Legal Insight

K&L GATES

www.klgates.com

July 9, 2012

Practice Group(s):

Indian Law (North America)

Supreme Court decides *Match-E-be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*

By Theresa L. Keyes and Brian P. McClatchey

On June 18, 2012, the United States Supreme Court issued its decision in *Match-E-be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[1] permitting an individual who owns land near a tribal casino in Michigan to challenge the federal government's acquisition of land in trust for the Band. While many commentators expected the Court to rely, at least in part, on its recent decision in *Carcieri v. Salazar*[2] that tribes "not under federal jurisdiction" in 1934 could not receive land in trust from the federal government taking, the Court instead based its decision on standing, the federal government's sovereign immunity, and the Quiet Title Act. It affirmed the decision of the District of Columbia Circuit Court of Appeals and remanded for trial on the merits.

Procedural history.

The Band was federally recognized in 1999. In 2001, it asked Department of the Interior to take land into trust for it in Wayland Township, Michigan (the "Bradley Property"). The Band wanted the land for gaming purposes, in order to obtain revenues for the Band and its people, consistent with the goals and principles of the Indian Gaming Regulatory Act.[3]

In 2005, the Secretary of the Interior agreed to take land into trust, but did not take title at that time. Even so, the decision sparked the "*MichGO*" litigation.[4] In the *MichGO* case, the U.S. District Court for the D.C. District and the D.C. Circuit Court of Appeals, spanning a period from 2005 to 2008, considered, and ultimately rejected, attempts to stop Interior from making the land-into-trust acquisition for the Band.

After the 2008 final decision in *MichGO*, Patchak filed suit. He sought declaratory and injunctive relief under the Administrative Procedure Act ("APA")[5] to prevent Interior from taking title to the Bradley Property in trust for the Band. Patchak claimed several types of harm, including economic harms such as lowered property values, environmental concerns such as increased traffic, and "aesthetic" harms to his mode of living.

In January 2009, the Supreme Court denied *certiorari* in the *MichGO* case, and the Secretary of the Interior took title to the Bradley Property in trust for the Band. While the act of taking the title mooted Patchak's claim for injunctive relief, the parties agreed that the declaratory judgment claim, if successful, would effectively divest the federal government of title to the Bradley Property. Shortly

1 ------ S.Ct. -----, 2012 WL 2202936 (2012).

2 555 U.S. 379 (2009).

3 25 U.S.C. § 2701 et seq.

4 Michigan Gambling Opposition v. Norton, 477 F.Supp.2d 1 (Dist.D.C. 2007); Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23 (D.C. Cir. 2008).

5 5 U.S.C. § 701 et seq.

thereafter, in February 2009, the U.S. Supreme Court decided *Carcieri*,[6] which held that the Secretary of the Interior was without the power, under the Indian Reorganization Act ("IRA"),[7] to take title to land in trust for tribes which were not "under federal jurisdiction" at the time of the IRA's enactment in 1934.[8]

The D.C. District Court concluded that Patchak lacked standing and did not reach the merits of his claims. The District Court explained that since Patchak did not own the land in question, his claims were not within the "zone of interests" that Congress passed the IRA to protect,[9] as the IRA was enacted so that tribes could modernize, develop, and protect and perpetuate their governmental form and status.

The D.C. Court of Appeals reversed, holding that Patchak had standing and that the government had waived its sovereign immunity via the APA's general waiver for agency actions,[10] which waives immunity unless another statute forbids the relief the claimant seeks.[11] The federal government argued that Patchak was really bringing a quiet title action; although the Quiet Title Act ("QTA") contains authorization for suits to quiet title, it excludes authorization for suits involving "Indian lands."[12] The Court of Appeals disagreed with the government on the interrelationship between the APA and the QTA. Its decision was at odds with decisions from the 9th, 10th, and 11th Circuits, a split which the Supreme Court granted *certiorari* to resolve.

The decision.

The Supreme Court, in an 8-1 decision (majority opinion by Justice Kagan, dissenting opinion by Justice Sotomayor) determined that Patchak's lack of an ownership interest in the land did not implicate the QTA's bar for suits involving Indian land.

The QTA provides: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest."[13] In the Supreme Court, the government and the Band argued that claimants in QTA actions need not actually hold or allege an ownership interest in the land, because the language of the QTA refers to an "adjudicat[ion of] a disputed title to real property." By implication, the government appeared to argue, any ownership interest potentially adverse to the United States, whether held by the claimant or not, could support a QTA claim. Therefore, the government argued, Patchak was actually stating a QTA claim regarding Indian lands, which allowed the government's sovereign immunity to remain intact.

The Court did not agree with the construction of the QTA put forth by the government and the Band. Instead, it looked to the title of the QTA, the pleading requirements, and the ability of the government to pay compensation to the claimant (rather than giving the land back) to support its conclusion that the QTA requires that the claimant actually claim an ownership interest in the land itself, adverse to the government's interest.[14] And, because Patchak did not claim an ownership interest in the land in which the government held an interest, the Court concluded that he was not actually stating a QTA claim. Patchak's suit under the APA was not barred by QTA.

---

[6] 555 U.S. 379 (2009).
[7] 25 U.S.C. § 465.
[8] 555 U.S. 379 (2009).
[9] 25 U.S.C. § 465.
[10] 5 U.S.C. § 702.
[11] *Id.*
[12] 28 U.S.C. § 2409a(a).
[13] 28 U.S.C. § 2409a(a).
[14] *Patchak* at 7.

Supreme Court decides *Match-E-be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*

The Court then considered whether Patchak had standing. The government and Band maintained that Patchak lacked standing because the IRA covered the acquisition, rather than the use, of land. The land having already been acquired, Patchak's claim was moot, or, at the very least, Patchak lacked prudential standing because the "zone of interests" stemming from the IRA did not include those whose only harm resulted from the use of the land, rather than the statutorily-enabled acquisition of the land. The Court disagreed.

Noting that the prudential standing test "'is not meant to be especially demanding,'"[15] the Court explained that the prudential standing "test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"[16] Applying that reasoning, the Court pointed out that the ability of the tribes to use land taken into trust for them by the government in a variety of ways, such as for economic development, resource management, tourism, and gaming, among others, is reflected in the statutes and regulations covering trust land acquisitions.[17] In the Court's view, the uses of land which Mr. Patchak claimed were harming him were not "so marginally related to or inconsistent with the purposes of the statute" that it would not be reasonable to think that Congress would have allowed his claim.[18]

The only mention of Patchak's *Carcieri* claim was in footnote 2: "The merits of Patchak's case are not before this Court. We therefore express no view on whether the Band was 'under federal jurisdiction' in 1934[;] . . . [n]or do we consider how that question relates to Patchak's allegation that the Band was not 'federally recognized' at the time."[19] It is likely that, on remand, there will be extensive discovery on Patchak's *Carcieri* claim, namely, whether the Band, recognized in 1999, was in fact "under federal jurisdiction" in 1934.

The dissent.

In her dissent, Justice Sotomayor rebuked those in the majority for what she sees as an ill-considered decision:

> After today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes – relief expressly forbidden by the QTA – so long as the complaint does not assert a personal interest in the land. . . . The Court's holding not only creates perverse incentives for private litigants, but also exposes the Government's ownership of land to costly and prolonged challenges.[20]

Justice Sotomayor explains three negative consequences of the majority's decision. First, the decision "will render the QTA's limitations easily circumvented."[21] For example, after the *Patchak* decision,

> savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting on an "aesthetic" interest in the land but seeking an identical practical objective –

---

[15] *Patchak* at 9 (*quoting Clarke v. Securities Industry Assoc.*, 479 U.S. 388, 399 (1987)).

[16] *Id.*

[17] For example, in considering trust land acquisitions, the Secretary must take into account the proposed land use and any conflicts that land use may create. *See, e.g.*, 25 CFR §§ 151.10(c) and (f); 25 CFR § 151.11(a).

[18] *See supra* note 17.

[19] *Patchak* at 17.

[20] *Patchak* at 11.

[21] *Patchak* at 16.

> to divest the Government of title and possession. Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.[22]

Second, the decision "will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously":[23]

> Until today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review. That deadline promoted finality and security – necessary preconditions for the investment and "economic development" that are central goals of the Indian Reorganization Act. Today's result will promote the opposite, retarding tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed.[24]

Finally, the decision "creates substantial uncertainty regarding who exactly is barred from bringing APA claims."[25] Justice Sotomayor asks whether "Congress really intend[ed] for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?"[26]

What is *Patchak*'s likely impact?

The *Patchak* decision appears likely to invite more costly challenges to land-into-trust acquisitions. As ratings agency Fitch points out, *Patchak* will likely make it more difficult for tribes to participate in the economy of the wider world, by introducing more risk (and therefore, more cost) into the process of the development of tribal casinos.[27] Financing for tribal gaming projects will likely be more difficult to get, because of increased risk of litigation and the delay associated with litigation.[28] The decision may also have a spillover effect on tribes seeking land-into-trust for purposes other than gaming.

Congressional efforts to provide some kind of "*Carcieri* fix" have yet to gain momentum. Without some kind of "*Carcieri* fix," there are likely to be challenges to trust land acquisitions completed during the past six years. One result of *Patchak* is that the statute of limitations for challenging final agency actions under the APA is now the relevant time period, rather than the thirty days mandated under Interior's regulations for judicial review of land-into-trust transactions.

Opponents of tribal gaming see *Patchak* as an unqualified vindication of local communities' desire to have a role in the land-into-trust process for tribal gaming facilities, a process which is conducted between the tribes, the state governor, and the Secretary of the Interior.[29] Tribal advocates, on the other hand, are quite disappointed by the ruling.[30] However, a few tribal advocates appear to see a silver lining:

---

[22] *Id.* (citation omitted).

[23] *Id.*

[24] *Id.* (citations omitted).

[25] *Id.*

[26] *Id.*

[27] *See* "Fitch: Supreme Court decision in Patchak case has mixed implications for gaming sector," MarketWatch.com, *available at*: http://www.marketwatch.com/story/fitch-supreme-court-decision-in-patchak-case-has-mixed-credit-implications-for-gaming-sector-2012-06-19 (last visited June 20, 2012).

[28] *Id.*

[29] *See* Ben van der Meer, "Supreme Court ruling big for Yuba County casino outcome," Yuba County Appeal-Democrat, June 21, 2012, *available at:* http://www.appeal-democrat.com/news/casino-117220-ruling-court.html (last visited June 21, 2012).

[30] *See* Bob Allen, "Supreme Court decision affects tribal lands in Michigan," Interlochen Public Radio, June 21, 2012, *available at: http://ipr.interlochen.org/ipr-news-features/episode/supreme-court-decision-affects-tribal-lands-michigan/2012-06-21* (last visited June 22, 2012).

Supreme Court decides *Match-E-be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*

> Asked if there is any lemonade to the lemon of a decision from the high court, [Michigan State University Law School Professor Matthew L.M.] Fletcher said, "Lemonade? Sotomayor is Indian country's best friend. Read the three consequences part of her dissent and you can see she actually gets it. She understands the consequences of these decisions. She gets it more than any other Justice in Supreme Court history. And that's a fact."[31]

While she may certainly "get it," it remains to be seen whether Justice Sotomayor can have a perceptible impact, over time, on the Court's Indian law jurisprudence.

Authors:

Theresa L. Keyes
theresa.keyes@klgates.com
+1.509.241.1598

Brian P. McClatchey
brian.mcclatchey@klgates.com
+1.509.241.1523

[31] *See* Gale Courey Toensing and Rob Capriccioso, "Supremes' ruling opens floodgates to challenges to Indian land trust acquisition," Indian Country Today, *available at:* http://indiancountrytodaymedianetwork.com/2012/06/19/supremes-ruling-opens-floodgates-to-challenges-of-indian-land-trust-acquisition-119342#ixzz1yL4lvWNt (last visited June 20, 2012).