**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| DAVID PATCHAK,<br><br>Plaintiff,<br><br>vs.<br><br>DIRK KEMPTHORNE, et al.,<br><br>Defendants. | Case No. 1:08-CV-01331<br>Hon. Richard J. Leon |
| MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,<br><br>Intervenor-Defendant. | |

**INTERVENOR-DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe"), a federally-recognized Indian Tribe, respectfully moves this Court for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). As set forth in the accompanying memorandum of law, Plaintiff lacks standing to assert his claim, and his claim is barred by the doctrine of laches.

Date: October 6, 2008

Respectfully submitted,

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Intervenor-Defendant,

By /s/ Conly J. Schulte

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**INTERVENOR-DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe"), a federally-recognized Indian Tribe, respectfully submits this memorandum in support of its Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c).

## INTRODUCTION

Seven years ago, the Tribe petitioned the Secretary of the Interior to take land into trust as the Tribe's initial reservation. Plaintiff was among those who publicly opposed the acquisition at that time. When the Secretary agreed to take the land into trust in 2005, opponents of his decision announced their intent to delay the transaction through litigation, and then filed suit against the Secretary in this Court. *Michigan Gambling Opposition v. Norton,* No. 05-1181 (D.D.C. filed June 13, 2005). Plaintiff, although undisputedly aware of that case, never intervened. Nor has he previously filed his own suit. Instead, for the past three years, Plaintiff has stood by while

challenges to the Secretary's decision have been fully litigated and rejected, first by this Court and then by the Court of Appeals for the D.C. Circuit. *Michigan Gambling Opposition v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd, Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). It was not until the Court of Appeals denied rehearing *en banc*, after more than three years of litigation, that Plaintiff *finally* decided to come forward with this eleventh-hour claim challenging the United States' recognition of the Tribe's sovereign status under the Indian Reorganization Act ("IRA")—a claim he clearly could have attempted to raise three years ago.

In any event, because the interests Plaintiff alleges are outside the zone of interests protected by the IRA, and, indeed, directly conflict with the interests protected by the IRA, Plaintiff lacks prudential standing to assert his claim. The Complaint should be dismissed for that reason. In the alternative, Plaintiff's transparent and improper use of this litigation as a delay tactic, to the detriment of both the United States and the Tribe, should be rejected under the doctrine of laches.

## STATEMENT OF FACTS

### I. Historical Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians "was initially recognized as a tribe by the federal government early in its history," and "descends primarily from a band of Pottawatomi Indians that was led by Chief Match-E-Be-Nash-She-Wish during the late 1700s and early 1800s[.]" (Patchak Compl. ¶ 15.) The Tribe has a well-documented history and has existed as a continuous community throughout its history. 63 Fed. Reg. 56,936. However, pursuant to historical federal allotment and assimilation policies, the Tribe lost its land base and, not long after

the IRA was enacted, the Tribe was erroneously deemed ineligible to organize under that statute. AR[1] 001989-90.

In 1994, the Tribe sought formal acknowledgement of its sovereign status, pursuant to the federal acknowledgment procedures found at 25 C.F.R. Part 83. *See generally* Patchak Compl. ¶ 18. In 1997, the Secretary published for notice and comment a proposed finding of federal acknowledgment. 62 Fed. Reg. 38,113-115 (July 16, 1997). On October 23, 1998, the Secretary issued a Notice of Final Determination that the Tribe "exists as an Indian tribe within the meaning of Federal law." 63 Fed. Reg. 56,936 (Oct. 23, 1998). After administrative appeals were exhausted, the Secretary's Final Determination became effective on August 23, 1999. 65 Fed. Reg. 13,298-01 (Mar. 13, 2000).[2]

Soon after obtaining federal recognition, the Tribe sought what every Indian Tribe requires in order to fully exercise its sovereign powers: a land base over which it can exercise territorial jurisdiction and through which it can pursue the twin federal goals of tribal economic development and self-government. And like many other Indian Tribes, the Tribe decided to pursue these goals in part through the operation of a gaming enterprise, as specifically contemplated by the Indian Gaming Regulatory Act ("IGRA"). *See, e.g.*, 25 U.S.C. §2719(b)(1)(B)(ii) (authorizing gaming on initial reservations of tribes restored to federal recognition). To that end, the Tribe identified and acquired a 146-acre parcel of disused industrial land, referred to as the "Bradley Tract," which was

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[1] References to "AR_____" are to the documents contained in the Administrative Record that the Defendants herein filed in the District Court in the *MichGO v. Norton*, No. 05-1181 case and which the Tribe understands will be filed in the case at bar.

[2] The Secretary's tribal status determination confirmed the Tribe's eligibility "for the services and benefits from the Federal government that are available to other federally recognized tribes." 25 C.F.R. § 83.12. These benefits include the ability to have tribal lands taken into trust by the Secretary of the Interior. *Cf.* Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791; 25 C.F.R. Part 151; *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004).

located within the Tribe's aboriginal territory and less than three miles from its historical center. In August 2001, the Tribe filed its "fee-to-trust" application, asking the Secretary to accept the tract into trust for the benefit of the Tribe, pursuant to the Secretary's authority under Section 465 of the IRA. 5 U.S.C. § 465; *see also* 25 U.S.C. §§ 467 and 2719(b)(1)(B)(ii)(iii); 25 C.F.R. Part 151.

The Tribe seeks to operate a gaming facility on the Bradley Tract in order to generate revenue so that the Tribe may provide essential governmental services for its members, including health care, housing (the rate of home ownership among Tribe members is three times lower than that of the surrounding area), emergency services, law enforcement and education, as well as to advance its members' economic well-being through employment (the Tribe's unemployment rate has been approximately six times the average unemployment rate of the surrounding area). *See Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008).

Plaintiff was a vocal critic of the Tribe's proposal from the start. In March 2001, for example, Plaintiff submitted the following comments to the Secretary and the President of the United States regarding the proposed casino, raising questions as to the Tribe's status:

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

AR011529. In December 2002, Plaintiff submitted similar comments to the Bureau of Indian Affairs Midwest Regional Office, asserting that: "These Indians are no longer a sovereign nation, as they are all American citizens, just like any other American." AR011324.

In 2005, after completing an extensive administrative process, which included numerous opportunities for Patchak to comment, the Secretary published a Notice of Determination in the Federal Register on May 13, 2005, stating that he would accept the land into trust on behalf of the

Tribe. Notice of Final Determination, 70 Fed. Reg. 25,596 (May 13, 2005). The notice expressly provided that the Secretary would not implement the transaction for at least thirty (30) days, *id*., thereby providing a window for interested parties to seek judicial review.[3]

## II. Proceedings In This Court And The Court of Appeals

Opponents of the Secretary's decision announced that they would pursue litigation, seeking to "delay th[e] process for anywhere up to seven years in the court[s]." Jessica English, *Casino Opponents Planning Two-Pronged Strategy*, MiBiz Network, May 31, 2005, attached hereto as "Exhibit 1." In particular, on June 13, 2005, a lawsuit was filed against the Secretary in this Court by Michigan Gambling Opposition ("MichGO"), an anti-gambling organization representing a variety of concerned citizens, including residents of surrounding communities. *MichGO v. Norton,* 477 F.Supp.2d 1, 4 (D.D.C. 2007). MichGO argued that the statute authorizing land acquisitions was an unconstitutional delegation of legislative power, and asserted several statutory claims under the Administrative Procedure Act ("APA"), National Environmental Policy Act ("NEPA"), and IGRA. The Tribe intervened, and both the Tribe and the United States filed motions to dismiss the case or for summary judgment. This Court granted their motions and dismissed MichGO's complaint on February 23, 2007. *Id.*

MichGO appealed, and the case was briefed and argued in the Court of Appeals.[4] More than four months after oral argument, MichGO moved to "supplement the issues" on appeal with the question on which the Supreme Court granted certiorari in *Carcieri v. Kempthorne*, 128 S. Ct. 1443 (2008) (whether Section 19 of the IRA limits definition of "Indian tribe" to those Tribes federally-

[3] The purpose of the thirty-day waiting period is to provide interested parties that have standing an opportunity to challenge final agency actions concerning land into trust. *See* 25 C.F.R. § 151.12(b).

[4] On March 5, 2007, based on grounds not relevant to this case (and no longer relevant in *MichGO*), the District Court granted MichGO's motion for a stay pending appeal. *MichGO v. Norton*, Case No. 05-1181 (D.D.C. Mar. 5, 2007) (Doc. 79).

recognized in 1934). The Court of Appeals denied that motion,[5] and affirmed this Court's ruling. *MichGO*, 525 F.3d at 23. MichGO petitioned for rehearing *en banc*, which was denied on July 25, 2008.[6]

Plaintiff did not to seek to intervene at any stage of the *MichGO* litigation.[7] Rather, on August 1, 2008—seven days after the Court of Appeals denied rehearing *en banc* in *MichGO*—Plaintiff filed the brand new lawsuit at issue here. Plaintiff's Complaint seeks to set aside the Secretary's decision on the ground that the Tribe is not an "Indian tribe" for purposes of the IRA.[8]

On September 8, 2005, this Court granted the Tribe's Motion to Intervene and lodged the Tribe's Answer.

## STANDARD OF REVIEW

The standard that applies to motions to dismiss under Fed. R. Civ. P. 12(b) also applies to motions for judgment on the pleadings under Fed. R. Civ. P. 12(c). *E.g., Holt v. Davidson*, 441

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[5] Order Denying Motion to Supplement, *Michigan Gambling Opposition* v. *Kempthorne*, Case No. 07-5092 (D.C. Cir. Mar. 19, 2008).

[6] On July 29, 2008, MichGO moved to stay the Court of Appeals' mandate pending a potential petition for certiorari. The Court of Appeals granted the motion (without opinion) on August 15, 2008; the Tribe's application to vacate the stay was denied on September 3, 2008.

[7] Although not necessary to decide for purposes of this Motion for Judgment on the Pleadings, the record (Dkt. No. 13-3 at ¶¶ 18, 19, 20, 21) strongly suggests that Plaintiff is a member of or is otherwise closely affiliated and in privity with MichGO. Plaintiff's alleged injuries are nearly identical to those raised in the *MichGO* suit. *Compare* Patchak Compl., *with MichGO v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007).

[8] Plaintiff incorrectly alleges that the Secretary's decision violated Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479. (Patchak Compl. ¶ 1.) Section 5 authorizes the Secretary to acquire land into trust for an "Indian tribe" or "individual Indian," for the purpose of "providing land for Indians." 25 U.S.C. § 465. Section 19 states that "[t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

F.Supp.2d 92, 95 (D.D.C. 2006). In determining whether such motions should be granted, courts consider facts alleged in the complaint and documents either attached to or incorporated in the complaint, as well as matters of which judicial notice may be taken. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Further, where a challenge to an agency decision presents only legal questions, the court may "consult the [administrative] record to answer the legal question before the court" without converting a 12(b)(6) motion into one for summary judgment. *Marshall County Health Care Authority*, 988 F.2d 1221,1226 (D.C. Cir. 1993); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("As we have repeatedly recognized, however, when a party seeks review of agency action under the APA … [t]he 'entire case' on review is a question of law.").

## ARGUMENT

### I. Plaintiff Lacks Prudential Standing To Challenge The Secretary's Decision To Take Land Into Trust, Or The Tribe's Status As An Indian Tribe, Under The IRA

The IRA was enacted for the benefit of Indians, to "'encourage Indians to revitalize their self-government,' . . . to 'rehabilitate their economic life' . . . and to reverse government policy which had 'destroyed Indian social and political institutions.'" *Feezor v. Babbit*, 953 F. Supp. 1 (D.D.C. 1996) (internal quotations and citations omitted). The interests Plaintiff alleges here, however, are far outside of the zone of interests Congress sought to protect under the IRA—indeed, the interests Plaintiff seeks to vindicate in this action are directly at odds with the purposes of that Act. Plaintiff therefore lacks prudential standing under the well-established "zone of interests" test, and his Complaint must be dismissed.

#### A. The Legal Framework For Prudential Standing

Plaintiff seeks relief under the APA, 5 U.S.C. § 702. That statute allows a party to seek review of an agency action where he is "adversely affected or aggrieved" by the action "within the

meaning of the relevant statute" (*id.*)—but only if that party has both constitutional standing and prudential standing to assert the claim. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997); *see also Nat'l Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1042 (D.C. Cir. 1989) (§ 702 "provides a statutory grant . . . to contest agency action," but a plaintiff must show both constitutional standing and prudential standing, which is "a judicial limitation necessary to ensure that the proper party is asserting a claim against the agency.").

In order to demonstrate "constitutional standing," a plaintiff must show that "he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162.[9] In order to demonstrate prudential standing, a plaintiff must not only establish constitutional standing, but must also "'establish that [his] injury . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint,'" *id*. at 176—and "if the plaintiff's interests are [instead] marginally related to or inconsistent with the purposes implicit in [that] statute," he will not have prudential standing to assert the claim. *Clarke v. Sec. Industry Ass'n*, 479 U.S. 388, 399 (1987). The basic premise of this prudential "test is a presumption that Congress intends to deny standing to 'those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

[9] While the Tribe does not concede that Plaintiff meets the standard for constitutional standing, the Court does not need to reach that question here. Plaintiff's lack of prudential standing requires that his Complaint be dismissed, regardless of whether Plaintiff meets the "constitutional minimum," *Bennett*, 520 U.S. at 162.

**B. Plaintiff's Interests Are Clearly Outside Of, And Flatly Inconsistent With, The Zone Of Interests Congress Sought to Protect Under The IRA**

Congress enacted the IRA for the benefit of Indians, to encourage tribal self-government and self-sufficiency. *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of [the IRA] was to [ensure that] Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) ("The intent and purpose of [the IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'"). Congress specifically sought, among other things, to restore Indian lands after the disastrous results of the General Allotment Act, which had previously resulted in the loss of tens of millions of acres of Indian land. Hence, Section 5 of IRA, which expressly authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. Congress contemplated that the Secretary would exercise his Section 5 authority "'to build up Indian landholdings until there is sufficient land for all Indians who will beneficially use it.'" *City of Tacoma v. Andrus*, 457 F. Supp. 342, 345 (D.D.C. 1978).

Courts have routinely held that private non-Indian plaintiffs do not have standing to challenge the Secretary's decisions under the IRA and other federal statutes that are specifically intended for the benefit of Indians. For example, in a case from this Court that is directly on point, *City of Sault St. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978), a municipality and non-Indian taxpayers sought to prevent the Secretary from taking land into trust for the Sault Ste. Marie Tribe of Chippewa Indians. The court dismissed the non-Indian taxpayers' claims, finding that their interests were not within the zone of interests covered by the IRA. *Id.* at 468; *see also id.* (agreeing with *City of Tacoma*: "As for the individual taxpayers, the court in Tacoma indicated that their interests were not within the zone regulated by the statute, and that therefore they should be

dismissed. . . . The individual plaintiffs in this case will suffer the same fate.") (citing *City of Tacoma et al. v. Andrus,* 457 F. Supp. 342, (D.D.C. 1978)).[10] Similarly, in *Western Shoshone Business Council v. Babbitt*, a law firm sought APA review of the Secretary's decision refusing to review a contract for legal services under 25 U.S.C. § 81. 1 F.3d 1052, 1054 (10th Cir. 1993). The court held that although the law firm was "regulated" by 25 U.S.C. § 81 and had "an interest that is arguably threatened by the [Secretary]'s" actions, the sole purpose of the statute was to protect Indians. *Id.* at 1055-56. Thus, the law firm's claims fell outside the zone of interest protected by the statute and the matter was dismissed for lack of prudential standing. *Id.*[11]

In this case, Plaintiff alleges no legitimate interests that even remotely fall within the zone of interests protected by the IRA. In fact, the only interests alleged in Plaintiff's Complaint, such as

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[10] While several recent cases in this Circuit have involved challenges to the Secretary's land acquisitions for Indians (*e.g., MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008); *CETAC v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007)), all of those cases were unsuccessful on the merits—and with respect to standing, all involved claims under the Indian Gaming Regulatory Act ("IGRA") or the National Environmental Policy Act ("NEPA"). NEPA is an environmental statute that allows very broad standing; and Congress specifically intended to provide private citizens with an opportunity to enforce certain provisions of IGRA. *Id.* at 463. Not so for the IRA.

[11] Similarly, in *Rosebud Sioux v. McDivitt*, a non-Indian lessee of tribal land sought review under the APA of the Secretary's decision to void the lessee's lease under 25 U.S.C. §§ 1a, 81 and 415. 286 F.3d 1031, 1034-35 (8th Cir. 2002). The court found that although the non-Indian lessee "has interests which are threatened by the [Secretary]'s actions," it nonetheless did not have prudential standing under the subject statutes. *Rosebud Sioux*, 286 F.3d at 1036. The court held that the statutes relied on by the lessee "are intended to protect only Native American interests . . . [and] we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribe's interest." *Id.* at 1038-37; s*ee also*, *San Xavier Development Auth. v. Charles*, 237 F.3d 1149, 1153, (9th Cir. 2001) (holding that lessee of allotted Indian land did not have standing to bring a claim for violation of a sublease by its sublessee under 25 U.S.C. § 416 on grounds that § 416 was intended solely for the benefit the Indian allottee, not tenants.); *Schmit v. International Finance Management Co.,* 980 F.2d 498, 498 (8th Cir. 1992) (finding that plaintiff, as a non-Indian, "was not within the zone of interest protected by [25 U.S.C. § 81]" to bring action complaining that an Indian tribe did not get secretarial approval of a contract); *Chuska Energy Company v. Mobil Exploration & Producing North American, Inc.*, 858 F.2d 727, 732 (Fed. Cir. 1988) (finding that non-tribal or non-governmental litigants do not have standing to bring a challenge pursuant to a federal statute involving oil or gas leases on Indian lands).

"loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site" (Patchak Compl. ¶ 9), and "increased traffic," (*id*.), are merely a repackaging of the environmental impacts that MichGO alleged in its NEPA claims. *Compare* Patchak Compl. at ¶ 9, *with* MichGO Complaint at ¶14, *MichGO v. Norton*, Case No. 05-1181 (D.D.C. filed June 13, 2005). These alleged environmental impacts were insufficient to win the day for MichGO—the Secretary's determination that the impacts were insignificant was upheld by both this Court and the Court of Appeals, *MichGO*, 477 F.Supp.2d at 11-19, *aff'd, MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008)—and they are certainly insufficient to demonstrate standing in a case proceeding exclusively under the IRA.

In addition, the relief requested in this case—denying the Tribe any hope for obtaining federal trust lands—would directly interfere with the IRA's core purposes of promoting Indian sovereignty and self-government, and restoring the tribal land base. Plaintiff fails to meet the "zone of interests" test for that reason alone. But because the basis of Plaintiff's legal challenge—his claim that the federally-recognized Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is not, in fact, an "Indian tribe" under Section 19 of the IRA—is one that cuts to the heart of the Tribe's identity as a Tribe, and threatens to interfere with the government-to-government relationship between the Federal Government and Indian Tribes, the consequences of allowing standing for a non-Indian private party in this case are even more stark. As one court observed in the context of another federal Indian statute, "to give legally enforceable rights to parties having interests that compete with the tribes' would be to impose a duty on the Secretary that is inconsistent with the statute's purpose of protecting tribal interests and resources." *Utah v. United States Department of the Interior,* 45 F. Supp. 2d 1279, 1283 (D .Utah 1999) (no prudential standing for non-Indian parties under the Indian Long-Term Leasing Act); *see also South Dakota v.*

*United States Department of the Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (Secretary has obligation to represent the interests of the tribe in land acquisitions under the IRA). For all of the above reasons, Plaintiff's Complaint should be dismissed for lack of prudential standing.

## II. Plaintiff's Action is Barred by the Doctrine of Laches

Plaintiff's decision to wait in the wings throughout the *MichGO* litigation, filing his own lawsuit only after MichGO's claims were fully adjudicated and denied by two courts, can only be understood as yet another delay tactic. Plaintiff unreasonably sat on his rights for a number of years, and the consequences of these delays have been, are, and will be borne exclusively by the Tribe and the United States. Thus, even if Plaintiff had standing (and he does not), his Complaint would be barred by the doctrine of laches.

### A. The Legal Framework for Laches

The doctrine of laches, separate and apart from the statute of limitations, reflects the principle that "equity aids the vigilant, not those who slumber on their rights." *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). The doctrine "is designed to promote diligence and prevent enforcement of stale claims," and its principal focus is on the "inequity of permitting the claim to be enforced." *Id.* The Court of Appeals for the D.C. Circuit considers two primary factors in that regard: (1) the plaintiff's lack of diligence; and (2) prejudice to the defendant. *Id.*; *see also Apache Survival Coalition v. United States*, 21 F.3d 895, 905 (9th Cir. 1994) (elements are "lack of diligence" and "prejudice" to the other party); *In re Centric Corp.*, 901 F.2d 1514, 1519 (10th Cir. 1990) ("inexcusable delay" and "resulting prejudice"); *Independent Bankers' Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) ("unreasonable delay" and prejudice).

**B. Plaintiff Unjustifiably Delayed Asserting His Claim**

Plaintiff has known about the Tribe's proposed land acquisition since at least March 2001 (*see* AR011529); he has known about the resulting administrative process since at least December 2002 (*see* AR011324); he has known, or should have known, about the Secretary's decision to accept land into trust since May 13, 2005, when the Notice of Final Determination was published (70 Fed. Reg. 25,596); and he has known about the *MichGO* litigation since at least October 2005, when the Wayland Township Board (of which Plaintiff was an elected member) voted to submit an amicus brief.[12] *See* Wayland Township, et al., Joint Amicus Brief, *MichGO v. Norton*, Case No. 05-1181 (D.D.C. filed January 19, 2006) (Doc. 37).

Plaintiff thus had every opportunity to litigate his claims in a timely manner, either by filing his own Complaint or by intervening at some stage of the *MichGO* litigation while it was pending in district court or the court of appeals. But he did not, choosing instead to sit on his rights until it appeared that the opponents of the Secretary's decision were coming to the end of their road in the *MichGO* case. The resulting delay of nearly thirty-nine (39) months is simply inexcusable. *See, e.g., Explosives Corp. of Am. v. Garlam Enter. Corp. of Am.*, 817 F.2d 894, 900-01 (1st Cir. 1987) (applying laches and emphasizing lack of explanation why party "never sought intervention in the [other action]" in which related issues had been litigated).

This is precisely the sort of lengthy and unreasonable delay that the doctrine of laches is designed to guard against. For example, in *Batiste v. City of New Haven*, the court applied the doctrine to prohibit claims under the Fair Housing Act, because the plaintiffs were fully aware of

[12] Patchak's membership on the Wayland Township Board and his presence at the October 19, 2005 meeting are demonstrated by the Wayland Township Board Meeting Minutes from October 19, 2005, attached as "Exhibit 2." The Court may take judicial notice of this document pursuant to Fed. R. Evid. 201(b)(2). *See, e.g.*, *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182 (court may take judicial notice of "public documents").

the facts underpinning their claims, but nonetheless "waited at least twenty-two months to file suit, which [was] an unreasonable amount of time[.]" 239 F. Supp. 2d 213, 225 (D. Conn. 2002). Similarly, in *Centric Corp.*, the doctrine applied when the claimant waited more than twenty months to prosecute his claims after a bankruptcy court lifted its automatic stay (which previously barred the claim). 901 F.2d at 1519. The courts have frequently found laches in light of similar delays, including delays substantially shorter than the one presented here. *See, e.g.*, *City of Rochester v. United States Postal Service*, 541 F.2d 967, 976-78 (2d Cir. 1976) (claim barred by two year delay); *National Parks and Conservation Ass'n v. Hodel*, 679 F. Supp. 49, 53-54 (D.D.C. 1987) (three years).

### C. Plaintiff's Delay Has Imposed Substantial Prejudice On Both The Tribe and The United States

Plaintiff's delays have imposed and will continue to impose considerable harm on the Tribe and the United States. *First*, the problems posed for the United States by successive, piecemeal litigation threaten to undermine the "integrity" of the administrative process and erode the Secretary's authority. *See Allens Creek/Corbetts Glen Preservation Group, Inc. v. Caldera*, 88 F. Supp. 2d 77, 85 (W.D.N.Y. 2000) ("The integrity of the [administrative] process . . . is substantially undermined if challenges may be mounted indefinitely, as plaintiffs seek to do here."). The Secretary cannot effectively carry out his responsibilities under the federal Indian statutes, or fulfill his trust responsibility to Indian Tribes, if every agency action can be the subject of an endless string of lawsuits, presented in piecemeal fashion and spread across many years.

*Second*, the United States and the Tribe have already shouldered the considerable burdens imposed by the *MichGO* litigation—and Plaintiff's delay has needlessly forced the United States and the Tribe to defend Plaintiff's claims in an entirely separate litigation, which could require "enormous amounts of time and energy." *Batiste v. New Haven*, 239 F. Supp. 2d 213, 226-27 (D.

Conn. 2002); *cf. Sworob v. Harris*, 451 F. Supp. 96, 102 (E.D. Pa. 1978) (government "already suffered excessive monetary losses occasioned by . . . previous litigation").

*Third*, any additional delay will perpetuate the historical injustice that has left the Tribe without any reservation or federally-protected lands for over 170 years. *See* AR001985-86. It is a harm that continues every day the litigation delays implementation of the Secretary's decision—leaving the Tribe in its present economically undeveloped state (*see* AR000018) and depriving the Tribe's members of the political, economic, and social benefits of having a tribal land base, as well as a vital means of economic self-sufficiency. *See* 25 U.S.C. § 2701(4) (finding that a "principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); *id.* at § 2702(1) (gaming is a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments"); *see also*, *e.g.*, *Batiste* 239 F. Supp. 2d at 225-26 (noting economic costs of delay); *Sworob*, 451 F. Supp. at 102 (noting monetary losses).

The Tribe is currently struggling to provide essential government services, sufficient infrastructure, administrative facilities and adequate housing for Tribal Members. AR000018, 000060. As of the date of the Tribe's Final Environmental Assessment, the Tribe's unemployment rate was approximately 27% (which was more than six times higher than that of Allegan County at the time), and only 26% of Tribal Members owned their own homes (as compared with 82.9% of Allegan County as a whole). *Id.* Revenues derived from the Tribe's project are necessary to bring about an economic base from the Tribe, which is intended to make the Tribe economically self-sufficient. *Id.* Thus, any further delays severely prejudice the Tribe. *See Sworob*, 451 F.Supp. at 102 (finding that the prejudice prong of the laches defense was established because further delays would deprive residents of the Defendant-Intervenor City of much needed housing).

In fact, in *MichGO*, the district court specifically recognized the devastating impacts to the Tribe from delays caused by related litigation, explaining that "intervenor, a historically oppressed tribe, has suffered and will continue to suffered [sic] every day that the litigation continues," and noting that the tribe is "saddled with staggering rates of unemployment." *MichGO v. Norton*, No. 05-1181, slip op. at 6 (Doc. 79) (D.D.C. Mar. 5, 2008). The fee-to-trust application at issue in this case has been pending before the Secretary for seven years, and the Tribe continues to lack federal trust lands over which it may exercise territorial jurisdiction and fulfill the promise of a "government-to-government relationship with the United States." *See* 25 C.F.R. § 83.12.

While the above injuries are clearly sufficient to satisfy the prejudice prong of the laches analysis in any event, they are more than sufficient in this case, where Plaintiff had no justification for his delay in bringing suit: "Where there is no excuse for delay, defendants need show little prejudice[.]" *Caldera*, 88 F. Supp. at 84 (citing *Stone v. Williams*, 873 F.2d 620, 625 (2d Cir. 1989) and *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963)). For all the foregoing reasons, Patchak's Complaint should be dismissed as barred under the doctrine of laches.

## CONCLUSION

The Tribe respectfully requests that the Court grant the Tribe's Motion for Judgment on the Pleadings and dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted.

Match-E-Be-Nash-She-Wish Band of
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By /s/ Conly J. Schulte

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Date: October 6, 2008