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 **DEFENDANT-INTERVENOR'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Defendant-Intervenor, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe") hereby submits this Opposition to Plaintiff's Motion for Summary Judgment. On September 22, 2014, this Court issued a Scheduling Order in this matter, requiring the Tribe and Plaintiff, David Patchak ("Patchak") to file respective Motions for Summary Judgment. Under that Order, the Tribe submitted its Motion for Summary Judgment, including Memorandum of Points and Authorities, on October 31, 2014, (ECF No. 78) (a true and correct copy of which is attached hereto as "Attachment A"), which sets forth fully the reasons the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913, ("Act" or "Gun Lake Act") is a proper exercise of Congress's plenary authority over Indian affairs and is neither a violation of separation of powers nor a bill of attainder. The legal arguments in the Tribe's Motion for Summary Judgment also support the present Opposition. The Tribe, therefore, incorporates those arguments and supporting authorities generally, as well as specifically, as noted herein.

I. INTRODUCTION

Mr. Patchak faces an extraordinarily heavy burden in his Motion for Summary Judgment, but he has done little to meet it. He has challenged the constitutionality of a statute that explicitly governs this proceeding. And, though surely cognizant of the presumption in favor of the statute's constitutionality and the powerful interpretative canon requiring construction in favor of the Tribe, none of his four constitutional claims even begins to overcome his burden, relying upon incomplete or inapplicable citations to authority.

Likewise, he has anachronistically challenged the agency's ***2005*** decision to take the subject land into trust while asserting violations based in a ***2009*** United States Supreme Court decision, *Carcieri v. Salazar*, 555 U.S. 379 (2009). He is fully aware that administrative law requires this Court to base its review upon a relevant administrative record. Yet, he insists this

Court must reject the Department of Interior's newly-created *Carcieri*-based decision, and instead asks this Court to pave its own *Carcieri* path through the factual landscape of the 2005 decision. This strategy likely recognizes the fact that he cannot meet his steep burden of proving that the new and proper administrative decision, explicitly targeted at the *Carcieri* question, is arbitrary and capricious.

Mr. Patchak's insubstantial efforts in his Motion for Summary Judgment, therefore, do not appear aimed at prevailing in this proceeding, but rather seem calculated merely to harass. Mr. Patchak has acknowledged to this Court that, in reality, he is not seeking any remedy under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"); rather he is seeking a financial settlement from the Tribe. Transcript of Sept. 9, 2014 Hearing, at pp. 12-13 (a true and correct copy of which is attached hereto as "Attachment B").

As set forth herein and in its own Motion for Summary Judgment (ECF No. 78), the Tribe is legally and factually entitled to a finding that the land at issue here is lawfully held in trust as set forth explicitly by Congress in the Gun Lake Act and as separately confirmed by the Department of Interior's updated *Carcieri*-based decision, such that Patchak's Motion for Summary Judgment must be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

The Tribe incorporates by reference the substantive and procedural facts in its Memorandum and Points of Authority in Support of Motion for Summary Judgment, ECF No. 78 at pp. 3-10, which describes the long history of the Tribe in Western Michigan, its history with the United States, and its protracted struggle to regain possession of its tribal lands. In addition to discussing these historical facts, it also discusses the Tribe's and the United States' modern efforts

[1] Pursuant to LCvR 7(h)(2), a separate statement of material facts will not be filed.

to correct the Tribe's status and rectify past wrongs, including the Tribe's successful application for federal acknowledgment under the modern procedures found at 25 C.F.R. part 83. ECF No. 78 at pp. 3-4, (citing Compl., ECF No. 1, ¶ 18; 62 Fed. Reg. 38,113-115 (July 16, 1997)).

Most important for this brief, the Tribe's Summary Judgment Motion describes in detail the procedural process that has resulted in the instant proceedings, including the Tribe's application on August 8, 2001, requesting the Secretary of Interior to take the 147-acre tract of land at issue in this proceeding ("Bradley Tract") into trust (ECF No. 78 at p. 4, (citing Compl., ECF No. 1, ¶¶ 20-21)); the Secretary's final decision on May 12, 2005 to accept the Bradley Tract into trust (*id*. at p. 5 (citing Compl., ECF No. 1, ¶ 21; 70 Fed. Reg. 25,596 (May 13, 2005))); and on August 1, 2008, the commencement of the instant action in which Mr. Patchak sued for declaratory and injunctive relief alleging 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 (*id.* at pp. 5-6, Compl. ECF No. 1).

However, six months after the commencement of this lawsuit and four years after the Secretary issued his final decision taking the Bradley Tract into trust, the United States Supreme Court decided *Carcieri v. Salazar*, in which it held for the first time, and contrary to the Secretary's long-held belief, that Sections 5 and 19 of the IRA only authorize the Secretary to take land into trust on behalf of a tribe that was "under the federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 395. Mr. Patchak agrees that this opinion, which was issued after the Secretary's final decision in 2005 and during the pendency of this case, "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. . . ." ECF No. 81-1 at p. 9 (citing ECF No. 1, Compl, at ¶¶ 22-33).

This Court did not apply *Carcieri*, however, in 2009, as it resolved this case on a finding that Patchak did not have prudential standing to bring this suit. ECF No. 78 at p. 6 (citing ECF Nos. 56-57). On June 18, 2012, the United States Supreme Court held that Patchak had standing and remanded to this Court to consider the merits. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012). Thereafter, Mr. Patchak took no action in this Court on remand for over two years—until July 17, 2014, when he requested a status conference. (ECF No. 78 at p. 7 (citing 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.[2] In the Amended Notice of Decision, the Interior Department specifically considered the Secretary's authority to take land into trust on behalf of the Tribe under the IRA under *Carcieri*, 555 U.S. 379 and based upon supplementary historical information. SAR000617-58. Interior conducted its analysis of this question pursuant to a two-part *Carcieri* inquiry articulated in a March 12, 2014 Memorandum prepared by the Solicitor of Interior that interprets and analyzes the meaning of "under federal jurisdiction" under the IRA and *Carcieri*. Memorandum from Hilary C. Tompkins, Solicitor of the Department of Interior, to Sally Jewell, Secretary of the Department of Interior (Mar. 12, 2014), M-37029, 2014 WL 988828; SAR000001-22[3] ("Solicitor's Memorandum"). In the Amended Notice of Decision, the Department of Interior, applying the Solicitor's opinion, concluded that

[2] Supplemental Administrative Record ("SAR"), lodged in this Court on October 27, 2014. ECF No. 75. Although, the Amended Notice of Decision concerns two tracts not related to this matter, its discussion of whether the Tribe was under federal jurisdiction in 1934 pursuant to *Carcieri* explicitly reaches the sole legal claim made by Mr. Patchak in the instant proceeding. SAR000622-650.

[3] The copy of this Memorandum in the Supplemental Administrative Record appears to be missing pages 2 through 5 of the original Memorandum. The electronic version is complete.

the Tribe was under federal jurisdiction in 1934 such that the trust acquisition lawfully was effected under 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 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).

III. STANDARD OF REVIEW

A. General Interpretive Standards

Cases involving Indian law are guided by an interpretive principle that generally trumps any contrary presumptions or standards of review: "The governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) (noting that "the standard principles of statutory construction do not have their usual force in cases involving Indian law" where the Indian canon applies). Furthermore, 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, Mich. 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)).

Moreover, it is well-settled that federal statutes are presumed to be constitutional. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988). Only "the most compelling constitutional reasons" may justify "invalidat[ion] of a statutory provision that has been approved by both Houses of Congress and signed by the President. . . ." *Mistretta v. United States*, 488 U.S. 361, 384 (1989). Where there is more than one possible interpretation of a statute, it is this Court's "plain duty to adopt that which will save the act." *Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see also Bowen*, 487 U.S. at 617. The party challenging the statute bears "an extremely heavy burden" of overcoming the presumption of constitutionality. *United States v. Turner*, 337 F. Supp. 1045, 1048 (D.D.C. 1972); *accord Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Cent. States, Se. & Sw. Areas Pension Fund v. Midwest Motor Exp., Inc.*, 181 F.3d 799, 806 (7th Cir. 1999); *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1124, 1129 (1st Cir. 1984).

B. Summary Judgment Under the Administrative Procedure Act

In light of the limited role of federal courts in administrative decisions, traditional summary judgment standards under Fed. R. Civ. P. 56(a) do not apply in challenges to a federal agency's administrative decision under the APA, 5 U.S.C. §§ 701 et seq. *E.g. Oceana, Inc. v. Penny Pritzker*, --- F. Supp. ---, CV 13-770 (JEB), 2014 WL 616599, *4 (D.D.C. Feb. 18, 2014); *Haselwander v. McHugh*, 878 F.Supp.2d 101, 105 (2012). As APA cases concern "the duty of the agency to resolve factual issues in a manner that is supported by the administrative record[,] . . . the district court is limited to determining whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision as it did." *Haselwander*, 878 F. Supp. 2d at 105 (internal citations and quotation marks omitted). When a court reviews an agency decision, "summary judgment therefore becomes the mechanism for deciding whether, as matter

of law, the final agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.* (citing *Sw. Merch. Corp. v. N.L.R.B.*, 53 F.3d 1334, 1341 (D.C. Cir. 1995)).

IV. ARGUMENT

A. The Gun Lake Trust Land Reaffirmation Act Is Constitutionally Sound and Conclusively Has Affirmed the Bradley Tract's Trust Status Such that Mr. Patchak May Not Pursue His Claims

In its Summary Judgment brief, the Tribe has set forth in detail Congress's clear constitutional authority to enact the Gun Lake Act, flowing from its plenary and exclusive power over Indian affairs and its specific authority over Indian lands. ECF No. 78, at pp. 12-17 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942)). Likewise, the Tribe has set forth in detail the proper interaction between the Act's legislation and the more general legislation in the IRA. *Id*. at pp. 15-17 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). The Tribe also has described how the Act's substance effectuates Congress's inherent fiduciary responsibility to the Tribe, by establishing its initial reservation and enabling it to build an economic development project that supports its governmental functions and benefits its tribal members. *Id*. at p. 17 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980); *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989)).

Moreover, the Tribe has already addressed in detail that the Act is not an unconstitutional violation of this Court's Article III powers, as it has amended substantive law (*id.* at pp. 19-22 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001)), and that it is not an unconstitutional bill of attainder, as it has a clear nonpunitive purpose

(*id.* at pp. 22-23 (citing *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984); *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003)).

The Tribe incorporates by reference herein the entirety of those arguments as set forth fully in its Memorandum of Points and Authorities in Support of Summary Judgment. *Id*. at pp. 12-30. However, the Tribe addresses below Mr. Patchak's unavailing arguments to the contrary, as well as his likewise unpersuasive arguments that the Act violates his right to petition under the First Amendment and that the Act violates his Fifth Amendment Due Process right.

1. The Act Does Not Encroach upon the Court's Article III Power to Decide this Case in Violation of Separation of Powers

As Mr. Patchak acknowledges, the only way he can possibly prevail under his Article III claim, is to prove that the Act effectuated no substantive legal change, but rather imposes upon this Court Congress's "interpretation of the IRA" that the Tribe was under federal jurisdiction in 1934 under *Carcieri*. *See* ECF 80-1, at pp. 26, 28 (citing *Plaut*, 514 U.S. at 218 ("whatever the precise scope of *Klein* . . . later decisions have made clear that its prohibition does not take hold when Congress amends applicable law.)). Mr. Patchak's argument fails because it premised upon both a blatant mischaracterization of the text and effect of the Act as well as a fundamental misunderstanding of Congress's authority over Indian affairs.

First, the argument ignores the plain wording of the Act, which makes no reference whatsoever to the question of whether this Tribe was "under federal jurisdiction" in 1934 or not.

> 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 actions of the Secretary are ratified and confirmed.

Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a). Indeed, the Act is wholly indifferent to "under federal jurisdiction" in 1934, because Congress need not concern itself with whether a tribe

satisfies provisions set forth in the IRA in order to authorize or ratify a trust acquisition. Congress enjoys unquestioned plenary and exclusive power over Indian affairs and Indian lands, such that Congress can create Indian trust land by specific legislation outside the general confines of the IRA whenever it so chooses. ECF 78, at p. 13-16.[4] Such legislation acquiring or defining trust land ***is by itself*** a substantive change—Congress is decidedly empowered to declare land to be held in trust; it does so; therefore the land is held in trust. *Id.* And that is the end of the analysis.[5] Applying the Act on its face, this Court need not make any finding, one way or the other, whether the Tribe was "under federal jurisdiction" in 1934 under *Carcieri*. Furthermore, the statute lacks any interpretive characteristics, such as language directing this Court to "construe," "apply," or otherwise interpret anything. *See, e.g., Cobell*, 392 F.3d at 467.

It is plain, moreover, based upon the legislative history that Congress did not intend this Court to make any findings under the IRA, because it explicitly sought merely "to ***ratif[y]*** the trust status of a discrete parcel of land" (S. Rep. No. 113-590, at 2 (2014) (emphasis added), a wholly unremarkable legislative function clearly within Congress's authority. In *James v. Hodel*, this jurisdiction considered plaintiff's challenge to the Secretary's acknowledgement of the Gay Head Wampanoag Tribe and its tribal council. *James v. Hodel*, 696 F. Supp. 699, 700 (1988). During pendency of the dispute, Congress enacted legislation that was "dispositive" of the plaintiff's challenge," in which Congress "ratifie[d] and confirm[ed]" the Secretary's decision to

[4] *E.g. Sioux Tribe*, 316 U.S. at 326 (noting that the Constitution places the authority to dispose of Indian lands "**exclusively in Congress**"); *see also* 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).

[5] Further, to the extent that the Act and the IRA coexist, as set forth fully in the Tribes Motion for Summary Judgment, under the "general/specific canon," such specific legislation harmonizes with the more general provisions contained in the IRA by construing the specific provision as an exception to the general one. ECF No. 78 at pp. 15-16 (citing *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2071; *Mancari*, 417 U.S. at 550-51). A specific exception to a general statutory scheme is a substantive change. Mr. Patchak can cite no authority that such an exception would instead constitute an attempt by Congress to *interpret* the general statute.

acknowledge the tribe's existence. *Id.* at 701. The District Court held that passage of the act mooted the challenge to the Secretary's decision, notwithstanding the fact that litigation antedated the legislation. *Id.* On appeal, the D.C. Circuit, in an unpublished opinion, affirmed the District Court, holding that "[t]he passage of the [legislation] during the pendency of [the] action mooted the appellants claims against the governmental appellees." *James v. Lujan*, 893 F.2d 1404, No. 88-5344, 1990 WL 4657, at *1 (D.C. Cir. Jan. 23, 1990).

The more general principle that Congress may properly ratify agency action, even if the action was not authorized when taken, is supported by the weight of authority. *E.g. Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, ratify acts which it might have authorized, and give the force of law to official action unauthorized when taken.") (internal citations and punctuation omitted); *see also E.E.O.C. v. Westinghouse Elec. Corp.*, 765 F.2d 389, 391 (3d Cir. 1985) ("It is clearly within Congress's power to enact retroactive legislation ratifying actions that when undertaken may have been unauthorized.

By both conclusively declaring the Bradley Tract to be held in trust and ratifying the Secretary's prior trust acquisition, Congress clearly effected a substantive legal change well within the scope of its authority, such that Mr. Patchak cannot make a showing that the Act violated this constitutional separation of powers under Article III.

2. The Act Does Not Violate Mr. Patchak's Right to Petition Guaranteed Under the First Amendment to the U.S. Constitution

Mr. Patchak's claim that the Act violates his right to petition under the First Amendment to the United States Constitution is wholly unavailing. Indeed, his argument is difficult to follow. He cites principally to the D.C. Circuit's decision in *American Bus Ass'n v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011), for the proposition 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." ECF No. 81-1 at p. 33 (citing *Rogoff*, 649 F.3d at 739-40). *Rogoff*, however, does not actually support Mr. Patchak's claim that his First Amendment right is being infringed—*Rogoff* held that the challenged legislation was constitutionally sound. *Rogoff*, 649 F.3d at 743. Instead, Mr. Patchak uses *Rogoff* as a vehicle to discuss, albeit briefly, *Rogoff's* terse reference to *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983) and *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963), which he has the good sense not to address head-on as they are wholly inapposite.

In *Bill Johnson's* the Supreme Court held that the NLRB's injunction of an allegedly retaliatory, but otherwise legally cognizable lawsuit, by an employer against an employee violated the First Amendment. *Bill Johnson's*, 461 U.S. 737-47. And *Button* held that state legislative restrictions violated the First Amendment when they prevented the NAACP from connecting with potential plaintiffs in civil rights litigations contemplating valid constitutional claims. *Button*, 371 U.S. at 437-45. In both cases, the offending governmental action effectively precluded litigants from bringing otherwise valid and worthy claims. Neither case stands for the proposition that a litigant is entitled by the First Amendment to bring a claim that he legally may not prevail upon.

Indeed, this is precisely what *Rogoff* prohibited. In *Rogoff*, Congress enacted temporary legislation that prohibited the Federal Transportation Agency from enforcing a certain rule against a public transportation authority in order to allow it to operate in contravention of the rule without actually changing the rule. *Rogoff*, 649 F.3d at 735-37. Private bus companies complained that their inability to challenge the rule before the agency violated its First Amendment right to petition. *Id.* The court disagreed, holding that law did not violate the bus companies' First Amendment

right because, even if the company could bring its challenge, the agency was precluded from ruling in its favor as Congress had prohibited the agency from enforcing the rule against the public transportation system. *Id.* at 741.

Rogoff is an extreme case, wherein Congress failed to change any substantive law, but rather only prevented enforcement of it. Here, Congress has changed the substantive law. As such, there is no question that the Act's dismissal provision avoids running afoul of a First Amendment constitutional impairment in light of the clear substantive change that conclusively moots this litigation. Any other interpretation of Mr. Patchak's "right to petition" argument would merely authorize him to pointlessly and wastefully express his mooted and unavailing position to a Court that can do nothing about it. The First Amendment does not protect such proceedings. *See Rogoff*, 649 F.3d at 741.

Furthermore, Mr. Patchak ignores the well-settled principle that Congress unequivocally has power to deny judicial review of agency action. While there is a strong presumption in favor of judicial review of agency decisions; this is only a presumption, which "can be overridden by specific language or clear and convincing evidence of legislative intent." *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1094-95 (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-73 (1986)); *see also McDougal-Saddler v. Herman*, 184 F.3d 207, 211-12 (3d Cir. 1999) ("Although Congress is presumed to have intended judicial review of agency action, Congress is absolutely free to limit the extent to which it consents to suit against the United States or its instrumentalities.") (internal citations and quotation marks omitted).

Mr. Patchak plainly cannot prevail on his First Amendment claim.

3. The Act Does Not Violate the Due Process Requirements Guaranteed Under the Fifth Amendment to the United States Constitution

Patchak's recitation of the principles underlying his due process claim omits one key detail: While a cause of action may constitute a "species of property" protected by the due process clause (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)), ***it is settled law that a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained***. *E.g. McCullough v. Com. of Virginia*, 172 U.S. 102, 123-24 (1898); *accord Daylo v. Adm'r of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 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*, *Plaut*, 514 U.S. 211 .

Patchak attempts without any discussion to paint the Supreme Court's prior decision in this matter in *Patchak*, 132 S. Ct. 2199, as a final unreviewable judgment that would trigger a property interest. Apparently pleading ignorance concerning the accepted meaning of a final judgment (*see, e.g.*, 28 U.S.C. § 1291; 28 U.S.C. § 1292; 28 U.S.C. § 158), he claims that the Act "eviscerate[s] the finality" of the Supreme Court's judgment and therefore violates his due process rights. ECF No. 80-1, at p. 34. However, while the Supreme Court's ruling in *Patchak* was the last word on whether Mr. Patchak *had standing* to bring this suit, it was not an adjudication of the merits. *See Patchak*, 132 S.Ct. at 2212 ("The QTA's reservation of sovereign immunity does not bar Patchak's suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D.C. Circuit, ***and remand the case for further proceedings consistent with this opinion***.") And, except for the instant briefing, virtually nothing has happened in this proceeding regarding the merits—let alone a final unreviewable judgment.

Finding no support for the proposition that mere standing to bring a lawsuit constitutes a property right, Mr. Patchak relies solely upon the Supreme Court's decision in *Logan v. Zimmerman Brush Co.*, which has no application here. In *Logan*, the court considered whether a state court properly had upheld dismissal of a probationary employee's unlawful termination charge in a state administrative proceeding where the state agency accidentally scheduled the employee's hearing after the statutory deadline. 455 U.S. at 426. The court held that the state had violated Logan's due process rights because the statutory provision that time-barred his claim constituted a mere "procedural limitation on [his] ability to assert his rights, ***not a substantive element of [his] claim***." *Id.* at 433. The court explained that Logan could not be prevented from adjudicating his claim on such pure procedural grounds; his ability to adjudicate could only be prevented for cause, *i.e.*, for substantive reasons. *Id.* at 430.

Such facts are not present here. The Act does not pose a mere procedural bar to Mr. Patchak's claim. Rather, as set forth fully herein, it operates to alter the substance of the legal landscape such that Mr. Patchak cannot prevail on the merits. *See* part IV(A)(1) *surpa*. And this clearly does not violate Mr. Patchak's due process rights, as articulated aptly by a case that Mr. Patchak himself cites, *Jung v. Ass'n of American Medical Colleges*, 339 F. Supp. 2d 26, 42-43 (D.D.C. 2004). In *Jung*, medical students initiated a class action lawsuit against institutions offering medical residencies alleging violation of federal antitrust laws. *Id.* at 30. During the pendency of that litigation, but prior to entry of a final judgment, Congress amended its antitrust laws specifically to address antitrust concerns in graduate medical residencies. *Id.* The legislation had two relevant effects: (1) it rendered the medical institutions' conduct that allegedly violated antitrust laws to be lawful; and (2) it prohibited evidence of that conduct from being used in any antitrust litigation in federal court. *Id.* at 34, 37. The Court denied the medical students' claims

that the legislation violated their due process rights. The Court stated that "[t]he court of appeals has made it clear that plaintiffs have no property interest in their pending claim. Causes of actions only become actionable property interests upon the entry of final judgment." *Id.* at 42-43 (internal citations omitted). As the merits of the medical students' claim had yet to be decided, and no final unreviewable judgment had issued, the medical students had no property interest and, therefore, they could not sustain a due process claim.

Jung is directly relevant to the present proceeding. Mr. Patchak is missing the essential element of his due process claim: a property right. There has been no final unreviewable judgment in this matter. His due process claim, therefore, fails.

4. The Act Does Not Constitute a Prohibited Bill of Attainder

Mr. Patchak feebly argues that the Act is a prohibited bill of attainder. He eloquently cites the policy considerations that inform the bill of attainder clause and colorfully describes the purported impact of the law on him. ECF No. 81-1 at p. 38. He also notes the existence of a bill of attainder test: (1) whether the law applies with specificity; and (2) whether it imposes punishment. *Id.* at 38 (citing *Foretich*, 351 F.3d at 1217). He briefly argues these points, yet he fails to apprise this Court that it is not enough to say that the legislation may hurt Mr. Patchak. Indeed, the punishment prong itself is governed by a three-part analysis, set forth in *Selective Service System. v. Minn. Public Interest Research Group*, 468 U.S. at 852:

> (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."

And further, 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*, 351 F.3d at 1218 (internal quotations omitted). "Indeed, compelling proof on this score may be determinative" of the entire bill of attainder analysis. *Id.* (internal quotations omitted). The Tribe has discussed these factors at length in its Summary Judgment brief and has demonstrated, based upon case law and the legislative and factual record, that preventing Patchak's litigation does not fall within the traditional definition of punishment, that the law has a clear nonpunitive purpose, and that the legislative history demonstrates Congress's plain nonpunitive intentions. (ECF No. 78 at pp. 23-28.) As set forth fully in the Tribe's Summary Judgment brief, Congress crafted the 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 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. Mr. Patchak has not even attempted to prove his bill of attainder claim, and so it must fail.

5. A Finding of Unconstitutionality in Section B of the Act Does Not Invalidate the Act as Section B Is Severable

Mr. Patchak's claims uniformly arise from his challenge to Section B of the Act, which directs this Court to dismiss the instant lawsuit. Patchak has made no colorable challenge to Congress's authority to enact Section A,[6] which conclusively establishes that the Bradley Tract is held in trust for the Tribe. Even if this Court is persuaded by Patchak's various arguments above that Section B of the Act is unconstitutional, it is severable from the balance of the Act, and the remaining provisions of the Act should be held to be valid. *E.g. Alaska Airlines, Inc. v. Brock*,

[6] The only challenge that Patchak raises against the Section A is his unsupported claim at ECF No. 81-1, p. 26 that the Act functions to "interpret" the IRA rather than to legislate. As discussed, in part IV(A)(1) *supra*, Congress has clearly exercised its plenary and exclusive power over Indian affairs to legislate in Section A; it did not merely suggest an interpretation of the IRA. Furthermore, the statute lacks any interpretive characteristics, such as language directing this Court to "construe" or "apply" or otherwise interpret anything. *See, e.g., Cobell*, 392 F.3d 467.

480 U.S. 678, 684 (1987). As a general rule, "a court should refrain from invalidating more of the statute than is necessary." *Id.* (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). To the extent that a statute contains "unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [the] court to so declare, and to maintain the act in so far as it is valid." *Id.* (quoting *Regan*, 468 U.S. at 652). Further, "invalid portions of a statute are to be severed unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *I.N.S. v. Chadha*, 462 U.S. 919, 931-32 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). If the non-offending portion of the statute is capable of operating independently, then the court must sever. *See Act Now to Stop War & End Racism Coal. v. D.C.*, 905 F. Supp. 2d 317, 353 (D.D.C. 2012) (citing *Brock*, 480 U.S. at 684).

Therefore, if this Court holds Section B to be unconstitutional, it is the Court's duty to declare that Section A is valid and maintain that Section A governs the instant proceeding. *See Brock*, 480 U.S. at 684; *Regan*, 468 U.S. at 652. As Section A conclusively resolves Mr. Patchak's sole legal challenge here (whether the Bradley tract lawfully has been taken into trust), notwithstanding any constitutional issues, this Court must deny Mr. Patchak's instant Motion for Summary Judgment and issue judgment in favor of the Tribe and the Secretary instead.

B. The Court Must Uphold the Secretary's Decision to Take the Bradley Tract into Trust Pursuant to the APA as the Tribe Was Under Federal Jurisdiction in 1934 Under the Controlling Agency Analysis

If this Court holds valid the Gun Lake Act, then Mr. Patchak's Motion for Summary Judgment and his entire claim have failed. Judgment must issue in the Tribe's favor. This Court may ***only*** proceed to a substantive analysis of whether to uphold the Secretary's decision to take the Bradley Tract into trust under the APA if it determines that Patchak has proved ***both*** that

Section B is unconstitutional ***and*** that Section A was not a valid exercise of Congress's plenary and exclusive authority.

Nevertheless, as set forth fully below, Mr. Patchak cannot meet his burden of demonstrating that the Secretary's trust acquisition was arbitrary or capricious, and hence his Motion for Summary Judgment cannot succeed on this basis.

1. This Court Must Take Notice of the Secretary's September 3, 2014 Notice of Decision Concluding that the Tribe Was Under Federal Jurisdiction in 1934 Pursuant to *Carcieri*

This court must base its decision on whether the Tribe was under federal jurisdiction in 1934 upon the Secretary's factual and legal conclusions contained in the Supplemental Administrative Record lodged by the United States on October 27, 2014 (ECF No. 75), applying the Supreme Court's interpretation of "now under federal jurisdiction" as articulated in *Carcieri*, 555 U.S. 395. Mr. Patchak's circular insistence that this Court must invalidate the Secretary's pre-*Carcieri* trust acquisition on the basis that it does not satisfy *Carcieri* without evaluating the Secretary's extant post-*Carcieri* analysis of this question is farfetched and contravenes clear authority of the Supreme Court and this jurisdiction.

This jurisdiction long has held that "administrative agencies have inherent power to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *E.g. Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)). Courts, in fact, are required to allow the agency to reconsider its prior decision and conduct additional investigation or explanation "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it. . . ." *Florida Power & Light Co. v.*

Lorion, 470 U.S. 729, 744 (1985). Such reconsideration is explicitly appropriate where an intervening legal change, including a new legal decision, affects the substance of the agency's prior decision. *E.g. Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 899 F.2d 1244, 1249 (D.C. Cir. 1990) (requiring the agency to reconsider its prior decision after an intervening legal opinion had changed "the legal background against which the [agency] rendered its interpretation. . .); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("The agency may [reconsider] because of intervening events outside of the agency's control, for example, a new legal decision or the passage of new legislation.") (citing *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 169 (1996)); *see also Lamprecht v. F.C.C.*, 958 F.2d 382, 385 (D.C. Cir. 1992) (discussing an agency's right to reconsider its prior decision to apply new legal standard contained in intervening legal decision).

Courts ***require*** that agencies must reconsider prior decisions where circumstances have changed because, if a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *accord I.N.S. v. Orlando Ventura*, 537 U.S. 12, 15 (2002). Courts "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery*, 318 U.S. at 88. This rule is also guided by the policy that courts must "allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (citing *Lamprecht*, 958 F.2d at 385). Furthermore, referral of such questions to the agency allows the agency to "bring its expertise to bear upon the matter[,] [to] evaluate the evidence[,] [to] make an initial determination[,] and, in doing so, it can, through informed discussion and analysis, help a court later determining whether its decision exceeds the leeway

that the law provides." *Ventura*, 537 U.S. at 17. Indeed, a court abuses its discretion when it "prevent[s] an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action." *Van Antwerp*, 560 F.Supp.2d at 23 (quoting *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)).

In *National Fuel Gas Supply Corp.*, the D.C. Circuit considered circumstances similar to these when the Federal Energy Regulatory Commission had issued a ruling directed at a fuel company based upon legal authority that was subsequently overturned by the D.C. Circuit in a separate case. *National Fuel*, 899 F.2d at 1246-49. The fuel company challenged the Commission's ruling under the new legal standards, however, the Court in *National Fuel* declined to rule upon the validity of the decision, and instead ruled that the Commission must be permitted to reconsider its ruling in light of the new authority. *Id.* at 1249. Recognizing the Commission's expertise and its congressionally delegated power to decide the disputed matter, the Court held that "it would therefore be inappropriate . . . to venture an assessment of the Commission's [decision] now that the legal background against which the Commission rendered its interpretation has been so dramatically . . . altered." *Id.* The Court concluded that, allowing such reconsideration "comports with the general principle that ***an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review***." *Id.* (citing *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 890 F.2d 435, 438-39 (D.C. Cir. 1989)) (emphasis added).

Even more to the point, in *New York v. Salazar*, 6:08-CV-00644 LEK, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012), a district court was called upon to apply the Supreme Court's ruling in *Carcieri* to the Secretary's pre-*Carcieri* decision to take certain land into trust on behalf of an Indian tribe. *Id.* at *11-17. As here, although the Secretary had previously rendered a final decision on the land's trust status and the Secretary's authority to take the land into trust under the

IRA, this decision predated *Carcieri*, hence, the Secretary had not had an opportunity "to consider the *Carcieri* issue and arrive at an informed decision." *See id.* at *13. Absent the *Carcieri* analysis, the court ruled that the Secretary's analysis of her authority to take the land into trust was deficient. *Id.* at *14. Applying the same principles discussed herein, the court held that the Secretary must be permitted to reconsider its decision and to specifically apply the new rule set forth in *Carcieri*. *Id.* at *12-13 (citing *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006); *Ventura*, 537 U.S. at 16; *Lorion*, 470 U.S. at 744; *Chenery*, 318 U.S. at 87-88). The court emphasized that "DOI (via the [Bureau of Indian Affairs]) has specific expertise that [courts] lack[]." *Id.* at *14 (citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001)); *accord Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 114-15 (D.D.C. 2006). It emphasized the importance of the notion that the agency, employing its expertise, must be allowed to "determine[] the facts and decid[e] whether the facts as found fall within a statutory term." *Id.* at *15 (citing *Thomas*, 547 U.S. at 186). The agency can then "bring its expertise to bear upon the matter, it can evaluate the evidence, it can make an initial determination; and, in doing so, it can, through informed discussion and analysis help a court later determine whether its decision exceeds the leeway the law provides." *Id.* (citing *Thomas*, 547 U.S. at 186-87).

In the present case, no one disputes that the Supreme Court's intervening decision in *Carcieri* has changed "the legal background against which the [Secretary] rendered [her] interpretation. . ." of whether the Secretary lawfully could take the Bradley Tract into trust on behalf of the Tribe. *See National Fuel*, 899 F.2d at 1249. It is undeniable, therefore, that this post-*Carcieri* challenge to the Bradley Tract's trust status must be based upon the Secretary's post-*Carcieri* analysis of the Tribe's status in 1934. A *Carcieri* analysis of the 2005 pre-*Carcieri*

decision would be both meaningless and impermissible, as the court would not be relying upon a relevant agency decision—it would be either paving its own path or relying on nothing.

This is underscored by the insubstantial nature of Mr. Patchak's arbitrary-and-capricious analysis at pages 23 through 25—barely three full paragraphs of analysis in total. Mr. Patchak fails even once in this analysis to criticize any reasoning of the Secretary in the 2005 decision that is contrary to *Carcieri* or any application of law to facts by the Secretary in the 2005 decision that is contrary to *Carcieri*. The reason for this is simple: that reasoning and analysis do not exist in the 2005 decision because *Carcieri* did not exist in 2005. Yet a basic premise of administrative law is that "[t]he task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." *Lorion*, 470 U.S. at 743-44. More specifically, the arbitrary and capricious analysis, including as set forth in the cases cited by Mr. Patchak, requires examination of an agency's reasoning and application of the relevant law to the relevant facts. S*ee Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 404 F.3d 454, 457 (D.C. Cir. 2005) (holding agency action to be arbitrary and capricious because of agency's ***unexplained*** departure from controlling precedent); *Lorillard, Inc. v. United States Food and Drug Administration*, --- F. Supp. 2d ---, CV 11-440 (RJL), 2014 WL 3585883 (D.D.C. July 21, 2014) (explaining the well-established rule that an agency action will be arbitrary and capricious, *inter alia*, where the administrative record shows that the agency relied upon impermissible factors, or failed to consider an important question, or offered an explanation for its decision that runs counter to the evidence). Mr. Patchak, however, would have this Court render a decision on whether the agency properly considered "under federal jurisdiction" pursuant to *Carcieri* without any relevant record at all.

And while Mr. Patchak turns a blind eye toward the new *Carcieri*-based decision, which is full of facts and analysis reaching the jurisdictional question at issue here, he gleefully announces at every turn that "no evidence exists" of this *Carcieri* fact or that *Carcieri* fact. ECF No. 87-1 at pp. 19, 20, 25. Outrageously, he even accuses the Tribe and the Secretary of failing to "argue[] or ***produce***[] any evidence" of a certain factor he believes should be considered in the *Carcieri* analysis. MSJ at p. 19. If Mr. Patchak wants relevant evidence, including easily reviewable facts and analysis explicitly reaching the sole legal question raised by Mr. Patchak in this lawsuit, he need only look to the Amended Notice of Decision lodged by the United States on October 27, 2014. Indeed, he cannot avoid those facts and analysis, try as he might, because, as set forth in detail above, the law requires that this Court consider them.

All of the cases cited *supra*, contemplated a *remand* to the agency to allow the agency to reconsider its decision in light of the changed circumstances or the new authority governing its decision. *See, e.g.*, *Thomas*, 547 U.S. at 186; *Ventura*, 537 U.S. at 16; *Lorion*, 470 U.S. at 744; *Chenery.*, 318 U.S. at 87-88; *Van Antwerp*, 560 F. Supp. 2d at 23; *Ethyl Corp.*, 989 F.2d at 523-24; *National Fuel*, 899 F.2d at 1249; *SKF USA Inc.*, 254 F.3d at 1028. However, a remand in this particular case would be wholly contrary to the notion that this Court's review of an agency's decision should conserve the Court's and the parties resources (s*ee Ethyl Corp.*, 989 F.2d at 523-24) because, here, the agency already has brought its expertise to bear upon the question of whether the Tribe was under federal jurisdiction in 1934 consistent with *Carcieri.* SAR000617-58. Remand would be a pointless formality, because that document, including supplementation of the historical record, evaluation of the evidence, and a conclusive determination of the Tribe's status in 1934 has already been created and made available to the Court and to the parties to assist in

determining whether the Secretary's decision was, in fact, arbitrary and capricious as Mr. Patchak insists in this proceeding.[7]

2. All Matters of Statutory Interpretation in this Matter Are Controlled by the Indian Canons of Construction

As a general rule, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Muscogee (Creek) Nation*, 851 F.2d at 1444. In these situations, "[t]he governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell*, 240 F.3d at 1101 (quoting *Blackfeet Tribe*, 471 U.S. at 766). As discussed in detail below, there is no question that deferential standards set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) and the decisional law that flows from it factor significantly in this matter. However, as this case concerns an Indian tribe and a statutory and regulatory scheme created to govern Indian tribes, this matter is even more fundamentally governed by the well-established Indian canon. Indeed, so significant are the principles underlying the Indian canon, that where *Chevron* and the Indian canon compete, the Indian canon prevails. *Cobell*, 240 F.3d at

[7] While the Tribe does not believe that a remand would be appropriate here for the reasons cited above, it is clear pursuant to the case law cited herein that such a remand would trump reliance upon the 2005 agency decision. In the event that this Court orders a remand to the agency to reconsider its decision in light of *Carcieri* rather than relying upon the extant 2014 agency decision, it should not vacate the Secretary's trust acquisition of the Bradley Tract as the agency easily can cure the deficiencies in the 2005 decision and as the trust property already has been developed and provided great benefit to the Tribe and the surrounding community. Whether or not to vacate an agency decision on remand is in a District Court's discretion. *E.g. Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). Whether to vacate on remand "depends on whether (1) the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860-62 (D.C. Cir. 2012) (declining to vacate on remand where agency easily could cure and impact on community of cessation of certain mail service would be dire). Further, courts should not vacate on remand where vacatur would be inappropriate, *i.e.*, when "the egg has been scrambled and there is no apparent way to restore the status quo ante." *Id.* (declining to vacate as program had launched and farmers had acted in reliance upon the program in ways that could not be undone). In this case, the Tribe has incurred $195,000,000 in debt to build its gaming facility, and now employs nearly 1000 persons at the facility. ECF No. 78 at p. 8. Also, State and local governments rely on revenues from the casino for current public projects and future planning. *Id.* Clearly, vacatur (which Patchak does not request) would be seriously disruptive and costly.

1101 (quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) ("This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from the ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people.").

Normally, *Chevron* and the Indian canon interact where the agency has interpreted a statute against a tribe, and as noted above, in such circumstances the Indian canon trumps *Chevron* deference. *See id.* However, if the challenged agency interpretation is consistent with liberal construction in favor of the Indians, the two deferential standards work in tandem, confirming one another. *See Quantum Entm't Ltd. v. U.S. Dep't of the Interior*, 714 F.3d 1338, 1346 (D.C. Cir. 2013) (noting with approval an agency interpretation entitled to *Chevron* deference that was consistent with the Indian law canon of construction "because it dovetailed with . . . Indian-protective goals"); *see also Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 471 (D.C. Cir. 2007) ("Accordingly, because the Secretary's interpretation of IGRA's 'initial reservation' exception is due deference under *Chevron* and is a permissible interpretation that is consistent with the Indian canon of construction, we affirm the grant of summary judgment to the Secretary.").

It is clear, moreover, that besides working in tandem with *Chevron*, the Indian canons can work interpretively ***upon*** the *Chevron* test, requiring a liberal construction in favor of the Indians even as to the two-step *Chevron* analysis. *See Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 146 n. 19 (D.D.C. 2005). That the Indian can would control *Chevron* flows logically from the notion that the Indian canon generally would trump the *Chevron* analysis where the two would compete. Courts are not clear, however, as to the scope of such

interaction. *Id.* ("[I]t is unclear whether the canon operates at *Chevron* step one, step two, or both.") Nevertheless, it is plain that to the extent that any statute or interpretation is susceptible to ambiguity in the instant case, the broad governing principle, even above the *Chevron* analysis, must be that these ambiguities must be construed liberally in favor of the Tribe. *See, e.g.*, *Blackfeet Tribe*, 471 U.S. at 766. If there is any doubt in how to apply *Chevron* to the analysis in this case, such doubt also must be resolved in favor of the Indians under the Indian canon. *See Colorado River Indian Tribes*, 383 F. Supp. 2d at 146; *Blackfeet Tribe*, 471 U.S. at 766.

3. This Court Must Afford Deference to the Department of Interior's Interpretation of "Now Under Federal Jurisdiction" Under Sections 5 and 19 of the Indian Reorganization Act

a. The Meaning of "Now Under Federal Jurisdiction" Is Ambiguous and Not Susceptible to a Plain Meaning Interpretation

Under *Chevron*, this Court must answer the threshold question of "whether Congress has directly spoken to the precise issue." 467 U.S. at 842. "If the statute is silent or ambiguous with respect to the specific issue," this Court must "ask whether the agency's position rests on a 'permissible construction of the statute.'" *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1280 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 842-43). A reviewing court determining whether Congress has specifically addressed the question at issue, "should not confine itself to examining a particular statutory provision in isolation." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Whether the statute is ambiguous should be derived from the statutory context. *Id.* Furthermore, for purposes of *Chevron*, a statute may be ambiguous if it requires the agency to use its discretion in applying the statute. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999).

Mr. Patchak claims that, in the present case, "Congress has directly and unambiguously spoken on the statutory provision at issue. . ." because, he asserts, "[t]he 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.'" ECF No. 81-1 at p. 22. Under federal jurisdiction, he says, means, unambiguously, "federally recognized" in 1934. *Id*. at pp. 10-13. Unfortunately for Patchak, this jurisdiction already has held that the meaning of "under federal jurisdiction" in 1934 remains ambiguous after *Carcieri*. *Stand Up for California! v. U.S. Dept. of Interior*, 919 F. Supp. 2d 51, 66-67 (D.D.C. 2013). Likewise this jurisdiction already has held that the meaning of "recognized Indian tribe" remains ambiguous, as well as "whether a tribe must have been 'recognized' in 1934 to be eligible for trust land." *Id.* at 69. The court in *Stand Up for California!* held that these terms are ambiguous for precisely the reasons set forth herein and as discussed below in the agency's interpretation of these decision. *See* part (3)(b) *infra*.

Notwithstanding, that controlling authority is contrary to Mr. Patchak's claim that "under federal jurisdiction" lacks ambiguity, Mr. Patchak also cannot actually establish that "under federal jurisdiction" means "federally recognized," nor can he pin down even the barest semblance of the related question of what "federally recognized" in 1934 might mean.

Indeed, the most concrete rule that Patchak can derive from *Carcieri* is that the "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." ECF 81-1 at p. 10 (emphasis added). This strong intimation, Mr. Patchak claims, flows from the fact that "[w]hile the majority ***did not squarely address this issue***, its opinion ***strongly implied*** a narrow, strict reading of the term. . . ." *Id.* (emphasis added). Mr. Patchak attempts to bolster his claim that the term is unambiguous by

noting the philosophical leanings of the majority, stating that the strong intimation was rendered by a "block of Justices whose statutory interpretation philosophy is traditionally more restrictive. . . ." *Id.* at p. 11.

He then helpfully points out that the "written opinion did not [even] opine" on the so-called unambiguous definition of "under federal jurisdiction," and blames that omission on the unspoken "***underlying assumption*** in *Carcieri* . . . that federal jurisdiction *required* federal recognition." ECF at p. 11 (initial emphasis added). However, to support this claim, Mr. Patchak cites Justice Souter's reference to the Secretary's statement at oral argument, which actually emphasizes the *differences* between the concepts of federal jurisdiction and federal recognition not their similarity.[8] MSJ at p. 11 (citing *Carcieri*, 555 U.S. at 400 (Souter, J., concurring in part, dissenting in part. Furthermore, Mr. Patchak ignores Justice Souter's clear explanation on the same page that he cites for the opposite proposition that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Carcieri*, 555 U.S. at 400 (Souter, J. concurring in part, dissenting in part).

Mr. Patchak also places significant emphasis on language in the majority opinion that is wholly ambiguous or constitutes dicta. ECF No. 81-1 at p. 11. While the Court found that the Narragansett Tribe failed to refute that the petitioner's explicit assertion that they were "neither federally recognized ***nor*** under the jurisdiction of the federal government," the Court never explicates either term and only one of them ("under federal jurisdiction") is actually a reference to

[8] Patchak's reference to the Secretary's statement at oral argument, which Patchak quotes for his assertion that the Secretary "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same," is (like many of Patchak's references) selectively quoted. In fact, Justice Souter and the Secretary were both highlighting the differences between the ***modern*** understanding of the two concepts and the understanding of these concepts in 1934—a notion that further confuses this the definition of the term as set forth herein.

the statutory language discussed in the Court's holding.[9] Further, although the Court refers to the Narragansett Tribe's Final Determination for Federal Acknowledgment (48 Fed.Reg. 6177 (Feb. 2, 1983)), it does not even begin to discuss how this fact weighs in any analysis of whether a Tribe is under federal jurisdiction. Indeed, the majority opinion contains no analysis whatsoever regarding the meaning of "under federal jurisdiction" in 1934.[10]

The conclusion that must be drawn, therefore, is that the meaning of "under federal jurisdiction of the United States when the IRA was enacted in 1934" ***is not*** clear either from the statute itself or from the Supreme Court's decision in *Carcieri*. Further, even if Mr. Patchak could persuade that the Supreme Court *did* mean to equate "jurisdiction" and "recognition," the meaning of "federal recognition" of an Indian tribe in 1934 remains unclear. Indeed, Mr. Patchak evinces no clue what it might mean. He appears to take the Justice Potter Stewart approach the question—he will know it when he sees it. He posits that perhaps federal recognition derives from tribal compliance with a treaty, although Mr. Patchak cites no authority for the proposition that noncompliance with a treaty would terminate a tribe. ECF No. 81-1 at p. 14. He posits that perhaps the meaning of federal recognition derives from federal acknowledgment under the procedures promulgated by the Department of Interior in 25 C.F.R. § 83, however, he fails to acknowledge that those procedures were not even drafted until 1978 (*see* 43 Fed. Reg. 39,361 (1978)) and hence could have no logical bearing on "federal recognition" in 1934. MSJ at p. 14-15. Therefore, Mr. Patchak's assertion elsewhere in his brief that the Tribe's application for acknowledgment under

[9] "We hold that the term 'now under ***Federal jurisdiction***' in § 479 unambiguously refers to those tribes that were under the ***federal jurisdiction*** of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395 (emphasis added).

[10] Furthermore, Patchak's reliance upon *Alabama v. PCI Gaming Authority*,-- F.Supp.2d --, 2:13-CV-178 WKW, 2014 WL 1400232, at *15 (M.D. Ala. Apr. 10, 2014), is unavailing as that case plainly misstates *Carcieri* when it alleges that the Court held that the Narragansett Tribe was not under federal jurisdiction in 1934 because the Narragansett Tribe did not achieve federal recognition until 1983. As Justice Breyer clarified in his concurring opinion, the statute "imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring); *accord Stand Up for California!*, 919 F. Supp. 2d at 66-67.

those procedures constitutes a factual admission that the Tribe was not under federal jurisdiction in 1934 is wholly incomprehensible. *See id* 14-16.

He even touches upon the criteria suggested by Justice Breyer in his concurring opinion in *Carcieri*, but in so doing, makes some serious mistakes. First, he blatantly mischaracterizes the Ninth Circuit's holding in *Big Lagoon Rancheria v. California*, 741 F.3d 1032 (9th Cir. 2014). He correctly notes that the court considered whether the tribe in that matter was on a list of 258 tribes compiled shortly after the IRA was enacted, which he concedes both Justice Breyer and the Ninth Circuit noted was not determinative of under federal jurisdiction. ECF No. 81-1 at p. 17 (citing *Big Lagoon*, 741 F.3d at 1044). However, Mr. Patchak avers that in *Big Lagoon*, "[b]ased on the tribe's 'undisputed absence from that list,' the court determined that the tribe was not 'under Federal jurisdiction' in 1934. . . .'" *Id*. That is simply false. In fact, *Big Lagoon's* discussion of the list was ancillary to and dependent upon a broader fact discussion.[11] Likewise, Mr. Patchak's comment that, "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 passage of the IRA" (MSJ at p. 18) is purely incomprehensible as Congress outlawed the making of treaties with the Indians in 1871 (*see United States v. Kagama*, 118 U.S. 375, 382 (1886). Hence, the Tribe could not possibly enter into a treaty after 1870.

These missteps in Mr. Patchak's brief clearly demonstrate that the meaning of "under federal jurisdiction" across history is elusive, as this jurisdiction has previously acknowledged.

[11] *Big Lagoon* states that the tribe's "undisputed absence from that list, ***combined with other facts***, leads us to the conclusion that the tribe was not under federal jurisdiction in 1934." *Big Lagoon*, 741 F.3d at 1044 (emphasis added). The court then proceeded to analyze in detail whether the present tribal members were descended from the original group for whom the land in question was reserved, and then concluded that "there was no family or other group on what is now the Big Lagoon Rancheria in 1934." *Id.* As such, "[s]ince no one resided on what is now the rancheria, there was no group to organize. The absence of Big Lagoon from the 258-tribe list was not an intentional or inadvertent omission; it was a reflection of reality." *Id.* Despite, Mr. Patchak's characterization, therefore, the Ninth Circuit's reference to the list was ancillary to and dependent upon a broader factual discussion.

Stand Up for California!, 919 F. Supp. 2d at 66-67. Federal Indian policy and the criteria for defining what group is or is not a tribe under federal jurisdiction has changed over time, from the treaty era, to the allotment era, to the IRA, to the termination era, to the tribal restoration era to the present. Indeed, the United States failed to establish any specific criteria for federal acknowledgment until 1978. *See* 43 Fed. Reg. 39,361 (1978). Further, as *Carcieri* demonstrates, even the United States did not understand "now under jurisdiction" to mean "in 1934" for ***75 years—***the amount of time between the enactment of the IRA and *Carcieri*. To fully outline the ambiguity inherent in the meaning of "under federal jurisdiction" in 1934, would require a legal history better suited for a law review article—those certainly exist and courts including the United States Supreme Court rely upon them for guidance through this difficult issue. *E.g. Carcieri*, 555 U.S. at 398 (Breyer, J. concurring) (citing William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331 (1990)).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW is "the leading treatise on federal Indian law." *Patchak*, 132 S. Ct. 2199, 2211 (2012); *see also* Matthew L.M. Fletcher, *Toward a New Era of American Indian Legal Scholarship: An Introductory Essay for the* American Indian Law Journal, 1 Am Indian L.J. 1, 6-7 (2012). COHEN'S has been cited by the Supreme Court more than all but one other Indian law scholar (*id.* at 6 n. 14), and Cohen's original 1942 edition was called by Justice Felix Frankfurter "an acknowledged guide for the Supreme Court in Indian litigation" Robert A. Williams, Jr., *The Hermeneutics of Indian Law American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy by Charles F. Wilkinson*, 85 Mich. L. Rev. 1012, 1012 n. 4 (1987) (quoting FELIX FRANKFURTER. OF LAW AND LIFE AND OTHER THINGS THAT MATTER 143 (1965)). COHEN'S devotes nearly 30 pages to the question of tribal federal

recognition, acknowledgment, and jurisdiction, and notes widely disparate methods of federal recognition across the years. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.02[2]-[8] (2012 ed.) ("COHEN'S"). On the specific Carcieri question, COHEN'S opines:

> Since *Carcieri*, the question of what it means to be "under federal jurisdiction," for purposes of the IRA, has acquired great importance. The 1934 edition of Webster's New International Dictionary, which the *Carcieri* Court used to define the word "now," defines the word "jurisdiction" as the "[a]uthority of a sovereign power to govern or legislate; power or right to exercise authority; control." Significantly, this definition does not require the actual exercise of authority, merely the power or right to do so. Thus, any tribe subject to federal plenary power over Indian affairs could be considered "under federal jurisdiction," especially if the federal government has at any time taken some action, such as treaty negotiations, provision of federal benefits, inclusion in a BIA census, or forcible relocation that reflects and acknowledges federal power and responsibility toward the tribe. The Supreme Court has affirmed that Indian tribes remain under federal power (jurisdiction) unless they have ceased tribal relations or federal supervision has been terminated by treaty or act of Congress. Furthermore, any tribe that has been federally recognized through the process administered by the federal Office of Federal Acknowledgment has had to demonstrate its continuous existence as a social and political group (tribal relations) and the absence of federal termination, thereby also establishing its subjection to federal power over Indian affairs. Therefore, any tribe federal recognized by the means should be able to show that it was "under federal jurisdiction" in 1934

COHEN'S, §3.02[6][d] (internal citations omitted).

Admittedly, COHEN'S interpretation of the term, by itself, would support a finding that the Tribe in this matter was decidedly under federal jurisdiction in 1934, as it has satisfied all of the criteria demonstrating continuous existence of a tribal group, by virtue of its successful application for federal acknowledgment, and absence of federal termination; however, at the very least COHEN'S comment accentuates the fact that Mr. Patchak's callow suggestion that "under federal jurisdiction" is susceptible to a plain meaning interpretation must fail. The term is plainly ambiguous and hence triggers step two of the *Chevron* analysis discussed by Mr. Patchak: whether the Secretary's interpretation of whether the Tribe was under federal jurisdiction "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Furthermore, as set forth below, the agency's interpretation of the statute contained in the March 12, 2014 Solicitor's Memorandum is thoroughly reasoned and consistent with the agency prior decisions and hence should be accorded deference consistent with its persuasive power. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

b. The Depart of Interior's March 12, 2014 Memorandum Interpreting and Providing an Analytical Framework for the Question of Whether a Tribe Was Under Federal Jurisdiction in 1934 Is Entitled to this Court's Deference

The United States Department of Interior, to which Congress has delegated authority under the IRA to acquire trust land on behalf of tribes (25 U.S.C. § 465), has agreed with COHEN'S that the concept of "under the federal jurisdiction of the United States when the IRA was enacted in 1934" (*Carcieri*, 555 U.S. at 395) does not have a plain meaning and requires construction and interpretation by the agency having expertise in this matter. As such, on March 12, 2014, the Solicitor of the Department of Interior issued a Memorandum to the Secretary explicating "The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act," and setting forth a two-part inquiry to determine whether a tribe was under federal jurisdiction in 1934 such that the Secretary properly may take land into trust on its behalf. *See generally* Solicitor's Memorandum. As set forth below, the Solicitor's Memorandum is entitled to deference that favors the Tribe.

Under *Chevron*, if Congress implicitly has left a gap for the agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 843-44. Courts must accord deference to an agency's interpretation of a statute even where the issue is whether the agency exceeded the authority authorized to it by Congress. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1866-71 (2013). A court also must defer to an agency's permissible construction of a statute even if it is

not the same construction that the court would have given. *New Jersey v. E.P.A.*, 517 F.3d 574, 581 (D.C. Cir. 2008) (citing *Chevron*, 467 U.S. at 843 n. 11). Although courts generally will not apply *Chevron*-style deference to an opinion letter, such letters are "entitled to respect" to the extent that they are persuasive as set forth in *Skidmore*. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Courts may determine the "power to persuade" by evaluating "the thoroughness evident in the agency's consideration, the validity of its reasoning, and its consistency with earlier pronouncements." *Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 90 (D.D.C. 2011) (citing *Skidmore*, 323 U.S. at 140). Further, a court may determine that an agency's interpretation "may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id.* At 90-91 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)).

In addition, agency interpretations entitled to strong *Skidmore* deference are those that contain detailed, in-depth explanation, rely on authoritative texts, weigh competing methods of interpretation, and demonstrate the agency's specialized expertise. *See, e.g. Brown v. United States*, 327 F.3d 1198, 1206 (D.C. Cir. 2003) ; *Tripoli Rocketry Ass'n, Inc. v. U.S. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 5-8 (D.D.C. 2004). Agency interpretations that lack persuasive power under *Skidmore* include circular reasoning and lack deliberation. *See, e.g. Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533-34 (2013). Agency legal opinions will fail persuasively when they have been made with no deliberation, "fail []to provide any logic for [the agency's] interpretation of the [statute]. . ." and are so vague as to "reflect []a complete lack of any thoughtful deliberations." *See New York State Bar Ass'n v. F.T.C.*, 276 F. Supp. 2d 110, 139 (D.D.C. 2003).

There is no question that the Department of Interior and the Bureau of Indian Affairs ("BIA") have specialized expertise that properly positions them to interpret this ambiguous statutory provision in a way that is consistent with federal Indian law standards and prior administrative and judicial decisions in this area. *See, e.g., Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 109 (D.D.C. 2009) (citing *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985)). Furthermore, the Solicitor's Memorandum is powerfully persuasive—relying upon controlling decisional law, its own prior interpretations, accepted principles of statutory construction, and objective historical facts. Its analysis is clearly intended to have precedential force within the agency and to provide a solid standard by which a reviewing court may measure trust acquisition decisions arising from it.[12]

The Solicitor's Memorandum first identifies the ambiguity inherent in the term "under jurisdiction of the United States under the IRA in 1934" (*Carcieri*, 555 U.S. at 395), noting the same factors discussed in part IV(B)(3)(a) *supra*. Solicitor's Memorandum at *1-7. It examines in detail *Carcieri's* majority opinion and notes, as the Tribe has here that despite its clear holding, "[t]he majority . . . did not address the meaning of the phrase 'under federal jurisdiction' in Section 19. . . ." *Id.* at *2. Likewise, it examines Justice Breyer's concurring opinion, noting his explication that the meaning of the term "may prove somewhat less restrictive than it first appears" as "a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." *Id.* (citing *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)). The Memorandum concludes, therefore, as Justice Souter did, that the "concepts of 'recognized' and

[12] Indeed, the Memorandum is explicitly mindful of the fact that *Skidmore* deference should apply to its ensuing interpretation. Solicitor's Memorandum at *4 ("For *Skidmore* deference to apply, a reviewing court need only find the existence of factors pointing toward a reason for granting the agency deference.") (citing *Chevron*, 467 U.S. at 842-45; *Mead*, 533 U.S. at 229-31; *City of Arlington, Tex.*, 133 S. Ct. at 1866-71; *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005)).

'under federal jurisdiction' in Section 19 are distinct." *Id.*; *see also Carcieri*, 555 U.S. at 400 (Souter, J. concurring in part, dissenting in part). The Memorandum proceeds to discuss the historical jurisdictional nuances that Justice Breyer outlined in his concurring opinion demonstrating the various ways that tribes may have been under federal jurisdiction in 1934 despite the BIA's failure explicitly acknowledgment such facts. *Id.*

Further, the Memorandum engages in a detailed analysis of the IRA, its legislative history, and the and the political and social research that informed the drafters, citing Indian Commissioner John Collier's testimony to Congress and the Meriam Report, the 1928 report on the conditions of the American Indians across the country that provided the basis for IRA reforms. *Id.* at *5. The Memorandum then examines the text of the statute based upon traditional statutory interpretation principles, and concludes that while the sources

> cast[] light on the broad scope of "jurisdiction," [they] fall short of providing a clear and discrete meaning of the specific statutory phrase "under federal jurisdiction." For example, these definitions do not establish whether in the context of the IRA, "under federal jurisdiction" refers to the outer limits of the constitutional scope of federal authority over the tribe at issue or to whether the United States exercised jurisdiction in fact over that tribe. I thus reject the argument that there is one clear and unambiguous meaning of the phrase "under federal jurisdiction."

Id. at *7.

Having concluded that the term is ambiguous, the Memorandum engages in the following analysis aimed at determining how the term should be interpreted. First, it reviews the broad legislative history of the IRA, including the bill drafts, floor debates, and agency comments upon the inclusion of the language "under federal jurisdiction." *Id.* at *7-9. The Memorandum further notes even contemporaneous confusion regarding the term, referring to a memorandum of Interior Solicitor Felix Cohen (original author of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW), which commented upon the bill's function to "limit[] recognized tribal membership to those tribes 'now

under [f]ederal jurisdiction,' *whatever that may mean*.'" *Id.* at *9 (citing Memo of Felix Cohen *Difference Between House Bill and Senate Bill*, at 2, Box 10, Wheeler-Howard Act 1933-37, Folder 4894-1934-066, Part II-C, Section 4 (4 of 4) (undated) (National Archives)). Next it outlines the backdrop of Congress's plenary authority over Indian affairs. *Id.* at *10-12.

It finally defines the meaning of "under federal jurisdiction" in light of the discussed "remedial purposes [of the IRA], the legislative history, and [Interior's] early practices, as well as the Indian canons of construction. . . ." Solicitor's Memorandum at * 15. The Solicitor concludes based on those considerations that the phrase 'under federal jurisdiction' requires a two-part inquiry. The first step is to examine "whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction . . . ." This inquiry requires examination of "whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of a tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." *Id.* The second step of the inquiry is "to ascertain whether the tribe's jurisdictional status remained intact in 1934." *Id.* The Solicitor notes that "[f]or some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934; [but in other instances], "it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934." *Id.*

The Memorandum then notes legal principles and restrictions that guide the analysis: (1) voting on the IRA after enactment is conclusive evidence of federal jurisdiction (*id.* at *16 (citing

Shawano County v. Acting Midwest Regional Director, Bureau of Indian Affairs, 53 IBIA 62 (2011)); (2) "the [f]ederal [g]overment's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status" (*id.* (citing Memo. from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, October 1, 1980, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe ("Stillaguamish Memorandum")); (3) "evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action" (*id*. (citing COHEN'S, § 4.01[1] (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-43 (D.D.C. 1976)))); (4) federal jurisdiction may exist even while dormant (*id.* (citing Stillaguamish Memorandum; *United States v. John*, 437 U.S. 634, 635 (1978)); and (5) "the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934 (*id.*).

The Memorandum finally examines in detail the various factors and evidence that can weigh in the federal jurisdiction inquiry. A tribe's vote on the IRA between 1934 and 1936 is conclusive proof in favor of federal jurisdiction and ends the inquiry, for which it cites *Carcieri*, 555 U.S. at 394-95 and several decisions of the Interior Board of Indian Appeals. (*Id.* at *16-17.) The Memorandum also examines the ways that Interior's interpretation and implementation of the IRA may factor in the analysis, including the agency's examination during the IRA era of whether a tribe was eligible for federal benefits as demonstrated in Solicitors' opinions and later Interior memoranda that included a Solicitor's comment that "'recognized tribe now under [f]ederal jurisdiction' includes all groups which existed and as to which the United States had a continuing course of dealings or some legal obligation in 1934. . . . ." *Id.* (citing Stillaguamish Memo.)

The Memorandum finally explicates the difference between federal recognition and federal jurisdiction. The Solicitor directly confronts analyses like Mr. Patchak's here that *Carcieri* held the two terms to be synonymous and reiterates the inescapable fact that "the Court's focused discussion on the meaning of 'now' never identified a temporal requirement for federal recognition," as confirmed by Justice Breyer's concurring opinion. *Id.* at *19. The Memorandum then expounds upon the various usages of the term "recognized" and concludes that, although *Carcieri* imposed a temporal limitation upon the term "jurisdiction" (1934), it did not do the same as to "recognized," hence the date of "recognition" is irrelevant to the analysis. *Id.* at *20.

The Solicitor's thoroughly-considered, well-reasoned, systematic interpretation of the meaning of "under federal jurisdiction" in 1934, is consistent with governing decisional law and prior pronouncements and considerations of the Department of Interior, and therefore, should be accorded strong deference under *Skidmore* commensurate with its demonstrated power to persuade. *See Christensen*, 529 U.S. at 586; *Skidmore*, 323 U.S. at 140; *Jackson*, 815 F. Supp. 2d at 91. The agency's statutory interpretation, moreover, serves the IRA's stated purpose of "providing land for Indians" (25 U.S.C. § 465); and because the agency's statutory interpretation represents a liberal construction of the term "under federal jurisdiction," which favors tribes, it is also consistent with the Indian canons. *See Blackfeet Tribe*, 471 U.S. at 766. Furthermore, any doubts arising in this Court regarding what measure of deference to accord to this statutory interpretation must also be guided by the Indian canon. *See Colorado River Indian Tribes*, 383 F. Supp. 2d at 146, n. 19.

4. The Secretary's Decision to Take the Bradley Tract into Trust Was Neither Arbitrary nor Capricious

Under the APA, this Court may only set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §

706(d)(A). "The party challenging an agency's action as arbitrary and capricious bears the burden of proof." *Lomak Petroleum, Inc. v. F.E.R.C.*, 206 F.3d 1193, 1198 (D.C. Cir. 2000). The arbitrary and capricious standard is a "highly deferential one[,] . . . [that] presumes agency action to be valid." *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 35 (D.C. Cir. 1976) (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The ultimate standard therefore is a narrow one, and "[t]he court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416. Under this standard, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* An agency action will be considered arbitrary and capricious "if an agency has '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.'" *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 34 (D.D.C. 2000) (quoting *Motor Vehicle Ass'n v. State Farm Mutual*, 463 U.S. 29, 42 (1983)).

Interior's determination that the Tribe was "under federal jurisdiction" at the time of the IRA's enactment under the interpretation set forth in the Solicitor's Memorandum was neither arbitrary nor capricious. To the contrary, the Department of Interior applied thoroughly researched applicable facts to the relevant two-part inquiry set forth in the Solicitor's Memorandum and concluded properly that the Tribe met both prongs of the test: the Tribe "unquestionably was under federal jurisdiction prior to 1934"; and the Tribe's "under federal jurisdiction status remained intact in and after 1934." SAR000650.

a. The Department of Interior Properly Concluded that the Tribe Was Under Federal Jurisdiction Prior to 1934

The Amended Notice of Decision ("NOD") adheres faithfully to the standards and guidelines set forth in the Solicitor's Memorandum. Indeed, it exceeds the quantum and proof and analysis required both by the law and by the agency interpretation to demonstrate that the Tribe was under federal jurisdiction in 1934. As the NOD notes, the existence of the treaties entered into between the Tribe and the United States during the 18th and 19th centuries[13] establishes definitively that the Tribe was under federal jurisdiction in 1934. SAR000622.[14] Further, the NOD explains that, as a matter of law, a dissolution provision in the 1855 Treaty of Detroit did not dissolve the Tribe's jurisdictional relationship with United States. SAR000629 (citing *United States v. Michigan*, 471 F. Supp. 192, 264 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert denied*, 454 U.S. 1124 (1981).) The NOD likewise notes the significance of Tribal attempts to renegotiate the treaties after 1855 as indicative of ongoing jurisdiction. *Id*. at 000630. Further, although the Tribe received no additional annuity payments after 1870, the NOD documents ongoing treaty-based relations between the Tribe and the federal government after this time. *Id*.at 000631.

Although the existence of an unabrogated treaty is sufficient, to satisfy this prong, the NOD notes significant additional indicia of federal jurisdiction prior to 1934, including federal attempts to remove the Tribe (SAR000632), receipt of government annuities (*id.*), inclusion in federal censuses (*id.* at 000633-34), successful assertion of claims by Tribal members against the United

[13] SAR 000623-28 (noting treaty history ranging from 1795 through 1855).

[14] Citing *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832); COHEN'S HANDBOOK (1942 ed.) (listing treaty relations as one factor relied upon the Department in establishing tribal status); Memo. from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, (M-36759) (Nov. 16, 1967) (discussing treaty relationship between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty).

States (*id.* at 00634-35), and Tribal inclusion in federal educational programs (*id*. at 000636). There is no question that these objective historical facts demonstrate a clear course of dealings for and on behalf both the Tribe and its Members "sufficient to establish federal obligations, duties, responsibility for or authority over the [T]ribe by the Federal Government" under the first step of the inquiry set out by the Solicitor's Memorandum; and hence it was certainly rational and neither arbitrary nor capricious. *See* Solicitor's Memorandum at *15.

Moreover, the Department's analysis, which relies upon the application of historical evidence to prior agency pronouncements and relevant decisional law, is exactly in line with this jurisdiction's case law examining agency determinations of "under federal jurisdiction" under *Carcieri*. In *Stand Up for California!*, this jurisdiction concluded that a plaintiff's challenge to a trust acquisition was unlikely to prevail as the agency's determination of "under federal jurisdiction prior to 1934" was based on "Historical DOI" documents. 919 F. Supp. 2d at 68.

b. The Department of Interior Properly Concluded that the Tribe's Federal Jurisdiction Status Remained Intact in 1934

The second step of the inquiry is "to ascertain whether the tribe's jurisdictional status remained intact in 1934." Solicitor's Memorandum at *15. As the Solicitor explained, "[f]or some tribes, the circumstances or evidence will demonstrate that jurisdiction was retained in 1934; [but in other instances], "it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934." *Id*. In the present circumstances, it is not disputed that the Tribe did not vote upon the IRA in the years after its enactment. However, as both Justice Breyer and the Memorandum note, while this may be conclusive evidence that federal jurisdiction existed in 1934, it is not evidence that federal jurisdiction did not exist in 1934. *Carcieri*, 555 U.S. at 400 (Breyer, J., concurring);

Solicitor's Memorandum at *16-17. Indeed, this factor is not even a consideration under the two-part inquiry because satisfying this factor precludes application of the two-part inquiry completely. Solicitor's Memorandum at *15-16.

In its consideration of whether federal jurisdiction remained intact in 1934, the Department of Interior considered efforts of the Tribe to be considered for inclusion in the IRA (SAR000640-43); the United States' official investigation and inquiry into the status of the Tribe and its Members during the IRA period (*id*. at 000642-43); and the affirmative withdrawal of federal services from the Tribe and its Members in 1939 (*id.* at 000645-48). The Department noted several important facets of this collection of historical facts. First, the records demonstrated that the United States' justification for failing to include the Tribe in the IRA was based explicitly upon the Department of Interior's erroneous view that it would be required to appropriate funds to acquire land on behalf of this landless Tribe in order to include it within the IRA and that funds were not available otherwise to support them. *Id.* at 000643-644. Second, the Secretary noted the starkly logical conclusion resulting from the United States' specific withdrawal of federal services to the Tribe and its Members in 1940—***that there would be no need for the United States to withdraw federal services from the Tribe in 1940 if they were not under the jurisdiction of the United States prior to that date***. *Id*. at 000637, 645-48.

The Department was mindful of the inconsistent attitudes of the federal government toward the Tribe in the record, but reiterated the Solicitor's instructions in the Memorandum:

> It should be noted that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status. And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself revoke jurisdiction absent express congressional action. Indeed, there may be periods where federal jurisdiction exists but is dormant. Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.

SAR000648 (citing Solicitor's Memorandum at * 15).

The Department concluded, based upon the foregoing, that "[a] determination that the Secretary is authorized to take land into trust for the [Tribe] under Section 5 of the IRA is thus consistent with the Supreme Court's decision in *Carcieri*. SAR000650. As set forth fully above, this conclusion was in accordance with the agency's well-reasoned and thorough interpretation of the law as set forth in the Solicitor's Memorandum. It considered the relevant factors governing the question of whether the Tribe was under federal jurisdiction in 1934. The Department of Interior's conclusion that the Tribe was indeed under federal jurisdiction in 1934—based upon historical fact applied to a prudent interpretation of the law—was neither arbitrary nor capricious and should be confirmed by this Court.

V. CONCLUSION

Based on the foregoing, Patchak's Motion for Summary Judgment should be denied.

Respectfully submitted December 4, 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 4th day of December, 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