

## Life After *Patchak*: What Does It Mean For Tribal Gaming?

By Heidi McNeil Staudenmaier

The Tribal gaming industry was struck a blow by the United States Supreme Court right before the high court ended its session for the summer. Whether the blow results in a knock-out punch which leads to the closing of the Gun Lake Casino in southwestern Michigan or is simply a wake-up call resulting in a longer and more challenging process for tribal land acquisitions remains to be seen.

The referenced Court ruling was issued on June 18, 2012 – *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. \_\_\_\_ (2012). In that case, the Court decisively held (8-1) that an individual property owner (David Patchak) near the Tribe's Gun Lake Casino had standing to challenge the Secretary of the Interior's acquisition of land into trust for the Tribe. The Court determined that the U.S. Government had waived its sovereign immunity and that Patchak had prudential standing to challenge the Secretary's acquisition of the land. The Court reasoned that Patchak was not claiming any competing interest in the Gun Lake land, so the claim was not barred by the Quiet Title Act ("QTA"), and that he had asserted an interest "arguably within the zone of interests" protected or regulated under the Administrative Procedure Act ("APA"). As a result, the case has been sent back to the



Artist rendering of Gun Lake Casino

Michigan trial court for litigation on the merits.

Pertinent case background: The Secretary of the Interior took the subject land into trust for the Tribe in 2009. Patchak challenged the land acquisition by contending that the Tribe was not a federally recognized tribe as of 1934 (when the Indian Reorganization Act was enacted). The suit was filed prior to the Supreme Court's ruling in *Carciere v. Salazar*, 129 S. Ct. 1058 (2009). Patchak supported his standing claim by asserting the Gun Lake casino would increase traffic and crime and irreversibly change the area's rural quality. The Michigan trial court refused to divest the government of title to the land and permitted the Tribe to develop its casino, which has been successfully operating since 2011.

The Supreme Court, however, concluded that the QTA was not applicable and therefore did not void the sovereign immunity waiver provided by the APA. The Court determined that Patchak was not claiming a right, title or interest in the land, but he was instead seeking a declaration that the government was not entitled to any such right, title or interest in that land. With the QTA argument deemed inapplicable, the Court then only needed to consider whether the government was subject to a lawsuit under the APA. The Court found that Patchak did have sufficient "prudential standing" to pursue his claim based on their view that the differences between "land acquisition" and "land use" were immaterial.

Dissenting Justice Sonia Sotomayor believes the ruling ironically will per-

mit persons with tenuous connections to Indian lands to challenge the government's acquisition of those lands, whereas persons who actually may have "right, title or interest" in those Indian lands are barred from bringing such claims. Further, the government's land into trust decisions may now be subjected to the APA's six-year statute of limitations, which could have a chilling effect on tribal development. The majority acknowledged that Sotomayor's argument was "not without force" but expressly left that to be worked out by Congress.

The Court's decision has been viewed as a "game changer" by many tribal gaming observers. Prior to September of 2011, the Department of the Interior had only approved five "off reservation" land acquisitions for gaming purposes. Since that time, the Department has issued four favorable determinations – (1) Enterprise Rancheria (CA); (2) North Fork Rancheria (CA); (3) Keweenaw Bay Indian Community (MI); and (4) Ione Band (CA) (the latter was determined under the restored tribe exception). The Enterprise and North Fork situations require specific concurrence by the Governor of California, who is expected to make his decision by late August. Rather than going the Department route, the Graton Rancheria (CA) is moving forward with casino plans based upon Congressional legislation placing the land into trust for the tribe. Keweenaw Bay also requires concurrence from the Michigan Governor.

The Supreme Court in *Patchak* did not rule on the *Carcieri* implications – leaving that open for further debate. Pending tribal gaming projects that could be impacted by this decision include the Cowlitz Tribe in Washington (currently in litigation over *Carcieri* even though the Department already

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**In addition to having a significant impact on Native American tribes and the gaming industry in general, Indian gaming continues to make significant contributions to the U.S. economy.**  
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has rendered a positive determination that the Tribe meets the "under federal jurisdiction" test), Mashpee Wampanoag in Massachusetts, and Shinnecock Tribe in New York. Litigation on the merits of the *Patchak* case could take years, making it less likely that the Gun Lake Casino will ultimately be shut down. However, there certainly are concerns that the decision will inhibit would-be investors who might otherwise lend to tribes or invest in gaming projects. Additionally, this decision

could increase the likelihood that anti-gaming groups will oppose land into trust acquisitions – particularly since the new six-year window will give such interests more time to raise necessary support and capital) – all of which could impact proposed casino development or other economic development on tribal lands. In short, the *Patchak* decision means that the time for getting a casino up and running will be greatly increased, and the costs will be considerably higher. As a result, the return on investment in future tribal projects will likely be reduced for both the tribe and its developers/financiers.

In addition to the *Patchak* decision setting up what could be a difficult roadblock for further expansion of tribal gaming, both California's Diane Feinstein and Arizona's John McCain are pushing bills to stop off-reservation casinos. At the same time, however, there have been continuing efforts in Congress to enact a "Carcieri Fix".

How the *Patchak* proceedings ultimately are resolved as the merits unfold remain unknown. Indeed, many observers believe there is little or no merit to *Patchak*'s claims. Nevertheless, in the interim, the expansion of tribal gaming will certainly be impeded in light of the new tools provided to casino opponents by this Supreme Court ruling. ♣



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