

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK,	:	Docket No. CV08-1331
	:	(RJL)
Plaintiff,	:	
	:	January 26, 2009
	:	
v.	:	10:00 a.m.
	:	
DIRK KEMPTHORNE, ET AL.,	:	
	:	
Defendants.	:	
. . . . .	:	

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER CONFERENCE  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	BRUCE A. COURTADE, ESQ. Rhoades Mickee 161 Ottawa Avenue, NW Grand Rapids, Michigan 49503
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For the Defendant Dirk Kempthorne:	GINA L. ALLERY, ESQ.  U.S. Department of Justice  PO Box 44378  Washington, DC 20026
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(Appearances) Continued:

For the Intervenor Defendant

Match-E-Be-Nash-She-Wish

Band of Pottawatomi Indians: SETH P. WAXMAN, ESQ.

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Washington, D.C. 20001

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P R O C E E D I N G S

1  
2 COURTROOM DEPUTY: Calling civil case 08-1331 David  
3 Patchak versus Dirk Kempthorne, et al. Would counsel please  
4 come forward and identify yourself for the record?

5 MR. COURTADE: Your Honor, Bruce Courtade here on  
6 behalf of Mr. Patchak.

7 THE COURT: Welcome.

8 MS. ALLERY: Good morning, your Honor, I am Gina Allery  
9 here on behalf of the United States.

10 THE COURT: Welcome.

11 MR. WAXMAN: Good morning, your Honor, Seth Waxman on  
12 behalf of the intervenor tribe.

13 THE COURT: Welcome. Will Plaintiff's counsel come up?

14 MR. COURTADE: Thank you, your Honor.

15 THE COURT: I have had a flurry of Motions from you in  
16 the last few days. You must not have litigated in this Court  
17 very often.

18 MR. COURTADE: No, I do not, your Honor. It is my  
19 first time.

20 THE COURT: It is obvious. You file one TRO.

21 MR. COURTADE: I understand.

22 THE COURT: That's how we do things here. Don't be  
23 coming in here with a second and a third. That's not how we do  
24 things in this Court. You should get local counsel and check  
25 with them. That's not how we litigate in this Court. You get

1 one bite at the apple. Don't be filing unnecessary pleadings.  
2 This Court is very busy with a lot of things. We don't need  
3 extra pleadings and the Defendants don't need to be responding  
4 to extra pleadings that aren't necessary. One TRO.

5 I assume that's what you want is a TRO, right?

6 MR. COURTADE: Your Honor, we do and the second Motion,  
7 if I -- again I apologize -- the last thing I want to do is  
8 burden the Court -- the reason for the filing on Friday was for  
9 the off chance that the Court was not going to decide. We  
10 hadn't heard anything about when we could expect a decision and  
11 we needed something in place if the Government's 5 o'clock p.m.  
12 deadline on Monday expired or --

13 THE COURT: What do you mean you needed something in  
14 place? What does that mean?

15 MR. COURTADE: Well --

16 THE COURT: What does that mean? Do you know anything  
17 about TROs?

18 MR. COURTADE: Absolutely, your Honor.

19 THE COURT: Do you know that a TRO is not an appealable  
20 order?

21 MR. COURTADE: Absolutely.

22 THE COURT: You know that? How about a PI? Is that an  
23 appealable order?

24 MR. COURTADE: Actually I don't -- haven't looked at  
25 that, your Honor. But, no, the reason that I needed something in

1 place was because as of Friday morning, there was nothing in  
2 place and --

3 THE COURT: You filed your pleading. The Court could  
4 rule on the pleadings. You don't have a right to this hearing  
5 right now. The Court is giving you a hearing to give you a  
6 chance and to give the Defendants a chance to express their  
7 position over and above what's on paper. So don't be flooding  
8 this Court with extra pleadings that are unnecessary and frankly  
9 frivolous. You filed your one pleading. That's what you get.  
10 Now, you are asking for extraordinary relief.

11 MR. COURTADE: I understand, your Honor.

12 THE COURT: You can have 15 minutes.

13 MR. COURTADE: Okay. Thank you.

14 THE COURT: Explain why the Court should grant a TRO.  
15 Why should this Court grant a TRO?

16 MR. COURTADE: Because without a TRO in place, the  
17 Government can take the land in trust.

18 THE COURT: Right.

19 MR. COURTADE: Once the land is taken in trust,  
20 everything is moot. This Court cannot --

21 THE COURT: Right.

22 MR. COURTADE: -- review that decision.

23 THE COURT: Right.

24 MR. COURTADE: Even the United States Supreme Court  
25 cannot review that decision.

1 THE COURT: Right.

2 MR. COURTADE: And the Government has taken the  
3 position and admitted that they will argue as soon as the land  
4 is taken into trust, this is done.

5 THE COURT: Right.

6 MR. COURTADE: That constitutes the irreparable injury  
7 to David Patchak and his interests because --

8 THE COURT: But it is not just that simple, is it?

9 MR. COURTADE: No, it is not simple.

10 THE COURT: It is not just an issue of irreparable harm,  
11 is it?

12 MR. COURTADE: No, it is not, your Honor.

13 THE COURT: No. Where is the likelihood of success on  
14 the merits? Let's hear about that.

15 MR. COURTADE: The Indian Regulation Act of 1934 states  
16 that only tribes which were federally recognized, now federally  
17 recognized are entitled to protection under the IRA. Gun Lake  
18 band was not recognized in 1934. Therefore, they are not  
19 entitled to rely on IRA to have land taken in trust.

20 The very issue is before the Supreme Court in Carcieri  
21 and we have briefed that obviously a little too often, but we  
22 expect a decision on that any day. That will absolutely answer  
23 the decision, or answer the question, but we believe just this  
24 Court can look at the law and say the law clearly on its face  
25 says they have to be now recognized when the act was passed.

1 THE COURT: Um-hmm.

2 MR. COURTADE: Therefore, it is a strong case. It is  
3 common sense reading of the statute and, in fact, looking at  
4 Chief Justice Roberts' comments and oral argument in Carcieri, I  
5 mean he said in order to accept the Government's position that  
6 now is ambiguous, you would have to ignore that. You would have  
7 to strike that word from the statute which obviously under  
8 statutory construction you are not supposed to do. So that's the  
9 strength of the case.

10 THE COURT: Anything else?

11 MR. COURTADE: Well, I don't know if the Court has any  
12 more questions.

13 THE COURT: Well, you have read their pleadings. They  
14 raise a whole host of arguments. Do you want to respond to some  
15 of them?

16 MR. COURTADE: Well, some of them particularly they are  
17 not --

18 THE COURT: Do you think they are frivolous?

19 MR. COURTADE: They are not frivolous but they are too  
20 early.

21 THE COURT: Go ahead. Tell me what's wrong with their  
22 pleadings.

23 MR. COURTADE: First of all, what the Government is  
24 trying to do here is to push this through before Carcieri can be  
25 decided. I mean that just --

1 THE COURT: It bothers you?

2 MR. COURTADE: Well, it doesn't seem appropriate.

3 THE COURT: It doesn't seem appropriate. Is that a  
4 legal standard that you are uttering there?

5 MR. COURTADE: No, your Honor.

6 THE COURT: It just doesn't seem appropriate, is that a  
7 grounds to grant a TRO?

8 MR. COURTADE: What I would say is that it would be  
9 unjust and that that would be grounds to grant the TRO.

10 THE COURT: Have you got a comparable case where an  
11 injustice of that kind was the basis for granting a TRO?

12 MR. COURTADE: Well, I think if we look at Judge Penn's  
13 opinion in the MichGo case where he granted a TRO under very  
14 similar circumstances, he found that the imminent threat of the  
15 Government's action was sufficient to grant the TRO, and I cited  
16 Judge Penn in our brief.

17 The Court asked for things that weren't in writing, but  
18 if the Court would indulge me, he said that the D.C. Circuit  
19 should have a chance to review any appeal brought by Plaintiff  
20 from the decision entered in this case because of the imminent  
21 nature of agency action. It says that the Defendants in that  
22 case said they had until March 5, 2007, at 5 o'clock p.m. And  
23 then Judge Penn said: This factor weighs heavily in Plaintiff's  
24 favor.

25 So again under very similar circumstances, Judge Penn

1 said, reading his opinion, he said he wasn't too sure that they  
2 had any chance of winning. As it turns out, he was correct.  
3 They lost on appeal, but the imminent threat that the Government  
4 could moot that claim without having a chance to hear it or have  
5 it decided on its merits was sufficient in Judge Penn's mind to  
6 grant the TRO.

7 THE COURT: What about the PI?

8 MR. COURTADE: We need to --

9 THE COURT: Did he grant the PI?

10 MR. COURTADE: Absolutely. I am sorry.

11 THE COURT: Did Judge Penn grant the PI?

12 MR. COURTADE: He granted a stay. It was a different  
13 Motion. It was a stay and then the stay was in place until they  
14 appealed and then the appellate Court granted a stay pending the  
15 completion of the appeal. So, in essence, it was a PI even  
16 though it was an administrative stay pending the appeal. So  
17 there was never an official PI entered, but it was the  
18 equivalent. So again that, we briefed that.

19 As far as the respective damage to the parties, at this  
20 point there is no damage that will result to the intervenor or  
21 to the Government because right now there is no compact in place  
22 with the State of Michigan that would allow them to open up  
23 their class three facility.

24 The State of Michigan, the Governor has entered an  
25 agreement, a tentative agreement. The House has issued a

1 resolution that said they are in favor of it, but it also  
2 requires action by the Senate and at this point the Senate has  
3 not and there is no indication that they will take this up.  
4 Frankly, I think they are waiting to see what the determination  
5 is of this litigation. So right now there is no damage to --

6 THE COURT: How do you know that?

7 MR. COURTADE: How do I know --

8 THE COURT: What is your basis to say that?

9 MR. COURTADE: Which part of it, your Honor? The no  
10 damage or the --

11 THE COURT: You just made a representation to this  
12 Court that the legislature of Michigan is awaiting a decision by  
13 this Court before it acts. Now, that's a very substantial  
14 statement to be making in a Federal courtroom. Do you have a  
15 basis for that statement? Do you have a statement by the  
16 Majority Leader in the State Senate, for example?

17 MR. COURTADE: I do not have a written statement from a  
18 Majority Leader, your Honor, and I think --

19 THE COURT: What have you got, a ouija board? How do  
20 you know what they are thinking? What is your basis to make that  
21 claim in this Court that that's what the legislature of Michigan  
22 is doing? Give me your basis. Is that just conjecture on your  
23 part?

24 MR. COURTADE: Your Honor, it is, first off, I said I  
25 believe that's what they are doing. My belief is based on

1 conversations that I have had with --

2 THE COURT: Have you got an affidavit?

3 MR. COURTADE: No, I don't, your Honor.

4 THE COURT: Don't be coming in here with conjecture as  
5 the basis for getting a TRO. Don't please.

6 MR. COURTADE: Well, the thing that I am not  
7 conjecturing about and that there is no question about is that  
8 there is no compact in place and to the extent that, you know,  
9 reversing the shoes to the extent that the Government or the  
10 intervenor argues that there is damage, that is pure conjecture  
11 because without a compact they cannot open a class three  
12 facility.

13 So the status quo which is all we are trying to  
14 maintain is there is no land in trust. Without the land in  
15 trust, they cannot open a gaming facility, but once they take  
16 that, excuse me, once they take that land in trust, there is  
17 nothing that anybody can do about it.

18 As far as the public interest, your Honor, again there  
19 are three aspects of public interests that I would submit are  
20 paramount here. First is, as Chief Justice Roberts indicated,  
21 it is an extraordinary assertion of power by the Department of  
22 Interior to remove land from the state and local control and to  
23 give it to an Indian tribe under the IRA.

24 THE COURT: What about the point made by the Defendant  
25 that you relied on the MichGo litigation to resolve this issue?

1 MR. COURTADE: I did not rely and Mr. Patchak did not  
2 rely on the Michigan litigation, the MichGo litigation. What we  
3 said --

4 THE COURT: So that's just a false statement?  
5 Plaintiff concedes that he knew about Michco's litigation and  
6 consciously decided to allay Michco's efforts instead of filing  
7 his own claim or intervening in this case. Is that just a false  
8 statement?

9 MR. COURTADE: I believe that is a false statement.

10 THE COURT: By a Justice Department attorney, right?

11 MR. COURTADE: Based on a misunderstanding by the  
12 Justice Department, your Honor.

13 THE COURT: Misunderstanding. All right.

14 MR. COURTADE: And Mr. Patchak filed a statement  
15 explaining that he did not in fact rely on them regarding  
16 Carcieri, that in fact the Government -- excuse me -- the MichGo  
17 lawsuit did not raise Carcieri and that -- again, your Honor, I  
18 always try and anticipate what the other side is coming from.  
19 If we would have tried to file a lawsuit on behalf of David  
20 Patchak, they would have argued there is no need for that  
21 lawsuit. All of the issues are being raised in MichGo.

22 So until this Carcieri issue came up, there was no  
23 reason for David Patchak to file any lawsuit. So he did not --  
24 he was aware of the MichGo lawsuit. He followed it in the  
25 newspapers, and that was the extent of it.

1 THE COURT: Why didn't he seek to intervene?

2 MR. COURTADE: Because at that point there was no need  
3 for him to intervene and it would have cost him money and --

4 THE COURT: He just wanted to intervene when it started  
5 going in the wrong direction? Is that what he wanted to do?

6 MR. COURTADE: No. He sought to initiate his own  
7 lawsuit when he became aware of a new legal theory that was not  
8 and ultimately was decided it could not be raised in the MichGo  
9 lawsuit.

10 Again, just so the record is clear on this, there have  
11 been some allegations that Mr. Patchak is a member of MichGo or  
12 a member of the group that funded the MichGo litigation, and  
13 again Mr. Patchak filed an affidavit explaining he absolutely is  
14 not a member of MichGo, he is not a member of 23 Is Enough.  
15 This is an individual who is bringing his own cause of action.

16 The second element of public interest, your Honor, is  
17 just a litigant has a right to have their day in court and to  
18 have their claims decided. Absent a Temporary Restraining Order  
19 and ultimately a PI in this case because the land will be taken  
20 in trust, Mr. Patchak will be denied that; and he will not have  
21 the opportunity to have the merits of his case decided.

22 The final issue of public interest and given the unique  
23 facts, the timing here, your Honor, when we know for a fact that  
24 the United States Supreme Court is going to be ruling by not  
25 later than June on this very issue, I would submit there is a

1 public interest in making sure that only those tribes who are  
2 entitled to protection under the act receive it and when there  
3 is going to be a decision, an imminent decision from the Supreme  
4 Court that will clarify that very issue, I would say that the  
5 public interest is let's take a breath, see what the Court  
6 decides in *Carcieri*, see its impact on this case.

7 We have stated that if the -- excuse me, your Honor. If  
8 the First Circuit decision is upheld, we will dismiss the case  
9 that day. We will dismiss it -- we can't do it instantaneously  
10 but as soon as we could prepare the documents that say that we  
11 will dismiss it, we will dismiss it.

12 On the other hand, if the Supreme Court as it looks  
13 like they are going to do, and this I want to make clear -- your  
14 Honor told me not to conjecture -- this is a conjecture but it  
15 is based on looking at the fact that they accepted it when there  
16 was no split of circuits; and when you look at the transcript of  
17 that oral argument, there are at least four Justices who clearly  
18 indicated that they felt that now means now. So if they  
19 overturn that decision --

20 THE COURT: It is very risky business trying to  
21 conjecture what the Supreme Court is going to do.

22 MR. COURTADE: I understand, your Honor.

23 THE COURT: Check with the Department of Defense. They  
24 will tell you that's true.

25 MR. COURTADE: Well, and that's why, your Honor, the

1 last thing we wanted to do ever on this case was burden this  
2 Court or to cause any undue burden to the Government or the  
3 parties. That's why from the start we have said please, let's  
4 just sit back, take a breath and see what happens in Carcier.   
5 There is no need for anybody to do anything until we see  
6 Carcier.

7 THE COURT: How about harm to the tribe that will  
8 result?

9 MR. COURTADE: Again, currently there is no harm to the  
10 tribe because again without a compact, they can't do anything  
11 anyway. So as we sit here today, there is no harm to the tribe  
12 awaiting the decision in Carcier. Furthermore, if Carcier --  
13 again I am conjecturing, I apologize, your Honor -- but if  
14 Carcier comes out and overturns the First Circuit, then the  
15 tribe would have no right to that which they are seeking from  
16 this Court. Actually they are seeking it through the  
17 administrative process, but they are asking this Court to rubber  
18 stamp that to allow it to go through.

19 At that point since it cannot be undone, that's the  
20 irreparable damage because they would never be entitled to have  
21 that land held in trust, but they are trying to ramrod it  
22 through before that can be stopped.

23 THE COURT: All right. Anything else?

24 MR. COURTADE: Unless the Court has any other  
25 questions --

1 THE COURT: You can five minutes on rebuttal.

2 MR. COURTADE: Thank you, your Honor.

3 THE COURT: All right. We will hear from both parties  
4 ten minutes each. No injury to the tribe?

5 MS. ALLERY: Good morning, your Honor.

6 THE COURT: No injury to the tribe and they are not  
7 seeking a second bite at the apple. That's what he says.

8 MS. ALLERY: There is significant injury to the tribe,  
9 your Honor. This is currently a landless tribe in Michigan that  
10 has no land to assert governmental authority over. There is a  
11 significant -- I mean economic, socioeconomic -- they just can't  
12 avail themselves of any of the governmental, you know, authority  
13 they would like to exercise as a sovereign Indian tribe within  
14 the United States. There is significant injury to them. There  
15 is injury to the United States as well.

16 The United States has an administrative process for the  
17 land in the trust to occur. As part of that process on May 13th  
18 in 2005, the secretary released a Federal Register notice. I  
19 want to quote that notice for you, your Honor.

20 THE COURT: All right.

21 MS. ALLERY: It states: The purpose of the 30-day  
22 waiting period in 25 CFR 151.12 B is to afford interested  
23 parties the opportunity to seek judicial review of the final  
24 administrative decisions to take land into trust for Indian  
25 tribes and individual Indians before transferring the title to

1 the property occurs. MichGo sought that judicial review within  
2 that 30 days.

3 THE COURT: Right.

4 MS. ALLERY: Plaintiff Patchak did not. Now he wants  
5 years later to seek that judicial review and, your Honor, I mean  
6 we have already litigated MichGo. We already litigated through  
7 the party that did seek judicial review.

8 I would also like to address his statements about the  
9 Carcieri case.

10 THE COURT: What about the compact thing? He says there  
11 is no compact so therefore there is no harm.

12 MS. ALLERY: Well, the compact issue at the time when  
13 this litigation first came through, the MichGo case, the  
14 Governor of Michigan had said that she would not negotiate with  
15 them until the land was the trust. My understanding is that  
16 that has since changed. They do have a compact that they  
17 negotiated with the Governor. Where that is at this state  
18 legislative position, I don't know. I think the tribe will  
19 speak to that.

20 I believe they have a better handle on where that  
21 actually is in the legislative process so one has been  
22 negotiated with the Governor is my understanding.

23 THE COURT: But your position is there is harm  
24 nonetheless to both the United States and the tribe regardless  
25 of where it is?

1 MS. ALLERY: Absolutely. This litigation has already  
2 been delayed almost four years, your Honor. I mean again May 13,  
3 2005, was when this decision was originally made. We are now  
4 coming into 2009. I mean May is only couple months away. It is  
5 going to be four years. Carcieri is also not going to decide  
6 this case. There are two statutes at issue in Carcieri. One is  
7 the Rhode Island Land Claim Settlement Act which has nothing to  
8 do with Gun Lake, a Michigan tribe.

9 THE COURT: Right.

10 MS. ALLERY: And the Narragansetts are not situated,  
11 the tribe at issue in Carcieri, are not situated in the same way  
12 as the Gun Lake Band. The Gun Lake Band has treatise with the  
13 United States. They were in existence out in Michigan in 1934.  
14 I mean this is not going to decide that case.

15 I would also point out that Carcieri involves local and  
16 State Government challenging the secretary's decision to remove  
17 land from their jurisdiction. Plaintiff Patchak does not have  
18 standing to challenge the IRA as a state or local government in  
19 that situation would. He is not situated the same way as the  
20 Plaintiff in Carcieri. They are arguing that this land  
21 shouldn't be taken off of their state rules and their tax  
22 rules. Plaintiff Patchak is not making that argument because he  
23 does not have standing to do that.

24 There is not a single case that would support standing  
25 for an individual nongovernmental entity to challenge an Indian

1 Reorganization Act land into trust acquisition. There are  
2 actually two District Court cases from this District, City of  
3 Sue Saint Marie and City of Tacoma stating that. The cities  
4 were allowed to challenge it, but the local private citizens  
5 were not allowed to challenge it. So his likelihood of success  
6 on the merits, it is nonexistent.

7 The United States believes the public is not served by  
8 a further delay in this case. Again, we have a process for land  
9 into trust. We have followed that process. We have endured  
10 extensive litigation in the District Court here with Judge Penn.  
11 Judge Penn made a decision on the merits. He chose to stay that  
12 decision pending appeal so that MichGo could exhaust their  
13 remedies in the D.C. Circuit and in the Supreme Court. That  
14 cert has been denied. They have had that opportunity.

15 THE COURT: The posture of that case couldn't be more  
16 different than this case, could it?

17 MS. ALLERY: I mean do you mean where it stands? I  
18 mean --

19 THE COURT: In other words, Judge Penn was in a  
20 situation where the merits of the question were being looked at  
21 by him in the first instance.

22 MS. ALLERY: Correct.

23 THE COURT: This isn't that situation.

24 MS. ALLERY: No. Judge Penn had already made a  
25 decision on the merits. He decided to stay that decision

1 although the United States did prevail to allow them to go to  
2 the D.C. Circuit and the Supreme Court with their NEPA, IGRA and  
3 IRA claims.

4 THE COURT: Right.

5 MS. ALLERY: I would note too that Plaintiff Patchak  
6 has made the same allegations of harm as MichGo. Those are tied  
7 to IGRA and NEPA, National Environmental Policy Act and Indian  
8 Gaming Regulatory Act, not to the Indian Reorganization Act.  
9 Those are harms that have already been litigated by MichGo by  
10 that process through those acts.

11 This is an entirely different situation here now. Now  
12 we are only looking at the Indian Reorganization Act. He is not  
13 harmed by the land going into trust for this tribe. The tribe  
14 is harmed by significant delay in this case, and the public  
15 interest is not served by the United States having to go through  
16 this piecemeal litigation. This is a decision made. You know,  
17 parties were moving on.

18 THE COURT: All right.

19 MS. ALLERY: If there are no further questions, your  
20 Honor, I will allow the tribe.

21 THE COURT: Very good. Thank you, ma'am. Mr. Waxman.

22 MR. WAXMAN: May it please the Court, this lawsuit,  
23 this request for a Preliminary Injunction and the request for a  
24 Temporary Restraining Order does not present a close case.  
25 These are outrageous requests, and I use that term fully aware

1 of my responsibilities to the Court as an advocate.

2 There is with respect to likelihood of success on the  
3 merits, the likelihood of success on the merits of this case is  
4 actually statistically zero, and I will get to that in a minute.  
5 The balance of harms whether we are talking about irreparable  
6 injury or the respective balance and the public interest is  
7 entirely one sided. In 30 -- I don't want to count any more --  
8 I have never been involved in a proceeding like this before.

9 Number one, on the likelihood of success on the merits,  
10 there is no case in any jurisdiction that supports the standing  
11 of an individual citizen taxpayer to challenge the secretary's  
12 taking of land into trust for an Indian tribe under Section 19  
13 of the IRA or for that matter any other provision of the IRA.

14 I was clerking, I was Judge Geselle's sole law clerk on  
15 this Court when he decided City of Tacoma that is directly on  
16 point, and we have attached for the Court I think as a result of  
17 all the pleadings in this case several times, his opinion.  
18 Judge Flannery independently the following year made the same  
19 ruling in City of Sue Saint Marie.

20 The Court of Appeals of this circuit has made  
21 absolutely clear in the Hazardous Waste Treatment Council that  
22 prudential standing particularly does not lie whereas to  
23 those -- quote -- as to those Plaintiffs who suits are more  
24 likely to frustrate than to further statutory objectives.

25 Now, Mr. Courtade didn't say one thing about standing

1 in this case and that is an entirely dispositive defense. The  
2 Court does not have subject matter jurisdiction with all due  
3 respect. His pleading, his briefs point out that there are  
4 plenty of cases in which individuals are granted standing to  
5 challenge actions under the Indian Gaming Reorganization Act or  
6 under the National Environmental Policy Act, and that is  
7 unexceptional. I have litigated plenty of those cases in this  
8 courthouse.

9 That's why MichGo and its members had standing to  
10 litigate the very issues and the very harms that he is  
11 asserting. Those statutes particularly grant people in the  
12 quote "surrounding communities" individual prudential standing  
13 to bring an Article III action in Federal Court. The IRA  
14 doesn't, and this Court would be the first Court in the country  
15 ever to so hold to the contrary with the consequence that any  
16 citizen in the United States, any taxpayer, maybe even if they  
17 don't pay taxes, would be able to bring a judicial challenge in  
18 Federal Court every time the Secretary of Interior decided to  
19 take any act under the Indian Reorganization Act.

20 THE COURT: So the practical consequence, Mr. Waxman,  
21 if I am correct, tell me if I am not, the practical consequence  
22 of me granting a PI here is to issue an order that's appealable  
23 that at a minimum would have to be litigated through, or would  
24 be unquestionably based on the conduct I have observed to date,  
25 would unquestionably be litigated through the D.C. Circuit which

1 in the normal course of events, and I stress the phrase in the  
2 normal course of events, because it is hard to predict even what  
3 the D.C. Circuit does in the normal course of events, would be  
4 about a year.

5 So this whole matter would be put in a state of  
6 suspension for about a year, right, at least?

7 MS. ALLERY: With all due respect to the Court of  
8 Appeals and its docket, I think we are talking about a  
9 minimum --

10 THE COURT: A minimum.

11 MR. WAXMAN: -- a minimum of a year.

12 THE COURT: Yes.

13 MR. WAXMAN: And this gets to, I am going to  
14 address -- I have three points with respect to likelihood of  
15 success on the merits. One is laches which folds into the  
16 balance of harms and I will address that in the context of harms  
17 except to point out that the notion -- with respect to the  
18 representations about what Mr. Patchak did or didn't do, I think  
19 the Court, if the Court is in any doubt, the Court ought to  
20 consult with Mr. Patchak's own declaration in this case which is  
21 Exhibit 4 to Document 26.2.

22 He knew everything about this suit. MichGo attached a  
23 petition with his name and signature on it as proof that it had  
24 members that had standing to sue or bring this case to begin  
25 with which is also attached to the pleadings in this case.

1 THE COURT: Right.

2 MR. WAXMAN: But the cause of action that he says I  
3 didn't join because I thought that MichGo was taking care of all  
4 my claims and I wasn't aware of the Carcierri cause of action  
5 until the Supreme Court granted cert couldn't be more  
6 irrelevant. First of all, the Supreme Court in United States  
7 versus Johns in the 1970s identified this issue. Carcierri  
8 itself has been in litigation in Federal Courts with reported  
9 decisions up and down the First Circuit including two decisions  
10 by the First Circuit, a panel en banc for years. So there is  
11 nothing new about this cause of action.

12 THE COURT: No.

13 MR. WAXMAN: Now, with respect to the merits and that  
14 is the question of whether the Supreme Court might decide  
15 something in Carcierri, even if this man had standing and this  
16 Court had subject matter jurisdiction and even if the deliberate  
17 gamesmanship that has characterized Mr. Patchak's litigation  
18 from 2001 when he first objected to the tribe's application to  
19 put this industrial land into trust until this very litigation  
20 when in response to our Motion for judgment on the pleadings and  
21 the Government's Motion To Dismiss, he responded not on the  
22 merits, but by moving to stay everything in this Court. Don't  
23 decide the dispositive issues of subject matter jurisdiction  
24 until such time as the Supreme Court is done with MichGo.

25 That level of gamesmanship, leaving aside that, on just

1 the merits of the Carcierri issue, the question in Carcierri is  
2 whether a tribe, the Narragansetts that was never recognized by  
3 the United States until sometime in the 1980s, it was never the  
4 subject of a treaty. It had a relationship with Rhode Island  
5 but Rhode Island disestablished it. There was no argument that  
6 it ever was recognized by the United States Congress, the  
7 Interior Department or anything in 1934.

8 THE COURT: Right.

9 MR. WAXMAN: Could not be less relevant to this case  
10 for the following reason: This tribe -- there is no doubt  
11 whatsoever that Indian tribes as can be recognized as domestic  
12 dependent sovereigns by Congress. There is also an argument  
13 that is there is delegated authority to the secretary to  
14 acknowledge that existence. This tribe was recognized by  
15 Congress. It signed multiple treatise in the 18th and  
16 19th centuries.

17 It is also black letter law that when Congress  
18 recognizes the sovereignty of another entity, whether it is a  
19 domestic dependent sovereign like an Indian tribe or a foreign  
20 country, only Congress can withdraw that recognition. There  
21 isn't a darn thing that the Secretary of Interior or the  
22 Attorney General or the chairman of the Joint Chiefs of Staff  
23 can do to withdraw that recognition. There isn't even an  
24 argument in this case that that was ever done by the Congress of  
25 the United States, and the Congress of the United States and the

1 secretary in the administrative proceedings that have been cited  
2 and provided to you have found definitively to the contrary.

3 That is, so this was an Indian tribe for purposes of 25  
4 USC Section 479. This is undoubtedly an Indian tribe that was  
5 recognized in 1934, whatever the rule may be or whatever the  
6 outcome may be with respect to the Narragansetts.

7 Now, with respect to the balance of harms, they are  
8 entirely one-sided. I am sure I don't need to remind the Court  
9 that the standard in this jurisdiction for irreparable injury is  
10 quote "harm that is both certain and great."

11 On the one hand, we have a man who was pointedly and  
12 avowedly aware of this petition since 2001 when he commented,  
13 2002 when he commented, and intimately aware of the MichGo, the  
14 long, long, long litigation involving the MichGo claims.

15 THE COURT: Um-hmm.

16 MR. WAXMAN: He affirms that he is -- he purposely sat  
17 on his rights. He says in his affidavit, paragraph four, he  
18 didn't join the litigation because he was under the impression  
19 that the MichGo Plaintiffs had raised all of the available legal  
20 arguments quite correctly, and he didn't think that his addition  
21 to the lawsuit would bring any new or added value to the case.

22 Now, I happen to think that was a correct judgment,  
23 but it nonetheless reflects a degree of awareness that is  
24 actually rare in circumstances like this. This man participates  
25 in the Whalen County Township process. He is intimately

1 familiar, was a signatory on a MichGo petition. He acknowledges  
2 that he followed this litigation in its slow pace through the  
3 Federal Courts.

4 The harms that he alleges in this complaint in this  
5 case are NEPA, are harms that sound in NEPA that have already  
6 been rejected by the secretary, by the District Court and  
7 following a lengthy appeal proceeding by the Court of Appeals  
8 and the United States Supreme Court has denied cert.

9 The gamesmanship as I said has continued even in this  
10 lawsuit which wasn't even brought until after the Court of  
11 Appeals decided this case in which in response to our prompt  
12 Motion for judgment on the pleadings, he sought, he asked this  
13 Court to stay all proceedings, anything until this point that we  
14 are at right now where the Supreme Court has dispositively ended  
15 all of the legal issues that were presented in MichGo including  
16 the very issue that he is raising here.

17 Now, he says, well, the Quiet Title Act because once  
18 the land goes into trust, the Court -- the United States'  
19 position will be that the Court doesn't have jurisdiction to  
20 consider whether or not it in fact has good title to the  
21 property is true as far as it goes, but it doesn't establish any  
22 harm because the harms that he is concerned about are gaming  
23 related. They have nothing to do over who owns this land.

24 This is a disused, abandoned industrial site that is  
25 owned by the tribe in fee. The transfer is affirmatively

1 supported by the State of Michigan, the Allegan County and  
2 Whalen Township, all of the governmental entities that would  
3 have any possible concern over who owns this land came to the  
4 District Court and said we support the secretary's action.

5 So the question of who owns it or not is entirely  
6 irrelevant to him. What he is complaining about are the  
7 environmental consequences of operating a casino, and his remedy  
8 as he has been availing himself already is in the Michigan  
9 political process with the Governor, with the House of  
10 Representatives and with the Senate.

11 Now, I can't make any representations to this Court  
12 about what is going on in Michigan. I can tell you this. The  
13 Federal District Court in Michigan ruled that unless and until  
14 this land is taken into trust, the tribe has no legal right to  
15 compel the State of Michigan to negotiate and conclude a  
16 compact. We brought that action earlier in this decade and the  
17 Court held that until the land is in trust, you don't have  
18 standing to invoke your rights under the Indian Gaming  
19 Reorganization Act and require state officials to do anything.

20 So let me then move to the other side of the balance of  
21 harms. This tribe is destitute. Judge Penn made that finding.  
22 There is no dispute about it. Chairman Sprague's declaration  
23 which is attached to our opposition to their Motion To Stay  
24 explains in great detail the extent to which the members of this  
25 tribe don't own homes, the extent to which the unemployment

1 rate, both the homeownership rate, the unemployment rate exceed  
2 by many multiples the already pretty unhappy situation as  
3 regards people in lower Michigan already.

4 THE COURT: Right.

5 MR. WAXMAN: And that is a finding that was made. This  
6 is the only tribe in Michigan that has no land, the only tribe;  
7 and that was true when we petitioned and it is true now.

8 The delay in this case since 2001 until now has  
9 resulted and, again, Judge Penn found this, and it is detailed  
10 in affidavits that are completely uncontroverted have resulted  
11 in huge lost opportunities and the delay perpetuates what the  
12 United States Congress and what the Secretary of Interior have  
13 formally recognized on behalf of our country was an historic  
14 injustice.

15 The secretary's decision in this case has already, in  
16 which Mr. Patchak participated, has already been delayed by four  
17 years of excruciating judicial review that has rejected each and  
18 every single claim that has been made in this case and what Mr.  
19 Patchak now wants is additional years of litigation based on  
20 pure speculation that the Supreme Court of the United States  
21 will overrule 70 years of judicial and administrative  
22 interpretation in a way that somehow will have some effect on a  
23 tribe that was recognized by the Congress of the United States  
24 in 1795 in subsequent treatise for an issue that he like anybody  
25 else could have raised if he had standing at least four years

1 ago when the MichGo litigation began.

2 Now, I believe one of the questions your Honor asked  
3 was so what is the on the ground damage to the tribe? It doesn't  
4 have a compact. Number one, it needs this land in trust in  
5 order to finish the compacting negotiation process. Number two,  
6 as we detailed in front of Judge Penn, it is now so long ago, I  
7 can't remember all the details of it, this tribe has done  
8 absolutely everything it can to prepare this land and to do  
9 things to begin to make some economic use of the land that it  
10 can until there is some certainty that some form of economic  
11 process can go forward and the land has to be in trust.

12 If this land is -- once the land is in trust, they can  
13 start basic construction. They can start putting in basic  
14 infrastructure. As I said, they can negotiate. There was  
15 evidence in representations to the Court about how long in  
16 advance it takes just to negotiate and order steel in order to  
17 begin anything and it is absolutely true that the tribe cannot  
18 begin class three gaming unless and until there is a compact;  
19 but it absolutely can open a facility to have class two gaming  
20 or class one gaming without any compact or any permission  
21 whatsoever and none of that is happening.

22 So I submit, your Honor, that like the likelihood of  
23 success inquiry, the balance of harms inquiry is entirely one-  
24 sided. Thank you.

25 THE COURT: Thank you, Mr. Waxman. We are going to

1 take a five-minute break. When we come back, you will get five  
2 minutes of rebuttal and then we will move on to the next case.

3 (Recess.)

4 MR. COURTADE: Thank you, your Honor. Addressing first  
5 the issue of standing, I believe that we addressed that in our  
6 brief fairly well in response to the Motion To Dismiss. I would  
7 point out for the purposes of this Motion today where the issue  
8 is whether the Government ought to be allowed to moot this  
9 entire case by taking the land into trust, it is important again  
10 to look at that there is a rule that says that adversely  
11 affected parties are presumptively entitled to judicial review  
12 of any administrative action under the Administrative Procedures  
13 Act. Presumptively entitled.

14 We have a right to have our case heard and the problem  
15 is without a stay in place, that right will be taken away  
16 immediately as soon as the land is taken into trust. Further,  
17 under the International Ladies Garment Workers case that was  
18 cited in our brief, even a slight indicia of prudential standing  
19 will suffice for standing under the APA. I do believe that we  
20 have a slight indicia at least.

21 Miss Allery intimated that there was an injury to the  
22 tribe because they cannot avail themselves of sovereignty as it  
23 currently stands. Your Honor, if they were not recognized by  
24 the Federal Government in 1934 under IRA, then they cannot avail  
25 themselves of a protection under IRA. They are asking to be

1 able to do something that they are not entitled to do under the  
2 statute. That's why we are here.

3 Now, again the Court urged me not to engage into  
4 conjecture. I would respectfully submit that Miss Allery may  
5 have done that inadvertently when she said that Carcieri may be  
6 decided on an entirely different issue. Well, it may or it may  
7 not be, but when you look at the transcript and 1333 of 1349  
8 lines of the transcript are devoted to the Carcieri issue, I  
9 think it is conjecture but a pretty good bet, no pun intended,  
10 that they will decide it on this issue.

11 One thing I want to make absolutely clear to the Court  
12 and to opposing counsel and to anybody who cares to listen is  
13 that, your Honor, I have heard a lot of claims that I have  
14 engaged in gamesmanship in this litigation, and I have been a  
15 practicing attorney for 21 years. My record in the State of  
16 Michigan speaks for itself. I know that is this is my first  
17 time here and Court does not know me from Adam.

18 I take my role as an officer of the Court very  
19 seriously, your Honor. I would never purposely engage in  
20 gamesmanship. In fact, the accusation that we filed our Motion  
21 for an administrative stay as gamesmanship is actually, that's  
22 the furthest thing from my mind. That was not what I was  
23 intending at all. What I was intending is everybody take a  
24 breath. Nobody has to incur any cost, any burden. Let's sit  
25 back. We don't have to be in front of the Court. Sit back and

1 let's see what happens in MichGo and Carcieri because depending  
2 on what happens in those cases, we may not even have to be in  
3 front of the Court.

4 So to the extent that this Court feels or that opposing  
5 counsel feels that I have engaged in gamesmanship, I sincerely  
6 apologize. That was never my intent and never will be my  
7 intent.

8 Now, Mr. Waxman engaged in -- he has got a lot longer  
9 history involved in these issues than I do, your Honor, and I  
10 have got the utmost respect for what he has done in this area.  
11 I would suggest that he engaged in some hyperbole about all the  
12 damages to the tribe, the damages to the tribe. There is no  
13 doubt that this tribe is hurting. There is absolutely no doubt,  
14 but as it relates to the issues before this Court, when Mr.  
15 Patchak is being accused of laches because a decision was issued  
16 in April, 2008 which changed the playing field and he waited  
17 until August 1st to file his lawsuit, the irony there is that  
18 the tribe according to its own papers stopped being recognized  
19 in 1870 and waited until 1993 to seek recognition and did so  
20 saying that it would never have gaming facilities on its  
21 property; and then as soon as it got recognition, it says okay  
22 now we want a casino.

23 The other point about that is when they did seek  
24 recognition in 1993, your Honor, they did so under a provision  
25 of the code that applies to tribes that are not recognized by

1 the Federal Government. Why if it is their position that they  
2 were recognized all along and that therefore Carcieri is  
3 completely irrelevant, why did they do it under that provision  
4 that indicates they were not recognized?

5 Your Honor, I believe that supports our position that  
6 they were not recognized in 1934 and therefore under the  
7 Carcieri analysis they are not going to be entitled to the  
8 protection under IRA. So I am not sure, and this is sort of a  
9 procedural question, and that is our Motion that was filed on  
10 Friday requested a stay pending appeal. To the extent that --

11 THE COURT: I don't know what that was. I don't even  
12 know if there is a basis in the law for you to file the Motion  
13 you have filed. I have never seen anything like it and I have  
14 been on this Court for seven years. I don't know where you  
15 dreamed it up from. I just don't know where you got that from.  
16 You had already filed a TRO. In my judgment, that's the most  
17 you could file and whatever you filed Friday, well, you had some  
18 creative class in civil procedure somewhere, but I don't believe  
19 it is before the Court.

20 MR. COURTADE: That answers the question, but to the  
21 extent that the Court is inclined to deny the Motion for TRO, we  
22 would request an order as soon as possible so that -- because we  
23 will have --

24 THE COURT: A TRO is not appealable. You mustn't be  
25 familiar with our Circuit. Decisions on TROs are not

1     appealable.  That's the third time I have told you that today.  
2     You may not have heard it the first time.  Now that's three  
3     times.

4             MR. COURTADE:  In this case, we have filed a request  
5     for a Preliminary Injunction and we would ask that we get an  
6     order on that, your Honor.  If you have any further questions --

7             THE COURT:  No.

8             MR. COURTADE:  Again, your Honor, the final comment and  
9     it is only because it is so important to me as an officer of the  
10    Court, to the extent this Court believes there was any  
11    gamesmanship, I sincerely apologize.  There was never intended  
12    to be any.

13            THE COURT:  The Court will rule on the TRO.  The Court  
14    will deny TRO.  The Court does not believe there is any  
15    likelihood of success on the merits but also believes that the  
16    interests of the United States and the tribe are substantial and  
17    would be harmed substantially if a TRO would be granted  
18    especially under circumstances where the likelihood of success  
19    on the merits was as conjectural and questionable as they are  
20    here.  Indeed there is a substantial question as to whether or  
21    not there is subject matter jurisdiction of the Court in the  
22    first instance and whether or not there is standing of the  
23    challenge by the Plaintiff.

24            The Court will take under advisement the ruling on the  
25    Preliminary Injunction and reflect further on that and at the

1 appropriate time issue a decision on that with a written ruling  
2 as it relates to the Preliminary Injunction request.

3 The chances of that being ruled on today are I would  
4 say infinitesimal or beyond infinitesimal, but the TRO is denied  
5 and the Court will rule on the PI when the Court has time to  
6 rule on the PI in the not too distant future. Any questions?  
7 The parties are excused.

8 MR. WAXMAN: Thank you, your Honor.

9 (Whereupon, at 11:16 a.m., the proceedings were  
10 concluded.)

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CERTIFICATE OF REPORTER

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I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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