Update:

Effect of Patchak on Tribal Trust Lands

By Heidi McNeil Staudenmaier and Harsh P. Parikh

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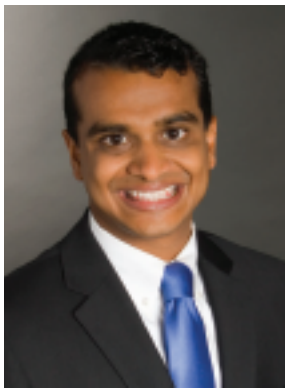

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Last year's decisive (8-1) decision by the United States Supreme Court in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) appeared to be a major blow to tribal gaming. *Patchak* seemed to open up challenges to fee-to-trust transfers to a broader group of plaintiffs and significantly extend the time for filing such suits. Most gaming observers at the time agreed that *Patchak* would certainly delay development on newly acquired tribal lands.

Not necessarily. The Secretary of the Department of Interior ("Secretary" or "DOI") has indicated a major shift in federal policy to foster tribal economic development on newly acquired trust lands. Even without Congressional action to address *Patchak*, the Secretary and the Bureau of Indian Affairs ("BIA") are primed to continue to transfer land into trust at a rapid pace. The Court's decision in *Patchak*, when combined with the Supreme Court's 2009 decision in *Carcieri v. Salazar*, 129 S. Ct. 1058, raises several complex issues, including (1) whether the litigation floodgates were opened to question newly acquired Indian land trust acquisitions, and (2) whether the trust transfers would remain in limbo during the pendency of litigation.

These questions may have been answered by the Secretary's recent attempts to assuage the detrimental impact of *Patchak* on tribal gaming developments.

On June 18, 2012, the Supreme Court determined that an individual property owner (plaintiff David Patchak) near the Gun Lake Band's Casino had standing to challenge the Secretary's acquisition of land into trust for the Tribe. The Supreme Court's decision consisted of two parts.

First, the eight-justice majority held that Patchak's claim under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, was not barred by the Quiet Title Act's "Indian lands" exception. The Court determined that Patchak was not claiming a right, title or interest in the land, but rather that the government was not entitled to any such right, title or interest in that land. The Quiet Title Act was therefore not applicable and did not void the APA's sovereign immunity waiver. Second, the Court determined that Patchak had prudential standing to challenge the Secretary's trust acquisition because Patchak's alleged economic, environmental, and aesthetic harms "fall…within the zone … protected or regulated by" the contention that the Secretary violated the Indian Reorganization Act. At the time, many tribal gaming scholars viewed this decision as a "game changer." *Patchak* was initially feared to hinder tribal gaming and economic development on newly acquired trust lands. However, the Secretary has attempted to mitigate some of these harsh effects through reversal of certain long-standing DOI policies. Prior to the ruling in *Patchak*, the Secretary would publish a notice of a final decision to take land into trust for a tribe at least thirty days before the date of the transfer. If any litigation was commenced within this thirty-day window, the DOI's internal policies encouraged it to "self-stay" any fee-to-trust transfers until resolution of the pending litigation.

Based on actions in late 2012 and early 2013, the DOI may have already eliminated its "self-stay" policy. On December 3, 2012, the DOI published its thirty-day notice in the Federal Register of its intent to take into trust: (1) a 305-acre parcel on behalf of the North Fork Band of Mono Indians in Madera County ("North Fork Transfer"), and (2) a 40-acre parcel on behalf of the Enterprise Rancheria of Maidu Indians, in Yuba County ("Enterprise Transfer").

Following the public notice, nearby citizens and Indian tribes affected by the fee-to-trust transfers timely filed separate lawsuits challenging the Secretary's decision under the APA. Unlike past practice, the Secretary refused to "self-stay" either transfer. The Secretary asserted that his principal reason for "self-stay" in prior cases was no longer extant and determined that it was not necessary to consult the Department's internal procedures set forth in the BIA Handbook. Specifically, in the Secretary's view, since *Patchak* allowed suit under the APA even after land was taken into trust, a "self-stay" was no longer necessary.

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As a result of the Secretary's change in policy, the plaintiffs in both cases sought to enjoin the trust transfers. In both cases, the judges separately concluded that the land could be taken into trust. The courts opined that the Secretary could "unwind" the transfer if later ordered to do so, and therefore the plaintiffs were not irreparably harmed. Nevertheless, the beneficiary Tribes and the Government are required in both cases to provide certain notice before undertaking any "physical alteration" of the land at issue. The courts further warned that the beneficiary tribes could proceed moving forward with planning their gambling facilities "at their own risk."

The Secretary also has indicated reconsideration of the 30-day public notice requirement. Earlier this year, the Assistant Secretary of the BIA publicly commented that the DOI is considering doing away with the 30-day review period to notify the public of land-into-trust decisions.

While these post-*Patchak* developments may mitigate some uncertainties created by the *Patchak* ruling, other concerns remain. For instance, even though the land will be transferred into trust, the tribe must determine whether to move forward with construction and development on its newly acquired trust lands or delay major financial investments until the six-year statute of limitation expires. The *Patchak* decision means there is a certain risk that the fee-to-trust transfer could be undone through litigation, almost six years later. As such, the tribe may opt to resolve the pending litigation before investing and expending major revenues for casino development. In this regard, *Patchak* still may mean that the time for getting a casino up and running is increased, and the costs are considerably higher.

California Senator Diane Feinstein and Arizona Senator John McCain remain outspoken critics of off-reservation gaming. In a January 31, 2012, letter to the Secretary, Senator Feinstein noted that the Secretary's "abrupt change in [self-stay] policy has caught many…by surprise." She posed several interesting questions regarding the DOI's decision to abandon its "self-stay policy," including:

- Federal liability and indemnity for investments made by tribe to trust lands
- Procedures for unwinding the fee-to-trust transfer
- Consultation with tribes and other stake holders

While the Secretary's *Patchak* "patch" may alleviate some of the initial concerns, it also raises other legal complexities in an uncharted land. Litigation over fee-to-trust transfer is bound to continue and may hinder economic development on newly acquired trust lands. ♣

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