IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, in her official capacity as SECRETRARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant,

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor-Defendant

Case No. 1:08-cv-1331

Hon. Richard J. Leon

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Other Authorities

Plaintiff, David Patchak, respectfully submits this Memorandum in Support of his Motion for Summary Judgment. As Mr. Patchak demonstrates below, he is entitled to judgment as a matter of law.

Introduction

Mr. Patchak brought this suit challenging the decision of the Secretary of Interior to take into trust two parcels of land in Allegan County Michigan, on behalf of the Intervenor-Defendant, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe" or "Tribe" or "Intervenor"), pursuant to the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"). The United States Supreme Court determined that Mr. Patchak has standing to challenge the Interior Department's decision to take land into trust for the Tribe, and this suit may proceed pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012).

Mr. Patchak specifically challenges the Secretary's decision as contrary to the limitations of the IRA, which restricts the Secretary's authority to take land into trust on behalf of Indian tribes to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). It is an undisputed fact established by the Administrative Record that Intervenor-Defendant Tribe was not a federally recognized Indian Tribe in 1934, when the IRA was enacted. (AR 001912.)

On September 26, 2014, President Obama signed into law the Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014) ("Gun Lake Act"). That legislation purports to "reaffirm" that the land at issue in this litigation has been taken into trust for the benefit of the Tribe. In passing the Act, Congress made no effort to amend the IRA or the APA. The United

States Supreme Court in *Carcieri* has made a specific determination about how the IRA, passed by the 1934 Congress, must be interpreted. This 2014 Congress has attempted to usurp the Judicial Branch's authority to interpret the law by purporting, in the Gun Lake Act, to superimpose its own apparent interpretation of the IRA or the APA. As such, Mr. Patchak challenges, on a variety of grounds including under the United States Constitution, the validity of the new legislation as a means to dissolve his lawsuit by directing the judicial branch to dismiss it.

Statement of Facts and Procedural History

Pursuant to Local Rule of Civil Procedure 7, Mr. Patchak herein sets forth a statement of facts with reference to the Administrative Record.[1] D.D.C. LCvR 7(h)(1). Portions of the Administrative Record referenced within this Motion for Summary Judgment are attached for the Court at the end of this document, as required.[2] D.D.C. LCvR 7(n)(1).

I. Brief Tribal History of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Also Known As the "Gun Lake Band"

The Tribe has a lengthy history with roots grounded in the Pottawatomi Band led by Chief Match-E-Be-Nash-She-Wish. Under the Chief, the Tribe's reservation land was located in Kalamazoo, Michigan. The Chief entered into several treaties with the United States, from 1795 to 1821, as the Tribe's representative. (AR 001210 - 001211.) He entered into the 1821 Chicago Treaty and, as a result, because of stipulations from the 1795 Greenville Treaty, his band was ceded a 3-square mile parcel of land south of the Grand River. (AR 001211.) In 1833, all Indian tribes in southwest Michigan were signatories to the Chicago Treaty of 1833, in which they

[1] For ease of discussion, references to the Administrative Record shall be cited "(AR [page number].)"

[2] A joint appendix cannot be filed as required by LCvR 7(n)(2) because the parties have not come to an agreement on the Administrative Record. (*See* Dkt. Nos. 75-77).

agreed to relocate to either Kansas or Northern Michigan, with the exception of the Match-E-Be-Nash-She-Wish Band. *Id*. To avoid forcible removal, the Tribe relocated to Bradley, Michigan, formerly known as the Griswold Mission, an Episcopalian effort to convert Indian tribes to Christianity. (AR 001988.) The Griswold Mission was established by Bishop McCoskry and funded through the 1836 Ottawa Treaty which was due to expire in 1856. *Id*.

On July 26, 1855, Bishop McCoskry put the land into trust for the Tribe's benefit, but it remained in his name. (AR 001989.) That same year, the Treaty of Detroit was entered into by Shop-quo-ung, whose Band was antecedent to the Gun Lake Tribe. The 1855 Treaty entitled Shop-quo-ung's Band to annuity payments until 1870, when the Tribe relocated from Oceana County to Allegan County, terminating its compliance with the Treaty. (AR 001912.) This made 1870 the final date of "unambiguous previous Federal acknowledgment." *See* 62 Fed.Reg. 38, 113; (AR 001912.) Current members of the Tribe are descendants "from persons listed on the 1870 annuity payroll for Shop-quo-ung's Band" as well as from persons listed on the BIA's 1904 Taggart Roll, which was prepared to determine eligibility for claims payments. (AR 001913.) No federal disbursements were made to the Tribe past the Tribe's conclusion of the Treaty of Detroit in 1870. *Id*.

In 1874, the State of Michigan began to impose a state tax on Bishop McCorsky for the Griswold Mission Land, and 20 years later, in 1894, the Bishop resigned his Trust to the Circuit Court of Allegan County, a Michigan state court. Some land was given to certain tribal members, but in the subsequent years, most tribal residents had their land seized for failure to pay state taxes. *Id*.

No party disputes that the Tribe was not federally recognized in 1934, the year the IRA was enacted. (AR 001185.) Indeed, it was not until 1992 that the Tribe petitioned the BIA for

federal acknowledgment, which was originally granted on October 23, 1998. The agency's determination would have gone into effect on January 21, 1999, 90 days after its Notice of Determination was published in the Federal Register; however, before this could take effect, the city of Detroit, Michigan objected to the acknowledgment. (AR 001442.) The city's request for reconsideration was ultimately dismissed and the Tribe's status as a federally recognized tribe became effective on August 23, 1999. *Id*.

Having neither reservation nor other land held in trust by the Federal government, the Tribe submitted an off-reservation Fee-to-Trust Application to the BIA's Midwest Regional Office for the Secretary to take land into trust on their behalf on August 8, 2001. (AR 001438.) The land the Tribe sought to place into trust consists of two parcels located in the township of Wayland, Michigan in Allegan County, comprising approximately 147.48 acres of land. (AR 000001). The first parcel (Parcel Identification No. 03-24-019-026-30) and the second parcel (Parcel Identification No. 03-24-019-026-20) are commonly known as 1123 129th Avenue, Bradley, Michigan (hereinafter, the "Bradley Property"). *Id*.

The trust application requested consideration for a 193,500 square-foot Class III gaming and entertainment facility, pending negotiations of a Tribal-State Compact with the State of Michigan. (AR 001445.) On May 13, 2005, the Department of the Interior, Bureau of Indian Affairs issued a "Notice of Final Agency Determination" affirming the decision of the Associate Deputy Secretary to acquire the land into trust on behalf of the Tribe. *See* 70 Fed.Reg. 92; (AR 000001.).

II. Procedural Posture of the Present Case

Mr. Patchak filed the instant case on August 1, 2008. On February 4, 2009, during the pendency of this case, the Supreme Court decided *Carcieri,* 555 U.S. 379. That decision has a

substantial impact on Mr. Patchak's case because the Court in *Carcieri* held that the language in the IRA authorizing the Secretary of the Interior to take land into trust for Indian tribes applies to those tribes that were "under Federal jurisdiction" in June 1934, when the IRA was enacted. *Id*. Following *Carcieri*, Mr. Patchak filed a motion for summary judgment on April 2, 2009; however, on August 19, 2009, this Court dismissed the case with prejudice for lack of prudential standing to challenge the Secretary's acquisition of the Bradley Property.

Mr. Patchak appealed on September 15, 2009. The United States Court of Appeals for the D.C. Circuit reversed this Court's determination, finding that Mr. Patchak had Article III and prudential standing, as well as finding that the Indian lands exception in the Quiet Title Act's waiver of sovereign immunity provision did not negate the Administrative Procedure Act's waiver of sovereign immunity, and remanded for further proceedings. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 632 F.3d 702, 704-08 (D.C. Cir. 2011). Intervenor-Defendant appealed the D.C. Circuit's decision and the Supreme Court granted *certiorari*.

On June 18, 2012, the Supreme Court affirmed the D.C. Circuit's decision, stating that the United States has waived its sovereign immunity and that Mr. Patchak has prudential standing to bring the present case and remanded it to this Court for further proceedings consistent with its findings. *Patchak*, 132 S.Ct. 2199. On September 4, 2014, the parties held a Status Conference before this Court to initiate proceedings on the merits of Mr. Patchak's claims.

III. The "Gun Lake Trust Land Reaffirmation Act" is Signed into Law

Another significant event during the pendency of this case was the passage of the Gun Lake Act, a statute that directs the federal judiciary to dismiss all claims regarding the Bradley Property and imposes a Congressional interpretation of the IRA or the APA, which is contrary to

the Supreme Court's holding in *Carcieri*, without amending either statute. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-119 (2014). Senator Debbie Stabenow introduced the "Gun Lake Trust Land Reaffirmation Act" to the Senate on October 29, 2013. It passed the Senate on June 19, 2014 and the House of Representatives on September 16, 2014, without amendment. President Obama signed the bill into law on Friday, September 26, 2014.

The new legislation purports to reaffirm the actions taken by the Secretary of the Interior when it took the Bradley Property into trust on behalf of the Tribe. *Id*. at § 2(a). In addition to a unique legislative "reaffirmation" of the Secretary's decision, section 2(b) specifically targets Mr. Patchak's case in stating that "[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 … shall not be filed or *maintained* in a Federal court and shall be promptly dismissed." *Id*. at § 2(b) (emphasis added).

Mr. Patchak raises several constitutional challenges to the validity of the newly enacted legislation that would direct this Court to dismiss his claims without a fair and proper adjudication of its merits. As stated *supra*, in addition to a request that this Court find unlawful and set aside the Interior Department's determination to take the Bradley Property into trust on behalf of the Gun Lake Tribe, Mr. Patchak also seeks that this Court find the Gun Lake Act unconstitutional.

Standard of Review

I. The APA Standard of Review Requires a Reviewing Court to Set Aside an Agency's Determination if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A) and (C).

When assessing a summary judgment motion in an Administrative Procedure Act ("APA") case, "the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v.*

Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "In such a case, summary judgment merely serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Oceana, Inc. v. Locke*, 831 F.Supp. 2d 95, 106 (D.D.C. 2011). The review must be based on the administrative record that was before the agency at the time its decision was made. *Zarmach Oil Services, Inc. v. U.S. Dept. of the Treasury*, 750 F.Supp.2d 150, 154 (D.D.C. 2010)(quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)). Summary judgment is "an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record." *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C. 1995) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

The APA creates a process for a reviewing court to directly review agency decisions through an examination of the administrative record, rather than a *de novo* review of Plaintiff's claims. *McDougall v. Windall*, 20 F.Supp. 2d 78, 79 (D.D.C. 1998). Under the APA, courts must to set aside agency decisions that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A) and (C).

The Supreme Court has explained that the "arbitrary and capricious" standard "require[s] the reviewing court to engage in a substantial inquiry." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). In particular, the reviewing court must determine whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *City of Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991)(even "assuming[]

arguendo" that the agency had ample statutory authority, its action was devoid of "reasoned decision-making," and was therefore arbitrary and capricious). If the Court finds that an "agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *AT&T Co. v. Fed. Communications Comm'n*, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

A reviewing court must likewise overturn agency decisions that are "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A) and (C). It does so by examining the underlying statute, and where the statute is clear and unambiguous, it must give weight to its plain meaning." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).[3]

II. The Court Must Consider Plaintiff's Challenges to the Constitutionality of the "Gun Lake Trust Land Reaffirmation Act" *de novo* and Apply Strict Scrutiny.

Plaintiff herein asserts constitutional challenges which "'present[] a pure question of law,'" requiring that the claims be considered *de novo*. *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 737 (D.C. Cir. 2011)(quoting *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001)). In determining the constitutionality of a statute that infringes upon a fundamental constitutional right, applying the "strict scrutiny" analysis is appropriate. *Elrod v. Burns*, 427 U.S. 347, 362 (1976)("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny."). When applying this heightened standard of review, the law or policy must satisfy a three-part inquiry: (1) it must be justified by a "compelling governmental interest;" (2) it must achieve or advance the compelling governmental interest; and (3) it must be "narrowly tailored," meaning the "least restrictive means" for achieving that interest. *SEC v. Blount*, 61 F.3d 938, 944

[3] As explained *infra* at pp. 24, the applicable statute here is the IRA, which the Supreme Court has determined is unambiguous. *Carcieri v. Salazar*, 555 U.S. at 395.

(D.C. Cir. 1995). The law or policy must meet these three prongs in order to be upheld, and the government bears the burden of showing that the test has been satisfied.

ARGUMENT

I. Under the APA, the Court Must Set Aside the Decision of the Secretary to Take the Land into Trust under the IRA Because the Gun Lake Tribe was Not Under Federal Jurisdiction When the IRA Passed in 1934.

The IRA authorizes the Secretary to take lands into trust on behalf of Indian Tribes, but only for tribes that were "under Federal jurisdiction" in June 1934 when the IRA passed. *Carcieri*, 555 U.S. 379. The Gun Lake Tribe was not "under Federal jurisdiction" in 1934 when the IRA passed, as it did not enjoy any federal acknowledgement between 1870 and 1999, nor was it otherwise under Federal jurisdiction. Accordingly, the Secretary's act of taking the land into trust on behalf of the Gun Lake Band was arbitrary and capricious, not accordance with the law and in excess of statutory authority and limitations. For these reasons, explained in detail *infra*, the Court should find that the Secretary's action violates § 706 (2)(A) and (C) of the APA, and hold the decision unlawful and set it aside.

A. Pursuant to the Supreme Court's Decision in *Carcieri*, the Secretary of the Interior Cannot Take Land into Trust under the IRA for a Tribe that was Not Under Federal Jurisdiction when the IRA Passed.

During the pendency of this case, the United States Supreme Court issued its opinion in *Carcieri*, 555 U.S. 379, which held that the term "now under Federal jurisdiction" in 25 U.S.C. § 479 unambiguously refers to those tribes that were under Federal jurisdiction when the IRA was enacted in June 1934. That holding directly impacts this case because Mr. Patchak's Complaint alleges, specifically, that the Secretary of the Interior erred in taking the land into trust on behalf of the Gun Lake Tribe under § 465 of the IRA because the Tribe does not meet the requirements set forth therein, namely, it was not "under Federal jurisdiction" when the IRA passed. Compl.

at 22-33. That is, to wit, the primary issue in this case.

The decision of the Court[4] examined the IRA, the statute that authorizes the Secretary of the Interior to bring land into trust on behalf of Indian tribes. 25 U.S.C. §§ 465, 479. Pursuant to 25 U.S.C. § 465, the Secretary is authorized to acquire land into trust only for "the purpose of providing land for Indians." The statute goes on to define "Indian" to "include all persons of Indian descent who are members of any *recognized Indian tribe now under Federal jurisdiction*...." 25 U.S.C. § 479 (emphasis added). In issuing its decision, the Court relied upon the plain language of the statute, as well as legislative history, to determine that its meaning was unambiguous.

The *Carcieri* Court emphasized that its finding "limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." 555 U.S. at 391. It further found that, given this limitation, the Secretary did not have authority to take into trust the land at issue because it was for the benefit of the Narragansett Tribe, who was not recognized at the time the IRA passed. *Id.* at 395.

B. Because the Gun Lake Tribe was Not Federally Recognized When the IRA Passed, It Was Not Under Federal Jurisdiction at That Time, as Required by *Carcieri*.

i. The Carcieri *Court's Ruling Indicates that a Tribe Must Have Been Federally Recognized to have been "Under Federal Jurisdiction" when the IRA Passed.*

The *Carcieri* Court's decision strongly intimates that for a tribe to be "under Federal jurisdiction" when the IRA passed in 1934, it had to have been federally recognized. While the majority did not squarely address this issue, its opinion strongly implied a narrow, strict reading

[4] The case was decided 8-1, with Justice Stevens dissenting. Justice Thomas delivered the opinion of the Court, in which five justices joined; Justice Breyer filed a concurring opinion; Justice Souter filed an opinion concurring in part and dissenting in part, in which Justice Ginsberg joined.

of the term "under Federal jurisdiction." Indeed, the *Carcieri* majority comprised a block of Justices whose statutory interpretation philosophy is traditionally more restrictive—the opinion was written by Justice Thomas, and he was joined by Justices Roberts, Scalia, Kennedy and Alito.

Justice Thomas's opinion explicitly stated that no party had advanced an argument that the Narragansett Tribe was under federal jurisdiction and that "the evidence in the record is to the contrary." *Id.* Significantly, the appears to have reached that conclusion based solely on the fact that the Narragansett Tribe was not federally recognized in 1934. Indeed, the Court cites to only one document as evidence that indicated the Tribe was not under federal jurisdiction in 1934 — the Final Determination for Federal Acknowledgment of Narragansett Indian Tribe from February 2, 1983. *Id.*; *see also* 48 Fed.Reg. 6177. The *Carcieri* Court, therefore, endorsed later federal recognition—showing that the tribe was not federally recognized in 1934— as demonstrating that the tribe was not under federal jurisdiction at that time. *See Alabama v. PCI Gaming Authority*, -- F.Supp.2d--, 2014 WL 1400232 at *15 (M.D. Ala. Apr. 10, 2014)("the Supreme Court held that the Secretary lacked authority to take the land into trust because the Narragansett Tribe did not achieve federal recognition until 1983").

Moreover, while the Court's written opinion did not opine on this particular question, it needed not, because the underlying assumption in *Carcieri* was that federal jurisdiction *required* federal recognition. Indeed, the Secretary even said so at oral argument. The Department declared that it "*understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same*.' " *Id.* at 400 (Souter, J., concurring in part, dissenting in part) (emphasis added).

Moreover, in *Carcieri*, the concurring Justices offered broader, more expansive views of what might constitute "under Federal jurisdiction," all of which the Court distinctly declined to adopt. For example, in Justice Breyer's concurring opinion, he specifically sets forth three qualifications to his joining the majority, one of which was the narrow understanding of "under Federal jurisdiction" that could be read in the majority's opinion. *Id.* at 399 (Breyer, J., concurring). His concurrence suggested that "an interpretation that reads 'now' as meaning 'in 1934' may prove somewhat less restrictive than it at first appears" insofar as federal jurisdiction may not require federal recognition. *Id*. Justice Breyer goes on to describe different circumstances under which, he surmises, federal recognition is not required for a tribe to be under federal jurisdiction. *Id*. The majority, however, did not anywhere embrace, directly or implicitly, any of the concurring Justices' more expansive interpretations of "under Federal jurisdiction."

To the contrary, Justice Thomas's decision in *Carcieri* rested on the well-worn principle of statutory construction that when the text of a statute is plain and unambiguous, the statute is applied according to its terms. It is not necessary or appropriate to import additional layers of interpretation. Indeed, the plain language of the statute supports a similar construction with respect to tribal recognition, defining "Indian" as "all persons of Indian descent who are members of any ***recognized*** *Indian tribe* ***now*** *under Federal jurisdiction*...." 25 U.S.C. § 479 (emphasis added).

To wit, an interpretation of the IRA that equates federal recognition with federal jurisdiction is most congruent with the federal regulations that provide for tribal recognition in the first place. The very purpose of tribal recognition is to grant tribes the advantages that come with being "under federal jurisdiction:"

> *Acknowledgment of tribal existence by the Department is a* ***prerequisite*** *to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.* Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. *Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States* to which other federally acknowledged tribes are subjected.

25 CFR § 83.2 (2008)(emphasis added).

Thus, a tribe must be acknowledged to receive the protection, services, benefits, immunities, and privileges of the United States government, as well as to be saddled with the responsibilities, powers, limitations and obligations of a relationship with the United States government. This recognition language plainly describes a jurisdictional relationship between a Tribe and the United States, establishing that jurisdiction requires recognition and *vice versa*. Accordingly, the most reasonable interpretation of *Carcieri* and the IRA requires that a Tribe be *federally recognized* in 1934 for the Secretary to be authorized to take land into trust on its behalf.

ii. The Gun Lake Tribe Was Not Recognized When the IRA Passed.

It is undisputed that the Gun Lake Tribe was not federally recognized in June 1934 when the IRA was passed. While the Gun Lake Tribe's long history includes federal recognition of its ancestors as late as 1870 and the subsequent dissolution of that recognition, the Tribe was not since federally recognized until August 23, 1999. (AR 001912.) More specifically, it was not

recognized in 1934, when the IRA passed, which the Tribe, its members and the Secretary have unequivocally conceded time and again.

Before its present acknowledgement, the Gun Lake Band was acknowledged only until 1870. As explained in the *Proposed Finding for Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan* (62 FR 38113, 38113-38114; (AR 001912-001914), the Gun Lake Band's ancestors received a three-mile square reserve near Kalamazoo, Michigan under the Treaty of 1821. The Band moved to Allegan County after the 1833 Treaty of Chicago, and was incorporated for payment purposes with the Grand River Ottawa under the Compact of 1838 following the 1836 Ottawa Treaty. The Gun Lake Band was a signatory to the 1855 Treaty of Detroit, and received annuity payments under that and prior treaties until 1870, when it chose to discontinue its compliance with that Treaty by moving from Oceana County to Allegan County and received its last annuity-commutation payment. *See* 62 Fed.Reg. 38113; (AR 001912.) The date of the Gun Lake Band's final annuity commutation payment (1870) has been used as the date for the most recent Federal acknowledgement for purposes of enabling the Band to seek Federal recognition under 28 C.F.R. § 83.8. *Id*.

There is also no disputing that the Gun Lake Band was not federally recognized when the IRA was passed into law in 1934, or for more than sixty years thereafter. The Gun Lake Band first sought to restore its federal recognition in 1993, when it submitted documents pursuant to 25 C.F.R. § 83 ("Part 83"), which sets forth the procedure for establishing that an American Indian group exists as an Indian Tribe under Federal law. On July 16, 1997, the Bureau of Indian Affairs issued a "Proposed Finding for Federal Acknowledgement," which indicated that, "[p]ursuant to 25 CFR 83.l 0 (m), notice is hereby given that… [the Gun Lake

Band] exists as an Indian Tribe within the meaning of Federal law." *See* 62 Fed.Reg. 38113; (AR 001912.) Significantly, the Gun Lake Band qualified for federal recognition under Part 83, which is available only to tribes that are not currently recognized by the federal government. 25 C.F.R. § 83 (a) and (b) ("[t]his part *applies only to those American Indian groups... which are not currently acknowledged* as Indian tribes by the Department…. *Indian tribes, organized bands ... which are already acknowledged… may not be reviewed under the procedures established by these regulations"*)(emphasis added). Had the Gun Lake Tribe been federally recognized in 1997, it could not have been reviewed under Part 83.

Moreover, not only the Secretary's action, but also the Gun Lake Tribe's application under Part 83 necessarily concede that it was not recognized at that time. Part 83 specifically recognizes that some Indian tribes or organized bands might have previously been recognized by the federal government but had that recognition end or terminate, providing that: "[u]nambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner *to the date of the last such previous acknowledgment.*" 25 C.F.R. § 83.8(a). A tribe previously recognized need only demonstrate that it meets the requirements of Part 83 "since the point of *last Federal acknowledgment.*" 25 C.F.R. § 83.8(c). The Secretary determined that the Gun Lake Tribe was federally acknowledged, by way of treaty, as late as 1870; therefore the Tribe only demonstrated that it met the Part 83 criteria since that time. Therefore, when it submitted its request for Federal recognition under Part 83 in 1993, the Gun Lake Band necessarily admitted that it was not federally recognized, and had not been since 1870. The Secretary agreed, and proceeded to review the application under Part 83.

In addition to that unequivocal statement by the Secretary and the Tribe, the Gun Lake Band submitted its Fee-To-Trust application on August 8, 2001, requesting that the Secretary take into trust the land at issue in this case. In a response to public comments opposing the Trust

Application, a member of the Gun Lake Band offered the following explanation for why the Band was seeking to have land taken into trust on its behalf:

> GP220. Trial History and Needs: For approximately 150 years, my Tribe has suffered due to the United States government's failure to recognize us as an Indian tribe. In 1992, my tribal community decided to pursue federal acknowledgement by filing a petition with the Branch of Acknowledgement and Research of the BIA. In August of 1999, the tribe was finally acknowledged as a federally recognized Indian tribe.

(AR 001185.)(emphasis added).

This theme was echoed when the Gun Lake Band wrote its appeal briefs in *MichGO v. Kempthorne:* "the federal government withheld formal acknowledgement beginning in 1870. ... Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue communal self-determination and self-sufficiency." (Dkt. 24, Ex. 1 at 3.) The Secretary likewise admitted that the Gun Lake Band was not federally recognized. Department of Interior Acting Deputy Assistant Secretary George T. Skibine offered a sworn affidavit that described the Gun Lake Band as a "once-terminated tribe." (Dkt. 28, Ex. 1 at 8.) Federal Acknowledgement of the antecedent to the Gun Lake Tribe terminated in 1870, and the Tribe was not federally acknowledged again until 1999.

For all these reasons, it cannot reasonably be disputed that the Gun Lake Tribe was not federally recognized in 1934 and, as such, is not entitled to benefit from land taken into trust under the IRA.

C. Even Under an Expansive Reading of the IRA, the Gun Lake Tribe was Not Otherwise "Under Federal Jurisdiction" When the IRA Passed.

The Gun Lake Tribe was not "under Federal jurisdiction" in 1934, even under more expansive constructions of that phrase. The *Carcieri* concurring Justices suggest a broader view of the meaning of "under federal jurisdiction." Justice Breyer proposed that relationships other than recognition may be described as "jurisdictional" for purposes of the statute. *Carcieri*, 555

U.S. at 399 (Breyer, J., concurring). Justice Souter's concurring opinion echoed Justice Breyer's in large part, but also went on to dissent to the extent that the Narragansett Tribe may have been afforded the opportunity to "advocate a construction of the 'jurisdiction' phrase" that would be more expansive. *Id.* at 401 (Souter, J., concurring in part, dissenting in part). Even if, however, this Court adopts the broader construction, the Gun Lake Tribe still fails to qualify as having been "under Federal jurisdiction" when the IRA passed in June 1934.

i. The Gun Lake Tribe Did Not Meet Any of the Criteria for "Under Federal Jurisdiction" Set Forth in the Carcieri *Opinions when the IRA Passed.*

In the aftermath of *Carcieri*, it has been a thorny task to expand the definition of "under Federal jurisdiction" beyond federal recognition. Justice Breyer, in his opinion, offered a starting point: "following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act," noting that "we also know that it wrongly left certain tribes off that list." *Id*. at 398 (Breyer, J., concurring). Indeed, that method has been adopted by certain courts in analyzing whether a tribe not recognized in 1934 was nevertheless "under Federal jurisdiction" at that time.

In *Big Lagoon Rancheria v. California*, the Ninth Circuit examined which circumstances, beyond federal acknowledgment, might demonstrate that a tribe was "under Federal jurisdiction." With little direction beyond *Carcieri*, the Ninth Circuit stated that "[a] BIA memorandum tells us that a 'helpful… starting point' is a list of 258 tribes compiled shortly after the IRA was enacted, but that the list is 'not the only or finally determinative source.'" 741 F.3d 1032, 1044 (9th Cir. 2014)(citing *Carcieri*, 555 U.S. at 398). Based on the tribe's "undisputed absence from that list," the court determined that the tribe was not "under Federal jurisdiction" in 1934, stating that "[t]he absence of Big Lagoon from the 258-tribe list was not an intentional or inadvertent omission; it was a reflection of reality." *Id.* Like the tribe in *Big Lagoon*, the Gun

Lake Tribe is not on the list of 258 tribes. Nor is it on any subsequent list compiled by scholars of tribes that should have been included. *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring). Accordingly, under this framework, the Gun Lake Tribe was clearly not under federal jurisdiction in 1934.

Justice Breyer also set forth other specific mechanisms that might demonstrate "under Federal jurisdiction" in his opinion: "for example, a treaty with the United States (in effect in 1934), a (pre–1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." *Carcieri*, 555 U.S. at 399 (Breyer, J., concurring). Based on the administrative record, it is clear that the Gun Lake Tribe does not satisfy any of these criteria either.

The Gun Lake Tribe had no treaties with the United States government in effect in 1934. As explained *supra*, the Gun Lake Tribe's ancestors do have a history of entering into treaties with the federal government, but that history ended in 1870, long before the passage of the IRA. (AR 001912.) The first treaty to which the Gun Lake Band's predecessor was a party was the Greenville Treaty of August 3, 1795. Indeed, the Tribe was a signatory to sixteen treaties with the United States between 1795 and 1855. (AR 001987.) Under the Treaty of 1821, the Gun Lake Band's ancestors received a three-mile square reserve near Kalamazoo, Michigan, which was later ceded by the Pottawatomi in the Treaty of 1827. (AR 001986.) In the 1833 Treaty of Chicago, the United Nation of Chippewa, Ottawa, and Pottawatomi ceded large tracts of land, resulting in the Band's move to Allegan County, Michigan. (AR 001986-87.) The Gun Lake Band's antecedent, Shop quo-ung's Band, was a signatory to the 1855 Treaty of Detroit, and received annuity payments through that treaty until 1870, when the payments ended because the Tribe chose to discontinue its compliance with the Treaty by moving from Oceana County to Allegan County. *See* 62 Fed. Reg. 38113; AR 001912. The Department of Interior's findings

of fact supporting its acknowledgement of the Gun Lake Band stated that it found 1870, the last date of annuity payments to the Tribe, to be the last date of previous federal acknowledgement. No treaty was still in effect between the United States government and the Gun Lake Tribe after 1870, including in 1934, when the IRA was passed.

The Tribe has not asserted—nor can it, based on the record— that it was receiving any federal appropriation as of 1934. In 1904, members of the "Bradley Settlement," were included on the "Taggart Role," which was a list compiled by the BIA to settle claims of Michigan's Pottawatomi Indians. (AR 001989.) There is no evidence or indication, however, that the Tribe or its members received any resultant federal appropriation. Moreover, had there been any such appropriation, it would have been three decades before the passage of IRA. In 1908, "descendants of the of Shau-Be-Quo-Ung's Band," were included on the "Durant Role," which was compiled for federal appropriation to settle claims of Michigan's Ottawa Indians. (AR 001989.) Again, there is nothing to suggest that any appropriation inured to the tribe or its members as a result and, even if it had, that would have occurred 26 years before the passage of the IRA. Defendant and Defendant-Intervenor have not suggested, nor does the record support, the proposition that the Gun Lake Tribe received federal appropriations as of 1934.

Likewise, neither the Gun Lake Tribe nor the Secretary has argued or produced any evidence that the Tribe enrolled with the Indian Office as of 1934. As mentioned *supra*, members of the tribe were included in certain census reports, the Taggart Roll and the Durant Roll as late as 1908, but there is absolutely no evidence to suggest they were enrolled with the Indian Office or BIA as of 1934. Accordingly, the Gun Lake Band meets none of the criteria set forth in even the most liberal *Carcieri* opinions for having been "under federal jurisdiction" in June 1934.

ii. The Gun Lake Tribe Did Not Meet Any Other Potential Criteria for "Under Federal Jurisdiction" when the IRA Passed.

In addition, the Gun Lake Tribe had no other connection to the federal government in June 1934 that might lead one to believe it could have been "under Federal jurisdiction" at that time. First of all, the Tribe had no land to speak of at the time, and did not pay any taxes to the federal government. The Tribe admits, in its Fee-to-Trust application, that "the Band was ineligible to organize under the Indian Reorganization Act of 1934" because it owned no common land. (AR 001989.)

Ancestors of the Gun Lake Tribe had lived on the land owned by Bishop Samuel McCoskry, who put the land into trust for the benefit of the Band in 1855, but retained title in his name. This was known as the "Bradley Colony," and members of the Band lived there for several years. (AR 001989.) In 1874, the State of Michigan began to tax Bishop McCoskry and in 1894, he resigned the Trust to the Circuit Court of Allegan County, a Michigan state court. (AR 001989.) Within a few years, however, almost all the members of the tribe had lost their lands as a result of their failure to pay taxes owed to the State of Michigan. These lands, accordingly, were necessarily seized under state, not federal, law. They no longer owned any land, nor did the federal government control any of its land. The Tribe thus had no land ownership or presence on any land that may have placed it "under Federal jurisdiction" in 1934.

Further, there is no evidence that the Gun Lake Tribe was receiving any other benefit provided by the federal government to Indian tribes when the IRA passed. As explained *supra,* any appropriations or annuities received by the Tribe from the federal government ended decades before the passage of the IRA. Neither did the Tribe receive any other benefit from the federal government during this time. While it is possible that other Indian groups within Michigan *may* have been receiving federal benefits in June 1934— although there are no indicia of such in the

Administrative Record—none of those benefits inured to the Gun Lake Tribe. To wit, the Gun Lake Tribe has steadfastly maintained its independence from the other Michigan tribes, stating in its Fee-to-Trust application that they have "third named identity, their distinctive language, their own traditional history of separation from the ancestors of the modern Chippewa and Ottawa." (AR 001985.) As such, the Gun Lake Tribe was not receiving any benefits from the federal government, directly or indirectly, in 1934.

In 1934, the Gun Lake Tribe simply had no connection to, benefit from or relationship with the federal government. Accordingly, it was not "under federal jurisdiction" when the IRA passed.

D. Under the APA, the Court Must Set Aside the Decision of the Secretary to the Land into Trust under the IRA.

Pursuant to APA § 706, a reviewing Court must "hold unlawful and set aside agency action" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "in excess of statutory jurisdiction, authority or limitations." 5 U.S.C. § 706 (2)(A) and (C). Because the Gun Lake Tribe was not under federal jurisdiction in 1934 when the IRA passed, as the statute and *Carcieri* require, the Secretary's decision to take the Bradley Property into trust on behalf of the Gun Lake Tribe was: (1) in excess of the IRA's statutory authority; (2) not accordance with the IRA; and (3) arbitrary and capricious because the decision was not based on the relevant factors. As such, the APA requires that the decision be held unlawful and set aside.

i. The Decision to Take the Land into Trust was in Excess of the Statutory Authority and Limitations Provided Under the IRA.

The Court should find that the Secretary's decision to take the Bradley Property into trust on behalf of the Gun Lake Tribe exceeded the authority and limitations provided by the IRA.

Under the APA, the reviewing Court must set aside those agency actions that are "in excess of an agency's statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). To determine whether an agency has acted in excess of its statutory authority, Courts must engage in the two-step inquiry set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Step One of the Chevron analysis examines "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, then the inquiry ends and the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843; *see also Bhd. of R.R. Signalmen v. Surface Transp. Bd.,* 638 F.3d 807, 811 (D.C. Cir. 2011).

In this case, Congress has directly and unambiguously spoken on the statutory provision at issue. The Supreme Court has already determined that "'now under Federal jurisdiction' in § 479 [of the IRA] unambiguously refers to those tribes that were under federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395. Accordingly, this Court "must give effect to the unambiguously expressed intent of Congress," and find that the Secretary has exceeded the statutory authority and limitations set forth in the IRA.

Namely, the Secretary has exceeded the temporal limitation in the language of the IRA, which requires that tribes were "under Federal jurisdiction" in 1934 when the IRA passed to be beneficiaries of lands held in trust under the Act. Moreover, because the Gun Lake Tribe does not meet this criterion, the Secretary has exceeded her statutory authority under the IRA because the Department took land into trust for the Gun Lake Tribe when it did not have authority to do so under the IRA. Accordingly, this Court should find that the Department of Interior has acted "in excess of statutory … authority [and] limitations" pursuant to 5 U.S.C. § 706 (2)(C).

ii. The Decision to Take the Land into Trust was Not in Accordance with the Law.

The Court should find that the Secretary's decision to take the land into trust was "not in accordance with the law" because it violated the IRA. As has been clearly established by the Supreme Court, "§ 465 authorizes the Secretary to take land into trust only for tribes that were 'under federal jurisdiction' in 1934." *Patchak*, 132 S.Ct. at 2203 (citing *Carcieri*, 555 U.S. at 382). It is worth again noting that, because the language of the statute contains no ambiguity, the Court need give no deference to any statutory construction developed by the Department. Indeed, "[w]here the Court can easily discern Congressional intent from the statutes' plain language, the Court's APA review terminates at step one of the *Chevron* review and the Agency's construction is owed no deference." *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F.Supp.2d 37, 47 (D.D.C. 2006)(citing *Chevron*, 467 U.S. n. 9); *see also Beaty v. Food and Drug Admin*., 853 F.Supp.2d (D.D.C. 2012)(holding that, where Congress spoke clearly and plainly in the statute and agency action violated the plain language of the statute, such action was "contrary to law" under the APA).

The statute clearly requires that a tribe have been under federal jurisdiction in 1934 when the IRA passed to have land taken into trust by the Department of Interior on its behalf. As established *supra* at pp. 12-23, the Gun Lake Tribe was not under federal jurisdiction at the time the IRA passed. The action of the Secretary—taking the Bradley Property into trust on behalf of the Gun Lake Tribe under the IRA—was therefore contrary to law. The Court should so find and, under the APA, hold the action unlawful and set it aside.

iii. The Decision to Take the Land into Trust was Arbitrary and Capricious.

In addition, the Court should hold the Secretary's act of taking the land into trust unlawful because it was arbitrary and capricious. Courts must "set such a decision aside when it

is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat'l Treasury Employees Union v. Fed. Labor Rel. Authority*, 404 F.3d 454 (D.C. Cir. 2005)(citing *Bureau of Alcohol, Tobacco and Firearms v. FLRA,* 464 U.S. 89, 97 n. 7, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983)). This Court has explained that, "[w]hile a court may not 'substitute its judgment for that of the agency,' … it will set aside agency action as arbitrary and capricious if the agency committed a 'clear error of judgment,' such as when 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Lorillard, Inc. v. U.S. Food and Drug Administration*, -- F.Supp.2d--, 2014 WL 3585883 at *9 (D.D.C. July 21, 2014)(citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). An agency's determination is arbitrary and capricious if the decision was not based on consideration of the relevant factors. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

The Department of the Interior committed a "clear error of judgment" when it took the Bradley Property into trust on behalf of the Gun Lake Tribe. It acted arbitrarily and capriciously when it failed to give proper weight—indeed, any weight— to the fact that the Gun Lake Tribe was not under federal jurisdiction in 1934 when the IRA passed. As is clear from the plain language of the statute as well as the Supreme Court's holding in *Carcieri*, the Secretary can take lands into trust under the IRA's § 465 only for tribes that were "under federal jurisdiction" in 1934. 555 U.S. 379; *Patchak*, 132 S.Ct. at 2203. As such, that factor is a necessary aspect of any determination by the Secretary to take lands into trust on behalf of an Indian tribe. Here, the Gun Lake Tribe was not under federal jurisdiction in 1934 when the IRA passed. As described at

length *supra* at pp. 12-23, there is no evidence of any jurisdictional relationship between the Gun Lake Tribe and the federal government at that time because there was no such relationship. The Secretary simply gave *no* weight to this fact, ignoring it entirely when taking the land into trust on behalf of the tribe. Such an action can be described as nothing less than the very paradigm of "arbitrary and capricious."

For these reasons, the Court should find that the Department of Interior's action of taking the land into trust was arbitrary and capricious and, therefore, set aside it aside as unlawful under the APA.

II. The Gun Lake Act Is Unconstitutional As Applied to Mr. Patchak and on its Face Because It Violates Several Provisions of The United States Constitution.

On August 8, 2008, Mr. Patchak filed his complaint in this Court challenging the decision of the Secretary of the Interior and the Bureau of Indian Affairs ("federal Defendants") to place into trust approximately 146 acres of land in Wayland Township, Michigan for use by Intervenor, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. On September 26, 2014, a little more than six years later, following a decision by the Supreme Court holding that Mr. Patchak has standing to pursue his challenge in district court, the Gun Lake Trust Land Reaffirmation Act (the "Act" or "Gun Lake Act"), was signed into law by President Obama. Pub. L. No. 113-179 (2014). That legislation, by its express terms, purports to reaffirm the decision of the Secretary to take the relevant property into trust and to extinguish Mr. Patchak's case by directing this Court that it must dismiss it. The Act states, in pertinent part:

> **SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.**
>
> (a) IN GENERAL—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is

> reaffirmed as trust land, and the actions of the Secretary are ratified and confirmed.
>
> (b) NO CLAIMS—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) *shall not be filed or maintained in a Federal court and shall be promptly dismissed.*

Pub. L. No. 113-179 (2014)(emphasis added).

A. The Gun Lake Act Encroaches upon the Court's Article III Power to Decide this Case in Violation of Separation of Powers Principles.

The Gun Lake Act is an unconstitutional congressional attempt to bypass the judiciary in its review of the Department of Interior's actions. In passing the Gun Lake Act, Congress took no action to amend the IRA or the APA. To be clear, the IRA was passed by the 1934 Congress; the judiciary and the judiciary alone is vested under Article III with the power to interpret the statutory language chosen by that Congress. It did just that when, in *Carcieri*, the Supreme Court held that when the 1934 Congress included the word "now under Federal jurisdiction," it intended to limit the IRA to tribes that were under Federal jurisdiction when the statute passed. The Gun Lake Act, passed by the present Congress, purports to impose its own interpretation of the IRA in an attempt to usurp the judiciary's power. It does not amend the IRA or the APA, but, rather, overlays those laws with its own interpretory lens. Congress has greatly overstepped its constitutional authority in passing the Gun Lake Act.

Indeed, the Gun Lake Act not only purports to ratify the decision of the Secretary—an end-run around APA review of that action—it also mandates a particular result in the instant case, a case that has been pending in the federal judiciary since 2008. As such, Congress has further exceeded the bounds of Article I, Section 10 of the United States Constitution by assuming the judiciary's role under Article III to decide cases. More particularly, the Gun Lake

Act imposes a decision upon this Court, removes the capacity of this Court to make its own factual determinations, and directs this Court to dismiss the instant case. It has long been held that when a statute attempts to "prescribe rules of decision to the Judicial Department ... in cases pending before it," that statute has "passed the limit which separates the legislative from the judicial power." *U.S. v. Klein,* 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871).

In *Klein*, the United States Supreme Court addressed a statute similar to the Gun Lake Act, and struck it down for unconstitutionally imposing a particular rule of decision on Article III courts through congressional action that did not amend the underlying statute. In 1863, Congress passed a law that allowed individuals whose property was seized during the Civil War to recover (or be compensated for) such property; to do so, however, they had to show loyalty to the Union. Shortly thereafter, in *United States v. Padelford,* 76 U.S. (9 Wall.) 531, 19 L.Ed. 788 (1869), the Supreme Court held that a presidential pardon was sufficient to prove loyalty. Klein's property had been seized during the Civil War, but he had since been pardoned by the President; he thus filed suit in the Court of Claims to recover his property, which he did successfully. *Id.* The government appealed, and while the appeal was pending, Congress passed a new statute providing that proof of a presidential pardon would show disloyalty, not loyalty, and would divest courts of jurisdiction to hear a claim for return of the property. *Id.* The Supreme Court held that the statute was unconstitutional because, while Congress had authority to determine the jurisdiction of appellate courts, it could not "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 147.

The *Klein* decision made clear that laws which direct the Court to make a particular decision encroach upon the power of the judiciary to decide the cases before it. "Article III establishes a 'judicial department' with the 'province and duty ... to say what the law is' in

particular cases and controversies." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, 115 S. Ct. 1447, 1453, 131 L. Ed. 2d 328 (1995)(citing *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Indeed, "[i]t is of vital importance that these powers be kept distinct. *Klein,* 80 U.S. at 147. To strip the judiciary of its power to decide the cases before it is antithetical to the separation of powers that is so delicately set forth in our Constitution. As Justice Scalia explained in *Spendthrift Farm*:

> The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments.

514 U.S. at 218-19 (*citing* Easterbrook, Presidential Review, 40 Case W.Res.L.Rev. 905, 926 (1990)).

The D.C. Circuit has opined that "[i]t was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends.'" *Bartlett v. Bowen*, 816 F.2d 695, 705 (D.C. Cir. 1987).

Since *Klein* was decided, its scope has been narrowed in one primary respect. It has been clarified that when the statute amends the underlying applicable law, it does not violate *Klein*. *Spendthrift Farm,* 514 U.S. at 218 ("[w]hatever the precise scope of *Klein* ... later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law'")(quoting *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 441, 112 S.Ct. 1407 (1992)); *Jung v. Ass'n of Am. Medical Colleges,* 184 Fed.Appx. 9, 12 (D.C. Cir.2006)("Congress may amend substantive laws, even when doing so affects pending litigation")(citing *Robertson,* 503 U.S. at 438)*; Nat'l Coalition to Save Our Mall v. Nortion,* 269 F.3d 1092, 1097 (D.C. Cir. 2001). Indeed, statutes that "compel changes in law, not findings or results under old law," are

not subject to a constitutional challenge under *Klein*. *Wazir v. Gates*, 629 F. Supp. 2d 63, 66 (D.D.C. 2009)(citing *Robertson*, 503 U.S. at 438).

This narrowing of *Klein*'s scope, however, does not impact the instant case because the Gun Lake Act does not amend the underlying law (the IRA or the APA)[5]; instead, by directing the Court to dismiss the case, it dictates a specific rule of decision under the IRA, the existing law which formed the statutory basis for Mr. Patchak's APA case, not under new law. Moreover, the Gun Lake Act unlawfully attempts to superimpose a new congressional *interpretation* of an old statute—the IRA—onto this Court when, in fact, the U.S. Supreme Court has already interpreted that very statute. The province of statutory interpretation rests in the federal judiciary, and the Act cannot place a veil over the IRA's true meaning, when that meaning has already been divined by our highest Court. Indeed, the D.C. Circuit has recognized that "[w]ith respect to ongoing cases, precedent suggests that if Congress explicitly legislates a rule of decision without amending the underlying substantive law it violates the exclusive province of the judiciary." *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 164 (D.D.C. 2002) *aff'd,* 333 F.3d 228 (D.C. Cir. 2003)(citing *Klein,* 80 U.S. at 141–44); *see also Paramount Health Sys., Inc. v. Wright,* 138 F.3d 706, 710 (7th Cir. 1998)(*Klein* stands for "the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case"); *Ruiz v. United States,* 243 F.3d 941, 948 (5th Cir. 2001)(citing *Klein* for the proposition that "[t]he separation of powers principles inherent in Article III prohibit Congress from adjudicating particular cases legislatively"); *Hadix v. Johnson,* 144 F.3d 925, 940 (6th Cir.

[5] Moreover, the Supreme Court *invited* the Defendant and Defendant-Intervenor to petition Congress for a proper amendment of the Quiet Title Act: "[t]hat argument is not without force, but it must be addressed to Congress." *Patchak*, 132 S.Ct. at 2209. Yet Congress, despite the opportunity, did not act to amend either that statute or the IRA, as it must to direct a particular decision in this case.

1998) ("[T]he Legislature may not impose a rule of decision for pending judicial cases without changing the applicable law").

As such, the Gun Lake Act falls squarely within the confines of a *Klein* violation. The Act clearly directs that an action "relating to the land described in (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014). This is precisely the type of offending provision that the *Klein* Court described as unconstitutional:

> We are directed to dismiss the appeal …. Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not.

United States v. Klein, 80 U.S. 128, 146, 20 L. Ed. 519 (1871).

The language in the Gun Lake Act differs from many of the statutes that have been examined under *Klein*, in that it quite blatantly requires a particular outcome to the present adjudication. Indeed, it has often been said that "[t]he line between a statute that provides the standard to which courts must adhere and a statute that compels a specific result in a pending action at times is difficult to draw." *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 42 (D.D.C. 2004) *aff'd,* 184 F. App'x 9 (D.C. Cir. 2006)(citing *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir. 1993)("The conceptual line between a valid legislative change in law and an invalid act of adjudication is often difficult to draw"). Here, that line is bright and clear, and the Gun Lake Act falls squarely on the wrong side of it.

To wit, the Gun Lake Act calls for a very specific outcome: dismissal. It directs this Court to "promptly" dismiss any action pending before it "relating" to the Land-in-Trust. The Supreme Court has made clear that a statute is unconstitutional when "the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of

decision, in causes pending, prescribed by Congress." *Klein*, 80 U.S. at 146. By the same token, the Supreme Court has held that "[i]t is clear that Congress may not legislate to reopen suits for money damages after judgment has been granted in order to change the outcome. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211. The Act, in directing that claims legitimately pending before this Court be "promptly dismissed," dismiss the claims, unconstitutionally infringes upon the province of this Court and the federal judiciary.

The Gun Lake Act further offends the Constitution when it prescribes a rule, established by Congress, that directs the judiciary to rule in favor of the United States Government in pending litigation. As the *Klein* Court pointed out:

> Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

Klein, 80 U.S. at 147.

It was the prospect of this very imbalance that led the Framers to "buil[d] into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo,* 424 U.S. 1, 122, 96 S.Ct. 612, 4 L.Ed.2d 659 (1976), *abrogated on other grounds*. The judiciary's distinct role within our three-branch system is also well-established, as it is the only branch meant to remain detached from partisan influence.

The Gun Lake Act purports to strip the judiciary of its power to interpret laws enacted by each and every Congress, deprive this Court of its capacity to independently review the Secretary's decision, divest the Court of any further jurisdiction to hear or decide the instant case (which has been pending before it since 2008), and divine that this Court must rule in the Secretary's favor by dismissing the case. Simply put, there are so many layers of

unconstitutional overreach by Congress in the Gun Lake Act, and it is unconstitutional as applied to Mr. Patchak and on its face.

B. The Gun Lake Act Violates Mr. Patchak's Right to Petition Guaranteed Under the First Amendment to the U.S. Constitution.

The Gun Lake Act imposes a significant and unlawful burden upon Mr. Patchak's First Amendment right to petition in that the Act *requires* dismissal of his petition, that is, this lawsuit, and it prohibits the filing of any other lawsuit that challenges the federal Defendant's actions taking the Bradley Property into trust the land. This statute effectively suspends the Petition Clause of the First Amendment, insofar as Mr. Patchak's lawsuit is concerned, silencing his ability to even file a formal complaint or pursue the action he filed in 2008.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances." It is well-settled that the Petition Clause to the First Amendment protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. *Borough of Duryea, Pennsylvania v. Guarnieri,* 131 S.Ct. 2488, 2494 (2011)("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government") (quoting *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 896-897 (1984)).

The constitutional right to petition the government "extends to all departments of the Government," and it includes the right of access to courts. *California Motor Transport Co. v. Trucking Unlimited et al.*, 404 U.S. 508, 510 (1972); *accord Bill Johnson's Restaurants, Inc. v. N.L.R.B,* 461 U.S. 731, 741 (1983). The concept of access to courts as a form of the constitutional right to petition, if it is to have any meaning at all, cannot legitimately allow a legislative dismissal of Mr. Patchak's lawsuit. Such action, though consistent with the terms of the Gun Lake Act, runs contrary to the First Amendment and the precedent interpreting it.

In *American Bus Association v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011), the D.C. Circuit considered the question whether the First Amendment right to petition was violated because a statutory amendment prevented the petitioner from *successfully* petitioning an agency. The court was clear in its holding that the First Amendment does not compel government policymakers to actually listen to or respond to individuals' petitions, rather, it simply protects the right of an individual to speak freely and to advocate ideas through petitioning his government for redress. *Id.* at 739-40. If the Gun Lake Act had been drawn to establish limits on judicial authority, rather than limits on speech and judicial advocacy, perhaps a different outcome would be required. But as the law is drafted, requiring the Court to silence Mr. Patchak's petition through dismissal of his lawsuit, Congress has impermissibly restricted Mr. Patchak's rights. The Gun Lake Act interferes with Mr. Patchak's ability to express his views to a decisionmaker. As the court in *Rogoff* recognized, "in *Bill Johnson's* and *[NAACP v.] Button,* [371 U.S. 415 (1963)], the government interfered with *the plaintiffs' ability to express their views* to a decisionmaker—in both cases, to a court. Here, by contrast, Congress has instead interfered with *the decisionmaker's ability to grant the remedy* the plaintiffs seek." 649 F.3d at 741 (emphasis in original). Stated simply, *Rogoff* draws a distinction between the act of petitioning a court and the ability of the decisionmaker—in the instant case, the court—to grant relief. *Rogoff* is clear in holding that Congress may indeed restrict the remedy, but it must not silence the petition.

Furthermore, when Congress enacted the APA, its "evident intent" was to make agency actions presumptively reviewable, as was noted in the Supreme Court's decision in this case. *Patchak*, 132 S.Ct. at 2210. While Mr. Patchak certainly does not suggest that Congress is powerless to change the law, and frequently does so without constitutional violation, he does maintain that any legislative changes must be entirely consistent with constitutional principles,

particularly where the Bill of Rights is concerned. Through its enactment of the Gun Lake Act, Congress has improperly abridged Mr. Patchak's right to petition, and accordingly, we ask the Court to declare the statute unconstitutional as applied to Mr. Patchak and on its face.

C. The Gun Lake Act Violates the Due Process Requirements Guaranteed Under the Fifth Amendment to the U.S. Constitution

With the passage of the Gun Lake Act, Congress has reacted in a uniquely judicial manner. It has reviewed a prior decision of an Article III tribunal, eviscerated the finality of that judgment as determined by the Supreme Court, and required dismissal in a pending case. Because Mr. Patchak's right to challenge the Secretary of Interior's decision to take the land into trust amounts to a property interest, and because the purported deprivation of that property interest would be final, Mr. Patchak's Fifth Amendment due process rights are implicated. More to the point, those rights have been violated by the terms of the Gun Lake Act.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982), relying in part upon its decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Supreme Court held that even an unadjudicated cause of action is constitutional property, stating, "[t]he first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process clause." *Id.* at 428.[6] Here, Mr. Patchak has pursued his claim through adjudication to the Supreme Court, which, in holding in his favor, referenced Congress's "evident intent" to make agency action, such as the one Mr. Patchak challenges, presumptively reviewable under the APA. *Patchak,* 132 S.Ct. at 2210. Indeed, the conclusion that a lawsuit itself may embody a protected property interest is hardly a novel one.

[6] The due process clauses of the Fifth and Fourteenth Amendments are identically interpreted, the primary difference being that the Fifth Amendment is applicable exclusively to the federal government, while the Fourteenth Amendment applies to states. U.S. Const. amend. V, XIV.

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan* at 429.

The Supreme Court's decision in *Logan* is instructive; the facts in that case led the Court to invalidate a provision of state law because it denied the plaintiff a judicial forum to determine his dispute. In *Logan*, the Illinois Supreme Court had ruled that the failure of the Illinois Fair Employment Practices Commission to schedule a fact-finding conference within 120 days, as required by statute, divested an allegedly unlawfully discharged employee of his rights to proceed under the Fair Employment Practices Act ("FEPA"). On review, the Supreme Court ruled that the employee's remedies under the act were "property" within the meaning of the Due Process Clause, and that his property could not be divested by operation of a procedural rule. Further, the Court held that the state Commission was therefore required to hear the employee's case. The Court rejected the contention that the loss of the employees' remedies under the Illinois FEPA did not constitute a due process violation because of the availability of an alternative and separate tort action wherein he could make essentially the same challenge.

Just as the Supreme Court held that Mr. Logan had a right to use the adjudicatory procedures of FEPA, despite the statutory deadline lapsing, without action by the Commission, applying *Logan*, this Court should similarly invalidate, at a minimum, the provision of the Gun Lake Act that requires dismissal of Mr. Patchak's case. Mr. Patchak has a right to pursue his request to have judicial review of the Secretary of Interior's actions placing the Bradley Property into trust. No compelling reason is offered by the government for the requirement of dismissal included in the Act. This is nothing more than a power grab, which admittedly, Congress may be permitted in many other circumstances; however, Mr. Patchak has due process rights that must

be afforded. Mr. Patchak has a protected property right in his cause of action, in which he has obtained a final, unreviewable judgment from the Supreme Court. Thus, he has a valid constitutional challenge, and the law should be held unconstitutional.[7] *See Jung v. Association of American Medical Colleges*, 339 F.Supp. 2d 26 (D.D.C. 2004), *aff'd*, 184 F. Appendix 9 (D.C. Cir. 2006).

Because, as applied, the Gun Lake Act transfers control of Mr. Patchak's lawsuit to Defendants in this case, the legislation violates due process requirements and amounts to an unconstitutional taking of private property for public use without just compensation.

D. The Gun Lake Act Constitutes a Prohibited Bill of Attainder Directed Solely at Plaintiff

Following Mr. Patchak's success before the Supreme Court, which held that Mr. Patchak could challenge, under the APA, the Secretary of Interior's decision to acquire land in trust under the IRA, Congress intervened by targeting his lawsuit with the Gun Lake Act, legislation supported by the federal Defendants. S. 1603, The Gun Lake Trust Land Reaffirmation Act Before the S. Comm. On Indian Affairs, 113th Cong. (2014)(testimony of Kevin Washburn, Asst. Sec. Indian Affairs.) In addition to the many constitutional violations discussed above, the Act is similarly constitutionally barred as an unlawful bill of attainder.

The purpose of the Gun Lake Act, as stated in its preamble, is "[t]to reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians." Pub. L. No. 113-179 (2014). No land other than the Bradley Property, regardless of whether it has been brought into trust under the IRA for the Gun Lake Band, is the

[7] The Gun Lake Act may also raise the issue of a taking under the Fifth Amendment. As applied, the act transfers control of Mr. Patchak's lawsuit to Defendants in this case, implicating the Takings Clause of the Fifth Amendment as an unconstitutional taking of private property (his lawsuit) for public use without just compensation.

subject of this lawsuit or of the Gun Lake Act. The only land affected by the Gun Lake Act is the Bradley Property at issue in this case.

Significantly, the language of the Gun Lake Act, which purports to "ratify and confirm" the Secretary's actions in taking the Bradley Property into trust, does nothing to alter the framework for review of the Secretary's actions, as discussed in detail by the Supreme Court. *Patchak*, 132 S.Ct. 2199. Quite simply, the Gun Lake Act is not a "legislative fix" for the Supreme Court's *Carcieri* decision interpreting the IRA, nor does it exempt the Secretary's determinations regarding land trust determinations from the potential for judicial review under the APA. It is, however, a piece of legislation that affects only one plaintiff and one land acquisition, a classic bill of attainder.[8]

Congress is required by the Constitution to accomplish results by rules of general applicability, rather than by specifying the person upon whom the sanction it prescribes is to be levied. "Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to the other tribunals." *Unites States v. Brown*, 381 U.S. 437, 461 (1965). Here, the legislative branch has made a judgment, in effect a crippling policy, depriving Mr. Patchak of the right to maintain his legal action, a right that no less than the Supreme Court acknowledged he had standing to pursue.

The Bill of Attainder Clause to the Constitution provides protection against precisely this type of targeted, retroactive civil legislation. Article I, section 9 of the Constitution provides that

[8] Although the Gun Lake Act, in addition to calling for the dismissal of the instant case, also states that no other action can be filed or maintained in federal court "relating to the land described" in the act, that reference to other actions is to a completely null set. In that the notice of final agency determination was published in the Federal Register in 2005, the statute of limitations for bringing an action has long since expired. As provided by 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." It is clear that the Gun Lake Act inflicts its disqualification upon Mr. Patchak alone.

"[n]o Bill of Attainder . . . shall be passed." This provision 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. Administrator of General Services*, 433 U.S. 425 (1977). The Clause was intended to serve 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). As the D.C. Circuit has noted, "[t]he infrequency with which courts have relied upon this provision to invalidate legislation has not prevented its meaning from evolving to fulfill this purpose." *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003)(quoting *BellSouth Corp. v. FCC,* 162 F.3d 678, 683 (D.C. Cir. 1998)).

As discussed in detail in the D.C. Circuit's *Foretich* decision, prevailing case law establishes that a law is prohibited under the bill of attainder clause if it applies with specificity and imposes punishment. *Id.* at 1217. Both requirements are easily met here. Because Mr. Patchak's case is the only pending case affected by the dismissal requirement of the Gun Lake Act, and because there is a statute of limitations bar to the filing of any new claims, it is clear that the act satisfies the specificity prong; Mr. Patchak is the lone plaintiff in any challenge in existence or that can be filed. Furthermore, Mr. Patchak is being punished here for past actions, that is, he is being stripped of his right to challenge the government, which amounts to punishment.

It is of no consequence that Congress stopped short of referencing Mr. Patchak by name in the Gun Lake Act because the law is so narrowly drawn as to apply only to him and to his litigation. The fact that the Act requires him to dismiss his case is nothing less than a punitive reaction to his pursuit of his rights. To be sure, the legislation does not address the "problem" federal Defendants face following *Carcieri* in that there is nothing in the Gun Lake Act that

addresses federal jurisdiction of a tribe for purposes of the IRA. Instead, the legislation targets Mr. Patchak personally, depriving him of his right to petition. Thus, there is no legitimate nonpunitive purpose of the Gun Lake Act. Indeed, the purpose of the act appears to be neither rational nor fair. The punitive nature of the bill, combined with the Act's undisputed specificity, renders the Gun Lake Act an unlawful bill of attainder and it should be held unconstitutional as applied to Mr. Patchak and on its face.

CONCLUSION

For these reasons, Plaintiff respectfully moves this Court to declare the Gun Lake Act unconstitutional as applied to Mr. Patchak and on its face. Plaintiff also moves this Court to grant his Motion for Summary Judgment under the APA, by holding the Secretary's decision to take the land into trust on behalf of the Gun Lake Tribe unlawful under the IRA and setting aside the Secretary's action.

Date: October 31, 2014

By: */s/Sharon Y. Eubanks*

Sharon Y. Eubanks D.C. BAR 420147
Catharine E. Edwards, D.C. BAR NO 1000457
John R. Edwards, N.C. Bar No. 007706,
admitted *pro hac vice*
Edwards Kirby LLP
2000 P Street NW Suite 300
Washington, D.C. 20036
Telephone: (202) 223-2732
Fax: (202) 478-2690
Email: seubanks@edwardskirby.com