NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

Case No. 15-5200

DAVID PATCHAK,

Plaintiff-Appellant,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and CARL J. ARTMAN, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,

Defendant-Appellees.

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

Intervenor for Defendant-Appellees.

On Appeal from the United States District Court for the District of Columbia Case No. 1:08-CV-01331-RJL (Hon. Richard J. Leon, U.S. District Judge)

OPENING BRIEF FOR APPELLANT

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December 7, 2015

CERTIFICATE OF PARTIES RULINGS AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1) and the Court's order dated July 21, 2015, the following information is provided.

(A) Parties, Intervenors, and Amici

Appellant:

David Patchak

Appellees:

Sally Jewell

United States Department of the Interior

United States Department of the Interior Bureau of Indian Affairs

Intervenor:

Match-E-Be-Nash-E-Wish Band of Pottawatomi Indians

(B) Rulings Under Review

The ruling under review is the final order entered in case no. 1:08-cv-1331 by Judge Richard J. Leon on June 17, 2015. That Order denied Appellant's motion for summary judgment, granted Appellee's (Intervenor-Defendant's) motion for summary judgment, and denied Appellant's motion to strike the "supplemental" administrative record. The opinion and order comprising the "Underlying Decision" are separately filed.

(C) Related Cases

This case was previously before this Court in *Patchak v. Salazar, et al.*, 632 F.3d 702 (D.C. Cir. 2011), on appeal from a district court decision, *Patchak v. Salazar, et al.*, 646 F. Supp. 2d 72 (D.D.C. 2009). Following this Court's ruling on appeal reversing the district court, the United States Supreme Court heard the case on writs of *certiorari*, affirming this Court's decision and remanding the action to the district court. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.Ed. 2d 211 (2012). Counsel is aware of no other related cases currently pending in this Court or any other court.

Dated: December 7, 2015

Respectfully Submitted,

/s/ Sharon Y. Eubanks

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction under 28 U.S.C. § 1331, because this is a civil action arising under federal statutes, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act" or "the Act"), Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b). Plaintiff challenges the decision of the Secretary of the Interior to take land into trust for the intervenor Indian tribe as an arbitrary and capricious exercise of authority. In addition, Plaintiff challenges the constitutionality of a federal statute, the Gun Lake Act. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. Following remand from the United States Supreme Court, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012), the District Court issued an Order and Memorandum Opinion denying Plaintiff's Motion to Strike the Administrative Record Supplement filed by the Department of the Interior, granting Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule, denying Plaintiff's Motion for Summary Judgment, and granting Intervenor-Defendant's Motion for Summary Judgment, on June 17, 2015. The notice of appeal was filed on July 14, 2015, within 60 days of the District Court's decision. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Indian Reorganization Act ("IRA"), pursuant to §§ 5 and 19, authorizes the Secretary of the Interior to take land into trust on behalf of an Indian Tribe, but only where such Tribe was under federal jurisdiction at the time that the IRA was passed, on June 1, 1934. *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009). In 2005, the Secretary of the Interior Department, Appellee herein and Defendant below, took land known as the Bradley Property into trust on behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Tribe"), Appellee herein and Intervenor-Defendant below, despite the undisputed evidence which establishes that the Tribe was not federally recognized between the years of 1870 and 1998. Did the District Court err by granting summary judgment in favor of the Defendants, despite the requirement that the Tribe have been under federal jurisdiction in 1934 and the evidence which demonstrates that it was not?

2. Laws that are enacted which contain provisions that result in violations of the United States Constitution are void *ab initio*. The Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of separation of powers principles, abrogates Appellant's First Amendment right to petition, violates Appellant's Fifth Amendment rights to due process, and constitutes an unlawful bill of attainder, prohibited by Article I,

section 9. Did the District Court err in finding the Gun Lake Act to be constitutional, and consequently to mandate dismissal of Appellant's claim?

3. A court reviewing an agency decision "'should have before it neither more nor less information than did the agency when it made its decision.'" *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (quoting *Fund for Animals v. Williams,* 391 F.Supp.2d 191, 196 (internal citations omitted). Well after making its decision and prior to the filing of motions for summary judgment in this matter, the Secretary of the Interior filed an Administrative Record Supplement, accompanied only by a brief statement asserting that the supplemental documents related to a 2014 decision to take two separate and unrelated parcels of land into trust for the Tribe. The documents produced in the Administrative Record Supplement were not in existence at the time of the 2005 decision, and therefore could not have been considered by the Department of the Interior while making that decision. Did the District Court err by denying Plaintiff's Motion to Strike the Administrative Record Supplement and permitting such additional documents as part of the Administrative Record in this case?

STATUTES

Indian Reorganization Act of 1934, 25 U.S.C. § 465

Indian Gaming Regulatory Act of 1998, 25 U.S.C. § 2701, *et. seq.*

Administrative Procedure Act, 5 U.S.C. §§ 702, 706

Gun Lake Trust Land Reaffirmation Act, Pub. L. 113-179, 128 Stat. 1913, Sec. 2(a)-(b).

STATEMENT OF THE CASE

I. History of the Gun Lake Tribe

Setting forth a chronological history of the Gun Lake Tribe is essential to this matter. Chief Match-E-Be-Nash-She-Wish led a band of Pottawatomi Indians within the area of Kalamazoo, Michigan, which became the location of their reservation land. During the period of 1795 to 1821, Chief Match-E-Be-Nash-She-Wish, on behalf of the Tribe, entered into various treaties with the United States government. Dkt. No. 22, Admin. Record 001210-001211. In 1821, he entered into the 1821 Chicago Treaty, which resulted in the band giving up a 3-square mile parcel of land located south of the Grand River. Dkt. No. 22, Admin. Record 001211. In 1833, all Indian tribes located in southwest Michigan were signatories to another treaty, the Chicago Treaty of 1833, which resulted in an agreement whereby these tribes would relocate to either Northern Michigan or the state of Kansas. *Id*. The one exception to this agreement was the Match-E-Be-Nash-She-

Wish band, which relocated to Bradley, Michigan, so as to avoid being forcibly removed pursuant to the treaty. The land located in Bradley was formerly known as the Griswold Mission, which had been established by Episcopalian Bishop McCoskry, in an effort to convert local Indian tribes to Christianity. Dkt. No. 22, Admin. Record 001988. The Griswold Mission received funding through the terms of a treaty known as the 1836 Ottawa Treaty, which had an expiration date of 1856. *Id*.

On July 26, 1855, prior to the expiration of the 1836 Ottawa Treaty, Bishop McCoskry put the land which formed the Griswold Mission into a trust for the benefit of the Tribe, though it remained in his own name. Dkt. No. 22, Admin. Record 001989. Also in 1855, the Shop-quo-ung band, another Michigan Indian band which was antecedent to the Gunk Lake Tribe, entered into the Treaty of Detroit. This treaty provided for annuity payments to the Shop-quo-ung. These annuity payments ceased in 1870, when the band moved from Oceana County, Michigan, to Allegan County, Michigan, in violation of the terms of the Treaty of Detroit. Dkt. No. 22, Admin. Record 001912. The year 1870 thereby marked the final date of "unambiguous previous Federal acknowledgement." Dkt. No. 22, Admin. Record 001912; *see also* 62 Fed. Reg. 38, 113. The Gun Lake Tribe is currently comprised of members who are descendants from the "persons listed on the 1870 annuity payroll for Shop-quo-ung's band," and also descendants from

persons listed on the BIA's 1904 Taggart Roll. Dkt. No. 22, Admin. Record 001913. The Tribe received no federal disbursements past the 1870 conclusion of the Tribe's compliance with the Treaty of Detroit. *Id.*

The Griswold Land Mission remained in the name of Bishop McCoskry, but the State of Michigan began to impose taxes on Bishop McCoskry in 1874, so in 1894, Bishop McCoskry resigned the trust to the Michigan state Circuit Court of Allegan County. *Id*. At this time, some members of the Tribe retained ownership of some of the land, but as years passed, most tribal residents surrendered their land to the state for failure to pay state taxes. *Id*.

None of the parties to this matter, Mr. Patchak, the Gun Lake Tribe, or the United States government, dispute that the Tribe was not federally recognized in 1934, the year in which the Indian Reorganization Act was enacted into law. Dkt. No. 22, Admin. Record 001185. In 1992, the Tribe made its first efforts to gain federal acknowledgement, by petitioning the BIA for such federal recognition. This was subsequently granted on October 23, 1998, and was scheduled to go into effect as of January 21, 1999. However, before this occurred, the city of Detroit, Michigan objected to federal acknowledgment of the Tribe, delaying the effective date of the federal recognition. Dkt. No. 22, Admin. Record 001442. Though the city of Detroit's objection was dismissed, the federal recognition did not become effective for the Gun Lake Tribe until August 23, 1999. *Id.*

At the time that the Tribe was granted federal recognition, it possessed no reservation land nor land held in trust by the federal government. Dkt. No. 22, Admin. Record 001438. To obtain land, the Tribe submitted an off-reservation Fee-to-Trust application with the BIA, asking the Secretary to take land into trust on the Tribe's behalf. *Id*. This application was officially submitted on August 8, 2001, and sought to have two parcels located in Wayland, Michigan to be placed into trust for the Tribe ("the Bradley Property"). Dkt. No. 22, Admin. Record 000001, 001438. The application also sought approval for a gaming and entertainment facility, pending negotiations of a Tribal-State Compact between the Tribe and the state of Michigan. Dkt. No. 22, Admin. Record 001445. On May 13, 2005, the Department of the Interior, Bureau of Indian Affairs, approved the application, and issued a "Notice of Final Agency Determination" which affirmed the decision of the Associate Deputy Secretary to take the land into trust for the Tribe. Dkt. No. 22, Admin. Record 000001; *see also* 70 Fed.Reg. 92. It is from this decision that the instant matter arose.

II. Procedural History of this Case

The instant matter was initially filed in the United States District Court for the District of Columbia on August 1, 2008. Dkt. No. 1. Appellant, and Plaintiff below, David Patchak, brought claims challenging the Secretary of the Interior's decision to place two parcels of land in Allegan County, Michigan ("the Bradley

Property"), into trust on behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Gun Lake Tribe" or "the Tribe"), Appellees and Intervenor-Defendant below. *Id*. This decision to place the land into trust was made pursuant to the Indian Reorganization Act, 25 U.S.C. § 465 ("the IRA").

On February 4, 2009, while this instant matter was pending, the United States Supreme Court issued a decision in the matter of *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009). The *Carcieri* decision was of particular importance to the instant matter, because it interpreted key language in the Indian Reorganization Act, which is the same act under which Mr. Patchak's claims arose. In *Carcieri*, the Court held that the IRA authorized the Secretary of the Interior to take land into trust for Indian tribes, but only where such tribes had been "under Federal jurisdiction" at the time when the IRA was enacted, in June 1934. *Carcieri*, 555 U.S. 379 (2009). Following this decision, on April 2, 2009, Mr. Patchak filed a motion for summary judgment, in which he argued that, because the Tribe had not been "under Federal jurisdiction" as of June 1934, as required by the IRA and *Carcieri*, he was entitled to summary judgment on his claims. Dkt. No. 52. In response, the United States District Court for the District of Columbia dismissed the case, with prejudice, on August 20, 2009, finding that Mr. Patchak lacked prudential standing to challenge the decision of the Secretary of the Interior. Dkt. Nos. 56, 57.

Mr. Patchak appealed the District Court's decision to dismiss, filing his appeal on September 15, 2009. Dkt. No. 58. This Court reversed the decision of the District Court, finding that Mr. Patchak had both Article III standing and prudential standing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 632 F.3d 702, 704-08 (D.C. Cir. 2011). This Court also found that the Indian Lands exception in the Quiet Title Act's waiver of sovereign immunity provision did not negate the Administrative Procedure Act's waiver of sovereign immunity. *Id*. The matter was then remanded to the District Court for further proceedings. *Id.* The Tribe appealed this Court's decision to the United States Supreme Court, and the matter was granted *certiorari*. On June 18, 2012, the United States Supreme Court determined that Mr. Patchak did, in fact, have prudential standing to challenge the Secretary of the Interior Department's 2005 decision. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012). The Court also found that the instant lawsuit may proceed pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and the matter was again remanded to the District Court for further proceedings. *Id*.

Also occurring during the pendency of this case, and significant to the instant matter, was the passage of the Gun Lake Trust Reaffirmation Act, Pub. L. No. 113-119 (2014) ("The Gun Lake Act"). The Gun Lake Act was introduced by

Michigan Senator Debbie Stabenow on October 29, 2013, and passed the Senate on June 19, 2014. The Act then passed in the House of Representatives on September 16, 2014, without amendment. President Obama signed the Gun Lake Act into law on Friday, September 26, 2014. The Gun Lake Act presents a unique legislative "reaffirmation" of the Secretary of the Interior's decision to take the Bradley Property into trust for the Tribe. The Act also directs courts to dismiss all claims regarding the Bradley Property,[1] a directive applicable only to the instant matter, as it was, at all times, the sole case which was pending in a Federal court and which involved the Bradley Property. Moreover, the decision of the Secretary from with Mr. Patchak's claims arose was rendered in 2005, and any new claims, following the 2014 Gun Lake Act, would have been barred by the APA's general six-year statute of limitations. 28 U.S.C. § 2401(a).

On September 4, 2014, pursuant to the remand from the United States Supreme Court, counsel for the parties appeared before the District Court for a status conference, which would begin proceedings to address the merits of Mr. Patchak's claims. Just one day before this status conference, the Secretary of the Interior issued another decision, entirely separate from this case, whereby two

[1] Section 2(b) of the Gun Lake Act states, in relevant part, "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described . . . shall not be filed or maintained in a Federal court and shall be promptly dismissed." Pub. L. No. 113-119 § 2(b) (2014).

additional parcels of land were taken into trust on behalf of the Tribe. Counsel for the Secretary declined to address this at the September 4, 2014 status conference, despite having the clear opportunity to do so, and instead simply stated the possibility that a supplemental administrative record may be filed. Dkt. No. 84-2, pp. 7-9. No formal motion was made to file such a supplement. A briefing schedule for Summary Judgment motions was entered on September 22, 2014. On October 27, 2014, just four days prior to the filing deadline for the dispositive motions, the Secretary filed a Supplemental Administrative Record. Dkt. No. 75. This record purported to contain the administrative record for the Secretary's September 3, 2014 decision to take the separate two parcels of land into trust on behalf of the Tribe; however, such a record had no relevance to the instant matter, as many of those documents had not even been in existence at the time of the 2005 decision regarding the Bradley Property which forms the basis of this matter. *Id*. Plaintiff's Motion to Strike the Supplemental Administrative Record was filed later that same day. Dkt. No. 76. The Secretary filed her Response to Plaintiff's Motion to Strike the Supplemental Administrative Record on October 29, 2014, and Mr. Patchak filed his Reply to Defendant's Response to Plaintiff's Motion to Strike the Supplemental Administrative Record on November 5, 2014. Dkt. Nos. 77, 81.

On October 31, 2014, in accordance with the briefing schedule set by the District Court, Mr. Patchak filed his Motion for Summary Judgment and

Memorandum in Support thereof. Dkt. Nos. 80, 80-1. The Tribe filed its Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Defendant-Intervenor's Motion for Summary Judgment that same day. Dkt. No. 78. The Court declined to hear oral argument on any of the Motions.

On June 17, 2015, the United States District Court for the District of Columbia entered its Order and Memorandum Opinion denying Plaintiff's Motion to Strike the Administrative Record Supplement, granting Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule, denying Plaintiff's Motion for Summary Judgment, and granting Intervenor-Defendant's Motion for Summary Judgment. Dkt. Nos. 92, 93. The District Court declined for want of jurisdiction, to reach the merits of Plaintiff's APA challenge. *Id.* It is from the June 17, 2015 Order that Mr. Patchak now appeals.

SUMMARY OF ARGUMENT

Under the Indian Reorganization Act, and as further established by the Supreme Court's decision in *Carcieri*, the Secretary of the Interior has the authority to take into trust land on behalf of Indian tribes, but only where such tribes were under Federal jurisdiction as of the date on which the IRA was enacted, in June 1934. Examining the factual history of the Gun Lake Tribe in light of applicable law, it is clear that, under no interpretation of the IRA, even one far

more expansive than that established by *Carcieri*, can the Gun Lake Tribe show that it was under Federal Jurisdiction in June of 1934. As such, the Secretary of the Interior lacked the legal authority to take into trust any land, including the Bradley Property, on behalf of the Tribe.

The Administrative Procedure Act requires a reviewing court to set aside a decision made by an agency if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if the decision is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706 (2)(A) and (C). Because the Secretary of the Interior's decision to take the Bradley Property into trust on behalf of the Gun Lake Tribe was in violation of both the plain statutory language of the Indian Reorganization Act and the decision set forth by the Supreme Court in *Carcieri*, it cannot be "in accordance with the law," and must be set aside under the APA.

Contrary to the decision below and arguments advanced by the Tribe in the record below, the Gun Lake Act does not validate the Secretary of Interior's actions, nor does it properly mandate dismissal of the instant matter, because the Gun Lake Act violates several provisions of the Constitution of the United States. The Gun Lake Act should be found unconstitutional because it usurps the powers granted solely to the judiciary under Article III, by directing an outcome in a judicial matter. It is also unconstitutional because it violates Mr. Patchak's right,

pursuant to the First Amendment, to petition the government for redress of grievances, and because it constitutes a taking in violation of due process requirements established by the Fifth Amendment. Finally, the Gun Lake Act amounts to an unlawful bill of attainder, directed at Mr. Patchak alone, in violation of Article I, section 9. Because the Gun Lake Act is, and at all times has been, unconstitutional, it should be declared unconstitutional, and Mr. Patchak's claims should be permitted to proceed to be decided on the merits.

Finally, the District Court denied Plaintiff's Motion to Strike the Administrative Record Supplement, with no explanation or analysis, and contrary to well-established principles of agency law which requires courts to review an agency's decision based only upon the materials which were before the agency, and considered by the agency, at the time the administrative decision was made. Many of the documents contained in the Administrative Record Supplement filed by the Secretary were not even in existence until years after the Secretary of the Interior made the decision, in 2005, to take into trust the Bradley Property on behalf of the tribe. As such, those documents should not be contained as part of the Administrative Record supporting the Secretary's decision.

STATEMENT OF THE STANDARD OF REVIEW

On appeal, this Court reviews *de novo* a district court's grant of summary judgment. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of*

Justice, 746 F.3d 1082, 1091 (D.C. Cir. 2014) (citing *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mex.*, 740 F.3d 195, 200 (D.C. Cir. 2014)); *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992); *Branch Ministries v. Rossotti*, 341 U.S. App. D.C. 166, 211 F.3d 137, 141 (2000) (summary judgement on constitutional claims reviewed *de novo*); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (review of district courts summary judgment decision on claims arising under the [Administrative Procedure Act] is "de novo without deference to the district court's determinations.").

Whether the District Court properly denied Plaintiff's Motion to Strike the Administrative Record Supplement will be reviewed for abuse of discretion. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("We review the district court's refusal to supplement the administrative record for abuse of discretion") (citing *Novartis Pharm. Corp. v. Leavitt*, 435 F.3d 344, 348 (D.C. Cir. 2006)).

ARGUMENT

I. The District Court erred by declining to conduct a legal analysis of the Secretary's decision under APA standards and by granting summary judgment to the Defendants.

A. Standard of Review

The Administrative Procedure Act provides for a "strong presumption" of reviewability of agency decisions. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The APA standard of review requires a reviewing court to set aside a decision made by an agency if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if the decision is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706 (2)(A) and (C). This presumption of reviewability may "be overcome by . . . specific language or specific legislative intent that is a reliable indicator of congressional intent." *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)). Only where that presumption is overcome will a court not be permitted to examine the merits of the case. A court reviewing an agency decision must examine the administrative record, and will generally not be permitted to consider any sources which were not before the agency at the time the decision at issue was rendered. *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (quoting *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 196 (internal citations omitted).

While the District Court correctly set forth the terms of its jurisdiction pursuant to the APA, the District Court erred in reaching the conclusion that it had no jurisdictional authority in this matter. Dkt. No. 92, Memorandum Opinion, p. 8. As set forth in detail in Section II of this brief, *infra*, the Gun Lake Act cannot be found to have properly removed the District Court's jurisdiction to entertain Mr. Patchak's claims in this case, nor could it have properly mandated dismissal of Mr. Patchak's claims, because the Gun Lake Act violates provisions of the United States Constitution in four ways. A law which is unconstitutional will be found to be void *ab initio*, and any decision rendered by a court under such a law is subject to reexamination. The District Court should have proceeded to examine the merits of Mr. Patchak's claims under the standards required by the APA, which such examination would have resulted in a finding that the decision of the Secretary of the Interior to take land into trust on behalf of the Tribe was not in accordance with applicable laws, and was similarly beyond the scope of the agency's statutory authority. Furthermore, and as set forth in detail in Section III, *infra*, the District Court improperly permitted materials which were not a part of the administrative record, and in fact were not even created, at the time that the Department of the Interior rendered its decision to take the Bradley Property into trust.

B. Argument

In the decision entered in *Carcieri v. Salazar*, the Supreme Court found the IRA to be unambiguous, and made clear that the Secretary of the Department of the Interior has the authority, under the Indian Reorganization Act, to take land into trust on behalf of Indian tribes, but only when the tribe was under federal jurisdiction as of June 1, 1934, the effective date of the IRA. *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009). The Supreme Court specifically emphasized that *Carcieri* "limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." *Id.* at 391. Although the decision in *Carcieri* did not specifically set forth the criteria to be examined in determining whether an Indian tribe was "under federal jurisdiction" in the year 1934, such elaboration is not necessary or pertinent to this instant matter. The evidence and record in this matter clearly establishes that the Gun Lake Tribe was not under federal jurisdiction in 1934, and as such, the Secretary was without authority to take land into trust for the Tribe under the IRA.

The factual scenario which laid the groundwork for the *Carcieri* decision is instructive to the instant matter. *Carcieri* involved a challenge to land taken into trust by the Secretary on behalf of the Narragansett Tribe. Once the Supreme Court determined that the IRA is unambiguous in limiting the Secretary's authority to tribes which were under federal jurisdiction as of the time of the IRA's enactment,

the Court went on to find that, because the Narragansett Tribe was not federally recognized at the time the IRA was passed, the decision to take land into trust on that tribe's behalf exceeded the scope of the Secretary's authority. *Carcieri*, at 395. This provides strong indication that "under federal jurisdiction" and "federally recognized" are one and the same, and that there is an underlying logical assumption that a tribe could not be under federal jurisdiction unless it was federally recognized.[2] The IRA itself defines "Indian" as "all persons of Indian descent who are members of any *recognized* Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479 (emphasis supplied). This language was specifically acknowledged in the concurring opinion filed by Justice Thomas in *Carcieri*, which pointed to the well-established principle of statutory construction whereby words are given their plain meaning and applied accordingly.

In addition to this letter-of-the-law analysis, the purpose of a tribe gaining federal recognition is so that the tribe may receive advantages, such as "protection, services, and benefits," which become available once the tribe is deemed to be "under federal jurisdiction." *See* 25 C.F.R. § 83.2 (2008) ("Acknowledgment of

[2] During oral argument in *Carcieri*, the Secretary of the Department of the Interior stated that the Department "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same," proving that this is not simply a theory concocted and advanced by the Plaintiff in the instant matter, or by parties' opposing decisions reached to take land into trust for tribes under the IRA. *Carcieri v. Salazar*, 555 U.S. at 400 (Souter, J., concurring in part, dissenting in part).

tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. . . Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected."). This further establishes that, for a tribe to be found to be "under federal jurisdiction," the tribe similarly must be under federal recognition. Other sources examining the relationships between Indian tribes and the United States government throughout the years have also concluded that "under federal jurisdiction" is most sensibly defined as federally recognized. *See* William W. Quinn, Jr., *Federal Acknowledgment of Indian Tribes,* 34 Am. J. Legal Hist. 331, 333, 356 (1990) (equating recognition with jurisdiction).

It is undisputed, and has been throughout the pendency of this lawsuit from its initiation, by any of the parties to this matter, that the Gun Lake Tribe was not federally recognized in 1934. The Tribe gained federal recognition on August 23, 1999, pursuant to the Tribe's application under 25 C.F.R. § 83.8 ("Part 83"). In fact, for the Tribe to have even been eligible to apply for, and obtain, federal recognition under Part 83, the Tribe must *not* have been federally recognized at the time of application. 25 C.F.R. § 83(a) and (b) ("[t]his part applies only to those American Indian groups . . . which are not currently acknowledged as Indian tribes by the Department . . . Indian tribes, organized bands . . . which are already

acknowledged . . . may not be reviewed under the procedures established by these regulations."). Simply put, if the Gun Lake Tribe had already been federally recognized, they could not have obtained federal recognition under Part 83 in 1999. The Tribe itself conceded as much, simply by completing the Part 83 application. Similarly, during the public comment period for the Tribe's Fee-To-Trust Application, a member of the Gun Lake Tribe responded to public comments opposing the land trust application by stating that "for approximately 150 years, my Tribe has suffered due to the United States government's failure to recognize us as an Indian tribe." (AR 001185.) The Tribe set forth similar statements in briefing during the *MichGO v. Kempthorne* litigation, including statements such as that "the federal government withheld formal acknowledgment beginning in 1870," and that "for well over a century, the Tribe was denied both federal recognition and reservation lands . . ." (Dkt. 24, Ex. 1 at 3.) In addition to the Tribe's statements regarding its lack of federal recognition and acknowledgment, the Department of the Interior made statements to the same effect. George T. Skibine, Department of the Interior Acting Deputy Assistant Secretary, provided a sworn affidavit categorizing the Gun Lake Tribe as a "once-terminated tribe." (Dkt. 28, Ex. 1 at 8.)

There is, quite simply, a host of evidence to support the finding that the Gun Lake Tribe was neither federally acknowledge nor under federal jurisdiction in

1934, as required by the IRA and *Carcieri* to receive land held in trust. Nevertheless, the District Court erroneously failed to consider this substantial evidence in its Memorandum Opinion because it improperly upheld the constitutional validity of the Gun Lake Act. At the same time, the District Court inappropriately permitted the government to include an Administrative Record Supplement that included extraneous and irrelevant information having positively no bearing on the decision challenged. As discussed in further detail in Section II, *infra*, if Congress had intended to impose some other standard by which the Secretary of the Interior was to have reached a decision pertaining to the Bradley Property, or any other land taken into trust for an Indian tribe, then Congress could have amended either the Indian Reorganization Act or the Administrative Procedure Act to permit such alternate decision-making processes. Congress declined to do so, and therefore, the District Court was under the obligation to assess this matter under the IRA and APA as they have, and continue to, exist. The District Court improperly declined to do so. As such, Mr. Patchak respectfully asks that this Court reverse the decision of the District Court which granted summary judgment in favor of the Defendants below, and find that the Secretary's decision to take the Bradley Property into trust was arbitrary, capricious, and an abuse of discretion, not in accordance with the law set forth by the IRA and *Carcieri*, and in

excess of the Department of the Interior's statutory authority under the IRA, and cannot be upheld under the APA. 5 U.S.C. § 706 (2)(A) and (C).

II. The District Court erred by upholding the constitutionality of the Gun Lake Act and finding that it mandated dismissal of Mr. Patchak's claims.

A. Standard of Review

Constitutional challenges to a statute, such as those advanced by Mr. Patchak, present questions of pure law, which are to be reviewed *de novo*. *Am. Bus. Ass'n v. Rogoff*, 649 F.3d 734, 737 (D.C. Cir. 2011) (quoting *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001)).

B. Argument

1. The Gun Lake Act violates well-established Constitutional principles regarding separation of powers because it encroaches upon the Article III judicial power of the courts to decide cases and controversies.

When a statute attempts to "prescribe rules of decision to the Judicial Department . . . in cases pending before it," such a statute has "passed the limit which separates the legislative from the judicial power." *U.S. v. Klein*, 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871). As the District Court properly recognized, *Klein* is the "seminal case" on the issue of separation of powers where the legislature has impermissibly coopted those powers and responsibilities reserved solely to the judiciary by enacting legislation which directs a particular outcome of a legal

matter. Dkt. No. 92, Memorandum Opinion, p. 10. This has been a long-standing principle of separation of powers, whereby laws which direct courts to make a particular decision in a pending matter are found to encroach upon the power of the judiciary. While the legislature may amend substantive laws, even when doing so will affect pending litigation, there is an important and notable difference between an amendment which will cause a change in the underlying law and an amendment which will compel a particular finding or result. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.E.2d 328 (1995); *Jung v. Ass'n of Am. Medical Colleges*, 184 Fed.Appx. 9, 12 (D.C. Cir. 2006) ("Congress may amend substantive laws, even when doing so affects pending litigation"); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001) (internal citations omitted). Amendments to a federal statute do not violate *Klein* so long as they do not "direct any particular findings of fact or applications of law, old or new, to fact." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

The underlying laws applicable to the instant case are the Indian Reorganization Act and the Administrative Procedure Act. Mr. Patchak's claims arose from the provisions of the IRA, as further set forth in the *Carcieri* decision, which limit the authority of the Secretary of the Interior to take land into trust on behalf of Indian tribes, but *only* where such tribes were "under federal jurisdiction" as of the passing of the IRA in June 1934. Mr. Patchak has consistently argued that

the Secretary lacked such authority, because the evidence clearly establishes that the Gun Lake Tribe was not under federal jurisdiction as of June 1934, even under the most expansive reading of the IRA. As such, the 2005 decision of the Secretary to take the Bradley Property into trust on behalf of the Gun Lake Tribe was "arbitrary, capricious, and an abuse of discretion," was "otherwise not in accordance with the law," and was made "in excess of statutory jurisdiction, authority, or limitations," as clearly prohibited by the APA. 5 U.S.C. § 706 (2)(A) and (C). The Gun Lake Act does not amend either of these underlying substantive laws, and Congress did not otherwise amend either of these laws in a manner that would have affected this instant litigation. Rather, the Gun Lake Act unlawfully directs the District Court to dismiss Mr. Patchak's claims. Contrary to the District Court's findings, this constitutes a specific rule of decision, rather than an amendment of an underlying substantive law which merely happens to affect litigation which is pending in the courts at the time of passage. The principles which narrow the scope of the rule set forth in *Klein* are therefore inapplicable, yet were inappropriately relied upon by the District Court to support its determination that the Gun Lake Act did not run afoul of *Klein*. Dkt. No. 92, Memorandum Opinion, p. 12.

As discussed in detail here, the Gun Lake Act, signed into law by President Obama in 2014, by its express terms purports to "reaffirm" the 2005 decision of

the Secretary to take the relevant property into trust and to extinguish Mr. Patchak's case by directing this Court and any other court to dismiss the action. The Act states, in pertinent part:

> **SEC.2. REAFFIRMATION OF INDIAN TRUST LAND**
>
> (a) IN GENERAL—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land and the actions of the Secretary are ratified and confirmed.
>
> (b) NO CLAIMS—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

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

A case given great credence by the District Court in its Memorandum Opinion, which recognizes that under *Klein*, Congress retains the authority to amend the underlying, substantive law even when doing so will affect the outcome of pending litigation is *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). This case, however, is distinguishable from the instant matter, though the District Court declined to make that examination.

A significant distinction between *National Coalition* and the instant matter is that the statute at issue in *National Coalition*, a statute which dictated the location of a World War II Memorial and withdrew the jurisdiction of the courts to review the decision of where to locate the memorial, did not violate any substantive provision of the Constitution, unlike the Gun Lake Act. In the decision in *National Coalition*, this Court distinguished the matter from *Klein*, noting that the statute at issue in *Klein* was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional Power of the Executive," but that because the Coalition "pose[d] no constitutional objection to the substance of Public Law No. 107–11, this element of *Klein* is of no concern." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (quoting *Klein*, 80 U.S. at 147). Quite the opposite is the case with respect to the Gun Lake Act, which is subject to multiple constitutional infirmities, including violations of the Due Process Clause and the prohibition on Bills of Attainder, the types of challenges which were recognized by the Court in the *National Coalition* opinion as potential problems which would have implicated the principles established by *Klein*. *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("There is no independent objection that this Memorial-specific legislation violates some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal

Protection clause.") As such, *National Coalition* does not apply in the exact parallel manner in which the District Court found, and does not dictate a finding that the Gun Lake Act does not encroach upon the powers of the judiciary, as the District Court erroneously found.

Furthermore, the District Court's heavy reliance upon the decision in *National Coalition* to find that the Gun Lake Act did not violate constitutionally mandated separation of powers was inadequate because it failed to take into consideration other cases which have also examined the rules of *Klein*, and which make clear that, in order to pass muster under *Klein*, a statute must change and amend the underlying law and not simply make sweeping declarations which dictate a rule of decision in a pending legal matter. Indeed, it is precisely this type of overreach that *Klein* determined unreasonable. "With respect to ongoing cases, precedent suggests that if Congress explicitly legislates a rule of decision without amending the underlying substantive law it violates the exclusive province of the judiciary." *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 164 (D.D.C. 2002) *aff'd*, 333 F.3d 228 (D.C. Cir. 2003) (citing *Klein*, 80 U.S. at 141-44); *see also Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (*Klein* stands for "the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case"); *Ruiz v. United States*, 243 F.3d 941, 948 (5th Cir. 2001) (citing *Klein* for the proposition that

"[t]he separation of powers principles inherent in Article III prohibit Congress from adjudicating particular cases legislatively"); *Hadix v. Johnson*, 144 F.3d 925, 940 (6th Cir. 1998) ("[T]he Legislature may not impose a rule of decision for pending judicial cases without changing the applicable law"). Each of these cases makes clear that the separation of powers principles set forth in *Klein* remain authoritative where Congress has passed a law which dictates a rule of decision in a judicial matter. This effect can occur only where Congress has amended the underlying law. In the instant matter, neither the Indian Reorganization Act nor the Administrative Procedure Act has been amended. Since those are the laws which give rise to Mr. Patchak's claims, Congress should have amended these laws to affect his pending litigation. Congress declined to do so, and therefore, under *Klein*, the Congressional attempt to achieve that goal through the Gun Lake Act runs afoul of the separation of powers between the legislature and the judiciary, and should be found unconstitutional.[3]

2. The Gun Lake Act abrogates Mr. Patchak's First Amendment Right to Petition.

In addition to violating constitutionally mandated principles of separation of powers, the Gun Lake Act imposes a significant and impermissible burden upon

[3] The District Court erroneously states in footnote 6 of its decision that Mr. Patchak failed to raise its argument that Congress' failure to amend the IRA invalidated the Gun Lake Act given the direction of *Klein*. Mr. Patchak did in fact raise this argument in his initial Memorandum supporting his Motion for Summary Judgment at pages 27-32.

Mr. Patchak's right to petition the government for redress of grievances, as guaranteed by the First Amendment. The Petition Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances," protecting the rights of citizens to seek resolution of legal disputes through courts and other forums. *Borough of Duryea, Pennsylvania v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government") (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). This right to petition extends to every department of the United States government, including the judiciary. *California Motor Transport Co. v. Trucking Unlimited et al.*, 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). While this right does not guarantee a successful outcome in the petition, for the right to be protected as required by the Constitution, it must be more than a mere façade of the ability to do so. The First Amendment does not require the government to actually listen or respond to a petitioner's grievances, but it does protect the petitioner's right to speak freely about his grievances, to advocate ideas through requests for redress, and to actively participate in a democratic government. *American Bus. Ass'n v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011). Congress may restrict the remedy, but it

cannot prohibit the petition. *Id.* Yet this is precisely what the Gun Lake Act, and the District Court's decision, seek to do.

The Gun Lake Act does not simply result in Mr. Patchak's case being dismissed, it expressly requires it. Furthermore, it prohibits Mr. Patchak from filing any other lawsuit which would relate to the Bradley Property and the Secretary's decision to take it into trust on behalf of the Tribe. That is to say, the Gun Lake Act intentionally bars Mr. Patchak from bringing valid claims arising under the IRA and the APA, for which the Supreme Court has already determined him to have standing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012). This effectively eliminates the First Amendment's Petition Clause as it pertains to Mr. Patchak's instant lawsuit. He will have no further option to pursue the legal claims he has had pending since 2008, nor will he have another option to file a formal complaint.

In reaching the conclusion that the Gun Lake Act does not abridge Mr. Patchak's First Amendment right to petition the government, the District Court focused only on whether the Gun Lake Act prohibits Mr. Patchak from receiving a *favorable* outcome in his petition. This is simply not the proper focus of the analysis. Mr. Patchak has not asserted any entitlement to a particular outcome, other than one that is adequately and accurately supported by the applicable laws to the facts of his case. Mr. Patchak has instead correctly asserted that he is entitled to

bring a meaningful petition for redress of his grievances, and is further entitled to a proper legal analysis by the court in determining the outcome. Thus far, he has not received such proper and substantive legal analysis of his claims, and the District Court's upholding of the Gun Lake Act seeks to further extinguish his constitutionally protected attempts to pursue his legitimate legal claims. The Court further concluded, without analysis, that even with dismissal of his lawsuit, Mr. Patchak continues to have the right to petition the Department of the Interior for relief. Notably, though, the District Court cites to no process or precedent—other than through his APA challenge—that would create a right to petition. Such a petition in the face of the Gun Lake Act would clearly be futile and meaningless. Furthermore, when Congress enacted the APA, its "evident intent" was to make agency actions presumptively reviewable, as was noted in the Supreme Court's decision in this case. *Patchak*, 132 S.Ct. at 2210.

The Department of the Interior has made decisions, on more than one occasion, which are adverse to Mr. Patchak's rights, and has vigorously defended the lawsuit Mr. Patchak brought in an attempt to protect those rights. To suggest that Mr. Patchak could seek the same relief from the Department of the Interior directly is simply not true. Petitioning the Department of the Interior would amount to, at minimum, not doing anything at all, and more likely, would result in a situation which would force Mr. Patchak into a position where he would expend

time and resources to have his claims simply hurried right back out of the Department's door. This does not comport with constitutional protections provided by the First Amendment, and the District Court erred in concluding that it does. While Mr. Patchak certainly does not suggest that Congress is powerless to change the law, and frequently does so without constitutional violation, he does maintain that any legislative changes must be entirely consistent with constitutional principles, particularly where the Bill of Rights is concerned. The District Court's decision should be reversed, and the Gun Lake Act should be found to violate the First Amendment right to petition the government for redress of grievances.

3. The Gun Lake Act violates Mr. Patchak's Fifth Amendment rights to Due Process.

Fifth Amendment Due Process issues arise where certain, protected rights of an individual have been threatened or violated. One such right is a person's property interest. Mr. Patchak's interest in this pending litigation, and his rights to challenge the 2005 decision of the Secretary to take the Bradley Property into trust, amounts to a property interest. As a result, Mr. Patchak's Due Process Rights pursuant to the Fifth Amendment are implicated and have, in fact, been violated by the Gun Lake Act.

Even though Mr. Patchak's interest is one that remains in the litigation process, this does not automatically preclude him from having a valid, tangible property interest. The Supreme Court has found that even an unadjudicated cause

of action can create a constitutionally protected property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). The *Mullane* decision found that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process clause,"[4] which the *Logan* decision reaffirmed. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 428-29 ("The Court traditionally has held that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.") The Supreme Court has emphasized that "[t]he hallmark of property. . .is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 at 430, 102 S. Ct. at 1155; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561-1562, 56 L.Ed.2d 30 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574, 95 S.Ct. 729, 735-736, 42 L.Ed.2d 725 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2709, 33 L.Ed.2d 548 (1972). Following this analysis, courts have found a host of protected property interests to arise, under a variety of circumstances. *See, e.g., Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (finding a property

[4] The Due Process rights established by the Fourteenth Amendment are the same as those established by the Fifth Amendment, and courts will analyze them interchangeably.

interest in a horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, *supra* (finding a property interest in a utility service); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (finding a property interest in disability benefits); *Goss v. Lopez, supra* (high school education); *Connell v. Higginbotham*, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971) (finding a property interest in government employment); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)(finding a property interest in a driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (finding a property interest in welfare benefits). The concept that a pending cause of action can create a property interest has been acknowledged on other occasions as well. In *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), the Supreme Court noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause." *Martinez v. California*, 444 U.S. 277, 281-282, 100 S.Ct. 553, 556-557, 62 L.Ed.2d 481 (1980).

It is clear that the law has identified and protected a vast array of property interests, many of which are not even related to actual, tangible property. Mr. Patchak has brought suit to protect his interests in his real property, and his rights to have quiet enjoyment thereof. It is this interest which is at stake in the pending litigation, and it is this interest which has been taken, without notice or hearing, by

the passage of the Gun Lake Act and the District Court's Order granting summary judgment to the Defendants. With the passage of the Gun Lake Act, Congress has reacted in a uniquely judicial manner. It has reviewed a prior decision of an Article III tribunal, eviscerated the finality of that judgment as determined by the United States Supreme Court, and required dismissal of a pending case, completely ignoring Mr. Patchak's rights to due process. The District Court erred in finding that Mr. Patchak did not have a cognizable property right which was owed the protection of the Fifth Amendment, and its decision should be reversed.

4. The Gun Lake Act constitutes an unconstitutional Bill of Attainder, specifically prohibited by Article I, section 9.

Article I, section 9 of the United States Constitution specifically prohibits Congress from passing a bill of attainder. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The purpose of this constitutional provision is to prevent "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). To determine whether a law constitutes and impermissible bill of attainder, courts will apply a two-step analysis. *Foretich v. United States*, 352 F.3d 1198, 1217 (D.C. Cir. 2003). The first step examines whether the law applies with specificity. *Id*. The second step examines whether the

law imposes a punishment. *Id.* Courts will determine whether a statute inflicts a "punishment" by examining whether the statute "falls within the historical meaning of legislative punishment," whether the statute "reasonably can be said to further nonpunitive legislative purposes," and whether there is evidence that Congress intended the statute to create a punishment. *Id.* at 1218.

The first element of the analysis for a bill of attainder is easily met in the instant matter. The Gun Lake Act very specifically applies to Mr. Patchak and his pending litigation, and was in fact specifically directed at him in its drafting and passage. Testimony before the House Committee on Natural Resources stated, in no unclear terms, that passage of the Gun Lake Act "would void a pending lawsuit [by neighboring landowner David Patchak]." Dkt. No. 92, Memorandum Opinion, p. 8. It is also undisputed that Mr. Patchak's case was, at all times, the only lawsuit pending in the courts which dealt with the Bradley Property, a point noted by the District Court. Dkt. No. 92, Memorandum Opinion, p. 19. The evidence thus shows a legislative intent to target David Patchak for even raising the issue that the Secretary of the Interior Department's decision to take the Bradley Property into trust on behalf of the Tribe was an improper one under the IRA and the APA. Such a directed extinguishment of Mr. Patchak's right to pursue a valid lawsuit not only establishes the specificity requirement, but is also tantamount to punishment for his doing so in the first place. Furthermore, the Gun Lake Act is not rationally related

to a legitimate state interest, a burden which falls upon the Secretary, and not Mr. Patchak, to meet.

Significantly, the language of the Gun Lake Act, which purports to "ratify and confirm" the Secretary's action in taking the Bradley Property into trust, does nothing to alter the framework for review of the Secretary's actions, as discussed in detail by the Supreme Court. *Patchak*, 132 S.Ct. 2199. Quite simply, the Gun Lake Act is not a "legislative fix" for the Supreme Court's *Carcieri* decision interpreting the IRA, nor does it exempt the Secretary's determinations regarding land trust determinations from the potential for judicial review under the APA. It is, however, a piece of legislation that affects only one plaintiff and one land acquisition, a classic bill of attainder.[5]

Congress is required by the Constitution to accomplish results by rules of general applicability, rather than by specifying the person upon whom the sanction it prescribes is to be levied. "Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to the other tribunals.

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

United States v. Brown, 381 U.S. 437, 461 (1965). Here, the legislative branch has made a judgment, in effect a crippling and punitive policy, depriving Mr. Patchak of the right to maintain his legal action, a right that no less than the Supreme Court has acknowledged he has standing to pursue.

Even if the District Court found Mr. Patchak's arguments that the Gun Lake Act violated his Fifth Amendment right to Due Process and constituted an unconstitutional bill of attainder to be unconvincing, the Act is still unconstitutional, as explained in Sections II.B.1 and II.B.2 of this brief, *supra*, the Gun Lake Act, because it violates long-standing and well-established constitutional principles which require the separation of powers, and because it abrogates Mr. Patchak's right under the First Amendment to petition the government for a redress of grievances.

III. The District Court erred by permitting the Administrative Record Supplement.

A. Standard of Review

The issue of whether the District Court properly denied Plaintiff's Motion to Strike the Administrative Record Supplement is reviewed for abuse of discretion. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("We review the district court's refusal to supplement the administrative record for abuse of discretion") (citing *Novartis Pharm. Corp. v. Leavitt*, 435 F.3d 344, 348 (D.C. Cir. 2006)).

B. Argument

A court tasked with review of an agency's decision is to be made based on the administrative record that was before the agency at the time that the decision was rendered. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The reviewing court "'should have before it neither more nor less information than did the agency when it made its decision.'" *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (quoting *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 196 (internal citations omitted). Review of an agency decision is to be a thorough inquiry, and should confirm whether the agency, in reaching its decision, "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *City of Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991) (even "assuming[] arguendo" that the agency had ample statutory authority, its action was devoid of "reasoned decision-making" and was therefore arbitrary and capricious). Where an agency's decision is unsupported by an articulated, reasoned explanation, or where the administrative record fails to justify, or contradicts, the agency's decision, the reviewing court must undo the

agency's action. *AT&T Co. v. Fed. Communications Comm'n*, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

The Supplemental Administrative Record filed by the Secretary and forwarded with no request for leave to file, has no relevance to or bearing on the instant case and decision at hand. The instant matter arose from the May 2005 decision of the Department of the Interior to take lands into trust. The information contained in the Supplemental Administrative Record consists of documents created and developed well after that May 2005 decision. In fact, many of the documents were created between the year of 2011 and 2014, many years after the decision at issue in this matter. As such, these documents were not even available at the time that the Department of the Interior made the 2005 decision regarding the Bradley Property, and could not have been considered by the Department while making that decision, as they *did not even exist* at the time of the decision. It was therefore improper for the District Court to permit the Secretary to file this Supplemental Administrative Record, and it is similarly improper for a Court to consider any of the documents or information contained therein in its review of the Department's decision.

In the only real, and very brief, mention of the Administrative Record Supplement contained in the Memorandum Opinion, the District Court placed an undue emphasis on a September 3, 2014 decision made by the Secretary, whereby

two other parcels of land, unrelated to the Bradley Property, were taken into trust for the Tribe, in reaching a conclusion that the Secretary therefore also had the authority to take the Bradley Property into trust. Dkt. No. 92, Memorandum Opinion, p. 6. As the law makes clear, a reviewing court has an obligation to conduct a thorough inquiry into the agency's decision-making process. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where the record does not support a finding that the agency engaged in reasoned decision-making, even if the agency had statutory authority to make such a decision – which the Department of the Interior did not, in the instant matter – such unfounded decisions may be found to be arbitrary and capricious. *City of Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991). Such is the case here.

Any legal basis that the District Court may have had for denying Plaintiff's Motion to Strike the Administrative Record Supplement is unclear, as no meaningful or reasoned analysis was given to the issue in the Memorandum opinion, and no legal authority was provided on the issue. Accordingly, the District Court abused its discretion in permitting the Administrative Record Supplement, and this Court should reverse the decision of the District Court denying Plaintiff's Motion to Strike the Administrative Record Supplement, and strike the Administrative Record Supplement filed by the government in this case.

CONCLUSION

WHEREFORE, Appellant respectfully requests that the District Court's Order be REVERSED and that the Court find that the Gun Lake Act is unconstitutional as described herein. Appellant also seeks to have the case REMANDED to the District Court with instructions to vacate the decision of the Secretary of the Interior because her actions in taking the land into trust were not under color of legal authority. Finally, Appellant asks the Court to REVERSE the decision of the District Court denying Appellant's motion to strike the supplemental administrative record.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument to further elucidate the proper legal standards and the correct application of those legal standards to the facts of this case. In addition, because the case presents issues of constitutionality, the opportunity to address those issues at oral argument with the Court would be a useful aid to the decisional process.

Respectfully submitted,

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STATUTORY ADDENDUM

STATUTORY ADDENDUM

The Indian Reorganization Act, June 18, 1934

(Wheeler-Howard Act - 48 Stat. 984 - 25 U.S.C. § 461 *et seq*)

--An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Sec. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States; Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That this section shall not apply to

lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That the order of the Department of the interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: Provided further, That the damages shall be paid to the Papago Tribe for loss of any improvements of any land located for mining in such a sum as may be determined by the Secretary of the Interior but not exceed the cost of said improvements: Provided further, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Indian Tribe: Provided further, That in the event that any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: Provided further, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore said in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that the patent is not required.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained

therein, except as expressly provided, shall be construed as authority by the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgement, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians.

For the acquisition of such lands, interests in lands, water rights,

and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures how pending in congress and embodied in the bills (S. 2531 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Sec. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

Sec. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing

reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Sec. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sec. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Sec. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Sec. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any

unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Sec. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who maybe appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian office, in the administrations functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Sec. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: Provided, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following named Indian tribes, together with members of other tribes affiliated with such named located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the indians of the Klamath Reservation in Oregon.

Sec. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (25 Stat.L. 891), or their commuted cash value under the Act of June 10, 1886 (29 Stat.L. 334), to all Sioux

Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 (35) Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

Sec. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided.

Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly

called by the Secretary of the Interior, shall vote against it application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all person who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

Amendments to the Wheeler-Howard Act, June 18, 1934
(The Indian Reorganization Act)

Section 15 of the Indian Reorganization Act was modified in part by the following provisions contained in the Act of August 12, 1935 (Public Law 260 - 74th Congress, 1st Session):

Sec. 2. In all suits now pending in the Court of claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Court of Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its finding of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: Provided, that the expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act, shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Court of Claims or hereafter filed.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Public Law 100-497
100th Congress

An Act

To regulate gaming on Indian lands.

Oct. 17, 1988
[S. 555]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Indian Gaming Regulatory Act".

Indian Gaming Regulatory Act.
25 USC 2701 note.

FINDINGS

SEC. 2. The Congress finds that— 25 USC 2701.

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

DECLARATION OF POLICY

SEC. 3. The purpose of this Act is— 25 USC 2702.

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

DEFINITIONS

SEC. 4. For purposes of this Act— 25 USC 2703.

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act.

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

NATIONAL INDIAN GAMING COMMISSION

SEC. 5. (a) There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission. Establishment. 25 USC 2704.

(b)(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and President of U.S.

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment. Federal Register, publication.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

President of U.S.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).

(d) Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g)(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) All members of the Commission shall be reimbursed in accordance with title 5, United States Code, for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

POWERS OF THE CHAIRMAN

25 USC 2705.

SEC. 6. (a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 14(b);

(2) levy and collect civil fines as provided in section 14(a);

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

POWERS OF THE COMMISSION

25 USC 2706.

SEC. 7. (a) The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2).

(b) The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act. Regulations.

(c) The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on— Reports.

(1) whether the associate commissioners should continue as full or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to the Act; and

(4) any other matter considered appropriate by the Commission.

COMMISSION STAFFING

SEC. 8. (a) The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code. 25 USC 2707.

(b) The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification

and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

COMMISSION—ACCESS TO INFORMATION

25 USC 2708.

SEC. 9. The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

INTERIM AUTHORITY TO REGULATE GAMING

25 USC 2709.

SEC. 10. Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

TRIBAL GAMING ORDINANCES

25 USC 2710.

SEC. 11. (a)(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits; Contracts.

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and Environmental protection. Safety.

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and Law enforcement and crime.

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally Children and youth.

incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

Taxes.

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act.

Federal Register, publication.

(iii) Within sixty days of the date of enactment of this Act, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c)(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act; and

(B) has otherwise complied with the provisions of this section

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

Law enforcement and crime.

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Federal Register, publication.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

Effective date.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

Federal Register, publication.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

Law enforcement and crime.

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Federal Register, publication.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

Law enforcement and crime.

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; Taxes.

(v) remedies for breach of contract; Contracts.

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment. State and local governments.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over— Courts, U.S.

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by

the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph. Federal Register, publication.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12. Contracts.

(e) For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

MANAGEMENT CONTRACTS

SEC. 12. (a)(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1), but, before approving such contract, the Chairman shall require and obtain the following information: 25 USC 2711.

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c)(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the

effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

Real property.

(g) No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

REVIEW OF EXISTING ORDINANCES AND CONTRACTS

25 USC 2712.

SEC. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

(b)(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 11(b) of this Act.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 11(b), the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 11(b), the Chairman shall provide written notification of

necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c)(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12.

(2) If the Chairman determines that a management contract submitted under subsection (a), and the management contractor under such contract, meet the requirements of section 12, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 12, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

CIVIL PENALTIES

25 USC 2713.

SEC. 14. (a)(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13.

Regulations.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13, that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b)(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the

Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

(d) Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

JUDICIAL REVIEW

SEC. 15. Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code. 25 USC 2714.

SUBPOENA AND DEPOSITION AUTHORITY

SEC. 16. (a) By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. 25 USC 2715.

(b) The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Law enforcement and crime.
Classified information.
25 USC 2716.

INVESTIGATIVE POWERS

SEC. 17. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) The Attorney General shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

COMMISSION FUNDING

25 USC 2717.

SEC. 18. (a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each class II gaming activity that is regulated by this Act.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 19, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. (a) Subject to the provisions of section 18, there are hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission. 25 USC 2718.

(b) Notwithstanding the provisions of section 18, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989.

GAMING ON LANDS ACQUIRED AFTER ENACTMENT OF THIS ACT

SEC. 20. (a) Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless— 25 USC 2719.

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and—

(A) such lands are located in Oklahoma and— Oklahoma.

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b)(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim, Claims.

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

Federal Register, publication.

(c) Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d)(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.

DISSEMINATION OF INFORMATION

25 USC 2720.

SEC. 21. Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

SEVERABILITY

25 USC 2721.

SEC. 22. In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.

CRIMINAL PENALTIES

SEC. 23. Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1166. Gambling in Indian country

"(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

"(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

"(c) For the purpose of this section, the term 'gambling' does not include—

"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

"(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

"(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe. Law enforcement and crime.

"§ 1167. Theft from gaming establishments on Indian lands Fraud.

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value of $1,000 or less belonging to an establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $100,000 or be imprisoned for not more than one year, or both.

"(b) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $250,000, or imprisoned for not more than ten years, or both.

"§ 1168. Theft by officers or employees of gaming establishments on Indian lands Fraud.

"(a) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins,

willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value of $1,000 or less shall be fined not more than $250,000 and be imprisoned for not more than five years, or both;

"(b) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $1,000,000 or imprisoned for not more than twenty years, or both.".

CONFORMING AMENDMENT

SEC. 24. The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following:

"1166. Gambling in Indian country.
"1167. Theft from gaming establishments on Indian lands.
"1168. Theft by officers or employees of gaming establishments on Indian lands.".

Approved October 17, 1988.

LEGISLATIVE HISTORY—S. 555:

SENATE REPORTS: No. 100-446 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 134 (1988):
Sept. 15, considered and passed Senate.
Sept. 26, 27, considered and passed House.

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Administrative Procedure Act

5 U.S.C. §701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, §5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, §5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

5 U.S.C. §702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C. §703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought

against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C. §705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

Public Law 113–179
113th Congress

An Act

To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Sept. 26, 2014
[S. 1603]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Gun Lake Trust Land Reaffirmation Act.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

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

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band

of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

Approved September 26, 2014.

LEGISLATIVE HISTORY—S. 1603:

HOUSE REPORTS: No. 113–590 (Comm. on Natural Resources).
SENATE REPORTS: No. 113–194 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 160 (2014):
June 19, considered and passed Senate.
Sept. 15, 16, considered and passed House.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

__X__ The brief contains 10,465 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

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2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14 point Times New Roman font or

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December 7, 2015

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David Patchak v. Sally Jewell, No. 15-5200

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by BORDAS & BORDAS, PLLC, Attorneys for Appellant to print this document. I am an employee of Counsel Press.

On **December 7, 2015**, counsel has authorized me to electronically file the foregoing **Brief for Appellant** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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A courtesy copy has also been mailed to the above listed counsel.

Any required paper copies will be filed with the Court on the same date via Express Mail.

December 7, 2015

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