No. 09-5324

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK,
Plaintiff-Appellant,
-v.-
KENNETH LEE SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,
Defendants-Appellees,
MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Intervenor Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(a) Parties and Amici:

Plaintiff-Appellant is David Patchak.

Defendants-Appellees are Kenneth Lee Salazar, in his official capacity as Secretary of the United States Department of the Interior, and Larry Echo Hawk, in his official capacity as Assistant Secretary -- Indian Affairs of the United States Department of the Interior (Mr. Echo Hawk's title in the official caption is incorrect).

Intervenor Defendant-Appellee is Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians.

There were no amici in the district court. The National Congress of American Indians has filed a brief on appeal as amicus curiae.

(B) Rulings Under Review: August 20, 2009 Memorandum Opinion (reported at 646 F. Supp. 2d 72 (D.D.C.)) and Order (not reported), Hon. Richard J. Leon.

(C) Related Cases: This case has not been before this Court previously. The trust acquisition that is the subject of Plaintiff's lawsuit was previously before this

Court in *Michigan Gambling Opposition v. Kempthorne*, D.C. Cir. No. 07-5092, 525 F.3d 23 (D.C. Cir. 2008).

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7 March 2011

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GLOSSARY

APA	Administrative Procedure Act
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Gun Lake Band or the Band	Intervenor Defendant-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
IGRA	Indian Gaming Regulatory Act
Interior	Department of the Interior, and, collectively, Defendants-Appellees Kenneth Lee Salazar, in his official capacity as Secretary of the United States Department of the Interior, and Larry Echo Hawk, in his official capacity as Assistant Secretary -- Indian Affairs of the United States Department of the Interior
IRA	Indian Reorganization Act
JA	Joint Appendix
MichGO	Michigan Gambling Opposition
Patchak	Plaintiff-Appellant David Patchak
the Property	the Bradley Property
QTA	Quiet Title Act

INTRODUCTION

A panel of this Court reversed the district court's dismissal of this case on prudential standing grounds and held that the Quiet Title Act (QTA) does not prohibit adjudication of this case under the Administrative Procedure Act (APA). The panel acknowledged that its decision *created* a circuit split with at least three other circuits; that alone demonstrates this case presents a question of exceptional importance and should be reheard. Slip Op. 18; Fed. R. App. P. 35(b)(1)(B) & 40. And the question on which the panel created that split has substantial implications -- when has Congress waived the United States' sovereign immunity from lawsuits challenging the United States' title to real property. The APA's waiver of federal government immunity from suit does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the *relief* which is sought." 5 U.S.C. § 702 (emphasis added). Here, the QTA forbids the relief Plaintiff-Appellant David Patchak seeks -- to divest the United States of its title to land that it currently holds in trust for Indians. In concluding otherwise, the panel asked and answered the wrong question. The panel focused entirely on relief that Patchak does not seek, reasoning that because Patchak does not expressly bring a QTA case, the QTA could not forbid the relief he seeks. The panel failed to ask and answer the question required by the APA -- whether the relief Patchak seeks in his APA suit is expressly or impliedly forbidden by the QTA. The answer to that, as every other circuit to have addressed the issue has concluded, is yes.

Further, the panel created that circuit split only after it held, in conflict with Supreme Court precedent, that Patchak has prudential standing. Instead of analyzing Patchak's prudential standing based on the statutory provision whose violation forms the basis of his complaint as Supreme Court precedent requires, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Bennett v. Spear*, 520 U.S. 154, 162, 175-76 (1997), the panel relied on a completely different statute, passed more than a half-century later, that Patchak did not seek to enforce.

This case therefore meets the criteria for rehearing and rehearing en banc, Fed. R. App. P. 35 & 40, and the Court should grant this petition.

STATEMENT

1. In May 2005, Interior announced its decision to acquire the so-called Bradley Property (located in Michigan) in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (sometimes called the Gun Lake Band). 70 Fed. Reg. 25,596, 25,596-97 (2005). Interior explained that it would wait 30 days before transferring title to the property to afford an opportunity for judicial review. *Id.* Within those 30 days, Michigan Gambling Opposition (MichGO) filed a lawsuit alleging that Interior's decision violated the Indian Gaming Regulatory Act (IGRA) as well as the National Environmental Policy Act, and that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority to the Executive Branch.

While MichGO's lawsuit worked its way through the courts, Patchak sat back. Then, more than three years after Interior's notice of its decision, Patchak

filed his lawsuit. His complaint set forth a single cause of action -- that Interior lacked authority to acquire the Property in trust pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. § 465, because the Band had not been a federally recognized tribe in June 1934. Patchak premised his standing on injuries he alleged would result from a gaming facility that the Band planned to operate on the Property. Patchak filed his single-claim complaint based solely on the IRA only after this Court denied MichGO's request to supplement the issues on appeal with that claim. *Mich. Gambling Opposition v. Kempthorne*, D.C. Cir. No. 07-5092, March 19, 2008 Order. After the district court denied Patchak's requests for an administrative stay of proceedings and a temporary restraining order, there being no legal impediment to Interior's accepting the Property in trust, the agency did so.

2. The district court dismissed Patchak's lawsuit. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009). The court held that Patchak lacks prudential standing because his alleged injuries to "his own environmental and private economic interests" are not within the zone of interests protected by 25 U.S.C. § 465, the statutory provision he alleged was violated. *Id.* at 76-78. The court also observed that its continuing subject matter jurisdiction was "seriously in doubt" because Interior had accepted the land in trust, and the United States' waiver of sovereign immunity in the QTA does not apply to Indian trust lands. *Id.* at 78 n.12.

3. A panel of this Court reversed and remanded. With respect to whether the United States had consented to Patchak's suit, the panel framed the question as

whether Patchak brought a QTA case and if not, the panel said, then "the QTA does not forbid the relief Patchak seeks, and the APA has waived the government's immunity from suit." Slip Op. 13. The panel held that "the terms of the QTA do not cover Patchak's suit," because Patchak does not seek a declaration that he alone possesses valid title to the Property and is not an adverse claimant, and therefore Patchak's claim "falls within the general waiver of sovereign immunity set forth in § 702 of the APA." Slip Op. 21.

The panel also concluded that Patchak satisfied prudential standing requirements. In so holding, the panel refused to "view[] the IRA provisions in isolation," instead concluding that, linking the IRA and IGRA "together, the limitations in those statutes arguably protected Patchak from the 'negative effects' of an Indian gambling facility." Slip Op. 8.

ARGUMENT FOR PANEL REHEARING AND REHEARING EN BANC

I. THE PANEL CREATED A CIRCUIT CONFLICT BY HOLDING THAT PATCHAK MAY CIRCUMVENT THE LIMITATIONS ON THE UNITED STATES' SOVEREIGN IMMUNITY FROM SUITS CHALLENGING ITS TITLE TO PROPERTY IN THE QUIET TITLE ACT BY INVOKING THE APA

A. The panel acknowledged that it created a circuit split when it held that Patchak may pursue his APA lawsuit notwithstanding the QTA. Slip Op. 18. It referenced three other circuits that have held that individuals like Patchak who do not claim any ownership interest in the property cannot use the APA to bring a

lawsuit that effectively challenges the United States' title to Indian trust land.[1] Rehearing is necessary to correct the panel's erroneous creation of a circuit split.

B. Prior to the QTA's enactment in 1972, the United States had not waived its immunity with respect to suits involving title to land in which it claims an interest. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). When Congress enacted the QTA's limited waiver of sovereign immunity, it included "carefully crafted provisions . . . deemed necessary for the protection of the national public interest." *Id.* at 284-85. As relevant here, the Act provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands.

28 U.S.C. § 2409a(a). Thus, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *United States v. Mottaz*, 476 U.S. 834, 843 (1986).

In 1976, Congress added a waiver of sovereign immunity to the Administrative Procedure Act. Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5

[1] *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987) (per curiam), *aff'd by equally divided Court*, *California v. United States*, 490 U.S. 920 (1989) (per curiam); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005); *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008); *Iowa Tribe of Kan. and Neb. v. Salazar*, 607 F.3d 1225 (10th Cir. 2010); *Florida v. U.S. Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985).

U.S.C. § 702). When it did, however, Congress was careful to preserve the limitations on the consent to suit under other statutes in which Congress had more narrowly waived the United States' sovereign immunity for certain classes of cases. Specifically, the last sentence of 5 U.S.C. § 702, provides in subsection (2) that "[n]othing herein" -- i.e., nothing in the APA's waiver of sovereign immunity -- "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The House and Senate reports explained that "the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. . . . If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained [under the APA] only if Congress has not intended that provision for relief to be exclusive." H.R. Rep. No. 94-1656, at 12-13 (1976); S. Rep. No. 94-996, at 11-12 (1976). In enacting the APA's waiver provision in 1976, with its explicit limitation, Congress adopted the 1969 proposal of the Administrative Conference of the United States. *See* H.R. Rep. No. 94-1656, at 12, 23-24, 26-28; S. Rep. No. 94-996, at 3, 12, 22-23, 25-27. In a memorandum supporting its proposal, the Administrative Conference explained the reason for that limitation on the sovereign immunity waiver:

> The Committee's recommendation is phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes . . . in which Congress has conditionally consented to suit. While this result would probably have been reached by the preservation of all other 'legal or

> equitable ground[s]' for dismissal [*see* 5 U.S.C. § 702(1)], which include the designation by Congress of an exclusive remedy or method of review, clause (2) of the final sentence of part (1) of the recommendation is intended to prevent any question on this matter from arising.

Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., at 138-39 (1970). Congress therefore unmistakably expressed its determination that plaintiffs not be permitted to rely on the APA's general waiver of sovereign immunity to circumvent limitations on the waiver of sovereign immunity in other statutes that address particular subject matters.

Congress's intention to give full effect to limitations on review under other statutory sovereign immunity waivers is further underscored by the fact that Congress accepted the recommendation of the Department of Justice that the APA amendment should retain the language in the Administrative Conference's proposal that withholds authority to grant relief under the APA where another statute that grants consent "impliedly" forbids relief as well as where it "expressly" does so.[2] As then-Assistant Attorney General Scalia explained in his letter urging that approach, waiver statutes enacted prior to 1976 were passed against the

[2] The version of the APA bill as originally introduced and considered by the Senate would have narrowed the scope of 5 U.S.C. § 702(2) to withhold authority to grant relief only if the other statute granted consent to suit for money damages; it also deleted the phrase "expressly or impliedly" in the Administrative Conference proposal. S. Rep. No. 94-996, at 12, 26. On the Justice Department's urging, the Senate Committee amended the provision to conform to the Administrative Conference's proposal, *id.* at 12, and it passed the House and Senate in that form.

background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular waiver statute. Assistant Attorney General Scalia further explained that because then-existing statutes that waived the United States' sovereign immunity in particular categories of cases were enacted against the backdrop of sovereign immunity, "in most if not at all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." H.R. Rep. No. 94-1656, at 28; S. Rep. No. 94-996, at 27.

C. The panel reasoned that the government had consented to Patchak's lawsuit simply because Patchak is not an "adverse claimant" to title in the Property and therefore he did not bring a QTA lawsuit. Thus, the panel held, the APA waiver of sovereign immunity remains available to him. In coming to that conclusion, the panel erred by asking the wrong question. The panel discussed only the relief that Patchak does *not* seek (i.e., he does not seek to quiet title in himself; he is not an adverse claimant). The panel never addressed the relief that Patchak *does seek* and whether the QTA expressly or impliedly forbids it. Patchak seeks to reverse Interior's acquisition of the Property as trust lands for the Band. Patchak does not dispute that the United States claims an interest in real property due to the Property's status as trust land. It is therefore of no significance that Patchak's

complaint talks in terms of challenging Interior's "decision" to accept the Property in trust for the Band. To obtain any meaningful relief, Patchak needs the courts to set aside Interior's land-into-trust decision, thus necessarily requiring the United States to relinquish its title to the Property. In fact, on appeal Patchak described the relief he seeks as including a direction to the district court "to order the Bradley [Property] taken out of trust." Br. 26. That is precisely the consequence that Congress sought to avoid by including in the QTA the bar to suits challenging the United States' title to land it holds in trust for Indians. And it therefore is, in turn, precisely the consequence that Congress sought to avoid by providing in 5 U.S.C. § 702(2) that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

D. To be sure, the panel is correct that Patchak did not (and could not) bring a lawsuit based on the QTA because he is not an adverse claimant. Slip Op. 13-16. But that does not answer the question of whether the relief that Patchak does seek in his APA lawsuit is expressly or impliedly forbidden by the QTA. The panel also draws the wrong lesson from the fact that Patchak is foreclosed from seeking review under the QTA. The QTA's purpose is to subject the United States' claim of title to adjudication by a court where there is a party who has an adverse claim to the same property and who therefore may suffer hardship as a result of his inability to remove a cloud on his title to that property. *See* H.R. Rep. No. 94-1656, at 8; S.

Rep. No. 94-996, at 7-8. Without such a limitation, the United States would be exposed to numerous lawsuits by various third persons who might wish to bring about the resolution of a controversy concerning the United States' claim of title but who have no competing claim to the same property. Such suits do not present the potential for hardship or concrete adversity regarding a particular parcel that would warrant subjecting the Executive Branch, the courts, and third parties (such as the Band in this case) to the burdens of suit. The panel's holding leads to the particularly inappropriate result that a party who claims no interest in the land at issue may challenge the nature of the United States' title to lands that are held in trust where, as here, such a suit would be barred by an explicit exception in the QTA if it were brought by a party who did claim an interest in the land.

The panel was not deterred by that anomaly, reasoning it is "far-fetched to attribute an intention to the 1972 Congress [that passed the QTA] about a subject" -- i.e., claims by individuals not seeking to quiet title in themselves -- "not within the terms of the statutory language." Slip Op. 19. That ignores, however, what Assistant Attorney General Scalia explained when Congress accepted the Department of Justice's recommendation as to the wording of the APA amendment. The 1972 Congress enacted the QTA against the background of a system that assumed the existence of a *general rule* of sovereign immunity. That Congress therefore had no reason to "expressly" forbid in the statutory language relief to individuals who were not seeking to quiet title in themselves; the general rule of

sovereign immunity already prevented those individuals from obtaining relief. The 1972 Congress comprehensively addressed and limited the waiver of sovereign immunity with respect to lawsuits challenging United States' title to real property in the QTA, and the 1976 Congress that passed the APA's waiver of sovereign immunity did not intend the APA provision to be used to circumvent that scheme and limitations on the sovereign immunity waiver. *Block*, 461 U.S. at 285 & n.22. Put another way, relief is not available to Patchak under the APA's waiver of sovereign immunity in 5 U.S.C. § 702 because the QTA is such an "other statute that grants consent to suit" but "impliedly forbids" relief to a party who does not claim an interest in the property in which the United States also claims an interest. *See Block*, 461 U.S. at 285 n.22.

II. THE PANEL'S PRUDENTIAL STANDING ANALYSIS CONFLICTS WITH SUPREME COURT PRECEDENT BY RELYING ON A STATUTE THAT DOES NOT FORM THE BASIS OF PATCHAK'S COMPLAINT AND BY CONFLATING ARTICLE III AND PRUDENTIAL STANDING PRINCIPLES

A. In addition to the "immutable requirements of Article III," the federal courts have imposed prudential requirements that bear on the question of standing. *Bennett*, 520 U.S. at 162 (quotation marks and citation omitted). A "plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint*." *Lujan*, 497 U.S. at 883 (emphasis added); *Bennett*, 520 U.S. at 162, 175-76. The zone-of-interests test "denies a right of review if the

plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). That test enables suit by a plaintiff with an interest arguably sought to be protected by the statutory provision at issue while excluding a plaintiff who might technically be injured in an Article III sense but whose interests are unrelated to the statutory provision at issue. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011); *Clarke*, 479 U.S. at 395-96. The panel's decision conflicts with that Supreme Court precedent in two ways that warrant rehearing.

B. First, the panel recognized that it did not limit its zone-of-interests analysis to the statutory provision (or even the statute) whose violation forms the legal basis for Patchak's complaint. Slip Op. 8. Instead, the panel resorted to IGRA (an act passed in October 1988, some 54 years after Congress passed the IRA) and the notion that the IRA's provisions are "linked" to IGRA. But the IRA and IGRA are "linked" only in the sense that the IRA is one vehicle by which a tribe may have land acquired in trust and having land held in trust by the United States may be a precursor to a tribe operating a gaming facility. Whether a tribe may ultimately be able to operate a gaming facility on any land held in trust for it by the United States is governed by IGRA, not the IRA, and there are other lands on which a tribe may conduct gaming, such as all lands within an Indian reservation or restricted fee land, 25 U.S.C. § 2703(4). Where Interior has determined that land

is eligible for gaming in a final agency action, an entity injured by gaming on the relevant land could bring a claim that the agency's decision violates IGRA. Indeed, MichGO brought such a challenge. Patchak's lawsuit, however, does not challenge the Property's eligibility for gaming under IGRA. Patchak's claim is that Interior lacked IRA authority to acquire the Property in trust for the Band *for any purpose*.

The only authority the panel cited for its novel approach is *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991). But that case is inapposite and actually undermines the panel's analysis. In *Air Courier*, postal-worker unions premised their prudential standing on the fact that Congress reenacted the statutory provision the unions sought to enforce as part of the 1970 Postal Reorganization Act and one of the purposes of the Postal Reorganization Act was to stabilize labor-management relations within the Postal Service. The Supreme Court *rejected* that argument. The Court acknowledged that it had sometimes looked beyond the particular statutory provision that a plaintiff invoked in its lawsuit to related provisions within the same statute when applying the zone-of-interests test. *Id.* at 529 (discussing *Clarke*). But to accept the unions' argument, the Court held, would require the Court to conclude that the Postal Reorganization Act was the relevant statute for prudential standing, "with all of its various provisions united only by the fact that they dealt with the Post Service." *Id.* The Court refused to accept that "level of generality" because it "could deprive the zone-of-interests test of virtually all meaning." *Id.* at 529-30.

In concluding that the Congress that passed the IRA in 1934 arguably sought to protect and permit suit based on interests embodied in an entirely different statute passed over a half-century later, the panel stretched what will satisfy the zone-of-interests test far beyond what the unions sought, and the Supreme Court rejected, in *Air Courier*. And by attributing an intention to the 1934 Congress regarding what interests the IRA protects based on a 1988 statute, the panel engaged in reasoning that later in its opinion it termed "far-fetched." Slip Op. 19 ("far-fetched to attribute an intention to the 1972 Congress about a subject not within the terms of the statutory language" passed by that Congress). The panel erred by failing to limit its analysis to the IRA.

C. The panel also conflated Article III and zone-of-interests principles. For example, states have proceeded with IRA claims without challenge to their prudential standing. That the "nature" of Patchak's injuries "may be different" from a state's was of no significance to the panel because Patchak's injuries "are just as cognizable" and "have long been considered sufficient for purposes of standing." Slip Op. 9-10. The panel would be correct that differences in the nature of Patchak's injury may not matter for purposes of Article III's injury-in-fact requirement. The very point of the zone-of-interests test, however, is to determine whether the "nature" of a plaintiff's injury is of the sort Congress sought to protect.

D. Had the panel engaged in the correct analysis, it is clear Patchak's alleged injuries do not fall within the zone-of-interests of the IRA provision, 25 U.S.C.

§ 465, that forms the legal basis of his complaint. Patchak's interest is his concern that the gaming facility that the Band planned to build on the Property "would detract from the quiet, family atmosphere of the surrounding rural area." JA12. It is the alleged "negative effects of building and operating the anticipated casino in Mr. Patchak's community" that form the basis of Patchak's alleged injury to his property value, his neighborhood's rural character, and nearby agricultural land. *Id.* Patchak's vague and generalized grievances have nothing to do with the purposes for which Congress enacted 25 U.S.C. § 465. The IRA's statutory text does not mandate that Interior balance interests such as the ones Patchak asserts when making a trust acquisition decision, nor does the Act contain any requirement that Interior consider the intended use of the land when exercising its IRA authority. The IRA's stated purpose is to promote Indian sovereignty and self-government, and to facilitate restoration of a tribe's land base. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). Its purpose is not protection of individual non-Indian environmental and economic interests such as Patchak's. Finding Patchak's vague and unrelated assertions of harm sufficient would vitiate the separate requirement that a plaintiff be within the statute's zone of interests.

The panel's erroneous analysis warrants rehearing.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

s/Aaron P. Avila

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90-6-24-00981

ADDENDUM

PANEL SLIP OPINION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2010 Decided January 21, 2011

No. 09-5324

DAVID PATCHAK,
APPELLANT

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

John J. Bursch argued the cause for appellant. With him on the briefs was *Daniel P. Ettinger*.

Aaron P. Avila, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief was *Elizabeth Ann Peterson*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Edward C. DuMont argued the cause for appellee Match-E-Be-Nash-She-Wish band of Pottawatomi Indians.

With him on the brief were *Seth P. Waxman*, *Demian S. Ahn*, *Conly J. Schulte*, and *Shilee T. Mullin*.

John H. Dossett and *Riyaz A. Kanji* were on the brief for *amicus curiae* National Congress of American Indians in support of appellees.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: The district court dismissed David Patchak's suit to prevent the Secretary of the Interior from holding land in trust for an Indian tribe in Michigan. Patchak's appeal presents two jurisdictional issues: whether, as the district court held, he lacks standing; and whether, if he has standing, sovereign immunity bars his suit.

The land consists of 147 acres in Wayland Township, Michigan, a rural, sparsely populated farming community. The Secretary published in the Federal Register his decision to take this property—the Bradley Tract—into trust for the Match-E-Be-Nash-She-Wish Band, also known as the Gun Lake Band. 70 Fed. Reg. 25,596 (May 13, 2005). The Band owned the land and wanted to construct and operate a gambling facility there. To do this, the Band had to convince the Interior Secretary to take title to the land into trust pursuant to the Indian Gaming Regulatory Act. *See* 25 U.S.C. §§ 2701–21; *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 191-92 (D.C. Cir. 2010).

The Secretary's notice in the Federal Register announced that he would wait at least thirty days before consummating the transaction. The purpose of the delay, which 25 C.F.R.

§ 151.12(b) required, was "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." 70 Fed. Reg. at 25,596.

During the thirty-day period, an anti-gambling organization—"MichGO"—brought an action claiming that the Secretary had violated the National Environmental Policy Act and the Indian Gaming Regulatory Act. The district court issued a stay of the Secretary's action. The court later dismissed the organization's suit, and this court affirmed. *See Mich. Gambling Opposition* (*MichGO) v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd sub nom. Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

In the meantime, Patchak filed his complaint. He alleged that he lived near the Bradley Tract; that the Tribe's gaming facility would attract 3.1 million visitors per year; that this would destroy the peace and quiet of the area; that there would be air, noise and water pollution; that there would be increased crime in the area and a diversion of police and medical resources; and that the Secretary's proposed action was *ultra vires*. Patchak invoked general federal question jurisdiction and the Administrative Procedure Act. He claimed that because the Gun Lake Band was not under federal jurisdiction in 1934, the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79, did not authorize the Secretary to take the Band's land into trust. The Gun Lake Band intervened as a defendant.

After this court affirmed the dismissal of the *MichGO* action, the stay expired. The district court then denied Patchak's emergency motion for an order preventing the Secretary from proceeding with the land transaction. On January 30, 2009, the Secretary took the Bradley Tract into trust. Three weeks later,

on February 24, the Supreme Court issued its opinion in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). The Court agreed with Patchak's argument that § 479 of the Indian Reorganization Act—the IRA—limited the Secretary's trust authority to Indian tribes under federal jurisdiction when the IRA became law in 1934.

Despite *Carcieri*, the Secretary urged the district court to dismiss Patchak's suit. He argued that the Quiet Title Act, 28 U.S.C. § 2409a, precluded any person from seeking to divest the United States of title to Indian trust lands. In other words, by taking the Bradley Tract into trust for the Gun Lake Band while Patchak's suit was pending, the Secretary deprived the court of jurisdiction.

In August 2009, the district court dismissed the suit on a different ground—namely, that Patchak, "at a minimum, lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The court reasoned that Patchak's "interests do not only not fall within the IRA's zone-of-interests, but actively run contrary to it." *Id.* at 78. The court also expressed doubt about its subject matter jurisdiction in light of the Quiet Title Act. *Id.* at 78 n.12.

I

There is no doubt that Patchak satisfied the standing requirements derived from Article III of the Constitution. Neither the Secretary nor the Band argues otherwise. In terms of Article III standing, the impact of the Band's facility on Patchak's way of life constituted an injury-in-fact fairly traceable to the Secretary's fee-to-trust decision, an injury the court could redress with an injunction that would in effect prevent the

Band from conducting gaming on the property. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

We believe, contrary to the district court, that Patchak also fulfilled the judicially created zone-of-interests test for standing. The test began as a "gloss" on § 702 of the Administrative Procedure Act, 5 U.S.C. § 702. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987). Section 702 allows judicial review of agency action by a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." As the Supreme Court formulated the test in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970), the "adversely affected or aggrieved" plaintiff must be trying to protect an interest of his that is "*arguably* within the zone of interests to be protected" by the "relevant" statutory provisions. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

The Supreme Court introduced the zone-of-interests test in recognition of the "trend . . . toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154. The APA had "pared back traditional prudential limitations." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985). Given the APA's "generous review provisions," *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (internal quotation marks omitted), and the "drive for enlarging the category of aggrieved 'persons,'" *Data Processing*, 397 U.S. at 154, the test is not "especially demanding," *Clarke*, 479 U.S. at 399-400.

The Secretary tells us that the Indian Reorganization Act is "not concerned with the interests that Patchak asserts in this litigation." DOI Br. 31. The Band adds that the function of the IRA is to "give the Indians the control of their own affairs and

of their own property." *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting 78 Cong. Rec. 11125 (1934)). But application of the zone-of-interests test does not turn on such generalities. *See Nat'l Credit Union Admin.*, 522 U.S. at 492-93. Patchak did not have to show that the Indian Reorganization Act was meant to benefit those in his situation. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *Am. Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 815 (D.C. Cir. 2005). The "analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Mova*, 140 F.3d at 1075.

As the Secretary's announcement in the Federal Register stated, IRA § 465 (and the definition of Indians in § 479)[1] served

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[1] Section 465 states:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in

as the predicate for the government's taking the Gun Lake Band's property into trust for the purpose of gaming under § 2719(b)(1)(B)(ii) of the Gaming Act.[2] The IRA provisions

> Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 479 defines "Indians" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

[2] *See* 70 Fed. Reg. at 25,596. The Gaming Act permits federally recognized Indian tribes to conduct gaming on "Indian lands." The Act defines "Indian lands" to mean all lands within any Indian reservation and "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . .." 25 U.S.C. § 2703(4). Indian gaming is not permitted on "newly acquired lands"—that is, lands the Secretary took into trust for a tribe after October 17, 1988, when the Gaming Act went into effect. An exception to this bar, on which the Secretary relied in accepting the Bradley Tract, allows Indian gaming on lands the Secretary takes into

interpreted in *Carcieri v. Salazar*, 129 S.Ct. at 1066, limit the Secretary's trust authority. He may act only on behalf of tribes that were under federal jurisdiction at the time of the IRA's enactment in 1934. When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected. And because of their interests, they are proper parties to enforce the IRA's restrictions.

In reaching this conclusion, we have not—as the Secretary would have it—viewed the IRA provisions in isolation. Patchak's asserted injuries are the "negative effects of building and operating a casino" in his community. The Secretary claims that these "vague and generalized grievances have nothing to do with the purposes for which Congress enacted 25 U.S.C. § 465" and thus do not grant him prudential standing. DOI Br. 32. But Patchak's standing—for purposes of both Article III and the zone-of-interests test—must be evaluated in light of the intended use of the property. The IRA provisions are linked to the Gaming Act. *See Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 530 (1991). In its fee-to-trust application filed with the Secretary, the Gun Lake Band invoked both statutes. One of the considerations in the Secretary's decision whether to take land into trust pursuant to the IRA is whether doing so would "further economic development . . . among the Tribes." *See Mich. Gambling Opposition*, 525 F.3d at 31. Indian gaming is meant to do just that. 25 U.S.C. § 2701(4). Taken together, the limitations in these statutes arguably protected Patchak from the "negative effects" of an Indian gambling facility.

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trust after the 1988 date "as part of . . . the initial reservation of an Indian tribe." *Id.* § 2719(b)(1)(B)(ii); *see Butte Cnty., Cal.*, 613 F.3d at 191-92.

The Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments. A regulation already mentioned (25 C.F.R. § 151.12(b)) gives "affected members of the public" thirty days to seek judicial review before the Secretary takes land into trust for an Indian tribe. 61 Fed. Reg. 18,082 (1996). By any measure, Patchak fits within the category of "affected members of the public." Other regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to "potential conflicts of land use." 25 C.F.R. § 151.10(c), (f). Internal memoranda regarding the Band's application show that members of the Interior Department considered such conflicts here and accepted the Wayland Township Supervisor's assertion that the gaming facility would be "compatible with the surrounding land use." We realize that the APA and *Data Processing* require the litigant's interests to be measured by statutes not regulations. *See Nat'l Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1043 (D.C. Cir. 1989). But regulations implementing statutes may cast some light on what the statutes arguably protect.

The Secretary argues that the State of Michigan, not Patchak, is the proper entity to police the Secretary's authority to take lands into trust under the IRA. He acknowledges cases in which states or municipalities or their officials have been allowed to sue to prevent the Secretary from taking land into trust for the purposes of Indian gaming. *See, e.g.*, *Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001). *Carcieri v. Salazar* is another example, although the land there was to be used for Indian housing rather than gaming. 129 S.Ct. at 1060. (The plaintiffs in *Carcieri* were a town, a state and the governor.) The Secretary offers a distinction between those cases and Patchak's: a state in which the land is

located is a proper entity to police the Secretary's trust decision "because it stands to lose some of its regulatory authority as a result of Interior's trust acquisition." DOI Br. 36-37. But the distinction cannot hold. If the interests of a state or a municipality are within the zone of interests the IRA protects then so are Patchak's interests. A state may, as the Secretary contends, lose some regulatory authority and, depending on the intended use of the trust land, some tax revenue. *But see Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989). But the Secretary is merely describing the nature of the state's injuries. Patchak's injuries may be different, but they are just as cognizable. Among other things, he alleged that the rural character of the area would be destroyed, that the value of his property would be diminished and that he would lose the enjoyment of the agricultural land surrounding the casino site. These sorts of injuries have long been considered sufficient for purposes of standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

As a practical matter it would be very strange to deny Patchak standing in this case. His stake in opposing the Band's casino is intense and obvious. The zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Patchak is surely not in that category. We therefore hold that he had prudential standing to bring this action.

II

This brings us to the question whether the government has consented to Patchak's suit.

Section 702 of the APA waives the government's sovereign immunity in the following terms: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702. Patchak does not seek money damages and he has stated a claim that an agency—the Interior Department—and its Secretary acted under color of legal authority.

Patchak's action therefore seems to fit within the waiver of sovereign immunity in § 702. But the last clause of the section states: "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Secretary argues that the Quiet Title Act is such a statute.

We set forth the relevant provisions of the Quiet Title Act in the margin.[3] The Act, in its first subsection, waives sovereign

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[3] 28 U.S.C. § 2409a provides in relevant part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

immunity: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). This is followed by the provision that directly concerns us: "This section does not apply to trust or restricted Indian lands . . .." *Ibid.* The Supreme Court has held that the Act provides "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property," *Block v. North Dakota*, 461 U.S. 273, 286 (1983), and that, when applicable, the Indian lands exception operates "to retain the United States' immunity to suit," *United States v. Mottaz*, 476 U.S. 834, 842 (1986).

> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.
>
> (c) No preliminary injunction shall issue in any action brought under this section.
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> (d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

The proper question therefore is whether Patchak's suit is, in the words of the statute, the sort of "action under this section" for which the United States has waived sovereign immunity except with respect to Indian lands. That is, did Patchak bring a Quiet Title Act case? *Cf. Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992). If not, the Quiet Title Act does not forbid the relief Patchak seeks, and the APA has waived the government's immunity from suit. *Id.* at 609; *see also Block v. North Dakota*, 461 U.S. 273, 286 n.22 (1983).

The official name of the Quiet Title Act, passed in 1972, was "An Act to permit suits to adjudicate certain real property quiet title actions." Pub. L. No. 92-562, 86 Stat. 1176.[4] This provides a clue about the statute's coverage. Actions to "quiet title" originated in the courts of equity as a means of preventing a multiplicity of suits at law. 4 POMEROY, EQUITY JURISPRUDENCE § 1394 (5th ed. 1941). Referred to as either "bills of peace" or "bills *quia timet*," they existed in two forms. The first allowed the holder of legal title to land to prevent a single adverse claimant from bringing successive actions of ejectment against the plaintiff for the same parcel. 1 *Id.* § 253. For equity to intervene, the plaintiff was required to be in possession of the land and to have sufficiently established his title in at least one previous action at law. *Ibid.* The second form allowed the holder of legal or equitable title to land to bring one suit against many persons asserting equitable titles to the same land. 4 *Id.* § 1396. Like the first form, plaintiffs were required to be in

[4] Before enactment of the Quiet Title Act, an adverse claimant's only legal remedy was an action for just compensation under the Tucker Act, 28 U.S.C. § 1491. Unless the United States voluntarily instituted a quiet title action or the claimant successfully petitioned Congress or the Executive for discretionary relief, he could not recover possession of the property. *See Block*, 461 U.S. at 280-81.

possession of the land in dispute. *Ibid.* Later statutes expanded quiet title actions, sometimes removing the requirement of possession, *ibid.*, and often allowing the actions to determine ownership. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 551 (3d ed. 2002).

As should be apparent from this summary, a common feature of quiet title actions is missing from this case. In each of the forms just mentioned, the plaintiff would seek to establish his rightful title to the real property. The modern definition of the action is the same: "A proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it." BLACK'S LAW DICTIONARY 34 (9th ed. 2009). Patchak is not requesting relief of that sort; he mounts no claim of ownership of the Bradley Tract. We recognize that the title of a statute cannot alter the meaning of the statute's operative language. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). But it is of some interpretive use. *Ibid.* And here there is more than just the title. As part of the same 1972 legislation, Congress amended the venue statute to provide that "[a]ny civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States" shall be brought in the district where the property is located. 28 U.S.C. § 1402(d).[5] Congress also gave the district courts jurisdiction over civil actions "under section 2409a to quiet title." 28 U.S.C. § 1346(f). Congress thus viewed § 2409a as authorizing a proceeding known as a "quiet title" action. And the language of § 2409a firmly indicates that Congress intended

[5] *See also* 28 U.S.C. § 2410(a)(1), dealing with "quiet title" actions involving property in which the United States holds a security interest.

to enact legislation building upon the traditional concept of an action to quiet title.[6]

This much is apparent from the Act's pleading requirement. "The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstance under which it was acquired . . .." 28 U.S.C. § 2409a(d). Failure to comply may result in dismissal of the complaint. *See, e.g.*, *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978). This

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[6] As the Department of Justice put it:

> The bill would allow the United States to be made a party to an action in the Federal district courts to quiet title to lands in which the United States claims an interest.
>
> Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills *quia timet*, which allowed the plaintiff to institute suit when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication on title and relief against further suits. Similarly, one who feared that an outstand [sic] deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. The plaintiff in such suits was required to be in possession, and the usual grounds of equitable jurisdiction (an imminent threat and an inadequate remedy at law) had to be present.

Letter from Attorney General to Speaker, House of Representatives, *reprinted in* H.R. Rep. No. 92-1559, at 8-9 (1972).

provision tells us what constitutes an "action under this section." 28 U.S.C. § 2409a(a). It is an action in which the plaintiff is claiming an interest in real property contrary to the government's claim of interest. Neither the brief of the Secretary nor that of the Band confronts this language.

Nor do they deal with subsection (b) of the Act. This provision gives the United States the option of retaining possession of the property if it loses the quiet title action, so long as the government pays just compensation to the person entitled to the property. *Id.* § 2409a(b). The provision is senseless unless there is someone else—the plaintiff—claiming ownership. Again, the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit.

The origins of the Act and the committee reports accompanying it contain examples of the types of suits the legislation was expected to cover. *See Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on S. 216*, 95th Cong. 2-6 (1972) (statement of Sen. Frank Church) ("House Judiciary Committee Hearing"); H.R. Rep. No. 92-1559 (1972); S. Rep. No. 92-575 (1971). All of these examples were suits in which plaintiffs claimed title to property. *E.g.*, H.R. Rep. No. 92-1559, at 6; S. Rep. No. 92-575, at 1, 5; *Dispute of Titles on Public Lands: Hearing Before the Subcomm. on Pub. Lands of the S. Comm. on Interior and Insular Affairs*, 92d Congress 20, 55 (1971); House Judiciary Committee Hearing, *supra*, at 45-46 (statement of R. Blair Reynolds).

Two Supreme Court decisions have interpreted the Quiet Title Act. Neither is inconsistent with our view that Patchak's suit is not an action under that statute, although the government and the Band try to convince us otherwise. *Block v. North Da-*

kota, 461 U.S. 273 (1983), was a typical quiet title action. As the Court put it, "the United States and North Dakota assert competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." *Id.* at 277. The Court held in *Block* that the Quiet Title Act was "the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.* at 286. But by "adverse claimant" the Court meant "States and all others asserting title to land claimed by the United States," *id.* at 280, a description that does not fit Patchak.

Three years later, the Court took up the Quiet Title Act once more in *United States v. Mottaz*, 476 U.S. 834 (1986). The issue was, as in *Block*, the applicability of the Act's twelve-year statute of limitations. The plaintiff claimed that the Bureau of Indian Affairs had sold three parcels of land in which she had an interest to the United States Forest Service and the Chippewa National Forest "without [her] consent or permission." *Id.* at 838. She requested "[d]amages in a monetary sum equal to the current fair market value of each parcel illegally transferred," invoking several jurisdictional grants (not including the Quiet Title Act). *Ibid.* (internal quotation marks omitted) (alteration in original). The Court held again that the Quiet Title Act provides the exclusive means for "adverse claimants" to challenge the United States' title. *Id.* at 841. Mottaz sought "a declaration that she alone possesses valid title to her interests in the [parcels of land] and that the title asserted by the United States is defective." *Id.* at 842. Her claim was therefore "clearly . . . within the Act's scope." *Ibid.* Because her claim had accrued more than twelve years before she filed her complaint, it was barred. *Id.* at 844.

In short, the plaintiffs in *Block* and *Mottaz* were the type of "adverse claimants" traditionally found in quiet title actions. Patchak's position is different. He does not seek a declaration

that "[]he alone possesses valid title" to the Bradley Tract, *Mottaz*, 476 U.S. at 842, and he is not an adverse claimant.

We acknowledge the views of the Ninth, Tenth and Eleventh Circuits that this difference does not matter, that the Quiet Title Act bars suits seeking to "divest[] the United States of its title to land held for the benefit of an Indian tribe," whether or not the plaintiff asserts any claim to title in the land. *Fla. Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985); *see also Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-63 (10th Cir. 2004); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987).

These opinions appear to rest on two related rationales, neither of which we find convincing. The first is that the legislative history of the Indian lands exception shows that it rested on the federal government's "solemn obligations . . . to the Indian people." *Neighbors*, 379 F.3d at 962 (quoting H.R. Rep. No. 92-1559, at 13 (1972) (letter from Mitchell Melich, Solicitor for the Dep't of the Interior)); *see also Metro. Water Dist.*, 830 F.2d at 143-44; *Fla. Dep't*, 768 F.2d at 1253-54. This may be true, but we do not see why that should alter our analysis. If Patchak's suit is the type of quiet title action the Act governs, then the fact that the disputed property is Indian trust land means that government has not waived sovereign immunity. It also means that Patchak could not rely on § 702 of the APA to supply the missing consent to suit. On the other hand, if—as we believe—Patchak's suit is not governed by the Quiet Title Act, then § 702 of the APA waives the government's sovereign immunity.

The second rationale is this: "If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress

intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust lands." *Neighbors*, 379 F.3d at 963; *see Fla. Dep't*, 768 F.2d at 1254-55. We do not find the point at all telling. Congress passed the Quiet Title Act in 1972. At the time there was no general waiver of the government's sovereign immunity for non-monetary actions. The 1972 Congress therefore did not have to concern itself with plaintiffs such as Patchak who were not seeking to quiet title. Patchak could not have successfully sued the United States over the Bradley Tract even if Congress had not inserted the Indian lands exception in the Quiet Title Act. Given these circumstances, it seems to us rather far-fetched to attribute an intention to the 1972 Congress about a subject not within the terms of the statutory language.

Matters changed in 1976 when Congress amended the APA to include a general waiver of sovereign immunity. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. § 702). This legislation, recommended by the Administrative Conference of the United States[7] and supported by the Department of Justice,[8] was consistent with the trend toward easing restrictions on judicial review of administrative action, a trend identified in *Data Processing*, 397 U.S. at 154, and its companion case, *Barlow v. Collins*, 397 U.S. 159, 166 (1970). As then–Assistant Attorney General Antonin Scalia explained in a letter to Senator Kennedy, one of the main reasons for abolishing sovereign immunity in these kinds of cases was "the failure

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[7] 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 23-24 (1970).

[8] Letter from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Edward M. Kennedy, Chairman, Subcomm. on Admin. Practice & Procedure, U.S. Senate, *reprinted in* H.R. Rep. No. 94-1656, at 25.

of the criteria for sovereign immunity, as they have been expressed in a long and bewildering series of Supreme Court cases, to bear any relationship to the real factors" that should control.[9] By waiving sovereign immunity, Congress sought to ensure that courts could review "the legality of official conduct which adversely affects private persons." H.R. Rep. No. 94-1656, at 5. As the House Report put it:

> Just as there is little reason why the United States as a landowner should be treated any differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or offer acting in an official capacity.

Id. at 9.

We may agree that the Quiet Title Act of 1972 reflects a congressional policy of honoring the federal government's solemn obligations to Indians with respect to title disputes over Indian trust land. We may also agree that the amendment to § 702 of the APA in 1976 reflects a congressional policy of easing restrictions on judicial review of agency action seeking non-monetary relief. Which of these policies should prevail? The courts of appeals mentioned above have extended the reach of the Quiet Title Act beyond its text to favor one policy without giving any indication that they considered the other. For our part, we agree with the Supreme Court in *Carcieri* that we need

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[9] Letter from Antonin Scalia, *supra* note 8, at 26; *see also* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

not chose between "these competing policy views." 129 S.Ct. at 1066-67. For the reasons we have discussed, it is enough that the terms of the Quiet Title Act do not cover Patchak's suit. His action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA.[10]

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The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[10] In light of our determination that the Quiet Title Act does not bar Patchak's claim, we do not address whether sovereign immunity should be determined as of the date his complaint was filed rather than after the Secretary took the land into trust. *Cf. Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 570 (2004). We also decline Patchak's request that we decide whether the Band was under federal jurisdiction in 1934, or any other remaining issues. *See Doe v. diGenova*, 779 F.2d 74, 89 (D.C. Cir. 1985).

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's May 15, 2009 Administrative Order, I hereby certify that on this date, March 7, 2011, I caused the foregoing Defendants-Appellees' Petition for Panel Rehearing and Rehearing En Banc to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by counsel of record in the Service Preference Report. I have also served two copies by U.S. Mail to the following addresses:

David Patchak
2721 6th Street
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John Hayden Dossett
National Congress of American Indians
2010 Massachusetts Avenue, NW
Washington, DC 20036

As required by the rules, I have also caused nineteen copies of this brief to filed with the Court.

s/Aaron P. Avila

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