No. 16-498

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 11, 2016
CERTIORARI GRANTED MAY 1, 2017

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RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT NO. 2015-5200

Date Filed	Docket Text
07/21/2015	US CIVIL CASE docketed. [15-5200]
07/21/2015	NOTICE OF APPEAL filed [1563558] by David Patchak seeking review of a decision by the U.S. District Court in 1:08-cv-01331-RJL. Assigned USCA Case Number [15-5200]
	***
12/07/2015	APPELLANT BRIEF [1587286] filed by David Patchak [Service Date: 12/07/2015] Length of Brief: 10,465. [15-5200] (Eubanks, Sharon)
	***
02/18/2016	APPELLEE BRIEF [1599553] filed by Carl J. Artman and Sally Jewell [Service Date: 02/18/2016] Length of Brief: 13,753 words. [15-5200] (McFadden, Lane)
	***

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02/19/2016	*CORRECTED* APPELLEE BRIEF [1599696] filed by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [Service Date: 02/19/2016] Length of Brief: 13,953 words. [15-5200] (Schulte, Conly)
	***
03/07/2016	APPELLANT REPLY BRIEF [1602714] filed by David Patchak [Service Date: 03/07/2016] Length of Brief: 6,684. [15-5200] (Eubanks, Sharon)
	***
03/21/2016	*JOINT* APPENDIX [1604882] filed by David Patchak and Carl J. Artman, Sally Jewell and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. [Volumes: 1] [Service Date: 03/21/2016] [15-5200] (Eubanks, Sharon)
	***
03/28/2016	APPELLANT FINAL BRIEF [1605865] filed by David Patchak [Service Date: 03/28/2016] Length of Brief: 10,465. [15-5200] (Eubanks, Sharon)

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03/28/2016	APPELLANT FINAL REPLY BRIEF [1605866] filed by David Patchak [Service Date: 03/28/2016] Length of Brief: 6,684. [15-5200] (Eubanks, Sharon)
03/28/2016	APPELLEE FINAL BRIEF [1605882] filed by Carl J. Artman and Sally Jewell [Service Date: 03/28/2016] Length of Brief: 13,724 words. [15-5200] (McFadden, Lane)
03/28/2016	APPELLEE FINAL BRIEF [1605908] filed by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [Service Date: 03/28/2016] Length of Brief: 13,899 words. [15-5200] (Ducheneaux, Nicole)
	***
05/13/2016	ORAL ARGUMENT HELD before Judges Rogers, Pillard and Wilkins. [15-5200]
07/15/2016	PER CURIAM JUDGMENT [1624906] filed that the decisions of the District Court appealed from in this cause are hereby affirmed, for the reasons in the accompanying opinion . Before Judges: Rogers, Pillard and Wilkins. [15-5200]
07/15/2016	OPINION [1624907] filed (Pages: 19) for the Court by Judge Wilkins. [15-5200]

07/15/2016	CLERK'S ORDER [1624908] filed withholding issuance of the mandate. [15-5200]
09/07/2016	MANDATE ISSUED to Clerk, U.S. District Court. [15-5200]
10/13/2016	LETTER [1642038] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 10/13/2016 as No. 16-498. [15-5200]
05/01/2017	LETTER [1673479] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in case No. 16-498: The motion of Federal Courts Scholars for leave to file a brief as amici curiae is granted. The petition for writ of certiorari was granted limited to Question 1 presented by the petition on 05/01/2017. [15-5200]

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (WASHINGTON, DC) CIVIL DOCKET FOR CASE #: 1:08-CV-01331-RJL

Date Filed	#	Docket Text
08/01/2008	1	COMPLAINT against DIRK KEMPTHORNE, CARL J. ARTMAN (Filing fee $350, receipt number 4616014126) filed by DAVID PATCHAK. (Attachments: # 1 Civil Cover Sheet)(jf,) (Entered: 08/05/2008)
		***
08/19/2008	13	MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Memorandum in Support, # 2 Declaration of Chairman David K. Sprague, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit K, # 14 Exhibit L, # 15 Exhibit M, # 16 Exhibit N, # 17 Exhibit O, # 18 Exhibit P, # 19 Exhibit Q, # 20 Exhibit Proposed Answer, # 21 Text of Proposed Order) (jf,) (Entered: 08/22/2008)

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08/28/2008		MINUTE ORDER granting 13 MOTION to Intervene by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the unopposed motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b) is GRANTED and it is hereby further ORDERED that movant is permitted to intervene as a defendant in this matter. Signed by Judge Richard J. Leon on 08/28/2008. (lcrjl1) (Entered: 08/28/2008)
08/28/2008	14	ANSWER to 1 Complaint by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. Related document: 1 Complaint filed by DAVID PATCHAK.(jf,) (Entered: 08/29/2008)

***

10/06/2008	19	MOTION for Judgment on the Pleadings by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Exhibit News Article, # 2 Exhibit Meeting Minutes, # 3 Text of Proposed Order) (Schulte, Conly) (Entered: 10/06/2008)

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10/06/2008	20	MOTION to Dismiss for Lack of Jurisdiction by DIRK KEMPTHORNE, CARL J. ARTMAN (Attachments: # 1 Memorandum in Support, # 2 Certificate of Service)(Allery, Gina) (Entered: 10/06/2008)

***

10/17/2008	23	MOTION to Stay by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibits 1-9, # 3 Text of Proposed Order, # 4 Certificate of Service)(Marzouk, Tobey) (Entered: 10/17/2008)
10/17/2008	24	Memorandum in opposition to re 20 MOTION to Dismiss for Lack of Jurisdiction, 19 MOTION for Judgment on the Pleadings filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibits 5-7, # 5 Exhibit Exhibit 8, # 6 Exhibit Exhibit 9, # 7 Text of Proposed Order Order-Motion to Dismiss, # 8 Text of Proposed Order Order-Motion for Judgment on Pleadings, # 9 Certificate of Service)(Marzouk, Tobey) (Entered: 10/17/2008)

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10/27/2008	28	REPLY to opposition to motion re 20 MOTION to Dismiss for Lack of Jurisdiction filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Exhibit, # 2 Text of Proposed Order, # 3 Certificate of Service)(Allery, Gina) (Entered: 10/27/2008)
10/27/2008	29	Memorandum in opposition to re 23 MOTION to Stay filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Declaration, # 2 Text of Proposed Order, # 3 Certificate of Service)(Allery, Gina) (Entered: 10/27/2008)
10/27/2008	30	REPLY to opposition to motion re 19 MOTION for Judgment on the Pleadings filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit A - City of Tacoma v Andrus Order)(Schulte, Conly) (Entered: 10/27/2008)
10/27/2008	31	Memorandum in opposition to re 23 MOTION to Stay filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Affidavit Decl of Sprague, # 2 Exhibit A - Ampro Site,

		# 3 Exhibit B - MichGO v Kempthorne 4-29-08 Decision, # 4 Exhibit C - Mtn to Supplement Issues, # 5 Exhibit D - MichGO v Kempthorne 3-19-08 Order, # 6 Exhibit E - MichGO v Kempthorne 7-25-08 Order, # 7 Exhibit F - Petition, # 8 Exhibit G - 23 Is Enough Supporters, # 9 Errata H - 6-13-05 News Article, # 10 Exhibit I - 2-24-07 News Article, # 11 Exhibit J - 2-25-07 News Article, # 12 Exhibit K - 9-05 Letter from Boorsma, # 13 Exhibit L - Patchak Campaign Ad, # 14 Exhibit M - Amicus Brief, # 15 Exhibit N - Wayland Meeting Minutes, # 16 Exhibit O - Wayland Meeting Minutes, # 17 Text of Proposed Order) (Schulte, Conly) (Entered: 10/27/2008)

***

11/06/2008	33	REPLY to opposition to motion re 23 MOTION to Stay filed by DAVID PATCHAK. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Errata Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Certificate of Service)(Marzouk, Tobey) (Entered: 11/06/2008)

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11/13/2008		MINUTE ORDER denying 23 MOTION to Stay by DAVID PATCHAK. It is hereby ORDERED that the motion is DENIED. Signed by Judge Richard J. Leon on 11/13/2008. (lcrjl1) (Entered: 11/13/2008)

***

01/08/2009	36	MOTION for Temporary Restraining Order/*Preliminary Injunction* by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Certificate of Notice and Compliance With Local Rule 65.1(a), # 3 Text of Proposed Order, # 4 Certificate of Service, # 5 Exhibit 7, # 6 Exhibit 8, # 7 Exhibit 9, # 8 Exhibit 1, # 9 Exhibit 2, # 10 Exhibit 3, # 11 Exhibit 4, # 12 Exhibit 5, # 13 Exhibit 6)(Marzouk, Tobey) (Entered: 01/08/2009)
01/08/2009	37	RESPONSE *to Plaintiff's re 36 MOTION for Temporary Restraining Order/Preliminary Injunction Request for Emergency Hearing filed* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) . (Entered: 01/08/2009)

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11/06/2008	40	Memorandum in opposition to re 36 MOTION for Temporary Restraining Order/*Preliminary Injunction* filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Affidavit, # 2 Certificate of Service) (Allery, Gina) (Entered: 01/09/2009)

***

01/14/2009	44	REPLY to opposition to motion re 36 MOTION for Temporary Restraining Order/*Preliminary Injunction* filed by DAVID PATCHAK. (Attachments: # 1 Certificate of Service)(Marzouk, Tobey) (Entered: 01/14/2009)

***

01/23/2009	46	Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)* by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Marzouk, Tobey) (Entered: 01/23/2009)

01/23/2009	47	Memorandum in opposition to re 46 Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)*Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)* filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Attachment A (Opposition To Plaintiff's Second Motion For Injunctive Relief)) (Ahn, Demian) (Entered: 01/23/2009)
01/23/2009	48	REPLY to opposition to motion re 46 Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary Restraining Order/Preliminary Injunction (with Certificate of Service)*Emergency MOTION for Temporary Restraining Order *Enjoining Defendants from Taking Land Into Trust Pending a Decision on Motion for Temporary*

		Restraining Order/Preliminary Injunction (with Certificate of Service) filed by DAVID PATCHAK. (Marzouk, Tobey) (Entered: 01/23/2009)
		***
01/26/2009		Minute Entry for proceedings held before Judge Richard J. Leon. Motion Hearing held on 1/26/2009. MOTION 36 for Temporary Restraining Order filed by DAVID PATCHAK - Heard and Denied. Motion for 36 Preliminary Injunction filed by DAVID PATCHAK - Taken Under Advisement. (Court Reporter Patty Gels.) (kc) (Entered: 01/26/2009)
		***
03/02/2009	50	ORDER that the plaintiff shall submit in writing within 21 days of this Order a memorandum addressing whether this Court retains subject matter jurisdiction in this case in light of the Quiet Title Act, 28 U.S.C. 2409a(a); and it is further ORDERED that defendants and defendant-intervenor shall each have 14 days after service of plaintiff's memorandum in which to file a response, if any. Signed by Judge Richard J. Leon on 2/27/09. (see order.) (kc) (Entered: 03/02/2009)

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03/20/2009	51	MEMORANDUM re 50 Order, by DAVID PATCHAK. (Attachments: # 1 Exhibit Argument Transcript Excerpt)(Courtade, Bruce) (Entered: 03/20/2009)
04/02/2009	52	MOTION for Summary Judgment by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Exhibit Exhibit 1, # 3 Text of Proposed Order, # 4 Certificate of Service)(Courtade, Bruce) (Entered: 04/02/2009)
04/06/2009	53	RESPONSE re 51 MEMORANDUM re 50 Order, filed by DIRK KEMPTHORNE, CARL J. ARTMAN. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order) (Allery, Gina) Modified as to correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)
04/06/2009	54	MEMORANDUM in support of re 51 MEMORANDUM re 50 Order, by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Ahn, Demian) Modified as to the correct docket text on 4/7/2009 (jf,). (Entered: 04/06/2009)

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04/07/2009	55	MOTION to Stay *Briefing on Plaintiff's Motion For Summary Judgment* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Text of Proposed Order)(Schulte, Conly) (Entered: 04/07/2009)
04/09/2009		MINUTE ORDER granting 55 MOTION to Stay Briefing on Plaintiff's Motion For Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. It is hereby ORDERED that the motion is GRANTED and it is further ORDERED that briefing on plaintiff's 52 motion for summary judgment is STAYED pending the Court's resolution of the pending 19 motion for judgment on the pleadings and 20 motion to dismiss for lack of jurisdiction. Signed by Judge Richard J. Leon on 4/9/2009. (lcrjl1) (Entered: 04/09/2009)
08/20/2009	56	MEMORANDUM OPINION. Signed by Judge Richard J. Leon on 8/19/09. (kc) (Entered: 08/20/2009)

08/20/2009	57	ORDER REVERSED PURSUANT TO USCA MADATE FILED 4/28/11.....ORDER denying Motion 36 for TRO; denying Motion 41 for Order; denying Motion 46 for TRO; denying Motion 52 for Summary Judgment and granting Motion 19 for Judgment on the Pleadings and granting Motion 20 to Dismiss for Lack of Jurisdiction. ORDERED that this case be DISMISSED with prejudice. SO ORDERED. Signed by Judge Richard J. Leon on 8/19/09. (kc) Modified on 5/2/2011 (zsmm). Modified on 5/2/2011 (zsmm). (Entered: 08/20/2009)
09/15/2009	58	NOTICE OF APPEAL as to 57 Order on Motion for TRO, Order on Motion for Order,, Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion to Dismiss/Lack of Jurisdiction,,,,,, by DAVID PATCHAK. Filing fee $455, receipt number 00900000000001961103. Fee Status: Fee Paid. Parties have been notified. (Courtade, Bruce) (Entered: 09/15/2009)

09/16/2009		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 58 Notice of Appeal, (jf,) (Entered: 09/16/2009)
09/22/2009		USCA Case Number 09-5324 for 58 Notice of Appeal, filed by DAVID PATCHAK. (jf,) (Entered: 09/23/2009)
01/08/2010	59	ORDER of USCA as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. Upon consideration of the motion to dismiss in part, the response thereto, and the reply, it is ORDERED that the motion to dismiss in part be referred to the merits panel to which this appeal is assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss in part rather than incorporate those arguments by reference. The Clerk is directed to enter a briefing schedule. (kb) (Entered: 01/08/2010)

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04/28/2011	61	MANDATE of USCA (certified copy) as to 58 Notice of Appeal, filed by DAVID PATCHAK; USCA Case Number 09-5324. ORDERED and ADJUDGED that the judgment of the District Court

appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date. (Attachments: # 1 Opinion)(zsmm) (Entered: 05/02/2011)

***

12/12/2011	63	ENTERED IN ERROR.....NOTICE *of Granting Petitions for Writs of Certiorari by Supreme Court* by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Schulte, Conly) Modified on 12/13/2011 (znmw,). (Entered: 12/12/2011)

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07/17/2014	67	MOTION for Hearing *Status Conference* by DAVID PATCHAK (Edwards, Catharine) Modified event title on 7/18/2014 (znmw,). (Entered: 07/17/2014)

***

09/04/2014	Minute Entry: Status Conference held on 9/4/2014 before Judge Richard J. Leon: Parties shall file a Joint Proposed Briefing Schedule within

		ten (10) days of today's hearing. (Court Reporter Patty Gels) (tb,) (Entered: 09/05/2014)
09/22/2014		MINUTE SCHEDULING ORDER: It is hereby ORDERED that the parties shall abide by the following briefing schedule: (1) plaintiff shall file his Motion for Summary Judgment and intervenor-defendant shall file its Motion for Summary Judgment on res judicata, laches, and other defenses on or before 10/31/2014; (2) any and all oppositions to plaintiff's and intervenor-defendant's motions for summary judgment shall be filed on or before 12/4/2014; and (3) replies to the motions for summary judgment shall be filed on or before 12/18/2014. It is further ORDERED that oral argument on the motions will be set by the Court at a date to be determined. Signed by Judge Richard J. Leon on 9/22/14. (lcrjl2,) (Entered: 09/22/2014)
		***
10/09/2014	73	NOTICE OF SUPPLEMENTAL AUTHORITY by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, SALLY JEWELL (Attachments: # 1

		Supplement Gun Lake Trust Land Reaffirmation Act)(Schulte, Conly) (Entered: 10/09/2014)
10/09/2014	74	NOTICE of *Response* by DAVID PATCHAK re 73 NOTICE OF SUPPLEMENTAL AUTHORITY (Edwards, Catharine) (Entered: 10/09/2014)
		***
10/31/2014	78	MOTION for Summary Judgment by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (Attachments: # 1 Declaration Chairman Sprague, # 2 Text of Proposed Order)(Schulte, Conly) (Entered: 10/31/2014)
		***
10/31/2014	80	MOTION for Summary Judgment by DAVID PATCHAK (Attachments: # 1 Memorandum in Support, # 2 Appendix, # 3 Text of Proposed Order)(Eubanks, Sharon) (Entered: 10/31/2014)
		***

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12/04/2014	84	Memorandum in opposition to re 80 MOTION for Summary Judgment filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit Tribe's Mot for Summary Judg, # 2 Exhibit Transcript)(Schulte, Conly) (Entered: 12/04/2014)

***

12/04/2014	86	Memorandum in opposition to re 80 MOTION for Summary Judgment *(CORRECTED)* filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Attachments: # 1 Exhibit Tribe's Mot for Summ Judg, # 2 Exhibit Transcript, # 3 Text of Proposed Order)(Schulte, Conly) (Entered: 12/04/2014)

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12/18/2014	88	REPLY to opposition to motion re 80 MOTION for Summary Judgment filed by MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS. (Schulte, Conly) (Entered: 12/18/2014)

***

12/18/2014	90	REPLY to opposition to motion re 80 MOTION for Summary Judgment filed by DAVID PATCHAK. (Attachments: # 1 Appendix Part I, # 2 Appendix Part II, # 3 Appendix Part III, # 4 Appendix Part IV)(Edwards, Catharine) (Entered: 12/18/2014)

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06/17/2015	92	MEMORANDUM AND OPINION. Signed by Judge Richard J. Leon on 06/16/15. (tb) (Entered: 06/17/2015)
06/17/2015	93	ORDER: For the reasons set forth in the Memorandum Opinion entered this date; it is hereby ordered that plaintiff's 76 Motion to Strike the Administrative Supplement is DENIED; it is further ordered that Intervenor-Defendant's 78 Motion for Summary Judgment is GRANTED; it is further ordered that plaintiff's 80 Motion for Summary Judgment is DENIED; it is further ordered that plaintiff's 89 Unopposed Motion for Leave to File Excess Pages is GRANTED; and it is further ordered that this case be DISMISSED. Signed by Judge Richard J. Leon on 06/16/15. (tb) (Entered: 06/17/2015)

07/14/2015	94	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 93 Order on Motion to Strike, Order on Motion for Summary Judgment,, Order on Motion for Leave to File Excess Pages,,,,,,,, 92 Memorandum & Opinion by DAVID PATCHAK. Filing fee $505, receipt number 0090-4175484. Fee Status: Fee Paid. Parties have been notified. (Eubanks, Sharon) (Entered: 07/14/2015)
07/15/2015	95	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 94 Notice of Appeal to DC Circuit Court. (znmw) (Entered: 07/15/2015)
07/21/2015		USCA Case Number 15-5200 for 94 Notice of Appeal to DC Circuit Court, filed by DAVID PATCHAK. (md) (Entered: 07/21/2015)

***

09/07/2016	97	MANDATE of USCA as to 94 Notice of Appeal to DC Circuit Court, filed by DAVID PATCHAK. USCA Case Number 15-5200. (Attachments: # 1 judgment filed July 15, 2016)(zrdj) (Entered: 09/07/2016)

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges.*

Argued May 13, 2016
Decided July 15, 2016

Opinion for the Court filed by Circuit Judge WILKINS.

Appendix B

WILKINS, *Circuit Judge*: David Patchak brought this suit under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705, challenging the authority of the Department of the Interior to take title to a particular tract of land under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The land, called the Bradley Property, had been put into trust for the use of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan, otherwise known as the Gun Lake Band or the Gun Lake Tribe.

Following the Supreme Court's determination in 2012 that Mr. Patchak had prudential standing to bring this lawsuit, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), Congress passed the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014), a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removing jurisdiction from the federal courts over any actions relating to that property. Taking into account this new legal landscape, the District Court determined on summary judgment that it was stripped of its jurisdiction to consider Mr. Patchak's claim. Holding additionally that the Act was not constitutionally infirm, as Mr. Patchak contended, the District Court dismissed the case.

Mr. Patchak now appeals the dismissal of his suit, as well as a collateral decision regarding the District Court's denial of a motion to strike a supplement to the administrative record. For the reasons stated below, we affirm the District Court's determination that the Gun

Lake Act is constitutionally sound and, accordingly, that Mr. Patchak's suit must be dismissed. We further conclude that the District Court did not abuse its discretion by denying Mr. Patchak's motion to strike a supplement to the administrative record.

I.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Gun Lake Tribe) is an Indian tribe whose members descend from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who occupied present day western Michigan. *See Proposed Findings for Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 62 Fed. Reg. 38113, 38113 (July 16, 1997). While the Tribe had been a party to many treaties with the United States government in the 18th and 19th centuries, it only began pursuing federal acknowledgement under the modern regulatory regime of the Bureau of Indian Affairs, 25 C.F.R. §§ 83.1-83.46, in 1992. The Tribe was formally recognized by the Department of the Interior in 1999. In 2001, the Tribe petitioned for a tract of land in Wayland Township, Michigan — called the Bradley Property — to be put into trust under the IRA. The Tribe sought to use the land to construct and operate a gaming and entertainment facility. The Bureau of Indian Affairs approved the petition in 2005, placing the Bradley Property into trust for the Tribe's use. *See Notice of Determination*, 70 Fed. Reg. 25596, 25596 (May 13, 2005). The Gun Lake Casino opened on February 10, 2011.

Appendix B

David Patchak lives in a rural area of Wayland Township commonly referred to as Shelbyville, in close proximity to the Bradley Property. Mr. Patchak asserts that he moved to the area because of its unique rural setting, and that he values the quiet life afforded him there. Mr. Patchak filed the present lawsuit against the Secretary of the Interior and the Assistant Secretary of the Interior for the Bureau of Indian Affairs on August 1, 2008, invoking the court's jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 705. Mr. Patchak claimed that he would be injured by the construction and operation of a casino in his community because it would, among other things, irreversibly change the rural character of the area, increase traffic and pollution, and divert local resources away from existing residents. Mr. Patchak argued that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked the authority to put the Bradley Property into trust for the Gun Lake Tribe.[1] The Gun Lake Tribe intervened as a defendant.

In response to Mr. Patchak's complaint, the United States and the Tribe claimed that Mr. Patchak lacked prudential standing because his interest in the Bradley Property was "fundamentally at odds with the purpose

1. Mr. Patchak's arguments on the merits of his claim rely heavily on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), published after he initially filed his lawsuit. *Carcieri* interpreted part of the recognition provision of the IRA, 25 U.S.C. § 479. 555 U.S. at 387-93. Because we do not reach the merits of Mr. Patchak's claim in this appeal, we do not consider the impact of *Carcieri* in this case.

of the IRA" and he therefore did not fall within the IRA's "zone of interests." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The District Court agreed, and dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 76, 79. Patchak appealed to this Court, and we reversed. *See Patchak v. Salazar*, 632 F.3d 702, 394 U.S. App. D.C. 138 (D.C. Cir. 2011). The Supreme Court agreed, holding that Patchak did indeed have prudential standing to bring his suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2212. The case was remanded to the District Court for further proceedings.

In the time between the Supreme Court's prudential standing determination and the parties' renewed attention to the case, both the Department of the Interior and Congress weighed in further on the legal status of the Gun Lake Tribe and the Bradley Property, respectively. First, the Department of the Interior issued an Amended Notice of Decision approving an application the Tribe had submitted for two other parcels of land it sought to acquire. As part of this Notice of Decision, the Secretary expressly considered, and confirmed, its authority to take land into trust for the benefit of the Gun Lake Tribe. Second, on September 26, 2014, President Obama signed the Gun Lake Act into law. The substantive text of the Gun Lake Act is as follows:

> (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.

Gun Lake Act § 2.

Shortly following the enactment of the Gun Lake Act, the parties filed motions for summary judgment. The District Court determined that, as a result of this legislation, it was now stripped of jurisdiction to consider Mr. Patchak's claim. *See Patchak v. Jewell*, 109 F. Supp. 3d 152, 159 (D.D.C. 2015). Rejecting Mr. Patchak's constitutional challenges to the Gun Lake Act, the District Court granted summary judgment in favor of the Government and the Tribe, and dismissed the case. *Id.* at 160-65. The District Court also denied Mr. Patchak's

Motion to Strike the Administrative Record Supplement, which had challenged the addition of the Amended Notice of Decision to the record before the court. *See* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). Mr. Patchak now appeals those decisions.

II.

The language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction to consider the merits of Mr. Patchak's complaint, which undisputedly "relat[es] to the land described" in Section 2(a) of the Act. Gun Lake Act § 2(b). Accordingly, Patchak's suit "shall not be . . . maintained . . . and shall be promptly dismissed." *Id.* Of course, this is only so if the Gun Lake Act is not otherwise constitutionally infirm, as "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (citing RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 368 (4th ed. 1996)). The federal courts have "presumptive jurisdiction . . . to inquire into the constitutionality of a jurisdiction-stripping statute." *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008).

Mr. Patchak's constitutional challenges to the Gun Lake Act are pure questions of law that we review *de novo*. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001).

Appendix B

A.

Mr. Patchak first argues that the Gun Lake Act encroaches upon the Article III judicial power of the courts to decide cases and controversies, in violation of wellestablished constitutional principles of the separation of powers. Article III imbues in the Judiciary "the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). This endowment of authority necessarily "blocks Congress from 'requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.'" *Id.* at 1322-23 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases. *See Bank Markazi*, 136 S. Ct. at 1325. Without question, "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* This rule is no different when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096. It is well settled that "Congress has the power (within limits) to tell the courts what classes of cases they may decide." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Congress may not, however, "prescribe or superintend how [courts] decide those cases." *Id.* at 1869. Congress impermissibly encroaches upon the judiciary when it "prescribe[s] rules of decision" for a pending case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). In short, Congress may

not direct the result of pending litigation unless it does so by "supply[ing] new law." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992). Mr. Patchak argues that the Gun Lake Act did not provide any new legal standard to apply, but rather impermissibly directed the result of his lawsuit under pre-existing law.

These principles do not require, as Mr. Patchak suggests, that in order to affect pending litigation, Congress must directly amend the substantive laws upon which the suit is based. Indeed, Supreme Court precedent belies such a contention.

In *Seattle Audubon*, for example, the Supreme Court considered the impact of new legislation on pending cases challenging the federal government's efforts to allow the harvesting and sale of old-growth timber in the Pacific Northwest. 503 U.S. at 431. The legislation was the Northwest Timber Compromise, a provision of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989). *Id.* at 433. It established rules to govern the forest harvesting at issue in the pending consolidated cases, and spoke expressly to those suits — even identifying them by caption number. *Id.* at 433-35. If loggers complied with the new rules, Congress posited, they would thereby satisfy the statutory obligations on which the pending environmental litigation rested. *Id.* The Ninth Circuit held that the Northwest Timber Compromise unconstitutionally dictated the outcome of pending litigation without amending the underlying laws, but the Supreme Court disagreed. The Court held that the legislation effectively "replaced the legal standards

underlying the two original challenges . . . without directing particular applications under either the old or the new standards." *Id.* at 436-37. Because the provision "compelled changes in law," *id.* at 438, the Court concluded that the provision "affected the adjudication of the [specifically identified] cases . . . by effectively modifying the provisions at issue in those cases," *id.* at 440.

The Supreme Court's recent *Bank Markazi* decision likewise applied new legislation to pending litigation. That legislation did not directly amend or modify the particular statute upon which the pending litigation was based. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258, 22 U.S.C. § 8772 (2012) had been passed in order "[t]o place beyond dispute" the availability of certain assets for satisfaction of judgments rendered in certain specifically identified terrorism cases. *Bank Markazi*, 136 S. Ct. at 1318. The statute was enacted as a freestanding measure, not as an amendment to the Foreign Sovereign Immunities Act of 1976 (FSIA) (which allows American nationals to file suit against state sponsors of terrorism in United States courts, *see* 28 U.S.C. § 1605A), or the Terrorism Risk Insurance Act of 2002 (TRIA) (which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party"). *Id.* Rejecting a challenge similar to the one Mr. Patchak pursues here — that the provision "did not simply amend pre-existing law," *id.* at 1325 — the Court held that "§ 8772 changed the law by establishing new substantive standards," *id.* at 1326. As the Court explained, "§ 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored

terrorist attacks will be permitted to execute against those assets." *Id.*

Our decision in *National Coalition to Save Our Mall* is also instructive. There, we considered a separation-of-powers challenge to a statute that withdrew from the federal courts subject matter jurisdiction to review challenges to specific executive decisions relating to the placement of the World War II Memorial on the National Mall. 269 F.3d at 1096-97. In rejecting that challenge, we emphasized that there is no "prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Id.* at 1096. And while this Court "express[ed] no view" on the question whether a court could do so without amending the substantive law on which a pending claim rested, we did note that the provision at issue (Public Law No. 107-11) "present[ed] no more difficulty than the statute upheld in [*Seattle Audubon*], as Public Law No. 107-11 similarly amend[ed] the applicable substantive law." 269 F.3d at 1097.

Consistent with those decisions, we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." *Bank Markazi*, 136 S. Ct. at 1326. More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action

relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

That this change has only affected Mr. Patchak's lawsuit does not change our analysis here, for Congress is not limited to enacting generally applicable legislation. Particularized legislative action is not unconstitutional on that basis alone. *See Bank Markazi*, 136 S. Ct. at 1327-28; *Plaut*, 514 U.S. at 239 n.9; *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut*, 514 U.S. at 239 n.9.

In passing the Gun Lake Act, Congress exercised its "broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). Accordingly, we ought to defer to the policy judgment reflected therein. Such is our role. Indeed, "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Bank Markazi*, 136 S. Ct. at 1326.

B.

Mr. Patchak next asserts that the Gun Lake Act burdens his First Amendment right to petition. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). The Petition Clause "protects the right of individuals to appeal to courts and other forums established by the government

for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The right of access to courts is, without question, "an aspect of the First Amendment right to petition the government." *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)); *see also Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972). It is an important right, *see Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983), but it is not absolute, *see McDonald v. Smith*, 472 U.S. 479, 484 (1985). For example, an individual does not have a First Amendment right of access to courts in order to pursue frivolous litigation. *Id.* More to the point, the right to access federal courts is subject to Congress's Article III power to define and limit the jurisdiction of the inferior courts of the United States. *See* U.S. CONST. art. III, § 1; *cf. Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Ameur v. Gates*, 759 F.3d 317, 326 (4th Cir. 2014). Congress may withhold jurisdiction from inferior federal courts "in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

Moreover, the Gun Lake Act does not foreclose Mr. Patchak's right to petition the government in all forums; it affects only his ability to do so via federal courts. And while he argues that other forms of petition — such as seeking redress directly from the agency — would be futile, Patchak concedes that he is not entitled to a successful outcome in his petition, or even for the government to listen or respond to his complaints. Rightfully so. "Nothing

in the First Amendment or in [the Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *see also We the People Found., Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007).

By stripping federal courts of subject matter jurisdiction over challenges to the status of the Bradley Property, Congress has made its determination as to what is "proper for the public good." *Palmore*, 411 U.S. at 401 (quoting *Cary*, 44 U.S. (3 How.) at 245). There is no constitutional infirmity here.

C.

Mr. Patchak also claims that the Gun Lake Act implicates his rights under the Fifth Amendment's Due Process Clause. The Fifth Amendment instructs that the federal government may not deprive individuals of property "without due process of law." U.S. CONST. amend. V. In order to determine whether there has been a violation of due process rights, we undertake a two-part inquiry: first, we must determine whether the claimant was deprived of a protected interest; and second, if the claimant was so deprived, we then consider what process the claimant was due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

Mr. Patchak identifies a potentially protected property interest in his unadjudicated claim. The Supreme Court has "affirmatively settled" that a cause of action is a species of property requiring due process protection. *Logan*, 455 U.S. at 428 (analyzing due process rights under the Fourteenth Amendment) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Surely so, as "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)). Once the legislature confers an interest by statute, it may not constitutionally authorize the deprivation of that interest without implementing appropriate procedural safeguards. *Id.* at 432.

But even assuming that there may be a property right to pursue a cause of action, in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due. As discussed above, the legislature has the power to change the underlying laws applicable to a case while it is pending and, as a result, to alter the outcome of that case. *See Nat'l Coal. to Save Our Mall*, 269 F.3d at 1096; *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (where "a law intervenes and positively changes the rule which governs, the law must be obeyed").

In *Logan*, the Supreme Court acknowledged that "[o]f course," a legislature "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily-created causes of action

altogether—just as it can amend or terminate" benefits programs it has put into place. 455 U.S. at 432; *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92 (1980) (Marshall, J., concurring) ("[T]he Due Process Clause does not forbid the 'creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929))). Indeed, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917). Accordingly, while a cause of action may be a "species of property" that is afforded due process protection, *Logan*, 455 U.S. at 428, there is no deprivation of property without due process when legislation changes a previously existing and still-pending cause of action, *id.* at 432. In such a circumstance, "the legislative determination provides all the process that is due." 455 U.S. at 433.

We have no reason to except the Gun Lake Act from this general approach. Congress made a considered determination to ratify the Department of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe, and further to remove any potential impediments to the finality of that decision. It did not violate Mr. Patchak's due process rights by doing so.

D.

Mr. Patchak's final constitutional challenge to the Gun Lake Act is that it constitutes an impermissible Bill of Attainder. *See* U.S. CONST. art. I, § 9, cl. 3. Under

this provision, Congress may not "enact[] 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977)). A law is prohibited under the Bill of Attainder Clause if two elements are met: (1) the statute applies with specificity; and (2) the statute imposes punishment. *Id.* at 1217. We are able to resolve Mr. Patchak's challenge on the second element alone, because the Gun Lake Act is not punitive.

In order to decide whether a statute impermissibly inflicts punishment, we consider each case in "its own highly particularized context." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)). In so doing, we pursue a three-part inquiry:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment;
>
> (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and
>
> (3) whether the legislative record 'evinces a congressional intent to punish.'

Id. (quoting *Nixon*, 433 U.S. at 475-76, 478). These factors are considered independently, and are weighed together to resolve a bill of attainder claim. *See Foretich*, 351 F.3d at 1218. None of the three factors is necessarily dispositive, but this Court has noted that the second factor — what is called the "functional test" — "invariably appears to be the most important of the three." *Id.* (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998)).

Historically, laws invalidated as bills of attainder "offer[ed] a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [Article] I, § 9." *Nixon*, 433 U.S. at 473. "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich*, 351 F.3d at 1218. Jurisdictional limitations are generally not of this type. *See Ameur*, 759 F.3d at 329 ("[J]urisdictional limits are usually not viewed as traditional 'punishment.'"); *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) ("Jurisdictional limitations . . . do not fall within the historical meaning of legislative punishment."); *see also Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008) (declining to find that a "generally applicable jurisdictional rule" amounted to a bill of attainder in part because it "d[id] not impose punishment of any kind"); *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (jurisdictional limitation "d[id] not impose a punishment 'traditionally adjudged to be prohibited by the Bill of Attainder Clause'" (quoting *Nixon*, 433 U.S. at 475)).

The second prong of the inquiry, the "functional test," requires that the legislation have "a legitimate nonpunitive purpose" and that there is "a rational connection between the burden imposed and [the] nonpunitive purposes." *Foretich*, 351 F.3d at 1220-21. In other words, the means employed by the statute must be rationally designed to meet its legitimate nonpunitive goals.

The Gun Lake Act passes this test. The Gun Lake Act serves the legitimate nonpunitive purpose of "provid[ing] certainty to the legal status of the [Bradley Property], on which the Tribe has begun gaming operations as a means of economic development for its community." S. REP. NO. 113-194, at 2 (2014). Congress accomplished this goal by affirming and ratifying the Department of the Interior's initial decision to put the land into trust for the Tribe in Section 2(a), but also by removing jurisdiction over matters relating to the land in Section 2(b). In point of fact, Congress's intended goal of providing certainty with respect to the trust land would have been impossible to achieve absent the termination of any outstanding litigation — specifically, Mr. Patchak's suit. The legislative history reflects an acknowledgement of this fact, noting that Mr. Patchak's suit "places in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land." *Id.* Whatever burden is imposed by Section 2(b), on Mr. Patchak or otherwise, the statute is rationally designed to meet its legitimate, nonpunitive purpose of providing certainty with respect to the trust land.

Finally, the legislative record does not evince a congressional intent to punish. Mr. Patchak has presented

no evidence, other than the acknowledgement that his case would be affected, for his claim that Congress purposefully targeted him for retaliation through the Gun Lake Act. While it may be true that Mr. Patchak was adversely affected as a result of the legislation, the record does not show that Congress acted with any punitive or retaliatory intent.

E.

The Government suggests that there is an alternative ground on which we could rule, arguing that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity. While the Government did not make this argument in the proceedings below, sovereign immunity is a threshold jurisdictional question that speaks to the court's authority to hear a given case, and so we would be well within bounds to consider the question. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Indeed, the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Nevertheless, because we conclude that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn, we need not consider the matter further.

III.

In a separate challenge to the proceedings below, Mr. Patchak contends that the District Court erred by permitting the administrative record to be supplemented. We review the District Court's denial of Mr. Patchak's Motion to Strike the Administrative Record Supplement for abuse of discretion. *Cf. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

Although this case may not present circumstances typically permitting the agency to supplement the record, *see id.*, the District Court's failure to strike the supplemental information provided to it was not an abuse of discretion. The District Court denied Mr. Patchak's Motion to Strike Supplemental Record "[f]or the reasons set forth in the Memorandum Opinion" entered on the same date, *see* Order, *Patchak v. Jewell*, Civil Action No. 08-1331 (RJL), Docket No. 93 (D.D.C. June 17, 2015). — *i.e.*, the District Court's determination, at issue in this appeal, that it was without jurisdiction to consider the suit and that the case was to be dismissed in its entirety, *Patchak v. Jewell*, 109 F. Supp. 3d 152 (D.D.C. 2015). The District Court only mentioned the record supplement in the Procedural Background section of its opinion in order to indicate the "events [that] have altered the legal landscape" in the time since the case was remanded from the Supreme Court. *Id.* at 158. The District Court did not abuse its discretion by referencing that development in this way. Nor did it abuse its discretion by denying a motion to strike a supplement to the record at the same time that it was dismissing the case in its entirety for lack of jurisdiction.

IV.

For the foregoing reasons, the District Court's decisions below are affirmed.

So ordered.

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 15, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5200

DAVID PATCHAK,

Appellant,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

September Term, 2015
Filed On: July 15, 2016

Before: ROGERS, PILLARD and WILKINS, *Circuit Judges*

Appendix C

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the decisions of the District Court appealed from in this cause are hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 15, 2016

Opinion for the court filed by Circuit Judge Wilkins.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, *et al.*,[1]

Defendants,

and

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

Intervenor-Defendant.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior, for the former Secretary, Ken Salazar.

Appendix D

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is this 16th day of June 2015, hereby

ORDERED that Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion for Summary Judgment [Dkt. #80] is **DENIED**; it is further

ORDERED that Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78] is **GRANTED**; it is further

ORDERED that Plaintiff's Motion to Strike the Administrative Record Supplement [Dkt. # 76] is **DENIED**; and it is further

ORDERED that this case be **DISMISSED.**

SO ORDERED.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX E

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 17, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,[1] *et al.*,

Defendants,

and

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

Intervenor-Defendant.

---

1. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court will automatically substitute that officer's successor. Accordingly, the Court substitutes Sally Jewell, the current Secretary of the Interior for the former Secretary, Ken Salazar.

Appendix E

MEMORANDUM OPINION

(June 16, 2015) [Dkts. ##76, 78, 80, 89]

This case is before the Court on remand from the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. Plaintiff David Patchak ("plaintiff") is challenging the Secretary of the Interior's ("Secretary") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of the Intervenor-Defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. In a Verified Complaint filed on August 1, 2008, plaintiff sought an injunction barring the Secretary from taking the land into trust, claiming that the Secretary lacked authority to do so under the IRA. Compl. ¶ 28 [Dkt. #1]. This Court dismissed the case for lack of standing on August 20, 2009. Mem. Op. [Dkt. #56]. Following remand by the Supreme Court, both parties filed motions for summary judgment. Presently before the Court are Plaintiffs Motion to Strike the Administrative Record Supplement [Dkt. #76], Intervenor-Defendant's Motion for Summary Judgment [Dkt. #78], Plaintiff's Motion for Summary Judgment [Dkt. #80], and Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule [Dkt. #89]. Upon consideration of the parties' pleadings, the relevant case law, and the entire record herein, this Court DENIES Plaintiff's Motion to Strike the Administrative Record Supplement, GRANTS Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule,

DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Intervenor-Defendant's Motion for Summary Judgment.

BACKGROUND

This Opinion represents the latest chapter in plaintiff's quest to enjoin a gaming casino in Allegan County, Michigan. This case's history is, to say the least, lengthy, and the Court, for the sake of economy, recounts only those portions necessary to its holding.

I. Statutory Framework

Since the 1800s, Congress has enacted various statutes to regulate Indian affairs. One such initiative, the Indian Reorganization Act of 1934, was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage." *See* 1-1 Cohen's Handbook of Federal Indian Law § 1.05. Its animating purpose was therefore to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1973). To that end, the IRA authorizes the Secretary "to acquire . . . any interest in lands" on behalf of groups that meet the statutory definition of "Indians." *See* 25 U.S.C. § 465. The IRA defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[2] 25 U.S.C. § 479. Land

2. While the IRA does not elaborate on what it means to be a "recognized Indian Tribe now under Federal jurisdiction," the Supreme Court recently interpreted the word "now" to refer to the date of the IRA's enactment in June 1934. *Carcieri v. Salazar*, 555

acquired pursuant to the IRA "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," 25 U.S.C. § 465, and may be designated as part of the Tribe's official reservation, *id.* at § 467.

Like the IRA, the Indian Gaming Regulatory Act of 1998 (the "IGRA") was enacted to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). To facilitate this goal, the IGRA provides "a statutory basis for the operation of gaming by Indian tribes," *id.*, and allows gaming on land that was taken into trust as part of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," 25 U.S.C. § 2719(b)(1)(B). A tribe may be formally acknowledged if it can "establish a substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." *See* 25 C.F.R. § 83.3(a).

II. Factual Background

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is now a federally-recognized Indian tribe. Compl. ¶ 18. But this was not always the case. The Tribe, though in existence for over two centuries, has endured a lengthy struggle for federal recognition. It was initially recognized by the federal government between 1795 and 1855, during which time it was party to no fewer than sixteen

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U.S. 379, 382 (2009). The Supreme Court left open the question of what constitutes "Federal jurisdiction."

treaties with the United States. Compl. ¶ 15; AR001987.[3] This recognition was, however, short-lived. Beginning in 1855, the Tribe fell victim to a slew of federal policies that divested the Tribe of both its ancestral lands and its sovereign status. *See* Compl. ¶¶ 16-17.

The Tribe remained dispossessed for much of the 20th century. *See* Compl. ¶ 16-18. In 1998, after decades of landlessness, the Tribe sought to reinstate its sovereign status under the modern federal acknowledgment procedures. Compl. ¶ 18. It succeeded. On October 23, 1998, the Secretary of the Interior proclaimed the Tribe an "Indian tribe within the meaning of Federal law," thus entitling the Tribe, and its members, to a bevy of federal protections. *See* 63 Fed. Reg. 56936-01 (1998).

In 2001, shortly after receiving federal acknowledgment, the Tribe identified a 147-acre tract of land in the Township of Wayland, Michigan, ("the Bradley Tract") that it wished to acquire as its "initial reservation" under the IRA. *See* AR001438. In its ensuing trust application, the Tribe requested permission to construct and operate a 193,500 square foot gaming and entertainment facility on the Bradley Tract. AR001445. The Tribe prevailed, and on May 13, 2005, the Department of the Interior issued a Notice of Final Agency Determination accepting the Bradley Tract into trust to "be used for the purpose of construction and operation of a gaming facility." 70 Fed. Reg. 25596-02 (May 13, 2005). In January 2009,

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3. References to "AR" correspond to the Administrative Record filed on October 6, 2008. *See* [Dkt. #21].

the Secretary formally acquired the Bradley Tract on the Tribe's behalf. Decl. Chairman David K. Sprague Supp. Intervenor-Def.'s Mot. Summ. J. ("Sprague Decl.") ¶ 14 [Dkt. #78-1]. Thereafter, the Tribe incurred approximately $195,000,000 in debt to develop the land. Sprague Decl. ¶ 18. Its efforts culminated in the opening of the Gun Lake Casino on February 10, 2011. Sprague Decl. ¶ 19.

III. Procedural Background

Plaintiff filed the present lawsuit on August 1, 2008 under section 702 of the Administrative Procedure Act ("APA"), arguing that because the Tribe was not formally recognized when the IRA was enacted in June 1934, the Secretary lacked authority to take the Bradley Tract into trust. Compl. ¶¶ 25-28. On August 19, 2009, I dismissed this action for lack of subject matter jurisdiction. Mem. Op. [Dkt. #56]. Plaintiff appealed to our Circuit Court, which reversed and held that plaintiff indeed had standing to pursue his action. *See Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). On June 18, 2010, the United States Supreme Court affirmed the Circuit Court's decision and remanded the case to this Court for adjudication on the merits of plaintiff's suit. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

Since this case was remanded, two events have altered the legal landscape. First, on September 3, 2014, the Secretary issued an Amended Notice of Decision concerning the Tribe's fee-to-trust application for two other parcels of land it sought to acquire. SAR000617-

58.[4] In so doing, the Secretary expressly considered, and confirmed, its authority under the IRA to take land into trust on behalf of the Tribe. *See* SAR000650 ("The [Tribe] unquestionably was under federal jurisdiction prior to 1934. . . . [And] the [Tribe's] under federal jurisdiction status remained intact in and after 1934."). Second, on September 26, 2014, President Obama signed into law 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). The Act, which bears directly on the instant case, declares as follows:

> (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.
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> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b).

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4. References to "SAR" are to the Administrative Record Supplement. *See* [Dkt. #75].

Thereafter, on October 31, 2014, the parties filed motions for summary judgment. For the following reasons, the Court GRANTS Intervenor-Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

DISCUSSION

Plaintiff would have this Court disregard the Gun Lake Act and proceed directly to the merits of his challenge. I decline to do so. Because the Gun Lake Act purports to moot plaintiff's case, it is hard to see how it can be ignored. To disregard it entirely would, moreover, violate the usual principle that a court is to apply the law in effect at the time it rules. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

As a fallback position, plaintiff argues that the Act is void because it violates numerous constitutional provisions, including separation of powers principles, the First Amendment Right to Petition, Fifth Amendment Due Process, and the ban on Bills of Attainder. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") at 25-39 [Dkt. #80-1]. For the reasons discussed herein, I reject each of these arguments and find that the Gun Lake Act is constitutional and, further, that it moots plaintiff's case.

I. APA REVIEW

Federal courts are courts of limited jurisdiction and may not reach the merits of a case absent jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 101 (1998). Plaintiff brings his suit pursuant to the Administrative Procedure Act, which entitles any person "adversely affected or aggrieved by [an] agency action" to judicial review. *See* 5 U.S.C. § 702. As the APA makes clear, there is a "strong presumption" of reviewability of agency decisions. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption, "like all presumptions," may "be overcome by . . . specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 673 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)); *see* 5 U.S.C. § 701(a) (limiting judicial review to the extent that a federal statute "preclude[s] judicial review" or the "agency action is committed to agency discretion by law"). Once that presumption is overcome, courts may venture no further into the merits of the case. "For a court to pronounce upon the meaning" of federal action when "it has no jurisdiction to do is, by very definition, for a court to act ultra vires." *See Steel Co.*, 523 U.S. at 101-02. Such is the case here.

Section 2(b) of the Gun Lake Act states that "no claims" regarding the Secretary's decision to take the Bradley Tract into trust shall be "maintained in a Federal court." *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Section 2(b) tracks, moreover, section 2(a)'s ratification of the Secretary's decision, leaving no doubt that Congress intended to have the final word. *See id.* This intent is born out in the legislative history. The House Committee on Natural Resources stated, for example, that the Act, if passed, "would void a pending lawsuit [by neighboring landowner David Patchak] challenging the

lawfulness of the Secretary's original action to acquire the Bradley Property." H.R. Rep. 113-590 (2014). The Senate Committee on Indian Affairs agreed that the Act "would prohibit any lawsuits" related to the "lands taken into trust by the Department of the Interior (DOI) for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in the state of Michigan." S. Rep. 113-194 at 3 (2014). Taken together, the Act's plain language and legislative history manifest a clear intent to moot this litigation. Barring some constitutional infirmity, this Court therefore lacks jurisdiction to reach the merits of plaintiff's claim.

II. Constitutionality Of The Gun Lake Act

While Congress may have removed this Court's jurisdiction over plaintiff's APA claim, it did not foreclose consideration of the Gun Lake Act's constitutionality. Indeed, section 2(b) only withdraws judicial review of "action[s] relating to" the Secretary's acquisition of the Bradley Tract. *See* Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(b). Nothing in the Act bars consideration of constitutional challenges to *Congress*'s action, and the Court declines to construe it in such a fashion.[5] Absent

5. To construct the statute otherwise would raise serious concerns about its constitutionality, and, in such a case, I heed the "cardinal principle" of statutory interpretation and choose "a construction of the statute . . . by which the (constitutional) question(s) may be avoided." *See Johnson v. Robison*, 415 U.S. 361, 367 (1974) (alternation in original) (internal quotation marks omitted); *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (finding that although a statute removed Article III jurisdiction

such an impediment, the Court may address plaintiff's constitutional challenges.

The Court's limited jurisdiction does not, however, guarantee plaintiff a victory. Quite the opposite is true. Federal statutes are presumptively constitutional, *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), and litigants challenging a statute's constitutionality bear an "extremely heavy burden," *United States v. Turner*, 337 F. Supp. 1045, 1048 (D.D.C. 1972). Only "the most compelling constitutional reasons" may justify invalidating "a statutory provision that has been approved by both Houses of Congress and signed by the President." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (citation and internal quotation marks omitted). Unfortunately for plaintiff, I find that he has not surmounted this burden and, accordingly, uphold the Act.

A. Separation of Powers

Plaintiff argues that the Act raises two separation of powers concerns. Plaintiff first contends that section 2(b) infringes the role of the judiciary by requiring dismissal of this action. *See* Pl.'s Mem. at 26-32. Plaintiff next argues that by reaffirming the Secretary's May 2005 decision to take the Bradley Tract into Trust, section 2(a) unlawfully imposes Congress's "own interpretation of the IRA" on the federal courts. *See* Pl.'s Consol. Reply Defs.' & Intervenor-Def.'s Opp'n to Pl.'s Mot. Summ. J. ("Pl.'s Reply") at 31

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to review an agency action, it did "not touch [the court's] jurisdiction over [the statute's] own constitutionality").

[Dkt. #90]. For the reasons discussed below, I find both arguments unavailing.

Plaintiff's first contention presents a thorny legal issue. The Constitution prohibits the legislature from coopting the judiciary's function. The seminal case on this issue is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). There, the executor of a Confederate estate sought to recover property seized by the Union army during the Civil War. In his suit, the executor relied on a statute permitting recovery for landowners that were loyal to the Union, proof of which was satisfied by receipt of a Presidential pardon. *Id.* at 131-32. After the plaintiff recovered in the Court of Claims, Congress passed a statute directing courts to construe proof of a Presidential pardon as proof of disloyalty and, further, to dismiss, for lack of jurisdiction, any cases in which proof of a Presidential pardon was submitted. *Id.* at 133-34. Faced, on appeal, with a statute that dictated how it was to adjudicate claims of Union loyalty, the Supreme Court declared the statute unconstitutional and refused to give effect to an Act of Congress that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *See id.* at 146.

Although *Klein* establishes limits on legislative power, it simply "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001). To preserve the balance of federal power, *Klein's* progeny have clarified that the Constitution is not offended when

Congress amends substantive federal law, even if doing so affects pending litigation. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Congress may "amend applicable law" in a way that impacts the outcome of a pending case without violating *Klein* (internal quotation marks omitted)); *see also Miller v. French*, 530 U.S. 327, 348-50 (2000) (finding no separation of powers issue where a statute "simply impose[d] the consequences of the court's application of the new legal standard"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (finding no separation of powers violation where a statute "amend[ed] [the] applicable law"). Although the line between a permissible "amendment" of the underlying law and an impermissible "rule of decision" remains unclear, federal statutes do not run afoul of *Klein* as long as they refrain from "direct[ing] any particular findings of fact or applications of law, old or new, to fact." *See Robertson*, 503 U.S. at 438.

One "sure precept" emerges from this legal thicket: "a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection." *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1096. Yet because Congress may "impose new substantive rules on suits" that were not "resolved on the merits when Congress acted," courts faced with *Klein* challenges must tread lightly indeed. *See id.* at 1097.

Plaintiff argues that section 2(b) of the Gun Lake Act violates *Klein* because it mandates dismissal and, as a consequence, dictates a rule of decision. *See* Pl.'s Mem. at 26-32. Plaintiff is correct that dismissal has the same

practical effect as a judgment on the merits—it compels a favorable disposition for defendants. There is a difference, however, between a statute that dictates a particular decision on the merits, which *Klein* prohibits, and a statute that altogether withdraws jurisdiction to reach the merits, which *Klein* arguably does not preclude. *See Klein*, 80 U.S. at 146-47. The Gun Lake Act falls within the latter category. The Act does not mandate a particular finding of fact or application of law to fact. Instead, it withdraws this Court's jurisdiction to make any substantive findings whatsoever. Our Circuit Court considered—and rejected—a challenge to a similar statute, finding that a withdrawal of jurisdiction does not, by itself, violate *Klein*. *See Nat'l Coalition to Save our Mall*, 269 F.3d at 1097 (stating, without any detailed explanation, that the Act did not run afoul of *Klein).*

Congress's actions in this instance are more appropriately characterized as an effort to circumscribe the Court's jurisdiction. This, Congress most assuredly can do. The Constitution "gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Congress, as such, has plenary power to "define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That is precisely what happened here. Rather than dictate a particular outcome on the merits of plaintiff's case, Congress has legislatively restricted the Court's jurisdiction. I find nothing constitutionally repugnant in its exercise.

Plaintiff argues in the alternative that section 2(a) of the Act, which "reaffirm[s]" the Secretary's May 2005 decision to take the Bradley Tract into trust, violates *Klein* because it superimposes Congress's "own interpretation of the IRA without amending it."[6] *See* Pl.'s Reply at 31. Were Congress to issue such a dictate, it would surely invade the powers of the judicial branch. *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (opining that a statute presents constitutional problems if, rather than "*changing* the substantive law, [it] direct[s] the court how to *interpret* or apply pre-existing law"). The Court takes seriously, however, the invalidation of a Congressional action and applies the "cardinal principle" that "as between two possible interpretations of a statute by one of which it would be constitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (when faced with dueling interpretations, one of which "would raise serious constitutional problems," courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

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6. The Court is reluctant to opine on this particular argument, which plaintiff presented, for the first time, in his Reply brief. As this Circuit has emphasized, "[t]he premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Considering an argument advanced for the first time in a reply brief . . . entails the risk of an improvident or ill-advised opinion on the legal issues tendered." *See McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (citations and internal quotation marks omitted).

While plaintiff has proffered one potential reading of the statute, section 2(a) can more plausibly be read in a way that does not raise constitutional concerns, *i.e.*, as an affirmance of agency rulemaking. Nowhere does the Act instruct this, or any other, Court to ratify the Secretary's action. Nor, for that matter, does it compel "any particular findings of fact or applications of law." *See Robertson*, 503 U.S. at 438. Simply put, Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same. Endorsements of this nature are hardly unprecedented and Congress has, on at least one occasion, retroactively validated agency actions taken on behalf of Native American Tribes. *See James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990) (upholding a statute that *"ratifies and confirms* [the Wampanoag Tribal Counsel's] existence as an Indian tribe" (emphasis added)); *see also Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297, 301-02 (1937) (Congress may use its plenary power to "ratify [agency] acts which it might have authorized, and give the force of law to official action unauthorized when taken" (citations omitted)).

Given that the Act neither mandates a particular interpretation of the substantive law nor creates an impermissible rule of decision, I reject plaintiff's separation of powers challenge and turn to plaintiff's remaining constitutional arguments.

B. First Amendment Right to Petition

Plaintiff next argues that section 2(b) of the Gun Lake Act burdens his First Amendment Right to Petition the government. I disagree. The First Amendment protects the right of individuals "to petition the Government for a redress of grievances." U.S. Const. amend. I. The Right to Petition "is cut from the same cloth as the other guarantees of [the First] Amendment," and operates as "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Broad in scope, the right "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and guarantees, at a minimum, the right to seek redress from a federal decision-maker on the basis of a well-pleaded claim for relief, *see Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (citation and internal quotation marks omitted)). Laws that "significant[ly] impair" this right must, like all substantial constitutional burdens, survive "exacting scrutiny." *See Elrod v. Burns*, 427 U.S. 347, 362 (1976).

Not all burdens are "significant" and although the First Amendment protects the right to speak, it does not ensure the right to speak to *all* tribunals. The distinction that emerges is narrow indeed. Congress may not foreclose a plaintiff's right to petition *all* decision-makers, but it may withdraw access to *some* decision-makers. *See Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 742

(1983) (invalidating a law that enjoined plaintiffs from filing "a meritorious suit" in state court). *But see Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741 (D.C. Cir. 2011) (finding that a law did not violate the First Amendment because plaintiff could at least petition the agency for relief). Construing the Right to Petition more broadly would have far-reaching implications. Were it read to require access to all tribunals, the First Amendment would run headlong into another tenet of federal governance—Congress's power to "define and limit the jurisdiction of the inferior courts of the United States." *See Lauf*, 303 U.S. at 330. This, it does not do.

Plaintiff argues that the Gun Lake Act abridges his Right to Petition because it "prohibits the filing of any other lawsuit that challenges the federal Defendant's actions taking the Bradley Property into trust." *See* Pl.'s Mem. at 32. Defendants counter that although the Act enjoins filings in federal court, it does not bar plaintiff from pursuing other avenues of redress. *See* Mem. P. & A. Supp. United States' Opp'n Pl.'s Mot. Summ. J. at 22 [Dkt. #85]; Def.-Intervenor's Opp'n Pl.'s Mot. Summ. J. at 11-12 [Dkt. #86], I agree. Plaintiff may not be able to bring his claim before this Court, but he remains free to petition federal agencies, including the Department of the Interior, for relief. Nothing in the Act can be read to restrict such advocacy and this Court sees no reason to hold otherwise.

Plaintiff argues that this alternative is insufficient because any future complaints filed with the agency, whose decision Congress has ratified, "will fall upon completely

deaf ears." Pl.'s Reply at 32. The Department of the Interior may, indeed, be reticent to reverse its position. But nothing in the First Amendment entitles plaintiff to a favorable disposition of his claim. *See Am. Bus Ass'n*, 649 F.3d at 741 (refusing to find that Congressional interference with a plaintiff's potential remedies abridges the Right to Petition). The First Amendment safeguards only a citizen's right to *express* his grievance to a tribunal of competent jurisdiction. Nowhere does it "guarantee a citizen's right to receive a government response to or official consideration of a petition for redress of grievances" and I decline to find such an assurance. *See We the People Found. Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007). Accordingly, because nothing in the Petition Clause bars Congress from restricting, as it has, the forum for judicial review, I find that the Gun Lake Act does not violate the First Amendment.

C. Fifth Amendment Due Process

Plaintiff next argues that section 2(b) of the Act violates his Fifth Amendment due process rights because it requires dismissal without allowing him to fully litigate his claim. Pl.'s Mem. at 34-35. Due process challenges are governed by a two-part inquiry: "whether [plaintiff] was deprived of a protected property interest and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). A cause of action is considered a "protected property interest" only if a court has rendered "a final judgment" in that action. *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 43 (D.D.C. 2004), *aff'd*, 184 Fed. App'x 9 (D.C. Cir. 2006) ("Causes of actions only become actionable property interests upon the entry of final judgment.").

Plaintiff here argues that because the Supreme Court affirmed his standing to pursue this action, he has a property right protected by the Fifth Amendment. *See* Pl.'s Mem. at 35. Plaintiff is correct that his standing can no longer be challenged. However, he presents no authority—nor am I aware of any—to support the proposition that the ability to bring a lawsuit constitutes the type of vested property right that the Fifth Amendment due process clause protects.[7] It would be bold, to say nothing of unprecedented, to redraw the lines of property in such a fashion. Thus, in the absence of a cognizable property right, plaintiff's due process claim fails.

D. Bill of Attainder

Plaintiff's final constitutional attack to the Gun Lake Act lies in a Bill of Attainder. Article I, section 9 of the Constitution states that "[n]o Bill of Attainder . . . shall be passed." U.S. Const, art. 1 § 9, cl. 3. This provision prohibits Congress from enacting "a law that

7. Even assuming, *arguendo*, that plaintiff has a property right in this action, he has arguably received all the process he is due. Congress has plenary power to grant, abridge, or revoke Article III jurisdiction. As the Supreme Court has held in welfare cases, which involve an analogous Congressional power to confer, and revoke, a public benefit, "[t]he procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *See Atkins v. Parker*, 472 U.S. 115, 129 (1985) (citation and internal quotation marks omitted). In such instances, "the legislative process provides all the *process* that is constitutionally due" before Congress enacts a provision restricting litigants' judicial remedies. *See Am. Bus Ass'n*, 649 F.3d at 743.

legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). A law is thus a prohibited Bill of Attainder if it punishes a specific person or entity. *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998). To determine whether a statute imposes a punishment, courts assess: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute . . . reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Foretich v. United States*, 351 F.3d 1198, 1218 (D.C. Cir. 2003) (quoting *Selective Serv. Sys.* v. *Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)).

Although the Gun Lake Act applies specifically to suits involving the Bradley Tract, this alone is not problematic. *See Nat'l Coalition to Save Our Mall*, 269 F.3d at 1097 (finding a "[statute's] level of specificity to be unobjectionable"). Notwithstanding its specificity, the Gun Lake Act does not qualify as a Bill of Attainder for a second reason: it is not punitive. Jurisdiction stripping is simply not "punishment" in a historical sense—it does not impose a prison sentence, a fine, or any restriction that falls within the traditional "checklist of deprivations and disabilities" proscribed by the Constitution. *See Foretich*, 351 F.3d at 1218 ("This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions."). Nor was Congress's goal to disadvantage Mr. David Patchak. The Act's express purpose was to "provide

certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014). The Act may have incidentally affected plaintiff's use and enjoyment of his property. But incidental burdens do not a punishment make. As such, plaintiff's final constitutional challenge is no more meritorious than his prior attacks.

Having rejected each of plaintiff's challenges, I find no constitutional obstacle to the enforcement of the Gun Lake Act and must decline, for want of jurisdiction, to reach the merits of plaintiff's APA challenge.

CONCLUSION

Accordingly, for all of the foregoing reasons, Plaintiff's Unopposed Motion to File Consolidated Reply Brief and to Exceed Page Limits Specified by Local Rule is GRANTED, Intervenor-Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED. Finally, Plaintiff's Motion to Strike the Administrative Record Supplement is DENIED. This action is therefore DISMISSED. An Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX F

CONSTITUTIONAL & STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

UNITED STATES CONSTITUTION, Article I, Section 1.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

UNITED STATES CONSTITUTION, Article III, Section 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

UNITED STATES CONSTITUTION, Article III, Section 2.

STATUTORY PROVISIONS

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.

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

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.

Public Law 113–179, 128 STAT. 1913.

APPENDIX G

AMENDED NOTICE OF DECISION BY THE BUREAU OF INDIAN AFFAIRS, DATED SEPTEMBER 3, 2014

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437

September 3, 2014

Honorable David K. Sprague
Chairman
Match-E-Be-Nash-She-Wish Band of Pottawatomi
Indians of Michigan
P.O. Box 218/1743 142nd Avenue
Dorr, MI 49323

Re: AMENDED Notice of Decision (NOD) for the Fee to Trust Application for the Jijak Camp and Walker-Larkin (Settlement) parcels

Dear Chairman Sprague:

The Notice of Decision issued August 7, 2014 in this matter is hereby amended, as stated herein, to include more detail of the comprehensive analysis in response to 25 CFR § 151.10(a) - Statutory Authority for proposed acquisition. The remainder of the NOD subject to this amendment remains the same.

Appendix G

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) submitted application to have real property transferred into trust status pursuant to 25 United States Code (USC) § 465. The properties subject to this determination are known as Jijak Camp and Walker-Larkin (Settlement) with a total of approximately 210.07 acres. Neither property is contiguous to the Band's reservation; therefore the request for trust status is being processed with off-reservation status. The legal descriptions for these properties are illustrated below:

"Jijak Camp" Legal Description (176.47 acres)

Parcel 1:

That part of the Northeast 1/4, Section 32, Town 3 North, Range 12 West, Township of Hopkins, Allegan County, Michigan, described as: Beginning at the Northeast corner of Section 32; thence South 00°48'10" East 672.87 feet along the East line of said Northeast 1/4; thence South 89°32'27" West 1298.24 feet; thence North 00°12'52" West 672.86 feet along the West line of the Northeast 1/4 of the Northeast 1/4, Section 32; thence North 89°32'27" East 1291.33 feet along the North line of said Northeast 1/4 to the place of beginning.

Parcel 2:

That part of the Northeast 1/4 and Southeast 1/4, Section 32, Town 3 North, Range 12 West, Township of Hopkins, Allegan County, Michigan, described as: Commencing at the Northeast corner of Section 32; thence South 00°48'10"

East 672.87 feet along the East line of said Northeast 1/4 to the place of beginning of this description; thence South 00°43'10" East 813.41 feet along said East line; thence South 89°11'50" West 70.00 feet; thence South 00°48'10" East 500.00 feet along the Westerly line of 20th Street; thence South 89°11'50" West 40.00 feet along said Westerly line; thence South 00°48'10" East 493.58 feet along said Westerly line; thence North 89°32'29" West 393.51 feet; thence South 00°00'00" East 899.00 feet; thence South 40°18'35" West 788.91 feet; thence South 89°17'49" West 1630.10 feet along the South line of the Northeast 1/4 and Northwest 1/4 of the Southeast 1/4 of Section 32; thence North 00°24'09" East 1315.58 feet along the West line of the Southeast 1/4 to the center of Section 32; thence North 00°22'18" East 1331.21 feet along the West line of the Northeast 1/4; thence North 89°25'17" East 1304.95 feet along the North line of the Southwest 1/4 of the Northeast 1/4; thence North 00°12'52" West 655.50 feet along the West line of the Northeast 1/4 of the Northeast 1/4; thence North 89°32'27" East 1298.24 feet to the place of beginning.

"Settlement" (Walker-Larkin parcel)
Legal Description (33.60 acres)

(Walker)
That part of the NW ¼ of Section 28, T3N, R11W, Wayland Township, Allegan County, Michigan described as: Commencing at the North ¼ corner of said Section; then South 89°33'03" West 1000.0 feet along the North line of said NW ¼, to the place of beginning, thence South 00°55'26" East 1978.07 feet parallel with the East line

of said NW ¼, thence South 89°50'59" West 156.69 feet along the South line of the NW ¼, SE ¼. NW ¼ of said Section, thence North 00°38'39" West 659.06 feet along the East line of the West 170 feet of said NW ¼, SE ¼, NW ¼, thence North 31°36'34" West 847.21 feet, thence North 54°05'03" East 173.76 feet along the East line of 128th Avenue as recorded in Liber 527 on page 240; thence North 28°10'02" East 364.10 feet along said East line; then 01°13'02" East 172.77 feet along the East line; then North 89°33'03" East 259.99 feet along the North line of said Section to the place of beginning.

(Larkin)
That part of the Northwest ¼ of Section 28, Town 3 North, Range 11 West, Wayland Township, Allegan County, Michigan, described as: Commencing at the North ¼ corner of said section; thence South 89 degrees 33 minutes 03 seconds West 500.0 feet along the North line of said Northwest ¼ to the place of beginning; thence South 00 degrees 55 minutes 26 seconds East 1320.45 feet parallel with the East line of said Northwest ¼; thence South 89 degrees 45 minutes 02 seconds West 161.73 feet along the South line of the North ¼ of said Northwest ¼; thence South 00 degrees 47 minutes 03 seconds East 659.93 feet along the East line of the Northwest ¼, Southeast ¼ of said Northwest ¼; then South 89 degrees 50 minutes 59 seconds West 336.68 feet along the South line of said Northwest ¼, Southeast ¼, Northwest ¼; thence North 00 degrees 55 minutes 26 seconds West 1978.07 feet; thence North 89 degrees 33 minutes 03 seconds East 500.0 feet along the North line of said section to the place of beginning.

Appendix G

Regulatory Authority

The approval to acquire land in trust status for an Indian tribe is committed to the discretion of the Bureau of Indian Affairs (BIA) on behalf of the Secretary of the Interior. The BIA must review all acquisition proposals prior to making a decision as to whether the lands can be placed into trust status for a tribe. The regulatory authority governing the Secretary's acquisition of land in trust for an Indian tribe is set forth in Title 25 of the Code of Federal Regulations (CFR) §151.

The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of tribes when such acquisition is authorized by an Act of Congress, and (1) when such lands are within the exterior boundaries of the tribe's reservation, or adjacent thereto, or within a tribal consolidation area, or (2) when the tribe already owns an interest in the land, or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing.

Pursuant to 25 CFR § 151.11, the Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h)

§ 151.10 (a) the existence of statutory authority; (b) need of the tribe for additional land; (c) the purpose for which the land will be used; (c) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (f) jurisdictional problems and potential conflict of land use which may arise; (g) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status, and (h) compliance with 516 DM 6 appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions.

(b) The location of the land relative to state boundaries and distance from the boundaries of the tribe's reservation;

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits;

(d) Contact with state and local governments pursuant to part 151.10 (e) and (f)

Accordingly, in response to the foregoing, the following analysis of the application is provided:

Appendix G

25 CFR § 151.10(a) - Statutory authority for proposed acquisition:

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority.

Section 5 of the Indian Reorganization Act ("IRA") is the primary general statutory authority for the Secretary of the Interior ("Secretary") to acquire lands in trust for Indian tribes and individual Indians. It provides in relevant part:

> 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 land for Indians ....
>
> Title to any lands or rights acquired pursuant to [the IRA] 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.[1]

1. 25 U.S.C. § 465.

In connection with the Band's applications, the Solicitor's Office evaluated whether the Secretary can exercise her authority to take the land in trust given the Supreme Court's decision in *Carcieri v. Salazar.*[2] Pursuant to *Carcieri,* to exercise her authority to take land into trust for an Indian tribe under the first definition of "Indian" in the IRA, the Secretary must determine whether the particular Indian tribe was "under federal jurisdiction" in 1934, the year the IRA was enacted.[3]

In 1999, the Department of the Interior ("Department") formally recognized the Band after review by the BIA Office of Federal Acknowledgment ("OFA") in accordance with 25 C.F.R. Part 83 (1998). The Department had earlier issued its Proposed Finding regarding the Band, accompanied by among other things a Historical Technical Report ("Technical Report),[4] on June 23, 1997.[5] The

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2. 555 U.S. 379 (2009)

3. The *Carcieri* decision addresses the Secretary's authority to acquire land in trust under the first definition of "Indian" in the IRA--"members of any recognized Indian tribe now under [f]ederal jurisdiction." *See* 25 U.S.C. § 479. The case does not address the Secretary's authority to acquire land in trust for groups that fall under other definitions of "Indian" in Section 19 of the IRA.

4. *See* United States Department of the Interior, Office of Federal Acknowledgement, Historical Technical Report on the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (June 23, 1997) ("Technical Report"').

5. *See* United States Department of the Interior, Office of Federal Acknowledgement. Summary under the Criteria and Evidence for Proposed Finding Match-e-be-nash-she-wish Band of

Department affirmed the Proposed Finding and issued its Final Determination on October 14, 1998.[6] Relevant parts of the extensive factual and historical record developed by the Department as part of the Federal Acknowledgement Process ("FAP") and the FAP Record of Decision ("FAP ROD"), including the Technical Report, are incorporated by reference herein, as they directly bear on and establish that the Band was under federal jurisdiction at least by the time it negotiated its first treaty with the United States in 1795, and certainly by 1870.[7]

Pottawatomi Indians of Michigan, at 3 (June 23, 1997) ("Proposed Finding"). *See also* Notice of Proposed Finding for Federal Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 62 Fed. Reg. 38,113 (July 16, 1991).

6. *See* U.S. Department of the Interior, Office of Federal Acknowledgement, Summary Under the Criteria and Evidence for the Final Determination for Federal Acknowledgement of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, at 21 (Oct. 14, 1998) ("Final Determination"). *See also* Notice of Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. 56,936 (Oct. 23, 1998). The Final Determination "was made following a review of the third party comments on the proposed finding to acknowledge the MBPI, of the MBPI's response to the third party comments, and of the 1998 membership MBPI list." *Id.* Among the comments was a report submitted on behalf of the City of Detroit by Dr. James M. McClurken entitled "Preliminary Comments Regarding the Branch of Acknowledgment and Research Proposed Finding for Federal Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan," and dated January 12, 1998.

7. The Band received its final annuity payment from the Federal Government in 1870. In determining that 1870 was the "latest date of unambiguous Federal acknowledgment" the

Appendix G

In 2011, the Band submitted to the Department two reports entitled "A Summary of Federal Interaction, Prepared for Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians" by Kevin R. Finney and "The Match-e-be-nash-she-wish Band of Potawatomi Indians and the United States in the 1930s" by James M. McClurken. The Office of the Solicitor reviewed the Band's reports and other

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Department noted that "[t]he use of the obvious date of 1870 for this finding is not to be taken as a definitive determination by the Department that prior acknowledgement of the group ended in 1870." *See, e.g.*, Final; Determination, at 3, 4, 7, 11; Introduction to Proposed Finding, at 2; Proposed Finding, at 2, 5, 11, 17; Technical Report, at 1, 81. We have stated that "if a tribe is federally recognized, by definition it satisfied the IRA's term 'recognized Indian tribe' in both the cognitive and legal senses of term." *See* Memorandum from Solicitor to the Secretary of the Interior, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act*, M-37029 ("M-Opinion"), *infra*, at 23-26. "[T]he fact that the tribe is federally recognized at the time of the [trust] acquisition satisfies the 'recognized' requirement of Section 19 of the IRA, and should end the inquiry." *Id.* at 26. The IRA does not require that a tribe be "recognized" in 1934, but even assuming *arguendo* that it did, the M-Opinion explained that a tribe be "recognized" in 1934 under the IRA, the M-Opinion noted that the term "recognized" has been used historically in at least two distinct sense: a "cognitive" of quasi-anthropological sense; and a more formal legal sense to "connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique political relationship with the United States." *Id.* at 24. Given the Band's treaties with the United State and its other interactions with the Federal Government summarized in this opinion, as well as the findings in the federal acknowledgment process. There can be no question that the Band was "recognized" in 1934 under either sense of the term.

materials, including materials related to the Band's federal acknowledgement, and analyzed whether the Band was under federal jurisdiction in 1934 in an opinion dated and received July 30,2014 *(Carcieri* Opinion).

Based on the Solicitor's analysis, we conclude that the Band was under federal jurisdiction in 1934, as set forth below.

I. Application of the Two-Part Inquiry to the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

In response to the *Carcieri* decision, the Solicitor of the Department of the Interior issued an M-Opinion on March 12, 2014 titled The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, M-37029 ("M-Opinion"). The Solicitor construed the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first part examines whether there is a sufficient showing in a tribe's history, at or before 1934, that it was under federal jurisdiction.[8] The second question is to ascertain whether a tribe's jurisdictional status remained intact in 1934.[9]

As a whole, the record before the Department demonstrates that the Band satisfies the two-part inquiry. First, we conclude that the Band was under federal jurisdiction both in and before 1934. This is evident from the succession of treaties, three of which were ratified, between the Band

8. *See* M-Opinion, at 19.

9. *See id.*

and the United States that provided annuities and other benefits for the Band. A treaty between the United States and a tribe definitively establishes that the tribe was under federal jurisdiction.[10] Thus, these treaties alone require a conclusion that the Band was under federal jurisdiction prior to 1934. In addition, while not a named signatory to other treaties and agreements with Indian tribes in the area, the Federal Government guaranteed federal annuities for the Band under those treaties and agreements making it a beneficiary of the Federal Government based on its relationship with the United States as an Indian tribe. The Band received these federal annuity payments throughout the 19th Century.

In addition, although not required for our conclusion that the Band was under federal jurisdiction prior to 1934, there is ample additional evidence in the record demonstrating that the United States had engaged in a course of dealings with the Band and its members that establishes that the Band was under federal jurisdiction. Beginning in 1839, the Band resided on mission property in Allegan County, Michigan at the Griswold Indian Colony, later referred to as the Bradley Settlement, which was secured with federal funds.

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10. *Worcester v. Georgia*, 31 U.S. 515, 556, 569-60 (1832); Felix Cohen, *Handbook of Federal Indian Law* 271 (1942 ed.) (listing treaty relations as one factor relied upon by the Department in establishing tribal status); Memo. from Acting Associate Solicitor for Indian Affairs to Comm'r of Indian Affairs, (M-36759) (Nov. 16, 1967) (discussing treaty relations between the Federal Government and the Burns Paiute Tribe as evidence of tribal status even though such relations did not result in a ratified treaty). *See also* discussion below in Section II(A)(1).

The government also supported a school for the Band's children to attend, and the Band was included regularly in census documents and other federal reports. In 1890, Congress authorized the Band and other Potawatomi groups to file suit against the United States to account for unpaid treaty annuities. Not only was the Band was successful in two cases brought before the Court of Claims pursuant to this authorization, both judgments were affirmed by the U.S. Supreme Court, and the Band was included in rolls compiled by the government for the distribution of claims awards.

Second, the Band's under federal jurisdiction status remained intact in 1934, despite conflicting policies of the Department in the 1930s stemming from a lack of appropriations that limited the ability of tribal groups in Lower Michigan to organize under the IRA. In 1999, the Department formally acknowledged the Band through the FAP, and determined that it existed continuously since at least 1870. Admittedly, the Department did not at all times believe that it had legal obligations to the Band and similarly situated tribes in the Lower Peninsula. The Federal Government's jurisdiction over the Band did not cease however, despite the Department's erroneous view of its responsibilities to the Band in the 1930s, because only Congress has the authority to terminate that jurisdiction.

A. The Band Was Under Federal Jurisdiction Prior to 1934

The evidence confirming the Band's under federal jurisdiction status prior to 1934 is extensive. The Band

has been under federal jurisdiction since at least 1795, when it entered into its first treaty with the United States. Not only was the Band party to or beneficiary of several treaties with the United States, the Federal Government engaged in a wide-ranging course of dealing with the Band that included honoring the financial obligations owed to the Band stemming from treaties and the provision of services to the Band, all of which reaffirmed the government's ongoing obligation to and responsibility for the Band up to 1934.

We illustrate below the record of federal jurisdiction over the Band. First, we discuss the Band's treaties with the United States, as well as the government's failure to implement these treaties and the Band's attempts to secure additional treaty rights. Next, we describe the other evidence of the Band's jurisdictional status, notably the establishment of the Griswold Indian Colony, a mission settlement paid for with federal funds.

1. Treaties and Treaty Implementation Issues

a. Early Treaties

Over the course of its history with the Federal Government, the Band was a party to six treaties with the United States, and was the beneficiary of various rights flowing from these treaties. The history of these treaties and the Band's numerous other interactions with the Federal Government, often through the Department, are discussed below and summarized at length in the documents associated with the FAP.

The Band traces its origins to two Potawatomi bands: "those of Sagamah at Prairie Ronde ... and of Matchebenashshewish at Kalamazoo with some additional Potawatomi families who can be documented as having come from the Pokagon villages and from White Pigeon's village at Coldwater, Michigan, with a few Grand River Ottawa."[11] Although the Band is Potawatomi in origin, it was closely associated with neighboring Ottawa groups, and the Band's leaders even signed some treaties with the Federal Government as Chippewas or Ottawas.[12]

On August 3, 1795, the Band entered into the Treaty of Greenville with the United States, thus establishing that it was under federal jurisdiction at least as of that date.[13] In this treaty, the signatory tribes, including the Band, ceded a large portion of land following conflicts with the United States Army.[14] However, Article VII of the treaty permitted the signatory tribes to hunt on the ceded territory.[15] Article 5 clarified that the treaty tribes had a right to hunt and dwell on property relinquished by the government for the tribes in consideration for land

11. Technical Report, at 9-10. The aboriginal territory of the Potawatomi as a whole "reached from Detroit across Southern Michigan, into northwestern Indiana, northeastern Illinois, and included the Wisconsin shore of Lake Michigan" at its greatest geographic extent. *Id.* at 11.

12. *See id.* at 9.

13. 7 Stat. 49.

14. *Id.* at 49-51. *See also* Technical Report, at 18-19, 22.

15. 7 Stat. 49, 52.

cessions, but restricted the tribes from selling these lands to any party besides the United States.[16] In consideration for the relinquished lands, Article IV of the Treaty of Greenville guaranteed the annual payment of goods to the signatory tribes and promised payments of 1,000 dollars each to the Chippewa, Ottawa, and Potawatomis.[17] The Treaty "acknowledged [the signatory tribes] to be under the protection of the said United States and no other power whatever." 7 Stat. 49, 52. Matchebenashshewish,[18] the Band's leader, signed the Greenville Treaty as a Chippewa leader and participated extensively in the proceedings.[19] He was instrumental in the proceedings, and made at least eleven speeches before, during, and after the treaty negotiations on behalf of the "'Chippewa, Ottawa, and

16. *Id.*

17. *Id.* at 51.

18. Matchebenashshewish was also known as "Bad Bird," and in the 1795 Treaty, his name was spelled as "Mashipinashiwish." *Id.* at 54.

19. *See* Technical Report, at 18 (citing Erminie Wheeler-Voegelin and David Bond Stout, Indian Claims Commission, Anthropological Report on the Ottawa, Chippewa, and Potawatomi Indians, Vol. 25 at 19 (1974)). Although Matchebenashshewish was mentioned in the treaty proceedings as a Chippewa, he spoke on behalf of the "Chippewa, Ottawa, and Pottawatomies." *Id.* The Technical Report clarifies that "[i]t was common practice for Potawatomi villages to accept outsiders as chiefs" and, in any case, concluded that it did not "make any difference to the acknowledgability of "the Band" whether [Matchebenashshewish] was a Chippewa or Ottawa in origin." *Id.* at 18-19.

Pottawatomies."[20] At the time of the Treaty of Greenville, Matchebenashewish was associated with villages along the Kalamazoo River.[21]

Most Potawatomi bands allied with the British during the War of 1812.[22] After the war, the Band signed the Treaty of Spring Wells on September 8, 1815, in which the signatory tribes affirmed their allegiance with the United States. 7 Stat. 131. This Treaty, which was ratified by Congress on December 26, 1815, restored to the signatory tribes "all the possessions, rights, and priviledges [sic], which, they enjoyed, or were entitled to, in the year one thousand eight hundred and eleven, prior to the commencement of the late war with Great Britain; and the said tribes, upon their part, agree again to place themselves under the protection of the United States, and of no other power whatsoever."[23] The Treaty was signed by the son of Matchebenashshewish, "Paanassee, or the bird," as a

Chippewa chief.[24] Following the signing of the 1815 Treaty, "the Potawatomi of southern Michigan were in regular contact with one or another Indian agency."[25]

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20. *Id.* at 18 n.15.

21. *See id.* at 19.

22. *See id.* at 22.

23. 7 Stat. 131, 131.

24. *Id.* a 132.

25. *See* Technical Report, at 22.

Although the Band, along with other Potawatomi in southern Michigan, was technically the responsibility of the Michigan Superintendent, these Potawatomi groups also appear in records of both the Chicago agency and the Logansport, Indiana agency.[26]

The Band also participated in the Treaty of Chicago on August 19, 1821, along with other Ottawa, Chippewa, and Pottawatomi groups. 7 Stat. 218. The 1821 Treaty, which was signed by "Mat-che-pee-na-che-wish" as an Ottawa, ceded to the United States over four million acres of land, largely in what was the Michigan Territory, south of the Grand River.[27] Although the cession included most of the Band's territory along the Kalamazoo River, the Treaty of Chicago reserved two tracts of land for the Band surrounding its traditional villages: "[o]ne tract at the village of Prairie Ronde, of three miles square" and "[o]ne tract at the village of Match-e-be narh-she-wish [sic], at the head of the Kekalamazoo river."[28] Significantly, the treaty memorialized the tribes' rights to hunt on the ceded property "while it continues [sic] the property of the United States."[29] The 1821 Treaty of Chicago also

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26. *See id.* at 22-23.

27. 7 Stat. 218, 221. *See also* Technical Report at 25-28.

28. 7 Stat. 218, 219. As codified, the 1821 Treaty of Chicago clarified that "[t]he tract reserved at the village of Match-e-be-nash-she-wish, at the head of the Ke-kal-i-ma-zoo river, was by agreement to be three miles square. The extent of the reservation was accidentally omitted." *Id.* at 221. This tract was Matchebenashshewish's village in Kalamazoo County, Michigan. *See* Technical Report, at 25.

29. 7 Stat. 218, 220.

established a reserve for "the village of "Na-to-wa-se-pe, of four miles square."[30] In consideration for the land cessions, Article 4 of the Treaty promised annual payments to both the Ottawa and Potawatomi nations.[31]

Six years later, in 1827, both "Mitch-e-pe-nain-she-wish, or bad bird" and his son "Pee-nai-sheish, or little bird" signed the Treaty of St. Josephs, between the United States and the Pottawatomi bands.[32] In the 1827 Treaty, the Band ceded, "[o]ne tract at the village of Match e be nash she wish, at the head of the Kekalamazoo river, of three miles square, which tracts contain in the whole ninety nine sections and one half section of land."[33]

The stated purpose of the Treaty of St. Josephs was "to consolidate some of the dispersed bands of the Potawatamie Tribe in the Territory of Michigan."[34] It also retained the Nottawaseppi Reserve established in the 1821 Treaty of Chicago and enlarged the reservation for the signatory groups.[35] However, the 1827 Treaty did not require the Band to relocate to the Nottawaseppi Reserve or to relinquish the Band's rights to use ceded lands under the prior Treaty of Chicago of 1821.[36]

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30. *Id.* at 219.

31. *Id.* at 220.

32. 7 Stat. 305 (Sept. 19, 1827).

33. *Id.* at 306.

34. *Id.* at 305.

35. *Id.* at 306.

36. *See* Technical Report, at 29.

In the next Treaty of Chicago signed on September 26, 1833, between the United States and Chippewa, Ottawa, and Pottawatomi bands, the participating tribes ceded approximately five million acres.[37] Although neither Matchebenashshewish nor his son Penassee signed this treaty, "Sauk-e-mau" or Sagamah, the leader of the Prairie Ronde village (reserved for the Band by the 1821 Treaty), signed the supplementary articles to the 1833 Treaty.[38] The supplementary articles to the 1833 Treaty, executed on September 27, 1833 were agreed to by "the Chiefs and Head-men of the said United Nation of Indians, residing upon the reservations of land situated in the Territory of Michigan."[39] The signatories to the articles were to be considered parties to the September 26 Treaty "and entitled to participate in all the provisions therein contained."[40] The supplementary articles ceded the Nottawaseppi Reserve to the United States, and in consideration, the United States gave to the signing bands a sum of one hundred thousand dollars, including annuities to certain individuals on an attached schedule.[41]

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37. 7 Stat. 431.

38. *Id.* at 443. *See also* Technical Report, at 30-31.

39. 7 Stat. 431, 442. Both the 1833 Treaty of Chicago and its supplementary articles were ratified and confirmed by the U.S. Senate in two resolutions setting forth certain conditions and modifications. *See id.* at 447-48.

40. *Id.* at 442.

41. *Id.*

Moreover, the supplementary articles to the 1833 Treaty of Chicago required "[a]ll the Indians residing on the said reservations in Michigan shall remove therefrom within three years from this date, during which time they shall not be disturbed in their possession, nor in hunting upon the lands as heretofore."[42] Despite not signing the 1833 Treaty, Matchebenashshewish and his son Penassee received their annuity payments under that Treaty, and [t]he village of Kalamazoo (Ke kan a ma zoo village) was listed in 1833 among the Chippewa, Ottawa, and Potawatomi of Illinois and Michigan ... as having received its annuity payment."[43]

Later, in 1836, a group of Ottawa and Chippewa bands entered into the Treaty of Washington with the United States. 7 Stat. 491 (March 28, 1836). In the 1836 Treaty, the bands (1) ceded land that presently comprises the northwest one third of the State of Michigan; (2) reserved some land for their own use for a period of five years; (3) agreed to permanently resettle on land located southwest of the Missouri River; (4) reserved hunting and fishing rights on the ceded lands until the lands were needed for settlement; (5) agreed to specific sums of money to be paid immediately, and (6) were pledged an annuity of $30,000 for twenty years. The Treaty also provided that the bands would receive annual funding for specified periods of time for education, teachers, schoolhouses, books, agricultural implements, cattle, tools, salt, fish barrels, medicines, and doctors, and thereafter so long as Congress appropriated

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42. *Id.* at 442-43.

43. Technical Report, at 31.

funding.[44] Although the Band was not a party to the 1836 Treaty, a schedule referred to in Article 10 includes three classes of chiefs. Notably, "Penasee or Gun lake" is explicitly listed as one of the third class of chiefs entitled to one hundred dollars under the treaty.[45]

As a party to and beneficiary of the treaties discussed above, the Band was under federal jurisdiction since the earliest days of the Nation. These treaties provide definitive evidence that the Band was under federal jurisdiction prior to 1934, a fact that was conclusively established during the acknowledgement process. Treaty relations between the United States and Band not only reflect the recognition of the Band's status as a sovereign tribal entity capable of engaging in a government-to-government relationship with the United States but also evidence of the United States' jurisdictional relationship with the Band. Negotiating and securing a treaty with the Band derives from the inherent, authority of the Federal Government to manage Indian affairs and Congress' intention that, among other things, treaty-making with

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44. 7 Stat. 491. In *United States v. Michigan*, the court found that the United States failed to adhere to the terms of the 1836 Treaty in several ways; namely by failing to pay annuities in full, taking fishing grounds for a canal, permitting settlers to flood the area, and reducing the land available for Indian settlement. 471 F. Supp. 192, 216 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). The Band was not a party to the litigation. *See also* Technical Report, at 31-32.

45. 7 Stat. 491, 496.

tribes prevented state encroachment on the exclusively federal power to regulate affairs with Indian tribes.[46]

Treaty relations, therefore, reflect both the government-to-government relationship between the Band and the United States, as well as demonstrate the United States' acknowledged responsibility for, and obligations to, the Band.

b. The 1855 Treaty of Detroit

The Treaty of Detroit, the next treaty to which the Band was a signatory, as well as the Band's rights under that Treaty, further reinforce our conclusion that the Band was under federal jurisdiction before 1934. In June 1855, the Band's leaders Shau-bau-quong and Maw-bese were anxious about the expiration of certain terms in the 1836 Treaty and petitioned the Secretary of the Interior seeking confirmation that the Band could continue living at the colony.[47] Meanwhile, the Office of Indian Affairs[48] ("OIA") had begun preparations for a new treaty with the Ottawa and Chippewa Indians of Michigan.

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46. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.02[3], at 24.

47. *See* Technical Report, at 64-69.

48. The OIA was the predecessor entity of the BIA during the 19th Century and was an agency of the War Department. In 1849, the office was transferred to the newly created Department of the Interior.

George W. Manypenny, the Commissioner of Indian Affairs at the time, responded to the Band's petition (and another petition from Rev. Selkirk) stating that no relief could be provided to the Griswold Indian Colony, particularly given the upcoming treaty negotiations.[49]

The Band joined the group of Ottawa and Chippewa bands in participating in negotiations and entering into the Treaty of Detroit with the United States on July 31, 1855,[50] which was signed by Shau-bau-quong.[51] The Treaty, ratified on April 15, 1856, withdrew specified areas of land in Oceana and Mason Counties, Michigan, from unsold areas of public land for each signatory band and set a five-year limit during which members of each band could select allotments from the area set aside.[52] Any allotment not selected within the five-year period would remain the property of the United States.[53] The allotments were held in trust for a period of ten years.[54] The Treaty also provided for a variety of payments to the Band over a ten-year period.[55]

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49. *Id.*

50. 11 Stat. 621.

51. *See Id.* at 629. *See also* Final Determination, at 23; Technical Report, at 69-71.

52. 11 Stat. 621, 621-23.

53. *Id.* at 622-23.

54. *Id.*

55. *Id.* at 623-24.

c. The Dissolution Provision in Article 5 of the 1855 Treaty Did Not Alter the Status of the Signatory Tribes and Bands

At times, Article 5 of the 1855 Treaty has been misinterpreted as altering the status of the various signatory tribes and bands. That is inaccurate. The Article merely dissolved the federally established group of bands of the Ottawa and Chippewa Indians that had been organized for purposes of treaty negotiations. The Article provides as follows:

> The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purposes of carrying into effect the provisions of this agreement, is hereby dissolved and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.[56]

56. *Id.* at 624.

This Article was a source of confusion for the Department, which later erroneously construed the provision erroneously as dissolving the individual Chippewa and Ottawa bands.[57] Implementation of the 1855 Treaty

57. The government's misinterpretation of Article V of the 1855 Treaty of Detroit is perhaps best explained in *Grand Traverse Band v. Office of the United States Attorney*:

> Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty. In the years that followed, the Ottawas and Chippewas vociferously complained about being joined together as a single political unit. To address their complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the two tribes. This language, however, was not intended to terminate federal recognition of either tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities. Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments "tribal relations will be terminated." Letter from Secretary of the Interior Delano to Commission of Indian Affairs at 3 (Mar. 27, 1872). Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

369 F.3d 960, 961 n.2 (6th Cir. 2004). In that case, the Sixth Circuit found that the Grand Traverse Band of Ottawa and Chippewa

provisions were seriously delayed by the Federal Government and ultimately were never completed.[58]

However, in *United States v. Michigan*, — a case in which the Band was not a party that involved fishing rights of the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians under the Treaty of Washington,—the court concluded that this Article had no impact on the United States' government-to-government relationship with signatory bands, but was intended only to dissolve the treaty negotiation group:

> This clause was intended to accomplish two goals: to relieve the United States of the burden of convening general councils in the event local matters required attention in the future, and to satisfy the Ottawa and Chippewa's desire to be treated separately. Article 5 had no impact on the governmental structure of the bands. There was no change in the way in which the Indian agents dealt with them after the treaty, except that they were never convened again as one group.[59]

Indians was restored to federal recognition for purposes of the Indian Gaming Regulatory Act.

58. *See* Technical Report, at 71.

59. *United States v. Michigan*, 471 F. Supp. 192, 264 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

Significantly, Congress expressly repudiated the Department's treatment of similarly situated tribes who were likewise signatories to the 1855 Treaty of Detroit.[60]

d. Treaty Implementation Issues and the Loss of Trust Lands

While the treaties between the United States and the Band, as well as the establishment of the Griswold Indian Colony and provision of services to the Band, all demonstrate the Band's ongoing under-federal-jurisdiction status, additional federal actions subsequent to the Treaty of Detroit further confirm our conclusions regarding the Band. For instance, the Band's attempts to renegotiate treaties with United States further bolster our determination that the Band was under federal jurisdiction throughout the rest of the 19th Century.

As recorded in federal census rolls and pension documents, many members of the Band relocated to the reserve established for the Band in the Treaty of Detroit in Oceana County, Michigan, beginning in 1858, while some families remained in Allegan County.[61] At around that time, and consistent with the Treaty of Detroit, the Cob-moo-sa school, named after a Grand River Ottawa chief,

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60. *See* 25 U.S.C. § 1300k (finding that the United States Government had continuous dealings with the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians from 1836 to the present).

61. *See* U.S. Census Reports, Crystal Township, Michigan (1860, 1870). *See also* Technical Report, at 73-79.

was funded by the government for Indians living on the reserve in Oceana County.[62]

Throughout the 1860s, Shau-bau-quong, as well as his Ottawa and Chippewa peers, consistently petitioned the government and participated in numerous failed efforts to negotiate new treaties with federal agents, due in part because they did not believe their Treaties were being upheld.[63] For example, during the American Civil War, the United States took no additional action to implement the provisions of the Treaty of Detroit, particularly the elaborate allotment provisions in the treaty.[64] This was in part due to the OIA's failure to produce the requisite lists of Indians under the treaty for the purpose of making allotments.[65] In addition, the government failed to enforce a preemption clause in the Treaty of Detroit, which exempted lands occupied by settlers or by "persons entitled to pre-emption," providing that all "such pre-emption claims shall be proved, as prescribed by law."[66]

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62. *See* Technical Report, at 74.

63. *See, e.g.*, Letter from Indian Agent Leach to Commissioner of Indian Affairs (Oct. 4, 1864); Letter from Indian Agent Leach to Commissioner of Indian Affairs (June 14, 1864). *See also* James McClurken, Our People, Our Journey: The Little River Band of Ottawa Indians, at 76-77 (2009) ("McClurken"); Technical Report, at 74-81, 86.

64. *See* Technical Report, at 74-76, 81-82.

65. *See id.* at 83-86.

66. 11 Stat. 621, 626-67.

As a result, many of the lands withdrawn by the treaty were occupied by settlers and even the State of Michigan.[67]

Frustrated by the failure of the allotment process, in 1863, Shau-bau-quong and other tribal leaders requested to send a delegation to Washington, D.C., through the local Indian Agent.[68] In 1865, Shau-bau-quong was elected by Indians living in the Oceana County (and also Mason County) settlements as "Chief Speaker" for negotiations of a new treaty between the Ottawa and Chippewa bands.[69] Although the government expressed some interest and made preliminary steps to enter into a new treaty with the Ottawa and Chippewa bands, these plans failed to materialize.[70]

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67. *See* Technical Report, at 82-83.

68. *See, e.g.,* Letter from Louis Genereau, Interpreter to Indian Agent Leach (Nov. 7, 1863).

69. *See* Technical report, at 79-80.

70. *See id.* In fact, in 1868, "Moses Shawbequoung, who often spoke for the Indian Town community, prepared to send delegates to Washington, complaining that 'We have laid this matter before our Agent year after year, but no answer yet; while other tribe [sic] of Indians are making treaties with the Government every year." McClurken, at 76-77. Although officials denied this request, the Grand River bands sent a delegation anyway. Although they failed in their efforts to negotiate a new treaty, the delegation anyway. Although they failed in their efforts to negotiate a new treaty, the delegation "returned to Michigan believing that the commissioner of Indian Affairs had promised that federal negotiators would soon visit Michigan." *Id.*

The Band, including Shau-bau-quong, then left Oceana County and returned to Allegan County between 1869 and 1877.[71] This was a consequence of several factors, including: the government's failed allotment policies under the Treaty of Detroit; the final distribution of residual annuities paid to the Band in 1870;[72] and the Federal Government's closure of its schools in Oceana County.[73]

Meanwhile, a significant portion of the Band's reserve lands continued to be claimed by non-Indian settlers, especially in the aftermath of certain Congressional enactments in the 1870s.[74] Shau-bau-quong regularly made official petitions to the President, the Secretary of the Interior, legislators, Indian agents, and the OIA on behalf of the Band, and at one point requested the closure of the OIA "so that the Indians could bargain directly with the Department of the Interior."[75] Nevertheless, "[d]uring the decade 1870-1880, the Indian agent in Michigan was aware of the [Band] and its location near Bradley."[76]

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71. *See* Technical Report, at 81.

72. *See id.*

73. *See id.* at 74, 87.

74. *See* McClurken, at 80-82, 88-90, 103-05 (citing the Michigan Indian Homestead Act of 1872 and amending legislation in 1875 and 1876).

75. *See* Technical Report at 86, 89, 89 n.91.

76. *Id.* at 87.

The trust property at Bradley, too, was divided and sold when the State of Michigan began to tax the former mission site in 1874,[77] and when the trust property was allotted pursuant to a Trust Statement previously executed by Bishop McCoskry, who at that point bad left Michigan.[78] The process of the trust dissolution continued in the courts well into the next decade.[79] During that period, D.K. Foster, the brother of Moses Foster or Shau-bau-quong was employed by the Federal Government as a teacher and interpreter for the Band.[80] He corresponded regularly with the Michigan Indian Agent, who also expressed concerns and requested federal assistance regarding the division and loss of trust land to settlers.[81]

That the Band continued to engage in additional treaty relations with the United States after 1855, as well as its numerous interactions with government agents and officials, all demonstrate that the Federal Government clearly regarded the Band as a sovereign entity capable of engaging in a formal treaty relationship with the United States and as such, necessarily requires the conclusion that the band was also under the jurisdiction of the Federal Government.[82]

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77. *See id.* at 89.

78. *See id.* at 67-68, 92-94.

79. *See id.* at 94-95.

80. *See id.* at 89-95.

81. *Id.*

82. *See* Record of Decision: Trust Acquisition of, and Reservation Proclamation for the 151.87 acre Cowlitz Parcel in

2. Other Indicia of Federal Jurisdiction

a. The Griswold Indian Colony, Annuity Payments, and Federal Census Reports

While the treaty making evidence definitively establishes that the Band was under federal jurisdiction prior to 1934, other evidence also supports this determination. For example, in the late 1830s, federal efforts were underway to remove the Potawatomi living in Michigan.[83] As discussed in more detail below, the Band avoided being removed to reservations further West by taking asylum with a church mission in central Michigan, near the town of Bradley, initially referred to as the Griswold Indian Colony. By 1838, the Band moved from the Kalamazoo Village site to the Griswold Indian Colony in what is now Allegan County. Michigan.[84] As summarized below, the relocation to the Griswold Indian Colony, coupled with additional federal payments and provisions to aid the Band during this period, further support our finding of federal jurisdiction over the Band.

Clark County, Washington, for the Cowlitz Indian Tribe, at 79 (April 22, 2013), *available at* http://cowlitzeis.com/documents/record_of_decision_2013.pdf ("Cowlitz ROD").

83. *See* Technical Report, at 32-33.

84. *See id.* at 34-35, 46. Historical materials locate the Band near Martin, Michigan, in 1836, and then later at Hastings Point at Gun Lake by the winter of 1839-1840. *See id.*

Following an incident involving the murder of a family of white settlers in the Grand River Valley in early 1838,[85] the OIA responded to local concerns that the Grand River Ottawa or other Indians nearby were involved by entering into a compact with the Band and other Indians.[86] Although it was later determined that the crime was committed by another settler. Michigan Superintendent. Henry Rowe Schoolcraft, initiated the Compact of June 5, 1838, with the Grand River bands.[87]

While the Band did not sign the 1838 Compact,[88] between 1838 and 1839, it nonetheless is significant that Superintendent Schoolcraft extended benefits to the Band along with the Grand River Ottawa, and the Band began to receive annuities from the government under

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85. *See* Technical Report, at 46. *See also* Letter from Henry Schoolcraft to COIA Harris (April 6, 1838); Letter from Lyons to Henry Schoolcraft (March 30, 1838); Letter from Henry Schoolcraft to Lyons (April 6, 1133); Letter from Henry Schoolcraft to COIA Harris (May 1, 1838).

86. *See* Technical Report, at 46- 47.

87. See *id. See also* Letter from Henry Schoolcraft to COIA Harris (June 18, 1838). The 1838 Compact set forth a general assurance of mutual friendship and modified the Treaty of Washington with the Ottawa and Chippewa to provide for provisions of tobacco and salt, as well as a more convenient location for making annuity payments, to the Grand River bands. *See* Technical Report, at 47; Compact Between Henry Schoolcraft and Grand River Ottawa. (June 5, 1838).

88. *See* Technical Report, at 48.

the Compact.[89] Thus, the Band is included as the "Gun Lake Village" in a list of Grand River Bands, specifically in a document setting forth "Payment to the Ottawa and Chippewa Indians, 1839."[90]

The Griswold Indian Colony (also known as the Selkirk Mission), where the Band ultimately settled, was established in 1839.[91] President Martin Van Buren had developed a means to "educate and civilize" tribes in Michigan by funding five Christian denominations.[92] Superintendent Schoolcraft had earlier identified Samuel Allen McCoskry, an Episcopal Bishop, as eligible to receive funds for "Indian Missions and Schools, within the State of Michigan."[93] During the summer of 1839, Rev. James Selkirk, who had been designated by Bishop McCoskry as a missionary, selected land for the Griswold Indian Colony about four miles west of Gun Lake (and several miles northeast of Bradley) with the assistance of Sagamah, the leader of the Band at the Prairie Ronde Village, and his associates.[94] In June 1839, Selkirk acquired property for the mission under Bishop McCoskry's name using federal

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89. *See id.*

90. *Id.*

91. *See id.* at 38-39.

92. *See id.*

93. *See id. See also* Letter from Henry Schoolcraft to COIA Harris (April 27, 1837); Letter from Henry Schoolcraft to COIA Harris (May 27, 1837).

94. Autobiography of Rev. James Selkirk, at 34.

funds.[95] By November 1839, the Band had relocated to the Griswold Indian Colony near Gun Lake with other Potawatomis and Ottawas.[96]

In 1840, Superintendent Schoolcraft conducted a survey under the jurisdiction of the Michilimackinac Agency for the Commissioner of Indian Affairs. In that survey, the Band, under the name "Gun Lake or Griswold" with the notation "Compact June 5, 1838" is listed as one of the bands "entitled to receive annuities under the Treaty of 28th March 1836."[97] Subsequent to Schoolcraft's actions, the Band was closely associated with the Ottawa and Chippewa Bands by the Federal Government, particularly for purposes of treaty negotiation and certain payments.

Also beginning in 1840, Selkirk and Bishop McCoskry reported regularly on the progress of the Griswold Indian Colony to the Office of Indian Affairs over the course of the next fifteen years.[98] The Band was likewise included in federal Indian censuses (as Ottawas) and other annual

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95. Technical Report, at 42-43. *See also* Letter from Henry Schoolcraft to COIA Harris (Sept. 30, I 839) (stating that Bishop McCroskey reported in July 1939 that "the fund committed to him has been and is in the process of being applied to the object with good prospect of success.").

96. *See* Technical Report, at 43; Final Determination at 9, 11.

97. *See* Technical Report, at 48. *See also* "Indian Population Within the Agency of Michilimackinac" (Sept. 30, 1840).

98. *See* Technical Report, at 49-61.

reports.[99] In addition, as discussed above, the Band received annuity payments along with the Grand River Ottawa bands during this time.[100]

By 1845, both Matchebenashewish and Sagamah had died, and were succeeded by Penassee.[101] Penassee remained the exclusive leader of the Band until his death in 1854, when the Band elected as chief Penassee's oldest son, Shaw-bau-quong, also known as Moses Foster.[102] Although federal funding for the benefit of the Band and other Indians was set to expire in 1855 pursuant to the terms of the 1836 Treaty of Washington, the Federal Government continued providing funding for another three years.[103] In sum, the establishment of the Griswold Indian Colony with federal funds, the payment of annuities, and the Band's inclusions on federal Indian censuses and other annual reports support our finding of federal jurisdiction over the Band during the 1830s and 1840s, as well.

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99. *See e.g., id.* at 61-69. The Technical Report clarifies that the population at the Griswold Indian Colony included a Potawatomi base "with a few Grand River Ottawa and even an occasional Chippewa" *Id.* at 40.

100. *See id.* at 48.

101. *See* Technical Report, at 5. *See also* Autobiography of Rev. James Selkirk, at 40-43.

102. *See id.*

103. *See* Technical Report, at 68.

b. Claims Activities and Educational Services

In addition, in the late 19th Century, the Band asserted successful claims against the United States in several federal court cases, by participating in the legal efforts led by the other Potawatomi bands in Michigan that sought unpaid tribal annuities from the United States.[104] Significantly, an 1890 Act of Congress granted jurisdiction to the United States Court of Claims to "try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon."[105] This legislation, along with the federal courts' decisions in favor of the Band for financial compensation show both that the Band was under federal jurisdiction, and that the United States bad established money-mandating duties to the Band, even though the government did not acknowledge these obligations at the time.[106] As the Office of Federal Acknowledgment recognized in its Proposed Finding, which was affirmed in the Band's final acknowledgement determination:

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104. *See id.* at 101-02.

105. 26 Stat. 24 (1890).

106. *Cf. Carcieri,* 555 U.S. at 398-99 (Breyer, J., concurring) ("And the Department has sometimes considered that circumstances circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934 – even though the Department did not know it at the time.").

> In 1882, in cooperation with Chief Phineas Pamptopee of the [Huron Potawatomi], [Band] leaders Chief Shau-be-quo-ung (a.k.a. Moses Foster) and his brother David K. Foster began to press the issue of Potawatomi claims interests. An Act of Congress (March 19, 1890, 26 Stat. 24), granted jurisdiction to the U.S. Court of Claims, after which both (bands] and the Pokagon Potawatomi filed suits on behalf of "all the Potawatomi Indians in the States of Michigan and Indiana" in *Potawatomi Indians v. The United States and Phineas Pam-To-Pee* and *1371 Other Potawatomi Indians v. The United States.* The court records generated by this suit in the period 1882-1904 included numerous depositions identifying and describing the Allegan County Indian community, specifying its ties to Match-e-be-nash-she-wish's Band from the former Kalamazoo Reserve.[107]

Several members of the Band, including those who no longer lived in Allegan County, provided depositions regarding the history and composition of the Band.[108] The Potawatomi bands successfully litigated their case, and on March 28, 1892, the U.S. Court of Claims awarded funds to certain individuals listed on specific annuity rolls and their descendants.[109] The Court of Claims' award to the

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107. *See* Proposed Finding, at 3.

108. *See* Technical Report, at 107-09.

109. 27 Ct. Cl. 403 (1892).

Potawatomi was upheld by the U.S. Supreme Court on April 17, 1893.[110]

In its decision, the Court of Claims did not determine the names of the individual Potawatomi Indians who were eligible for compensation as a result of its judgment.[111] Accordingly, the Secretary of the Interior and the Commissioner of Indian Affairs prepared a roll (the "Cadman Roll") in 1895 identifying the individual Potawatomi Indians entitled to receive payments.[112] The Cadman Roll, for the most part, included only the descendants of those on a prior payment roll for Pottawatomi Indians but excluded the Band.[113] In a letter dated April 2, 1896, the Commissioner of Indian Affairs explained the rationale for the exclusion.[114] He stated that "they allied themselves with the Ottawa and Chippewa Indians in 1855 at a Treaty made with such Indians at Detroit, Michigan and shared in the annuities and distribution of lands made to said Indians in 1855 to 1871, and were never enrolled with any Pottawatomi Indians."[115] The Band's residence at the Bradley settlement confirmed the Commissioner's view that the Band allied

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110. *Pam-To-Pee v. United States,* 148 U.S. 691 (1893).

111. *See* Technical Report, at 109.

112. *See id.*

113. *See id.*

114. *See id.* at 109-110 (citing Letter from the Commissioner of Indian Affairs to Hon. H.F. Thomas (April 2, 1896).

115. *Id.*

with the Ottawas and Chippewas who resided thereby, and consistent with the view, omitted the Band from the Cadman Roll.[116]

Nevertheless, leaders of the Band, along with the Huron and other Michigan Potawatomi, continued to pursue claims against the government through the court system[117] and in 1902, the United States Supreme Court concluded that certain Michigan Potawatomi Indians, in addition to those individuals on the Cadman Roll were entitled to payment, including those living on the settlements in Allegan County.[118] Congress, in turn, appropriated money to pay the claimants listed in the lawsuit.[119] This Supreme Court decision was the basis for the preparation by the government of the 1904 Taggart Roll to determine the Potawatomi individuals eligible for payment.[120] The Taggart Roll included the majority of the Band's members

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116. *See id.* at 109.

117. *See* 36 Ct. Cl. 427 (1901).

118. *Pam-To-Pee v. United States*, 187 U.S. 371 (1902). The Supreme Court explained that on August 23, 1894, Congress passed legislation, 28 Stat. 424, 450, appropriating money for the payment of Court of Claims' earlier judgment in favor of the Potawatomi claimants. On March 2, 1895, it passed another act, 28 Stat. 876, 894, directing the Secretary of the Interior to assign an inspector to take a census and prepare a roll of the individual Indians who were entitled to share in the judgment. 187 U.S. at 374. *See also* Technical Report, at 111 (stating that the Supreme Court's decision occurred in 1899).

119. *See* Pub L. No. 58-125 (1904).

120. *See* Technical Report, at 116-17.

living in Allegan County, among other Potawatomi groups.[121]

Similarly, because of the Band's close association with the Grand River Ottawa, it was also included in the 1908 Durant Roll, which was compiled by the OIA for the distribution of another claims award to the Ottawa and Chippewa tribes of Michigan.[122]

As early as 1896, D.K. Foster had simultaneously been submitting claims on behalf of the Band under the Ottawa treaties with the United States.[123] In order to compile the Durant Roll, OIA "special agent Durant tracked each individual who had been listed in Shop-quo-ung's band on the 1870 Ottawa final annuity payment roll and what had become of them and their families in the interval."[124]

Apart from monetary compensation, the Federal Government also exercised its jurisdiction over the Band through the operation of education programs from the 1890s to the 1930s. In 1893, the Mount Pleasant Indian Industrial School was established on an Indian reservation in Isabella County, Michigan, in accordance with Article 2 of the 1855 Treaty of Detroit.[125] The Band's children from

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121. *See id. See also* Final Determination, at 11, 28-29.

122. *See* Technical Report, at 117.

123. *See id.* at 118.

124. *Id.*

125. *See id.* at 113.

Bradley Settlement regularly attended the school, from its establishment until its closing in 1934, pursuant to an Act of Congress transferring the school to the State of Michigan and requiring that Indian children be accepted in the state public schools without discrimination.[126] The United States oversaw operations at the school throughout this time and maintained records of the Band's children attending Mount Pleasant.[127] In addition, in 1900 and 1910, the federal census enumerated the Band members in Allegan County on its special Indian Population schedules.[128]

In sum, the first prong of the test is readily satisfied: before 1934, the United States, *inter alia,* entered into multiple treaties with the Band, provided annuity payments to the Band under the treaties until 1870, listed Band members on various federal census rolls, and provided federal funding for both the establishment of the Griswold Indian Colony and educational services to the Band. This entire history reflects wide-ranging federal course of dealing that demonstrates that the Band was under federal jurisdiction prior to 1934.

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126. *See id.* at 113, 130. *See also* Pub. L. No. 73-95 (1934).

127. *See* Records of the Bureau of Indian Affairs in NARA's Great Lakes Region, Mt. Pleasant Indian School and Agency Student Case files, 1893-1946 (RG 75) (1920-1925).

128. *See* OFA Proposed Finding, at 3-4. Earlier, "[t]he group's settlement in Wayland Township, near Bradley and on the lands of the former Griswold Mission, was enumerated on the 1880 Federal census of Allegan County, Michigan, as an 'Indian Colony.'" *Id* at 3.

B. The Tribe's Under Federal Jurisdiction Status Remained Intact in 1934

The next step of the inquiry focuses on whether the Band's jurisdictional relationship with the United States remained intact in 1934. In concluding that it did, we first describe the Department's fiscal concerns in the 1930s and their negative implications for the ability of tribes in Lower Michigan to organize under the IRA during that time. Next, summarize the Band's collaborations with other groups to pursue organization, as well as the Federal Government's investigations into and reports on the status of the Michigan Indians.

Lastly, as the Department highlighted in its Proposed Finding and Technical Report, we explain that the government commissioned a study of the condition of these tribes in 1939 in response to multiple requests for IRA organization from Indian groups throughout Michigan.[129] The 1939 survey by Holst, discussed below, reflected the Department's view at the time that it lacked the funds to implement the IRA in Michigan further, and that the State had assumed responsibility over the tribes there. In response to recommendations from agency officials, the Commissioner of Indian Affairs in 1940 "issued a policy limiting further extension of Federal services to Indians in Lower Michigan" including the Band.[130]

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129. *See* Proposed Finding, at 4; Technical Report, at 2, 131-32.

130. Technical Report, at 133. *See also* Proposed Finding, at 4; Technical Report, at 2, 130, 132-33.

Despite the Department's inactivity with respect to the Band during the 1930s, we conclude that its jurisdictional status remained intact.[131] The Department's numerous statements dismissing its obligations to the Band and other Michigan tribes did not, and could not terminate the relationship between the Band and the United States.[132] Once a tribe is clearly under federal jurisdiction, as was the case with the Band through a series of treaties dating back to 1795, only Congress has the authority to terminate the Band's under federal jurisdiction status.[133] Moreover, it would have been unnecessary for the Department to adopt a policy of withdrawing services from the southern Michigan Indian tribes like the Band unless there was a preexisting obligation to such Indian tribes. Stated another way, if the Band was not under the jurisdiction of the Federal Government in the 1930s, the Department would not have been required to shift its policy and withdraw services from it and other southern Michigan Indian tribes by 1940.

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131. *See* M-Opinion, at 20.

132. *See id.* at 20 n. 122 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]). *See also United States v. Long,* 324 F.3d 475, 479-80 (7th Cir. 2003); *Hargo v. Kleppe,* 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978).

133. *See id.* at 20 n. 123 (citing *United States v. John,* 437 U.S. 634, 653 (1978).

1. The Department's Fiscal Concerns in the 1930s and Their Effects on Lower Michigan

The IRA is considered the "crowning achievement" of many years of effort to change the Federal Government's Indian policy.[134] As the Supreme Court has held, the "overriding purpose" of the IRA was to "establish a machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.[135] This "sweeping" legislation manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy characterized by the General Allotment Act, which had been designed to "put an end to tribal organization and to "dealings with Indians ... as tribes."[136] To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-governance. Apart from Section 5, Congress authorized Indian tribes

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134. *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05.

135. *Morton v. Mancari,* 417 U.S. 535, 542 (1974).

136. *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler)). *See also* The Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (1928) (detailing the deplorable status of health, *id.* at 3-4, 189-345, poverty, *id.* at 4-8, 430-60, 677-701, education, *id.* at 346-48, and loss of land, *id.* at 460-79). The IRA was not confined to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe." 25 U.S.C. § 479.

to adopt their own constitutions and bylaws[137] and to incorporate.[138] It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.[139]

The desired economic objectives of the IRA were not immediately achieved.[140] This was exacerbated by the Great Depression, and "on a practical economic level the federal government was unable to respond fully to the economic plight of Indian people."[141] Similarly, "[t]he coming of the Second World War and the end of the New Deal native policy found Indian country with most of the same problems it faced at the end of the First World War."[142]

The Department's failure to fully implement the IRA is reflected in its interactions with and policy approaches towards the Indian tribes of Lower Michigan, based on constrained and limited federal resources. It appears that in implementing the IRA, Department officials believed that in order for the landless Indian groups in southern Michigan to organize under the IRA, the government was

137. Section 16, 25 U.S.C. § 476.

138. Section 17, 25 U.S.C. § 477.

139. Section 18, 25 U.S.C. § 478.

140. *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.05.

141. *Id.*

142. *Id.*

required to purchase lands, and the evidence suggests that there was a policy determination not to expend limited funds in this area.[143]

It is important to emphasize here that Congress has explicitly found that, like the Band, other similarly situated Lower Michigan tribes were not permitted to organize under the IRA by agents of the Federal Government, not based on the merits, the tribes' history, or their need, but rather due to a lack of funding to comply with what was perceived to be necessary to implement the provisions of the Act.[144] Significantly, Congress found that in spite of the government's denial of their rights to organize under the IRA, these tribes maintained continuous dealings with the Federal Government since its early history.[145]

The legislative history of laws and proposed legislation recognizing these Michigan tribes or reaffirming the federal relationship with them likewise confirm Congress'

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143. *See, e.g.*, Letter from M.L. Burns to John Collier (April 6, 1936) (discussed *infra*). ("With the passage of the Indian Reorganization Act, a problematical issue arose in Michigan among the Indians as to what benefits were in store for them under the new legislation. They did not seem to realize that the Act was primarily drawn up to legislate for those Indians who were directly under Federal jurisdiction, living within the confines of reservations and enrolled members of tribes.").

144. *See* 25 U.S.C. § 1300j (Pokagon Band of Potawatomi Indians) and 25 U.S.C. § 1300k (Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians).

145. *See id.*

rejection of the Department's stance towards Lower Michigan tribes during the 1930s.[146]

Thus, the Department's statements, discussed below, about the lack of applicability of the IRA to the Band and other southern Michigan Indian tribes were wrong because, as later found by Congress, the IRA applied to all "Indians" as that term is defined in Section 19 of the statute, and these definitions are not limited by congressional appropriations.[147]

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146. *See, e.g.*, S. Rep. No. 103-260 (1994) ("Although many members of the [Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians] continued to live within the exterior boundaries of the reservations a number of whom lived on restricted fee and trust parcels, the federal officials ultimately withheld the assistance promised to the Bands. This failure to permit the Bands to organize pursuant to the Indian Reorganization Act was predicated on the Bureau's assumption that residence on trust lands held in common for the Bands was required for reorganization and that appropriations to purchase such lands had run out."); H.R. Rep. No. 103-620 (1994) ("The Pokagon Band was not permitted to complete the process of organizing pursuant to the IRA however, because of an administrative decision not to provide services or to extend the benefits of the Indian Reorganization Act to Indian tribal governments in Michigan's lower peninsula. In great part the administrative decision was predicated on the misguided assumption that residence on trust lands held in common for the Band was required for reorganization and the fact that appropriations to purchase such lands had run out."). *See also* Reorganization Act benefits to the [Burt Lake Band of Ottawa and Chippewa Indians] did not terminate the band's government-to-government relationship with the United States, and Congress has never taken any action to terminate Federal acknowledgment of the Burt Lake Band.").

147. 25 U.S.C. § 479.

Accordingly, erroneous statements from various executive branch officials do not overcome the conclusion that the Band was under federal jurisdiction in 1934, even if the Department "did not believe so at the time."[148]

Unfortunately, the Department's mistaken position resulted in the rendering of numerous erroneous administrative decisions and communications with respect to groups in the Lower Michigan peninsula, including the Band.[149] Nevertheless, as we elaborate in more detail below, the tribes in Lower Michigan continued to petition the government for action and for assistance, as well as to express frustration.

2. Efforts to Reorganize in the 1930s

During the 1930s, the Band collaborated with other tribal groups in pursuing organization under the IRA, despite receiving numerous, albeit confusing and inconsistent

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148. *See Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring). *See also* M-Opinion at 3, 20.

149. *See, e.g.,* Letter from William Zimmerman, Jr., Assistant Commissioner for Indian Affairs to Albert J. Engel (Dec. 29, 1938). The Department's treatment of some tribal groups in Lower Michigan was also vexed by the Department's interpretation of Section 5 of the 1855 Treaty of Detroit, an interpretation that was later invalidated by the federal courts. *See Grant Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960 (6th Cir. 2004); *United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *affirmed in relevant part*, 653 F.2d 277 (6th Cir. 1981, *cert. denied*, 454 U.S. 1124 (1981).

responses from the Department about the status of Indians in Michigan's Lower Peninsula. The confusion appears to have arisen largely in response to fiscal concerns related to tribal services, as well as to the Department's earlier mistaken interpretation of the 1855 Treaty with the Chippewas and Ottawas.[150]

The historical record shows that members of the Band participated with both the Potawatomis and the Chippewas and Ottawas of Michigan in their attempts to organize under the IRA. For instance, two groups of Potawatomis filed petitions seeking inclusion in IRA efforts: the Nottawaseppi Band at Athens in 1934[151] and the Potawatomis of Michigan and Indiana in 1938.[152] The latter group counted as members Potawatomis living in various counties in Southern Michigan, including Allegan County.[153]

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150. *See, e.g.*, Letter from John Collier to the Hon. B.K. Wheeler (April 18, 1838) (discussed *infra*).

151. *See* Letter from Austin Mandoka *et al.* to John Collier (March 20, 1934).

152. *See* Letter from John D. Williams *et al.* to John Collier (May 2, 1932 [sic]).

153. The record suggests that a Potawatomi with family living in Allegan County contacted Commissioner of Indian Affairs John Collier in September 1934 inquiring as to the "conditions, if any, may an Indian with a small holding live in a chartered community?" *See Letter from Francis S. Wakefield to John Collier* (Sept. 7, 1934). Collier's response requested more information about the community, while also stating that the details for administering the IRA and the rules for its implementation had not yet been completed. *See* Letter from John Collier to Francis S. Wakefield (Sept. 21, 1934).

At the same time, during the 1930s, Chippewa and Ottawa bands in Michigan were commonly met with and addressed as a group by the government. By letter dated April 28, 1934, Superintendent Frank Christy advised Commissioner of Indian Affairs John Collier that he intended to meet with the Ottawas and Chippewas of the Grand Traverse District to explain to them that the applicability of the IRA to the Ottawas and Potawatomis of Michigan depended on congressional appropriations.[154] By letter dated May 4, 1934, Collier responded to Christy confirming that Christy's statement about the applicability of the bill (IRA) was correct and suggested that the Indians should contact their congressmen if they favored the bill.[155] Collier stated that this advice "also applies to the Pottawatomi Indians."[156] The next day, Christy discussed the bill at a meeting attended by over a hundred Indian individuals, largely from the Grand Traverse Band of Ottawas and Chippewas.[157] He reported that "[t]he Indians were frankly told that the question of whether the provisions of the proposed legislation would apply to them or to other Indians similarly situated would depend on the amounts of the appropriations which Congress might provide." Sampson Pigeon, a lifelong member and

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154. *See* Letter from Frank Christy, Superintendent to Commissioner of Indian Affairs (April 28, 1934).

155. *See* Letter from Commissioner John Collier to Frank Christy (April 28, 1934).

156. *Id.*

157. *See* Letter from Frank Christy to John Collier (May 9, 1934).

recognized leader of the Bradley community attended this meeting, which was held near Suttons Bay, as a speaker representing one of the districts.[158]

The Potawatomis of Michigan and Indiana also explored reorganizing under the IRA in 1934, and selected a committee of five leaders who asked the Secretary of the Interior for advice about filing the appropriate documents necessary "to share in the benefits of the IRA."[159] The committee then wrote Senator Arthur Vandenberg of Grand Rapids for assistance.[160] Senator Vandenberg forwarded the Potawatomi request for information to Commissioner Collier, who sent the committee a copy of the act and inquired as to which definition of Indian the group fell within, under Section 19 of the IRA.[161]

However, before the Potawatomis could reply, a December 17, 1934, letter from William Zimmerman, Jr., Assistant Commissioner, Indian Affairs, advised Senator Vandenberg on the status of Michigan Indians. Zimmerman stated without further elaboration that "since

158. *Id.* As discussed above, the Band was a signatory to the 1855 Treaty of Detroit and at times had therefore been associated with the Ottawa and Chippewa groups of Michigan.

159. *See* Letter from Paul Knapp *et al.* to Secretary of the Interior (Nov. 24, 1934).

160. *See* Letter from Paul Knapp *et al.* to Arthur Vandenberg (Nov. 2, 1934).

161. *See* Letter from A.H. Vandenberg to John Collier, Commissioner of Indian Affairs (Dec. 3, 1934); Letter from John Collier to Michael Williams (Dec. 4, 1934).

practically all of the Michigan Indians had lost their wardship status and are not members of a recognized tribe under federal jurisdiction," they would be required to organize as half-bloods.[162] He further stated that the OIA was making arrangements to extend the benefits of the IRA Act to several thousand qualified Indians in the northern part of Michigan.[163] Thus, it appears that Assistant Commissioner's Zimmerman's statements do not reflect any contemplation of the Band's history or relationship with the United States, a relationship that is amply demonstrated by the numerous treaties with the Band, as discussed above. The Assistant Commissioner's actions in this regard stemmed not from consideration of the details concerning the Band's jurisdictional status, but primarily from concerns that the Department did not have adequate funding to fully implement the IRA in Lower Michigan. These financial issues drove the Department's policy concerning the implementation of the IRA in Michigan; as noted above, Congress later repudiated this approach, finding that the Department's obligations to Lower Michigan Indian tribes persisted, despite the budgetary constraints the agency faced at that time.

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162. Letter from William Zimmerman, Jr., Acting Commissioner to Hon. A.H. Vandenberg (Dec. 17, 1934) (stating that the "Potawatomi Indians of Southwestern Michigan ... must have one-half degree or more of Indian blood in order to be able to participate in the benefits of the Indian Reorganization Act" and recommending that the Potawatomi group send "a list of the Potawatomies, their financial and blood status, and any other information that would help us to determine what we can legally do for them under the provisions of the Indian Reorganization Act.").

163. *See id.*

Appendix G

The Potawatomi of Michigan and Indiana committee of five leaders seeking information regarding the IRA ultimately responded to John Collier's letter inquiring as to what classification the group fell within, stating:

> The people of our committee is delegated to represent are in fact and in all truth Indians.
>
> We have an organization here generally denominated a "band," and numbers perhaps two hundred-fifty to three hundred souls.
>
> Almost the entire percentage of the membership is composed of people of either half, or more, to full bloods.
>
> We are descendants of Potawatomis and should now be a participating fractional part of the original Nation in matters of annuities and land grants only that we have been barred and denied by the United States Government on grounds purely technical and superficial.
>
> The major portion of our members are *resident [sic] of the Counties of Allegan,* Berrien, Cass and Van Buren, of the State of Michigan, and St. Joseph County, of Indiana, while some of our members, in pursuit of livelihood are scattered about here and there in various other states.[164]

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164. Letter from Paul Knapp *et al.* to John Collier, Commissioner of Indian Affairs (Jan. 5, 1935) (emphasis supplied).

In January 1935, Senator Vandenberg continued to press the Department, including Secretary Harold Ickes, to act on behalf of the Potawatomis.[165] Soon after, in February 1935, Commissioner Collier forwarded the Potawatomis' correspondence to Mark L. Burns, Superintendent of the Consolidated Chippewa Agency for his consideration.[166]

3. Federal Inquiry into the Status of Lower Michigan Indians in the 1930s

Despite its mistaken view that the Band and other Indian tribes of southern Michigan were no longer its responsibility, the Department conducted, or received information from, several different inquiries of the status of the Indian tribes of the region, including the Band. It is clear from the historical record, for example, that social workers who were employed by the State of Michigan reported to federal officers at the Great Lakes and Tomah Indian Agencies. Between 1934 and 1940, federal records show the intervention of social workers, on behalf of the Federal Government, to assist tribes residing in Southern Michigan.[167]

In addition, inquiries into the eligibility of Potawatomis living in Michigan's Lower Peninsula to participate in the

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165. *See* Letter from A.H. Vandenberg to Harold L. Ickes, Secretary of the Interior (Jan. 4, 1935).

166. *See* Letter from John Collier to Mr. M.L. Burns (Feb. 27, 1935).

167. *See, e.g.,* Agnes Fitzgerald to Commissioner of Indian Affairs (Dec. 3, 1934).

IRA commenced in March 1935. Mark Burns was tasked with studying the Michigan Indian communities and reporting to the Commissioner of Indian Affairs about their status, including that of the Band, in relationship to the IRA. Olive Gwinn, a social worker, also investigated claims that the Potawatomis in Allegan County were being neglected by state and county welfare programs. She found that the Indians there indeed received little relief, but concluded that they were not the focus of anti-Indian discrimination; instead, budgets were simply too small to provide effective help for some counties.[168] As Gwinn would later report to the Federal Government, the State of Michigan withdrew all welfare services from Allegan County by the end of 1935 because the county government failed to raise mandatory matching funds.[169]

In a letter to the Commissioner dated May 4, 1935, superintendents Burns and Christy reported a "joint survey of conditions among the Michigan Indians under the Tomah [agency in Wisconsin] jurisdiction."[170] While

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168. *See* Letter from Olive Gwinn to John Collier (March 18, 1935).

169. *See* Social Worker's Monthly Report, Tomah Agency (Dec. 1935).

170. *See* Letter from M.L. Burns and Frank Christy to John Collier (May 4, 1935). The OIA officers visited the Lower Peninsula Potawatomis living at Athens, Dowagiac, Hartford, and Niles, but not the community living in Allegan County. Still, the agents observed:

> Pottawatomie of Southern Michigan—Acquisition of additional land adjoining the existing small reservation at Athens and formation of a community

purporting to survey the conditions of Indians there, the agents sought funding for the lands under the Rural Rehabilitation Corporation, because of the funding limitations under the IRA.[171] Burns and Christy stated that "[i]n view of the improbability that any of the necessary additional land for these Indians can be acquired under the Wheeler Howard Act, it is likely that this proposed program if carried out will have to be financed on a reimbursable bases by the Rehabilitation Corporation."[172]

Significantly, despite these limited appropriations, a memorandum prepared at the OIA central office on June 8, 1935, concluded that the "Potawatomis of Southern Michigan (near Athens, Dowagiac, Hartford, etc.)" were "under Tomah Jurisdiction."[173] Although these towns are not in Allegan County, this memorandum clearly illustrates the inconsistent attitudes of the United States towards the Potawatomis residing in Southern Michigan, including the Band.

> there consisting of Pottawatomis now scattered over several counties who wish to avail themselves of the opportunity offered them. The activities to be carried on would consist of gardening, subsistence farming, basket making, small fruit culture, to be supplemented by seasonal labor. The educational advantages of this locality are all that could be desired."

Id.

171. *Id.*

172. *Id.*

173. *See* Memorandum from Chief C. Porter for Tribal Organization (June 8, 1935).

In another example demonstrating the government's conflicting views towards the Lower Michigan Indians, an April 6, 1936, letter to the Commissioner from the OIA Superintendent at Cass Lake advised that the Ottawa and Chippewa Indians, who were persistent in their endeavors to be included in the IRA operations, were not a distinct band of Indians in Michigan, that they were not wards of the Federal Government, had not been wards for nearly a century, and that they had no land.[174] He recommended that the government either buy land and establish a reservation for them or inform them that they could not be considered under the IRA.[175] In his report, Burns also addressed the issue of whether the Michigan Indians would be eligible for organization as a community comprised of people with one half or more Indian blood, stating that:

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174. *See* Letter from M.L. Burns to John Collier (April 6, 1936). Burns stated, *inter alia*:

> Furthermore, these Indians have been citizens of the State of Michigan for many years—they are not wards of the federal government. The only time the federal government had jurisdiction over their welfare was during the time the Mount Pleasant Boarding School was in operation, at which time many of the Michigan Indian children received their early schooling at Mount Pleasant; while under the supervision of the boarding school these Indian children could have been classed as wards of the government. With this exception, these people have been citizens of the State of Michigan and come under the laws of the state.

Id.

175. *See id.*

> To determine the blood status of the Michigan Indians of "one-half or more Indian blood" as defined in the Act, will necessitate the employment of one or two men for at least one year to collect data and there is a question in my mind as to whether or not this information can be obtained with any degree of accuracy, because the reliability of this information will largely depend upon the honesty and integrity of the Indians themselves, since there are no census rolls from which this information might be obtained.

In describing the "distinct bands of Indians in Michigan," Burns also briefly acknowledged "the Potawatomi Band, living in five or six counties in the southwestern corner of the State of Michigan and numbering about 500."[176]

OIA officials in Washington expressed the same fiscal concerns and noted the limited services provided by the Federal Government to the Lower Peninsula Indians. On April 27, 1936, John Collier responded to an inquiry from Congressman Albert Engle on behalf of his Ottawa constituency, emphasizing that:

> The enactment of the Indian Reorganization act has taxed to capacity the efforts of a limited field force to ascertain the status of Indians in the Lake States, and especially these Indians of Michigan, many having been apparently

176. *Id.*

> abandoned, some of whom can now be assisted through the Act.[177]

Likewise, on April 18, 1938, Collier wrote to Senator Wheeler regarding the Grand River Band of Ottawas, advising him that while the Department had not yet made a final decision whether to permit the Ottawas in Michigan to organize under the IRA due to the lack of funding, it was not disposed to make a final decision at that time.[178] This letter confirms that despite the "demands made upon [available funds] by Indians whom we really consider our responsibility," the government hesitated towards taking a position on the Indians residing in Southern Michigan because of a lack of money.[179]

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177. Letter from John Collier to the Hon. Albert J. Engel (April 27, 1936).

178. Letter from John Collier to the Hon. B. K. Wheeler (April 18, 1938). Collier stated:

> This particular group presents an unusual problem. While they may have rights under the Indian Reorganization Act when and if organized, they have for years been dealt with by the State authorities as have other citizens, receiving direct relief employment relief, health and educational facilities, etc. For the Indian Service to go among these people with inadequate funds and to attempt to take over functions and services which they are now receiving from the State and thereby disturb a definite social order in the community presents a real problem. It is a situation which we have hesitated to disturb.

Id.

179. *Id.*

Meanwhile, in May 1938, the "Pokagon Band of Pottawattomi Indians of Southwestern Michigan and northern Indiana" petitioned Collier to authorize the extension of the IRA to them. Members of that Band convened in a meeting and signed a letter asking the OIA to send an "organizer" to their community.[180] At least one of the signatories to that letter lived in Allegan County, which was home to the most distant community represented by the Pokagon committee. At the end of 1938, OIA officials attributed their failure to extend federal reorganization to the Potawatomis and the Ottawas to "limited funds made available from emergency appropriations" which were available only for "Indians who live on tribal or allotted land ...."[181]

4. The Holst Report and Withdrawal of Federal Services in Lower Michigan

A 1939 survey of the Indian groups in the State of Michigan undertaken by John H. Holst, Supervisor of Indian Schools, reported that the Indians in Michigan maintained no tribal organizations.[182] Holst's report identifies three groups in Lower Michigan: Pottawatomies (including the "Bradley group, consisting of 23 families

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180. *See* Letter from John Williams *et al.* to Commissioner of Indian Affairs (May 2, 1932 [sic]).

181. Letter from William Zimmerman, Jr., Assistant Commissioner for Indian Affairs to the Hon. Albert J. Engel (Dec. 29, 1938).

182. John Holst, A Survey of Indian Groups in the State of Michigan, at 4 (1939).

... scattered over twenty miles of country from Burnips to Shelbyville"), Chippewas, and the Ottawas located on the Lake Michigan coast of the Lower Peninsula.[183] Holst opined that their lands had been allotted previously, which immediately eliminated wardship status.[184] He then

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183. *Id.* at 4, 14. Holst explained that:

> Most of [the Potawatomis at Bradley] have land. Silas Bush near Middleville bought 80 acres for $750.00 and has plans for a comfortable home. He is building up rapidly. Stevens at Burnips has 85 acres, Church a well-farmed 40 acres, and several others have from on to 40 acres. Some baskets are made in this section, otherwise there are no native crafts.

Id. at 14.

184. Specifically, Holst recommended that:

1. The present understanding and arrangements between the Federal Government and the State of Michigan, relating to the general welfare and education of Indian children be continued, except that the sponsorship of the Federal Government may be diminished gradually as the State agencies extend their responsibilities for the common welfare of all citizens.
2. That the Indian Office shall not attempt to set up any additional or supplementary educational or welfare agencies for the Indians of lower Michigan that in any way tend to recognize Indians as a separate group of citizens.
3. That there be no further extension of organization under the Indian Reorganization Act in Michigan.
4. That steps be taken to abolish the prohibition on the sale of liquor to Indians in lower Michigan.

Id. at 21.

recommended no further extension of organization under the IRA in Michigan. Consistent with Holst's 1939 survey, Walter V. Woehlke, the Assistant to the Commissioner of Indian Affairs, "prepared a memorandum to COIA John Collier recommending withdrawal of BIA activities from Lower Michigan."[185]

The Holst Report, however, was not a formal position of the Department and there were strenuous objections to Holst's report by government officers indicating that the Michigan Indians were actually in need of assistance. For example, in his letter to John Collier, Peru Farver, the Tomah Superintendent stated:

> This issue will be kept alive for many years in view of the fact that most of the groups in the upper peninsula have been recognized and we are likewise contributing to the Chippewas in Lower Michigan. In other words, the Ottawas and Potawatomis are the only tribes in Michigan which have been denied assistance under the Indian Reorganization Act. There are some 35 Ottawa and Potawatomie children receiving Boarding Home Care and public School Assistance at this time and so far as I know none have been denied enrollment in Government boarding schools on the basis of belonging to these tribes. The fact that we are rehabilitating all other groups in the state and are granting certain benefits to these two tribes

185. Technical Report, at 132.

> keeps alive a ray of hope and a realization that there is an Indian Service.
>
> The State is exercising and the Indian is accepting, State jurisdiction. However, it is believed legislation should be enacted granting State jurisdiction on Government-owned and restricted Indian lands. There is every reason to believe that State jurisdiction will eventually be questioned in those areas where we hold restricted lands and have purchased IRA land.
>
> If it should be decided that no assistance is to be given the Ottawa and Potawatomies of Lower Michigan then it would seem that a definite statement of the policy to that effect should be made.[186]

Recognizing that these tribes were being treated unequally for policy reasons, Farver nonetheless fully agreed that "no further extension of organization under the Indian Reorganization Act should be made in Lower Michigan and that no action tending to designate these people as a separate group should be taken."[187]

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186. Letter from Peru Farver, Superintendent, Tomah Indian Agency, Tomah Wisconsin, to the Commissioner of Indian Affairs, Washington, D.C., Attention: Fred H. Daiker (Dec. 1, 1939).

187. *Id.* (noting the deplorable housing facilities of some Indians and expressing hope that through the Holst Report "some plan would be developed through State and Federal cooperation to improve the living conditions of many of these people.").

In addition, OIA staff proposed subsidizing state activities and allowing state offices to administer federal rehabilitation programs to the Potawatomis and other groups in Lower Michigan, such as the Michigan Work Project Administration ("WPA") Indian Arts and Crafts Project.[188] The Band benefitted from this endeavor, which enlisted eleven Bradley Settlement basketmakers for the project, as reported by Olive Gwinn.[189] To that end, the Technical Report notes that "[a] good, if terse, summation of the situation at the end of the 1930's was presented in the WPA Guide, Michigan—A Guide to the Wolverine State, published under the Writers' Program of the W.P.A."[190]

Notwithstanding these efforts on behalf of the Band, on May 29, 1940, Collier advised all of the OIA superintendents for the Lake States Region that the Indian Office had adopted the recommendations of the Holst report. Collier further recommended:

1. That the present understanding and arrangements between the Federal Government and the State

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188. *See, e.g.,* Letter from J.C. Cavill to the Commissioner of Indian Affairs (Oct. 26, 1939).

189. See Letter from Olive Gwinn, OIA Field Service, to Katherine Foley, State Supervisor of Indian Arts and Crafts Projects (Sept. 20, 1939).

190. Technical Report, at 133. The W.P.A. publication stated that at the "Bradley Indian Settlement ... 75 Indians of the Ottawa, Potawatomi, and Chippewa tribes have built their community around a church and mission. Many of them have attended Indian schools, and only the older members can speak their native tongue." *Id.*

of Michigan relating to the general welfare and education of Indian children be continued, except that the sponsorship of the Federal Government may be diminished gradually as the state agencies extend their responsibilities for the common welfare of all citizens.

2. That there be no further extension of Organization under the Indian Reorganization Act in Lower Michigan.

3. That the Indian Office shall not attempt to set up any additional or supplementary educational or welfare agencies for the Indians of Lower Michigan that in any way tend to recognize Indians as a separate groups of citizens.[191]

As a consequence of this directive, the IRA was not implemented in Lower Michigan.

In sum, the failure of the Federal Government to fully implement the IRA in Lower Michigan in the 1930s was primarily the result of policies relating to a lack of adequate funds, which contributed to a diminishment in federal services to the Band. Such policies can have no impact on the legal relationship established with the United States through treaties and other course of dealings.

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191. Letter from John Collier, Commissioner of Indian Affairs to Superintendent J.C. Cavill, Superintendent Peru Farver, Superintendent Frank Christy, School Social Worker Olive Gwinn, Field Agent Archie Phinney (May 29, 1940).

Even with minimal services provided by the government during the 1930s, the historical record makes clear that the Federal Government was aware of the Band, which was still residing in Allegan County at that time. Moreover, federal agents and social workers made numerous investigations and reports on the Lower Michigan Potawatomis, including the Band. The OIA still received proposals on how to best rehabilitate Lower Peninsula tribes such as the Band, including through the federal WPA Indian crafts project, despite the government's disavowal of its responsibilities to these groups. And in any event, it would have been unnecessary for Commissioner Collier to issue a policy in 1940 to formally withdraw services from the Indian tribes of southern Michigan unless the Department had an obligation to provide services to such tribes.

5. Summary

Notwithstanding the confusing correspondence and erratic administrative treatment by certain officials within the Department, the Band continuously existed under federal jurisdiction during and after 1934. As the Solicitor has opined:

> It should be noted ... that the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status. And evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke

> jurisdiction absent express congressional action. Indeed, there may be period where federal jurisdiction exists but is dormant. Moreover, the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934.[192]

It is well-settled that only Congress has the authority to terminate the federal relationship with the Band, once that relationship is established.[193] The administrative actions or inactions of the Department could not legally terminate the federal relationship with the Band.[194] We have stated before that neither federal denials of requests for assistance, nor occasional misstatements from government officials results in the repudiation of federal jurisdiction.[195] In addition, occasional misstatements by Department officials do not by themselves terminate federal jurisdiction over a tribe.[196]

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192. M-Opinion, at 20.

193. *See id.* at 20 n. 123 (citing *United States v. John*, 437 U.S. 634, 653 (1978).

194. *See id.* 20 n. 122 (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]). *See also United States v. Long*, 324 F.3d 475, 479-80 (7th Cir. 2003); *Hargo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

195. *See* Cowlitz ROD, at 95.

196. *See generally Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring) (recognizing that a tribe may have been under federal

The Band's situation, while not the same, is akin to the Department's treatment of the Stillaguamish Tribe. In the Stillaguamish Memorandum, the Associate Solicitor concluded that previous Departmental findings regarding the Stillaguamish did not preclude IRA applicability upon reversal of the earlier findings.[197] To the contrary, the memorandum found that "[a]lthough the United States was apparently unaware in 1934 that it had a continuing obligation to protect the Stillaguamish treaty fishing rights, those rights put the Stillaguamish 'under federal jurisdiction' for purposes of the IRA."[198] However, in the case of the Band, Congress openly corrected the Department's treatment of similarly situated tribes in

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jurisdiction in 1934 even though the Federal Government did not believe so at the time).

197. *See* Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, *Request for Reconsideration of Decision Not to Take Land into Trust for the Stillaguamish Tribe* (Oct 1, 1980) ("Stillaguamish Memorandum"). The Stillaguamish Memorandum concluded that the Secretary could take land into trust for the Stillaguamish, because:

> it appears that the fact that the United States was until recently unaware of the fact that the Stillaguamish were a "recognized tribe now under Federal jurisdiction" and that this Department on a number of occasions has taken the position that the Stillaguamish did not constitute a tribe in no way precludes IRA applicability.

Id. at 7. *See also* M-Opinion, at 23 (discussing the Stillaguamish Tribe).

198. Stillaguamish Memorandum, at 2, 7.

Michigan and affirmed that they had continuous dealings with the United States Government from treaty times until the present.[199]

As Justice Breyer noted in *Carcieri,* a particular tribe, in this case the Band, may have been under federal jurisdiction in 1934 even though the Department did not realize it at the time.[200] The Solicitor has noted that Justice Breyer's concurrence in *Carcieri v. Salazar*:

> specifically cited to specific tribes that were erroneously treated as not being under federal jurisdiction by federal officials at the time of the passage of the IRA, but whose status was later recognized by the Federal Government. Justice Breyer further suggested that these later-recognized tribes could nonetheless have been "under federal jurisdiction" in 1934 notwithstanding earlier actions or statements by federal officials to the contrary. In support of these propositions, Justice Breyer cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under federal jurisdiction in 1934, but which nevertheless exhibited a "1934 relationship between the tribe and Federal Government that could be described as jurisdictional."[201]

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199. *See* 25 USCS § 1300j; 25 USCS § 1300k.

200. *Carcieri*, 555 U.S. at 397-99 (Breyer, J., concurring).

201. M-Opinion at 3 (citing *Carcieri,* 555 U.S. at 397-99 (Breyer, J., concurring)).

In sum, the Department acted without Congressional authority in determining, based on budgetary concerns, to withdraw services from the Indian tribes in southern Michigan, including the Band. These policy decisions did not relieve the Department of its ongoing obligations to the Band even if the Department believed they did at the time.

Accordingly, despite the fact the Department greatly reduced its services and overlooked its obligations to the Band, we thus determine that the United States' jurisdiction over the Band remained intact.

II. Conclusion

Based on the record as a whole, the Band meets both prongs of the two-part inquiry set forth above. The Band unquestionably was under federal jurisdiction prior to 1934, thus meeting the first prong. The Band entered into a succession of treaties and other course of dealings with the United States beginning by at least 1795. In 1890, Congress specifically granted jurisdiction to the U.S. Court of Claims, after which Potawatomi bands, including the Gun Lake Band, sued the United States to account for these treaty obligations. In 1904, the Department derived the Taggart Roll, which included the Potawatomi living in Allegan County, for distributing the favorable Court of Claims judgments.

Correspondence between Interior and Indian tribes in Lower Michigan during the 1930s, albeit confusing and conflicting, reflected a policy position premised on lack of funding. Nothing in the record indicates that

Congress terminated its relationship with the Band, and the Department's sporadic inaction regarding the Band does not effectuate a termination of the Band's under-federal-jurisdiction status. Indeed, the Department's inaction towards Lower Peninsula tribes during that time period was due primarily to a lack of operational funding, and a misinterpretation of the IRA, that led the Department to justify inaction on the Lower Peninsula. The Department's actions also were premised on a misinterpretation of treaty language (later corrected by Congress and the federal courts). Neither the inaction nor the misinterpretation of the treaty language altered the Department's obligations to the Band. As a legal matter, the Department's gradual withdrawal of federal services to the Band did not terminate United States' overarching jurisdiction over the Band, because it is well-settled that only Congress can sever jurisdiction through an express action. The second prong of the inquiry is met because the Band's under federal jurisdiction status remained intact in and after 1934. A determination that the Secretary is authorized to take land into trust for the Band under Section 5 of the IRA is thus consistent with the Supreme Court's decision in *Carcieri.*

25 CFR § 151.10(b) – The need of the Tribe for additional land

The Tribe's need for additional land is evident by the current land holdings of the Tribe. The United States currently holds 146 acres of land in trust for the benefit of the Tribe, which constitutes the Gun Lake Tribe's reservation. The Tribe seeks further trust land holdings to meet the needs of their membership and governmental

operations. Trust status protects these lands from alienation and gives the Tribe opportunity to manage and practice jurisdiction over their lands which compliments the arena of self-governance and self-determination.

25 CFR § 151.10(c) – Purpose for which the land will be used

The Jijak Camp is currently used for cultural and religious purposes associated with the Jijak Foundation's non-profit activities.

The Settlement is comprised of nine tribal housing units managed through the Band's housing Department.

The use of these lands will not change with trust status.

25 CFR § 151.10(e) – Impact on the State and Local governments resulting from the removal of the land from the tax rolls

The Notice of Application (NOA) allows the State and local governments 30 days to submit comments regarding a proposed trust acquisition, in the areas of regulatory jurisdiction, real property taxes and special assessments.

On March 14, 2014, notice of the Jijak application for trust status was mailed via certified mail to the Governor of Michigan, Allegan County and Hopkins Township. In addition to the initial 30 day period provided for comment by the regulations, the comment period was extended allowing an additional 30 days to both the Governor and the Township at their request.

Correspondence dated May 16, 2013 was received by the Michigan Agency from John K. Lohrstorfer, Attorney acting in behalf of the Hopkins Township. Attorney Lohrstorfer, states in the correspondence, the current property taxes, which at that time totaled $27,011.72 with a delinquent amount of $22,524. He adds a general statement in response to impacts of the political subdivision, "Loss of property taxes and State of Michigan revenue sharing would generate to fire, ambulance, police, library, schools and roads services," but does not substantiate any detail for further consideration in our analysis, to depict what those impacts specifically or realistically are. Although we do find the following provided by the Band:

- The Winter 2013 and Summer 2014 property tax total is approximately $28,475.46. (The Winter 2014 tax is not yet available.) We find illustrated in the tax statements, the millage is split between County Op and the State Ed Tax, almost equally, however the Town's share is not shown. We don't find any information to show that the Town would be losing out on the full amount being taxed.

- There is not a long standing history of property tax revenue for the Jijak Camp property as it was owned and operated by two religious organizations for the past 30 years prior to purchase by the Jijak Foundation in 2010. It was at that time, the property was placed back on the tax rolls.[202]

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202. E-mail from Zeke Fletcher, Tribal Attorney, dated July 25, 2014.

In this same correspondence, in response to the opportunity to identify "Any special assessments, and amounts thereof, which are currently assessed against the property," Attorney Lohrstorfer simply states "Drain Assessments and Recycling Assessments" with no other information to substantiate the claim. The Attorney adds, "However depending on what develops on the property, there could be special assessments for water, sewer, utilities, etc."

- The information provided in the comments submitted on behalf of the Town is limited, with nothing to substantiate the claim of drain and recycling assessments, nor are there amounts stated. The tribe on the other hand, in their response to the comments submitted on behalf of the Town, discusses a recycling assessment of $25.00.

- The comment made in the Town's behalf with respect to what might be developed on the property is purely speculative and we are therefore non-responsive in that regard.

In addition, Attorney Lohrstorfer, responds to "Any governmental services which are currently provided to the property by your jurisdiction," by stating, "General governmental services for the property include, fire protection and police protection, library service, recycling service and ambulance services. At this time there is no current contract or discussion with Hopkins Township to provide any of these governmental services."

- The Tribe states it is prepared and able to provide its own police service to the parcel in addition to support by Allegan County pursuant to the Cross-Deputation Agreement already referred to.

- The Tribe adds it has established an agreement with Wayland Area Emergency Services (WAEMS) to provide Ambulance Services.

- The Tribe continues to remain pro-active in their desire to establish agreements for services and has provided a proposed agreement to the Hopkins Area Fire Department and Fire Board, which remains in pending status.[203]

- The town of Hopkins doesn't have a fire or police Department *per se,* however the town of Wayland continues to provide fire protection.[204]

Finally, in the response to "Describe the current zoning classification and any potential conflicts of land use which may arise," Attorney Lohrstorfer did note the following:

"At this time a small part of the community is zoned R-1. The majority of the property is in the R-2 classification. R-1, Rural Estate district uses include farms, greenhouses, orchards, single-family dwellings, parks and cemeteries. In addition, special use permits would be needed for any home occupation, removal and processing of the top soil,

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203. Correspondence from the Tribe dated June 14, 2013.

204. Correspondence from the Tribe dated July 22, 2014.

sand, gravel and kennels. R-2, Low Density Residential districts include single-family and two-family dwellings. Special Use Permits are needed for schools, libraries, parks, playgrounds, community centers, governmental service buildings, churches and home occupations. The historical use of the property has been that of a seasonal church camp and related recreational activities associated with the camp. We believe this camp was created prior to the adoption of the Township Zoning Ordinance and therefore would not constitute a legal non-conforming use. To the extent that the property remains a camp use, there would not be any conflict. However, if the property is to be used other than a camp and not consistent with the residential uses, then there would be a potential conflict. One of the issues for the Township is that no plan for future development has been presented to the township. At this time the Township does not know exactly what the uses may be in the future for the property. To that extent, certain uses could be in conflict with the zoning classifications. Therefore, we cannot comment on what the issues in the future may be."

- There is no disagreement with regard to the zoning status of this property as R-1 and R-2. However, we will point out, the proposed use as stated by the Tribe, depicts no change in use for this property in trust status, therefore, the discussion by Attorney Lohrstorfer with regard to any other use is purely speculative in nature without any reason or factual information to substantiate. The Tribe continues to state their proposed use, as no change to the existing use, and adds in their consideration of the

> Town's comments regarding the use of the Camp property, "... a camp to promote charity to those in need and education of the Tribe's cultural and religious aspects to other Native Americans and the general public."[205]

In their May 28, 2013 correspondence the State of Michigan Governor's Office asked, "... does the Department anticipate providing an explanation as to whether the Gun Lake Tribe was under federal jurisdiction as of 1934?"

- To summarize what is stated in a larger context at Section § 151.10 (a) above, the Band unquestionably was under federal jurisdiction prior to 1934, and the Band's "under federal jurisdiction" status remained intact in and after 1934. Our determination that the Secretary is authorized to take land into trust for the Band under Section 5 of the IRA is thus consistent with the Supreme Court's decision in *Carcieri.*

Notice of Application for the Settlement property was mailed June 5, 2012 to the Governor of Michigan, Allegan County and Wayland Township. Each had 30 days from the date of delivery to provide responsive comments.

Comments were received June 29, 2012 from Wayland Township in which the Town states the taxes currently levied at $19,376.50, "As all the affected parties are also part of the Inter Local Agreement which receives monies

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205. Tribal Response June 14, 2013.

as part of the revenue sharing from the Tribe's casino, there should be no adverse effect" and there are no special assessments. Police and fire protection are provided and police costs are covered by revenue sharing. Zoning was addressed as part of the PUD (Planned Unit Development) and is in compliance. The Town also expressed their pleasure working with the Gun Lake Tribe over the years, pointing out, that together they have been able to do great things for the area. The Town also expressed the trust and friendship that has grown through the years through the Tribe's efforts to make life better for the residents of Wayland township and surrounding areas.

We note the 2014 property tax is $25,236.67 and payment is current.

The state responded June 27, 2012 to present concern raised by the state's boundary expert regarding the subject property legal description. The Midwest Regional Office, Bureau of Land Management (BLM) surveyor worked through resolution with the state and on August 16, 2012, the BLM surveyor stated resolution of their concerns and had no official comments regarding the subject acquisition.[206]

The County of Allegan did not respond to the Notice of Application in either matter.

The Tribe notes services required for the Settlement and the Camp are limited to Fire and EMS services. The Tribe

206. State of Michigan email August 16, 2012.

has submitted and continues to pursue an agreement with the Hopkins Area Fire Board and in the meantime, the agreement they have in place with the Wayland Area Fire Department will cover all trust parcels through the mutual aid agreement between the various townships. The Tribe also has a Public Works Department to address utilities, roads, etc.

25 CFR § 151.10(f) – Jurisdictional problems and potential conflicts of land use which may arise

There is no change in use of either property to support potential conflict of land use, nor have jurisdictional problems been identified or presented by any of the parties notified for comment or otherwise to cause concern. Weight is given to the "Cross-Deputization Agreement[207] Between Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the Allegan County Sheriff Department of Michigan" which extends deputization to Gun Lake Tribal Police allowing the officers to enforce both state and tribal law on Tribal trust lands. The County and Tribe continue to collaborate to maintain and promote effective law enforcement for all those present in the county. The Tribe notes the tribal police actively patrol the Jijak camp pursuant to the Cross-Deputization Agreement.

25 CFR § 151.10(g) – Whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

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207. Cross-Deputization Agreement dated April 1, 2011, on file with the Bureau of Indian Affairs.

This trust acquisition will result in increased tribal self-sufficiency and, ultimately, less dependence on the Interior Department. Furthermore, acceptance of the subject parcel into Federal trust status will not impose any significant additional responsibilities or burdens on the BIA beyond those already inherent in the Federal trusteeship over the existing Reservation. The property has no forestry or mineral resources, which would require BIA management. With no leases, rights of ways or any other trust transactions anticipated, any additional responsibilities resulting from this transaction will be minimal. As such, the Bureau of Indian Affairs, Michigan Agency, is equipped to administer any additional responsibilities resulting from this acquisition.

25 CFR § 151.10(h) – Compliance with 516 DM 6, appendix 4, National Environmental Policy Act and 602 DM 2, Hazardous Substances Determinations

In accordance with Interior Department Policy (602 DM 2), we are charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. The record includes an update to the Phase 1 Environmental Site Assessment which was approved by the Regional Director on August 7, 2014.

NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE

An additional requirement, which has to be met when considering land acquisition proposals, is the impact upon

the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA).

The actions listed therein have been determined not to individually or cumulatively affect the quality of the human environment, and therefore, do not require the preparation of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). A categorical exclusion requires a qualifying action; in this case, 516 DM 6, Appendix 4, part 4.4.I., Land Conveyance and Other Transfers of interests in land where no immediate change in land use are planned. This acquisition is for 201.07 acres with no change in land use anticipated, therefore, qualifies as a categorical exclusion.

25 CFR § 151.11 – OFF-RESERVATION ACQUISITION – ADDITIONAL REQUIREMENTS

Factor 1 – The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation [25 CFR § 151.11(b)]

The Jijak Camp is located approximately 5 miles and the Settlement 3 miles from the Tribe's initial reservation, and both approximately 100 miles from the Southern border of Michigan.

Factor 2 – Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use. [25 CFR §151.11(c)]

The Jijak Camp nor the Settlement property are being acquired for business purposes, so therefore the requirements of this regulation are not applicable to the Tribe's request.

Factor 3 – Contact with State and Local governments having regulatory jurisdiction over the land to be acquired [25 CFR § 151.11(d)]

Refer to Section § 151.10(e) above.

40 USC § 255/25 CFR part 151.13

The Department of Justice (DOJ) is authorized to approve the title in Land Acquisitions on behalf of the United States (25 CFR § 151.13). Pursuant to 40 USC § 255, the Regional Solicitor, Midwest Region, has rendered title opinions as to the encumbrances on the subject title, and that they will not jeopardize the interest of the United States. The Tribe provided an updated title commitment dated June 17, 2014.[208]

Based on the above information, the Regional Director has decided to approve the taking of this land into trust status for the benefit and welfare of the Match-E-Be-Nash-She-Wish Band of Pottawtomi Indians, provided the tribe delivers a marketable title to the property, and in a manner as required in 25 CFR § 151, Land Acquisition regulations.

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208. Commitment for Title Insurance dated June 17, 2014, on file with the Bureau of Indian Affairs.

This decision may be appealed to the Interior Board of Indian Appeals, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR § 4.310-4.340 (copy attached). Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed to the (1) the Assistant Secretary - Indian Affairs, 1849 C Street, N.W., Washington, D.C. 20240; (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal. If you have any questions regarding this matter, please contact this office at (612) 725-4500.

Sincerely,

/s/_____
Diane K. Rosen
Regional Director

APPENDIX H

DECLARATION OF DAVID K. SPRAGUE, IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DATED OCTOBER 31, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:08-CV-01331

DAVID PATCHAK,

Plaintiff,

vs.

SALLY JEWELL, SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

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

Intervenor-Defendant.

Hon. Richard J. Leon

Appendix H

DECLARATION OF CHAIRMAN DAVID K. SPRAGUE IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The information contained herein is based upon my personal knowledge, and I am competent to testify to the matters herein if called to do so in any proceeding.

2. I reside at 1642 Parker Drive, Wayland, Michigan 49348, and have resided there for twelve years. My residence is about five miles from the 147-acre parcel at issue in this case.

3. I am the duly elected Chairman of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, a federally-recognized Indian tribe commonly known as the "Gun Lake Tribe" (hereinafter "Tribe" or "Gun Lake Tribe"). I have served in this capacity for twenty-two years.

4. In my capacity as Chairman, I am the primary representative of the Tribe and preside over the Tribe's governing body, the elected Tribal Council. As a member of the Tribe and as the Tribe's Chairman, I have knowledge of the Tribe's history, its legal status, its finances, and its business operations.

5. The Tribe has existed from time immemorial and entered into numerous treaties with the United States early in its history. However, the Tribe lost all of its land during the 19th century. The Tribe suffered from

this dispossession, but it maintained its sovereign character, nationhood, culture, and community.

6. In 1998, the Tribe successfully won affirmation of its existing sovereignty from the United States, but it still did not have any reservation or trust lands. Without land, the Tribe struggled to support our government and our people. Our people and our community suffered high unemployment and rates of poverty.

7. Therefore, in approximately 2001, the Tribe identified a 147-acre tract of land to acquire for the establishment of its gaming and entertainment facility. This land is comprised of two adjacent parcels totaling 147.48 acres. Both parcels are located in the Township of Wayland, County of Allegan in the State of Michigan. One of the parcels is commonly known as "1123 129th Avenue, Bradley, Michigan." Both parcels are collectively referred to as "the Bradley Tract." The Bradley Tract is located less than three miles from lands the Tribe has historically occupied.

8. On August 8, 2001, the Tribe requested that the Secretary of Interior accept the Bradley Tract into trust for the benefit of the Tribe. The Tribe also requested that the Secretary proclaim that the Bradley Tract is the Tribe's initial reservation for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(ii).

9. During the lengthy administrative process that followed, hundreds of comments were received from

the general public, local organizations, governments, and government officials (including supporters and opponents of the project).

10. The BIA published notice of the Secretary of the Interior's decision to take the Bradley Tract into trust on May 13, 2005. 70 Fed. Reg. 25,596. The notice provided interested parties with thirty days from the date of the notice to appeal the decision.

11. Shortly after the Secretary's final decision, on June 13, 2005, an anti-gambling organization called Michigan Gambling Opposition ("MichGO") filed a lawsuit against the United States to stop the Secretary from taking the Bradley Tract into trust. The U.S. District Court for the District of Columbia granted the Tribe's motion to intervene in that matter on September 1, 2005. On February 23, 2007, the District Court dismissed MichGO's claims in their entirety. MichGO then appealed to the District of Columbia Circuit Court of Appeals, and the Court issued an opinion on April 29, 2008 affirming the District Court. The Court of Appeals denied MichGO's Petition for Rehearing on July 25, 2008.

12. The plaintiff in this case, David Patchak, was not a named party to the MichGO suit, though on information and belief, he was either a member of MichGO or was closely affiliated with MichGO.

13. On August 1, 2008, David Patchak filed this lawsuit challenging the Secretary's decision to take the

Bradley Tract into trust, alleging that the United States did not have authority to take the Bradley Tract into trust as the Tribe did not constitute an "Indian Tribe" under Sections 5 and 19 of the Indian Reorganization Act. This theory was similar to one that MichGO unsuccessfully tried to bring in its Petition for Rehearing.

14. The Secretary of the Interior took the Bradley Tract into trust in January 2009 after the United States Supreme Court declined to grant MichGO's Petition for Certiorari to that Court.

15. This Court dismissed Patchak's suit for lack of standing to bring this suit. Patchak then appealed to the Court of Appeals, which resulted in a ruling from the United States Supreme Court that Patchak had standing to sue. This decision issued on June 18, 2012. The United States Supreme Court remanded the case to this Court to consider the merits of Patchak's suit.

16. Mr. Patchak did not take any action in this Court to pursue his claims for over two years following the Supreme Court's decision.

17. In the meantime, the Tribe's dire economic need compelled the Tribe to proceed with pursuing economic development in the Bradley Tract, which had been taken into trust in 2009.

18. Therefore, the Tribe invested hundreds of millions of dollars into the construction and development

of the gaming facility on the Bradley Tract in accordance with the Indian Gaming Regulatory Act, including accruing debt in that totaling approximately One Hundred Ninety Five Million Dollars ($195,000,000.00), of which approximately Fifty Four Million Dollars ($54,000,000) remains unpaid. Also, the Tribe negotiated a Tribal-State Gaming Compact ("Compact") with the Governor of the State of Michigan pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(1)(c). The Compact was subsequently approved by the Michigan legislature, and then approved by the Secretary of the Interior on April 22, 2009. 74 Fed. Reg. 18397-98 (April 22, 2009). The Compact provides, *inter alia*, that the Tribe will share revenues from its casino with State and local governments.

19. After years of preparation and significant expenditures, the Tribe was finally able to open the gaming facility on February 10, 2011.

20. Revenues from operation of the gaming facility have allowed the Tribe to offer the basic functions of the Tribe's government and has enabled the Tribe to provide essential services to its members, including housing, healthcare, education, infrastructure, language and cultural preservation, and other critical social programs essential to fostering and preserving the health and well-being of the Tribe and its members. The income from the gaming facility is the Tribe's primary source of revenue.

21. Since the gaming facility's opening in 2011, the Tribe has contributed approximately $52,235,219.00 to state and local revenue sharing boards in accordance with its Compact with the State of Michigan. The Tribe, along with State and local governments, have made substantial financial and future planning commitments based upon continued casino revenues.

22. Additionally, the gaming facility project has provided over 1,000 jobs, making it one of the largest employers of Allegan County, including tribal members as well as non-tribal members.

23. The gaming facility's operation has also permitted the Tribe to give generously to charities since the facility's opening.

24. The gaming facility's unimpeded operation will allow the Tribe to continually provide funds and other services to those members of the community, both tribal members and non-tribal members, who depend on the Tribe to provide them.

I swear under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

October 31, 2014 — /s/ _____
Dated — Chairman David K. Sprague