IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK, Plaintiff, vs. SALLY JEWELL, Secretary of the U.S. Department of the Interior, *et al*., Defendants, and MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, Intervenor-Defendant.	Case No. 1:08-CV-01331 Hon. Richard J. Leon **INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

In accordance with Federal Rule of Civil Procedure 56(a), Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe"), a federally-recognized Indian Tribe, respectfully moves this Court to enter summary judgment in favor of the Defendants on the sole claim contained in Plaintiff's Complaint, which alleges that United States unlawfully has taken into trust certain land for the benefit of the Tribe, on the grounds that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. This motion does not arise from the question of whether the Secretary of Interior's 2005 decision to take certain land into trust was proper, but rather the applicability of subsequent legislation and the separate threshold question of whether this suit is barred by the equitable doctrine of laches.

The Tribe bases this motion on the pleadings and other papers on file, the separate statement of material facts not in genuine dispute attached hereto pursuant to Local Rule 7(h)(1), as well as the following memorandum of points and authorities, the accompanying declaration of

Tribal Chairman David K. Sprague, and exhibits referenced herewith, and any argument of counsel that may be heard by the Court, and respectfully asks the Court to enter the proposed order filed concurrently with this motion.

Dated: October 31, 2014

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

By /s/ Conly J. Schulte

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Pursuant to Local Civil Rule 7(h)(1),[1] Intervenor-Defendant submits that the following material facts are not in genuine dispute.

1. The Match-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe") is a federally-recognized Indian tribe. Compl., ECF No. 1 ¶ 18; 79 Fed.Reg. 4750 (Jan. 29, 2014).

2. The Tribe descends primarily from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish. AR001985[2]; Compl., ECF No. 1, ¶ 15.

[1] Intervenor-Defendant is aware that judicial review of agency decisions are confined to "materials that were before the agency at the time its decision was made" (*IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)) and that LCvR 7(h)(2) does not require a separate statement of facts in a Motion for Summary Judgment where "judicial review is based solely on the administrative record." The instant Motion for Summary Judgment, however, does not arise from a review of the agency decision or the administrative record. This motion is premised upon: (1) the applicable law at issue in this proceeding; and (2) whether this lawsuit is barred by the equitable doctrine of laches. As such, Intervenor-Defendant appropriately submits this Statement of Material Facts Not in Genuine Dispute pursuant to LCvR7(h)(1).

[2] "AR" denotes the Administrative Record.

3. The Tribe was initially recognized as a tribe by the federal government early in its history and was a party to sixteen treaties with the United States between 1795 and 1855, which the Tribe negotiated as an independent sovereign. AR001987-90; Compl., ECF No. 1, ¶ 15.

4. In 1994, the Tribe sought acknowledgement of its sovereign status under the modern federal acknowledgment procedures found at 25 C.F.R. Part 83. Compl., ECF No. 1, ¶ 18; 62 Fed. Reg. 38113-115 (July 16, 1997).

5. On October 23, 1998, the Secretary of Interior issued a Notice of Final Determination that the Tribe "exists as an Indian tribe within the meaning of Federal law." Compl., ECF No. 1, ¶ 18; 63 Fed. Reg. 56936-01.

6. The Secretary's Final Determination became effective on August 23, 1999, after administrative appeals were exhausted. 65 Fed. Reg. 13298-01 (Mar. 13, 2000).

7. Although the United States formally had acknowledged the Tribe's sovereign status, the Tribe lacked a reservation or any trust land. AR000017-20.

8. In approximately 2001, the Tribe identified a 147-acre tract of land to acquire for the Tribe's Initial Reservation and for the establishment of its gaming and entertainment facility. This land was comprised of two adjacent parcels totaling 147.48 acres. Both parcels are located in the Township of Wayland, County of Allegan in the State of Michigan. Both parcels are collectively referred to as "the Bradley Tract." Compl., ECF No. 1, ¶¶ 19-20.

9. The Tribe determined that it was critical to its plans for economic development and self-sufficiency that the Bradley Tract should be placed into trust. Placing the Bradley Tract into trust would enable the Tribe to be eligible for benefits and services that are only available to federally-recognized tribes with trust or restricted lands. The Tribe also sought to place the Bradley Tract into trust to enable the Tribe to operate gaming on the parcel in accordance with

the Indian Gaming Regulatory Act, as this would provide an economic base to enable the Tribe to provide both governmental services related to housing and health care as well as provide jobs for tribal members and other residents of the community. AR000018-20; Compl., ECF No. 1, ¶¶ 20-21.

10. On August 8, 2001, the Tribe requested that the Secretary of Interior accept the Bradley Tract into trust for the benefit of the Tribe. The Tribe also requested that the Secretary proclaim that the Bradley Tract is the Tribe's initial reservation for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(B)(1)(ii). AR001258-1261; Compl., ECF No. 1, ¶ 20.

11. On May 13, 2005, the Bureau of Indian Affairs published notice of the Secretary's final decision to accept the Bradley Tract into trust to "be used for the purpose of construction and operation of a gambling facility." Compl., ECF No. 1, ¶ 21; 70 Fed. Reg. 25596 (May 13, 2005).

12. On June 13, 2005, an anti-gambling organization called Michigan Gambling Opposition ("MichGO") filed a lawsuit against the Defendants in the above-captioned matter to halt the Secretary's acceptance of the Bradley Tract into trust. The U.S. District Court for the District of Columbia granted the Tribe's motion to intervene in that matter on September 1, 2005. On February 23, 2007, the District Court dismissed MichGO's claims in their entirety. MichGO then appealed to the District of Columbia Circuit Court of Appeals, and the Court issued an opinion on April 29, 2008 affirming the District Court. *MichGO v. Norton*, 477 F.Supp.2d 1 (D.D.C. 2007); *MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). The Court of Appeals denied MichGO's Petition for Rehearing on July 25, 2008. *Patchak v. Salazar*, 632 F.Supp.2d 72, 75 (D.D.C. 2009).

13. On August 1, 2008, Plaintiff David Patchak ("Patchak") filed the instant action requesting declaratory and injunctive relief on the basis that the United States unlawfully took the Bradley Tract into trust as the Tribe did not constitute an "Indian Tribe" under Sections 5 and 19 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 479. Compl., ECF No. 1.

14. MichGO's petition for certiorari was denied on January 21, 2009. *MichGO v. Salazar*, 555 U.S. 1137 (2009).

15. The Secretary of Interior took the Bradley Tract into trust in January 2009. Declaration of Tribal Chairman David K. Sprague ("Sprague Decl."), ¶ 18; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204 (2012).

16. In April 2009, the Tribe entered into a tribal-state gaming compact ("Compact") with the State of Michigan pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2701(d)(1)(c). The Compact was negotiated by the Governor of Michigan, approved by the Michigan legislature, and then approved by the Secretary of the Interior on April 22, 2009. 74 Fed. Reg. 18397-98 (April 22, 2009). The Compact provides, *inter alia*, that the Tribe will share revenues form its casino with the State and local governments. Sprague Decl., ¶ 18.

17. On August 19, 2009, in the instant matter, this Court dismissed Patchak's suit for lack of subject matter jurisdiction upon a finding that Patchak did not have prudential standing to bring this suit. ECF Nos. 56-57.

18. Patchak appealed to the Court of Appeals, which reversed this Court and found that Patchak had Article III standing, prudential standing, and that the Quiet Title Act did not prohibit his suit. *Patchak v. Salazar*, 629 F.3d 702 (D.C. Cir. 2011).

19. On June 18, 2012, the United States Supreme Court affirmed the Court of Appeals and remanded to this Court to consider the merits of Patchak's suit pursuant to its

decision in *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), which held that the Secretary of Interior's authority to take land into trust under Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, was limited to tribes under federal jurisdiction in 1934. *Id*. at 395. *Patchak*, 134 S.Ct. at 2204.

20. Plaintiff took no action in this Court on remand for more than two years until June 25, 2014 when Sharon Eubanks entered her notice of appearance on his behalf. ECF No. 64.

21. On September 3, 2014, the Department of Interior issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two different parcels unrelated to the Bradley Tract. ECF No. 75; SAR000617-58.[3]

22. In the Amended Notice of Decision, the Department of Interior specifically considered its authority to take land into trust under the Indian Reorganization Act pursuant to *Carcieri v. Salazar*, 555 U.S. 379 and based upon supplementary historical information provided by the Tribe and analyzed by the Office of the Solicitor for the Department of the Interior. The Department of Interior concurred with the Solicitor's opinion that the Tribe was under federal jurisdiction in 1934 such that it had authority to take land into trust on the Tribe's behalf pursuant to the Indian Reorganization Act. SAR000650-57.

23. On September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act, declaring that the Bradley Tract, at issue here, "is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Gun Lake Trust Land Reaffirmation Act of 2014, Pub. L. No. 113-179, 128 Stat. 1913.

24. The Tribe incurred debt in the approximate amount of $195,000,000 to acquire land and construct the casino and pay related expenses, of which approximately $54,000,000

[3] Supplemental Administrative Record ("SAR"), lodged in this Court on October 27, 2014. ECF No. 75.

remains unpaid. The Gun Lake Casino opened on February 10, 2011. Since its opening, the Tribe, pursuant to its Compact with the State of Michigan, has contributed approximately $52,235,219.00 to state and local revenue sharing boards, and the Tribe, along with State and local governments, have made substantial financial and future planning commitments based upon continued casino revenues. The casino has also created nearly 1,000 jobs for the community at large as well as tribal members. The casino funds the basic functions of the Tribe's government and has enabled the Tribe to provide essential services to its members, including housing, health care, education, infrastructure, and other important services. Sprague Decl., ¶¶ 18-24; *see also* CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representative Grijalva).

25. Patchak opposed the Tribe's casino since as early as March 2001, availing himself of several opportunities to voice this opposition through the administrative process governing the trust acquisition, including submission of comments to the Secretary of Interior and the President of the United States challenging the Tribe's status. AR-011529; ECF No. 24, at p. 5; ECF No. 19 at p. 4.

26. Patchak was aware of the MichGO suit challenging the Tribe's casino and neither joined nor filed a separate lawsuit until the filing of the instant suit on August 1, 2008, in which he asserts that he is entitled to declaratory and injunctive relief on the basis that the United States taking into trust of the Bradley Tract violated Sections 5 and 19 of the Indian Reorganization Act. ECF No. 1; ECF No. 24 at p. 7.

Dated: October 31, 2014

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

By /s/ Conly J. Schulte

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I. INTRODUCTION

For nearly 200 years, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians has been struggling to fight its way back from the brink of destruction and to regain its self-sufficiency and nationhood. The Tribe, which has existed since time immemorial, was once a powerful nation that entered into numerous treaties with the fledgling United States. The Tribe suffered the effects of the United States' early Indian policies, having lost all of its land and much of its ability to support its people and its government by the end of the 19th century. And its people suffered the severe economic hardship of this dispossession. Finally, in 1998, the Tribe gained formal affirmation from the United States of its status as a federally-recognized tribe that had been identified as an Indian tribe on a "substantially continuous basis" since at least 1900, had comprised a distinct community from historical times to the present, and had maintained "political influence over its members as an autonomous entity from historical times until the present.[4] The Tribe then began the process of establishing its reservation and creating an economic development project on that land that could support and sustain the nation and its people for the first time in more than a century. In 2001, the Tribe submitted its application to the Secretary of Interior to put into trust a modestly-sized tract of land called the Bradley Tract. And the Tribe, unfortunately, has been fighting for that land and for its future ever since.

Much of this fight has been with Mr. Patchak in the instant litigation. It has been a fight marked by Mr. Patchak's inexcusable delay in prosecuting this case—not once, but twice. And as a result of the delay, *nearly ten years* has elapsed during which the Tribe has waited anxiously for certainty and finality to accrue to its sole tract of trust land. Even the bitterly divided United States Congress has taken note of the gross injustice that this litigation has caused the Match-E-Be-Nash-She-Wish people and, less than two months ago enacted ***bipartisan*** legislation ratifying

[4] *See* 25 C.F.R. § 83.7 (mandatory criteria for federal recognition).

and confirming the Secretary's acquisition of the land at issue so that the Tribe, the United States, and this Court may finally move on.

Nevertheless, Mr. Patchak remains intent upon pressing his now moot claim, and dragging this litigation out *ad infinitum*. This litigation, however, is over. Patchak's Complaint raises a single legal issue: whether the Bradley Tract lawfully has been placed in trust by the Secretary of Interior for the Tribe's benefit pursuant to the dictates of federal law, specifically Sections 5 and 19 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 465, 479. Compl., ECF No. 1, ¶¶ 26-33. However, Congress, recognizing that the instant lawsuit had "place[d] in jeopardy"[5] the tract that is so crucial to the Tribe's self-sufficiency and self-government, enacted the Gun Lake Trust Land Reaffirmation Act of 2014, Pub. L. No. 113-179, 128 Stat. 1913 ("Act"). The Act, which was enacted pursuant to Congress's plenary constitutional authority over Indian affairs under Article 1, Section 8 of the United States Constitution, expressly ratified and confirmed the Secretary's decision to acquire the Bradley Tract in trust for the benefit of the Tribe, and defines the Bradley Tract as lawfully in trust.

Accordingly, any factual issues arising from the more general grant of authority to the Secretary of Interior to take land into trust contained in Sections 5 and 19 of the IRA have been wholly nullified by the Act. As set forth in detail herein, it is beyond dispute that Congress, which wields plenary and exclusive authority over Indians and their land, was well within its Constitutional authority to ratify and confirm the trust acquisition of the Bradley Tract. The Act, likewise, coexists properly and harmoniously with the Sections 5 and 19 of the IRA, and further does not suffer from any Constitutional infirmity as a bill of attainder or a violation of separation of powers. The Act is a valid and proper exercise of Congress's plenary authority over Indian

[5] S. REP. NO. 113-194, at 1 (2014).

affairs, and it irrefutably and finally resolves this litigation in such a way that there is no genuine issue of material fact, and the Tribe is entitled to judgment as a matter of law.

In addition, Mr. Patchak has brazenly and unreasonably sat on his right to prosecute this case—inexcusably delaying his filing of this suit for more than three years after the Secretary's decision, and utterly failing to prosecute this case for an additional two years since the United States Supreme Court remanded to this Court for resolution of this matter. Notwithstanding the clear substantive factual and legal reality that entitles the Tribe to judgment as a matter of law, Mr. Patchak's lawsuit is also barred by the doctrine of laches and cannot be sustained.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Match-Be-Nash-She-Wish Band of Pottawatomi Indians is a federally-recognized Indian tribe whose members descend primarily from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish who occupied present day western Michigan. Compl., ECF No. 1 ¶¶ 15, 18; 79 Fed.Reg. 4750 (Jan. 29, 2014). The Tribe was initially recognized by the federal government early in its history and was a party to sixteen treaties with the United States between 1795 and 1855, which the Tribe negotiated as an independent sovereign. Compl., ECF No. 1, ¶ 15; AR001987.[6] The Tribe fell victim, however, to the effects of the ill-conceived federal Indian policies of the 19th and early 20th centuries, as well as encroachment by non-Indians, and it was eventually totally dispossessed of its tribal lands. AR001987-90.

After decades of landless existence in a state of political limbo, the Tribe sought acknowledgement of its sovereign status under the modern federal acknowledgment procedures found at 25 C.F.R. Part 83. Compl., ECF No. 1, ¶ 18; 62 Fed. Reg. 38113-115 (July 16, 1997). On October 23, 1998, the Secretary of Interior issued a Notice of Final Determination that the Tribe "exists as an Indian tribe within the meaning of Federal law." Compl., ECF No. 1, ¶ 18;

[6] AR denotes the Administrative Record.

63 Fed. Reg. 56936-01. The Secretary's Final Determination became effective on August 23, 1999, after administrative appeals were exhausted. 65 Fed. Reg. 13298-01 (Mar. 13, 2000). As part of the determination, the Secretary determined that the Tribe had been identified as an Indian tribe on a "substantially continuous basis" since at least 1900 or the point of last federal acknowledgment, had comprised a distinct community from historical times to the present, and had maintained "political influence over its members as an autonomous entity from historical times until the present.[7]

Although the United States formally had acknowledged the Tribe's sovereign status, the Tribe continued to lack a reservation or any trust land. AR001987-90. In approximately 2001, the Tribe identified a 147-acre tract of land to acquire for the establishment of its gaming and entertainment facility. AR000022-23. This land is comprised of two adjacent parcels totaling exactly 147.48 acres. AR001259. Both parcels are located in the Township of Wayland, County of Allegan in the State of Michigan. Both parcels are collectively referred to as "the Bradley Tract." AR001259-60; Compl., ECF No. 1, ¶¶ 19-20. On August 8, 2001, the Tribe submitted an application asking the Secretary of Interior to take the Bradley Tract into trust, pursuant to the authority delegated to it in Section 5 of the IRA, 25 U.S.C. § 465, to become its initial reservation under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(B)(1)(ii). Compl., ECF No. 1, ¶¶ 20-21.

The Tribe's application noted the dire economic hardship that years of landlessness had wrought on the Tribe. The Tribe was struggling to provide essential governmental services, sufficient infrastructure, administrative facilities, and sufficient housing for tribal members. AR000018. The Tribe's unemployment rate was more than six times higher than that of the

[7] *See* 25 C.F.R. § 83.7 (mandatory criteria for federal recognition). Though Patchak had an opportunity to challenge the Secretary's acknowledgment, he did not do so.

county in which it is located. *Id*. And only 26% of tribal members owned their homes compared to 82.9% in the county at large. *Id*. The Tribe's application established that placing the Bradley Tract into trust would make the Tribe eligible for important benefits and services that are only available to federally-recognized tribes with trust or restricted lands. The application further established that the trust acquisition would provide the Tribe with the ability to operate gaming in accordance with the Indian Gaming Regulatory Act, and therefore provide an economic base to enable the Tribe to provide both governmental services related to housing and health care, as well as provide jobs for tribal members and other residents of the community. *Id*. at 000018-20.

On May 13, 2005, the Bureau of Indian Affairs published notice of the Secretary's final decision to accept the Bradley Tract into trust to "be used for the purpose of construction and operation of a gambling facility." Compl., ECF No. 1, ¶ 21; 70 Fed. Reg. 25596 (May 13, 2005). Shortly thereafter, in June 2005, litigation began, starting with a suit brought by an anti-gambling organization called Michigan Gambling Opposition ("MichGO") against the Defendants in the instant matter to halt the Secretary's acceptance of the Bradley Tract into trust. *MichGO v. Kempthorne*, 525 F.3d 23, 25 (D.C. Cir. 2008). The Tribe successfully moved to intervene in that matter. *Id*. On February 23, 2007, the District Court dismissed MichGO's claims in their entirety on the basis that the Secretary's decision was lawful. *Id*. at 26. MichGO then appealed to the District of Columbia Circuit Court of Appeals, and the Court issued an opinion on April 29, 2008 affirming the District Court. *Id*. The Court of Appeals denied MichGO's Petition for Rehearing on July 25, 2008. *Patchak v. Salazar*, 646 F.Supp.2d 72, 75 (D.D.C. 2009).

On August 1, 2008, shortly after MichGO's suit finally failed, Mr. Patchak brought the instant action requesting declaratory and injunctive relief on the basis that the United States unlawfully took the Bradley Tract into trust as the Tribe did not constitute an "Indian Tribe"

under Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479. Compl. ECF No. 1. However, Patchak was aware of the Tribe's planned land acquisition since as early as March 2001 (*see* AR011529), availing himself of several opportunities to voice this opposition through the administrative process governing the trust acquisition, including submission of comments to the Secretary of Interior and the President of the United States challenging the Tribe's status. ECF No. 24, at pp. 6-7; AR011529. Patchak was aware of the MichGO suit challenging the Tribe's casino and neither joined nor filed a separate lawsuit until the filing of the instant suit on August 1, 2008, in which he asserts that he is entitled to declaratory and injunctive relief on the basis that the United States taking into trust of the Bradley Tract violated Sections 5 and 19 of the IRA. ECF No. 1; ECF No. 24, at pp. 6-7.

Soon after, on January 21, 2009, MichGO's petition for certiorari was denied. *MichGO v. Salazar*, 555 U.S. 1137 (2009). The Secretary of Interior thereafter acquired the Bradley Tract in trust in January 2009. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204 (2012).

In April 2009, the Tribe entered into a Tribal-State Gaming Compact with the State of Michigan pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(c). The Compact was negotiated by the Governor of Michigan, approved by the Michigan legislature, and then approved by the Secretary of the Interior on April 22, 2009. 74 Fed. Reg. 18397-98 (April 22, 2009). The Compact provides, *inter alia*, that the Tribe will share revenues from its casino with State and local governments. Sprague Decl., ¶ 21.

Then on August 19, 2009, in the instant matter, this Court dismissed Patchak's suit for lack of subject matter jurisdiction upon a finding that Patchak did not have prudential standing to bring this suit. ECF Nos. 56-57. Patchak appealed to the Court of Appeals, which reversed this

Court and found that Patchak had Article III standing, prudential standing, and that the Quiet Title Act did not prohibit his suit. *Patchak v. Salazar*, 629 F.3d 702 (D.C. Cir. 2011). On June 18, 2012, the United States Supreme Court affirmed the Court of Appeals and remanded to this Court to consider the merits of Patchak's suit pursuant to its decision in *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), which held that the Secretary of Interior's authority to take land into trust under Section 19 of the IRA, 25 U.S.C. § 479, was limited to tribes under federal jurisdiction in 1934. *Patchak*, 132 S.Ct. at 2204. **Thereafter, Mr. Patchak took no action in this Court on remand for more than two years--until July 17, 2014, when he requested a status conference. ECF No. 67.**

Since this proceeding on remand has become active, two critical events have occurred. First, On September 3, 2014, the Secretary of Interior issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two different parcels.[8] In the Amended Notice of Decision, the Secretary of Interior specifically considered its authority to take land into trust under the IRA pursuant to *Carcieri v. Salazar*, 555 U.S. 379 and based upon supplementary historical information provided by the Tribe and analyzed by the Office of the Solicitor for the Department of the Interior. SAR000617-58. The Secretary of Interior concurred with the Solicitor's opinion that the Tribe was under federal jurisdiction in 1934 such that it had authority to take land into trust on the Tribe's behalf pursuant to the IRA. SAR000650-57.

Second, on September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act, declaring that the Bradley Tract, at issue here, "is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a). Congress further provided that "[n]otwithstanding any other provision of law, an action (including an action pending in a

[8] Supplemental Administrative Record ("SAR"), lodged in this Court on October 27, 2014. ECF No. 75.

Federal court as of the date of enactment of this Act) relating to the [Bradley Tract] shall not be filed or maintained in a Federal court and shall be promptly dismissed." *Id*. at Sec. 2(b).

Since the Secretary of Interior took the Bradley Tract into trust in January 2009, the Tribe has incurred debt in the approximate amount of One Hundred Ninety Five Million Dollars ($195,000,000.00) to acquire land and construct the casino and pay related related expenses, of which approximately Fifty Four Million Dollars ($54,000,000) remains unpaid. Sprague Decl., ¶ 18. The Gun Lake Casino opened on February 10, 2011.[9] Sprague Decl., ¶ 19. Since its opening, the Tribe, pursuant to its Compact with the State of Michigan, has contributed approximately $52,235,219.00 to the state government and local revenue sharing boards, and the Tribe, along with State and local governments, have made substantial financial and future planning commitments based upon continued casino revenues. Sprague Decl., ¶ 21; *see also* CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representative Grijalva). The casino has also created nearly 1,000 jobs for the community at large as well as tribal members. Sprague Decl., ¶ 22; CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representative Grijalva). The casino funds the basic functions of the Tribe's government and has enabled the Tribe to provide essential services to its members, including housing, health care, education, infrastructure, and other important services. Sprague Decl., ¶ 20.

[9] Notably, Mr. Patchak sought no injunctive relief with regard to the Tribe's construction and operation of the casino from this Court or any other after prevailing in the Supreme Court until taking initial action in this matter **two years** after remand and after the casino itself had already been built, opened, and had begun creating substantial revenues. Mr. Patchak's counsel, moreover, has made no secret of the fact that his present efforts in this Court on remand are directed at extracting monetary compensation from the Tribe, which this Court cannot order pursuant to the Administrative Procedure Act, 5 U.S.C. § 705. *See Attorney Claims Case Against Gun Lake Tribe's Casino Still Alive*, indianz.com (Oct. 2, 2014), http:// http://www.indianz.com/IndianGaming/2014/028308.asp (last visited Oct. 31, 2014).

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(a) requires summary judgment in favor of a moving party when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotox Corp. v. Catrett*, 477 U.S. 317, 322 (1995); *Tao v. Freeh*, 27 F.3d 635, 368 (D.C. Cir. 1994). Summary judgment is generally appropriate when the unresolved issues are primarily legal rather than factual, including matters turning upon interpretation of and applicability of a statute. *See Edwards v. Aguillard*, 482 U.S. 578, 594-96 (1987); *325-343 E. 56th Street Corp. v. Mobil Oil Corp.*, 906 F.Supp. 669, 675, 675 n.3 (D.D.C. 1995). Specifically, whether the Secretary of Interior properly has exercised its authority to take land into trust on behalf of an Indian tribe is appropriately considered in a motion for summary judgment. *See, e.g., Akiachak Native Community v. Jewell*, 995 F.Supp.2d 1, 3-6 (D.D.C. 2013); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 156 (D.D.C. 2000); *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 159-60 (D.D.C. 1980); *see also South Dakota v. U.S. Dept. of Interior*, 487 F.3d 548, 550-51 (8th Cir. 2007). Courts evaluating whether certain land properly has been placed into trust on behalf of an Indian tribe must "'***tread lightly***' so as to avoid infringing on this area reserved to Congress." *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 473 (D.D.C. 1978) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (emphasis added)).

Further, whether a suit is barred by the doctrine of laches is also properly resolved by a motion for summary judgment. *See, e.g., Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882-83 (D.C. Cir. 2009); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 167, 172 (D.C. Cir. 2003).

A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law. . . ." *Anderson*, 477 U.S. at 248. The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322; *Tao*, 27 F.3d at 638. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (internal quotation and punction omitted); *see also Celotex*, 477 U.S. at 324. "To survive a motion for summary judgment, the party bearing the burden of proof at trial . . . must provide evidence showing that there is a triable issue as to an element essential to that party's claim." *Arrington v. United States*, 473 F.3d 329, 335 (D.C. Cir. 2006) (citing *Celotex*, 477 U.S. at 322).

IV. ARGUMENT

The entirety of Mr. Patchak's case hinges upon the question of whether the Bradley Tract is lawfully in trust on behalf of the Tribe. If the answer to that question is yes, then Mr. Patchak is entitled to no relief in this proceeding and the Tribe is entitled to judgment as a matter of law.

Since January 2009, this central question has been governed by the United States Supreme Court's decision in *Carcieri*, which requires a fact-intensive inquiry into whether land taken into trust under Section 5 of the IRA was on behalf of an Indian tribe under federal jurisdiction in 1934 as set forth in Section 19 of the IRA. *Carcieri*, 555 U.S. at 395. The United States Congress, however, changed the landscape of this litigation inexorably by enacting the Gun Lake Trust Land Reaffirmation Act, which functions as a conclusive substantive affirmation of the Bradley Tract's trust status. As a result, the answer to the central question of this litigation is now unequivocally yes, the Bradley Tract is lawfully in trust on behalf of the Tribe. There is, therefore, no further inquiry required into the Secretary of Interior's factual basis for taking the

Bradley Tract into trust. There is no additional legal analysis required. In short, there is no genuine issue of material fact remaining in this litigation, and the Tribe is entitled to judgment under Rule 56 of the Federal Rules of Civil Procedure as a matter of law.

The Gun Lake Trust Land Reaffirmation Act, moreover, is wholly proper. Congress enjoys such plenary and exclusive authority over this Indian land that there is no doubt that it has the power to regulate, define, and create Indian trust land in precisely the way that it has done here. It is likewise clear that this legislation, specifically and narrowly focused upon the 147-acre Bradley Tract, co-occurs without conflict with the general provisions contained in Sections 5 and 19 of the IRA. In short, the affirmation was a proper and valid exercise of Congress's Constitutional authority over Indian affairs.

Further, even reading the substantive trust status affirmation together with the procedural clause of the Act, which bars claims challenging the trust status of the Bradley tract, the Act suffers no constitutional infirmity. The Act is not a violation of separation of powers and clearly does not amount to a bill of attainder against Mr. Patchak. To the extent that Patchak could make a colorable claim of unconstitutionality as to the procedural clause, it is easily severable from the proper substantive affirmation of trust status.

Even in the event that this Court determines that the Act is not sufficient to resolve this lawsuit as a matter of law, Mr. Patchak has brazenly and unreasonably sat on his rights to prosecute this case—not merely during the three-year delay preceding the initial filing of this lawsuit, but during the two years since the United States Supreme Court remanded to this Court for resolution of this matter. Mr. Patchak's excessive delay in this litigation is inexcusable and has the potential to exact extraordinary prejudice upon the United States, the Tribe, and state and local governments, which rely extensively upon this small tract of trust land to support their

governments, people, and sovereignty. Notwithstanding the clear substantive factual and legal reality that entitles the Tribe to judgment as a matter of law, Mr. Patchak's lawsuit is also barred by the doctrine of laches and cannot be sustained.

A. The United States Lawfully Holds in Trust the Bradley Tract on Behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Hence No Genuine Issue of Material Fact Exists

1. The United States Congress, Exercising Its Plenary Authority over Indian Affairs, Has Properly Defined the Bradley Tract as Held in Trust by the United States for the Benefit of the Tribe as a Matter of Law

In the substantive portion of the Gun Lake Trust Land Reaffirmation Act of 2014, Congress has made two separate but related substantive rules: (1) that the Bradley Tract "is reaffirmed as trust land . . .;" and (2) that "the actions of the Secretary in taking that land into trust are ratified and confirmed." Pub. L. No. 113-179, 128 Stat. 1913 ("Act"). S. REP. NO. 113-194, at 1 (2014). The enactment of this legislation, which first defines conclusively the legal trust status of the Bradley Tract then gives Congress's formal approval to previous acts of the Secretary based upon the Tract's trust status, is a clear constitutional prerogative of Congress. Based upon its plain terms and the rules of statutory construction, moreover, the Act supplants Section 5 of the IRA in this narrow instance, such that Section 5, and by extension Section 19 under *Carcieri*, no longer govern this proceeding and any fact questions arising therefrom are moot.

The United States Constitution grants Congress with broad authority to legislate with respect to Indian tribes—authority that is "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-47 (1979). This authority derives specifically from the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3,

and the Treaty Clause, Art. II, § 2, cl. 2. *E.g.*, *Lara*, 541 U.S. at 200 (citing *Morton v. Mancari*, 471 U.S. 535, 552 (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973)). It is so broad that it encompasses such overarching powers as the ability to both create and extinguish the very sovereign existence of the Indian tribes. *E.g*, *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (stating that whether and to what extent Indian communities "shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States [is] to be determined by Congress. . .); *see, e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-13 (1968) (discussing federal legislation terminating sovereign existence of Indian tribe).

Included among these broad powers is Congress's comprehensive authority over tribal lands. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) (noting that the Constitution places the authority to dispose of Indian lands "***exclusively in Congress*** . . . ." (emphasis added)). As such, Congress may create new reservations. 25 U.S.C. § 467. Congress may take action notwithstanding tribal property interests, including by granting leases and exercising eminent domain. *See Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 656 (1890). Congress further may take Indian property without consent of the Indian owners. *E.g. Southern Kan. Ry. Co.*, 135 U.S. at 656; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903). But most importantly for purposes of the instant case, it is Congress's authority to acquire land on behalf of tribes and place it into trust. *E.g.*, *Sioux Tribe*, 316 U.S. at 326; *City of Sault Ste. Marie*, 458 F.Supp. at 473; 25 U.S.C. § 465 (delegating and codifying trust acquisition powers generally).

In 1934, in an effort to reverse the devastating effects of the allotment and assimilation era[10] upon tribes and tribal lands, Congress enacted the Indian Reorganization Act, 25 U.S.C. § 461, et seq. with the "intent and purpose . . . 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." *Carcieri*, 555 U.S. 379, 404 n. 4 (Souter, J. and Ginsburg, J. concurring in part and dissenting in part) (internal citations and punctuation omitted). Part of this new policy included a general delegation of authority over Indian lands to the Secretary of Interior, set forth in Section 5 of the IRA, 25 U.S.C. § 465, in which Congress authorized the Secretary of Interior generally to acquire and place land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. This general grant of authority to the Secretary is modified by the definition of Indian contained in Section 19 of the Indian Reorganization Act, 25 U.S.C. § 479, which the Supreme Court has construed in *Carcieri* to mean tribes "under federal jurisdiction" in 1934. *Carcieri*, 555 U.S. at 395. The Secretary of Interior has promulgated rules that govern how it acquires and takes land into trust that are subject to "provisions contained in the acts of Congress which authorize land acquisitions. . . ." 25 CFR § 151.3; *see generally*, 25 CFR § 151 et seq.

Despite this ***general*** grant of permission or authority to the Secretary of Interior in the IRA, it is beyond dispute that Congress retains its plenary authority over disposition and creation of Indian trust lands. *See City of Sault Ste. Marie*, 458 F.Supp. at 473 ("[T]he taking of land in trust [has] been committed to the Department of the Interior in Congress' exercise of its plenary power."); *see also Sioux Tribe*, 316 U.S. at 326; *Confederated Tribes of Siletz Indians of Oregon*

[10] During the allotment era, the United States' Indian policy was aimed at "civilizing" and assimilating Indian people and included the dispossession and acquisition of Indian lands by the United States under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed by* Act of Nov. 7, 2000, 114 Stat. 2007, and subsequent piecemeal legislation. From 1887 until 1934 when Congress enacted the Indian Reorganization Act, tribal lands in the United States shrunk from 138 million acres to less than 48 million. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, § 1.04 (2005).

v. United States, 110 F.3d 688, 698 (1997). Congress has not divested itself of this authority. Unsurprisingly, therefore, Congress routinely asserts its plenary authority over Indian lands by enacting ***specific*** legislation that directs the Secretary of Interior to acquire and take ***specific*** lands into trust on behalf of ***specific*** tribes, separate and apart from the ***general*** grant of authority contained in Section 5 of the IRA, 25 U.S.C. § 465. *E.g.*, 25 U.S.C. § 1300j-5 (specifically directing the Secretary to take lands into trust on behalf of the Pokagon Band of Potawatomi Indians); 25 U.S.C. § 1754 (specifically directing the Secretary to take lands into trust on behalf of the Mashantucket Pequot Tribe); (specifically directing the Secretary to take lands into trust on behalf of the Passamaquoddy Tribe, the Penobscot Tribe, and the Houlton Band of Maliseet Indians).[11] Clearly, Congress, in the exercise of its constitutionally-granted plenary authority over Indian affairs, may acquire lands in trust for the benfit of an Indian tribe regardless of whether the tribe was or was not "under federal jurisdiction" in 1934.

General and specific legislation on the same issue, such as these, work in harmony. It is axiomatic under the rules of statutory construction that the specific governs the general, particularly when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-71 (2012) (internal citations and quotation marks omitted); *see also HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (holding that the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of the [same statutory scheme]"). The United States Supreme Court has held that the "general/specific canon" applies frequently where a general permission in a statute is contradicted or modified by

[11] The Pokagon Band of Potawatomi Indians was denied the right to organize under the Indian Reorganization Act, and Congress later affirmed their federal recognition by statute in 1994. 25 U.S.C. §§ 1300j, 1300j-1. The Mashantucket Pequot Tribe was federally recognized by statute in 1983. 25 U.S.C. §§ 1751 et seq. The Passamaquoddy Tribe, the Penobscot Tribe, and the Houlton Band of Maliseet Indians were federally recognized by statute in 1983. 25 U.S.C. § 1725(i).

a specific permission. *RadLAX Gateway Hotel, LLC*, 132 S.Ct. at 2071. In such cases, "the specific provision is construed as an exception to the general one." *Id.* (citing *Mancari*, 417 U.S. at 550-51).

Specific Congressional action defining specific lands as Indian trust land for specific tribes is hardly controversial as it is a relatively minor exercise of Congress's plenary authority over Indian tribes. Not only is it an explicit Congressional prerogative under its plenary authority (*see, e.g.*, *Sioux Tribe*, 316 U.S. at 326; *City of Sault Ste. Marie*, 458 F.Supp. at 473), but it pales in comparison to such overawing Congressional powers as the authority to both create and extinguish a tribe's very existence (*see, e.g.*, *Sandoval*, 231 U.S. at 46; *Menominee Tribe*, 391 U.S. at 410-13). There can be no doubt, therefore, that Congress was wholly within the bounds of its substantive constitutional authority when it defined the Bradley Tract as trust land in the Gun Lake Trust Land Reaffirmation Act and ratified the Secretary's actions in conformity with the Tract's trust status.

And given Congress's clear authority to substantively define the Bradley Tract as trust land, it is also clear under the rules of statutory construction that Congress appropriately may enact separate specific legislation that defines, creates, or otherwise governs Indian trust land, notwithstanding the existence of the general statutory scheme concerning Indian trust land contained in the IRA—even if the specific legislation might contradict the general by avoiding the definition of "Indian" set forth in Section 19 as interpreted by *Carcieri*. *RadLAX Gateway Hotel, LLC*, 132 S.Ct. at 2070-71; *HCSC-Laundry*, 450 U.S. at 6. In such a case, the specific provision (the Gun Lake Trust Land Reaffirmation Act) must be construed as an exception to the general one (the IRA). *See RadLAX Gateway Hotel, LLC*, 132 S.Ct. at 2071; *Mancari*, 417 U.S. at 550-51. Indeed, Congress explicitly demonstrated its intention that the Gun Lake Trust Land

Reaffirmation Act should function as an exception to the IRA by including the phrase "[n]otwithstanding any other provision of law" in (b) of the Act—a phrase that "connotes a legislative intent to displace any other provision of law that is contrary to the Act. . . ." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (citing *Marcello v. Bonds*, 349 U.S. 302, 310-11 (1955); *Watt v. Alaska*, 451 U.S. 259, 280 (1981) (Steward, J., dissenting); *see also National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (noting that *non obstante* clauses "prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal").

Finally, the Act, which has enabled the Tribe to establish an initial reservation and to build an economic development project that supports its governmental functions and benefits its tribal members CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representative Grijalva)), is consistent with Congress's inherent fiduciary responsibility to tribes. *See, e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (holding that "tribal lands are subject to Congress' power to control and manage the tribe's affairs . . . ," but such power is "subject to limitations inhering in a guardianship"); *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989) ("[Congress's] guardian-ward relationship derives from the historical status of Indian tribes as 'domestic dependent nations,' and the correspondingly pervasive federal control over Indians as embodied in treaties and statutes." (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)); *see also United States v. Mitchell*, 463 U.S. 206, 224 (1983) (noting that federal Indian land statutes "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities").

In sum, the Act's definition of the Bradley Tract as land lawfully held in trust on behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians was an appropriate function of Congress's plenary authority over Indian tribes and Indian lands. By enacting this legislation, Congress properly and explicitly supplanted the Secretarial trust acquisition scheme as defined in the IRA. In light of the Act, therefore, no facts whatsoever are material to the question of the Bradley Tract's trust status. The Tract is held in trust by the United States for the benefit of the Tribe as a matter of law, such that it is irrefutable that judgment should be entered in favor of the Tribe pursuant to Federal Rule of Civil Procedure 56.

2. The Gun Lake Trust Land Reaffirmation Act Is Constitutionally Sound

In a separate subsection from the substantive affirmation of the Bradley Tract's trust status, Congress also included a clause prohibiting further claims from arising as to the Tract's status. Specifically, the Act states: "[n]otwithstanding 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 Federal court and shall be promptly dismissed." Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). The Act functions to amend the underlying substantive legal framework that governs this litigation and does so with a purpose to fulfill Congress's trust responsibility to the Tribe. Hence, as set forth in detail below, it is neither a violation of separation of powers nor is it an unconstitutional bill of attainder.

Further, even though these principles are clear, to the extent that there is any doubt, this Court must be guided by the canon that "[a]s between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (internal punctuation omitted). Moreover, this Court must be guided by a principle deeply rooted

in Indian law jurisprudence that "statutes are to be construed liberially in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992); (quoting *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985)).

i. The Act Does Not Violate Separation of Powers

The United States Supreme Court first articulated the separation of powers principle in *United States v. Klein*, 13 Wall. 128 (1871), in which the executor of the estate of a Confederate sympathizer sought to recover the value of property seized by the United States during the civil war under a statute that allowed recovery if the decedent had not aided the rebellion. *Id*. at 131. The Supreme Court had held in a separate case that a presidential pardon satisfied the burden of proving that no aid had been given. *Id*. While *Klein's* case was pending, Congress enacted legislation that provided that if a claimant had offered a presidential pardon as proof that he had not given aid, it would instead be construed as proof of the opposite and the case must be dismissed for lack of jurisdiction. *Id*. at 133-34. The Court held that the statute was unconstitutional as it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it[.]" *Id*. at 146.

Later decisions have made clear, however, that "[*Klein's*] prohibition does not take hold when Congress amends applicable law." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (*quoting Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992) (internal punctuation omitted). For example, in *Robertson v. Seattle Audubon Socy.*, the United States Supreme Court considered whether legislation that effectively resolved several pending litigations concerning the effect of timber harvesting on an endangered species violated constitutional separation of powers. The legislation created new substantive standards to define

lawful timber harvesting, effectively superseded the existing general statutory scheme. *Robertson*, 503 U.S. at 434. The legislation further identified by name and docket number the litigations that it intended to impact and explicitly directed the court to apply the new standards. *Id.* In effect, the legislation left nothing for the courts to decide and conclusively resolved the litigations. *Id*.

The Court held that the statute did not violate separation of powers, even though it conclusively and explicitly resolved the subject litigations, because it had replaced the existing legal standards underlying those litigations. *Robertson*, 503 U.S. at 441; *accord Miller v. French*, 530 U.S. 327, 349 (2000); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 218; *see also Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp.2d 174, 185 (D.D.C. 2009) ("[I]f a statute compels changes in the law, not findings or results under old law, it merely amends the underlying law, and is therefore not subject to a *Klein* challenge.") (quoting *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009). The *Robertson* court further remarked that it is immaterial that a statute might explicitly direct both the executive officials who administer the statute and the judges who apply it in particular cases as this is the function of ***all*** statutes, "even if (as is usually the case) Congress fails to preface its directive with an empty phrase like 'Congress directs that.'" *Robertson*, 503 U.S. at 439. Furthermore, Congress can effect an underlying substantive change that specifically changes the outcome of a specific litigation without explicitly amending, repealing, or even referencing the previous, general statutory scheme pursuant to the canon (discussed above) that the specific provisions qualify general ones. *Robertson*, 503 U.S. at 440.

In the present case, there is no question that Congress clearly has substantively amended the underlying law by creating an explicit exception to the Section 5 of the IRA and directly and

conclusively defining the Bradley Tract as trust land pursuant to its plenary constitutional authority over Indian affairs, as set forth in detail above. This statute does not compel this Court to render a finding of legality under Section 5; it requires this Court to consider the newly changed substantive landscape. Accordingly, it cannot be subject to a *Klein* challenge alleging violation of separation of powers. *E.g.*, *Robertson*, 503 U.S. at 441; *Miller*, 530 U.S. at 349; *Plaut*, 514 U.S. at 218.

In fact, the statute is very like a statute that was considered in a Circuit Court case that is on all fours with the instant proceeding. In *National Coalition to Save our Mall v. Norton*, plaintiffs sued the Secretary of Interior and other federal agencies challenging agency approval of the design and construction of a proposed World War II Memorial on the National Mall. 269 F.3d at 1093. While this litigation was pending in the District Court for the District of Columbia, Congress enacted legislation containing the following provisions that are nearly identical to the provisions of the Act here: (1) an affirmation of the existing agency decision by directing that the Memorial "shall be constructed expeditiously . . . in a manner consistent with [existing] plans and permits"; (2) ratification of existing and future agency actions consistent with the decision to build the memorial; and (3) prohibition on judicial review of the permit allowing construction of the memorial. *Id*. at 1094.

Plaintiffs objected to the legislation on two bases: first that legislation violated the presumption in favor of judicial review of agency decisions; (*id.*); and second that the legislation violated constitutionally-mandated separation of powers (*id.* at 1095-96). As to judicial review, the court held that "the presumption is only that, and can be overridden by specific language or by clear and convincing evidence of legislative intent." *Id.* at 1095 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). Congress's facial prohibition of

judicial review in the statute was sufficient by itself to demonstrate convincing legislative intent to override the presumption. *National Mall*, 269 F.3d at 1095 ("It is hard to see how Congress could make it clearer than it has here, providing that [the agency decision] 'shall not be subject to judicial review.'").

National Mall further held that the subject legislation did not infringe upon the Court's Article III power under *Klein*. The Court determined that Congress's affirmation of the existing agency decision and ratification of previous and future agency actions constituted an amendment to the substantive law no different than the change in underlying law that the Supreme Court approved in *Robertson*. *National Mall*, 269 F.3d at 1097. Further, provided that the legislation is otherwise within Congress's constitutional authority,[12] even Congress's explicit reference to a pending case (including, as in *National Mall*, by name and docket number) does not violate constitutional separation of powers. *Id.* at 1097. Indeed, *National Mall* emphasized that courts, in fact, are ***required*** to apply retroactive legislation to pending litigations where the new legislation would affect the outcome, provided there is no final judgment. *Id*. at 1096 (citing *Plaut*, 514 U.S. at 226 ((citing *United States v. Schooner Peggy*, 1 Cranch 103 (1801)).

In enacting the Gun Lake Trust Land Reaffirmation Act, it is indisputable that Congress has amended the substantive law that governs this litigation in a constitutionally proper way, and the fact that it has directed this Court to act in conformity with that substantive change is not unconstitutional as a violation of this Court's Article III powers.

ii. The Act is not a Bill of Attainder

Article I, section 9 of the Constitution, the Bill of Attainder Clause, prohibits Congress from enacting "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of*

[12] Part ii *infra* establishes that the Act does not represent an unconstitutional bill of attainder.

Gen. Servs., 433 U.S. 425, 468 (1977). The clause functions as "a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). A law is an unconstitutional bill of attainder "if it (1) applies with specificity, and (2) imposes punishment." *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998) ("*BellSouth II*"). Specificity by itself is not sufficient to render a statute a bill of attainder. *Nixon*, 433 U.S. at 472. Even statutes that specifically name particular parties do not constitute bills of attainder where the punishment element has not also been satisfied. *BellSouth II*, 132 F.3d at 684. As such, "it is not clear that the specificity requirement retains any real bite . . . as the principal touchstone of a bill of attainder is punishment." *BellSouth v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998) ("*BellSouth I*"). Even assuming that the Act meets the specificity factor, it nonetheless does not constitute a bill of attainder because it does not in any way inflict punishment on Patchak.

The Supreme Court has set forth a three-part inquiry to determine whether legislation constitutes punishment in the bill of attainder analysis:

> (1) Whether the challenged statute falls with the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 473). While each punishment factor is considered separately, the second factor, which has been called the "functional test"—"invariably appears to be the most important of the three." *Foretich v. United States*, 351 F.3d 1198, 1218 (2003) (quoting *BellSouth I*, 144 F.3d at 65 and *BellSouth II*, 162 F.3d at 684). "Indeed, compelling proof on this score may be determinative." *Id*. (citing *BellSouth I*, 144 F.3d at 65).

Courts have generally defined the first test of "historical punishment" very narrowly. While the historical meaning of legislative punishment has expanded since the founders drafted the Bill of Attainder Clause, historical punishment generally is limited to sentences of death, bills of pains and penalties, legislative bars to participation by individuals or groups in specific employments or professions, or notes of infamy that mark individuals as infamous or disloyal. *Foretich*, 351 F.3d at 1218-20 (*citing Nixon*, 433 U.S. at 474). In the instant proceeding, the specific effect of the Act on Mr. Patchak is to prevent him from pursuing litigation to invalidate the creation of a dispossessed Indian Tribe's initial reservation and to thwart the Tribe's most critical economic development and self-sufficiency project. Even characterizing the effect of the Act on Mr. Patchak in the light most favorable to his claims—as thwarting his efforts to stop the operation of a casino near his property—it still does not does not even remotely fall into the category of a traditional "historical punishment" as described in the authorities, and as such does not meet the historical punishment test. *See Foretich,* 351 F.3d at 1218-20.

The functional test requires a "nonpunitive legislative purpose," because "[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Nixon*, 433 U.S. at 475-76. To survive a bill of attainder challenge, a statute's nonpunitive aims must be "sufficiently clear and convincing." *BellSouth II*, 162 F.3d at 686. Courts that have analyzed the functional test have identified several nondispositive principles that guide the inquiry. As the Circuit Court in *Foretich* explained, "these considerations are not alone decisive," and courts analyzing these principles must do so with an understanding that "Congress must have sufficient latitude to choose among competing policy alternatives so that [the] bill of attainder analysis will

not 'cripple the very process of legislating.'" These principles can be divided into two general groups.

The first group of principles is aimed at examining *how* the statute serves its nonpunitive purpose. The nonpunitive purpose must be "rational and fair." *Foretich*, 351 F.3d at 1222 (citing *Selective Serv. Sys.*, 468 U.S. at 854; *Nixon*, 433 U.S. at 483; *BellSouth II*, 162 F.3d at 680, 688). The statute must demonstrate "a nexus between the legislative means and legitimate nonpunitive ends." *Id.* (*citing Selective Serv. Sys.*, 468 U.S. at 854; *BellSouth II*, 162 F.3d at 687-88). And "a court must weigh the purported nonpunitive purpose of a statute against the magnitude of the burden it inflicts." *Id*. (*citing Nixon*, 433 U.S. at 475-76). The inquiry is not "the severity of a statutory burden in absolute terms . . . [,] but the magnitude of the burden relative to the purported nonpunitive purpose. . . ." *Id*. (*citing Nixon*, 433 U.S. at 473; *Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 354 (2002)). An "extraordinary imbalance" must exist between the burden imposed and the alleged nonpunitive purpose if the burden is to outweigh the legitimate legislative purpose. *Id*. at 1223.

The legislative history of the Act is clear that Congress affirmed the trust status of the Bradley Tract as a function of its fiduciary duty to the Tribe by resolving definitively a dispute that had "place[d] in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land." S. REP. NO.113-194, at 2 (2014). Congress's clear legislative goal, therefore, was not to punish Mr. Patchak, but to "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." *Id*. Where legal certainty is sought, and litigation has caused chaos, changing the underlying substantive law is a rational way to achieve Congress's goal—certainly at least as rational as the connection between barring

a particular corporation from offering certain services and the goal of general commercial regulation (*see, generally BellSouth I*, 144 F.3d 58; *BellSouth II*, 162 F.3d 678); or the connection between prohibiting one nonprofit from receiving federal grant monies and Congress's desire to ensure effective expenditure of taxpayer dollars (*see, generally ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010)).

Moreover, weighing the magnitude of the burden that the Act imposes upon Mr. Patchak against the Act's purpose is even more compelling. The burden upon Mr. Patchak is an alleged impairment of his enjoyment and the value of his ***private property***. Compl., ECF No.1, ¶ 9. The purpose of the Act is to provide both a land base and means of survival for a ***sovereign Indian tribe*** consistent with Congress's inherent fiduciary duty to the Tribe. *See* S. REP. NO.113-194, at 2 (2014). As the legislative record demonstrates, Congress also intended the Act to preserve 1,000 new jobs created by the Tribe's casino and to safeguard the significant revenues the Tribe shares with the local government and local schools, "an incredible feat. . . [and] quite an advantage in a time when municipalities are slashing services due to deficits." CONG. REC. H7485, daily ed. September 14, 2014 (statement of Rep. Upton). The burden and the legislative purpose in this matter, standing side-by-side, speak for themselves. Further, the authorities demonstrate that a legislative purpose that serves a worthy government interest nearly always wins out over private interests—even private interests that are broader and more commendable than Mr. Patchak's. *See, e.g. SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 674-76 (2002) (weighing a shipping corporation's economic right against avoidance of a catastrophic oil spill in the Prince William Sound); *BellSouth I*, 144 F.3d at 120-23 and *BellSouth II*, 162 F.3d at 688-90 (weighing a telecommunications corporation's ability to

participate in a given industry and general commercial regulation); *Selective Serv. Sys.*, 468 U.S. at 854-56 (weighing students' right to federal financial aid against compulsory military service).

It is beyond question, therefore, that the Act serves a nonpunitive purpose. But the functional test also examines the scope and structure of the legislation, and the Act survives this inquiry too. While the Act does not include any safeguards designed to protect Mr. Patchak, which the Supreme Court discussed in *Nixon* (433 U.S. at 477), it would be impossible to achieve Congress's goal of providing legal certainty to the Bradley Tract's trust status while still enabling Mr. Patchak to pursue this litigation. And structurally, the fact that less burdensome alternatives were not available to Congress bolsters the validity of a nonpunitive purpose. *See Nixon*, 433 U.S. at 482; *SeaRiver*, 309 F.3d at 677-78; *Consolidated Edison Co.*, 292 F.3d at 354. Hence, the Act is both substantively and structurally nonpunitive.

The final test of legislative punishment has been called the "motivational test," and it examines "whether the legislative record evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478 (citing *United States v. Lovett*, 328 U.S. 303, 308-14 (1946); *Kennedy v. Mendoza Martinez*, 372 U.S. 144, 169-70 (1963). Courts applying this test must determine whether Congress has intended to "encroach[] upon the judicial function of punishing an individual for blameworthy offenses." *Id*. at 479. While "a formal legislative announcement of moral blameworthiness or punishment . . ." is not necessary to an unlawful bill of attainder, the absence of such expressions in the legislative history tends to demonstrate nonpunitive intentions. . ." and, further, "largely undercuts a major concern that prompted the bill of attainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of a judge." *Nixon*, 433 U.S. at 481 (internal citation omitted).

The legislative record evinces no congressional intent to punish Mr. Patchak.[13] Congress discusses Mr. Patchak's lawsuit on a number of occasions, but none of those utterances show a desire to "encroach[] upon the judicial function of punishing an individual for blameworthy offenses" or announcing "moral blameworthiness." *Nixon*, 433 U.S. at 479, 481. Both the House of Representatives and the Senate referred to this litigation only to note the importance of remedying the peril that it had potentially caused the Tribe. H.R. REP. NO. 113-590, 2 (2014); S. REP. NO. 113-194, at 2 (2014). Further, while Mr. Patchak's lawsuit was characterized as "frivolous" during House floor debates on the Act (a characterization that the Tribe does not here dispute), the focus remained properly upon the impact of the litigation on the well-being of the Tribe, its members and employees, and State and local governments. *See* CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representatives Hastings and Grijalva).

No "trial by legislature" has occurred here. *See Brown*, 381 U.S. at 442. Congress crafted the Gun Lake Trust Land Reaffirmation Act to respond to a legitimate concern in a manner consistent with its trust responsibility to the Gun Lake Tribe, and also its concern for state and local governments and the thousands of persons in western Michigan that have come to rely on the Tribe's gaming facility for their livelihood and future planning. As such the Act is a proper exercise of Congress's plenary authority over this matter, and is plainly not an unconstitutional bill of attainder.

[13] Mr. Patchak also has no right to an actual trial in this matter. It is an established principle of American jurisprudence that a party has no vested rights in a lawsuit until final judgment as entered. *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *accord Daylo v. Administrator of Veterans Affairs*, 501 F.2d 811, 816 (1974); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C. Cir. 1972); *see also Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493, n. 12 (6th Cir. 1993) (noting that *McCullough's* holding regarding the *vested rights doctrine* "remains good law . . . even if the Supreme Court has not ruled on a similar case since), *aff'd*, 514 U.S. 211 (1995). As such there can be no taking when Congress enacts legislation that moots pending litigation. *See McCullough*, 172 U.S. at 123-24 ("Legislation may act on subsequent proceedings, may abte actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.")

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

In addition to the above, Mr. Patchak's suit is now, and always has been, barred by the doctrine of laches. Despite his ostensible zeal in his fight to oppose and dispossess the Tribe of its trust land, Mr. Patchak has had a curiously lackadaisical attitude toward pursuing his claims. Mr. Patchak was aware of the Tribe's efforts to attain federal acknowledgment as an Indian tribe, yet he did not oppose those efforts or challenge the Department of Interior's decision acknowledging the Tribe in 1998. Patchak was aware of the Department's administrative proceedings to acquire the parcel of land here at issue for the Tribe as early as 2001 when Patchak went on the record opposing the acquisition. Indeed, in March 2001, Mr. Patchak 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.

Patchak had notice of the Secretary's decision to acquire the land in trust in May 2005, as he was an elected member of the County Board of Trustees at that time, and was present at meetings where the acquisition was discussed. ECF No. 13-3, at ¶ 22. He was aware of the *MichGO* litigation, and consciously chose not to join it.[14] ECF No. 24, at pp. 6-7. Having failed to join the *MichGO* suit and waiting on the sidelines while that litigation played out, Mr. Patchak

[14] The evidence in this matter demonstrates that Mr. Patchak was closely affiliated with the MichGO organization and appears on a list that MichGO used to determine its membership. ECF No. 13-3, ¶¶ 18-22, Exs. G-P. The Tribe reserves its right to assert the affirmative defense of claim preclusion based upon this relationship and the prior *MichGO* decisions. The Tribe has served Mr. Patchak with discovery requests on this issue, to which he has refused to respond.

allowed ***39 months*** to elapse between the date of the Secretary's decision to accept the Bradley Tract into trust and when he filed the instant suit. Then after the United States Supreme Court held that Patchak had standing to pursue this litigation on remand, Mr. Patchak waited over ***two additional years*** before he took any action whatsoever to pursue his claims in this Court.

As of today, Patchak has inexplicably and unreasonably sat on his rights cumulatively for over five years in this matter. This delay is simply inexcusable and has so disrupted and prejudiced both the Tribe and the United States that even our bitterly divided Congress has taken notice of this injustice and united, however briefly, to right this wrong.

Accordingly, Mr. Patchak's Complaint is clearly barred by the doctrine of laches. As discussed in detail herein, the law does not allow parties to let potential legal claims lay dormant for extended periods of time, and then pursue such claims at a party's leisure; especially where the plaintiff's delay prejudices another. No genuine issue of material fact exists as the delay speaks for itself. Based upon the facts set forth in the administrative record, as well as the procedural facts contained in the trial and appellate record in this matter, Mr. Patchak's suit must fail as a matter of law as it is barred by the doctrine of laches and judgment should be entered in favor of the Tribe on this basis.

1. The Doctrine Of 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); *see also National R.R. Passenger Corp. v. Lexington Ins. Co.*, 357 F.Supp.2d 287, 296 (D.D.C. 2005); *Purepac Pharmaceutical Co. v. Thompson*, 238 F.Supp.2d 191, 201 (D.D.C. 2002); *Lebrun v. England*, 212 F.Supp.2d 5, 13 (D.D.C. 2002); *N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational*

Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985). The doctrine "is designed to promote diligence and prevent [the] enforcement of stale claims." *Gull,* 694 F.2d at 843. "By preventing the enforcement of stale claims, the doctrine obligates litigants to pursue their rights expeditiously." *National R.R. Passenger Corp. v. Lexington Ins. Co.*, 357 F.Supp.2d 287, 296 (D.D.C. 2005).

Courts consider two factors in determining whether laches applies: "lack of diligence by the plaintiff and injurious reliance thereon by the defendant." *Id.* "Laches does not depend solely on the time that has elapsed between the alleged wrong and the institution of suit; it is 'principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Id*.; *see also LTMC/Dragonfly, Inc. v. Metropolitan Washington Airports Authority,* 699 F.Supp.2d 281, 292 (D.D.C. 2010); *Dove v. United States*, 1987 WL 8708, *6 (D.D.C. 1987); *Allen v. Carmen*, 578 F.Supp. 951, 963 (D.D.C. 1983). "If only a short period of time elapses between accrual of the claim and suit, the magnitude of prejudice required before suit would be barred is great; if the delay is lengthy, a lesser showing of prejudice is required." *Id*. However, "[w]here there is no excuse for delay, defendants need show little prejudice[.]" *Allens Creek/Corbetts Glen Preservation Group, Inc. v. Caldera,* 88 F. Supp. 2d 77, 84 (W.D.N.Y. 2000); *see also Stone v. Williams*, 873 F.2d 620, 625 (2d Cir. 1989); *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963); *Newsome v. Brown*, 2005 WL 627639, *8 (S.D.N.Y. 2005); *Batiste v. City of New Haven*, 239 F.Supp.2d 213, 225 (D.Conn. 2002); *Peyser v. Searle Blatt & Co., Ltd.*, 2000 WL 1876917, *2 (S.D.N.Y. 2000); *Harley-Davidson, Inc. v. O'Connell*, 13 F.Supp.2d 271, 284 (N.D.N.Y. 1998).

In short, the doctrine of laches provides that legal claims must be brought within a reasonable time of becoming ripe, and "applies where [a] person fails to take advantage of [the]

opportunity and occasion for asserting [their] rights." *Van Senden v. O'Brien*, 58 F.2d 689, 691 (D.C. Cir. 1932). In the present litigation, Patchak clearly decided to initiate his lawsuit well after any potential claim he possessed arose, and as such, Plaintiff must now be precluded by the doctrine of laches from pursuing the same.

2. Patchak Unjustifiably Delayed Asserting His Claim

Patchak has had ample knowledge of the circumstances surrounding his claim for a prolonged period for time. Patchak has known about the Tribe's proposed land acquisition since at least March 2001 (*see* AR011529); the resulting administrative process since at least December 2002 (*see* AR011324); 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 the *MichGO* litigation since at least 2005. ECF No. 1; ECF No. 24 at p. 7.

Patchak therefore has enjoyed multiple opportunities 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 before the district court or on appeal. Patchak, however, failed to exercise that right, choosing instead to sit on his rights until it appeared that the opponents of the Secretary's decision would fail to accomplish their goal in the *MichGO* litigation. The resulting delay of nearly 39 months for Patchak's initial filing and two years on remand 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). Indeed, unfounded delays of similar length are precisely the sort of lengthy and unreasonable delays that the doctrine of laches is designed to prevent.

In *Batiste v. City of New Haven*, 239 F. Supp. 2d 213 (D. Conn. 2002), the doctrine of laches to barred plaintiff's claims under the Fair Housing Act. *Batiste*, 239 F. Supp. 2d 213, 225. Plaintiffs in *Batiste* were fully aware of the facts underpinning their claims, but nonetheless, "waited at least twenty-two months to file suit, which [constituted] an unreasonable amount of time[.]" *Batiste*, 239 F. Supp. 2d at 225. Accordingly, the court dismissed plaintiff's claims as barred by the doctrine of laches. Likewise, in *In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990), the Tenth Circuit applied the doctrine of laches when the claimant waited more than 20 months to prosecute his claims after a bankruptcy court lifted its automatic stay previously barring the claim. *In re Centric Corp.*, 901 F.2d 1514, 1519. Further, courts have routinely applied the doctrine of laches when addressing similar delays; including delays substantially shorter than the delay presented in the instant litigation. *See City of Rochester v. United States Postal Service*, 541 F.2d 967, 976-78 (2d Cir. 1976) (claim barred by two (2) year delay); *National Parks and Conservation Ass'n v. Hodel*, 679 F. Supp. 49, 53-54 (D.D.C. 1987) (three (3) years).

The undisputed facts of this case are clear: Patchak can muster no legitimate justification for his failure to timely assert his challenge to the Bradley Tract's trust status when the *MichGO* litigation began nearly a decade ago. Indeed, Patchak has conceded that he knew about the *MichGO* litigation (ECF No. 26-2 ¶ 2), and that he made a strategic decision *not* to join the case because he believed MichGO had "raised all available legal arguments to prevent the casino" (*Id.* ¶ 4). Moreover, while Patchak previously has offered three excuses for his delay—(1) that he did not wish to incur legal costs by obtaining an attorney; (2) that he feared the public scrutiny that he believed would accompany a lawsuit; and, (3) that he did not initially realize and

comprehend the legal basis for his argument under Section 19 of the IRA (ECF No. 26-2 ¶¶ 4, 7-8)—none of these purported justifications possess any merit.

First, despite Mr. Patchak's supposed fear of the cost of litigation and public scrutiny (ECF No. 26-2 ¶¶ 7-8), he cannot show that he has ever been indigent, or otherwise unable to afford an attorney. Indeed, Patchak had the wherewithal to litigate this case through the Court of Appeals and the Supreme Court. Further, there is nothing unique about having concerns about the cost or publicity associated with litigation. Indeed, "[t]he strategic decision to rest, to minimize the legal expense and to let others carry the litigation burden, hardly excuses [plaintiffs'] delay [in bringing suit]." *Telelink, Inc. v United States*, 24 F.3d 42, 48 (9th Cir. 1994).

Moreover, even assuming that Patchak himself may not have known about the specific legal basis for his claim in 2005, he has been (unjustifiably) questioning the Tribe's legitimacy since at least 2001. And Patchak's specific legal arguments about Section 19 of the IRA have been publicly available since at least 2003, and thus, easily accessible to him and his legal counsel, as well as MichGO, on whom plaintiff decided to rely. *See Carcieri v. Norton*, 290 F.Supp.2d 167, 172, 178- 181 (D.R.I. 2003) ("plaintiffs contend that . . . [Section 19] restricts the secretary's trust-taking authority to acquisitions made on behalf of tribes that were federally recognized as of the time of the IRA's enactment in June 1934"). Thus, Patchak was fully aware of the legal basis for his claim more than ten years ago. *See* AR0011529. Therefore, had Mr. Patchak exercised even a shred of diligence at the time, he would have quickly uncovered the legal basis for his claim.

As demonstrated by these facts, this lawsuit began as a transparent and inexcusable attempt to delay an already long-overdue trust acquisition through never-ending, piecemeal

litigation. Further, now that the land has been taken into trust and affirmed explicitly by Congress, this suit is nothing more than a shake-down, and Patchak's counsel admitted as much at a recent hearing in this matter.[15] Under any set of circumstances, Patchak's suit is clearly barred by the doctrine of laches.

3. Patchak's Delay Has Imposed Substantial Prejudice On Both The Tribe and The United States

Patchak's delays have imposed, and threaten to further impose, considerable harm on the Tribe, the United States, state and local governments, as well as thousands of citizens of Western Michigan. Such delays have also caused great prejudice to 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."); *Friends of Magurrewock, Inc. v. U.S. Army Corps of Engineers*, 498 F.Supp.2d 365 (D.Me. 2007). The Secretary simply cannot effectively carry out his responsibilities under Federal Indian statutes, or fulfill her trust responsibility to Indian tribes, if every agency action is subject to an endless string of lawsuits, presented in piecemeal fashion, and spread across many years. This was part of Congress's concern when it enacted the Gun Lake Trust Land Reaffirmation Act. *See* CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Representative Grijalva).

[15] Mr. Patchak's counsel has stated that plaintiff's goal in this proceeding on remand is to extract a monetary settlement from the Tribe. *See Attorney Claims Case Against Gun Lake Tribe's Casino Still Alive*, indianz.com (Oct. 2, 2014), http:// http://www.indianz.com/IndianGaming/2014/028308.asp (last visited Oct. 31, 2014). Mr. Patchak's suit, however, arises from the Administrative Procedure Act, under which Mr. Patchak not entitled to receive monetary damages. 5 U.S.C. § 702. Mr. Patchak is therefore blatantly using this proceeding on remand to extort money from the Tribe.

Second, the United States and the Tribe already shouldered the considerable burdens imposed by the *MichGO* litigation. Patchak's delay has needlessly forced the United States and the Tribe to defend Mr. Patchak's claims in entirely separate litigation, and permitting him to pursue his belated claim here will require enormous amounts of additional time, energy and legal expense. *See Batiste*, 239 F. Supp. 2d at 226-27; *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 175 years. AR001985-90; *See* H.R. REP. NO. 113-590, 2 (2014); S. REP. NO. 113-194, at 2 (2014). Although the land has already been taken into trust, as Congress has noted, this lawsuit has put Bradley Tract in jeopardy as it has the potential to deprive 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. AR000018-20. *See also* 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"); *Batiste*, 239 F. Supp. 2d at 225-26 (noting economic costs of delay); *Sworob*, 451 F. Supp. at 102 (noting monetary losses).

Indeed, before the Bradley Tract had been taken into trust, the Tribe struggled to provide essential government services, sufficient infrastructure, administrative facilities, and adequate housing for tribal members. *See* AR000018, 000060-61. At the beginning of this litigation, the Tribe's unemployment rate was approximately 27%; more than six times higher than that of

Allegan County, where it is located. AR000018. Likewise, only 26% of tribal members owned their own homes; compared with nearly 83% 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, delay deriving from this litigation deprived the Tribe of the project and has already prejudiced it, and further uncertainty arising from this matter can only cause further harm. *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 (ECF No. 79) (D.D.C. Mar. 5, 2008). The fee-to-trust application at issue in this case was pending before the Secretary for nearly seven years, and during that time the Tribe lacked 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 possesses no legitimate justification for his delay in bringing suit. For all the foregoing reasons, Plaintiff's Complaint must be dismissed as barred under the doctrine of laches.

V. CONCLUSION

It is beyond any dispute that Congress, in enacting the Gun Lake Trust Land Reaffirmation Act, has validly exercised its plenary constitutional authority to acquire land for Indian tribes, which exists separately and independently of the IRA, and therefore exists regardless of whether the Tribe was under federal jurisdiction in 1934. Alternatively, the Act created a substantive exception for the Bradley Tract from Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479 as interpreted by *Carcieri v. Salazar*, 555 U.S. at 395, and, as such, has explicitly and conclusively established that the Tract is lawfully held in trust pursuant to federal law. This substantive change in the underlying law was both fully within Congress's plenary authority over Indian affairs and Indian lands and also does not violate either this Court's Article III authority or the United States Constitution's prohibition on bills of attainder. The Act has fully mooted Mr. Patchak's challenge to the Bradley Tract's trust status. No facts exists that might affect the outcome of this suit under the Act and hence no triable issue remains in this proceeding. *See Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 322. Accordingly, this Court must enter judgment in favor of the Defendants as a matter of law.

And further, as set forth fully herein, Mr. Patchak's suit is barred by the doctrine of laches. Patchak was aware of the planned acquisition nearly fifteen years ago, and the Secretary's decision he seeks to challenge was issued nearly a decade ago. Patchak can present no legitimate reason for his dilatory actions—actions which will severely prejudice the Tribe, its members and employees, and State and local governments—if he is permitted to pursue his claims so long after the fact.

Pursuant to Federal Rule of Civil Procedure 56, the Tribe is entitled to summary judgment in this matter.

Dated: October 31, 2014

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

By /s/ Conly J. Schulte

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2014, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Conly J. Schulte