The BIA Proposes *Patchak* Patch Regulations for Fee-to-Trust Land Acquisitions

By Heidi McNeil Staudenmaier and Harsh P. Parikh

In what appears to be a significant change to its land acquisition procedures, the Bureau of Indian Affairs (BIA) is proposing revisions to its regulations under 25 C.F.R. Part 151 for applications to acquire land in trust. The proposed regulations were published on May 29, 2013, in the Federal Register, and the time to comment on the proposed regulations closed on July 29, 2013. On August 16, 2013, the BIA reopened the comment period until September 3, 2013.

These proposed regulations are referred to by many as the "*Patchak* Patch" and are in response to last year's Supreme Court decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (*Patchak*), that appeared to be a major blow to tribal gaming and other fee-to-trust acquisitions. In the words of Assistant Secretary of Indian Affairs, Kevin Washburn, "[n]early 1,200 land into trust applications have been approved since the beginning of the Obama administration. We hope to keep that freight train moving. We want to keep restoring lands for tribes."

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The Department of Interior's (Department) proposed regulations are intended to significantly limit the uncertainties created by *Patchak* by adding administrative obstacles for potential litigants and expediting trust acquisitions. As the Assistant Secretary recently noted, the proposed *Patchak* Patch is intended to "protect tribes now."

Background on the Patchak Decision

The decision by the United States Supreme Court in *Patchak* seemed to open up challenges to fee-to-trust transfers to a broader group of plaintiffs and significantly extend the time for filing such suits.

On June 18, 2012, the Supreme Court determined that plaintiff David Patchak, an individual property owner near the Gun Lake Band's Casino, had standing to challenge the Secretary's acquisition of land into trust for the tribe. The Supreme Court's decision consisted of two parts:

1. The eight-justice majority held that Patchak's claim under the Administrative Procedures Act (APA), 5 U.S.C. § 701 *et seq.*, was not barred by the Quiet Title Act's "Indian lands" exception. The Court determined that Patchak was not claiming a right, title or interest in the land, but rather that the government was not entitled to any such right, title or interest in that land. The Quiet Title Act was therefore not applicable and did not void the APA's sovereign immunity waiver.

2. The Court determined that Patchak had prudential standing to challenge the Secretary's trust acquisition because Patchak's alleged economic, environment and aesthetic harms "fall …within the zone ... protected or regulated by" the contention that the Secretary violated the Indian Reorganization Act.

The Court's decision in *Patchak*, when combined with the Supreme Court's 2009 decision in *Carcieri v. Salazar*, 129 S. Ct. 1058, raises several complex issues, including (1) whether recently acquired Indian land trust acquisitions were subject to a potential flood of new litigation, and (2) whether the trust transfers would remain in limbo during the pendency of litigation. The *Patchak* decision refused to clarify *Carcieri*, which limited the scope of the Secretary's authority to take land into trust only for those tribes deemed to be "under federal jurisdiction" in 1934.

Most gaming observers at the time agreed that *Patchak*, when coupled with *Carcieri*, would delay development on newly acquired tribal lands.

Proposed Changes to Fee-to-Trust Acquisitions

The Department's revised regulatory provisions are intended to mitigate some of the effects of *Patchak*. These proposed regulations will modify the existing fee-to-trust application process for the Department in several key respects.

- Prior to the ruling in *Patchak*, the Secretary of Interior would publish a notice of a final decision to take land into trust for a tribe at least 30 days before the date of the transfer. If any litigation was commenced within this 30-day window, the Department's internal policies required it to "self-stay" any fee-to-trust transfers until resolution of the pending litigation. The BIA's proposed rule eliminates this 30-day waiting period for completing trust acquisitions and requires that the BIA "promptly" take land into trust.

- The proposed rule requires "interested parties," as that term is currently defined in the existing BIA regulations, to make themselves known to the BIA official in writing in order to require the BIA official to provide written notice to them. Parties must make themselves known in writing at each stage of the administrative review.

- The revised rule will require that all unknown interested parties receive notice of the decision and right to appeal, if any, through publication in a newspaper of general circulation serving the affected area.

- Most importantly, when the BIA official issues the decision to acquire land in trust, interested parties must first exhaust administrative remedies available (as set forth in 25 C.F.R. Part 2) within 30 days before seeking judicial review under the APA. If interested parties who have received notice fail to file an administrative appeal within that 30-day time frame, such parties are precluded from seeking any judicial review available under the APA because they failed to first exhaust administrative remedies.

- Unlike decisions made by BIA officials, there are no administrative remedies to exhaust when decisions are made directly by the Assistant Secretary of Indian Affairs. Such decisions are final for the Department.

Potential Pitfalls under the New Regulations

These changes may stem the tide of frivolous litigation and help tribes move forward with economic development on newly acquired trust lands. In attempting to eliminate the uncertainties created by *Patchak*, however, these proposed regulations may also unintentionally create a significant legal minefield for concerned citizens, local and state governments, and federal agencies.

For one, the proposed rule's elimination of the 30-day waiting period may undermine a party's ability to obtain judicial review of the land acquisition decision. For many years prior to *Patchak*, the federal government had argued that a trust acquisition cannot be reversed or undone. The *Patchak* decision held that the Quiet Title Act did not bar Patchak's private suit because he did not assert a right, title or interest in the real property that conflicted with the right, title or interest of the United States. It is unclear whether state and local governments that assert rights in maintaining their jurisdiction over the land would conflict with a right, title or interest of the United States. If they did, such lawsuits by state and local governments may be barred under the Quiet Title Act.

There is also potential for federal liability or a possibility that a court may not be able to reverse the land transfer. In reliance on the land's trust status, the resident tribe can immediately begin development on its newly acquired lands. If forced to vacate the trust acquisition, the federal government may be absconding its federal trust obligations and be liable to indemnify the tribe for its investments. United States Senators Dianne Feinstein (D-Calif.) and John McCain (R-Ariz.) have repeated these concerns in formal letters to the Secretary of the Interior.

The BIA may also be estopped from removing the acquired land out of trust even if it deter-

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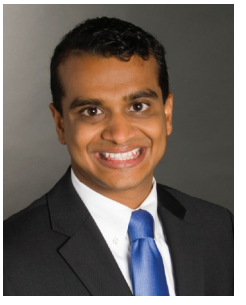

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the not-too-distant future." A former Regulator of the Year, Mark Lipparelli states, "David and I had the opportunity to serve together in agencies that were going through substantial reform. He has been a great leader for a market that is going through a period of material change. New Jersey and the gaming industry should be proud to have David at the helm."

Director Rebuck's approach to regulatory work embraces his guiding principle: "When you are confronted with great challenges, you have greater opportunities for corrective action." International Masters of Gaming Law and *Casino Lawyer* honor and congratulate Director Rebuck for his outstanding contributions to the regulation of the gaming industry in his jurisdiction. ♣

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licensing arrangements with one or more B2B providers to supply game software, payment processing, website hosting, liquidity management, and other services.

The second type of business model is a B2C model or a software license model. In a B2C model, the I-Gaming licensee will hold a gaming license, as well as own the underlying game software. The gaming licensee may also enter into agreements with B2B providers to perform certain other spheres of services or directly conduct some or all of the other sphere of activities. For example, in the software license model, the gaming licensee may engage third party affiliates to provide marketing services, but itself conduct payment processing activities.

In summary, armed with an understanding of the I-Gaming business model, policymakers and regulators can develop a robust regulatory model, which can support the development of the I-Gaming industry without threatening economic viability.

Conclusion

A basic understanding of public policy goals and the business model of a regulated industry is essential in developing a practical regulatory structure. A clear statement of policy goals can help guide the development of specific regulatory models. For instance, if the public policy goal is to maximize tax revenue, then regulations may require more extensive revenue reporting. Similarly, the public policy goals can also assist in identifying licensing standards, such as what market participants should be licensed and the level of scrutiny.

Comprehending the I-Gaming business model can also help drive the scope of regulations. As an example, identifying the business functions and role of suppliers can assist in identifying which persons should be subject to licensing. Similarly, an understanding of the flow of funds within an I-Gaming operation may be beneficial in order to develop safeguards for player funds deposited with operators. ♣

[1] Nevada initially adopted legislation in 2001, which allowed the promulgation of regulations to permit the licensing and operation of interactive gaming. *See* Nev. Rev. Stat. § 463.157. The 2001 Nevada statute conditioned implementation of regulations upon the Nevada Gaming Control Commission determining, among other matters, that interactive gaming can be operated in accordance with applicable law. *See* AB 466 (2001). The Nevada Legislature subsequently enacted legislation in 2001 to allow interactive gaming if sanctioned by the federal government. On February 21, 2013, Nevada enacted legislation legalizing intrastate interactive gaming in Nevada. New Jersey capped a two-year effort, including overcoming a veto from Governor Chris Christie, to permit I-Gaming on February 12, 2013.

[2] Nev. Reg. 5A.

[3] *See* British Columbia, Canada TGS5, Technical Gaming Standards for Internet Gaming Sys (2009).

[4] *See* Alcohol and Gaming Commission of Ontario, Canada: Draft iGaming Registrar's Standards.

[5] On December 20, 2011, the U.S. Department of Justice ("DOJ") publicly released a memorandum opinion, dated September 20, 2011, which concluded that the U.S. federal Wire Act, 18 USC § 1081, *et seq.*, extended only to wagers placed on a "sporting event or contest." While the DOJ memorandum represented a complete reversal of long-standing agency interpretation of the Wire Act, the memorandum would likely not be binding legal precedent. The DOJ memorandum has, however, had the effect of encouraging the states to pursue authorizing non-sports intrastate I-Gaming by reducing the likelihood that the DOJ would commence enforcement actions to curtail intrastate I-Gaming.

[6] *See* Anthony N. Cabot, Casino Gambling: Policy, Economics, and Regulation 395 (1996).

[7] *See id.*

[8] Gerald M. Gordon, Rudy J. Cerone & Scott Fleming, *Bankruptcy Trends in the Gaming Field*, 10 J. Bankr. L. & Prac. 293, 295 (2001); *see also* Robert W. Stocker II and Peter J. Kulick, *Chapter 11 Cases Involving Gambling Casinos*, *in* Collier Guide to Chapter 11: Key Topics and Selected Industries, ¶ 25.03 (Alan N. Resnick & Henry J. Somme reds).

[9] A "bot" refers to a robot, which is a computer program.

[10] Players may use other methods to fund a player account, such as sending in a live-check, use of electronic funds transfers, wire transfers, automated clearinghouse transfers, debit cards, or other means of electronic payments.

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member of the IMGL who has selflessly contributed significant time and energy to … this organization and advancing our mission" through expansion of programming in developing the Indian gaming tracks. Finally, Jane Zerbi, a colleague and mentor states, "I am very happy for John Roberts who is so deserving of this award. He is a leader in Indian gaming regulation who has an incredible depth of knowledge and diverse perspective, with experience in multiple tribal and state jurisdictions. And he always manages to maintain his sense of humor!" IMGL and *Casino Lawyer* congratulate John Roberts on a well-deserved honor. ♣

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mines that the trust acquisition was in error. For instance, in *Prieto v. United States*, a federal judge in the District of Columbia determined that the Department of Interior's Board of Indian Appeals abused its discretion and acted arbitrarily and capriciously in revoking an Indian's trust status because the plaintiff detrimentally relied on the representation by the government. 655 F. Supp. 1187, 1192 (D.D.C. 1987). The federal court stated that an agency is not free to "snatch back vested rights" and refused to allow the government to unwind the trust acquisition. The implications of *Prieto* remain unclear.

Finally, the proposed rules may create a difficult burden that requires citizens, community groups and local governments to make themselves known to BIA officials at every decision-making level in order to receive written notice of the acquisition. Unless these stakeholders promptly seek an administrative remedy, they may be foreclosed from later challenging the fee-to-trust acquisition in federal court.

Overall, the Department recognizes that trust acquisitions are the key to tribal economic development and self-sufficiency. While the proposed "*Patchak* Patch" may alleviate some of the concerns for Indian tribes, it also raises other legal complexities in an uncharted land. Litigation over fee-to-trust transfer is bound to continue and these regulations will likely be challenged in Court. ♣