of members who were under federal jurisdiction in 1934 and were living on reservations at that time.<sup>227</sup> After holding that the second definition unambiguously incorporated the first, the court declared the Secretary lacked authority to acquire land for the Mashpee, and on July 28, 2016, it remanded the issue back to the agency for further proceedings.<sup>228</sup> While the DOI—then under the Trump administration—did initially appeal, it later asked for and was granted voluntary dismissal in May 2017.<sup>229</sup>

Fearful of the DOI’s refusal to continue to defend the trust status of its reservation in court, the Mashpee utilized the *Patchak II* remedy.<sup>230</sup> In

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219. *Id.* at 396.

220. *Id.*

221. *Id.*

222. *Id.* at 397.

223. *Id.* at 398.

224. *Id.* at 399.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 400.

229. *Littlefield v. U.S. Dept. of the Interior*, No. 16-2481, 2017 WL 10238203 (1st Cir. May 8, 2017).

230. *Hearing on Indian Affairs Bills Before the H. Comm. on Natural Resources*, 115th

March 2018, the Mashpee Wampanoag Tribe Reservation Reaffirmation Act (“the Mashpee Act”) was introduced in the House and Senate.<sup>231</sup> Like the Gun Lake Act, the Mashpee Act reaffirms the reservation as trust land and requires that all actions pending in federal court relating to the reservation be dismissed.<sup>232</sup> Neither bill gave new or special rights to the Mashpee.<sup>233</sup> Both bills had bipartisan support, and passage was further encouraged by the City of Taunton, the National Congress of American Indians, numerous intertribal organizations, including the National Indian Gaming Association, and twenty-five individual tribes.<sup>234</sup>

On September 7, 2018, two years following remand, the DOI issued its opinion that in light of the *Littlefield* holding, the Mashpee had not been under federal jurisdiction in 1934, and the DOI therefore lacked authority to take land into trust on its behalf.<sup>235</sup> Answering whether the Mashpee had been under proper federal jurisdiction required the determination of whether the United States had taken any action establishing or reflecting federal responsibility for or over the Mashpee in or before 1934, and if it did, whether that status remained intact in 1934.<sup>236</sup> The DOI explained that while there existed significant dealings with the State of Massachusetts, little to no evidence of significant contact between the United States and the Mashpee via treaty, legislation, or federal administrative action existed.<sup>237</sup> Absent indicia of federal jurisdiction, the Mashpee failed to qualify under either the IRA’s first or second definitions of “Indian.”<sup>238</sup>

In response to the DOI decision, and to supplement the pending legislation, the Mashpee filed suit against the agency in the Federal District Court for the District of Columbia.<sup>239</sup> The complaint argues that the

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Cong. 2 (2018) (statement of Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe), [https://naturalresources.house.gov/imo/media/doc/7.24\\_testimony\\_cromwell.pdf](https://naturalresources.house.gov/imo/media/doc/7.24_testimony_cromwell.pdf) [hereinafter Cromwell Testimony].

231. H.R. 5244, 115th Cong. (2018); S. 2628, 115th Cong. (2018).

232. H.R. 5244 § 2; S. 2628 § 2.

233. Cromwell Testimony, *supra* note 230, at 3.

234. *Id.*

235. Memorandum Letter from Assistant Secretary-Indian Affairs Tara Sweeney to Mashpee Wampanoag Chairman Cedric Cromwell 1 (Sept. 7, 2018) <https://www.indianz.com/News/2018/09/10/mashpee090718.pdf> [hereinafter Sweeney Memorandum].

236. The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act, Op. Sol. Interior No. M-37029, at 19 (Mar. 12, 2014), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

237. Sweeney Memorandum, *supra* note 235, at 20.

238. *Id.* at 28.

239. Philip Marcelo, *Tribe Sues Feds over Decision Not to Affirm Reservation*, AP NEWS (Sept. 27, 2018), <https://apnews.com/f252529bf7b54a1c9954992f285a71dc>.

judgment is contrary to law and asks the court to set it aside as arbitrary and capricious.<sup>240</sup> The Mashpee also appealed the *Littlefield* decision, which remains pending in the U.S. First Circuit Court of Appeals.<sup>241</sup> Until all legal challenges are finalized, the DOI will continue to hold the land in trust.<sup>242</sup>

Because the IRA is the only vehicle by which the Mashpee can acquire trust land, if the trust status of its reservation is rescinded, the Mashpee will be effectively landless unless and until Congress chooses to act. Feeling “utterly abandoned by [its] federal trustee,” the Mashpee Tribe continues to petition Congress for passage of its Act.<sup>243</sup> Mashpee Chairman Cedric Cromwell has said that if the reservation is lost, the “ability to operate as a tribal government would be crushed.”<sup>244</sup> Even just the uncertainty surrounding the trust status has caused the Tribe “a massive loss of resources and services” meant to aid Mashpee citizens.<sup>245</sup>

The Mashpee Act was reintroduced with identical language on January 8, 2019, after it failed to make any progress in the previous Congress.<sup>246</sup> Although it still has bipartisan support and the widespread backing of Indian Country, challengers to the legislation remain.<sup>247</sup> Lawmakers from Connecticut and Rhode Island have resisted its passage, and competing gaming operators continue to be vocal in their opposition.<sup>248</sup> Despite federal acknowledgement of its aboriginal existence, and after having spent eight years inside the bureaucratic fee-to-trust process and another four in court and before Congress, there does not appear to be an end in sight for the Mashpee. The *Patchak II* remedy appears to be no remedy at all.

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240. *Id.*

241. Tanner Stening, *Interior: Mashpee Tribe’s Land Remains in Trust Pending Appeal*, CAPE COD TIMES (Sept. 11, 2018), <https://www.capecodtimes.com/news/20180911/interior-mashpee-tribes-land-remains-in-trust-pending-appeal>.

242. *Id.*

243. Tanner Stening, *Mashpee Tribe Sues Interior Department over Land Decision*, INQUIRER & MIRROR (Sept. 27, 2018), <https://www.ack.net/news/20180927/mashpee-tribe-sues-interior-department-over-land-decision>.

244. Tanner Stening, *Bill to Protect Mashpee Tribe’s Land Refiled*, CAPE COD TIMES (Jan. 7, 2019), <https://www.capecodtimes.com/news/20190107/bill-to-protect-mashpee-tribes-land-refiled> [hereinafter Stening, *Bill Refiled*].

245. #StandwithMashpee, MASHPEE WAMPANOAG TRIBE, <https://mashpeewampanoag.tribe-nsn.gov/standwithmashpee> (last visited Jan. 5, 2019).

246. See H.R. 312, 116th Cong. (2019).

247. Stening, *Bill Refiled*, *supra* note 244.

248. *Id.*

*C. Congress Must Step in to Prevent Another Devastating Shift in Federal Indian Policy*

The *Littlefield* judgement, along with the DOI choosing not to challenge it, is a dangerous precedent for Indian Country that has led tribal leaders to call it the dawning of a new termination era.<sup>249</sup> This ominous conclusion is supported by a new draft proposal to further change the 25 C.F.R. Part 151 fee-to-trust regulations.<sup>250</sup> These new amendments would require the BIA to “comply with a final court order and any resulting judicial remedy, including . . . taking land out of trust.”<sup>251</sup> Based on the holdings of *Littlefield*, *Carcieri*, and *Patchak I*, federal courts are no more likely than the current administration to protect Indian property interests.

Perhaps it is the rise and success of Indian gaming that is changing the judicial attitude toward tribes, making the trust doctrine and canons of construction seem superfluous as tribes are no longer perceived as being “weak or financially defenseless.”<sup>252</sup> This attitude is bolstered by the public perception that when a tribe takes land into trust it will—no matter the stated purpose—always build a casino, and that resulting revenue is or can be used to buy political power and influence.<sup>253</sup> Gaming, in fact, “has produced the single largest infusion of income into Indian country in history.”<sup>254</sup> When the Indian Gaming Regulatory Act was passed in 1988, total revenue from Indian gaming equaled \$100 million.<sup>255</sup> In 2016, Indian gaming generated \$31.2 billion,<sup>256</sup> nearly half of the United States casino industry’s \$70.16 billion gross gaming revenue.<sup>257</sup>

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249. Acee Agoyo, ‘Termination Is Here’: Tribes Rally Against Trump Administration, INDIANZ.COM (Nov. 14, 2018), <https://www.indianz.com/News/2018/11/14/termination-is-here-tribes-rally-against.asp>.

250. U.S. Dep’t of Interior, Bureau of Indian Affairs, Consultation Draft – Part 151 Land Acquisition §§ 151.11-.12 (Oct. 2017), <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Consultation%20Draft%20-%20Trust%20Acquisition%20Revisions.pdf>.

251. *Id.*

252. Skibine, *supra* note 20, at 38.

253. William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN L. REV. 415, 419-20 (2016).

254. WILKINSON, *supra* note 43, at 330.

255. *Id.* at 336.

256. 2016 Indian Gaming Revenues Increased 4.4%, NAT’L INDIAN GAMING COMM’N (Sept. 28, 2018), <https://www.nigc.gov/images/uploads/newsrelease/GGRPR20170717x.pdf>.

257. *State of the States 2017: The AGA Survey of the Casino Industry*, AM. GAMING ASS’N (Oct. 25, 2017), <https://www.americangaming.org/wp-content/uploads/2017/10/2017-State-of-the-States.pdf>.

What must be remembered, however, is that this staggering amount is not spread equally across Indian Country or among the 573 federally recognized tribes.<sup>258</sup> The \$31.2 billion was generated by 244 tribes across twenty-eight states, with fifty-seven percent of that revenue being generated by smaller gaming operations that grossed less than \$25 million.<sup>259</sup> Even this amount, though substantial, is likely not enough to create and maintain the social and economic programs necessary to lift and keep a tribe out of poverty. For the other 329 tribes (that either oppose gaming or are located in areas where gaming is not financially feasible), and for the tribes with gaming operations that barely pay for themselves, being in poverty or otherwise decidedly below middle-class remains the norm.<sup>260</sup> Because it is simply beyond the ability of the average tribe to “exercise[ ] its political influence to persuade Congress to enact a narrow jurisdiction-stripping provision that effectively ends all lawsuits threatening its casino” or any other controversial economic development, the *Patchak II* remedy is unavailable to most of Indian Country.<sup>261</sup>

The best remedy possible, then, is for Congress to exercise its plenary power to override the decision in *Patchak I*. As the Supreme Court previously held in *Mottaz*, the sole function of the Indian land exception in the QTA is to “retain the United States’ immunity from suit by third parties challenging the United States’ title to land held in trust for Indians.”<sup>262</sup> Therefore, Congress should legislatively affirm that any plaintiff who seeks to force government relinquishment of title should be barred, regardless of the strength or type of the plaintiff’s interest. The Supreme Court itself acknowledged that although *Patchak* did not seek to protect his own interest, the practical effect of his suit or any like it is to divest the government of its interest.<sup>263</sup> But it also made clear that it is “for Congress to tell us, not for us to tell Congress” that the harms should be treated alike and barred under the QTA.<sup>264</sup>

By passing legislation that safeguards acquired trust land from divestiture, Congress would acknowledge and affirm its duty as trustee to protect those Indian lands—something this Supreme Court and the

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258. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863 (July 23, 2018).

259. 2016 *Indian Gaming Revenues Increased 4.4%*, *supra* note 256.

260. WILKINSON, *supra* note 43, at 330-38.

261. *Patchak II*, 138 S. Ct. 897, 910 (2018).

262. *United States v. Mottaz*, 476 U.S. 834, 842 (1986).

263. *Patchak I*, 567 U.S. 209, 223 (2012).

264. *Id.* at 224.

Executive have failed to do. Because the problems of *Patchak I* and *Carcieri* are inseparable, Congress should override both statutory interpretation decisions. That the purpose of the APA should yield to that of the IRA and the QTA is due to the special fiduciary relationship between tribes and the federal government.<sup>265</sup> The chipping away of the fee-to-trust process is a new solution to the old Indian problem, an active pursuit of termination that Congress must stop to protect the ability of every tribe to not only meaningfully self-govern, but to exist.

#### *IV. Conclusion*

The ultimate purpose of the Indian Reorganization Act is to acquire land into trust for tribes on which to live and engage in economic development. This is undermined by the *Patchak I* and *Carcieri* decisions. Without the fee-to-trust process, tribes have few other opportunities to generate revenue to aid in the care of its citizens. The remedy provided by *Patchak II* is not sufficient to provide certainty concerning the status of trust lands. Therefore, Congress should exercise its plenary power over Indians to pass a congressional fix to both *Patchak I* and *Carcieri*. Doing so would affirm its trust responsibility and foster greater tribal self-determination.

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265. O'Brien, *supra* note 78, at 608.