IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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I. INTRODUCTION

Patchak's Opposition to the Tribe's Motion for Summary Judgment concedes the controlling facts and authorities in support of the Tribe's position and relies almost solely on two faulty legal conclusions to support his position. First, he scarcely makes any argument at all to refute the constitutionality of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 ("Act" or "Gun Lake Act") other than his grossly inaccurate claim that Congress was required to amend or repeal the Indian Reorganization Act, 25 U.S.C. § 461, et seq. ("IRA"). Second, he bases nearly his entire defense of his unreasonable delay in this matter upon an egregious misreading of a recent Supreme Court decision, which actually expresses in no uncertain terms the Court's approval of dismissing delayed claims exactly like Mr. Patchak's.

Aside from these deficient efforts, Mr. Patchak fails to raise any factual or legal arguments that defeat the Act's presumed constitutionality or justify his dilatory actions in prosecuting his case. As the United States Congress has noted, it is time to finally and conclusively end the uncertainty that the Match-E-Be-Nash-E-Wish Band of Pottawatomi Indians ("Tribe") has endured for so long. The law and the equities require that this Court grant the Tribe's Motion and enter judgment in the Tribe's favor such that this litigation is finally and permanently resolved.

II. ARGUMENT

A. The Gun Lake Act Conclusively Resolves This Litigation

The Tribe reiterates here certain principles that it has promoted throughout its briefing on this matter. As an initial matter, if this Court should determine that the Gun Lake Act is valid and constitutional, this conclusively resolves the instant litigation. The Bradley Tract's trust status is unequivocally in trust; Patchak's challenge to the Secretary's trust acquisition is moot; the instant

proceeding must be dismissed; and this Court need not reach any other questions or arguments raised in this litigation.

Further, this Court must be guided by several interpretative principles. First, 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, 809 (7th Cir. 1999); *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1124, 1129 (1st Cir. 1984); U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

Second, "[a]s between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (internal punctuation omitted).

Third, this Court must be guided by a principle deeply rooted in Indian law jurisprudence that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima*

Indian Nation, 502 U.S. 251, 269 (1992); (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

And finally, 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)).

1. The Gun Lake Act's Declaration that the Bradley Tract Is Held in Trust Constitutes a Discrete Substantive Legal Change Fully Within Congress's Constitutional Authority

The Bradley Tract's lawful trust status is a simple issue. Congress has the undisputed, plenary and exclusive authority to declare Indian lands to be held in trust. *E.g. Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 698 (9th Cir. 1997); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 473 (D.D.C. 1978). When Congress declares or directs Indian land to be held in trust, it is in trust. *See id*. By enacting the Gun Lake Act, Congress declared and directed the Bradley Tract to be held in trust, hence it is in trust. The declaration of the land's trust status is itself a substantive legal change. *See id*. Patchak, in his Opposition, does not and cannot dispute these clear, basic facts of federal Indian law, and therefore, he concedes them.

Instead, Patchak seems to hang his hat on two meritless arguments. First, he apparently has a semantic objection to Congress's use of the word "reaffirm," suggesting ***without any citation to authority*** that Congress cannot reaffirm trust status that was not certain in the first place. ECF No. 87 at p. 5. He calls this "poor word choice,"[1] but he does not quibble with the other words

[1] Notably, even if it were "poor word choice," this would do little to help Mr. Patchak in light of the fact that "statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. at 269 (quoting *Blackfeet Tribe*, 471 U.S. at 766).

chosen by Congress to describe its legislative action: "ratif[y] and confirm[]." Congress aptly chose these words, because "[i]t 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." [2] *Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) (emphasis added); *see also E.E.O.C. v. Westinghouse Elec. Corp.*, 765 F.2d 389, 391 (3d Cir. 1985). Hence, regardless of whether the Secretary of Interior had authority to take the Bradley Tract into trust under Sections 5 and 19 of the IRA in 2005—a fact question that this Court has yet to resolve, Congress indisputably retains the plenary authority to define Indian trust land and hence has the authority to ratify that trust acquisition whenever it so chooses. Once ratified, the agency action has the force of law. *Id*. Congress's ratification, therefore, ends any question of whether the Secretary's trust acquisition was proper under Sections 5 and 19 of the IRA. It is in trust. And this ratified trust status is itself a legal change. *See id.*

Furthermore, the Tribe clearly has explicated the interplay of the Gun Lake Act and the IRA in its Summary Judgment brief. ECF No. 78 at pp. 15-17. Sections 5 and 19 are a general grant of ***Congress's*** authority over Indian lands to the Secretary of Interior, in which Congress limited the Secretary's authority as set forth in Sections 5 and 19 as interpreted by *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). The general permission granted to the Secretary in the IRA did not terminate Congress's authority over Indian lands and trust acquisitions. Congress retains its plenary and exclusive authority over Indian lands and trust acquisitions. *See Sioux Tribe*, 316 U.S. at 326; *Confederated Tribes of Siletz Indians*, 110 F.3d at 698; *City of Sault Ste. Marie*, 458

[2] Indeed, this is such a well-entrenched, unexceptional legal principle, that it is generally only challenged in this jurisdiction where such ratification is effected, not in explicit standalone legislation such as this, but rather where Congress ratifies otherwise unauthorized agency action by funding it in appropriations bills. *See, e.g.,In Defense of Animals v. Salazar*, 675 F. Supp. 2d 89, 102 (citing *Fund for Animals v. United States Bureau of Land Management*, 460 F.3d 13, 19 n. 7 (D.C. Cir. 2006); *Schism v. United States*, 316 F.3d 1259, 1289 (Fed.Cir. 2002). Even in these cases, ratification generally survives.

F. Supp. at 473. Hence, only the Secretary is bound by the trust acquisition limitations contained in Sections 5 and 19.

Therefore, Patchak's further meritless argument suggesting that Congress could not legally effect a substantive declaration of the Bradley Tract's trust status without amending the IRA is pure nonsense. To accept that proposition would endorse the plainly preposterous notion that Congress may only create substantive legislation by amending or repealing existing laws.[3] Moreover, Patchak has failed to dispute the clearly established legal principles that guide the lawful interaction of the Gun Lake Act and the IRA as set forth in the Tribe's Summary Judgment brief, and therefore, he has conceded them. When Congress enacts a specific permission that contradicts or modifies an existing general permission, the specific provision must be construed as a lawful exception to general one. . ." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-71 (2012) citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974). This interaction was the explicit intent of Congress when it included the phrase "[n]otwithstanding any other provision of law" in (b) of the Act—a phrase that "connotes a legislative intent to displace any other provision of law that is contrary to the Act. . . ." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (citing *Marcello v. Bonds*, 349 U.S. 302, 310-11 (1955); *Watt v. Alaska*, 451 U.S. 259, 280 (1981) (Steward, J., dissenting); *see also National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (noting that *non obstante* clauses "prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal"). The fact that Congress expressly chose not

[3] For this reason, Patchak's emphasis upon the House and Senate reports' statement that the Gun Lake Act "will not make any changes in existing law" is irrelevant. (ECF No. 87l at pp. 5 n. 4, 8.) Patchak fails to note that such a representation is required by the rules governing the House and Senate. Rule XXVI(12) of the Standing Rules of the Senate requires that the committee must provide a "comparative print" of any legislation that is intended to "repeal[] or amend[] any statute or part thereof." Such language certainly does not signal Congress's intent to enact legislation that does not constitute a substantive legal change.

to directly amend or repeal to the IRA is, therefore, immaterial. Congress properly chose "not to change general Indian law or policy. . ." and instead simply to "ratify[y] the trust status of a discrete parcel of land." H. Rep. No. 113-590, at 2 (2014). This is precisely in line with the above authority.

It is, therefore, beyond any reasonable dispute that the Gun Lake Act's ratification of the Bradley Tract's trust status constitutes a standalone substantive change within the exclusive and plenary authority enjoyed by Congress that properly coexists and harmonizes with the extant provisions of the IRA. Patchak concedes the relevant legal principles that govern these conclusions. And his arguments to the contrary are uncited, not on point, and demonstrate a woeful lack of understanding of both basic statutory construction and the authority of the United States Congress generally.

The Gun Lake Act lawfully and conclusively has declared the Bradley Tract to be in trust by ratifying the Secretary's prior trust acquisition. This ratification has the force of law and constitutes a substantive legal change. Patchak's claim that it does not change underlying law is wholly without merit and must fail.

2. As the Act Effects a Substantive Change, It Cannot Constitute a Violation of Separation of Powers

As Patchak concedes, he has no separation of powers claim if the Gun Lake Act substantively amended the underlying law (ECF No. 87 at p. 7). It is clear, therefore, that he has no separation of powers claim. As above, his sole argument remains that Congress lacked authority to effect a substantive change to underlying law unless it amended either the IRA or the Administrative Procedures Act, again relying on absolutely no authority for this claim. He attempts in the alternative to distinguish this case from the controlling authorities and fails.

First, he attempts to distinguish *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992). As he correctly notes, *Robertson* stands for the proposition that a statute must "compel[] changes in law, not findings or results under old law. . . ." ECF No. 87 at p. 9 (citing *Robertson*, 503 U.S. at 438). Yet he fails again to explain why the Gun Lake Act does not compel a change in law and erroneously states that *Robertson* means that Congress may only compel a change in law by (1) legislating new standards to be applied by a reviewing court; and (2) explicitly referencing an "older statute that it [seeks] to amend." *Id*. These were not dispositive factors in the *Robertson* analysis. To the contrary, the Court explicitly rejected the notion that legislation must amend or repeal any existing law in order to survive a separation of powers challenge, citing the same general/specific canon discussed herein and in the Tribe's Summary Judgment briefing. *Robertson*, 503 U.S. at 439-40; ECF No. 78 at pp. 15-17.

Patchak's analysis of *National Coalition to Save Our Mall*, 269 F.3d 1092 (D.C. Cir. 2002), likewise completely misses the mark. In addition to harping on his IRA amendment theory, Patchak makes the bizarre assertion that *National Mall* means that the 2014 Congress enacting the Gun Lake Act was permanently bound by the intentions of the 1934 Congress, a proposition that has no support in *National Mall* or any other case. ECF No. 87 at pp. 10-11. Indeed, *National Mall's* discussion of Congress's intent supports the Tribe's position, not Patchak's, as *National Mall* in part bases the validity of that statute on its *non obstante* clause,[4] which "[o]n its face, . . . demonstrates Congress's clear intent to go ahead with the Memorial as planned, regardless of planning's relation to pre-existing general legislation." *National Mall*, 269 F.3d at 1095.

Likewise, Patchak fails to distinguish the statutory language in *National Mall* directing that the agency decision that Congress had ratified "shall not be subject to judicial review" (*id*. at 1094)

[4] The clauses in the Gun Lake Act and in *National Mall* are identical: "[n]otwithstanding any other provision of law." Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b); *National Mall*, 269 F. 3d at 1095.

from the Gun Lake Act's language directing that any challenge to the Bradley Tract's trust status, including specifically this challenge, "shall not be filed or maintained in a Federal court and shall be promptly dismissed" (Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b)). These phrases mean the same thing. And consistent with *National Mall*, this language properly signals Congress's express intent to withdraw this Court's subject matter jurisdiction over this controversy such that this case must be dismissed. *National Mall*, 269 F.2d at 1094-95.

National Mall, just like *Jung v. Ass'n of American Medical Colleges*, 339 F.Supp. 2d 26, 42 (D.D.C. 2004),[5] directly supports the validity of the Gun Lake Act. The Act changes the underlying substantive law by ratifying the Bradley Tract's trust status, hence, as Patchak himself agrees, he cannot prove a violation of separation of powers.

3. Congress's Clear Nonpunitive Purpose Completely Forecloses Patchak's Bill of Attainder Claim

Patchak knows that he cannot prove the punishment prong of the bill of attainder test as set forth in *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984), and so he does not even try. As set forth fully in the Tribe's prior briefing on this issue, the Gun Lake Act serves the plainly nonpunitive purposes of not only of providing a land base and a means of survival for this sovereign Indian tribe, but also providing powerful economic benefits for the State and local community alike. ECF Nos. 78 at pp. 23-28; 86 at pp. 15-16. As such, the Act is not an unconstitutional bill of attainder.

4. The Act Is Neither Overbroad Nor Does It Lack Clarity

Patchak tacks on a final desperate challenge to the Act alleging that language barring legal challenges to the Bradley Tract's trust status is overbroad and lacks clarity, however he fails to

[5] The Tribe discusses *Jung* in detail in its Opposition to Patchak's Motion for Summary Judgment, ECF No. 86 at p. 14-15.

support this claim with any relevant argument or authority. He relies on the Supreme Court's holding in *United States v. Magnolia Petroleum Co.*, in which the Court considered whether Congress could "change the status of ***claims fixed in earlier provisions***," specifically considering circumstances in which the petitioner had been deemed to be ***entitled*** to a tax refund that he had not yet received under the earlier provision, but had been denied payment of it after a retroactive legislative change. 276 U.S. 160, 162-63 (1928) (emphasis added). Patchak has no fixed claim in this matter, and hence, this authority has no application here.[6]

Furthermore, Patchak's unsupported claim that the Act could possibly be construed to foreclose all "tort actions, contract, actions, criminal indictments and more. . . " arising from the Bradley Tract fully lacks merits. ECF No. 87 at p. 15. Patchak's hoped-for interpretation of the Act contradicts the fundamental rule that "a section of statute should not be read in isolation from the whole act. . . ." *Richards v. United States*, 369 U.S. 1, 11 (1962); *accord United States v. Fahnbulleh*, 674 F. Supp. 2d 214, 219-20 (D.D.C. 2009). The Act is comprised of two subsections. Subsection (a) explicitly ratifies the trust status of the Bradley Act. Subsection (b) explicitly precludes litigation—including specifically the instant challenge to the Bradley Tract's trust status— arising from "the land described in subsection (a). . . ." Reading the two sections together, there is no reasonable interpretation of subsection (b) as precluding tort actions, contract actions, criminal actions, or anything other than challenges to the Bradley Tract's trust status. And the legislative history supports exactly this.[7]

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[6] Patchak's reference to *Casey v. Ward*, suffers the same problem, as it also concerns "the status of claims fixed in earlier provisions. . . ." 2014 WL 4387216, Case No. 13-01452 (RJL), at * 4-5 (D.D.C. Sept. 5, 2014) (citing *Magnolia Petroleum Co.*, 276 U.S. at 162-63). In *Casey*, the fixed claim was plaintiff's entitlement to sue under a statute of limitations contained in the earlier provision in effect at the time of his lawsuit. *Id*.

[7] The legislative history is clear that the purpose of the Act is to reaffirm the Bradley Tract's trust status and prevent further challenges to its trust status. As the Senate Report states after referring specifically to challenges to the land's trust status, the Act is intended to "ratify and confirm the Secretary's acquisition of the tract of land in trust for the Tribe. The bill would provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development." S. REP. 113- 194, p. 2 (2014).

Patchak's last ditch effort to avoid the Act by alleging overbreadth also fails.

B. The Doctrine of Laches Bars Patchak's Suit

Patchak's only defense to the Tribe's laches claim is his assertion that "[t]he Supreme Court has held that laches cannot apply where Congress has specifically proscribed a statute of limitations." ECF No. 87 at p. 16 (citing *Petrella v. Metro-Goldwyn Meyer, Inc.*, 134 S.Ct. 1962 (2014)). This is a bald misrepresentation of the Supreme Court's holding in *Petrella,* a case in which the Supreme Court explicitly endorsed the application of laches in cases precisely like the one at bar in which the plaintiff sued within the applicable statute of limitations, but knowingly delayed that suit while the defendants took essentially irreversible steps such that to grant plaintiff's requested relief "would work an ***unjust*** hardship upon the defendants and innocent third parties." *Id.* at 1978 (internal citations omitted) (emphasis in original).

Specifically, the Court held that laches appropriately bars suits brought timely under the applicable statute of limitations in circumstances like those in *Chirco v. Crosswinds Communities, Inc*., 474 F.3d 227 (6th Cir. 2007).[8] In *Chirco*, plaintiffs alleged that defendants unlawfully had used plaintiffs' copyrighted designs in planning and building a housing development. *Petrella*, 134 S.Ct. at 1978 (citing *Chirco*, 474 F.3d at 230). "Long aware of the defendants' project, the plaintiffs took no steps to halt the housing development until more than 168 units were built, 109 of which were occupied." *Id*. (citing *Chirco*, 474 F.3d at 230). The Sixth Circuit in *Chirco* held that laches properly barred the suit despite the fact that it had been brought timely under the applicable statute of limitations because, even if the plaintiffs could succeed in proving their case,

[8] The Court also discussed circumstances in *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584-85 (2d Cir. 1989), in which

> despite awareness since 1986 that book containing allegedly infringing material would be published in the United States, copyright owner did not seek a restraining order until 1988, after the book had been printed, packed, and shipped; as injunctive relief 'would have resulted in the total destruction of the work, the court relegated plaintiff to its damages remedy."

Petrella, 134 S.Ct at 1978.

their requested relief—an order mandating destruction of the housing project—would be inequitable for two reasons: (1) "the plaintiffs knew of the defendants' construction plans before the defendants broke ground, yet failed to take readily available measures to stop the project;" and (2) "the requested relief would work an ***unjust*** hardship upon the defendants and innocent third parties." *Id*. (citing *Chirco*, 474 F.3d at 236).

The facts in *Chirco* are virtually identical to the facts here. Plaintiff cannot dispute express knowledge either of the Tribe's intent to construct a casino on the Bradley Tract or the actual construction of the casino, the proximity of which to his home is the basis of his suit. And yet he delayed bringing his suit for three years, and has never once sought an injunction since the land has been taken into trust—not after the Supreme Court issued its decision in *Carcier v. Salazari*, 555 U.S. at 395, and not after the Supreme Court issued its decision in this case finding that he had standing and that his claim is not barred by the Quiet Title Act. Instead he simply sat back and watched as the Tribe constructed its $195,000,000 casino. ECF. No. 78-1, ¶ 18. Now the casino has been built, it is the primary basis for a sovereign Tribe's political and economic survival, it employs nearly a thousand people, and it has contributed almost $60,000,000 to the State and local community. Mr. Patchak's requested relief in this matter is an order invalidating the land's trust status, which he maintains would render it illegal for the Tribe to operate the casino. Therefore, if Mr. Patchak were permitted to bring this suit and subsequently prevailed, his requested relief unquestionably would "work an ***unjust*** hardship upon the defendants and innocent third parties." *Petrella*, 134 S.Ct. at 1978. Under *Petrella*, despite the fact that Patchak's suit was filed within the applicable statute of limitations, the equities require that Patchak's unreasonable delay must not be allowed to proceed pursuant to the doctrine of laches. *Id.*

Aside from his misplaced reliance upon *Petrella*, Patchak's only other substantial argument is that laches should not apply to his claim because the Tribe built its casino despite knowledge that Patchak's claim was pending. ECF No. 87 at pp. 23-25. In making this argument, he claims both that the Tribe was required to wait for him take action in this litigation[9] and that he cannot be held accountable for delay subsequent to the filing of his lawsuit. *Id*. at p. 22, 24-25. This argument does not withstand minimal scrutiny. Taken to its logical conclusion, it would mean that Patchak would be entitled to take the most preliminary steps of filing a lawsuit (i.e., obtaining a determination of standing), then take no further action in the litigation ***indefinitely***, and all the while the Tribe would be expected to sit on its hands and wait for Mr. Patchak to prosecute his claim. The effect would a de facto injunction against the Tribe, achieved with no due process and having no discernible end or limitation.[10] Such an outcome is of exactly the kind intended to be barred by the equitable doctrine of laches. *See, e.g.*, *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 138-39 (D.D.C. 2003) (discussing the particular applicability of laches in cases where delay could persist indefinitely); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821-22 (7th Cir. 1999) (discussing theoretically indefinite delay and holding that "[i]t would certainly be inequitable to reward this type of dilatory conduct and such conduct would necessary warrant application of laches. . . "); *see also Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 696 (1898) ("Nothing can call forth [a] court into activity but conscience, good faith, and reasonable diligence. . . . Laches and neglect are always discountenanced. . . .). This Court enjoys wide discretion to enforce the doctrine of laches in such circumstances where the equities so require. *Harjo*, 284 F. Supp. 2d

[9] He also suggests that Defendant or Intervenor-Defendant should have reopened this case to "avoid delay." ECF No. 87 at p. 22. Except for a motion to dismiss for failure to prosecute, the Tribe can think of no appropriate legal motion that it should have filed. This is Mr. Patchak's case.

[10] Courts generally disfavor rulings that would result in a de facto injunction. *See, e.g., Hunton v. Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 281-83 (4th Cir. 2010); *SKF USA, Inc. v. United States*, 246 Fed.Appx. 629, 698 (Fed. Cir. 2007); *E.E.O.C. v. Custom Companies, Inc.*, Case No. 02 C 3768, 2004 WL 1638224 at *2 (N.D. Ill. Jul. 21, 2004).

at 113 (citing *Hot Wax, Inc.*, 191 F.3d at 819). Furthermore, the cases that Patchak cites in support of his theory that "self-imposed prejudice" bars the Tribe's laches claim are not applicable here. In *Hurst v. U.S. Postal Service*, 586 F.2d 1197, 1200 (8th Cir. 1978), the "self-imposed prejudice" was the Postal Service's destruction of an administrative record; and in *National Capital Housing Authority v. Douglas*, 333 A.2d 55, 57 (D.C.App.Ct. 1975), the "self-imposed prejudice" was a tenant's failure to pay rent owed for several months. Patchak does not even attempt to compare these acts to the Tribe's necessity of effectuating the economic development plan that it requires to fund its government and support its people.

Mr. Patchak's attempts to validate his unreasonable delay in this matter and avoid his responsibility for any prejudice caused by it are unavailing. He has failed to defeat the Tribe's proper assertion that his claim is barred by the doctrine of laches and cannot proceed.

II. CONCLUSION

For the foregoing reasons, it is clear that Patchak cannot prevail in this lawsuit. The Tribe respectfully requests that the Court enter judgment in the Tribe's favor and dismiss the instant proceeding.

Dated: December 18, 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 18th 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