IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK, Plaintiff, v. SALLY JEWELL, Secretary of the Interior, *et al*. Defendants. MATCH-E-BE-NASH-SHE-WISH-BAND-OF POTTAWATOMI INDIANS, Intervenor.	**Case No. 1:08-CV-01331** Hon. Richard J. Leon

PLAINTIFF'S CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff David Patchak respectfully submits this consolidated reply[1] to both Defendants' and Intervenor-Defendant's oppositions to his Motion for Summary Judgment. As Mr. Patchak has established in his previous submissions, he is entitled to judgment as a matter of law. As Plaintiff demonstrates further in this submission, none of the arguments raised by Defendants ("Department of Interior" or "Federal Defendants") or by Intervenor-Defendant ("Tribe" or "Gun Lake Band") in their oppositions persuasively make the case for a ruling in Defendants' favor, and in particular, they do not overcome Plaintiff's constitutional challenges to the Gun Lake Act. Accordingly, Plaintiff requests that his motion for summary judgment be granted.

ARGUMENT

I. The Court Should Not Apply the Department of Interior's Current Interpretation of *Carcieri.*

A. The Federal Defendants Should be Estopped From Asserting The Inconsistent Position That a Tribe Need Not Have Been Recognized to Have Been Under Federal Jurisdiction in 1934.

This Court should apply the doctrine of judicial estoppel to prevent the Government from taking the position that "under Federal jurisdiction" differs from federal recognition for purposes of the Indian Reorganization Act ("IRA"), as that position directly conflicts with the position that the Government has taken in prior court cases. The doctrine of judicial estoppel, which has been expressly adopted by the D.C. Circuit, may be applied to prevent a party from taking inconsistent positions on an issue in separate cases or before different courts. *Moses v. Howard University Hosp.*, 606 F.3d 789, 797 (2010)(citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808 (2001))(quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990)).

[1] Many of the arguments in the Federal Defendants' and the Tribe Intervenors' oppositions are duplicated. In the interest of judicial economy and convenience, rather than file two separate briefs, which would have been largely repetitive, Mr. Patchak consolidated his reply brief into this single submission. Plaintiff is filing separately a motion to address the need to exceed 25 pages for this reply.

The purpose of judicial estoppel is to ensure "the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 743, 121 S.Ct. 1808, 1810, 149 L.Ed.2d 968 (2001).

In *New Hampshire v. Maine*, the Supreme Court applied judicial estoppel to bar the State of New Hampshire from arguing that the Piscataqua River boundary between New Hampshire and Maine runs along the Maine shore. It did so because that was inconsistent with the position that New Hampshire took in a 1970 court case, where it agreed with Maine that the boundary ran in the middle of the main navigable channel. The Supreme Court held that New Hampshire could not now adopt an opposing position and held that it was judicially estopped from doing so. *Id.* at 744.

In deciding *New Hampshire v. Maine*, the Supreme Court explained that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to writing," but went on to set forth three factors that courts should consider when determining whether to apply judicial estoppel. *Id.* at 750-751. First, a party's position in a case or controversy must conflict with a position that party took in an earlier matter before a judicial tribunal. *Id.* Second, courts should consider whether a party persuaded a court to accept its earlier position such that the acceptance of an inconsistent position in the later proceeding would create the perception that the party must have misled either the first or second court. *Id.* Third, the court should look to whether the party asserting the inconsistent position derives any unfair advantage from the change in position or whether the opposing party would suffer an unfair detriment if estoppel were not to apply. *Id.*

The D.C. Circuit has expressly applied the reasoning and standards set forth in *New Hampshire v. Maine* to prevent litigants from gaming the courts "'[w]here a party assumes a

certain position in a legal proceeding, … succeeds in maintaining that position, … [and then,] simply because his interests have changed, assume[s] a contrary position.'" *Moses v. Howard University Hosp.*, 606 F.3d 789 (2010)(citing *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C.Cir. 2010)). Since *New Hampshire v. Maine*, courts within this jurisdiction have widely invoked the doctrine of judicial estoppel to preclude such subterfuge and to preserve the integrity of our judicial system. *Data Mountain Solutions, Inc. v. Giordano*, 680 F. Supp. 2d 110, 129 (D.D.C. 2010)(applying judicial estoppel to prevent defendant from objecting to arbitrator's exercise of jurisdiction over dispute, where defendant had previously asserted that the arbitrator had jurisdiction); *Jenkins v. District of Columbia*, 4 F.Supp.3d 137 (D.D.C. 2013)(defendant officer who pled guilty to assault was judicially estopped from arguing, in a later civil action against her, that her conduct was reasonable); *Marshall v. Honeywell Technology Sys., Inc.,* -- F.Supp.3d --, 2014 WL 5822874 (D.D.C. Nov. 10, 2014)(failure to disclose employment claims in bankruptcy proceedings judicially estopped claimant from pursuing her claims in federal court); *Rogler v. Gallin*, 402 Fed.Appx. 530 (D.D.C. 2010)(holding that an employee who successfully settled a Title VII suit in which she argued that she was defendant's employee was judicially estopped from bringing suit against the same defendant on the theory that she was an independent contractor); *Robinson v. District of Columbia*, 10 F.Supp.3d 181 (D.D.C. 2014)(failure of plaintiff to list EEOC complaints as assets in bankruptcy court warranted application of judicial estoppel doctrine).

Here, the federal defendants should be judicially estopped from arguing that a party need not have been federally recognized to have been "under Federal jurisdiction" in 1934. In *Carcieri v. Salazar*, the Secretary made clear that the Department of Interior viewed federal jurisdiction to be synonymous with federal recognition under the IRA with respect to Indian

tribes. In oral argument before the Supreme Court, counsel for the Secretary of Interior explained, "the Secretary interprets "recognized" and "under Federal jurisdiction" to not have much difference with respect to tribes." (*Carcieri* Arg. Tr., 35, Nov. 3, 2008). This was not a passing comment; time and again the Department committed to an interpretation of the IRA that equates "under Federal jurisdiction" with federal recognition. Counsel for the Secretary later reiterated, "[a]s I said earlier, I don't think there's much distinction between recognition and Federal jurisdiction when one is speaking about tribes…." (*Carcieri* Arg. Tr., 41, Nov. 3, 2008). Hammering that point home, the Secretary's counsel explained that any distinction between jurisdiction and recognition related to the IRA's application to *individual* Indians, not to Indian *tribes*. She again stated that "the Secretary's interpretation from the beginning, as I suggested before, has – has understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same." (*Carcieri* Arg. Tr., 42, Nov. 3, 2008). Likewise, the Department made clear in its briefs in *MichGO v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), that the concepts of federal jurisdiction and federal recognition were merged for purposes of the IRA. For example, the Department stated, "the Gun Lake Band does not have a Federal Indian reservation and necessarily did not have a *Federal* Indian reservation prior to the point at which the Tribe was *federally* recognized." (*MichGO v. Kempthorne*, Dkt. No. 55 at 18).

Applying the principles set forth in *New Hampshire v. Maine*, this Court should invoke the doctrine of judicial estoppel to bar the Secretary of Interior from asserting this clearly inconsistent position in the instant case. First, the position that the Department of Interior has taken in previous court cases, including *Carcieri*, directly contradicts the position it takes in the instant case—the Department previously advanced the position that federal recognition and federal jurisdiction were, with respect to tribes, one and the same. Now, that position is

reversed, because it is harmful to its position in this case. So, the Department has made a 180 degree turn and now takes the altered position that federal jurisdiction encompasses something much broader than federal recognition or acknowledgement, clearly constituting an inconsistency by the Department. This is the classic instance in which judicial estoppel is appropriate, where a party's interests have changed and, in turn, so has its position.

In addition, the Department's view was adopted by courts of law. The majority in *Carcieri* declined to adopt the view of the Breyer concurrence that federal jurisdiction may entail something greater than federal recognition. *Carcieri*, 555 U.S. at 379-396 (the Narragansett tribe was not recognized and, as such, there was no evidence that it was under federal jurisdiction at that time); *see also Carcieri*, 555 U.S. at 401 (Stevens, J., dissenting)("the Secretary's more recent interpretation of this statutory language had 'understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same'"); *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005), rev'd by *Carcieri*, 555 U.S. 367 (holding that the Narragansett tribe was entitled to coverage under the IRA because of its federal acknowledgment, even if it was not recognized in 1934). Lastly, the Department of Interior's inconsistency results in both an unfair advantage for the Department and an unfair detriment to Plaintiff. The Department has strategically altered its position to justify its decision to take the Bradley Property into trust and to gain an advantage in this case. Worse, it does so while throwing its weight around, arguing that its agency status entitles it to deference from this Court. A Plaintiff, such as Mr. Patchak, relies upon the assertions and positions taken by the government in bringing these claims and is unfairly disadvantaged when that position is reversed for strategic reasons. Moreover, public policy considerations counsel that our Government not be allowed to change its position capriciously on matters of public concern. To

the contrary, there need be consistency and reliability in our Government function, as the citizenry relies upon its policy proclamations.

For all these reasons, this Court should invoke judicial estoppel to ensure "the integrity of the judicial process," and prohibit the Government from asserting its inconsistent position that "under Federal jurisdiction" means something broader than federal recognition.

B. The Solicitor's Memo is Not Entitled to *Chevron* Deference.[2]

The Department of Interior vastly overstates the weight of the March 12, 2014 Solicitor's Memorandum to the Secretary ("Solicitor's Memo") interpreting the meaning of the term "under Federal jurisdiction" in the IRA. The Solicitor's Memo is not entitled to *Chevron* deference because it is an informal, internal agency memo written as an advocacy piece by the Department's attorney; in addition, it is not entitled to *Chevron* deference because Congress has not delegated to the Secretary the authority to interpret the "now under Federal jurisdiction" provision of the IRA. Moreover, the Solicitor's Memo does not meet the standards set forth in *Chevron* to afford it deference. As the D.C. Circuit has explained:

> When reviewing an agency's construction of a statute that it administers, we first ask "whether Congress has directly spoken to the precise question at issue." If so, "that is the end of the matter" and we "must give effect to the unambiguously expressed intent of Congress." If, however, "the statute is silent or ambiguous with respect to the specific issue," we move to the second step and must defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."

Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs., 332 F.3d 654, 659 (D.C. Cir. 2003)(citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

[2] The Solicitor's memo is part of Defendant's Supplemental Administrative Record ("SAR"). Our citation to that memo and to any document in the SAR is without waiver of the arguments asserted in Plaintiff's Motion to Strike.

Applying these standards to the Solicitor's Memo, it is clear that it passes neither Step One nor Step Two of the *Chevron* analysis. For these reasons, the Solicitor's Memo should not be afforded deference.

i. The Solicitor's Memo Does Not Carry the Weight Necessary to Afford it *Chevron* Deference.

The Solicitor's Memo is an internal document that does not have the legal force necessary to apply *Chevron* deference. Indeed, the memo was created by the Solicitor, the Department's attorney, and sent to the Secretary of Interior to advocate for a broad, yielding interpretation of the meaning of "under Federal jurisdiction" post-*Carcieri*. (SAR 000001-22.) The Secretary erroneously asserts that this internal Solicitor's Memo is entitled to *Chevron* deference. (Def.'s Br. at 27). It is clear that this type of informal, internal memo simply does not carry the necessary weight to afford it *Chevron* deference. Indeed, the Supreme Court held in *Christensen v. Harris County* that "[i]nterpretations such as those in opinion letters—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1663, 146 L.Ed.2d 621 (2000)(citing *Reno v. Koray*, 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995)(internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," not entitled to *Chevron* deference (internal quotation marks omitted)).

The Solicitor's Memo went through no formal review or adjudication, nor was it the result of notice and comment rulemaking. Moreover, there is no indication that it was ever formally adopted by anyone at a lever higher than the Solicitor—including the Secretary or the Office of Legal Counsel. At most, the Solicitor's Memo would be entitled to *Skidmore*-level "respect," but even that is questionable. *Id*. at 1633 ("interpretations contained in formats such as opinion letters are 'entitled to respect,'" but not the high deference the defendant in this

action is seeking)(citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). The Solicitor's Memo is nothing more than the Department's attorney advocating for a broad-based meaning of "under Federal jurisdiction" so that she can more easily defend the Department's decisions. As such, if the Court decides to consider it, it should afford the memo little weight, if any. Indeed, it would not be an abuse of this Court's discretion to ignore it in its entirety and develop its own interpretation of the meaning of "under Federal jurisdiction," in accordance with the judiciary's distinct and expansive power to interpret the law.

ii. Congress Did Not Delegate Interpretive Authority Over This Text to the Department.

It is canonical that *"Chevron* applies only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Sherley v. Sebelius*, 689 F.3d 776, 785 (D.C. Cir. 2012) *cert. denied*, 133 S. Ct. 847, 184 L. Ed. 2d 655 (2013)(citing *United States v. Mead Corp.,* 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)); *Miller v. Clinton*, 687 F.3d 1332, 1340 (D.C. Cir. 2012)("[n]ot every kind of agency interpretation, even of a statute the agency administers, warrants *Chevron* deference"). Because Congress did not intend to delegate interpretive authority to the Department of Interior over the meaning of "now under Federal jurisdiction," the Court should not defer to the Department on its interpretation of that clause.

Indeed, in discussing the IRA's "now under Federal jurisdiction" provision, the *Carcieri* concurrence explained:

> [T]he provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty….These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference...

Carcieri, 555 U.S. at 396-97 (Breyer, J., concurring)(*citing United States v. Mead Corp.*, 533 U.S. 218, 227, 229-230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)).

Where Congress has not delegated the authority to interpret the law, there can be no deference to an agency that attempts to do so. *U.S. v. Mead*, 533 U.S. 218. Accordingly, the Court should not defer to the interpretation of "under Federal jurisdiction" contained in the Solicitor's Memo.

iii. The IRA is Not Ambiguous.

Even evaluating the Solicitor's Memo under *Chevron*, it fails both prongs. Step One of *Chevron* requires that a court determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. The statutory language "under Federal jurisdiction" in the IRA is not ambiguous and, therefore, "that is the end of the matter" and the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

The Supreme Court explicitly held, in *Carcieri*, that "the term 'not 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. Indeed, the term "jurisdiction" should be given its common meaning, as used in legal parlance. Black's Law Dictionary readily defines "federal jurisdiction" as: "the exercise of federal-court authority." Jurisdiction Definition, *Black's Law Dictionary* (9th ed. 2009) *available at* Westlaw BLACKS. A tribe is therefore "under Federal jurisdiction" when the federal government has exercised its authority over that tribe—either in government-to-government relations or by some other legal measure (such as the modern tribal acknowledgement process that grants an Indian tribe its special legal position). Because of the straightforward nature of this phrase, the

Carcieri court determined that the statutory text contained no ambiguities and, as such, that Congress spoke directly.

Gliding past the clear holding of the Supreme Court in *Carcieri*, the Solicitor's Memo states, with little support or analysis, that the language "under Federal jurisdiction" in the IRA is ambiguous. (SAR 000004-5.) The Solicitor goes on, however, and in short order easily defines that very phrase. Specifically, the Solicitor's Opinion says to examine:

> whether there is a sufficient showing… that [a tribe] was under federal jurisdiction, i.e., whether the United States had… taken an action or series of actions… that are sufficient to establish, or that general reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.

(SAR 000015.)

Indeed, where the statutory language is unambiguous, that is the end of the *Chevron* inquiry. *American Insurance Association v. U.S. Dept. of Housing and Urban Development*, No. 13-00966 (RJL), 2014 WL 5802283 (D.D.C. Nov. 7, 2014). Because the term "under Federal jurisdiction" is clear and unambiguous, the Court should find that Congress spoke directly on this point, and should give the phrase its ordinary meaning.

iv. The Solicitor's Construction is Not Based On a Permissible Construction of the Statute.

The Solicitor's Memo also fails at Step Two of the *Chevron* analysis, which examines whether an agency's interpretation of the statutory language at issue is permissible, or reasonable.[3] *Chevron,* 467 U.S. at 843. It is well-settled that where the construction or application of a statutory provision is not permissible or reasonable, it is not entitled to deference by a court. *Smoking Everywhere, Inc. v. U.S. Food and Drug Admin.*, 680 F.Supp.2d

[3] Plaintiff notes that the Court need not reach *Chevron* Step Two when it determines under Step One that the statutory language is unambiguous.

62, 69-75 (D.D.C. 2010)(holding that the FDA's position with respect to regulation of electronic cigarettes was unreasonable and, therefore, entitled to no deference under *Chevron*).

As mentioned above, the Solicitor's Memo first states that the term "under Federal jurisdiction" is ambiguous, and then goes to on construe "under Federal jurisdiction" to require the circular inquiry of whether a tribe is "under Federal jurisdiction" before 1934 and then retaining it through 1934. (SAR 000015.) As is clear from the breadth and leniency of the "standards" set forth in the Solicitor's Memo, the interpretation therein is entirely purposive; the Solicitor's Memo is intended to create standards that are so easily met that the Department may defend *any* decision to take land into trust under the IRA. Put simply, the Solicitor's Memo goes too far in its unrestrained description of what it means to be "under Federal jurisdiction." For example, the Memo makes the unfounded assertion that once a tribe has been subject to federal jurisdiction at any point, that jurisdiction cannot be revoked "absent express congressional action." (SAR 000016.) The Solicitor does not cite to any legal precedent to support this proposition.[4] The primary problem with this limitless interpretation is that, in practice, it renders the term "under Federal jurisdiction" meaningless. Indeed, it violates one of the cardinal rules of statutory construction, which requires effect be given to every term contained in a statute. *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 395, 27 L.Ed. 431 (1883)("it is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"). This alone makes the interpretation set forth in the Solicitor's Memo unreasonable and impermissible.

[4] None of the cases to which the Solicitor cites stand for this proposition.

The Solicitor's memo also contradicts previous Department of Interior interpretations of the IRA. For example, Commissioner Collier noted in his 1936 circular that "members of recognized tribes now under federal jurisdiction… would be 'carried on the rolls as members of the tribe, which is all that is necessary to qualify them for benefits under the Act." (SAR 000017.) The Solicitor's Memo takes note of this description, but brushes it off as "not the full extent of the Department's view of tribes under federal jurisdiction" without further analysis or explanation. Likewise, the Solicitor notes that the 1980 memorandum from the Associate Solicitor, Indian Affairs stated 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 whether or not that obligation was acknowledged at the time." (SAR 000019.) The Solicitor's Memo does not adopt this definition or explain the relationship between this definition and the one it attempts to implement; rather, it steps past the 1980 interpretation to create a new, far more expansive interpretation of what qualifies a tribe as having been "under Federal jurisdiction" in 1934. Nowhere, however, does the Solicitor explain her sudden departure from prior Departmental interpretations of "under Federal jurisdiction."

In addition to these internal contradictions, the analysis contained in the Solicitor's Memo also lacks any linear logic. For example, the Solicitor's Memo requires a circular analysis: the determination of whether a tribe is "under Federal jurisdiction in 1934" requires two separate determinations of whether a tribe was "under Federal jurisdiction" prior to 1934 and then again in 1934. Indeed, there are no clear lines anywhere in the Solicitor's analysis. The Memo states that "some federal actions may in and of themselves demonstrate that a tribe was… under federal jurisdiction," but that sometimes "a variety of actions when viewed in

concert" will so demonstrate. The Memo states that there may be specific actions, such as voting on whether to opt out of the IRA, which clearly demonstrate that a tribe is under federal jurisdiction, while other times federal jurisdiction can be demonstrated by "the absence of any probative evidence that tribe's jurisdictional status was terminated or lost prior to 1934." (SAR 000016.) This analysis does nothing to clarify or interpret the term "under Federal jurisdiction;" it serves only to expand it by blurring all lines and creating confusion.[5]

The Solicitor's Memo sets forth an unreasoned and unreasonable interpretation of the IRA's "under Federal jurisdiction" language. Accordingly, the Court should find that the Solicitor's Memo is not entitled to *Chevron* deference. Indeed, an agency action that is not entitled to *Chevron* deference may be entitled to "respect", but "only to the extent it has the 'power to persuade.'" *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012)(citing *Gonzales v. Oregon,* 546 U.S. 243, 256, (2006)). For the same reasons discussed above, the Solicitor's Memo also lacks the power to persuade under *Skidmore*. The Solicitor's Memo, therefore, should not be considered by this Court.

II. The Gun Lake Tribe Is Not Entitled to Have Land Taken Into Trust Under the IRA.

As the Supreme Court made clear in *Carcieri*, a tribe need have been "under Federal jurisdiction" in 1934 when the IRA passed in order for the Secretary of Interior to have authority to take land into trust on its behalf. As described at length in Plaintiff's Motion for

[5] Meanwhile, the Solicitor curiously explains that courts may consider "'recognized Indian tribe' in the IRA to require recognition on or before 1934." That reasoning has been adopted by one court that, while examining whether gaming could be authorized under the Indian Gaming Regulatory Act when the IRA did not authorize taking lands in trust for a tribe, that the IRA required a tribe be federally recognized in 1934. *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 22-23 (1st Cir. 2012)(explaining in the post-Carcieri world that "the Secretary presently most likely lacks authority" to take land into trust for a Tribe not recognized until after 1934).

Summary Judgment, the Gun Lake Band does not meet that standard because it was not under Federal jurisdiction in 1934. In reaching this conclusion, the Court should rely solely upon the record that was before the Department of Interior in 2005, when the agency decided to take the Bradley Property into trust on behalf of the Tribe. Even if the Court considers the Supplemental Administrative Record, however, there is still no basis for the Secretary's decision to take land into trust on behalf of the Gun Lake Band. Accordingly, the Court should find that, because there is no basis to determine that the Gun Lake Band was under Federal jurisdiction in 1934, the Secretary does not have authority to take land into trust on its behalf and the decision to take the Bradley Property into trust must be vacated.

A. Defendants' Reliance Upon Documents That Were Not A Part of the Administrative Record Is Improper Under the APA Review Standard

It is well-settled that judicial review of an agency's actions should be based on the materials that were before the agency *at the time its decision was made.* "[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013)(quoting *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)).

This suit was filed on August 1, 2008 to challenge, under the Administrative Procedure Act ("APA"), the May 13, 2005 decision of the Secretary of Interior to take into trust two parcels of land in Allegan County Michigan ("Secretary's May 2005 decision"), on behalf of the Gun Lake Band, pursuant to the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"). On October 6, 2008, Defendant Secretary filed the Administrative Record. Since that time, the Supreme Court determined that the Secretary's authority to take land into trust on behalf of Indian tribes under the IRA is limited to those tribes that were under the federal jurisdiction of

the United States when the IRA was enacted in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). Based on the Administrative Record that formed the basis for the decision at issue, the Secretary's May 2005 decision was made without any consideration by the Department of Interior as to whether the Gun Lake Tribe qualified as having been "under federal jurisdiction" when the IRA was passed, as required.

On September 3, 2014, the Secretary issued a second, separate decision apparently acquiring two additional, different properties into trust on behalf of the Gun Lake Tribe purportedly under the IRA ("Secretary's September 2014 decision"). Four days before the parties' Motions for Summary Judgment were due, Defendant Jewell filed her Supplemental Administrative Record [Dkt. 75], which purports to contain the administrative record for the Secretary's September 2014 decision. The information contained in the Supplement primarily includes documents created and developed well after that May 2005 decision—between 2011 and 2014—which were not even in existence at the time of the Secretary's May 2005 decision at issue in this case. Accordingly, such documents were neither considered by nor available to the Department when it made the May 2005 decision. Plaintiff moved to strike the Supplemental Administrative record, as it has no relevance to or bearing on the instant case, which examines whether the Department of the Interior erred under the APA and IRA in its May 2005 decision to take lands into trust.

Both the Tribe and the Department argue that it would be inappropriate for this Court to render a decision based on the 2005 administrative record without considering the 2014 Amended Notice of Decision, which is part of the Supplemental Administrative Record. Neither Defendant points to ***any*** authority for this proposition; instead, they simply demand that this Court consider the newly-created administrative record. To the contrary, "[i]t is a widely

accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency ***at the time its decision was made***." *IMS, PC v. Alvarez*, F.3d 618, 623 (D.C.Cir. 2013)(emphasis added); *Silver Slate Land LLC v. Beaudreau*, -- F.Supp.2d--, at *3 (D.D.C. 2014). This Circuit has long held that it is improper to supplement the administrative record with information that is new or different from that which was before the agency when it made its decision. *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *Stand Up for California! v. United States Department of Interior*, -- F.Supp.3d--, 2014 WL 5261940 at *4 (D.D.C. Oct. 15, 2014).

Of course, the 2014 Amended Notice of Decision did not exist when the Department made its 2005 decision to take the Bradley property into the trust; nor did it exist when this lawsuit was filed. That record was quite clearly created for purposes of this litigation and its creation was egregiously belated. The Amended Notice of Decision that the Defendants insist the Court consider (indeed, defer to) was not issued until September 3, 2014, just a few short weeks prior to the Court-ordered due date of the first summary judgment briefs in this matter. The D.C. Circuit has repeatedly held that supplementation of the record with documents produced for litigation purposes or at the APA review stage is inappropriate. *Martel, Inc. v. Collins*, 422 F.Supp.2d 188, 195-96 (D.D.C. 2006)("because the court's review is confined to the administrative record at the time of the agency's decision, it may not include 'some new record made initially in the reviewing court'")(quoting *Ctr. for Auto Safety*, 956 F.2d at 314 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)); *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C.Cir. 1991). Indeed, this Circuit has emphasized that "to review *more* than the information before the [agency] at the time [of its] decision risks [the court's] administrators to be prescient or allowing them to take advantage

of *post hoc* rationalizations." *Collins*, 422 F.Supp.2d at 196 (quoting *Walter O. Boswell*, 749 F.2d at 792)(emphasis in original).

It is thus clear that the Department cannot now correct its unsound decision by supplementing the record with additional, newly-created material that was not considered when the Bradley Property was taken into trust and which was clearly intended to defend its actions.[6] Accordingly, Plaintiff renews his Motion to Strike the Supplemental Administrative Record [Dkt. 76] and respectful requests that this Court not consider the "Supplemental Record," produced by the government as an eleventh hour attempt to rewrite history and justify its unlawful decision to take the Bradley Property into trust.

B. Even if the Court Gives *Chevron* Deference to the Secretary's Interpretation and Considers the Supplemental Record, the Secretary of Interior Does Not Have the Power to Take the Land Into Trust for the Gun Lake Tribe

The Secretary of Interior issued an unsound Amended Notice of Decision on September 3, 2014 ("Secretary's 2014 Decision"), which purports to determine that the Gun Lake Band was "under Federal jurisdiction" in 1934 and, therefore, the Secretary is authorized to take land into trust on its behalf. The Secretary's 2014 Decision is, however, littered with flawed reasoning, cavities in logic and unsupported declarations.[7] As such, even were this Court to

[6] The Tribe has also advanced the flawed argument that the new record must be considered because *Carcieri* was not decided until 2009, and therefore the Department of Interior had no way to know that it should examine whether a tribe was "under Federal jurisdiction" in 1934 when taking land into trust on its behalf. The *Carcieri* case, however, had been pending in federal courts since 2001, against the Department of Interior as the Defendant. It therefore knew that the issue should be examined. Bizarrely, in its Motion for Summary Judgment, the Tribe flatters Plaintiff by arguing that he should have known about the legal issue presented by *Carcieri* since the case's filing in 2001, despite the Tribe's position that the federal agency named in the lawsuit and charged with administering the IRA, should not.

[7] The Tribe and the Government argue that the Secretary's 2014 Decision is entitled to *Chevron* deference. That position is wholly without merit. As discussed *supra*, the Solicitor's Opinion is not entitled to *Chevron* deference and so, by extension, neither is the 2014 Decision. Moreover,

consider the Supplemental Administrative record and/or afford the Solicitor's Memo *Chevron* deference, the record still demonstrates that the Gun Lake Band was not "under Federal jurisdiction" in 1934 and, therefore, the Secretary does not have authority to take land into trust on its behalf.

An examination of the Secretary's 2014 Decision reveals that it rests the Gun Lake Tribe's purported "under Federal jurisdiction" status on remarkably thin evidence. As explained in Plaintiff's Motion for Summary Judgment, the Gun Lake Tribe had no ongoing relationship with the United States in 1934: it was not federally recognized, no treaty was in effect between the United States government and the Gun Lake Tribe after 1870, no party has asserted—nor is there any evidence—that the Tribe was receiving any federal appropriation as of 1934. The Government argues that settlements of claims with Michigan's Pottawatomi and Ottawa Indians is indicative of the Gun Lake Tribe's jurisdictional status, but those settlements occurred 25-30 years prior to the passage of the IRA. (AR 001989.) While some of the children of Gun Lake Tribe members attended a nearby school (which notably was a school on an Indian reservation, not a federal school),that was no longer true as of early 1934. (SAR 000636.) Moreover, the Secretary's 2014 Decision explicitly states that the Department was "inactiv[e]with respect to the Band during the 1930s." (SAR 000637.)

Indeed, this is highlighted by the lengths to which the Secretary's 2014 Decision goes to outline the various ways that the federal government ***did not*** interact with the Gun Lake Tribe, and then the reasons therefor. For example, the Decision states that the Tribe was not allowed

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the Secretary's 2014 Decision is, at best, an application of an interpretation, not an interpretation itself. The Defendants cite to no authority that supports the proposition that such an application should be given deference. Lastly, for the reasons set forth herein, the Secretary's 2014 Decision is unreasonable and therefore would not survive Step Two of a *Chevron* analysis, were the Court to reach it.

to organize under the IRA in large part because of fiscal concerns by the government at the time. It goes on to describe petitions that were filed with the Department in the late 1930s by ***other*** tribes in Lower Michigan that may have included members of the Gun Lake Tribe by virtue of their geographic proximity. Moreover, the Secretary's 2014 Decision describes correspondence and meetings with these nearby tribes where they were told that the IRA may not apply to them because of the fiscal concerns.[8] Most notably, the Decision goes on to say that a December 17, 1934 letter from William Zimmerman, Assistant Commissioner, Indian Affairs, advised that " 'since practically all of **the Michigan Indians** had lost their wardship status and **are not members of a recognized tribe under federal jurisdiction'**" they could not organize under that provision of the IRA. (SAR 000641)(emphasis added). Indeed, this contemporaneous document makes clear that the Gun Lake Tribe was not under federal jurisdiction at the passage of the IRA. This lack of interaction between the Tribe and the federal government, as well as refusals by the government in 1934 to engage other nearby lower Michigan tribes, forms a feeble—indeed, illogical—basis for the Secretary's 2014 Decision that the Gun Lake Band was under federal jurisdiction at the time.

Despite these clear concomitant signals that the United States Government was not interacting with, nor owed any duty towards, the Gun Lake Tribe, the Secretary's 2014 Decision nonetheless unabashedly continues to advocate that the Tribe was under federal jurisdiction in 1934. In one particularly attenuated line of argument, the Secretary's 2014 Decision states that there were several studies conducted of the tribes of Lower Michigan.[9] Of particular interest,

[8] The Decision also notes the presence of one member of the Bradley community at one such meeting, but does not state that this individual was a member of the Gun Lake Band.

[9] These studies appear to be conducted by civilians and were reported to the federal government, and there is no indication that the federal government financed or sanctioned the studies.

the Decision states, is a 1936 study conducted of other tribes in lower Michigan that "briefly acknowledged" the existence of a Potawatomi Band in the southwestern corner of Michigan that, it appears, may have referred to the Gun Lake Band. (SAR 000644.) This evidence falls well short, as these studies—none of which directly relate to the Gun Lake Tribe—simply do not support the Band's jurisdictional status.

The Secretary's 2014 Decision also discusses the Holst Report, a 1939 survey of the Indian groups in Michigan that reported that the Indian groups in Michigan maintained no tribal organizations and recommended "no further extension of organization under the IRA in Michigan." (SAR 000645-46.) While the Holst Report clearly indicates that the Gun Lake Tribe was not under Federal jurisdiction at the time, the Secretary's 2014 Decision attempts to debunk the report by stating that it was objected to at the time. (SAR 000646.) Those objections, however, focused on tribes that had been recognized and land that been taken under the IRA; even assuming they are relevant to contradict the Holst Report, they have no application to the Gun Lake Tribe[10] The remainder of the Secretary's Decision sets forth a variety of later decisions by the federal government not to provide support for Michigan tribes under the IRA. The Decision also outlines the later participation by members of the Gun Lake Band in rehabilitation projects administered by the State of Michigan, indicating state, not federal, jurisdiction. (SAR 000647.) The feather-light weight of this evidence, examined in the Secretary's 2014 Decision, demonstrates that the decision was unreasonable.

As Plaintiff recognized in his opening brief, this Court may determine that a number of factors could demonstrate that the Gun Lake Band was "under Federal jurisdiction" in 1934.

[10] If anything, it indicates that the Band was under the jurisdiction of the state. Notably, the objections assert: "the State is exercising and the Indian is accepting, State jurisdiction." (AR 000646.)

After examination of those possible factors, as described *supra* in reviewing the Secretary's 2014 Decision, it is clear that the Tribe was not. Moreover, neither the Government nor the Tribe have pointed to any persuasive evidence that the Gun Lake Band was "under Federal jurisdiction" in 1934. For example, the Government argues that the Tribe's 1999 Federal Acknowledgment only sets forth the date of previous *unambiguous* federal acknowledgement, but that does not mean that there were no subsequent interactions between the tribe and the government. The Government fails, however, to point to a single instance of such interaction. Moreover, to the extent that the Gun Lake Band relies on any informal recognition or "government-to-government" relations for its claim that it was "under Federal jurisdiction" in 1934, that also flies in the face of previous statements by the Department and the Gun Lake Band to the contrary. The Gun Lake Band's Chairman, David K. Sprague, testified before the Senate Committed on Indian Affairs that the Tribe's acknowledgement in 1999 "restablish[ed] their government-to-government relationship with the United States." (SAR 008976.)

Likewise, the Defendants go to great lengths to describe the different lists that have been comprised containing Indian tribes that existed in 1934. It is clear, however, that the Gun Lake Tribe is not on any of those lists. The government additionally makes the bald assertion the Gun Lake Band has met the requisites set forth in Justice Breyer's *Carcieri* concurrence; that is simply not true. There is not a single factor listed by Justice Breyer that is met in the Secretary's 2014 Decision. The Tribe and the Government also appear argue that the Gun Lake Band has been federally recognized since its early days of recognition in the 1800s. That assertion would not only be erroneous, but it would directly contradict previous sworn statements made by both the Tribe and the Department of Interior. For example, the Gun Lake Band wrote in *MichGO v. Kempthorne:* "the federal government withheld formal

acknowledgement beginning in 1870. ... Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue communal self-determination and self-sufficiency." (Dkt. 24, Ex. 1 at 3.) Moreover, any argument that the Tribe retained its "under federal jurisdiction" status simply by virtue of not being terminated is also contrary to the record. The Department of Interior Acting Deputy Assistant Secretary George T. Skibine offered a sworn affidavit that described the Gun Lake Band as a "once-terminated tribe." (Dkt. 28, Ex. 1 at 8.) Accordingly, and contrary to the bald assertion made in the Government's opposition, there is no "absence of any probative evidence that a tribe's jurisdictional status was terminated," as the Department itself has admitted that it was.

The Secretary's 2014 Decision relies on attenuated, tattered and murky reasoning to find the Gun Lake Band was under the jurisdiction of the United States in 1934. This is underscored by the legislative history of the Gun Lake Act, which makes clear the Secretary had no authority to take land into trust on behalf of the Tribe. The House Committee on Natural Resources 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). It went on the describe the inadequacy of the Secretary's findings:

> Information provided to the Committee by the Department of the Interior does not conclusively show that Gun Lake is a tribe that was recognized and under federal jurisdiction when the IRA was enacted in 1934. Rather, the Department 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 relevancy and accuracy.

H.R. REP. 113-590, at 2 (2014).

It is therefore clear, even considering the supplemental record, that the Gun Lake Band was not "under Federal jurisdiction" in 1934. Accordingly, both the Secretary's 2005 Decision and 2014 Decision were arbitrary, capricious, not in accordance with the law, and in excess of statutory jurisdiction, authority or limitations. 5 U.S.C. § 706 (2)(A) and (C).[11] The Court should so find and, pursuant to APA § 706, hold them unlawful and set them aside.

III. This Court Should Strike The Gun Lake Act In Its Entirety Because It Is Unconstitutional On Its Face and As Applied to Mr. Patchak.

A. The Indian Canons of Construction Do Not Affect the Constitutional Challenges Raised by Mr. Patchak

The Indian canons of statutory construction, invoked by Defendants, were first recognized by the Supreme Court in 1832 in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551 (1832).[12] In that case, the Court interpreted the treaties protecting the Cherokees from Georgia's encroachment liberally in the Indians' favor, specifically pointing out that the treaties should be interpreted as the Indians themselves would have understood them, and that "language used in treaties with the Indians should never be construed to their prejudice." *Id.* at 582. Since *Worcester*, the Supreme Court has employed the Indian canons in numerous cases when confronted with ambiguity in treaties or statutes affecting Indian tribes.

The purpose behind the Indian canons involved the fair interpretation of Indian treaties, which were forced upon Indian tribes lacking (at that time) legal sophistication. That situation is not even remotely similar to the facts underlying the third-party suit such as the instant one,

[11] The Tribe has puzzlingly criticized Plaintiff's arbitrary and capricious analysis in its opening brief for its number of paragraphs; unfortunately, that entirely misses the point. There was *no* examination by the Department of Interior on the issue of whether the tribe was under federal jurisdiction in 1934. Because this is required under the law, it is clear that the decision was unexplained, unauthorized, arbitrary and capricious in violation of 5 U.S.C. § 706 (2)(A). This vacuity in the record is so plain, that pages need not be devoted to analyzing it.

[12] The *Worcester* case has, over the years, been distinguished and overruled in a number of respects; however, the doctrine of Indian canons of construction, which sprang originally from this case, remains viable.

involving the government as a co-Defendant invested by a common interest shared with the Tribe. Moreover, it appears as well that the Tribe played an active role in effectuating the legislation that Mr. Patchak now challenges. Thus, the conceptual basis and necessity for the application of the Indian canons of construction is not present here.

In an analogous situation, last year, in a landmark Supreme Court case, *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013), the Court struck down a Section of the Voting Rights Act of 1965. In so doing, the Court recognized that Congress passed the Voting Rights Act of 1965 to address entrenched and pervasive race discrimination in voting, calling it "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 2615. Noting that "[n]early 50 years later, things have changed dramatically," and that "[c]overage today is based on decades old data and eradicated practices," *Id.* at 2625, 2617, certain preclearance requirements were no longer justified. By this same rationale, the necessity for applying the Indian canons of construction, at least in this case, are significantly obsolete, from a completely bygone era. Plaintiff believes these are factors that the Court should weigh in evaluating the statutes at issue here, in the unlikely event the Court finds that any statute is ambiguous.

Federal Defendants and the Tribes both contend that the Indian canons of construction should be applied by the Court in reviewing Defendants' interpretations of any statute governing Indian tribes. As the Court is well aware, when a statute is unambiguous, the plain meaning controls, and the Court need not engage in any canons of statutory interpretation when relying upon the plain meaning. "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v.*

Germain, 503 U.S. 249, 253-4 (1992) (citations omitted). "When the words of a statute are unambiguous, then, this first canon is also the last: '"Judicial inquiry is complete."' *Id.* at 254, *citing Rubin v. United States*, 449 U.S. 424, 430 (1981).

Ambiguity is not an issue surrounding the Gun Lake Act and its intended target, quite simply, this lawsuit. Regarding the constitutional challenges to the Gun Lake Act that Mr. Patchak has raised, Defendants have made no showing as to how the plain meaning is anything but clear. Moreover, Defendants have not taken issue with Plaintiff's interpretation of the requirements of the Gun Lake Act as drafted, rather, Defendants have argued that those requirements in the statute are constitutionally permissible.

Defendants now contend that the IRA is ambiguous, and they urge the Court to apply the Indian canons of construction to resolve interpretation issues in their favor. As we discuss below, the IRA is not ambiguous, and it did not become ambiguous after the Supreme Court decided *Carcieri*.

B. The Gun Lake Act Cannot Be Saved By Severability

All but conceding Plaintiff's position that the Gun Lake Act is unconstitutional, both Defendants suggest that Section B of the Act might be excised, but argue that Section A should remain. In support of their position, they argue that the doctrine of "severability" permits a Court to excise the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of the uncontested or valid remainder. Federal Defendant's Br. at 20-21 [Dkt. 85]; Tribe's Opp. to Plaintiff's Motion for Summ. Judg. At 16-17 [Dkt. 84].

The Defendants selectively address the case law of severability in their briefs, and they also misapply it to the facts presented in this case. Because Section A of the Gun Lake Act is not capable of operating independently, the law, in its entirety, must be deemed

unconstitutional. The judiciary does not have the kind of editorial freedom that Defendants suggest in urging severability. Standing alone, Section A is ambiguous, and the failure of Congress to include a severability clause in the legislation lends support to the rational conclusion that Congress never intended, nor did it consider, that Section A might exist independently.

In *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), the Supreme Court addressed the issue of severability, noting the importance of Congressional intent. The Court found that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685 (emphasis in original). This functionality aspect imposes a requirement that a court evaluate not only whether the statute itself makes sense and can function as a law without its unconstitutional portion, but also that the way the "new" law will function is consistent with Congress' intent when enacting the legislation originally and in its entirety. The Court may not use its remedial powers to circumvent the intent of the legislature. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-30. (2006).

In an attempt to salvage the Gun Lake Act, Federal Defendants rely on *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S.Ct. 3138, 3161 (2010). Their reliance, however, is misplaced. The *Free Enterprise* case made clear in its analysis of the severability issue that the outcome is dependent upon evidence of the intent of the legislature. In other words, if the legislature would not have enacted the valid provisions without the invalid provisions, the court may not sever the statute.

Section A of the Gun Lake Act is an excellent example of an indivisible provision. Section A of the Gun Lake Act, standing alone, fails to accomplish the overall purpose that

Congress had in mind, which was to extinguish all rights to legal actions that might be brought involving the Bradley Property. Without Section B, the Act cannot accomplish that, as all that remains is ambiguous language regarding the actions of the Secretary of the Interior.

Section 2 of the Gun Lake Act states, in pertinent part:

> (a) IN GENERAL—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
> (b) NO CLAIMS—Notwithstanding any other provision of law, an action (including an action pending in a Federal Court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113-179, 128 Stat. 1913 (2014).

Section A, standing alone, offers no guidance regarding the effect of the purported ratification and confirmation of the Secretary's decision; it is nothing more than an announcement, a pronouncement at best. It does not address and it certainly does nothing to alter the standards under the APA that the Court is required to apply. Standing alone, Section A expresses no views and offers no direction regarding Mr. Patchak's litigation, or any other litigation, for that matter. Without Section B, which purports to extinguish all rights to legal actions in federal court relating to the land described in Section A, it merely is a dangling provision, fraught with ambiguity.

Defendants' argument that the ratification of the trust status contained in Section A renders moot Mr. Patchak's case reads far more into Section A than reasonably can be gleaned from its language, particularly without Section B. There is nothing in Section A that, as Defendants contend, conclusively establishes that the Bradley Property is held in *irrevocable*

trust for the Tribe. The Supreme Court, having found that Mr. Patchak has standing to pursue his claim, offers a setting in which the Secretary may defend her actions in Court, before a neutral decision-maker. In any event, Section A, standing alone, cannot be read to require dismissal of Mr. Patchak's viable claims. To read Section A to require dismissal of Mr. Patchak's case would set a questionable precedent, endorsing an unlawful acquisition of land by the Secretary.

Mr. Patchak is not the first to be concerned about the precedent set by the Gun Lake Act. The House Committee on Natural Resources, in its report, expressed concerns about the reach of the Act, stating that it was needed because of "a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe." H.R. REP. 113-590 at 2 (2014). The Report went on to note that the information provided by the Interior Department to the House Committee on Natural Resources provided scant information to the Committee regarding the status of the Gun Lake Tribe in 1934, providing records of "questionable relevancy and accuracy." *Id.* In addition, the Committee was concerned about setting a precedent "for validating or ratifying unauthorized actions undertaken by the Secretary," yet that is precisely what Section A accomplishes standing alone: an authorization of an illegal act of the Secretary of the Interior. *Id.* This is inconsistent with Congress' intent, which included a role for the judiciary, albeit an unconstitutional one.

There are other considerations as well, which lead to the conclusion that Section A may not stand alone. Congress did not include an express severability provision in the Gun Lake Act. Had it done so, the Court would have a better indicator of the intent of Congress. There is always a chance that a piece of legislation, without a particular provision, would not have

passed. Without a severability clause, the Court—although it has the power to excise—has far less direction regarding whether it should take a scalpel to the bill.

The Gun Lake Act may not appropriately be severed; its provisions are inextricably intertwined. With Section B excised, it is not fully operative as a law. Accordingly, the Gun Lake Act, in its entirety, should be stricken as unconstitutional.

C. The Defendants' Arguments That the Gun Lake Act Is Constitutional Are Unpersuasive and Not Supported by Precedent

The powers of Congress are subject to constitutional limitations, and this Court is empowered to determine if an act of Congress improperly overreaches. Plaintiff's Motion for Summary Judgment presents formidable arguments addressing the unconstitutionality of the Gun Lake Act. Defendants' responses to those arguments demonstrate a lack of understanding of the underlying constitutional principles that must guide the Court. Briefly, we respond to the arguments raised in Defendants' most recent submission. As Plaintiff demonstrates again, the Gun Lake Act violates constitutional principles of separation of powers, the First Amendment, the Fifth Amendment, and the prohibition against bills of attainder.

i. Separation of Powers

At this stage, it remains clear that the Gun Lake Act violates the constitutional principle of separation of powers if it does not amend the IRA or the APA. *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).[13] Contrary to the position set forth by the Government

[13] The Tribe erroneously asserts that the Gun Lake Act does not comport with Article III only if "the Act effectuated no substantive legal change." (Tribe's Opp. at 8.) Mr. Patchak does not agree with that generalized statement; the law requires not any substantive legal change, but an amendment to the underlying law. Moreover, the Government asserts that, because the D.C. Circuit has not expressly adopted this proposition, it is not the law in this Circuit. That is patently false. The Supreme Court of the United States has so held and, as such, it is the law of the land.

and the Tribe, the Gun Lake Act does not amend the underlying law. Indeed, the Government and the Tribe lack any support for the proposition that it does. On the contrary, there is ample support for the conclusion that the Gun Lake Act, which is cited in Plaintiff's previously filed briefs. For example, the Act's legislative history, explicitly states that the Act **"will not make any changes in existing law, "** S.Rep. 113-194, at 4 (2014). (emphasis added), **"would make no changes in existing law,"** H.R. Rep. 113-590, at 5 (2014)(emphasis added), and "**does not change general Indian law or policy**." *Id*. Because the Gun Lake Act fails to amend the IRA or the APA, it offends the Constitution by infringing upon the purview of the federal judiciary.[14]

Nor can Defendants hide behind *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 441, 112 S.Ct. 1407 (1992), which they speciously describe as demonstrating broad construction of what constitutes an amendment to law. *Robertson* is both factually and legally inapposite here. Unlike here, the *Robertson* Court's explained that the act in that case "compelled changes in law, not findings or results under old law" because it created additional standards. *Id.* at 438. In doing so, the act specifically referenced the older statute that it amended, as it created new standards for courts to employ when applying that statute. *Id.* The act at issue in *Robertson* did not, like the Gun Lake Act, direct any specific outcome in pending litigation.

The Government mistakenly advances the argument that the Gun Lake Act is lawful because it removes jurisdiction from federal courts. That is incorrect; rather, the Act directs this Court to render a particular decision, stating 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

[14] The Government infuses its separation of powers discussion with case law regarding the power of Congress to direct the *executive* branch. That is not relevant to the issues presented by the Gun Lake Act, which usurps the powers of the *judiciary*.

(a) … shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014). Moreover, it is clear from the Act's legislative history that its intent is 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). Rather than removing a grant of jurisdiction, the Gun Lake Act commands this Court, part of the federal judiciary, to rule in favor of the United States Government in this pending litigation. That offends the United States Constitution.

The substance contained in Part A of the Gun Lake Act likewise violates separation of powers principles. As Plaintiff has previously explained, the IRA was passed by the 1934 Congress, and it was interpreted by the judiciary, vested with the Article III power to interpret the statutory language chosen by Congress. In *Carcieri*, the Supreme Court held that the 1934 Congress included the word "now" before "under Federal jurisdiction," to limit the IRA to tribes that were under Federal jurisdiction when the statute passed. The Gun Lake Act, passed by the present Congress, purports to superimpose its own interpretation of the IRA, without amending it. That violates the constitution because it usurps the judiciary's power to interpret the law, a law whose meaning has already been divined by the United States Supreme Court.

In advancing the erroneous argument that the Gun Lake Act is lawful, the Tribe relies heavily on language from the District Court's ruling in *James v. Hodel*. 696 F. Supp. 700 (1988). That case examined Congress's enactment of the "Settlement Act," which confirmed the decision of the Department of Interior to federally acknowledge the Gay Head Indian tribe. The Gun Lake Band erroneously cites *James* for the proposition that Congress has the power to act to moot a pending case. That is neither true, nor is it what the *James* court said; to the contrary, the *James* court expressly stated that to pursue the specific claims Plaintiffs brought, they would

have to challenge the Settlement Act, which they had not. Here, of course, Mr. Patchak vehemently challenges the Gun Lake Act on a variety of constitutional grounds, including separation of powers.[15]

ii. First Amendment Right to Petition

The Bill of Rights guarantees a right to petition. The right to petition the government for the redress of grievances includes the right to file suit in a court of law. Lawsuits are petitions under the First Amendment. *Burough of Duryea v. Pennsylvania,* 131 S.Ct. 2488 (2011); *NAACP v. Button*, 371 U.S. 415 (1963). The Tribe's argument, that a litigant is not entitled by the First Amendment to bring a claim that he "legally may not prevail upon," is nonsensical. *Every* case potentially is one that a party legally may not prevail upon; that is hardly a distinction that affects Mr. Patchak's right to petition.

The Federal Defendants, without citation to authority, claim that because the decision-maker in an APA case is the agency, not the Court, Mr. Patchak is not prevented from filing a petition with the Department of the Interior, and that "nothing prevents the Secretary from granting a remedy to Plaintiff." For this reason, the government maintains, Mr. Patchak's right to petition is not violated by the Gun Lake Act, which requires the dismissal of his case. (Defs.' Opp. to Pl.'s Mot. For Summ. J. at 22.) In other words, Mr. Patchak could always go before the Secretary and present his case. This argument can hardly be taken seriously. Defendants' briefing makes very clear that any suggestion by Mr. Patchak that the Secretary's decision to take the land into trust was legally flawed will fall upon completely deaf ears.

[15] Moreover, the legislation in that case ratified the *decision* of the Secretary to federally acknowledge the Gay Head Tribe, whereas the Gun Lake Act ratifies the *actions* of the Secretary. The Gun Lake Act does not ratify any determination by the Secretary that the Gun Lake Tribe is eligible to be the beneficiary of trust land under the IRA.

Judicial redress is a well-settled petition right under the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.,* 365 U.S. 127 (1961). The Gun Lake Act unlawfully deprives Mr. Patchak of that right.

iii. Fifth Amendment Due Process

The Gun Lake Act cannot lawfully coexist with the Fifth Amendment's guaranteed due process rights. Defendants' arguments to the contrary ignore the uncontroverted fact that Mr. Patchak's ruling from the Supreme Court was the final word on the issue that was presented—whether he had standing to challenge the Secretary's determination under the APA.

Defendants argue that Mr. Patchak does not posses a property interest in his claim because he has not obtained a "final unreviewable judgment." (Defs.' Opp. to Pl.'s Mot. For Summ. J. at 23.) This, of course, ignores the fact that the Supreme Court's decision on standing in this case was both final and unreviewable. Defendants apparently erroneously assume that Mr. Patchak must have a final unreviewable judgment *on the merits* of his case. This position taken by Defendants wholly ignores the procedural road this case has traversed—from district court, to the court of appeals, to the Supreme Court, and back to this court. Again, the result of the final unreviewable result of that litigation came from no less than the Supreme Court dictating, with finality, that Mr. Patchak had a right to proceed. Without doubt, no party believes that this Court is free to reject the decision of the Supreme Court deciding the standing issue in Mr. Patchak's favor.

Even standing alone, Section A of the Gun Lake Act does not "moot" Mr. Patchak's claim. Section A does not speak at all to the disposition of a claim, but rather ambiguously attempts to "reaffirm" the Secretary's unlawful action, whatever that may mean. A reaffirmation of agency's action does not make it less subject to the APA, and nowhere in

Section A of the Gun Lake Act does Congress suggest that this action is immune from review. There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). *See also*, *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) ("it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.")

iv. Bill of Attainder

But for Mr. Patchak's lawsuit, there would be no Gun Lake Act. As Plaintiff's Motion for Summary Judgment discussed, because the statute of limitation has run on the Secretary's decision to take the Bradley Property into trust, there can be no other suits filed. Thus, the sole case encompassed by the Gun Lake Act's dismissal requirement is this case. Furthermore, no new cases can be filed because of the statute of limitation.

Defendants cannot reasonably suggest that the Gun Lake Act was not directed at Mr. Patchak, so instead, they suggest that his situation fails to meet the requirement of demonstrating that he was "punished." They suggest that, because the law has a nonpunitive purpose, it cannot be considered a bill of attainder. Under the prevailing case law, however, the Gun Lake Act is a modern day bill of attainder—it applies to him with specificity, and it imposes punishment (dismissal of his suit and no recourse for his injuries). Moreover, the Act was passed to circumvent the effects of a ruling in Mr. Patchak's favor from the United States Supreme Court. Any "legitimate purpose" must be evaluated in this environment. *See, e.g., Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003) ("[T]he Court has . . .to determine whether there is a rational connection between the restriction imposed and a legitimate nonpunitive purpose.") *Id.* at 1219.

The prohibition against bills of attainder requires the Court to hold that the Gun Lake Act is unconstitutional.

IV. Even if the Gun Lake Act Were Applied to This Case, the Court Should Rule on the Merits.

A. Mr. Patchak's Case is Not Moot and the Court Has Jurisdiction to Entertain and Address His Claims

Plaintiff does not dispute that exercising "judicial power under Article III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The enactment of the Gun Lake Act did not render moot Mr. Patchak's claims, and it did not deprive the Court of jurisdiction. The burden of demonstrating mootness is a heavy one, and Defendants have failed to meet it here. A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). When a change in circumstances deprives a court of the ability to provide "any effectual relief whatsoever," the matter is moot. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Because Mr. Patchak is injured, as demonstrated by his complaint and recognized by the Supreme Court,[16] and because those injuries may be redressed by this Court under the APA (the Gun Lake Act notwithstanding) his action presents a live case and controversy within the Court's jurisdiction, and it is not moot. As demonstrated below, the Court retains the power under the APA to set aside agency actions, particularly those actions that do not fall within the stated prohibitions of the Gun Lake Act. Defendants have not so far addressed in any of their briefing this tremendous loophole in the legislation that they so actively embrace.

[16] The Supreme Court noted that the "evident intent" of Congress, when enacting the APA, was to make agency action presumptively reviewable. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 2210 (2012). Mr. Patchak's allegations of economic, environmental, and aesthetic harms flowing from the operation of a casino conferred standing to challenge the decision of the Secretary of the Interior. *Id.*

Mr. Patchak acknowledges that the Gun Lake Act presents a change in circumstances, which by its terms purports to "ratify" and "confirm" the unlawful actions of the Secretary placing the Bradley Property into trust. That said, the plain and very specific language of the Gun Lake Act affects only the Bradley tract of land—it does not address other land that the Tribe has asked the Secretary of Interior to take into trust. Mr. Patchak's complaint, however, which initiated this action, does address other lands placed into trust for the Tribe and seeks a permanent injunction prohibiting Defendants from accepting or transferring any land into trust for the benefit of the Tribe, because to do so violates the IRA. Compl. p. 9, ¶¶ (B), (D).

In that the Gun Lake Act is specific to a single tract of land, the Bradley Property, it cannot reasonably be argued that Mr. Patchak no longer has live issues to be addressed, since his complaint seeks relief beyond the Bradley Property. In fact, the Tribe has requested a determination by the Secretary to place two other tracts of nearby land into trust, and one of those properties is adjacent to the Bradley Property, presumably to be used for an expansion of the casino. According to the Tribe, the Secretary issued a notice of determination under the IRA to take those two other parcels of land into trust earlier this year. (Intervenor-Def.'s Mot. for Summ. J. at 7.) As noted, those two new land tracts subject to the Secretary's trust determination are not covered by the Gun Lake Act, and therefore, the trust determination is not prohibited by any language of the Gun Lake Act. The new land tracts which have been placed into trust are subject to challenge under the APA. Thus, the case is not moot because the Court continues to have power to grant effective relief on Plaintiff's claims. In deciding the issue of mootness, "[t]he question is whether there can be any effective relief," not just whether the "precise relief sought at the time of the application" is still available. *Northwest Envtl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (emphasis in original); *see also United*

States v. Chrysler Corp., 158 F.3d 1350, 1353 (D.C. Cir. 1998) (noting that "even the availability of a partial remedy is sufficient to prevent a case from being moot.").

Mr. Patchak's suit simply alleges that the Secretary's actions taking land into trust for the Tribe fail to meet the requirements of the IRA and are inconsistent with law. As the Supreme Court recognized, Mr. Patchak "merely asserts that the Secretary's decision to take land into trust violates a federal statute—a garden-variety APA claim." *Patchak* at 2208. The Court went on to consider Mr. Patchak's remedy, acknowledging that upon a finding in Mr. Patchak's favor, the APA does not entitle him to monetary relief, instead: "The reviewing court **shall . . . hold unlawful and set aside agency action** . . . not in accordance with law [or] in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(A), (C). This is precisely what Mr. Patchak requests the Court to do—to declare unlawful the Secretary's actions in taking the lands into trust and to set aside those actions, vacating the Secretary's determination that any of the three parcels qualifies as trust land under the IRA.

Because the language of the Gun Lake Act does not expressly preclude APA review, Mr. Patchak is entitled to have the merits of his claims addressed by this Court. There is positively nothing in the Act that states otherwise, including the mandate to promptly dismiss any case in federal court relating to the Bradley Property. Had Congress wanted to require dismissal without a formal adjudication or at least an opinion on the merits,[17] it could have done so. Insofar as paragraph (b) of the Act is concerned, if applied, it should not operate as a complete dismissal in any event. That section requires dismissal of any action "relating to the land described," which, as discussed, only refers to the original Bradley Property. Accordingly,

[17] Should the Court determine that the Gun Lake Act precludes any other procedural ruling besides a judgment of dismissal, for the reasons discussed above, the Court has discretion to make any dismissal without prejudice.

Mr. Patchak would have a right to maintain at least part of his original action, the Court clearly having jurisdiction to entertain it. If the Court dismissed the case in its entirety, any dismissal would necessarily be without prejudice to refilling, in order to pursue those claims regarding the more recent trust acquisitions.

Even if the Gun Lake Act survives completely the constitutional challenges raised by Mr. Patchak in each of his briefs, the Act would not obstruct completely the relief properly pleaded and requested by Mr. Patchak in his complaint. Mr. Patchak's complaint sought declaratory and injunctive relief, including a request "[t]hat the Court issue a permanent injunction prohibiting Defendants from accepting or transferring any land into trust for the benefit of the Gun Lake Band." Compl. p. 9, ¶ (D).

This case is not moot and the Court has jurisdiction to entertain the merits of Mr. Patchak's arguments regarding the propriety of the Secretary's decision to take land into trust for the Tribe. There is noting about the Gun Lake Act that strips the Court completely of its power to resolve this controversy. The Court may still grant some form of effective relief. *See, e.g., Center for Food Safety v. Salazar*, 900 F. Supp. 2d 1 (D.D.C. 2013).

B. The Gun Lake Act Does Not By Its Terms Make the Land Eligible for Use by the Gun Lake Tribe.

Even if this Court applies Section A of the Gun Lake Act, the land held in trust cannot be used for the benefit of the Gun Lake Tribe, because it does not qualify as a beneficiary under the IRA. Section A of the Act states:

> The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

Gun Lake Trust Land Reaffirmation Act. Pub. L. No. 113-179 (2014).

Section A of the Act endeavors to accomplish two things. First, the Bradley Property is "reaffirmed as trust land."[18] Second, the Act states that "the ***actions*** of the Secretary of the Interior in taking that land into trust are ratified and confirmed." *Id*. (emphasis added). What the Act does not do, nor purport to do, is determine that the Gun Lake Tribe qualifies as an "Indian tribe" under the IRA. Accordingly, even if the Secretary lawfully held the land in trust under the Gun Lake Act, that trust determination could not benefit the Gun Lake Tribe.

As discussed at length in Plaintiff's Motion for Summary Judgment, in order for the Gun Lake Tribe to be the beneficiary of land held in trust, it must have been a Tribe "under Federal jurisdiction" at the time the IRA passed. *Carcieri*, 555 U.S. 367 (2009). Nothing in the Gun Lake Act designates the Tribe as "under Federal jurisdiction." Moreover, the "actions" of the Secretary in taking the Bradley Property into trust do not include any determination, acknowledgement, or finding that the Tribe was "under Federal jurisdiction" in 1934, because the Secretary did not examine this factor. (Pl.'s Mem. in Supp. Mot. Summ. J. at 9-20.) Accordingly, the Gun Lake Act does nothing more than place the Bradley Property into trust. It does not authorize the land to be used for the benefit of the Gun Lake Tribe because the Tribe is not so entitled under the IRA. Accordingly, it is unlawful for the Secretary to utilize the Bradley Property for the benefit of the Gun Lake Band. In addition to the reasons stated herein, the Court should vacate the still-unlawful use of the Bradley Property for the benefit of the Gun Lake Band.

[18] The phrase "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 a modifier of "land" that operates only to describe the land at issue.

V. The Secretary's Decision Should Be Vacated

Ignoring the requirements of the APA, the Tribe argues that the Court should not vacate the Secretary's action of acquiring the Bradley Property as trust land for the Tribe. (Intervenor-Def.'s Br. at 24 n.6). The language of the APA specifically mandates that a "reviewing court *shall* hold unlawful and *set aside* agency actions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (emphasis added). While the Intervenor-Defendant is not incorrect in stating that a decision to vacate an agency's erroneous decision is in the District Court's discretion, it fails to give the APA's language appropriate weight. Moreover, the Secretary's decision was not at all insignificant, and therefore a remand without vacatur does not remedy Plaintiff's injury. As previously discussed, the agency erroneously approved their land to trust determination. This oversight renders invalid the decision to acquire the Bradley Property, because it is required by the law as *Carcieri* makes clear. As for the disruptive nature of vacatur, here, it would not be disruptive to other tribes, and therefore, vacatur is appropriate.

The D.C. Circuit itself has questioned whether a remand without vacating the underlying agency decision is a proper remedy upon a finding that the agency has violated the APA. *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1135 n.4 (D.C. Cir. 1995)("As the AMA does not challenge our longstanding practice of remanding rules without vacating them in certain circumstances, we do not reach the question raised and left undecided … as to the validity of this precedent."); *See also Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("Although I greatly respect the majority's attempt to save a well-intended relief program from possibly inefficient further proceedings, I do not think we can lawfully do so."). If this Court desires to remand for any reason, the appropriate and just action

is to vacate the Secretary's earlier decision before remanding it to the agency. *See e.g. American Insurance Association v. United States Department of Housing and Urban Development,* 2014 WL 5802283.

CONCLUSION

For the foregoing reasons and the reasons set forth above and in Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendant-Intervenor's Motion for Summary Judgment, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Summary Judgment, Deny Defendant-Intervenor's Motion for Summary Judgment, and vacate the decision of the Secretary of Interior taking the Bradley Property into trust.

Respectfully submitted,

By: */s/*

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Date: December 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, I electronically filed the foregoing PLAINTIFF'S CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the District Court using its CM/ECF system, which then electronically notifies the following counsel of record:

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Dated: December 18, 2014

/s/

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