Essay

Preserving Trust: Overruling *Carcieri* and *Patchak* While Respecting the Takings Clause

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Abstract

The potential benefit of new Bureau of Indian Affairs ("BIA") regulations for development on Native land has been overshadowed by two recent Supreme Court decisions—Carcieri v. Salazar *and* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak—*which cast doubt on the title to Native land and dramatically expand the rights of nearby owners to sue by challenging Native use of that land under the Administrative Procedure Act ("APA"). Legislation that would amend the statutes the Court interpreted in* Carcieri *and* Patchak *could remedy these ill effects but would pose a new problem: the taking of a vested cause of action without just compensation.*

This Essay proposes that Congress enact appropriate legislation that both overrules the Court's interpretations of the relevant statutes and permits takings suits in place of suits under the APA, so that Native land remains securely under Native control. In addition, the BIA must harness the agency deference it deserves to set Native sovereignty at the center of federal Indian policy.

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INTRODUCTION

In early October 1492, hundreds of Native Nations occupied virtually all of the land in what is now the United States.[1] Today, 565 federally recognized tribes occupy only two percent of that land.[2] Most of this land is held in trust.[3] "Trust land" is land to which the United States holds title, with a tribe or certain Natives as the beneficial owners.[4] Native control over this land is critical: it is the last remaining inch of their sovereignty on a continent of betrayal.[5]

For decades (if not centuries), the federal government has wielded its plenary power over Native American tribes to limit their autonomy and extract valuable resources.[6] Thankfully, the past twenty years have seen a shift to "nation-to-nation" approaches that

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1 STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 3 (4th ed. 2012); *Today in History: October 12, Columbus Day*, LIBR. OF CONG. AM. MEMORY, http://memory.loc.gov/ammem/today/oct12.html (last updated Oct. 6, 2010) (noting that Christopher Columbus first landed in what later became known as the Americas on October 13th).

2 PEVAR, *supra* note 1, at 69, 74.

3 *The U.S. Government's Trust Responsibilities to American Indians*, MILLE LACS BAND OF OJIBWE, http://www.millelacsband.com/Page_FactSheet_USGovernmentTrustResponsibilities.aspx (last visited July 28, 2013).

4 PEVAR supra note 1, at 93.

5 *See generally* DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 38, 113, 151, 170 (3d ed. 2011) (describing past and present conflicts over land and sovereignty).

6 *See infra* note 23 and accompanying text.

promote increased sovereignty, economic development, and self-governance for tribes over their land and their people.[7]

This trend recently culminated in agency and legislative actions that remove the bureaucratic hurdles that had made it extremely difficult for many tribes to obtain investment into Indian Country[8]—even simple, personal home mortgages.[9] These actions would greatly reduce the time it takes to make contracts and leases effective, allow homeowners and investors to obtain adequate financing, and spur the development of projects that benefit Native communities.[10]

Despite these improvements, two recent Supreme Court cases have further restricted the ability of tribes to protect trust land. In *Carcieri v. Salazar*[11] in 2009, the Court ruled that the Secretary of the Interior ("Secretary") has no statutory authority to take land into trust unless the relevant tribe was federally recognized in 1934.[12] This decision threatens the government's title to the land of hundreds of tribes who were only later formally recognized.[13]

Then, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*[14] in 2012, the Court ruled that although the Quiet Title Act ("QTA")[15] preserves sovereign immunity against claims that seek to regain title from the United States to trust land, the QTA does not bar suits brought under the Administrative Procedure Act ("APA")[16] by a plaintiff who asserts no personal property interest in that land. This decision exposes the courts to a flood of suits by plaintiffs who disagree with a tribe's proposed use for a nearby parcel of trust land and could result in divesting the government of title to any land brought into trust within the APA's six-year statute of limitations.[17]

Although Congress is already considering legislation that would overrule the Court's interpretations by amending the relevant stat-

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7 *See* PEVAR, *supra* note 1, at 40–41, 63, 68; WILKINS & STARK, *supra* note 5, at 101–02, 133.

8 *See infra* Part I.B.

9 *See infra* text accompanying notes 35–43.

10 *See infra* Part I.B.

11 Carcieri v. Salazar, 555 U.S. 379 (2009).

12 *Id.* at 388–89.

13 *See infra* notes 67–71 and accompanying text.

14 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012).

15 Quiet Title Act, 28 U.S.C. § 2409a(a) (2006).

16 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006); *Patchak*, 132 S. Ct. at 2206–08.

17 *See infra* text accompanying notes 97–106.

utes,[18] this Essay argues that existing proposals overlook a serious issue. The *Patchak* decision vested thousands of owners of land "in close proximity to" recently acquired trust land with a valuable cause of action.[19] Any legislation that bars suits (even merely suits that have not yet been filed for which the statute of limitations has not yet run) will constitute a taking of property that requires just compensation.[20] Therefore, Congress must provide an avenue for limited relief to prevent its action from being found unconstitutional.

Further, *Carcieri*, *Patchak*, and other Supreme Court cases over the past two decades have hewn closely to textualist approaches to statutory interpretation, limiting rights that Native communities had previously enjoyed as a matter of agency practice.[21] As a result, it will take unambiguous legislative text and strong agency deference for the political branches to best secure the rights they intend to secure for Native peoples. Therefore, when Congress acts, it must make its intentions plain in the language of the statutes it creates. Additionally, the Bureau of Indian Affairs ("BIA") must use the full weight of the deference it is due as the agency charged with administering all of federal Indian law to highlight self-determination as its guiding principle.

This Essay proceeds in three parts. The first Part describes the history of the United States' policies regarding Native land and the newly proposed regulations that will expand investment, development, and homeownership. The first Part then introduces the recent Supreme Court cases and their effects. The second Part demonstrates that if Congress completely destroys the causes of action these cases created, an unintended side effect will result: the taking of a vested right of action without compensation. The third Part proposes legislation that would preserve the constitutional right to compensation while freeing tribes from any interference those suits may cause, and lists ways that the BIA can protect Native tribes' inherent sovereignty over their land.

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18 *See* Heidi McNeil Staudenmaier & Ruth K. Khalsa, *A Post*-Carcieri *Vocabulary Exercise: What if "Now" Really Means "Then"?*, 1 UNLV GAMING L.J. 39, 53–66 (2010) (summarizing congressional proposals).

19 *See Patchak*, 132 S. Ct. at 2202–03 (holding that the plaintiff, who lives in close proximity to recently acquired trust land, has standing to challenge the acquisition of that land).

20 *See* U.S. CONST. amend. V.

21 *See* PEVAR, *supra* note 1, at 150–59, 268–70; Melanie Riccobene Jarboe, Note, *Collective Rights to Indigenous Land in* Carcieri v. Salazar, 30 B.C. THIRD WORLD L.J. 395, 405–06 (2010).

I. Federal Regulation of Trust Land

This Part provides a brief introduction to recent federal Indian land policy and explains how two recent Supreme Court decisions impact trust land. This Part begins by considering the events that led to the creation of the land-into-trust system, and continues by discussing recent legislative and administrative enactments that expand Native communities' ability to control the use of this land. This Part then turns to two recent cases that together cast doubt on the title to trust land and facilitate suits by nearby owners who disapprove of tribal uses of that land.

A. Policies that Have Limited Investment and Development on Native Land

Federal control of trust land has undergone several shifts throughout the long history of federal Indian law. Although the United States originally engaged with Native tribes as sovereign nations and entered into treaties with them,[22] the establishment of federal Indian law announced that Congress had "plenary power" over Indian tribes and their people.[23] Following the removal of many tribes to the interior and limiting tribal control to within the boundaries of reservations,[24] Congress instituted the most devastating policy to the integrity of Native land: the General Allotment Act of 1887 ("GAA").[25]

The GAA sought to undermine the reservation system and communal stewardship of property by "allotting" to individual Indians a certain amount of land and then selling the "surplus" land to non-Indians, who would accelerate the assimilation and acculturation of

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22 Pevar, *supra* note 1, at 95 (indicating that "[i]nitially, the most common way by which the federal government set aside land for Indian tribes was by treaty"); Wilkins & Stark, *supra* note 5, at 34, 125.

23 United States v. Sioux Nation of Indians, 448 U.S. 371, 409–15 (1980); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558–60 (1832); *see also* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85–86 (1977); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (Congress may extinguish a tribe's title to land completely, without recourse to judicial review); Jancita C. Warrington, Expanding Tribal Citizenship Using International Principles of Self Determination 14 & n.50 (Apr. 7, 2008) (unpublished M.A. thesis, University of Kansas) (on file with author) (describing an instance in which Congress eliminated the political existence of a tribe, rendering Native peoples citizens of the United States only).

24 *See* Pevar, *supra* note 1, at 7–8; Wilkins & Stark, *supra* note 5, at 125–27. Most notably, on the "Trail of Tears" over four thousand Cherokees died in the thousand-mile death march from Georgia to Oklahoma. Wilkins & Stark, *supra* note 5, at 125; *see also* Pevar, *supra* note 1, at 265 (stating that as many as fifteen thousand Cherokees died during the march).

25 General Allotment Act of 1887, ch. 119, 24 Stat. 388.

Natives.[26] This process resulted in the loss of a full two-thirds of the land Natives had held prior to 1887.[27]

To end the loss of Native land and reinstate some tribal self-rule, Congress passed the Indian Reorganization Act ("IRA")[28] in 1934.[29] The IRA gave the Secretary a powerful new tool: he could accept transfers of land title to the United States and hold the land in trust for the benefit of a tribe.[30] This "trust land" would thereafter be inalienable from the tribe and exempt from state and federal taxation.[31] Trust land cannot be seized under a state's power of eminent domain or taken by adverse possession.[32] Additionally, trust land is part of "Indian country,"[33] the land over which a tribe has the most control.[34]

There are, however, some disadvantages to converting land into trust land. Under current law, essentially every decision regarding trust land must receive the approval of the federal government.[35] The Secretary must approve any sale or gift of trust land,[36] as well as any lease that authorizes possession.[37] The Secretary must approve any actual or potential property interest that "encumbers" trust land for seven years or more, and any encumbering contract must wait for the Secretary's approval to begin.[38] Any encumbering contract without

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26 PEVAR, *supra* note 1, at 8–10, 111–12; WILKINS & STARK, *supra* note 5, at 127–28; Jarboe, *supra* note 21, at 406–14 (arguing that the *Carcieri* Court overlooked the Indian Reorganization Act's intent to recognize and reinstate tribal communal stewardship of land).

27 PEVAR, *supra* note 1, at 70; *see also* WILKINS & STARK, *supra* note 5, at 127–28. The GAA also initiated inheritance rules that diluted heirs' shares in the decedent's land. *See* PEVAR, *supra* note 1, at 73 (describing "fractionation").

28 Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

29 WILKINS & STARK, *supra* note 5, at 129–30. For instance, the IRA required the Secretary to interface with the leaders the tribe chose. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

30 25 U.S.C. §§ 465, 476(f)–(g), 478. *See* PEVAR, *supra* note 1, at 23, 93. Despite over two million acres being restored to tribal ownership from 1935 to 1955, only eight percent of the land the tribes lost under the GAA has been restored. Staudenmaier & Khalsa, *supra* note 18, at 42, 62.

31 25 U.S.C. § 465; PEVAR, *supra* note 1, at 71, 96.

32 PEVAR, *supra* note 1, at 96.

33 *Id.* at 20–23, 96; *see also* 18 U.S.C. § 1151 (2006).

34 *See* PEVAR, *supra* note 1, at 20–23, 96.

35 *See id.* at 77.

36 25 C.F.R. § 152.23 (2012).

37 25 C.F.R. § 162; *see id.* § 162.103 (listing types of leases regulated by other statutes and regulations).

38 25 U.S.C. § 81 (2006); 25 C.F.R. § 84.001–.008. The phrase "encumbers" is read broadly to include liens, easements, and covenants. *See, e.g.*, Contour Spa at the Hard Rock, Inc. v.

approval is void as a matter of law,[39] meaning that none of its provisions survive, not even a waiver of a tribe's sovereign immunity or the implied covenant of good faith and fair dealing.[40]

The impact of this bureaucratic delay on investment and development cannot be overstated. To obtain a simple title search to assure the entity running the project will be able to retain possession—a process that takes mere days elsewhere—can take over six years at the BIA.[41] These complications make it difficult even to obtain home mortgages,[42] let alone establish a business requiring millions of dollars in initial investment.[43]

B. Current Regulations that Increase Tribal Sovereignty over Native Land

Recognizing these concerns, the BIA, through new land leasing regulations, and Congress, through the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 ("HEARTH Act"),[44] have opened up trust land for development and put tribes in charge of the land rather than the federal government—important steps that will solve most of the problems discussed in Part I.A.

Gathering input from tribes through the consultation process,[45] the BIA began notice-and-comment rulemaking in November 2011[46] that would completely overhaul the system for approving land use. The BIA promulgated these regulations as a final rule, and the new

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Seminole Tribe of Fla., 692 F.3d 1200, 1211–12 (11th Cir. 2012) (finding long-term lease "encumbers" the land).

39 25 U.S.C. § 81; 25 C.F.R. § 84.008.

40 *See Contour Spa*, 692 F.3d at 1211–12.

41 Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1315–16 (2008) (noting that as of 2003, the backlog of applications was so great that it would take current staff 113 years to respond to all pending applications).

42 *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, GUIDE TO MORTGAGE LENDING IN INDIAN COUNTRY 12–17 (2012), *available at* http://occ.gov/publications/publications-by-type/other-publications-reports/country.pdf (describing intricacy of legal landscape and approval process for home mortgages).

43 *See, e.g.*, Crystal D. Masterson, Comment, *Wind-Energy Ventures in Indian Country: Fashioning a Functional Paradigm*, 34 AM. INDIAN L. REV. 317, 321 (2010) (indicating that the typical initial capital investment for a wind farm is $200 million).

44 Helping Expedite and Advance Responsible Tribal Home Ownership ("HEARTH") Act of 2012, Pub. L. 112-151, 126 Stat. 1150 (amending 25 U.S.C. § 415).

45 *See* PEVAR, *supra* note 1, at 40–41 (describing the consultation process); Staudenmaier & Khalsa, *supra* note 18, at 71 (stressing the importance of the consultation process).

46 Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73,784 (proposed Nov. 29, 2011) (to be codified at 25 C.F.R. pt. 162).

regulations took effect January 4, 2013.[47] The regulations replace the general rules that applied to all "nonagricultural" leases with specific rules tailored to residential, business, and green-energy leases.[48] The new rules require the BIA to respond to most requests within thirty to ninety days of the date that the BIA receives all the required documentation[49] and, in many cases, deem the requests granted if the BIA does not respond in the required time frame.[50]

These easy-to-use regulations also relieve tribes and businesses from worrying about contracts that encumber trust land. The regulations promulgated under that statute[51] provide that they do not apply to leases the Secretary approves through other regulations, including these general leasing regulations.[52] Therefore, leases of any appropriate length can be approved through the same quick process as a short lease.

The HEARTH Act, signed into law in July 2012, further eases the restrictions on trust land that had previously hampered development.[53] It extends the maximum length of leases in many parts of Indian Country to seventy-five years.[54] Further, the HEARTH Act authorizes tribes to create their own regulations for approving leases

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47 Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

48 *Id.*

49 *See, e.g.*, 77 Fed. Reg. at 72,482, 72,491 (to be codified at 25 C.F.R. § 162.359, .457) (mortgage approval within twenty days); *id.* at 72,484 (to be codified at 25 C.F.R. § 162.373) (decision regarding an appeal within thirty days); *id.* at 72,490 (to be codified at 25 C.F.R. § 162.449) (same for assignment of business lease); *id.* at 72,498 (to be codified at 25 C.F.R. § 162.530) (up to fifty days for wind energy evaluation lease); *id. at* 72,480 (to be codified at 25 C.F.R. § 162.347(b)) (same for residential lease amendment); *id.* at 72,481 (to be codified at 25 C.F.R. § 162.351(a)) (same for residential lease assignment); *id.* at 72,489 (to be codified at 25 C.F.R. § 162.455) (same for business sublease); *id.* (to be codified at 25 C.F.R. § 162.440) (up to ninety days to reach final decision on business lease); *id.* at 72,503 (to be codified at 25 C.F.R. § 162.564–65) (same for wind and solar resource sublease).

50 *See id.* at 72,480 (to be codified at 25 C.F.R. § 162.347(b)) (residential lease amendment); *id.* at 72,481 (to be codified at 25 C.F.R. § 162.355(b)) (residential sublease); *id.* at 72,490 (to be codified at 25 C.F.R. § 162.447) (amendment to business lease, after up to sixty days); *id.* at 72,489 (to be codified at 25 C.F.R. § 162.455) (business sublease, after up to forty-five days); *id.* at 72,504 (to be codified at 25 C.F.R. § 162.572) (amendment to wind and solar resource lease); *id.* at 72,505–06 (to be codified at 25 C.F.R. § 162.580) (wind and solar resource sublease).

51 25 U.S.C. § 81(b) (2006); *see also supra* notes 38–40 and accompanying text (describing § 81).

52 25 C.F.R. § 84.004(a) (2012) (referring to 25 C.F.R. pt. 162).

53 *See* HEARTH Act of 2012, Pub. L. 112-151, 126 Stat. 1150 (amending 25 U.S.C. § 415).

54 *See* HEARTH Act, sec. 2, § 415(h), 126 Stat. at 1151 (generally allowing up to three consecutive twenty-five year leases).

on their lands, and once the Secretary approves a tribe's regulations, the tribe can administer its regulations on its own.[55]

C. Limitations that Recent Supreme Court Decisions Place on Tribal Sovereignty over Native Land

The promise of these statutes and regulations is now overshadowed by two recent Supreme Court decisions. The first limited the Secretary's power to take land into trust to only those tribes that were federally recognized in 1934, the date of enactment of the IRA. The second permits nearby landowners to sue tribes and Native landowners under the APA to challenge the tribes' chosen use for that land.

1. Carcieri v. Salazar

Carcieri v. Salazar sent shockwaves through Indian Country by overturning seventy years of agency practice, and jeopardizing long-settled final agency decisions regarding thousands of tracts of land.[56] The case focused on the IRA, which authorizes the Secretary to take land into trust "for the purpose of providing land for Indians."[57] Section 479 of the IRA defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."[58]

In 1998, the Narragansett Indian Tribe requested that the Secretary add to its 1800 acres of trust land an adjacent 31-acre parcel it had purchased in order to build low-income housing.[59] The Secretary granted that request and the State of Rhode Island appealed through the Interior Board of Indian Appeals.[60] The appeal ultimately presented the Supreme Court with the question of whether the word "now" in § 479 referred to when the IRA was enacted in 1934 or to the time at which each land-into-trust application is processed.[61]

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55 *See id.*

56 Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 53 n.54 (2012); Rice, *supra* note 29, at 594 (noting that the *Carcieri* decision "will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934").

57 25 U.S.C. § 465; Carcieri v. Salazar, 555 U.S. 379, 381–82 (2009).

58 25 U.S.C. § 479.

59 *Carcieri*, 555 U.S. at 385.

60 *Id.* at 385–86.

61 *See id.* at 387–88. The Court's decision did not affect the other classifications of "Indian" in § 479: the descendants of those residing on an existing reservation, and those with at least half "Indian blood." *See id.* (quoting 25 U.S.C. § 479).

Justice Thomas, writing for the Court, found that the word "now" was unambiguous and rejected the need for the First Circuit's application of *Chevron*[62] deference.[63] The Court reasoned that the word "now" in the definition of "Indian" in § 479 included only members of tribes that were federally recognized as of June 1934, in part because the presence of the phrase "now or hereafter" elsewhere in the statute suggested Congress intended something different when it used only "now" in § 479.[64] Because § 465 of the Act gave the Secretary authority to bring land into trust only "for the purpose of providing land for Indians," the Secretary can do so only for this limited set of tribes.[65] The Secretary therefore had no authority to take land into trust for the Narragansetts because that tribe did not gain federal recognition until 1983.[66]

The impact of *Carcieri* could well be far-reaching, especially because of the many benefits tied to the IRA definition of "Indian."[67] Of the 104 tribes federally recognized since 1934 in the continental United States, as many as 88 may have been granted trust land that, under *Carcieri*, the Secretary lacked the authority to give.[68] Perhaps even more striking, the decision calls into question the status of more than 200 now-recognized tribes that were admitted in 1959—and therefore after 1934—by virtue of Alaska becoming a state.[69] Further, the tax consequences of *Carcieri* could be crippling because states or

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62 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that if a statute is unambiguous, courts must not defer to the agency's interpretation, but that if the statute is ambiguous, courts will defer to the agency's interpretation so long as that interpretation is reasonable).

63 *Carcieri*, 555 U.S. at 386–91; *see also id.* at 396–97 (Breyer, J., concurring) (rejecting the need for *Chevron* deference because the legislative history reflects a belief that this word choice "resolved a specific underlying difficulty" and did not delegate the Department of the Interior any interpretive authority).

64 *Id.* at 389 (majority opinion).

65 *See id.* at 393 (quoting 25 U.S.C. § 465).

66 *Id.* at 384, 395–96.

67 *See* Rice, *supra* note 29, at 594; Staudenmaier & Khalsa, *supra* note 18, at 53–54.

68 Staudenmaier & Khalsa, *supra* note 18, at 57.

69 *See* Scott A. Taylor, *Taxation in Indian Country After* Carcieri v. Salazar, 36 WM. MITCHELL L. REV. 590, 600–01 (2010). The effect of the Alaska Natives Claim Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), and the Supreme Court's holding in *Alaska v. Native Vill. of Venetie*, 522 U.S. 520 (1998), is beyond the scope of this Essay. In short, the two are taken to forbid Alaskan tribes from taking land into trust, although this interpretation is likely incorrect. *See generally* John R. Bielski, Comment, *Judicial Denial of Sovereignty for Alaskan Natives: An End to the Self-Determination Era*, 73 TEMP. L. REV. 1279 (2000). Because Alaskan Natives remain federally recognized tribes, *id.* at 1293, this Essay's proposed enactment extending land-into-trust power to all federally recognized tribes would apply to Alaska Tribal Corporations, *see infra* Part III.A.

taxpayers may seek to correct taxes erroneously paid or not paid on land thought to be under tribal rather than state jurisdiction.[70] Already, the Secretary has put on hold any further consideration of land-into-trust applications for tribes that might not satisfy the 1934 test.[71] Taken together, ongoing uncertainty about marketability of title and about which tax, regulatory, civil, and criminal law applies will further stifle development and investment in Native communities.

2. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak

In 2005, the Secretary announced her intent to grant the request of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band") to take into trust a tract of land the Band intended to use for gaming purposes under the Indian Gaming Regulatory Act ("IGRA").[72] An organization called Michigan Gambling Opposition objected and challenged the Secretary's decision.[73] After the D.C. Circuit rejected the organization's claims, David Patchak, an individual who lives "in close proximity to" this tract, filed his own suit under the APA.[74] When the Supreme Court denied the organization's petition for certiorari in 2009, ending the original litigation, the Secretary took the tract into trust.[75]

The APA renders agency action—such as the Secretary's decision to take land into trust—presumptively reviewable, waiving the sovereign immunity of the United States.[76] However, the APA preserves sovereign immunity where "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[77] The purpose of that provision is to prevent "plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes."[78]

The Secretary and the Band believed that the QTA was just such a statute.[79] The QTA authorizes suits challenging the title of the

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70 Taylor, *supra* note 69, at 601, 604 (noting these claims will be constrained by each state's tax statute of limitations, often three to six years).

71 Staudenmaier & Khalsa, *supra* note 18, at 66–67.

72 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2203 (2012).

73 *Id.*

74 *Id.* at 2203–04

75 *Id.* at 2204.

76 *Id.* at 2204, 2210.

77 5 U.S.C. § 702 (2006).

78 *Patchak*, 132 S. Ct. at 2204–05.

79 *Id.* at 2205.

United States, and allows the United States to maintain title and deliver just compensation to a victorious plaintiff.[80] But the QTA excludes any challenge regarding trust land.[81]

The Court, however, gave the QTA a narrower construction than that which the Secretary and the Band advocated.[82] The statute's title, jurisdictional grant, venue provisions, and several of its sections use the term "quiet title."[83] The statute provides no definition for this term, but the Court reasoned that its ordinary meaning refers to traditional "quiet title actions," in which the claimant "not only challenges someone else's claim, but also asserts his own right to disputed property."[84] Consistent with this view, the QTA requires the claimant to "set forth with particularity" his or her interest in the parcel and allows for the payment of compensation in lieu of returning ownership,[85] which the Court reasoned would not make sense if the complainant were not found to be the true owner.[86]

As a result, Patchak's suit—in which he claimed no personal interest in the tract of land—was not within the scope of the QTA.[87] The QTA's clear prohibition on suits affecting trust land was therefore inapplicable.[88] The Court concluded that his challenge to the United State's use of the land was not an "end-run" around the QTA,[89] but a "garden-variety APA claim" seeking review of the Secretary's exercise of her statutory authority.[90]

The Court further held that Patchak had prudential standing under the APA.[91] To bring an APA suit, a plaintiff must not only have Article III standing, but must also show that his or her interests are "arguably within the zone of interests to be protected or regulated by the statute" that the plaintiff claims the official violated.[92] Although the IRA and its regulations focus solely on land acquisition, the Court concluded that IRA decisions are entangled with the use of the land

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80 *Id.*

81 *Id.* (quoting 28 U.S.C. § 2409a(a)).

82 *Id.* at 2206.

83 *Id.*

84 *Id.*

85 *Id.* at 2206 (quoting 28 U.S.C. § 2409a(d)).

86 *Id.* at 2206–07.

87 *Id*. at 2207–08.

88 *Id.* at 2207.

89 *Id*. at 2205.

90 *Id.* at 2208.

91 *Id.* at 2210–11.

92 *Id.* at 2210.

often enough that land use is "arguably" within the interests the IRA regulates.[93]

A powerful consequence that the Court likely overlooked in its ruling is that the "neighbors"[94] most affected by tribal land-use decisions are the non-Natives who hold fee simple title to land within reservation boundaries.[95] Given the checkerboarded nature of Indian Country,[96] these potential claimants are numerous.[97] And if, like Patchak, these claimants need allege only some "economic, environmental, or aesthetic" concerns,[98] then there is an alarming potential for suits that would threaten tribal land, thereby divesting the United States of title in favor of the heirs of some century-old former owner. At the very least, such suits will result in immeasurable harassment.[99]

In the year since the *Patchak* decision, these burdens have already begun to be felt in federal courts. One non-Native gaming corporation sought to bar the two tribes in Massachusetts from opening a casino because neither holds any federal land and, after *Carcieri*, cannot place land into trust to use for gaming under the IGRA.[100] Five separate and now-consolidated cases challenge a transfer of 13,000 acres into trust for the Oneida Indian Nation, arguing that the transfer is invalid under *Carcieri*.[101] Thus, Justice Kagan's conclusion in the majority opinion in *Patchak* that "neighbors to the use . . . are . . . predictable[ ] challengers of the Secretary's decisions"[102] may have been more prophetic than its author envisioned.

In a perhaps surprising take on *Patchak*, one district court has held that the QTA bars an APA suit by a non-federally-recognized tribe.[103] Such a tribe sought to force various federal agencies to respect its culturally and religiously significant sites located in national

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93 *Id.* at 2210–12.

94 *Id.* at 2212 (stating that "neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers to the Secretary's decisions").

95 *See id.* at 2217 (Sotomayor, J., dissenting).

96 *See* PEVAR, *supra* note 1, at 75.

97 *See id.* at 20–23.

98 *See Patchak*, 132 S. Ct. at 2212.

99 *See id.* at 2217–18 (Sotomayor, J., dissenting) (arguing that the majority's holding will "create[ ] perverse incentives for private litigants").

100 KG Urban Enters. v. Patrick, 693 F.3d 1, 11–13 (1st Cir. 2012); *see also* KG Urban Enters. v. Patrick, No. 11-12070-NMG, 2013 WL 2467729, at *5–9 (D. Mass. June 6, 2013) (denying the tribes any right to intervene in the case on remand).

101 New York v. Salazar, Nos. 6:08-CV-00644, 5:08-CV-00648, 5:08-CV-00633, 6:08-CV-00647, 6:08-CV-00660 (LEK/DEP), 2012 WL 4364452, at *1, *8 (N.D.N.Y. Sept. 24, 2012).

102 *Patchak*, 132 S. Ct. at 2212.

103 Franco v. U.S. Dep't of the Interior, No. CIV S-09-1072 KJM-KJN, 2012 WL 3070269, at *17 (E.D. Cal. July 27, 2012).

parks and other federal land.[104] The court reasoned that the tribe claimed an adverse property interest in the sites because it wanted to exclude the government and have the sites declared the tribe's property.[105] The tribe could not proceed because, unlike Patchak, it sought possession of the disputed land for itself.[106] In sum, the *Patchak* decision invites numerous challenges to the uses Native communities select for their own land, prevents Natives from ousting intruders, and is likely to delay promising development projects through lengthy and costly litigation.

Although federal Indian policy regarding Native land use has been consistently shifting towards full tribal sovereignty and a nation-to-nation collaborative approach between federal and tribal governments, the recent holdings of the Supreme Court undermine these political-branch endeavors. In particular, *Carcieri* clouds the title of the trust land held for the benefit of the hundreds of tribes whose federal-recognition status has changed since 1934.[107] Further, *Patchak* offers nearby landowners a much broader right to sue than what the common law of nuisance ever entertained.[108] Together, these developments obstruct long-needed development in Native communities and local, tribal control over Native land.

II. THE TAKINGS PROBLEM

Legislation could remove the undesirable effects of *Carcieri* and *Patchak* by altering the statutory language the Court interpreted.[109] Such changes, however, pose a serious constitutional risk by retroactively destroying the claims *Patchak* found permissible and predictable. The Takings Clause of the Fifth Amendment requires that if the government "take[s]" "property," it must provide "just compensation."[110]

Other cases provide an illustrative comparison. Several courts have found a taking where the government reasserts its sovereign immunity by statute, destroying the causes of action that underlie suits

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104 *Id.* at *2.

105 *Id.* at *17.

106 *Id.*

107 *See supra* text accompanying notes 67–69.

108 *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2215 (2012) (Sotomayor, J., dissenting).

109 *See e.g.*, Sarah Washburn, Note, *Distinguishing* Carcieri v. Salazar*: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA's Trust-Land Provisions*, 85 WASH. L. REV. 603, 638–39 (2010).

110 U.S. CONST. amend. V.

against it.[111] Similarly, statutes that explicitly foreclose relief likely represent takings. For instance, the Warner Amendment made the Federal Tort Claims Act the sole remedy for victims of the United States government's nuclear testing program; however, that Act's exceptions clearly eclipsed any chance of obtaining relief.[112] Similarly, the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 completely prevented any remedy against telecommunications companies that aided in government wiretapping of the American public at large.[113] It is not clear that the destruction of every *Patchak* claim amounts to a taking,[114] but Congress should tread carefully in light of precedent that holds that destroying a vested cause of action is a taking if that cause of action is firmly embedded in settled statutes[115] and has sufficient economic value.[116]

A vested cause of action—that is, one that has accrued[117]—is "property" within the meaning of the Takings Clause.[118] *Patchak* claims accrue when the Secretary decides to take land into trust[119] and

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111 *E.g.*, Armstrong v. United States, 364 U.S. 40, 48–49 (1960) (finding a taking where the United States forbade suits that were the sole recourse for builders to enforce their materialmen's liens on ships built for the government); Greyhound Food Mgmt., Inc. v. City of Dayton, 653 F. Supp. 1207, 1220–21 (S.D. Ohio 1986) (finding a taking where the State of Ohio resurrected the municipal immunity of its political subdivisions from suit where the present plaintiff was the insurer).

112 Carroll Dorgan, Comment, *Section 2212: A Remedy for Veterans—With a Catch*, 75 CALIF. L. REV. 1513, 1557–58 (1987); Elizabeth Louise Loeb, Note, *Constitutional Fallout from the Warner Amendment: Annihilating the Rights of Atomic Weapons Testing Victims*, 62 N.Y.U. L. REV. 1331, 1368–75 (1987).

113 Mike Wagner, Note, *Warrantless Wiretapping, Retroactive Immunity, and the Fifth Amendment*, 78 GEO. WASH. L. REV. 204, 223–30 (2009). Each of these differs from other statutes that were not takings despite retroactively affecting vested rights of action because they merely limited those rights rather than destroying them. *E.g.*, *id.* at 228–30 (describing the Air Transportation Safety and System Stabilization Act of 2001's modifications of airline liability for the September 11th attacks); Dorgan, *supra* note 112, at 1556 (contrasting the continued waiver of sovereign immunity in the Swine Flu Act).

114 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992) (suggesting that a taking cannot lie where the property loses most, but not all, of its economic value).

115 *See* Wagner, *supra* note 113, at 220.

116 *See Lucas*, 505 U.S. at 1017; Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

117 Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 392–99 (2009); Loeb, *supra* note 112, at 1348–50; Wagner, *supra* note 113, at 216–20.

118 Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Blumenthal, *supra* note 117, at 400; Wagner, *supra* note 113, at 215. Which interests amount to "property" is actually a question of state law. Blumenthal, *supra* note 117, at 381 & n.44.

119 The cause of action arises when the Secretary *decides* to take the land into trust, permitting suit. *See* 25 C.F.R. § 151.12(b) (2012). Arguably, however, it is not until the Secretary actually takes the land into trust that any injury occurs. Therefore, those who challenged land-into-trust applications on other grounds might now be allowed six years from the date the Secre-

may be brought any time within the APA's six-year statute of limitations.[120]

These claims are firmly embedded in settled statutes. Claims against the Secretary under the APA for taking land into trust could not occur before August 2012, when *Patchak* was decided.[121] A *Patchak* claim, however, is just "a garden-variety APA claim" that an agency official exceeded her statutory authority.[122] The APA has a long and well-recognized history, and renders agency action "presumptively reviewable."[123] Although *Bowles v. Seminole Rock & Sand Co.*[124] and *Chevron*[125] grant considerable deference to agencies in administering their charging statutes, the APA empowers the judiciary to check the executive's obedience to congressional legislation.[126] Because courts may address only claims that have real-world impact,[127] this judicial review is really a way for individuals to provide a check against agencies; a public role that is an essential aspect of modern democracy.[128] This long-recognized grounding demonstrates that the APA review *Patchak* claimants seek is nothing new, and is therefore sufficiently established to be eligible for Fifth Amendment protection.[129]

Finally, many *Patchak* claims have sufficient economic value to be compensable takings. Claims brought under the APA cannot seek

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tary *accepts* the lands. The BIA's own response to *Patchak* is congruent with this interpretation. *See infra* text accompanying notes 156–59.

120 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2217 (2012) (Sotomayor, J., dissenting); *see also* 28 U.S.C. § 2401(a) (establishing six-year statute of limitations).

121 In fact, three circuits forbade such suits. Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004); Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 143 (9th Cir. 1987); Fla. Dep't of Bus. Regulation v. Dep't of the Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

122 *Patchak*, 132 S. Ct. at 2208, 2210 (citing 5 U.S.C. § 706(2)(A), (C) (2006)).

123 *See id.* at 2210.

124 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945) (holding that an agency's interpretation of its own regulation controls unless that interpretation is "plainly erroneous").

125 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

126 *See* Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 730 (2009).

127 *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2366–67 (2011).

128 Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1037 & n.31 (2010).

129 The decision in *Fisch v. General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), provides an illustrative contrast. In that case, there was no taking where Congress overruled the Supreme Court case that created a right to "walking time pay" because that right was grounded in a very new statute: the two-year-old Fair Labor Standards Act. *See id.* at 270–71.

monetary damages,[130] but the interests claimants assert have measurable value.[131] For instance, Patchak alleged that if a casino were built nearby, he would suffer increases in traffic and crime, decreased property values, destruction of his current lifestyle and the rural character of the surrounding area, and "other aesthetic, socioeconomic, and environmental problems."[132] The Court found these concerns to state an injury and authorized his suit to continue towards relief that would prevent this injury (if proven to be real) from occurring by removing the tract from trust.[133] If Congress acts to foreclose these claims, the harms Patchak objected to would occur.

The question then becomes how to measure the value of the interest that is destroyed. If intangible property is deprived of all economic use, its fair market value is estimated.[134] If the state requires a particular use, or nonuse, of some property in exchange for granting permits, there has been a taking of the portion of the property affected because it results in the creation of an easement.[135] If the federal government destroys a cause of action that can seek compensatory damages, the proper compensation can be calculated despite the absence of a "market" for litigation and the uncertainty of recovery.[136] The key is that there is some actual economic loss that can be valued objectively.[137]

Certainly, the most familiar example of a regulatory taking is one that directly accomplishes a transfer of land title in a state-recognized property interest. Courts have found regulatory takings when a city denies a permit to construct a parking lot, so the city effectively has an easement over that plot forcing it to remain green space.[138] Similarly, courts have also found a regulatory taking when the state forbids construction of beachfront homes, resulting in an easement that preserves uninterrupted coastline.[139] When the government abolishes a cause of

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130 5 U.S.C. § 702 (2006).

131 *See infra* text accompanying notes 137–42.

132 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2203 (2012) (internal quotation marks omitted) (describing complaint).

133 *Id.* at 2211–12.

134 *See* Blumenthal, *supra* note 117, at 378–80, 413.

135 Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838–39 (1987); *see also* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1569–72 (Fed. Cir. 1994) (adopting a "partial takings" doctrine that compensates the owner for whatever economic interest was taken).

136 Blumenthal, *supra* note 117, at 413–20.

137 *Id.* at 414–15; *see* Loeb, *supra* note 112, at 1373–74.

138 *See Dolan*, 512 U.S. at 374.

139 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992).

action that allows monetary damages, the government has prevented the litigant from using that pot of money.

The contrast between the parking-lot and open-beach examples on the one hand and the monetary-damages-action example on the other illustrates a key aspect of takings jurisprudence: regulations that are "functionally equivalent to government acquisitions" of an interest in land are takings that the government must compensate by paying the owner the amount equal to the diminution in value of the owner's property.[140] When the only property in question is the money a victorious plaintiff would recover from a suit, the obvious compensation is the expected value of the suit.[141] But when a regulation affects real property either by addressing the property directly or by only indirectly constraining the owner's litigation options, what the government has taken is an easement-like interest in the land itself, and what the government owes is the diminution in value this imposes on the land.[142] Because the nature of a *Patchak* claim is one of the diminution in value of the owner's land as a result of Native land use, Congress's destruction of that cause of action is a taking.

III. RESPONDING TO *Carcieri* and *PATCHAK*

Congress should pass new legislation ("the Act") in response to *Carcieri* and *Patchak*. In order to fully protect trust land and respect the constitutional prohibition against taking property without just compensation, Congress must include an alternative source of relief for *Patchak* claimants. Additionally, Congress must clearly articulate its intent so that the courts must abide by it.

In order to accomplish these goals, Congress must amend the IRA to protect all current trust land and allow any tribe to obtain trust land once the tribe is federally recognized. Congress must also amend the QTA to make clear that its waiver of sovereign immunity to challenge government ownership of land never extends to a challenge against trust land. To prevent these changes from violating the Takings Clause, Congress must provide an alternative source of compensation by allowing *Patchak* claimants to bring a takings suit in lieu of a suit under the APA. Finally, the BIA must use the deference it is

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140 *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 869–70 (1995) (internal quotation marks omitted).

141 *See* Blumenthal, *supra* note 117, at 415; *see* Loeb, *supra* note 112, at 1373–74.

142 *See* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 508–09 & n.64 (2006). This is true even if that right is one in equity rather than law. *See id.*

due as the agency that administers federal Indian law to promote tribal sovereignty as the key principle in this area of law.

A. Amending the Indian Reorganization Act

The Act should amend the IRA to open land-into-trust applications to "all federally recognized Indian tribes," and affirm the past land-into-trust rulings of the Secretary.[143] Several proposals are already before Congress. For instance, some would expand the IRA to include tribes recognized after 1934 by changing the wording to "now *or hereafter* under federal jurisdiction."[144] Another proposal would remove the phrase altogether so that the proper interpretation is the absence of any restriction.[145] Several proposals seek to avoid confusion by explicitly allowing "any federally recognized Indian tribe" to use the land-into-trust process.[146] Some of these add a section to expand the definition of "Indian tribe."[147]

An excellent proposal is Senate Bill 676.[148] This bill not only expands the IRA to all federally recognized tribes without limitation, it also makes that amendment effective as if included in the original 1934 statute.[149] As a result, the Secretary could take land into trust for any federally recognized tribe, regardless of when that recognition occurred.[150]

The bill then "ratifie[s] and confirm[s]" any land-into-trust decision of the Secretary "for any Indian tribe that was federally recognized on the date of that action" making it as if Congress had "specifically authorized and directed" that decision.[151] This provision removes any legal basis for challenging the trust status of land on the theory that the Secretary lacked statutory authority to take title for the United States,[152] because Congress's plenary power over Indian tribes is absolute and certainly reaches to providing land for tribes.[153]

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143 *See* Staudenmaier & Khalsa, *supra* note 18, at 66–69 (noting a proposal by the National Congress of American Indians to amend § 479 to explicitly ratify the Secretary's actions).

144 *E.g.*, *id.* at 68–69 (internal quotation marks omitted) (proposal of the National Indian Gaming Association).

145 *E.g.*, *id.* at 69 (proposal of the National Congress of American Indians).

146 H.R. 666, 113th Cong. § 1(a)(1)(B) (2013); H.R. 3742, 111th Cong. § 1(a)(1)(B) (2009); H.R. 3697, 111th Cong. § 1(a)(1)(B) (2009); S. 1703, 111th Cong. § 1(a)(2) (2009).

147 H.R. 3742, § 1(a)(2); H.R. 3697, § 1(a)(2).

148 S. 676, 112th Cong. (2012).

149 *Id.* § 1(a).

150 *See* Staudenmaier & Khalsa, *supra* note 18, at 68–69 (discussing similar early proposals).

151 S. 676, § 1(b).

152 *See* Staudenmaier & Khalsa, *supra* note 18, at 59–60.

153 *See supra* note 23 and accompanying text.

B. Amending the Quiet Title Act

The Act should also amend the QTA to forbid suits that would interfere with a tribe's use of trust land. Although the legislation described in Part III.A would prevent judicial reversal of a land-into-trust decision on the basis of the Secretary's statutory authority, *Patchak* still allows nearby property owners to challenge the tribe's use of recently granted trust land under the APA.[154] Cases like *Carcieri*, *Patchak*, and the many others over the past two decades that have used textualist approaches to limit tribal sovereignty even in the face of agency practice that favored tribal self-determination[155] demonstrate that Congress must be painstakingly precise in its use of language.

The BIA is implementing a partial solution to *Patchak*. A proposed rule[156] attempts to bar future APA suits for failure to exhaust administrative remedies.[157] Ordinarily, a plaintiff can bring an APA suit despite the availability of an internal appeal mechanism once the agency decision becomes final. The agency can make the internal appeal a prerequisite for an APA challenge, however, by both requiring interested parties to use that internal procedure and treating the decision as inoperative during the internal appeal.[158] The BIA's proposed rule would notify all interested parties about the decision and "the right, if any, to file an administrative appeal," and would delay transfer of title until the time for appeal has elapsed or the appeal concludes in the BIA's favor.[159]

Assuming that notifying interested parties of a possible right of internal appeal amounts to "requiring" parties to use that internal mechanism,[160] suit under the APA would be barred to those who failed to use it.[161] Even so, tribes and the BIA will remain open to

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154 *See supra* notes 88–93 and accompanying text.

155 *See supra* note 21 and accompanying text.

156 Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 32,214 (proposed May 29, 2013) (to be codified at 25 C.F.R. § 151.12).

157 *Id.* at 32,216.

158 5 U.S.C. § 704 (2006); Darby v. Cisneros, 509 U.S. 137, 146 (1993).

159 78 Fed. Reg. at 32,219. Note that a decision to take land into trust will be immediately final if it is made by the Assistant Secretary-Indian Affairs, meaning that no internal appeal would be available. In that event, an APA suit could continue regardless of any failure to use the internal process. *Id.*

160 *Cf. Darby*, 509 U.S. at 141–42, 153–54 (finding that a rule providing that interested parties could seek internal review was not specific enough to require parties to use that mechanism).

161 *Id.* at 154. It is unlikely that this BIA rule would amount to a taking because it does not completely destroy all avenues to APA relief, but rather modifies the time limit in which that

lengthy APA suits from neighbors who oppose the tribe's intended use early enough. These opponents can still rely on the theories of *Carcieri* and *Patchak* that limit the Secretary's land-into-trust authority and imbue neighbors with protectable interests in nearby land.[162] Most importantly, these suits retain the power to keep the land out of trust and prevent the tribe's intended use.[163]

A proper response to *Patchak* must rest on the same logic the *Patchak* Court used to find that the QTA did not prevent APA suits, so that Native communities can move forward on beneficial projects without interruption.[164] Individuals can challenge agency action under the APA unless "'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff."[165] The QTA already clearly forbids the divestment of United States title to trust land.[166] The QTA failed to prevent Patchak's suit not because of any inadequacy of this clause, but because the scope of the QTA was not broad enough to include Patchak's "kind of grievance."[167]

In order for the QTA to prevent these APA suits and the harassment they entail, therefore, the scope of the QTA must expand to include claims like Patchak's. This expansion can be accomplished by amending the first subsection to read as follows (additions in italics):

> 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, *regardless of whether the plaintiff asserts any right, title, or interest in the real property,* other than a security interest or water rights.[168]

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right can be vindicated. *See supra* text accompanying notes 111–16, 134–42 (noting an identifiable interest must be completely destroyed to be taken). The more permanent, statutory solution this Essay proposes will prevent APA review, and thus substitutes takings suits to ensure just compensation is paid.

162 *See supra* Part I.C.1–2.

163 *See* Stand Up for Cal.! v. Dep't of the Interior, Nos. 12-2039 (BAH), 12-2071 (BAH), 2013 WL 324035, at *25 & n.28 (D.D.C. Jan 29, 2013) (holding that the Secretary taking land into trust would not prevent its later divestment and that the tribe exposed itself to binding injunctive relief by intervening in the suit).

164 *See supra* notes 76–93 and accompanying text.

165 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2204 (2012) (quoting 5 U.S.C § 702 (2006)).

166 28 U.S.C. § 2409a(a) (2006) (the QTA "does not apply to trust or restricted Indian lands").

167 *Patchak*, 132 S. Ct. at 2205–06.

168 28 U.S.C. § 2409a(a) (suggested amendments in italics).

This amendment expands the QTA's right to sue to include anyone challenging the government's ownership of land, regardless of whether the challenger seeks to own the land himself.

Of course, there is no need to allow any suits under the QTA that the statute did not allow before. Adding an equal and opposite exception to the QTA will achieve this balance. For example, this could be achieved by amending subsection (d) as follows (additions in italics):

> The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims*, if any,* in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States. *However, no civil action may be maintained under this section unless the plaintiff seeks to enforce a right, title, or interest of the plaintiff in the real property.*[169]

This amendment adds a new exception to the QTA, forbidding the relief the QTA provides to those without a personal interest in the land.

Because the scope of the QTA will broadly include everyone trying to challenge the government's title to land, anyone suing under the APA to challenge an agency action that gave the United States title to real property will have to show that none of the QTA's exceptions forbids the relief he or she seeks.[170] Individuals bringing actions other than traditional quiet title actions will be barred by the amended subsection (d), leaving the relief available to them under the QTA unchanged since *Patchak*. Individuals challenging the United States' title to trust land, even with a personal property interest, will confront the QTA's trust-land exception. As a result, the sovereign immunity of the United States will remain intact, and APA challenge will be inappropriate.[171]

C. Allowing Takings Claims in Lieu of APA Claims

The Act will completely destroy the APA claims that *Carcieri* and *Patchak* allow, enabling the Secretary to preserve all existing trust land, and to bring new land into trust for all federally recognized tribes, who can then freely use that land.[172] To prevent the Act from

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169 *Id.* § 2409a(d) (suggested amendments in italics); *cf. id.* § 2409a(h) (forbidding suits regarding military and defense facilities).

170 *See Patchak*, 132 S. Ct. at 2204–05.

171 *See id.* at 2204.

172 Note that the procedures for bringing land into trust and using trust land for certain purposes (such as gaming) allow interested parties to challenge those decisions. *E.g.*, 25 C.F.R.

being vulnerable to constitutional attack, Congress should include a savings provision that will allow those who could have brought an APA claim to instead bring a takings claim in federal court seeking just compensation for the destruction of that cause of action.

Allowing federal courts to hear these claims will provide an avenue for *Patchak* claimants to obtain any compensation they constitutionally deserve as a result of losing the ability to sue under the APA. Allowing these claims to be heard in court rather than before an agency is appropriate so that the court can decide whether the Act resulted in any compensable taking in the first instance.[173] Because this takings claim will be a suit against the United States for money damages,[174] the tribes who control the relevant trust land will not be a party to the suit and will not be enjoined from continuing to use the trust land in the manner of which the claimant disapproves. The tribe can therefore use its trust land without interference from neighbors and does not have to become embroiled in litigation unless it wishes to intervene or serve as an amicus.

These takings claims would seek as damages the difference in the claimant's property value that is proximately caused by a tribal use of trust land that the claimant could have complained of under *Patchak*: a use of land the Secretary recently brought into trust that the Secretary might have considered in granting the land-into-trust application.[175] In practice, very few of these claims would be brought. The actual difference in property value as a result of a Native use of tribal land—even building a new casino—is likely to be slight. Further, the main motivation current *Patchak* claimants have to bring their APA claims is to stop the tribe from engaging in a land use that would compete with an enterprise of the claimant or that offends the claimant's morals.[176] A takings claim cannot achieve these results, however, because it cannot provide injunctive relief and will not compensate for

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§ 83.11 (2012) (challenges to tribal recognition); *id.* § 151.12 (land-into-trust); *id.* § 290.21 (gaming). This Act would not affect these procedures.

173 Judicial review is, of course, the cornerstone of the delegation of authority to agencies. Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1357 (2010); *see also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986).

174 Of course, the Act would waive the sovereign immunity of the United States for this limited purpose, and could cap the ultimate amount of damages the United States would ever pay without violating the Takings Clause. *See* Wagner, *supra* note 113, at 224 n.143, 228–29.

175 *See* 28 U.S.C. § 2401(a) (2006) (providing six-year statute of limitations and some equitable tolling); *Patchak*, 132 S. Ct. at 2211–12.

176 *Cf. Patchak*, 132 S. Ct. at 2203–04; KG Urban Enters. v. Patrick, 693 F.3d 1, 13 (1st Cir. 2012).

injury to a property owner's moral sensibilities.[177] Adding such a provision to the Act will therefore guard it against constitutional attack while preserving relief for those who have suffered a true constitutional injury and preventing unnecessary harassment of tribes.

D. Harnessing Agency Deference to Emphasize Sovereignty

In the past two decades, Congress, the Executive, and the BIA have embarked on a "nation-to-nation" approach of interacting with Native tribes.[178] This approach seeks to overcome the previous policies that have constrained Native communities within social and physical boundaries, and recognizes that carrying out the federal government's fiduciary responsibilities to tribes requires that those tribes be able to remove the constraints that prevent them from becoming self-sufficient and self-governing.[179]

Under *Chevron*,[180] *Seminole Rock*,[181] and *Skidmore v. Swift & Co.*,[182] it is the BIA that is entitled to various levels of deference in its decisions because the BIA is the agency charged with administering federal Indian law.[183] The BIA should use this deference to emphasize sovereignty and self-determination as the guiding principle for all it does "for the benefit of Indians."[184] The *Patchak* Court focused on the aspects of the land-into-trust regulations that refer to land use, but this was to demonstrate that Patchak's interests "arguably" fell within the zone of interests of the IRA.[185] The regulations do not only reach the tribe's interests in self-sufficiency and economic development,[186] they also reach the tribe's interest in providing housing,[187] restoring more complete control over land within the boundaries of a reservation,[188] fortifying protections for land the tribe already owns,[189] and "facilitat[ing] tribal self-determination."[190] This last justification is particularly important because it does not necessarily have anything to

177 *See* Blumenthal, *supra* note 117, at 413–14.
178 *See supra* note 7 and accompanying text.
179 *See* PEVAR, *supra* note 1, at 63.
180 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
181 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
182 Skidmore v. Swift & Co., 323 U.S. 134 (1944).
183 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 52–60 (5th ed. 2009).
184 *See* 25 U.S.C. § 450(a)(1) (2006).
185 *See Patchak*, 132 S. Ct. at 2211–12.
186 *See id.* (citing 25 C.F.R. §§ 151.3(a)(3), 151.10(c), (f), 151.11(a), (c) (2012)).
187 25 C.F.R. § 151.3(a)(3).
188 *Id.* § 151.3(a)(1).
189 *Id.* § 151.3(a)(2).
190 *Id.* § 151.3(a)(3).

do with economic benefit or development. Simply providing a tribe with enough contiguous land to meaningfully govern a region is a justifiable interest.[191]

The BIA should highlight this interest in self-determination and self-governance in every action it takes. Even an application for gaming, a green-energy lease, or other use of land that was traditionally thought to involve only an interest in economic development should include an explicit agency finding that the project will further the ability of the tribe to be a sovereign entity.[192]

Pursuant to existing acts of Congress and agency regulations, the BIA should reduce the fractionation and checkerboarding that persists in Indian Country in a targeted manner.[193] Providing a small amount of land for Natives to enhance the ability of tribes to behave as nations (as they had for hundreds of years prior to the United States' unilateral decision to stop making treaties with them in 1871) is a powerful goal of the United States.

Such acts of the BIA and Congress to strengthen the integrity of Native land are not a "gift from the United States," but a recognition that policies of the United States that have survived from prior eras continue "to limit the ability of indigenous people to define their own identity and develop economically and politically on their own terms."[194]

Congress has plenary power and can do much to restore sovereignty to Native nations. Preserving trust land by responding to *Carcieri* and *Patchak* is a simple step on that path. Clear legislation that restores both the IRA's intent to provide secure Native land and the QTA's intent to free that land from challenge—while ensuring that the government is not taking any cause of action without just compensation—is immediately necessary. In the long term, both Congress and the BIA must continue to affirm and defend the sovereignty and self-determination of Native peoples.

CONCLUSION

Congress should act quickly and with extraordinary precision to remedy the ill effects of *Carcieri* and *Patchak* in a way that can with-

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191 Sherry Salway Black, *Sovereignty is an Asset*, *in* THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 136, 136–39 (2008).

192 *See id.*

193 *See supra* notes 97, 185–90 and accompanying text.

194 KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS xii, xiv–xvii (2007) (emphasis omitted).

stand the Court's textualist scrutiny so that all federally recognized tribes can benefit from the new regulations, which will greatly increase economic and culturally sensitive development in Indian Country. Enacting this response while permitting takings claims to proceed will ensure that Congress does not unwittingly take property without just compensation and will secure trust land—and the sovereignty that can come with it—for Native peoples.