IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK,

Plaintiff,

v.

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

Defendant,

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

Intervenor-Defendant

CASE NO. 1:08-CV-1331

HON. RICHARD J. LEON

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

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

In accordance with the Court's scheduling order entered on September 22, 2014, Plaintiff, David Patchak, respectfully submits this opposition in response to Intervenor-Defendant's ("Tribe" or "Gun Lake Band") Motion for Summary Judgment. (Dkt. No. 78.) As demonstrated below and in Plaintiff's Motion for Summary Judgment (Dkt. No. 80), Mr. Patchak is entitled to judgment as a matter of law.[1]

[1] Intervenor-Defendant's motion, in its own words, "does not arise from the question of whether the Secretary of Interior's 2005 decision to take certain land into trust was proper, but rather, the applicability of subsequent legislation and the separate threshold question of whether this suit is barred by the equitable doctrine of laches." In response to Intervenor-Defendant's "Statement of Material Facts Not in Genuine Dispute," filed with its summary judgment motion, Mr. Patchak submits his own Statement of Genuine Issues, supplementing, where necessary, material facts

I. SUMMARY OF ARGUMENT

As demonstrated in Plaintiff's Motion for Summary Judgment and below, the Secretary lacked authority to take into trust the Bradley Property for the benefit of the Gun Lake Band. Under the United States Supreme Court's decision in in *Carcieri v. Salazar*, 555 U.S. 379 (2009), Section 5 of the IRA limits the Department of Interior's authority to take land into trust on behalf of Indian tribes to those tribes who were under Federal jurisdiction when the Act passed in 1934. Because the Gun Lake Band was not under Federal jurisdiction at that time, the Secretary is not authorized to take land, including the Bradley Property, into trust on its behalf and its decision to do so violated the IRA.

In September of this year, Congress passed the Gun Lake Reaffirmation Act, which purported to reaffirm the Secretary's decision to take the Bradley Property into trust for the Tribe. Obviously, Congress cannot "reaffirm" the Secretary's decision to take into Trust property that it had no authority to take in the first place. The Gun Lake Act, however, violates the United States Constitution and therefore should be invalidated. Specifically, the Gun Lake Act usurps the Court's Article III power in violation of the separation of powers doctrine, infringes upon Plaintiff's First and Fifth Amendment rights, and constitutes an unlawful bill of attainder.

In addition, the Tribe's affirmative defense of laches cannot bar this claim because Mr. Patchak's claims were filed well within the statute of limitations set forth in the APA, nor was there any unreasonable delay or prejudice to the Defendants in the pursuit of the instant case.

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that were omitted from the Tribe's submission. LCvR 7(h). To be clear, in so doing, Plaintiff does not maintain or suggest that there exists any factual dispute necessitating a trial in this case.

For all these reasons, and the reasons set forth in Plaintiff's affirmative Motion for Summary Judgment, Plaintiff respectfully requests that this Court deny Intervenor-Defendant's Motion for Summary Judgment and grant Plaintiff's Motion for Summary Judgment.

II. LEGAL STANDARD

Intervenor-Defendant's Motion for Summary Judgment is not premised upon the propriety or authority of the Secretary of Interior to place land into trust for the Gun Lake Band, rather, it addresses only the applicability of the recently enacted Gun Lake Act and the Tribe's affirmative defense of laches. Thus, the standard of review for the Tribe's Summary Judgment Motion is embodied in Rule 56, which provides that a party is entitled to summary judgment in its favor if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

There is no genuine dispute or issue as to any material fact; the issues presented in the Tribe's motion are all legal questions, none of which require resolution of any disputed facts. Plaintiff has cross-moved for Summary Judgment in his favor, arguing that the application of these undisputed material facts to the law entitle him to judgment as a matter of law. With the exception of the Tribe's laches argument, Plaintiff's affirmative Motion for Summary Judgment, although based on an APA standard of review, addresses the same legal arguments raised by the Tribe. As such, disposition by summary judgment is appropriate, and the Court may deny the Tribe's motion and to grant summary judgment in Plaintiff's favor, in response to Plaintiff's Motion for Summary Judgment and this opposition.

III. ARGUMENT

A. The Secretary's Action of Taking The Bradley Land into Trust for the Gun Lake Tribe Was Unlawful.

In 2001, the Secretary of the Interior acquired the Bradley Property for the Gun Lake Band under the authority of Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465 ("IRA"). The Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), clearly established that Section 5 of the IRA does not authorize the acquisition of land in trust for a tribe that was not under federal jurisdiction on the date of enactment of the IRA in 1934. It cannot reasonably be disputed that the Gun Lake Tribe was not federally recognized in 1934, and it did not seek acknowledgement of its sovereign status until 1994. Intervenor-Defendant's Statement of Material Facts Not In Dispute ¶ 4. The Tribe was not otherwise under Federal Jurisdiction in 1934 either, as explained in detail in Plaintiff's Motion for Summary Judgment.

Moreover, the history behind the attempted legislative fix to the Secretary's fatally flawed decision (the Gun Lake Act) further demonstrates that the acquisition of the Bradley Tract into trust on behalf of the Gun Lake Tribe was unlawful. The House Committee on Natural Resources, which unequivocally stated the acquisition of the Bradley Tract is "now understood to be a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe in 2001" because " Section 5 of IRA does not authorize the acquisition of land in trust for a tribe, such as Gun Lake, whose members were not recognized and under federal jurisdiction on the date of enactment of IRA." H.R. REP. 113-590, at 1 (2014). According to the House Report, information provided to the Committee from the Department of the Interior did not conclusively demonstrate that the Gun Lake Band was a tribe that was recognized under federal jurisdiction when the IRA was enacted in 1934. The Committee further noted, "the Department [of Interior] has provided scant information to the Committee regarding the status of any tribe in 1934 except

for legal memoranda and various other records of questionable relevance and accuracy." H.R. REP. 113-590, at 2 (2014). The Senate Report also recognized that the "DOI lacked the authority to take nearly 150 acres into trust." S. REP. 113-194, at 3 (2014).

It is against this backdrop that the Gun Lake Act was passed. The Gun Lake Act did not amend any existing statute, nor did it change any existing law.[2] It merely purported to "reaffirm" the status of lands taken into trust for the Gun Lake Band by the Department of the Interior;[3] however, the Secretary never lawfully held the land in trust in the first place.

Proclaiming that this litigation is over, and relying upon the Gun Lake Act to support its position, the Gun Lake Band argues that the more "general grant of authority" to the Secretary of Interior to take land into trust contained in Sections 5 and 19 of the IRA has been "wholly nullified" by the Gun Lake Act. Intervenor-Def.'s Mot. Summ. J. at 2. This is completely inaccurate. The Tribe's argument turns a blind eye to the uncontroverted fact, based on its legislative history, that the Gun Lake Act made no amendment to existing law. This lack of change in existing law was recognized throughout the legislative process and so stated expressly by the Senate Committee on Indian Affairs and the House Committee on Natural Resources when recommending the legislation.[4] Both the House and Senate reports were clear on this fact. Indeed, the Report of the House Committee on Natural Resources went so far as to state that

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[2] This issue is discussed in more detail *infra*.

[3] Even this "reaffirmation" is questionable, and at a minimum, a poor choice of words. The court in *Carcieri* merely interpreted the existing law; it did not, nor could it, make law. Thus, the Secretary's actions taking the land into trust in 2001 were *ultra vires*, making any "reaffirmation" a nullity.

[4] As explained *infra*, both the Senate and House reports unequivocally state that the enactment of the Gun Lake Act **"will not make any changes in existing law."** S. REP. 113-194, at 4 (emphasis added); H.R. REP. 113-590, at 1 (2014)(emphasis added). Thus, it seems any argument to the contrary, that is, that the Gun Lake Act amended the IRA in any way, is wholly without merit.

there was no consensus in Congress on how to address *Carcieri,* noting that views of the Department of Interior were inconsistent on this issue. H.R. REP. 113-590, at 2 (2014).

Congress states with specificity any intent to override provisions of a long-standing act like the IRA, and there is nothing in the Gun Lake Act or its legislative history to suggest it amended or changed the IRA (or any statute, for that matter). Intervenor-Defendant's arguments that the Gun Lake Act altered any existing law in any way are simply specious.

B. The Gun Lake Act is Unconstitutional and Congress' "Plenary Authority" over Indian Affairs Cannot Suspend these Constitutional Protections.

Congress' power over Indian affairs is derived from and limited by the Constitution. *See, e.g., Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); *United States v. Wheeler,* 435 U.S. 313 (1978). As such, the "plenary power" of Congress to legislate with respect to Indian tribes is necessarily constrained by constitutional limits. Mr. Patchak does not take issue with the power of Congress to legislate, but respectfully, Mr. Patchak does raise the issue for this Court of whether the legislation that Congress passed, the Gun Lake Act, is constitutionally sound. There is nothing in any of the cases cited by the Tribe that would eliminate judicial review and this Court's consideration of the constitutional infirmities raised by Mr. Patchak. Where the issue is a constitutional one, it is well-settled that the courts have the last word. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Even "plenary authority," is not beyond the bounds of the constitution. *See U.S. ex rel. Humboldt S.S. Co. v. Interstate Commerce Comm'n*, 3 Alaska Fed. 611 (D.C. Cir. 1911) *aff'd* sub nom. *I.C.C. v. U.S. ex rel. Humboldt S.S. Co.,* 224 U.S. 474, 32 S. Ct. 556, 56 L. Ed. 849 (1912)("Congress, in the government of the territories, has plenary power, except as limited by the Constitution"). The Gun Lake Act, as

enacted by Congress, exceeds such authority. It fails to comport with the requirements of the United States Constitution and the requirements set forth in Section 5 of the IRA.

Not unlike the Tribe, Mr. Patchak has constitutional rights and is entitled to constitutional protections. In his motion for summary judgment, he addressed a number of significant constitutional problems overlooked by Congress when passing the Gun Lake Act, including issues arising out of the separation of powers doctrine, the First Amendment, the Fifth Amendment, and the constitutional prohibition against bills of attainder. There is no support for the notion that Congress' power, when crafting legislation affecting Indian tribes, is entitled to any greater deference, in the face of constitutional challenges, than other litigants. Congress is free to pass laws; however, it cannot escape judicial review of its actions, "plenary power" notwithstanding.

i. The Gun Lake Act Violates the Separation of Powers Doctrine.

There is no dispute that, unless the Gun Lake Act amended the underlying law, it would violate the constitutional separation of powers principle. *U.S. v. Klein,* 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871); *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, 115 S. Ct. 1447, 1453, 131 L. Ed. 2d 328 (1995); *Jung v. Ass'n of Am. Medical Colleges,* 184 Fed.Appx. 9, 12 (D.C. Cir.2006); *Nat'l Coalition to Save Our Mall v. Nortion,* 269 F.3d 1092, 1097 (D.C. Cir. 2001). Indeed, the D.C. Circuit has recognized that "[w]ith respect to ongoing cases, precedent suggests that if Congress explicitly legislates a rule of decision without amending the underlying substantive law it violates the exclusive province of the judiciary." *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 164 (D.D.C. 2002) *aff'd,* 333 F.3d 228 (D.C. Cir. 2003); *see also Paramount Health Sys., Inc. v. Wright,* 138 F.3d 706, 710 (7th Cir. 1998)(*Klein* stands for "the principle that Congress cannot direct the outcome of a pending case without changing the law

applicable to that case"); *Ruiz v. United States,* 243 F.3d 941, 948 (5th Cir. 2001)(citing *Klein* for the proposition that "[t]he separation of powers principles inherent in Article III prohibit Congress from adjudicating particular cases legislatively"); *Hadix v. Johnson,* 144 F.3d 925, 940 (6th Cir. 1998) ("[T]he Legislature may not impose a rule of decision for pending judicial cases without changing the applicable law"). Here, the Gun Lake Act did not amend either of the underlying laws, the IRA or the APA, by any stretch. Rather, with the Gun Lake Act, Congress attempts to overlay those laws with its own interpretive lens and direct this Court to reach a specific decision—dismissal—of the instant case.

An examination of the legislative history of the Gun Lake Act unequivocally demonstrates that the Act does not amend the IRA. First, the United States Senate requires the issuance of a Senate committee report that details how a bill will change any existing law. The report of the Senate Committee on Indian Affairs stated, under a topic captioned "CHANGES IN EXISTING LAW (CORDON RULE)," that the Committee found that the enactment of the Gun Lake Act **"will not make any changes in existing law."** S.Rep. 113-194, at 4 (2014). (emphasis added). Likewise, the House Committee on Natural Resources reported that the Gun Lake Act **"would make no changes in existing law."** H.R. Rep. 113-590, at 5 (2014)(emphasis added). The House Committee went further, to make clear that " the bill **does not change general Indian law or policy**." *Id*. This includes, as is relevant here, § 5 of the IRA. As such, it is evident that Congress did not—nor did it intend to—amend the IRA or any substantive law under which the Secretary's decision was made. The Gun Lake Act, therefore, squarely violates the constitutional principle of separation of powers, as set forth by *Klein* and its progeny.

Intervenor-Defendant relies heavily on *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 441, 112 S.Ct. 1407 (1992), but misconstrues the key holdings of that decision. In

Robertson, Congress enacted legislation that changed the standards by which agencies could satisfy the requirements of the Migratory Bird Treaty Act ("MBTA") in deciding to harvest lands for forestation. Specifically, the new act created two additional circumstances under which the agency could fulfill the requirements set forth in the MBTA. Critical to the *Robertson* Court's decision was that the Congressional enactment at issue "compelled changes in law, not findings or results under old law" because it created additional standards. *Id.* at 438. Moreover, the newly-enacted statute in that case specifically made reference to the older statute that it sought to amend. Most critically, perhaps, is that the legislation at issue in *Robertson* created new standards for the courts to apply, rather than directing any specific outcome in pending litigation.

The Gun Lake Act differs vastly from the law examined in *Robertson*. The Gun Lake Act neither references the IRA, nor does it create new standards for this Court to apply. Instead, it directs the Court to a specific decision in the instant case, overstepping the bounds of Congressional authority under the Constitution. The Gun Lake Act clearly crosses "[t]he line between a statute that provides the standard to which courts must adhere and a statute that compels a specific result in a pending action." *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 42 (D.D.C. 2004) *aff'd,* 184 F. App'x 9 (D.C. Cir. 2006)(citing *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir. 1993)).

The Tribe also puts great weight in the D.C. Circuit's decision in *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). Again, the Tribe mischaracterizes the breadth of that holding and its applicability to the instant litigation. In *Save Our Mall*, Congress passed an act that required the expeditious construction of a World War II memorial and stated that "the issuance of the special use permit identified in section 1 shall not be subject to judicial review." *Id.* at 1094. In so doing, the Court found that Congress had amended the applicable

law and removed from courts their jurisdiction to review that specific finding. *Id.* at 1097. First, as described *supra*, the Gun Lake Act does not amend any underlying statute. It is well-settled, and critical to the instant matter, that "[w]ith respect to ongoing cases, precedent suggests that if Congress explicitly legislates a rule of decision without amending the underlying substantive law it violates the exclusive province of the judiciary." *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 164 (D.D.C. 2002) *aff'd*, 333 F.3d 228 (D.C. Cir. 2003). Moreover, the Gun Lake Act does not remove jurisdiction from this Court, but rather directs this Court to make a particular decision, providing that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) … shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014). Indeed, the legislative history of the Gun Lake Act makes clear that the Act is intended to "void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property… filed by a neighboring private landowner named David Patchak." H.R.REP. 113-590, at 2 (2014). The Gun Lake Act is specifically designed to command this Court, part of the federal judiciary, to rule in favor of the United States Government in this pending litigation. That, quite simply, is not permissible under the United States Constitution.

Moreover, the 2001 statute in *Save Our Mall* was passed to effectuate the intentions of the 1993 Congress, which passed the original legislation authorizing the creation of a National World War II Memorial in Washington, DC. 147 CONG. REC. 2155 (2001). To the contrary, the Gun Lake Act attempts to contravene the intentions of the 1934 Congress when it enacted the IRA. Indeed, the judiciary alone has the power, pursuant to Article III, to interpret the statutory language chosen by that Congress. To that end, the Supreme Court decided, in *Carcieri*, that the 1934 Congress included the words "now under Federal jurisdiction," to intentionally limit the

IRA to tribes that were under Federal jurisdiction when the statute passed. With the statute enacted in *Save Our Mall,* the 2001 Congress effectuated the 1993 Congress' clear desire that a World War II memorial be built. Instead of effectuating a former Congress' intent, the Gun Lake Act did the opposite; this 2014 Congress attempts to circumvent the intended force of the IRA. It cannot do so, either constitutionally or under this delicately balanced, enduring political system.

Because the Gun Lake Act mandates a particular result in the instant case, a case that has been pending in the federal judiciary since 2008, it unconstitutionally usurps the judiciary's role under Article III to decide cases. Even further, the Gun Lake Act imposes a decision upon this Court, removes the capacity of this Court to make its own factual determinations, and directs this Court to dismiss the instant case. It has long been held that when a statute attempts to "prescribe rules of decision to the Judicial Department ... in cases pending before it," that statute has "passed the limit which separates the legislative from the judicial power." *Klein,* 80 U.S. at 146-47. Because it does so without amending the underlying law, the Gun Lake Act falls squarely within the parameters of a *Klein* violation and, as such, is constitutionally infirm.

For all these reasons, the Court should find that the Gun Lake Act, by attempting to bypass the IRA's requirements without amending the underlying statute and directing a particular decision by this Court, violates the constitutional principle of separation of powers.

ii. The Gun Lake Act Is a Clear Bill of Attainder and Is Constitutionally Prohibited.

Upon the same theory espoused by the plaintiffs in *Carcieri,* Mr. Patchak filed suit in 2008 in this Court seeking to enjoin the Department of the Interior and the Bureau of Indian Affairs from taking the Bradley Property into trust. When Mr. Patchak's complaint was filed, the land in question was not held in trust, and he tried diligently to obtain injunctive relief to

prevent that from happening. When Congress passed the Gun Lake Act in 2014, it was completely aware of the issues that *Carcieri* served to clarify under the IRA; however, Congress chose not to address those issues globally in its legislation.[5] Rather, Congress targeted Mr. Patchak directly, essentially reprimanding and punishing him for pursuing his right as a citizen to file suit in the first place. The Gun Lake Act dictates the dismissal of Mr. Patchak's lawsuit "promptly," and he is the sole person affected by this rule. Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014).

The Tribe's arguments that the Gun Lake Act is not a bill of attainder ignore the plain language of the Act as well as the legislative history. The Gun Lake Act was designed legislatively to end Mr. Patchak's suit following the Supreme Court's holding that he had standing under the Administrative Procedure Act to bring his claims challenging the land acquisition. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012). As described *supra*, David Patchak is even referred to by name in the legislative history.[6] H.R.REP. 113-590, at 2 (2014).

As Plaintiff addressed in his motion for summary judgment, the Bill of Attainder Clause to the Constitution provides protection against this type of targeted retroactive civil legislation. Pl.'s Mem. In Supp. Mot. for Summ. J. at 36-39. The Tribe counters Plaintiff's assertions by arguing that, because the Gun Lake Act does not inflict punishment, it is not a bill of attainder. It

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[5] The Report of the House Committee on Natural Resources made this observation about the Gun Lake Act: "The bill does not change general Indian law or policy. Rather, it ratifies the trust status of a discrete parcel of land. Section 2(c) of S. 1603 expressly provides that nothing alters the effect of *Carcieri* for any other action undertaken by the Secretary in the past, present, or future." H.R. REP. 113-590, at 2 (2014).

[6] As the D.C. Circuit has noted, early bill of attainder cases demonstrate that a statute will be particularly susceptible to invalidation as a bill of attainder where its effect is to mark specified persons with a brand of infamy or disloyalty. *Foretich v. United States,* 351 F.3d 1198 (2003), *citing U.S. v. Brown,* 381 U.S. 437, 453-54 (1965). It appears from the Tribe's brief that Mr. Patchak has achieved this unwarranted status of infamy.

is difficult to comprehend the Tribe's position that no legislative punishment is involved, when the Gun Lake Act by its very terms completely eradicates a right that Mr. Patchak traveled all the way to the United States Supreme Court to vindicate. The Act imposes a complete barrier to his ability to challenge a land use directly affecting him and his own property, a right that the Supreme Court found that he possessed.

The D.C. Circuit has stated that in determining whether a law is a bill of attainder, the Court looks to whether there is a rational connection between the restriction imposed and a legitimate nonpunitive purpose. *Foretich v. United States*, 351 F.3d 1198, 1219 (2003). The Tribe has failed to provide either a legitimate or a nonpunitive purpose supporting the Act. The Tribe suggests, however, that the law is nonpunitive because the goal of the legislation was to provide certainty to the legal status of the land it held in trust and to eliminate the "chaos" created by Mr. Patchak's litigation. Intervenor-Def.'s Mot. for Summ. J. at 25. Further, the Tribe argues, the sovereign interests of the Tribe are superior to Mr. Patchak's individual impairment of the enjoyment of his private property. Not surprisingly, the Tribe cites to no binding authority for the proposition that Mr. Patchak's interests are secondary to or of lesser importance than any other litigant's interests.

As the Supreme Court noted many years ago, the question of Congressional intent is not necessary to the inquiry whether a law results in punishment and is a prohibited bill of attainder. *See Cummings v. Missouri*, 71 U.S. 277 (1866). The question of punishment is one examined by looking not only at the purported ends of the contested legislation, but also at the means employed to achieve those ends. As noted here, Congress certainly could have targeted the Supreme Court's interpretation of *Carcieri* and taken action to change the law to the benefit of the Gun Lake Tribe and many others; however, that is not what happened here. Instead,

Congress singled out Mr. Patchak's lawsuit for special handling. Without doubt, there were other rational means to achieve the goals the Tribe now assigns to Congress, but they are not evident from the language of the Gun Lake Act. Mr. Patchak's lawsuit did not alter the underlying substantive law—where doing so may have served as a legitimate goal.

As the D.C. Circuit noted in *Foretich,* where there exists a significant imbalance between the magnitude of the burden imposed by legislation and a purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes. Such is the case here, where Congress has "piled on a burden" that was obviously disproportionate to any harm caused. *Id.* at 1222.

Congress' purposes were not benign when passing the Gun Lake Act, as is demonstrated by its language as well as the legislative history. This Court should invalidate the Gun Lake Act because it is an unconstitutional bill of attainder.

iii. The Gun Lake Act Is Overbroad and Lacks Clarity.

As Plaintiff addressed in his motion for summary judgment, the Gun Lake Act encroaches on his First Amendment right to petition the government and therefore is unconstitutionally overbroad. Pl.'s Mem. in Supp. Mot. Summ. J. at 32-34. In fact, the legislation goes so far as to foreclose any action "relating to the land described." Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014). When considering the legislation, the House Committee on Natural Resources addressed what it referred to as "an unusually broad grant of immunity from lawsuits pertaining to the Bradley Property" making it clear that "no one brought any concerns with the language to the attention of the Committee." H.R. REP. 113-590, at 2 (2014).

Ideally, Congress should have examined the legislation more closely before enactment and it certainly should have considered the First Amendment implications, providing some analysis in the legislative history. Its admitted failure to do so suggests that the actions of Congress were not consistent with constitutional requirements, making it even more important for the Court to perform its function in our "checks and balances" system.

The Gun Lake Act also, by its language, rules out ***all*** federal court actions relating to the land described and singles out and dictates the dismissal of Mr. Patchak's suit, without the benefit of any due process whatsoever. In that the Gun Lake Act does not contain or identify any limitation or exception to the prohibition of federal lawsuits, this immunity would include complete immunity from any tort actions, contract actions, criminal indictments and more—all actions in federal court are barred, to the extent that they "relate to the land" described. The statute offers no procedure to consider any exception to the bar.

The Due Process Clause of the Fifth Amendment provides that no one shall be deprived of property without due process of law. As Plaintiff addressed in his motion for summary judgment, this failure to permit due process—notice and an opportunity to be heard before striking an action—is fatal to the legislation. Mr. Patchak's rights, and the potential rights of any other citizen who may have otherwise had a claim "relating to the land described," are adversely affected by this legislation.

The Supreme Court has made clear that "[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to so do plainly appears." *United States v. Magnolia Petroleum Co.,* 276 U.S. 160, 162-63 (1928). The Gun Lake Act, as well as its legislative history, is silent on any Congressional intent to shut out every possible suit in federal court that could ever be filed that

relates to the Bradley Property,[7] yet the plain language of the Act does precisely that. Any potential legal claims "relating to the [Bradley] land," is far too broad. Whether the law is applied retroactively or prospectively, it should be stricken because of the absence of due process requirements. *Casey v. Ward*, 2014 WL4387216, Case No. 13-01452 (RJL)(D.D.C. Sept. 5, 2014)(amendment extending statute of limitations entitled only to prospective applicability and could not serve to affect change in status of claims filed before the change in law).

C. The Equitable Doctrine of Laches Does Not Bar This Suit.

Intervenor-Defendant erroneously argues in its Motion that the instant suit is barred by the doctrine of laches.[8] First, fatal to the laches defense is the fact that the Plaintiff's suit was filed within the six-year statute of limitations that governs his APA action. The Supreme Court has held that laches cannot apply where Congress has specifically proscribed a statute of limitations. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (2014).

Moreover, as with any affirmative defense, Intervenor-Defendant has the burden of proving the elements of such defense. Here, the Tribe has entirely failed to demonstrate the requirements of the laches doctrine. The Plaintiff has not unjustifiably or unreasonable delayed pursuing his claims. Neither has there been any prejudice to the Tribe, who broke ground and has been operating its casino since a few months after the initiation of the instant case.

[7] There is a fully operational casino and other improvements on the land known as the Bradley Property. Decl. of Chairman David K. Sprague, ¶ 18 [Dkt. No. 78-1].

[8] This Court stated in its decision on Defendant's Motion to Dismiss in 2008 that the Tribe also advanced a laches argument at that time. To the extent that the Court considered the merits of the Tribe's laches defense and rejected that defense, the Tribe should be precluded from pursing the defense a second time before this Court. The Tribe cannot get two bites at this apple.

i. The Doctrine of Laches Does Not Apply Because Mr. Patchak Brought His Case Within the 6-year Statute of Limitations Proscribed by the APA.

Earlier this year, the Supreme Court held that the doctrine of laches cannot be invoked where a statute of limitations has proscribed a time period in which the claims can be brought. *Petrella*, 134 S.Ct. 1962 (2014). Plaintiff emphatically notes that the Tribe entirely omitted from its Motion for Summary Judgment this recent, binding Supreme Court decision that is directly on point. Application of the *Petrella* holding, it turns out, completely eviscerates the Tribe's laches defense.

The High Court's decision in *Petrella* examined a copyright infringement action regarding the rights to the film *Raging Bull*, which was brought eighteen years after the renewal of the copyright, but within the three-year statutory limitation period, for certain of the infringing acts. The Court, in ruling that laches could not supplant the statutory time for bringing a claim, explained that the "the copyright statute of limitations… itself takes account of delay." *Id.* at 1973. Plaintiff notes that, while the *Petrella* court's holding extended in that case to a claim for monetary damages, it also explained that "laches is a defense developed by courts of equity… its principal application was, and remains, to claims of an equitable case for which the Legislature has provided no fixed time limitation." *Id.* at 1973. As such, because the instant Complaint is brought in its entirety under the APA, laches cannot be applied to <u>any</u> of the claims therein.

The *Petrella* court specifically rejected the defendant's argument that "where there is an ordinary six-year statute of limitations… case-specific circumstances might warrant a ruling that suit brought in year five came too late." *Id.* at 1974. It reasoned that:

> [W]e have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period. Inviting individual judges to set a time limit other than the one Congress prescribed, we note, would

> tug against the uniformity Congress sought to achieve when it enacted [the statute of limitations].

Id. at 1975.

That is precisely the situation presented by the instant case. The statute of limitations applicable in this case is six years, as prescribed under the APA. 28 U.S.C. § 2401; *see also Match-e-be-nash-she-wish Band Of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2217 (2012)(Sotomayor, J., dissenting)(stating that the majority's opinion allows APA challenges to Indian land-in-trust decisions, such as Mr. Patchak's, to be brought within the APA's 6-year statute of limitations). The Department of the Interior issued its "Notice of Final Agency Determination" affirming the decision of the Associate Deputy Secretary to acquire the Bradley Land into trust on behalf of the Tribe on May 13, 2005. *See* 70 Fed.Reg. 92; (AR 000001.) Mr. Patchak brought his suit on August 1, 2008. (Dkt. No. 1.) Accordingly, Mr. Patchak brought his suit approximately three years and two months into the six-year statute of limitations proscribed by Congress for his APA claims, well within the time period allowed. As such, his suit cannot be barred by the Tribe's invocation of the laches doctrine, an attempt to contravene the APA's limitations period. Indeed, the District Court for the District of Columbia has so held that APA cases cannot be barred by a laches defense because they are subject to the APA's six-year statute of limitations. *Beverly Enterprises, Inc. v. Herman*, 50 F.Supp.2d 7, 16 (D.D.C. 1999)("the doctrine of laches does not apply to [Plaintiff's] remaining APA challenge…. Rather, [that claim] is governed by the six-year statute of limitations set forth at 28 U.S.C. § 2401")(citing *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 (D.C.Cir. 1983).

The *Petrella* court's holding also cemented this jurisdiction's more general longstanding reluctance to apply the doctrine of laches where a cause of action has already been limited by a congressionally proscribed statute of limitations. *Potts v. Howard Univ. Hosp.*, 623 F. Supp. 2d

68, 73 (D.D.C. 2009)("because a congressionally mandated statute of limitations governs this case, the defense of laches is not available"); *see also Combs v. W. Coal Corp.,* 611 F.Supp. 917, 920 (D.D.C. 1985)(holding that "there is an applicable statute of limitations which has not yet expired, so defendant cannot rely on laches as a defense")(citing *United States v. RePass,* 688 F.2d 154, 158 (2d Cir.1982); *United States v. Mack,* 295 U.S. 480, 489, 55 S.Ct. 813, 79 L.Ed. 1559 (1935)); *Sis v. Boarman*, 11 App.D.C. 116, 124 (D.C.Cir. 1897)(holding "that upon the ground of lapse of time alone, there is not room for the joint application of the statute of limitations and the doctrine of laches where they would conflict with each other, and the equitable doctrine would have the effect of reducing the statutory period of limitations").

Pursuant to the Supreme Court's recent decision in *Petrella*, along with the great weight of long-standing case law from this jurisdiction, the doctrine of laches cannot be applied to the instant case, where Congress has proscribed a statute of limitations and the action was brought well within that time frame.

ii. The Doctrine of Laches Does Not Apply Because The Tribe Has Not Met Any of the Elements.

The Tribe has not demonstrated—nor can it demonstrate—that it has a meritorious laches defense, as none of the elements of laches have been met. It is axiomatic that laches requires that the Defendant prove, and the Court find, both that (1) the plaintiff delayed inexcusably or unreasonably in filing suit and (2) that the delay was prejudicial to the defendant. *National Wildlife Federation v. Burford*, 835 F.2d. 305, 318 (D.C. Cir. 1987)(citing *Rozen v. District of Columbia,* 702 F.2d 1202, 1203 (D.C.Cir.1983)). The Tribe has the burden of showing both elements of its laches defense. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2005). It has failed to meet that burden on both elements; indeed, it cannot prove a fiction.

a. There Has Been No Inexcusable or Unreasonable Delay by Plaintiff in Pursuing His Claims.

Intervenor-Defendant advances no clear or persuasive reason that the filing of Mr. Patchak's lawsuit constituted "inexcusable or unreasonable delay." Instead, the Tribe attempts to muddy the waters with irrelevant information and baseless accusations. For example, the Tribe groundlessly claims that Mr. Patchak "has been (unjustifiably) questioning the Tribe's legitimacy since 2001." (Def.'s Mot. at 34.) Not only is that grossly inaccurate, but even if true, it would have absolutely no bearing on the instant case. The Tribe infuses the record with facts that do not relate to Mr. Patchak's claims, such as that "Mr. Patchak did not oppose the Tribe's effort to seek federal recognition." (Def.'s Mot. at 29.) To be clear, Mr. Patchak did not and does not take issue with the federal recognition of the Gun Lake Tribe, nor is that part of this lawsuit. This lawsuit seeks APA review of the agency's decision to take into trust the Bradley Property on behalf of the Gun Lake Tribe. The question, for laches purposes, is simply whether Mr. Patchak unreasonably or unjustifiably delayed in bringing that suit. He did not.

The Tribe appears to primarily argue that the passage of time between the decision of the Secretary and the filing of Mr. Patchak's lawsuit was just too long. In so arguing, the Tribe entirely neglects an essential fact—Mr. Patchak filed his suit well within the statute of limitations proscribed by the APA.[9] Glossing over this critical fact, the Tribe instead makes a bald—and patently false—assertion that Mr. Patchak "faile[ed] to timely assert his challenge to the Bradley Tract's trust status." (Def.'s Mot. at 33.) Even outside of the Supreme Court's decision in *Petrella*, any evaluation under the laches doctrine of whether there was an unreasonable delay in the filing of a suit must necessarily consider the statute of limitations. *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, -- F.Supp.3d--, 2014

[9] The statute of limitations would have run, at earliest, on May 12, 2011.

WL 4759945 at *21 (D.D.C. Sept. 25, 2014). Intervenor-Defendant makes no effort to rebut this devastating presumption. Instead, the Tribe relies on cherry-picked case law from other jurisdictions wherein the laches doctrine was applied to lengthy delays in filing. A laches analysis is, however, a fact-laden, case-by-case inquiry and the determination of one court on one set of facts cannot be arbitrarily imported to another court on an entirely separate set of facts. *Naccache v. Taylor*, 72 A.3d 149, 153 (D.C. 2013)(the defense of laches was available, requiring a fact-intensive, case-by-case prejudice analysis that focused on the circumstances and actions of the particular parties). Each of the cases cited by the Tribe is factually inapposite.[10]

The Tribe also makes the bizarre argument that Mr. Patchak unreasonably delayed because he failed to join the *MichGO* lawsuit. First of all, the *MichGO* lawsuit was brought on entirely different grounds than the instant case. Secondly, Mr. Patchak has repeatedly made clear that he is not a member of *MichGO*, nor was he a member of *23 is Enough*, the group that apparently funded that litigation. (Tr. Hr'g Mot. For Temporary Restraining Order, Jan. 26, 2009). When this issue was addressed at oral argument on Mr. Patchak's Motion for Preliminary Injunction, his counsel reiterated that fact and explained that Mr. Patchak is an individual,

[10] Contrary to this case, which was filed far in advance of any development on the Bradley property, the vast majority of these cases involved lawsuits that were not filed until the investment in and development on the property was well underway. In *Batiste v. City of New Haven*, 239 F. Supp. 2d 213, 225 (D. Conn. 2002), unlike here, suit was brought only *after* the defendants had made significant investments in reliance on plans under the Fair Housing Act. The *Batiste* court weighed this with the fact that plaintiffs offered no reason whatsoever for waiting to bring suit. In *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 977 (2d Cir. 1976), the court found that laches barred an injunction on the building of a new post office, based in large part on the fact that construction was 18% complete before the suit was ever filed; Similarly, in *Nat'l Parks & Conservation Ass'n v. Hodel*, 679 F. Supp. 49, 54 (D.D.C. 1987), notably the only case the Tribe cites from this jurisdiction, the court applied laches to bar an injunction of a proposed restaurant and facility in a national park because the facility at issue had already been built and was fully operational before any lawsuit was filed. *In re Centric Corp*, 901 F.2d 1514 (10th Cir. 1990), concerned the failure to timely prosecute a claim in court, outside of bankruptcy after the automatic stay had been lifted, in circumstances not at all applicable or similar to those here.

bringing his suit on new grounds.[11] Despite this, the Tribe advances the position that, if Mr. Patchak was aware of the *MichGO* lawsuit, brought on different grounds by a group of which he was not a member, he should have intervened in that suit; because he did not, the Tribe argues, he unreasonably delayed bringing this suit. That position goes so far beyond the bounds of common sense that it is barely still visible. Indeed, by this standard, it is incumbent upon every Plaintiff to join any lawsuit against the same defendant, even if brought on different grounds, that may seek a similar remedy, lest the Plaintiff be vulnerable to a laches defense. Applying basic principles of reason and practicality, Mr. Patchak's failure to join the *MichGO* lawsuit does not give rise to a finding of unreasonable delay.

Defendants also argue that laches applies because when Plaintiff won his appeal with the Supreme Court, his case was remanded to this Court and no action was taken for approximately two years. First, laches is an equitable doctrine that applies to the *initiation* of a lawsuit, not its prosecution. Plaintiff emphasizes that the Tribe has pointed to no case, in any jurisdiction—nor has Plaintiff found any— applying laches because of a delay in proceedings after the case was filed. Moreover, the instant case was administratively closed in this Court pending appeal. Any party—including Defendant or Intervenor-Defendant—could have taken action to have the case reopened if they wanted to avoid delay. No party did so until Plaintiff filed his Motion for Status Conference.[12]

For all of these reasons, the Tribe has not presented any basis for the Court to find that Plaintiff unreasonably delayed this lawsuit and, therefore, the doctrine of laches does not apply.

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[11] Defendant-Intervenor is well aware that Mr. Patchak is not a member of MichGO, based on the documents he has provided in this litigation and statements made at oral argument. Its continued intimations that he is affiliated with that group is strongly misleading.

[12] Plaintiff also notes that, in the intervening time period, he also went through the process of engaging new counsel, who have since appeared in this case. (Dkt. Nos. 64, 66, 68.)

b. There Has Been No Prejudice to the Tribe from the Alleged Delay.

There has also been no prejudice to the Defendants that would give rise to relief under the laches doctrine. The Tribe first advances an argument that the Government has been prejudiced by Mr. Patchak's lawsuit because it is forced to continuously defend its actions in "piecemeal litigation." (Def.'s Mot. Summ. J. at 35.) This alleged prejudice amounts to the government's responsibility to defend its actions in courts of competent jurisdiction. That is not prejudice—that is a byproduct of the APA review system for agency action. (Indeed, it is not the result of the timing of Mr. Patchak's suit, but rather the result of the six-year statute of limitations prescribed by 28 U.S.C. § 2401.) The argument is also circular—by bringing this suit under the APA, the Department necessarily must defend its actions; but it argues that the defense, in and of itself, creates prejudice that gives rise to a bar of those claims. Neither the Tribe nor the Government can escape defense of this suit on the merits *vis-a-vis* a laches claim that the defense itself is the prejudice suffered. More to the point, it does not matter when the Plaintiff brought his claim – the Government would still be required to defend itself. Thus, this alleged prejudice could not have arisen as a result of the Plaintiff's alleged delay in filing suit.

The Tribe also asserts that it and the Government have experienced prejudice to the extent that it has already had to defend against the *MichGO* litigation. This alleged prejudice is similarly unpersuasive to the extent that it purports that the prejudice suffered is defense of the instant suit, which would have occurred regardless of the timing of Plaintiff's suit. Moreover, it is not the result of any delay on the part of Mr. Patchak, but rather resulted from the fact that a third party litigant brought a separate, distinct claim against the Defendant and Intervenor-Defendant regarding the land at issue. As mentioned *supra*, the legal claims in the two cases differ and Mr. Patchak was not a member of the organization that spearheaded the *MichGO*

litigation. A contention that the claims should have been brought together is purely wishful thinking; a contention that the actions could have been joined is purely speculative.

To the extent that the Tribe argues that it is prejudiced because it made investments in the Bradley Property and the Gun Lake Casino in reliance on the Secretary's decision, such prejudice was self-inflicted. Mr. Patchak filed his case on August 1, 2008. (Dkt. No. 1.) At that time, no investments had been made in the land, as an injunction was in place in the *MichGO* litigation. Plaintiff moved in this case for a preliminary injunction and temporary restraining order, which would have prevented any investment in or development on the Bradley Property, which motions the Tribe and the Government vehemently opposed. When no injunction or restraining order was issued, the Tribe wasted no time moving forward with development of the casino, despite having full knowledge of the Plaintiff's claims pending before this Court, assuming any risk that the instant litigation posed. A defendant "whose prejudice is largely self-imposed may not prevail on the affirmative defense of laches." *Hurst v. U.S. Postal Service*, 586 F.2d 1197, 1200 (8th Cir. 1978*); National Capital Housing Authority v. Douglas*, 333 A.2d 55 (D.C.App.Ct. 1975)(holding that laches was not available when defendant's prejudice was largely self-inflicted). Laches is not available here, to the extent that the "prejudice suffered" was the Tribe's investment in and development of the Bradley Property, because that "prejudice" was self-imposed.

Finally, the Tribe also appears to assert a claim of prejudice for the harm that a potential judgment against it in this case would bring. Mr. Patchak is sympathetic to the historical injustices that the Gun Lake Tribe may have experienced and in no way seeks to discount the impact of those injustices. They are not, however, the subject of the instant litigation. Moreover, "prejudice" for laches purposes refers to prejudice that the party has experienced as a

result of the alleged delay; it does not encompass the harm that a potential loss on the merits of a case may bring that party. While it is clear the Tribe is deeply concerned about a judgment against it on the merits in this case, that cannot provide the basis for prejudice in a laches defense. More particularly, the Tribe expresses concern about the attendant risk to the political, economic and social benefit inured by the Gun Lake Casino, but such risk is not a consideration before this Court in any respect. This Court is accountable to the rule of law, and the application of that law to the record before it. Mr. Patchak is likewise concerned with practical implications that the decision of this Court will have on his property and his community. He grounds his arguments, however, in the law, seeking to remedy his concerns through vacatur of the judgment of the Department of Interior to take land into trust and an injunction on future lands being taken into trust on behalf of the tribe, as plead in his Complaint.

CONCLUSION

The Supreme Court's decision in *Carcieri* firmly establishes that the Gun Lake Band was not under federal jurisdiction in 1935 and thus not eligible to have land taken into trust on its behalf under the IRA. Congress' enactment of the Gun Lake Act, because it violates the separation of powers doctrine and deprives Plaintiff of constitutional rights and protections, should be invalidated in whole by this Court. Finally, Intervenor-Defendant's claim that Plaintiff's case is barred by laches wholly misapprehends the law, and laches does not bar any part of Plaintiff's claims or right to proceed. Accordingly, and for the reasons set forth in this

Opposition and in Plaintiff's Motion for Summary Judgment, Plaintiff respectfully requests that the Court deny Intervenor-Defendant's Motion for Summary Judgment and grant Plaintiff's Motion for Summary Judgment.

Date: December 4, 2014

Respectfully submitted,

By: */s/*

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing PLAINTIFF'S OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, PLAINTIFF'S STATEMENT OF GENUINE ISSUES and this CERTIFICATE OF SERVICE on the following persons, via the Court's Electronic Case Filing (ECF/CM) System.

Defendant's Attorney:	Gina Allery
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Dated: December 4, 2014

/s/Sharon Y. Eubanks

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