

LIFE AFTER *PATCHAK*: WHAT DOES IT MEAN FOR TRIBAL GAMING IN CALIFORNIA?

by Heidi McNeil Staudenmaier

The tribal gaming industry received a blow from the United States Supreme Court right before the high court ended its session for the summer. Whether the blow is a knock-out punch that will thwart plans for new tribal casinos in California and elsewhere, or simply a wake-up call resulting in a longer and more challenging process for tribal land acquisitions, remains to be seen.

The referenced court ruling was issued on June 18, 2012 – *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ____ (2012). In that case, the court decisively held (8-1) that an individual owner (David Patchak) of property near the tribe’s Gun Lake Casino in Michigan had standing to challenge the Secretary of the Interior’s acquisition of land into trust for the tribe. The court determined that the U.S. government had waived its sovereign immunity and that Patchak had prudential standing to challenge the secretary’s acquisition of the land. The court reasoned that Patchak was not claiming any competing interest in the Gun Lake land, so the claim was not barred by the Quiet Title Act (QTA), and that he had asserted an interest “arguably within the zone of interests” protected or regulated under the Administrative Procedure Act (APA). As a result, the case has been sent back to the Michigan trial court for litigation on the merits.

Pertinent case background: The Secretary of the Interior took the subject land into trust for the tribe in 2009. Patchak challenged the land acquisition by contending that the tribe was not a federally recognized tribe as of 1934 (when the Indian Reorganization Act was enacted). The suit was filed prior to the United States Supreme Court’s ruling in *Carcieri v. Salazar*, ___ U.S. ___ [129 S.Ct. 1058] (2009), in which the court held that the secretary had no authority to take land into trust for any tribe not “under Federal jurisdiction” as of 1934. Patchak supported his standing claim by asserting that the Gun Lake Casino would increase traffic and crime and irreversibly change the area’s rural quality. The Michigan trial court refused to divest the government of title to the land and permitted the tribe to develop its casino, which has been successfully operating since 2011.

The Supreme Court, however, concluded that the QTA did not apply and therefore did not void the sovereign immunity waiver provided by the APA. The court determined that Patchak was not claiming a right, title or interest in the land, but instead he was seeking a declaration that the government was not entitled to any such right, title or interest in that land. With the QTA argument deemed inapplicable, the court then only needed to consider whether the government was subject to a lawsuit under the APA. The court found that Patchak did have sufficient “prudential standing” to pursue his claim based on its view that the differences between “land acquisition” and “land use” were immaterial.

Dissenting Justice Sonia Sotomayor believed the ruling ironically would permit persons with tenuous connections to Indian lands to challenge the government’s acquisition of those lands, whereas persons who may actually have “right, title or interest” in those Indian lands are barred from bringing such claims. Further, the government’s land-into-trust decisions may now be subjected to the APA’s six-year statute of limitations, which could have a chilling effect on tribal development. The majority acknowledged that Justice Sotomayor’s argument was “not without force,” but expressly left the matter to be worked out by Congress.

The court’s decision has been viewed as a “game changer” by many tribal gaming observers. Prior to September 2011, the Department of the Interior had approved only five “off reservation” land acquisitions for gaming purposes. Since that time, the department has issued four favorable determinations, three of which are in California: (1) Enterprise Rancheria (CA); (2) North Fork Rancheria (CA); (3) Keweenaw Bay Indian Community (MI); and (4) Ione Band (CA) (the latter was determined under the restored tribe exception). The Enterprise and North Fork situations required specific approval by the Governor of California, who did, in fact, concur in both decisions on August 31, 2012. Rather than going through the Department of Interior process, the Graton Rancheria (CA) is moving forward with casino plans based on Congressional legislation placing the land into trust for

the tribe. Keweenaw Bay also requires the concurrence of the Michigan governor.

The Supreme Court in *Patchak* did not rule on the *Carcieri* implications, leaving that open for further debate. The tribal casinos proposed in California by the Enterprise Rancheria, North Fork Rancheria, Ione Band and Graton Rancheria could all be impacted by the *Patchak* ruling. The ruling also could have negative implications for the Cowlitz Tribe in Washington (currently in litigation over *Carcieri*, even though the department has already rendered a positive determination that the tribe meets the “under federal jurisdiction” test), Mashpee Wampanoag Tribe in Massachusetts, and Shinnecock Tribe in New York.

Realistically, however, litigation on the merits of the *Patchak* case could take years, making it less likely that the Gun Lake Casino will ultimately be shut down. However, there certainly are concerns that the decision will inhibit would-be investors, who might otherwise lend to tribes or invest in gaming projects, and increase the likelihood that anti-gaming groups will oppose land into trust acquisitions – particularly since the new six-year window will give such interests more time to raise necessary support and capital – all of which could impact proposed casino development or other economic devel-

opment on tribal lands. In short, the *Patchak* decision means that the time for getting a casino up and running will be greatly increased and the costs will be considerably higher. As a result, the return on investment in future tribal projects will likely be reduced for both the tribe and its developers and financiers.

In addition to the *Patchak* decision setting up what could be a difficult roadblock for further expansion of tribal gaming, both California Senator Dianne Feinstein and Arizona Senator John McCain are pushing bills to stop off-reservation casinos. At the same time, however, there have been continuing efforts in Congress to enact a “*Carcieri* fix”.

How the *Patchak* proceedings will be ultimately resolved as the merits unfold cannot be known. Indeed, many observers believe there is little or no merit to *Patchak*’s claims. Nevertheless, in the interim, the expansion of tribal gaming will certainly be impeded or at least slowed in light of the new tools provided to casino opponents by this Supreme Court ruling.

Heidi McNeil Staudenmaier is a senior partner in the law firm of Snell & Wilmer LLP, based in the Phoenix, Arizona office, where her practice emphasizes gaming, federal Indian law, and business litigation.

