

**TESTIMONY OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ON H.R. 4546
THE “DEPARTMENT OF THE INTERIOR TRIBAL SELF GOVERNANCE ACT OF 2014”**

JULY 15, 2014

Chairman Young, Ranking Member Hanabusa, and Members of the Subcommittee, my name is Lawrence Roberts and I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify for the Department on H.R. 4546, the “Department of the Interior Tribal Self Governance Act of 2014.”

H.R. 4546 seeks to amend both Title I and Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. §§ 450 *et seq.*). In more than 200 years of federal Indian policy, the policies of self-determination and self-governance that have developed during the past four decades have produced, by far, the most successful relationship between the United States and its tribes. These policies have also increased tribal governmental capacities and improved services to Indian people.

The Administration strongly supports the principles of self-determination and self-governance, and consistent with this support we believe the ISDEAA should be strengthened to make it work better for the Federal government and for Indian tribal governments. Accordingly, the Administration supports H.R. 4546.

President Obama recognizes that federally recognized Indian tribes are sovereign, self-governing political entities that have a government-to-government relationship with the United States, as expressly recognized in the United States Constitution. Secretary Jewell, too, is a strong supporter of the principle of tribal self-determination, the principles of the ISDEAA, and is committed to working to further tribal self-governance.

In 1975, the Congress enacted the ISDEAA, Pub. L. No. 93-638. Title I allows a tribe to contract individual programs away from the Department and operate the programs as, in essence, tribal programs. Title I also gives a tribe the latitude to redesign and rebudget Federal programs that it assumes.

In 1988, Congress enacted Title III of the ISDEAA as a demonstration project, which allowed an Indian tribe to contract several programs from the Department, and allowed Indian tribes to reallocate funds and redesign those programs to best benefit their communities. In 1994, Congress made the demonstration project permanent in Title IV of the ISDEAA, Pub. L. No. 103-413.

Title IV provides resources to Indian tribes, enabling them to plan, conduct, consolidate, and administer programs, services, functions, and activities for tribal citizens according to priorities established by their tribal governments. Under Title I and Title IV, Indian tribes have greater control and flexibility in the use of these funds, reduced reporting requirements, and the authority to redesign or consolidate programs, services, functions, and activities. Title I and Title IV generally allow Indian tribes to reallocate funds during the year and carry over unexpended funds into the next fiscal year without Secretarial approval. As a result, these funds can be used with more flexibility to address each Indian tribe's unique condition.

Funding agreements under the ISDEAA have helped to strengthen government-to-government relationships with Indian tribes. Self-determination and self-governance tribes have been good managers of the programs they have undertaken. Many times, tribal governments add their own resources to the programs and are able to fashion programs to meet their needs and the particular needs of their members. Tribal governments are often better suited than the Federal government to address the changing needs of their members. Indian tribal governments have often observed that, when they are working under self-determination contracts and self-governance funding agreements, they are not viewed by the Federal government as just another Federal contractor, but rather that their work reflects a true government-to-government relationship characterized by mutually agreed-to responsibilities and tribal empowerment.

For nearly a decade, Indian tribes have asked Congress to update Title I and Title IV to address various issues, to include more non-BIA programs, and to streamline the process of negotiating annual funding agreements. H.R. 4546 goes a long way toward accomplishing these goals. Non-BIA programs, however, often have different characteristics that suggest a more tailored approach to the specific programs. For example, the Bureau of Reclamation uses a methodology in its budget formulation that is different from BIA's methodology because of the nature of Reclamation's appropriations for large projects. Section 202 of H.R. 4546 is intended to address those differences, and the Department looks forward to working with the Committee to ensure section 202 meets that objective.

The Department recognizes the need for the self-determination and self-governance programs to evolve to improve and increase the frequency of funding agreements. The Administration is proud to report that, after a series of negotiations with tribal stakeholders that began over three years ago, we reached agreement on a number of issues and the language is embodied in H.R. 4546. Our agreement on this critical legislative priority for Indian Country reflects the Administration's commitment to restore the integrity of the government-to-government relationship with Tribal Nations. The Native American communities in this country confront many challenges, and this Administration is committed to working with Tribal Nations to create opportunities for all of our communities to thrive and flourish.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

TESTIMONY
OF
KEVIN K. WASHBURN
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE AFFAIRS
ON
H.R. 4867, THE “ECONOMIC DEVELOPMENT THROUGH TRIBAL LAND EXCHANGE ACT”

JULY 15, 2014

Chairman Young, Ranking Member Hanabusa, and Members of the Subcommittee, my name is Kevin Washburn and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present testimony for the Department on H.R. 4867, the “Economic Development Through Tribal Land Exchange Act.” The Department supports H.R. 4867.

The Morongo Band of Mission Indians (the Tribe), located approximately 20 miles west of Palm Springs, CA, along with the City of Banning (the City) and Lloyd L. Fields (Mr. Fields), a private property owner who resides in California, have asked Congress to enact legislation providing for the exchange of certain lands within or adjacent to the Morongo Reservation (1) to promote the consolidation of the Tribe’s reservation lands, (2) to resolve a land-use dispute among Mr. Fields, the City and the Tribe, and (3) to facilitate commercial development on lands adjacent to the Tribe’s reservation that will be beneficial for the City and the Tribe, as well as Mr. Fields. A map depicting the property to be exchanged is referenced in the bill. The parcels are identified as Parcels A, B, C and D.

Background

Among the parcels of land the United States currently holds in trust on behalf of the Tribe is a parcel of 41.15 acres (Parcel B), a portion of which is adjacent to lands outside the Tribe’s reservation that are owned by Mr. Fields. This parcel has no currently existing access to any public road and has little economic value to the Tribe. In 1995, through transactions with other private non-Indian landholders, Mr. Fields acquired a similarly sized parcel (Parcel A) that at the time also was outside the Tribe’s reservation. Parcel A has since become encircled by lands acquired by the Tribe and now held in trust for the Tribe by the United States as part of the Tribe’s residential area, largely precluding Mr. Fields from commercial development of Parcel A. In an effort to relieve the City from the continued maintenance and upkeep of certain lands which it owns, the City is interested in conveying to the Tribe approximately 1.21 acres of land (Parcel C) that is within the Tribe’s reservation and that is used for a roadway, in return the Tribe would grant the City an easement over other tribal trust lands (Parcel D) adjacent to Parcel B, which the City intends to use as a roadway and for electrical, sewer, water, and related utility lines in order to enable future commercial development that the City believes will be beneficial to the City.

H.R. 4867

First, H.R. 4867 authorizes and directs the Secretary of the Interior (Secretary) to accept title to Parcel A to be held in trust for the Tribe. Second, H.R. 4867 authorizes and directs the Secretary to convey Parcel B to Mr. Fields, thus removing Parcel B from trust status. Third, the bill authorizes and directs the Secretary to grant an easement to the City for use of Parcel D as a roadway and for electrical, sewer, water, and related utility lines owned by the City. All three of these conveyances would be done simultaneously. Fourth, H.R. 4867 directs the Secretary to accept title to Parcel C to be held in trust for the Tribe after the City has vacated its interest in Parcel C pursuant to applicable state law.

Anticipated Use of Lands

The lands the Tribe is requesting be placed into trust on its behalf will assist the Tribe with its land consolidation efforts. The Tribe already has a hotel and casino in a different section of its Reservation that the Tribe has designated for entertainment and hospitality uses; thus, the Tribe is unlikely to use Parcel A for any commercial use other than grazing or other ranch or farming related activities. Parcel C will continue to be used by the Tribe as a roadway providing access to the Tribe's residential area. We would be happy to work with the Subcommittee to add legal descriptions of the parcels into the bill.

The Department recognizes that the land exchanges contemplated in this bill would reduce so-called checkerboarding of Indian land and produce more consolidated land holdings for the Tribe. The Tribe and the City of Banning are to be congratulated for working out an exchange that benefits both the Tribe and local government. The Department supports this bill.

This concludes my prepared statement. I will be happy to answer any questions the Subcommittee may have.

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BEFORE THE
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ON S. 1603,
THE GUN LAKE TRUST LAND REAFFIRMATION ACT

JULY 15, 2014**

Introduction

Chairman Young, Ranking Member Hanabusa, and Members of the Subcommittee, my name is and I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to testify on S. 1603, the Gun Lake Trust Land Reaffirmation Act, a bill to reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians (Tribe). The Department supports S. 1603, which applies to the only parcel of land held in trust for the Tribe. The Department supports legislative solutions that would provide such certainty to *all* federally recognized tribes and future acquisitions by the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians in light of the *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak* decision.

As this Subcommittee, and Congress, is aware, in June of 2011 the Supreme Court issued its decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*.¹ The Supreme Court held in that case that the decisions of the Secretary of the Interior to acquire land in trust under the Indian Reorganization Act could be challenged on the ground that the United States lacked authority to take land into trust even if the land at issue was already held in trust by the United States. This decision was inconsistent with the widely-held understanding that once land was held in trust by the United States for the benefit of a tribe, the Quiet Title Act (QTA) prevented a litigant from seeking to divest the United States of such trust title.² The Court held that the Secretary's decisions were subject to review under the Administrative Procedure Act even if the land was held in trust and expanded the scope of prudential standing under the Indian Reorganization Act to include private citizens who oppose the trust acquisition.

¹ 132 S. Ct. 2199 (2012).

² See, e.g., *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987) (Indian lands exception to Quiet Title Act's waiver of sovereign immunity operated to bar municipality's claim challenging increase of tribal reservation and related water rights); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (challenge to Secretary's land into trust decision barred by Indian lands exception to Quiet Title Act's waiver of sovereign immunity); *Florida Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (same).

Background

On April 18, 2005, the Department issued its decision to acquire approximately 147 acres of land in trust for the Tribe for gaming purposes. The Citizens' group Michigan Gambling Opposition ("MichGo") immediately challenged the decision in the United States District Court for the District of Columbia under the Indian Gaming Regulatory Act and National Environmental Policy Act ("NEPA"), as well as on the basis that the Indian Reorganization Act was unconstitutional. The district court rejected MichGo's claims, the District of Columbia Circuit Court of Appeals affirmed, and, in January 2009, the United States Supreme Court denied certiorari review. The Secretary then acquired the land into trust on January 30, 2009. Shortly thereafter in February 2009, the Supreme Court issued its decision in *Carciere v. Salazar*.³

While the MichGo lawsuit was on appeal, David Patchak filed suit in district court to also challenge the Secretary's decision, on the ground that the Secretary is without authority to acquire land in trust for the Band because the Band was not a federally recognized tribe when the IRA was enacted in 1934. The district court did not reach the merits of Patchak's claim, instead holding that Patchak lacked prudential standing to challenge the Department's authority under the Indian Reorganization Act. The D.C. Circuit reversed. Ultimately, on June 18, 2012, in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*,⁴ the Supreme Court held that Patchak had prudential standing to challenge the acquisition, and that the Quiet Title Act is not a bar to Administrative Procedure Act challenges to the Secretary's decision to acquire land in trust after the United States acquires title to the property unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge.

Until *Patchak* was decided, prevailing Federal court decisions held that the QTA precluded judicial review of trust acquisitions after the United States acquired title to the subject property. The effect of the *Patchak* decision is that plaintiffs may seek to reverse trust acquisitions many years after the fact and divest the United States of its title to the property.

Consequence of the *Patchak* Decision

The *Patchak* decision undermines the primary goal of Congress in enacting the Indian Reorganization Act: the acquisition of land in trust for tribes to secure a land base on which to live and engage in economic development. The *Patchak* decision imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions and the Court's decision may ultimately destabilize tribal economies and their surrounding communities. The *Patchak* decision casts a cloud of uncertainty on lands acquired in trust under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself.

Economic development, and the resulting job opportunities, that a tribe could pursue may well be lost or indefinitely stalled out of concern that an individual will challenge the trust acquisition up

³ 555 U.S. 379 (2009).

⁴ 132 S. Ct. 2199 (2012).

to six years after that decision is made.⁵ The Department has worked to provide more clarity to everyone by amending its land acquisition rules to provide for greater notice of land-into-trust decisions and clarify the mechanisms for judicial review, depending on whether the land is taken into trust by the Assistant Secretary for Indian Affairs, or by an official of the Bureau of Indian Affairs. Without legislation to address *Patchak*, the Supreme Court's new reading of the Quiet Title Act and the Administrative Procedure Act will frustrate the lives of homeowners and small business owners on Indian reservations throughout the United States, and undermine the efforts of the United States government in promoting growing communities and economies in Indian country.

The *Patchak* decision encourages litigation to undermine settled expectations

In the *Patchak* decision, the Supreme Court held that a litigant may file suit challenging the Secretary's authority to acquire land in trust for a tribe under the Administrative Procedure Act, even after the land is held in trust. The Court reached this decision, notwithstanding the widely-held view that Congress had prohibited these types of lawsuits through the Quiet Title Act, which states:

(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 . . .***

28 U.S.C. § 2409a (emphasis added).

As a result of the Court's reading of this provision, lawsuits could potentially reverse trust acquisitions many years after the fact, and divest the United States of its title to the property.

The majority in *Patchak* failed to consider – or even recognize – the extreme result that its opinion made possible. Divesting the United States of trust title not only frustrates tribal economic development efforts on the land at issue; more critically, it creates the specter of uncertainty as to the applicable criminal and civil jurisdiction on the land and the operation of tribal and federal programs there.

Before the *Patchak* decision, the Secretary's decision to place a parcel of land into trust could be challenged only **prior** to the finalization of the trust acquisition. The Department had adopted provisions in its regulations governing the trust acquisition process which ensured that interested parties had an opportunity to seek judicial review. It was the Department's general practice to wait to complete a trust acquisition until the resolution of all legal challenges brought in compliance with the process contemplated by the Department's regulations. This allowed all interested parties, including those who wished to challenge a particular acquisition, to move forward with a sense of certainty and finality once a trust acquisition was completed.

⁵ 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Certainty of title is important. It provides tribes, the United States and state and local governments with the clarity needed to carry out each sovereign's respective obligations, such as law enforcement. Moreover, such certainty is pivotal to a tribe's ability to provide essential government services to its citizens, such as housing, education, health care, to foster business relationships, to attract investors, and to promote tribal economies.

Once a trust acquisition is finalized and title transferred in the name of the United States, tribes and the United States should be able to depend on the status of the land and the scope of the authority over the land. Tribes must have confidence that their land cannot be forcibly taken out of trust once the government has made a final decision.

Conclusion

The Secretary's authority to acquire lands in trust for all Indian tribes, and certainty concerning the status of and jurisdiction over Indian lands after such acquisitions into trust, touch the core of the federal trust responsibility. The power to acquire lands in trust, and certainty that such land remain in trust, is an essential tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. A system in which some federally recognized tribes cannot enjoy the same rights and privileges available to other federally recognized tribes is unacceptable. The Department supports S. 1603. In addition, this Administration supports legislative solutions that make clear the Secretary's authority to fulfill her obligations under the Indian Reorganization Act for *all* federally recognized tribes.

This concludes my statement. I would be happy to answer questions.