Supreme Court Exposes Interior Fee-to-Trust Actions to Broader Challenges and Extends Periods for Challenges, with Possible Silver Lining for Some Developers.

The Case: The Supreme Court addressed two issues affecting economic development in Indian country in its June 27, 2012, decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[i] ("*Patchak*"): First, whether any suit challenging the United States' acquisition of land for Native Americans is barred by the federal Quiet Title Act ("QTA"); and, second, whether strict "standing to sue" requirements limit the classes of persons who can maintain such suits. Mr. Patchak, a non-Indian land owner, challenged the Secretary of the Interior's ("Secretary's") decision to take land neighboring Patchak's into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band"). The Court's 8-1 decision in *Patchak*, allowing the suit to proceed, creates disincentives for economic development in Indian country, but may also have positive implications.

In 2009, the Court decided *Carcieri v. Salazar*,[ii] interpreting 25 U.S.C. § 465, part of the Indian Reorganization Act of 1934 ("IRA"), which authorizes the Secretary to take land into trust for a tribe. However, *Carcieri* held the IRA authorizes such action *only* for a tribe that "was under federal jurisdiction" when the IRA was enacted in June 1934. *Carcieri* has spawned an outcry from tribes, correctly noting its rejection of the Bureau of Indian Affairs' ("BIA") longstanding contrary interpretation, and Congress has been asked to enact a "*Carcieri*-Fix" to overturn the decision. Invoking *Carcieri,* Mr. Patchak sued claiming the Secretary lacked power under the IRA to take the land into trust because the Band was not federally recognized in 1934 when the IRA was enacted. The district court did not reach the merits of Patchak's *Carcieri* claim, but instead dismissed his action, holding that he lacked standing to sue and interpreting the QTA to bar the action. The QTA waives the United States' sovereign immunity for quiet title suits, but it also states that the Act "does not apply to trust or restricted Indian lands." The district court held that provision implies that any action, including one that might otherwise lie under the federal Administrative Procedure Act ("APA"), is barred if it would affect title to trust or restricted Indian lands. The District of Columbia Court of Appeals reversed both holdings, and the Supreme Court granted the writ of certiorari to review the decision.

The Decision: In the final days of its 2011 Term, a Supreme Court majority affirmed the Court of Appeals. The Supreme Court concluded that the general waiver of sovereign immunity in the APA, which allows review of federal agency action, applied to allow the claim and was not impliedly over-ridden by the "trust of restricted lands" exception to the QTA. Because Mr. Patchak did not claim an adverse ownership interest in the land taken into trust, the Court concluded that Patchak's claim was not of the sort covered by the QTA; consequently, the trust lands exception to the QTA did not bar Patchak's suit under the APA.[iii]

With respect to standing, the Court's majority concluded that, despite not having an interest in the land to be taken into trust, Patchak had standing to contest the Secretary's decision. Patchak argued that, as a neighboring land owner, he would be injured by effects of the use of the land, including lowered property values, increased traffic, and aesthetic injuries. The United States and the Band argued that Patchak's injuries resulting from the use of the land were not within the "zone of interests" sought to be protected by the IRA, contending its statutory language limited the statute's interests to "providing land for Indians."[iv] The Court disagreed, holding that Patchak had prudential standing, because, under the BIA's regulations and practices, the Band's ultimate use of the land was relevant to the Secretary's decision to take the land into trust for the Band.[v] On remand, the lower courts will decide the merits of

Patchak's *Carcieri* claim. Justice Sotomayor's dissent argued that the majority's decision would engender three negative "consequences." First, the majority decision may enable plaintiffs to "easily circumvent" the QTA's limitations by artful pleading. Second, the majority decision may frustrate the United States' ability to quickly resolve challenges to fee-to-trust decisions, because, under the BIA's regulations (and before the *Patchak* decision), challenges to a fee-to-trust decision had to be raised within 30 days of the Secretary's decision, a far shorter deadline than the 6-year period under the APA.[vi] Justice Sotomayor thus cautioned: "Today's result will…retard tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed." Third, she argued, it is now uncertain "who exactly is barred from bringing APA claims."

What It Means: *Patchak* has several implications for both tribes and landowner/developers when projects involve lands that the United States has taken, or intends to take, into trust for a tribe, as well as for affected landowners. Economic development in Indian country, including gaming development, often involves the United States taking fee land into trust for a tribe's benefit. First, by concluding that an adjacent landowner has standing to challenge the Secretary's decision, the *Patchak* decision opens the door to a broader range of challengers to fee-to-trust transfers and possibly, to other actions. Second, because the Court held that the APA's 6-year statute of limitations may apply, previously approved fee-to-trust acquisitions may still be challenged, so long as the 6-year statute of limitations has not yet run. Third, as Justice Sotomayor's dissent points out, tribes and developers now may be leery of beginning a project on fee-to-trust land until after the 6-year limitations period has expired—and may not just delay, but not pursue, economic development. Tribes that have urged Congress to enact a "*Carcieri*-fix" may add a "*Patchak*-patch" to the to-do list.

Broader Implications? *Patchak's* standing analysis may have impacts beyond the fee-to-trust setting. By stepping beyond the strict statutorily expressed interests, and considering interests reflected in regulations and practical implications, it also may broaden the class of plaintiffs who can sue to challenge federal approval of leases or development agreements on Indian lands. That may be either chilling or helpful for developers: fear of project delay or invalidation of agreements through litigation filed by project opponents often concerns developers; conversely, it may allay developers' concerns, arising from much-discussed decisions that hold a developer/lessee lacks standing under the applicable Indian leasing and environmental statutes to challenge BIA's cancellation of its agreement with a tribe. Such decisions have held the developer's interests were not within the tribal- and environmental-protective interests articulated in the statutes involved.[vii] Thus, *Patchak*'s holding may not only create uncertainty and disincentives for developing tribal lands to be taken into trust under the IRA, it may also factor—favorably or unfavorably—into tribal and developer incentives for development agreements on tribal lands.

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[i] __ U.S. __, 132 S. Ct. 2199 (2012).
[ii] 555 U.S. 379 (2009).
[iii] 132 S. Ct. at 2209-10.
[iv] Brief of Federal Petitioners at 30.
[v] 132 S. Ct. at 2211-12.
[vi] *See* 25 C.F.R. § 151.12.
[vii] *See, e.g., Rosebud Sioux Tribe v. Sun Prairie*, 286 F.3d 1031, 1036-1040 (8th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).