TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 1603,
THE GUN LAKE TRUST LAND REAFFIRMATION ACT

MAY 7, 2014

Introduction

Chairman Tester, Vice-Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify on S. 1603, the Gun Lake Trust Land Reaffirmation Act, a bill to reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Tribe). The Department supports S. 1603, which applies to the only parcel of land held in trust for the Tribe. The Department supports legislative solutions that would provide such certainty to ***all*** federally recognized tribes and future acquisitions by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in light of the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* decision.

As this Committee, and Congress, is aware, in June of 2011 the Supreme Court issued its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak.*[1] The Supreme Court held in that case that the decisions of the Secretary of the Interior to acquire land in trust under the Indian Reorganization Act could be challenged on the ground that the United States lacked authority to take land into trust even if the land at issue was already held in trust by the United States. This decision was inconsistent with the widely-held understanding that once land was held in trust by the United States for the benefit of a tribe, the Quiet Title Act (QTA) prevented a litigant from seeking to divest the United States of such trust title.[2] The Court held that the Secretary's decisions were subject to review under the Administrative Procedure Act even if the land was held in trust and expanded the scope of prudential standing under the Indian Reorganization Act to include private citizens who oppose the trust acquisition.

Background

On April 18, 2005, the Department issued its decision to acquire approximately 147 acres of land in trust for the Tribe for gaming purposes. The Citizens' group Michigan Gambling Opposition

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[1] 132 S. Ct. 2199 (2012).
[2] *See*, *e.g.*, *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987) (Indian lands exception to Quiet Title Act's waiver of sovereign immunity operated to bar municipality's claim challenging increase of tribal reservation and related water rights); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (challenge to Secretary's land into trust decision barred by Indian lands exception to Quiet Title Act's waiver of sovereign immunity); *Florida Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (same).

("MichGo") immediately challenged the decision in the United States District Court for the District of Columbia under the Indian Gaming Regulatory Act and National Environmental Policy Act ("NEPA"), as well as on the basis that the Indian Reorganization Act was unconstitutional. The district court rejected MichGo's claims, the District of Columbia Circuit Court of Appeals affirmed, and, in January 2009, the United States Supreme Court denied certiorari review. The Secretary then acquired the land into trust on January 30, 2009. Shortly thereafter in February 2009, the Supreme Court issued its decision in *Carcieri v. Salazar*.[3]

While the MichGo lawsuit was on appeal, David Patchak filed suit in district court to also challenge the Secretary's decision, on the ground that the Secretary is without authority to acquire land in trust for the Band because the Band was not a federally recognized tribe when the IRA was enacted in 1934. The district court did not reach the merits of Patchak's claim, instead holding that Patchak lacked prudential standing to challenge the Department's authority under the Indian Reorganization Act. The D.C. Circuit reversed. Ultimately, on June 18, 2012, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[4] the Supreme Court held that Patchak had prudential standing to challenge the acquisition, and that the Quiet Title Act is not a bar to Administrative Procedure Act challenges to the Secretary's decision to acquire land in trust after the United States acquires title to the property unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge.

Until *Patchak* was decided, prevailing Federal court decisions held that the QTA precluded judicial review of trust acquisitions after the United States acquired title to the subject property. The effect of the *Patchak* decision is that plaintiffs may seek to reverse trust acquisitions many years after the fact and divest the United States of its title to the property.

Consequence of the *Patchak* Decision

The *Patchak* decision undermines the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to live and engage in economic development. The *Patchak* decision imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions and the Court's decision may ultimately destabilize tribal economies and their surrounding communities. The *Patchak* decision casts a cloud of uncertainty on lands acquired in trust under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself.

Economic development, and the resulting job opportunities, that a tribe could pursue may well be lost or indefinitely stalled out of concern that an individual will challenge the trust acquisition up to six years after that decision is made.[5] The Department has worked to provide more clarity to everyone by amending its land acquisition rules to provide for greater notice of land-into-trust decisions and clarify the mechanisms for judicial review, depending on whether the land is taken

[3] 555 U.S. 379 (2009).
[4] 132 S. Ct. 2199 (2012).
[5] 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

into trust by the Assistant Secretary for Indian Affairs, or by an official of the Bureau of Indian Affairs. Without legislation to address *Patchak*, the Supreme Court's new reading of the Quiet Title Act and the Administrative Procedure Act will frustrate the lives of homeowners and small business owners on Indian reservations throughout the United States, and undermine the efforts of the United States government in promoting growing communities and economies in Indian country.

The *Patchak* decision encourages litigation to undermine settled expectations

In the *Patchak* decision, the Supreme Court held that a litigant may file suit challenging the Secretary's authority to acquire land in trust for a tribe under the Administrative Procedure Act, even after the land is held in trust. The Court reached this decision, notwithstanding the widely-held view that Congress had prohibited these types of lawsuits through the Quiet Title Act, which states:

> (a) 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, other than a security interest or water rights. ***This section does not apply to trust or restricted Indian lands***….

28 U.S.C. § 2409a (emphasis added).

As a result of the Court's reading of this provision, lawsuits could potentially reverse trust acquisitions many years after the fact, and divest the United States of its title to the property.

The majority in *Patchak* failed to consider – or even recognize – the extreme result that its opinion made possible. Divesting the United States of trust title not only frustrates tribal economic development efforts on the land at issue; more critically, it creates the specter of uncertainty as to the applicable criminal and civil jurisdiction on the land and the operation of tribal and federal programs there.

Before the *Patchak* decision, the Secretary's decision to place a parcel of land into trust could be challenged only ***prior*** to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisition process which ensured that interested parties had an opportunity to seek judicial review. It was the Department's general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department's regulations. This allowed all interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed.

Certainty of title is important. It provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential

government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors, and to promote tribal economies.

Once a trust acquisition is finalized and title transferred in the name of the United States, tribes and the United States should be able to depend on the status of the land and the scope of the authority over the land. Tribes must have confidence that their land cannot be forcibly taken out of trust once the government has made a final decision.

Conclusion

The Secretary's authority to acquire lands in trust for all Indian tribes, and certainty concerning the status of and jurisdiction over Indian lands after such acquisitions into trust, touch the core of the federal trust responsibility. The power to acquire lands in trust, and certainty that such land remain in trust, is an essential tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. A system in which some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The Department supports S. 1603. In addition, this Administration supports legislative solutions that make clear the Secretary's authority to fulfill her obligations under the Indian Reorganization Act for ***all*** federally recognized tribes.

This concludes my statement. I would be happy to answer questions.