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Articles

*147 A DAY LATE AND A **DOLLAR** SHORT: SECTION 2719 OF THE INDIAN GAMING REGULATORY ACT, THE INTERPRETATION OF ITS EXCEPTIONS AND THE PART 292 REGULATIONS

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I. Introduction

Congress enacted the Indian Gaming Regulatory Act [FN1] (“IGRA”) in 1988. The IGRA does not affect the Secretary of the Interior's (“Secretary”) authority to take land into trust for tribes. [FN2] Section 2719 of the IGRA is a land use limitation that prohibits tribes from conducting gaming on lands they didn't possess in 1988. [FN3] However, § 2719 of the IGRA contains four exceptions that permit gaming to be conducted on Indian lands acquired after 1988. [FN4] Out of § 2719 there has emerged one of the most contentious issues involving the IGRA: which Indian lands acquired after 1988 may be used to conduct gaming on? This issue has been litigated many times.

Because § 2719 is ambiguous, courts have had to interpret it. The courts have employed several tools of statutory interpretation to determine on which lands may be used to conduct gaming. Over time, courts have promulgated several rules concerning whether land falls within one of the four exceptions. These rules created settled expectations. Over time, tribes and businesses have invested money and conducted business with these settled expectations.

In 2008, several years after courts had interpreted § 2719, the Department of the Interior (“DOI”) promulgated the Part 292 Regulations (“Regulations”), [FN5] which interpreted § 2719. For the most part, the Regulations are consistent with the cases that defined and interpreted § 2719. However, the Regulations add to the requirements cases previously held were necessary for a tribe to fit within the exceptions.***148** Sections 292.6(d) and 292.12(c) contain an additional burden that a tribe must demonstrate a modern connection to the land in question for purposes of the exceptions of § 2719(b)(1)(B)(ii) and 2719(b)(1)(B)(iii), which is beyond what courts have previously held. [FN6] Moreover, § 292.12(c) may be inconsistent with case law interpretations of § 2719(b)(1)(B)(iii).

The DOI's Regulations, which impose added burdens on tribes and narrow the exceptions, impair the settled expectations of tribes and businesses. Moreover, this impairment may persist because the Supreme Court's holding in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., [FN7] requires courts to defer to agencies, despite having been the first to interpret and define statutes. [FN8] However, because of the difference of circumstances, unlike in Brand X, the DOI's interpretations should not be deferred to. Chevron deference, as applied in Brand X, may unconstitutionally reallocate authority from Article III to Article II. Lastly, the discipline of law and economics tells us that the Regulations' changes and the majority's opinion in Brand X promulgates

an inefficient legal rule that may be-and should be-changed.

II. The Statute Prohibits Gaming on Indian Lands Acquired After the IGRA's Effective Date But Contains Four Exceptions

Section 2719 of the IGRA provides in part as follows:

> (a) Prohibition on lands acquired in trust by Secretary
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> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless - -
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> ***149** (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
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> (2) the Indian tribe has no reservation on October 17, 1988, and - -
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> * * *
>
> (b) Exceptions
>
> (1) Subsection (a) of this section will not apply when - -
>
> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
>
> (B) lands are taken into trust as part of - -
>
> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the secretary under the Federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition [FN9]

Section 2719 of the IGRA prohibits Indian gaming "on lands acquired by the Secretary [for an Indian tribe after the effective date of the act]." [FN10] Section 2719 of the IGRA provides four exceptions to its prohibition. [FN11]

A. The First Exception Allows a Tribe to Game on Lands From the Settlement of a Land Claim.

Pursuant to § 2719(b)(1)(B)(i), tribes may conduct gaming on land taken into trust as part of a land claim settlement such as the Mashantucket***150** Pequot Indian Claims Settlement Act [FN12] and the Timbisha Shoshone Homeland Act. [FN13] However, this exception does not apply to land in trust by tribes such as those in the Maine Indian Claims Settlement Act. [FN14] The Maine Indian Claims Settlement Act made future federal Indian laws inapplicable in Maine without specific language applying them. [FN15] However, outside of circumstances such as the Maine Indian Claims Settlement Act, as long as otherwise permitted by the IGRA, a tribe that has settled or won a land claim may exercise this option.

Land claims are based on the theory that the tribe's land was transferred in violation of the law. Specifically, a tribe usually claims that the United States government did not approve the transfer of land from the tribe to the State. Therefore, the agreement violated the Trade and Intercourse Act [FN16] (or non-intercourse Act) [FN17] and must be nullified. The Trade and Intercourse Act provides that the United States government has the exclus-

ive authority to regulate trade with Indian tribes and that it is unlawful to accept land from an Indian tribe without the United States' approval. [FN18] Based on an unlawful transfer of land, a tribe asserts a claim that the law was violated, which nullifies the transfer. The tribe then asks for possession of the land and damages for the state's unlawful use and occupation of the land. [FN19]

To settle the claim, a tribe may agree to give up any future claims associated with the land transfer, Congress then deems the transfer of land to be legal under the Constitution and the laws of the United States. [FN20] In return, the State, or the Federal Government on behalf of the State, may agree to pay the tribe damages.

***151** After settling a land claim, a tribe may put land into trust for gaming. However, the statute does not clearly define what constitutes the settlement of a land claim. This makes the statute ambiguous. Due to this ambiguity, courts must interpret and apply the statute.

1. How Courts Interpret Statutes

When interpreting statutes in the absence of an agency interpretation, courts move from concrete to abstract methods. Courts will first look to the plain language of the statute. Courts give the words "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." [FN21] If, as with § 2719(b)(1)(A), which is discussed below, the statute is unambiguous and if a court can dispose of the case with a plain language reading, it will. In the case of unambiguous statutes, a court's first-in-time interpretation controls under the principle of stare decisis. [FN22]

However, unlike § 2719(b)(1)(A), the exceptions found in § 2719(b)(1)(B)(i), (b)(1)(B)(ii), and (b)(1)(B)(iii) are ambiguous. Courts have interpreted and defined these three sections several times. Importantly, courts interpreted these exceptions before the DOI promulgated the Part 292 Regulations.

2. What Courts Do With Ambiguous Statutes

When, as with §§ 2719(b)(1)(B)(i), (b)(1)(B)(ii), and (b)(1)(B)(iii), the statute is ambiguous, a court will move to greater abstraction to interpret it. Courts will first consider statutory context, interpreting the words of the statute in relation to the other words of the statute [FN23] and the statute in relation to other statutes in the same ***152** field. [FN24] If a court must, it will look to the statute's legislative history and try to discern the specific intent and broad purposes of the legislation. [FN25] After all of this, if the statute's precise meaning is not ascertained, courts will employ the canons of construction to resolve the contest of differing interpretations. [FN26] In cases involving Indian tribes, courts have traditionally applied the substantive Indian canons. [FN27] Using these canons, courts must construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." [FN28] However, recently the Supreme Court seems to have relegated (or demoted) the substantive Indian canons to the statute of other procedural canons. [FN29] The canons may be used against one another to nullify or moot each other's impact. [FN30]

Courts apply the Chevron analysis when determining whether to defer to an agency's interpretation. [FN31] When interpreting ambiguous statutes that an agency has already interpreted and defined, courts defer to the regulating agency. [FN32]

***153** 3. The "Chevron Analysis"

The Chevron analysis is a two-step test for evaluating an agency's interpretation of a statute. The Supreme Court described the test as follows:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [FN33]

Moreover, in order to be valid the agency's interpretation need not be the only permissible construction, just a permissible construction of the statute. [FN34] If an agency has previously interpreted an ambiguous statute and the Chevron test is satisfied, a court will defer to the agency's definition.

4. Land Purchased With Funds From The Resolution of a Land Claim Also Fits Within This Exception

Interestingly, in Wyandotte Nation v. National Indian Gaming Commission, [FN35] which interpreted this section prior to the Regulations and illustrates land that is purchased with monies from the settlement of a land claim-allocated specifically for that purpose-qualifies under this exception. [FN36]

***154** In Wyandotte, a tribe challenged the National Indian Gaming Commission's ("NIGC") decision not to allow the tribe to conduct gaming on a tract of land that had been placed into trust. [FN37] The NIGC had made its decision based on the fact that the tribe had been granted a monetary judgment pursuant to a land claim dispute with the federal government. [FN38] The Indian Claims Commission ("ICC") [FN39] awarded the tribe interest for the dispossession of its land. [FN40] Congress had mandated that these funds be used "to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's land claims." [FN41]

The NIGC argued that settlement of a land claim meant the settlement of a claim for the return of land, not a monetary award. [FN42] Moreover, the NIGC argued that the claim needed to be related to the actual land and not "a wrong committed over the land." [FN43]

The tribe argued that "settlement of a land claim" included all awards related to a parcel of Indian land. [FN44] The tribe's argument concerned the sequence of the words "settlement of a land claim" in the statute. [FN45] The tribe also argued that the word "land" modified the word "claim." [FN46] The tribe argued that the word "land" did not modify the word "settlement" in the statute. [FN47]

Distinguishing the tribe's award from mesne profits, the court ruled that the tribe's award was a "land claim settlement" within the meaning of the first § 2719 exception. [FN48] The court stated as follows:

> ***155** The plain meaning of 'land claim' does not limit such claim to one for the return of land, but rather, includes an assertion of an existing right to the land. As the Tribe points out, the word 'land' modifies the word 'claim,' not 'settlement,' and thus a 'land claim' means that the operative facts giving rise to a right arise from a dispute over land, not that the land claim be resolved by the return of land. Thus, the plain language of section 2719(b)(1)(B)(i) does not preclude the land claim brought before the ICC in this case from falling within that exception. By interpreting the term 'land claim' as limited to claims for the return of land, the NIGC failed to give the words of section 2719(b)(1)(B)(i) 'their ordinary, contempor-

ary, common meaning.' [FN49]

The court went on to set aside the NIGC's decision pursuant to the State Farm "arbitrary and capricious" standard. [FN50]

5. The State Farm "Arbitrary and Capricious" Standard

Courts use the "arbitrary and capricious" standard from Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., [FN51] to evaluate agency decisions. [FN52] In State Farm, the Court discussed the standard as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for ***156** its action including a "rational connection between the facts found and the choice made. . . ." In reviewing [the agency's] explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." [FN53]

Absent a court finding its decision to be arbitrary and capricious, the Secretary's decision will be given controlling weight. [FN54]

The court in Wyandotte found that the NIGC had unnecessarily focused on the fact that the tribe received a monetary judgment. [FN55] The court found that this focus was a distraction. [FN56] Congress had mandated that $100,000 of the award be used to purchase land for the tribe. [FN57] The court also found that the NIGC failed to consider and realize the importance of the Congressional mandate attached to the award. [FN58] By neglecting the fact that some of the funds from the award were designated for the purchase of land, the NIGC "entirely failed to consider an important aspect of the problem." [FN59] Because of this failure, the court held that the agency's final determination was arbitrary and capricious, and appropriately set the determination aside. [FN60]

As a prerequisite to conducting gaming, the Secretary must take the land into trust. [FN61] A tribe may exercise this exception if it files a land claim, wins, and receives either a monetary judgment or specific relief from a land claim. [FN62] A tribe's land claim settlement that results in a monetary judgment must also be at least partially designated for the purchase of alternate lands for the tribe.

***157** 6. The Regulation Interpreting This Section

The Regulations are less detailed and very broad. Section 292.5 states as follows:

> Gaming may occur on newly acquired lands [under 2719(b)(1)(B)(i)] if the land at issue is either:
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> (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or
>
> (b) Acquired under a settlement of a land claim that:
>
> (1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue. [FN63]

7. Case Law and the Regulation's Interpretations Compared

There are no major inconsistencies between judicial interpretations of the statute and the Regulations. However, there is a difference between an inconsistency with the cases, the Regulations, and an addition or clarification of the statute. An inconsistency would exist if the Regulations interpreting the statute contravened a prior judicial interpretation. For example, if a court interpreted "the settlement of a land claim" to mean only those cases in which the settlement legislation expressly includes a precise parcel and the subsequent Regulation stated that any land purchased with funds from a land claim settlement***158** would qualify for this exception, then there would be an inconsistency between the two.

Alternatively, an addition or extension to the rule would exist if the prior judicial interpretations held that land acquired with monies from legislation and any other settlement to which the federal government is a party qualify for the exception. Then the subsequent Regulation included the outcomes of cases that resolve or extinguish the land claim at issue. In this example, the Regulation would simply add a manner that land could qualify for the exception.

Here, the Regulation that interprets this exception is very broad and not inconsistent with the case law. Subsections (a) and (b) cover everything from the northeastern land claims settlement acts [FN64] to the Wyandotte situation. The language of subsection (a) covers land claim settlements and cases that resolve or extinguish "with finality the tribe's land claim in whole or in part . . . ." [FN65] The language of subsection (b) is broad enough to encapsulate Wyandotte-like situations because it includes the outcomes of cases that extinguish "with finality the land claim at issue." [FN66] The Regulation's broad language makes it an addition or extension of the prior judicial interpretations as opposed to an inconsistency.

B. The Second Exception Allows a Tribe to Game on Lands That Comprise Its Initial Reservation After Acknowledgment [FN67]

Two cases establish the analytical framework for interpreting § 2719(b)(1)(B)(ii), Michigan Gambling Opposition v. Norton (MichGO), [FN68] and Citizens Exposing Truth About Casinos v. Kempthorne (CETAC). [FN69] These cases found that Congress did not clearly define the term "reservation" in the IGRA. [FN70] Because Congress did ***159** not define what "initial reservation" meant in § 2719(b)(1)(B)(ii), it is considered ambiguous and the Secretary may define and interpret it. Congress further delegated the authority to the Secretary to fill the interstices including the effective date of the IGRA [FN71] in a Department of Interior Appropriations Act. [FN72]

To exercise this exception, a tribe must have obtained acknowledgment through the Bureau of Indian Affairs ("BIA") acknowledgment process located at Code of Federal Regulation § 83 (C.F.R.). In fact, the exception expressly mentions the "federal acknowledgment process" [FN73] and courts have held that legislatively acknowledged tribes are excluded from this exception. [FN74] Additionally, a tribe must have subsequently obtained the land in question pursuant to the Secretary's designation as its reservation under section 5 of the Indian Reorganization Act ("IRA"), [FN75] which is discussed below.

The Secretary's acknowledgment of a tribe pursuant to 25 C.F.R. § 83.7 will be extended Chevron deference. [FN76] The Secretary's decision to acquire land in trust for a tribe and decide whether gaming may occur is also entitled to Chevron deference. [FN77] Ultimately, as long as the Secretary's definition of the statute is permissible and his or her decision was not "arbitrary and capricious," [FN78] it will stand.

The MichGo and CETAC courts have also held that a tribe's "initial reservation" is the land that the tribe may exercise jurisdiction or governmental powers over after acknowledgement. [FN79] These holdings ***160** stemmed from language in the IGRA's definition section. Section 2703(4)(B) states that "Indian lands" refers to "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." [FN80] Although a tribe may own lands without federal government acknowledgment, unacknowledged tribes - by definition - cannot have trust property before their federal acknowledgment. [FN81] Moreover, absent acknowledgement, a tribe may not lawfully exercise governmental powers over land. [FN82] Thus, only a tribe's land that is acquired in trust immediately after its initial acknowledgement satisfies the "initial reservation" exception of § 2719 as long as the tribe asserts jurisdiction and exercises governmental powers over it.

The case's judicial framework for determining what qualifies as a tribe's "initial reservation," which liberally allows for a tribe to conduct gaming on new lands under this exception, is reinforced by the IGRA's statutory purpose. The IGRA's statutory purpose is "promoting tribal economic development, self sufficiency, and strong tribal governments." [FN83] Tribes that are acknowledged (but not restored) after 1988 would not, otherwise, be able to conduct gaming without this exception. Cases have found that this exception "ensur[es] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." [FN84]

The court's findings regarding Congressional delegation to the Secretary to define "reservation" also comport with the Indian canons of construction. Specifically, the Indian canons state statutory ambiguities***161** are to be read in favor of Indians. [FN85] These findings comport with the stated Indian canons of construction because, in MichGO and CETAC, the Secretary's determination behooved the tribes.

In order to fall within this exception, a tribe must fulfill the requirements of § 83.7 to be considered an Indian tribe [FN86] and have certain lands declared by the Secretary to be a new federal reservation. [FN87] Then, a tribe must assert jurisdiction and exercise governmental powers over the land in question. The Secretary's interpretation is entitled to Chevron deference and his or her decision will stand unless it was "arbitrary and capricious." [FN88] Therefore, according to case law, a tribe who has been granted acknowledgement and obtained land as its "initial reservation" for gaming would withstand a challenge in the courts as long as these conditions were met. [FN89]

1. The Regulation Interpreting This Section

Section 292.6 contains the criteria a tribe must meet to conduct gaming on land under § 2719(b)(10(B)(ii) of the Code of Federal Regulations. [FN90] A tribe must cumulatively meet four conditions. [FN91] First, a tribe must have been acknowledged under 25 C.F.R. § 83; second, a tribe must not have a gaming facility on lands it acquired under the "restored lands" exception; third, the land in question must have been a tribe's first proclaimed reservation-pursuant to 25 U.S.C. § 467-following acknowledgement; and fourth, if a tribe does not yet have a proclaimed reservation, it must demonstrate a significant connection to the land in question. [FN92]

***162** 2. Case Law and The Regulation's Interpretations Compared

There are no major inconsistencies that contravene each other between judicial interpretations of the statute and the Regulations. A tribe must be acknowledged under § 83 and the Secretary must proclaim the land a reservation under 25 U.S.C. § 465. [FN93] The Regulation's requirement that a tribe must not have a gaming facility on lands it acquired as "restored lands" clarifies and distinguishes this exception from the next exception discussed immediately below. [FN94]

However, the Regulations add two requirements to what the case law required. There are two differences between what the cases and the Regulations require. The Regulations do not expressly require that the tribe exercise governmental powers over the land in question. [FN95] But a tribe would need to assert jurisdiction over a parcel once it was put in trust for purposes of gaming, and so, this Regulation will necessarily be met. [FN96] The Regulations also require that a tribe demonstrate a significant connection to the land in question. [FN97] This is beyond what the cases required for this exception.

Under § 292.6, a tribe may establish a significant connection by showing either of the following:

> (1) The land is near where a significant number of tribal members reside; or
> (2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2-years at the time of the application for land-into-trust; or
> (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land. [FN98]

***163** Criteria 1 and 2 clarify what may constitute a "significant connection." [FN99] However, it is unclear under the first criteria whether a significant percentage of the tribe's membership must live in the area or whether a specific number of persons living there would satisfy this requirement. [FN100] Must the tribe's members reside on the parcel in question or just in the general area?

Looking to the comments and responses regarding this section in the Federal Register, the Regulation in question-§ 292.6(d)-is commented on generally but sheds no more light on what exactly constitutes a "significant connection" for the exception. [FN101] The comments suggested that the Regulations limit the lands to which a tribe may demonstrate a "significant connection" to land within the tribe's first reservation or land close to the tribe's aboriginal homelands. [FN102] None of these recommendations were adopted because they failed to take into account the tribe's present circumstances and location. [FN103] One comment suggested a provision in the Regulations prohibiting precluding a tribe from demonstrating a "significant connection" to lands far removed from the tribe's historical area. This suggestion was not adopted. [FN104] These rejected suggestions reflect the DOI's reluctance to widen or narrow the original exception.

Another comment suggested that the Regulations include a process and standard by which the Secretary could make a decision regarding whether the tribe has demonstrated a "significant connection." [FN105] The secretary commented that "section 292.6(d) provides standards that the tribe must demonstrate in order to be proclaimed a reservation under the initial reservation exception." [FN106] This is a non-response that tells us the DOI does not want to impose a more rigid test for determining whether the exception is met. The Federal Register***164** comments and responses on this section do not elucidate this section.

A comment in the general comments on another Regulation-§ 292.12-suggests that the language of §§ 292.11 and 292.12 be made consistent with § 292.6. The secretary adopted this recommendation. [FN107] More importantly, §§ 292.11 and 292.12, which are discussed below, were commented on much more than § 292.6.

The Federal Register does not enlighten us as to what constitutes a “significant connection” to lands for purposes of fitting within the “initial reservation” exception. However, the comments on § 292.6 do tell us that we can look to §§ 292.11 and 292.12 for help in determining what constitutes a ‘significant connection’ to lands for gaming. [FN108] The comments and responses regarding these sections are discussed below.

The second criterion is the most concrete. It sets distances and time periods as standards. However, the third criterion is more vague than the first. What are “other factors” that could be enough in-and-of themselves to satisfy this exception? The statute does clarify this.

In the cases that interpreted this exception, the tribes had significant connections to the land in question-in that the land was within their historical aboriginal area. But exactly what “significant connection” means is still unclear. For example, does it mean “significant connection” to a parcel within the tribe's historical area or does it mean a piece of land the tribe owned prior to acknowledgement that they have put into trust and started asserting jurisdiction over immediately after acknowledgement? What a tribe needs to satisfy this criterion is unclear from the Regulations alone.

Although interpreting another exception, the Grand Traverse cases help to shed light on this criteria in Grand Traverse v. U.S. Att'y, where the concern was the “restoration” exception instead of the “initial reservation” exception, the tribe sought to conduct gaming on a parcel that it claimed had been part of its historical “core area.” [FN109] ***165** However, other local tribes also claimed this as part of their core area. [FN110] Moreover, the actual parcel in question was 1.5 miles outside of a previous reservation that had been assigned to the tribe by the federal government in 1836. [FN111] The court held that this parcel qualified (under the restoration of lands exception discussed next), which impliedly recognized that the tribe had a prior significant connection to lands located very close to the parcel in question. [FN112]

Therefore, a tribe may have a significant connection to lands in close proximity to its current (or former) reservation. Although the next exception-and the cases that interpret it-help to clarify this issue, it will likely be litigated in the future because the Regulations do not concretely clarify what a “significant connection” to the land is.

In sum, the definition section of the § 292 Regulations includes the elements of the prior judicial interpretations of this exception. [FN113] The Regulations differ but do not deviate in a manner that contravenes the judicial interpretations. The Regulations' additional requirement that a tribe demonstrate a “significant connection” to the land raises a significant question that will likely lead to more litigation in the future.

C. The Third Exception Allows a Tribe to Game on Lands That The United States Restores to It

“Restoration of lands” and “restored tribe” are terms not defined in § 2719(b)(1)(B)(iii). [FN114] Therefore, courts have looked to the plain meaning of the words “restoration” and “restored” to initially interpret the statute. [FN115] Courts have found the plain meaning of the words in dictionary definitions of “restoration” and “restored,” which include the meanings “to give back, return, make restitution, reinstatement,***166** renewal and reestablishment.” [FN116] Pursuant to these definitions and the facts of the cases before them, courts have found that a “history of governmental recognition, withdrawal of recognition, and then reinstatement of recognition ‘fits squarely within the dictionary definitions of ‘restore’ and is reasonably construed as a process of restoration of tribal recognition.”' [FN117]

Regarding past recognition, withdrawal of recognition, and subsequent restoration of recognition, courts have adopted a two-part test for establishing the first and the last portions. This test has both a legal and an empirical component. The court in Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y W. Dist. of Mich., stated the test as follows: federal recognition of a tribe requires (1) a legal basis for recognition (e.g. Congressional or Executive action) and (2) the empirical indicia of recognition (e.g. a "continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs"). [FN118]

Therefore, a tribe may be acknowledged by an express federal action or through the practical course of dealing. A tribe may cease to be recognized either through a federal action or through the course of dealing. [FN119] Then, a tribe may be restored by either of the two methods of acknowledgment-§ 83 or legislation.

Courts have also adopted a three-prong test for determining if gaming can be conducted on restored lands. [FN120] The three prongs: "(1) the factual circumstances of the acquisition, (2) the location of the acquisition, and (3) the temporal differentiation between restoration of the tribe and the acquisition." [FN121] Under the first factor, a tribe's ***167** acquisition of land must provide some "indicia of restoration." [FN122] Under the second factor, a tribe need not be restored its reservation, but the land must be within the tribe's historical location. [FN123] Lastly, a tribe must acquire the land for gaming as soon as possible after restoration. [FN124]

So, to recap, courts have ruled that to exercise this exception, a tribe must show that it was previously acknowledged. Then over time and through the course of dealing-such as not receiving services from the federal government-a tribe must show that its acknowledgement ceased de facto. Next the tribe must obtain acknowledgement pursuant to 25 C.F.R § 83.7 or Congressional legislation. If a tribe limits its gaming to its restored reservation, it will satisfy the three-prong test courts employ for this exception. If not, a tribe should acquire the land it intends to conduct gaming on shortly after being restored. Moreover, the tribe should acquire land within its historical location. As a last option to exercise this exception, if the NIGC or the Secretary does not authorize gaming to be conducted on the piece of "restored" land, then a tribe must obtain a declaration from a federal court stating that the tribe fits within this exception.

1. The Regulation Interpreting This Section

Regarding the interpretation of the statute, the Regulations are more thorough than the cases. The Regulations begin by describing the criteria for a tribe to be considered restored. To be restored, a tribe must have been federally recognized at one time. [FN125] A tribe can illustrate this by showing: (a) the U.S. entered into treaty negotiations with it at one time; (b) the DOI "determined that the tribe could organize under the [IRA] or the Oklahoma Indian Welfare Act; (c) Congress enacted legislation . . . indicating that a government-to-government relationship existed;" (d) the U.S. acquired land for the ***168** tribe; or (e) other evidence demonstrating that a government-to-government relationship existed between the tribe and the U.S. [FN126]

Next, a tribe must show that it lost its government-to-government relationship with the United States. [FN127] A tribe can illustrate this by showing: (a) legislation that terminated the relationship; (b) "[c]onsistent historical" Federal Government documentation stating that the U.S. "no longer recognized a government-to-government relationship with the tribe . . . or" (c) restoration legislation. [FN128]

Then a tribe must show that it "was restored to Federal recognition . . . ." [FN129] A tribe can illustrate this by showing: (a) restoration legislation; (b) acknowledgment through the 25 C.F.R. Section 83 process; "or (c) [a] Federal court determination in which the United States is a party or court-approved settlement agreement

entered into by the United States." [FN130]

Lastly, the newly acquired land must be considered "restored lands" under the Regulations. [FN131] Under the Regulations, there are three ways lands may be considered "restored."

i. First Way Lands may be Considered "Restored"

If a tribe was restored through legislation, it must show either of the following:

> (1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or (2) If the legislations does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of 292.12. [FN132]

***169** To meet the requirements of § 292.11, a tribe must establish a connection-modern and historical-to the land at issue. [FN133] A tribe may establish a connection by meeting the three criteria of § 292.12. [FN134]

a. First Criterion For Establishing Modern and Historical Connections to the Land in Question

First, the newly acquired lands must be "where the tribe is now located, as evidenced by the tribe's governmental presence or population . . . ." [FN135] With this, a tribe must demonstrate a modern connection. A tribe can do this by showing:

> (1) The land is within reasonable commuting distance of the tribe's existing reservation; . . . (2) The land is near where a significant number of tribal members reside; (3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or (4) Other factors [demonstrating] the tribe's current connection to the land. [FN136]

b. Second and Third Criteria For Establishing Modern and Historical Connections to the Land in Question

Second, a tribe must establish "a significant historical connection to the land." [FN137] And third, a tribe must demonstrate "a temporal connection" between its restoration and the purchase of the land at issue. [FN138] To do this, a tribe must either show the land acquired is the tribe's first acquisition after restoration or that the tribe applied to ***170** have the land taken "into trust within 25 years" of its restoration and that it is not gaming on other lands. [FN139] If a tribe meets all of these three criteria, it will establish a connection to the land in question.

i. Second Way Lands may be Considered "Restored"

If a tribe was restored through the 25 C.F.R. § 83 process, it must show that it "[m]eets the requirements of 292.12" discussed above and that it does not have a post-October 17,1988 "initial reservation." [FN140]

ii. Third Way Lands may be Considered "Restored"

Third, if a tribe was restored by a federal court determination, it must only show it meets the § 292.12 re-

quirements discussed above. [FN141] If a tribe meets any of these three criteria, its land may be considered "restored lands" for purposes of conducting gaming on.

2. Case Law and The Regulations' Interpretations Compared

Regarding restoration of the tribe itself, the Regulations are, for the most part-but not entirely-consistent with the cases. However, the Regulations are more thorough than the cases-in that they clearly list the ways in which a tribe may illustrate its prior acknowledgment, its loss of acknowledgment, and its restoration.

The Regulations also allow for judicially restored tribes to use this option. Presumably, a tribe would be judicially restored through a judicial finding that the tribe had been illegally administratively terminated by the Secretary's previous removing of the tribe from a list of acknowledged tribes. If a tribe challenges this and wins, it may now presumably be considered restored under the Regulations. This is an added option for tribes created under the Regulations.

***171** a. Issues With the Case Law and Regulation's Interpretations

Regarding the restored status of a tribe's land, the Regulations are more stringent, if not inconsistent, with the cases. The requirement of § 292.12(a) that a tribe establish a modern connection to the parcel of land in question is more stringent than what the cases required. The cases only required that a tribe illustrate that the parcel in question be within the tribe's "historical location." [FN142] Now, under the Regulation, a tribe must also establish a "modern connection" to the land and show that its population or government exists on or around the parcel it wants to conduct gaming on in order to fall under this exception. [FN143] This additional-more stringent-requirement will make it more difficult for a tribe to exercise this exception.

Reviewing the Federal Register shows that §§ 292.11 and 292.12 were commented on substantially. [FN144] These comments and responses regarding how a tribe establishes its connection to land for purposes of the exception are also instructive for §§ 292.12 and 292.6. The comments on the Regulations and the DOI's responses shed some light on how a tribe establishes a modern and historical "significant connection" to lands for purposes of conducting gaming.

According to the Federal Register, "[s]everal comments suggest[ed] removing the 'modern connections' test because, for example, the test is not in the plain language of IGRA, and the test is contradicted by case law." [FN145] The examples cited were Grand Traverse cases and the Confederated Tribes of the Coos, Lower Umpqua and Suislaw Indians v. Babbitt, all of which focused on whether the lands in question were historically occupied by the tribe. These cases and the Wyandotte case did not focus on modern connections to the land.

***172** These recommendations were not adopted. The DOI's response states:

> Though the "modern connections" test is not in the plain language of IGRA, nor is the test for a historical connection. The cases cited by the commenter do not limit the Department from considering a modern connection and only discuss the historical connection in relation to the process by which the Department made its decision. Additionally, the cases cited by the commenter provide guidance for the interpretation of section 2719(b)(1)(B)(iii); lands that are taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition. The Secretary has discretion to require a modern connection as part of the restoration of lands. The modern connection test remains in the final regulations

> because it offers a mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency, both of which are reflected in IGRA. [FN146]

With this, the DOI decided to narrow access to the exception from what the case law had held it to be. While the DOI's decision is not necessarily inconsistent with the case law interpreting this exception, the "modern connection" requirement does narrow the exception. It does this despite the Grand Traverse court's holding that "[t]he clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated." [FN147] Nowhere in § 2719(b)(1)(B)(iii) is such an intent stated. [FN148]

***173** However, while the DOI narrowed the exception from the cases, it did not do so to the extent other comments had suggested. Several comments stated that the test for establishment of a modern connection to the land is too permissive. [FN149] Several of these comments suggested that the Regulation require that the majority of the tribe live in the immediate vicinity of the land in question. [FN150] The DOI did not adopt these recommendations. In its response, the DOI stated that "a test that allows for consideration of a number of different factors" is preferable to a hard-line requirement-which could have potential practical difficulties and cause "confusion in [administration]." [FN151] So, while attempts to narrow the exception further than what the DOI had proposed were denied, efforts to keep the exception as wide as the cases had held were also denied. In the end, this additional "modern connection" requirement is narrower than-but not inconsistent with-the case law interpretations of the statute and will make it more difficult for a tribe to exercise this exception.

b. Potential Problem Between the Two Interpretations

The requirement of § 292.12(c) that a tribe not be gaming on other lands to exercise this exception is an added burden not found in the cases. There are two ways to view this addition. First, the facts of the cases that interpret this exception are inconsistent with the Regulation, and thus, the holding of the cases-with these operative facts-are at odds with the Regulation. Or second, because the facts are just incidental, the holdings are not necessarily in contravention with the Regulation. Here, it seems that the second view is stronger because this issue was not litigated and decided by the courts. However, it is reasonable to infer from the fact that the parties did not litigate the issue that it was generally-and mutually-understood that a prior gaming establishment's existence was not a part of the determination***174** of whether a tribe's land was "restored" for purposes of conducting gaming. Under the second view, the following analysis is moot.

However, under the first view, this new requirement is inconsistent with the cases and perhaps an impermissible construction of § 2719(b)(1)(B)(iii) not entitled to Chevron deference. It is arguable that the courts implicitly considered the issue of prior gaming establishments and their non-effect on land being considered restored for purposes of the restored lands exception-by the facts of the cases interpreting this exception.

Some courts have held that a trial court must adhere to the precedents from issues that an appellate court above it has addressed explicitly or implicitly. [FN152] Under this argument, the district courts in the Sixth Circuit are bound to consider the explicit and implicit issues addressed by the Grand Traverse Band of Ottawa and Chippewa Indians court and whether or not a prior existing gaming establishment precluding a tribe from the exception under the Regulation-and its inconsistency with the case-matters. [FN153]

Section 134 of American Jurisprudence, Second Edition, states:

> For a case to be stare decisis on a particular point of law, that issue must have been raised in the ac-

> tion decided by the court, and its decision made part of the opinion of the case; accordingly, a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced. Thus, a case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue by the court. [FN154]

American Jurisprudence also cites Central Virginia Comm. College v. Katz, for the proposition that the Supreme Court is not bound ***175** to follow its dicta when the point at issue was not fully debated. [FN155] Under this argument, a preexisting gaming operation precludes a tribe from exercising the exception under the Regulations, and there is no debate about whether the cases or the Regulations should be deferred to the Regulations control, and there is no inconsistency because the issue was never litigated in Grand Traverse, Grand Traverse Band of Ottawa and Chippewa Indians, or Wyandotte.

The Federal Register addresses § 292.12(c)(2), which precludes a tribe from exercising the exception if it has a gaming operation on other lands. [FN156] One comment suggested prohibiting a tribe from conducting gaming under the exception if it is gaming on other lands. [FN157] The DOI responded that "[t]he recommendation to qualify (c)(1) with the phrase 'the tribe is not gaming on any other trust lands' was adopted in part and added to (c)(2). The definition of newly acquired lands includes tribal land acquired in trust but does not include tribal fee land." [FN158]

While the Federal Register doesn't tell us much about the formulation of the Regulation, it does tell us that the DOI adopted the suggestion from just one comment. This suggests that they were very willing to impose an additional limit on the exception-that is incommensurate with prior case law definitions-without significant pressure. Ultimately, this contravention with the courts' prior definitions makes this exception narrower and disrupts the settled expectations from case law that previously interpreted the statute.

It is reasonable to infer from the fact that the parties did not litigate the issue that it was mutually-and generally-understood that a prior gaming establishment's existence was not part of the determination of whether a tribe's land was restored for purposes of conducting gaming. The courts did not hold that another pre-existing gaming operation precluded tribes from fitting within this exception. In fact, there was no mention of such a requirement in either case. Moreover, ***176** the court in Grand Traverse indicated the opposite intention when it stated "[t]he clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated." [FN159] Nowhere in § 2719(b)(1)(B)(iii) is such an intent stated. [FN160]

The new requirement of § 292.12(c) will make it harder for tribes to fit within this exception. This exception is narrowed by the Regulation because tribes that have a preexisting gaming operation on another parcel of land-even if only shortly before-and could otherwise game on a restored parcel will not be able to fit within this exception. Likely, their only remaining option would be to go through the two-part "section 20 process" discussed below. This will delay and stifle tribal economic development.

This is inconsistent with what Grand Traverse, Grand Traverse Band of Ottawa and Chippewa Indians and Wyandotte held in light of their facts. In both situations, the tribes fit within the gaming on restored lands exception despite having had prior existing gaming operations on other restored parcels. [FN161] In the case of the Grand Traverse Tribe, it had a gaming operation in Grand Traverse County, Michigan that had opened just after its restoration. [FN162] Years later, it decided to put the "turtle creek" parcel into trust for gaming. [FN163] In the case of the Wyandotte Nation, it had a gaming operation in Oklahoma when it decided to put the "Shriner tract" into trust for gaming. [FN164] Again, this all suggests that the parties did not litigate the issue because it

was generally understood that a prior gaming establishment's existence***177** had no effect on whether a tribe could conduct gaming on “restored” lands.

3. Solutions to the Potential Problem

So then the question that arguably exists is which interpretation of the statute is entitled to deference-the courts' prior interpretations or the DOI's later Regulations? Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. provides answers to this question.

a. Brand X's First Answer

The majority's holding in Brand X answers the question in favor of the DOI's later Regulations. Justice Thomas wrote for the 6-3 majority, which included Justices Rehnquist, Stevens, O'Connor, Kennedy, and Breyer. Although Justices Stevens and Breyer wrote separate concurring opinions, they sign on in full. In Brand X Internet Services, the Court considered whether a 2002 [FN165] Federal Communications Commission (“FCC”) definition of a statute was entitled to deference under the principles of Chevron and controlling over a 20009th Circuit definition of the same statute. [FN166] The Court found that Congress had spoken to the precise issue and that the statute was ambiguous. [FN167] Therefore, the agency's definition, which would have otherwise been deferred to, trumped the stare decisis effect of AT&T Corp. v. Portland. [FN168] The Court held that although the statute at issue was ambiguous and despite being first in time, the FCC's definition controlled. [FN169] Additionally, the Supreme Court stated “[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision***178** holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” [FN170]

The majority reasoned that section 5 of the Administrative Procedure Act authorizes Congressional delegations of authority to agencies and that Chevron created a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion ambiguity allows.” [FN171] Moreover, the majority reasoned that because the agency has expertise in the area, it-rather than the courts-is the proper body to promulgate the best definition of a statute. [FN172] Further, expert agencies are in the best position to address statutory definitions that involve “subject matter [that] is technical, complex, and dynamic.” [FN173] Thus, according to the Brand X majority, the principles of Chevron dominate the stare decisis effect of courts' first-in-time statutory definitions and interpretations. [FN174]

According to the Brand X Internet Services majority opinion, the Regulations' definitions control first-in-time judicial definitions. [FN175] Therefore, under the second (initial reservation) exception, a tribe must now demonstrate a connection to the land. Further, under the third (restoration) exception a tribe must now establish a modern connection to the land and must not be conducting gaming activity on other tribe land to fit within this exception. All of these requirements narrow the exceptions and are more burdensome for the tribes.

***179** b. Brand X's Second Answer

However, Justice Scalia wrote a strong dissent in Brand X Internet Services, which was joined by Justices Bader-Ginsburg and Souter. His dissent questioned the constitutionality of Chevron as applied in Brand X Inter-

net Services. Moreover, his dissent held that preexisting judicial definitions should be deferred to in the face of later administrative regulations. [FN176]

Scalia began by saying, "[a]ccording to today's opinion, the agency is thereupon free to take the action that the Supreme Court [and other lower courts for that matter] found unlawful." [FN177] Next, he highlighted that Chevron deference, as applied in this case, is probably unconstitutional because it reallocates authority from Article III to Article II. On this point, Scalia states that "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." [FN178] Moreover, Scalia notes that the Court had previously held that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." [FN179] Scalia finishes by saying "I would adhere to what has been the rule in the past: When a court interprets a statute without Chevron deference to agency views, its interpretation [whether or not asserted to rest an ambiguous text] is the law." [FN180]

i. Scalia's Dissent in Brand X is the Better Answer Here

There are two additional arguments beyond Justice Scalia's argument for why the majority's rule in Brand X Internet Services is not the most meritorious. First, Indian land determinations are matters of fact and law that are not "technical, complex, and dynamic." [FN181] Justice***180** Thomas' theory behind extending deference to an agency's later interpretation despite an earlier judicial interpretation is that agencies are staffed with experts who are in the best position to come up with the "best" interpretation. However, unlike the complex technical questions of Brand X Internet Services, land determinations can be made through simple findings of fact that ascertain whether a tribe meets an exception. A court may determine whether or not a tribe meets the tenets of "restoration" based on the facts presented at trial and then determine whether the land in question is part of the tribe's restoration, which would make the tribe eligible to conduct gaming. Thus, a court is at no disadvantage to the DOI or the NIGC on these matters and need not have its first-in-time interpretation overruled by an agency.

ii. Law and Economics and Justice Scalia's Dissent in Brand X

Second, the discipline of law and economics illustrates that Justice Scalia's rule is more efficient. Courts and agencies adhere to previously promulgated rules - and interpretations-pursuant to the doctrine of stare decisis. [FN182] The doctrine is designed to precipitate order in the law, allow for intelligible and consistent evolution of the law, and foster the actual and perceived integrity of the judicial process. [FN183]

An efficient outcome or rule is one that allocates a right to the party who values it more or allocates resources to the party that can use them. [FN184] When courts-or agencies-issue decisions and interpretations with efficient outcomes for the parties involved, other individuals or corporations in the particular industry take notice. When these actors take notice and order their affairs accordingly, they are likely to ***181** act in an efficient manner. Moreover, they structure their business practices to have the maximum likelihood of a beneficial outcome in future disputes. [FN185] An efficient legal rule precipitates efficient behaviors in the industry or market. Society-and Indian country-is made better off by efficient outcomes and efficient legal rules because they engender society's efficient investment and use of resources. [FN186]

Those fond of law and economics argue that the goal of the law and its processes should be to minimize social costs and maximize social benefits. [FN187] Moreover, the goal of the common law and agency regulation

should be efficient outcomes and rules that precipitate efficiency. [FN188]

Here, such a rule would be one that fosters predictability by being consistent with the previous case law rules that created settled expectations. Such a rule would protect and promote investment in tribal gaming, and for the most part, the Regulations do this. However, the ways discussed above do not create inefficient rules that are reinforced by the Brand X Internet Services majority opinion.

The litigation market aids the common law's evolution towards efficient rules. Robert Cooter and Thomas Ulen, two law and economics scholars, refer to this as "selective litigation." [FN189] They find that inefficient laws are challenged in court more than efficient laws. [FN190] Others in the field have also argued that inefficient laws will be challenged more often than efficient laws because parties with ongoing economic interests at stake will challenge the rule. [FN191] Scholars like Cooter and Ulen contend that this is likely because inefficient laws allocate resources inefficiently-meaning to the wrong parties. [FN192] Conversely, efficient rules are very likely to persist. [FN193]

***182** Economic actors have an interest in the efficient allocation of resources; they have an ongoing interest in precedent and a continuing efficient legal rule. [FN194] As such, they are more likely to fight inefficient rules. Accordingly, litigation "selects against inefficient laws" and moves the law towards efficiency. [FN195]

In Indian law, efficient legal rules would create and extend settled expectations, be predicable, and promote outside investment into reservations. Efficient legal rules encourage sound investment (which spurs monetary velocity) and economic development. However, rules that abruptly change the legal structure and disrupt settled expectations lead economic actors away from investment and stifle economic productivity on reservations.

Here, to maximize efficiency, the Regulations should congruently mimic the cases that created settled expectations. Specifically, the Regulations would be more efficient if, under the second and third exceptions, tribes did not need to demonstrate both historical and contemporary connections to the land and, under the third exception, tribes could not be precluded from gaming due to a gaming establishment on other lands. Moreover, if courts did not need to defer to administrative agencies-despite earlier judicial holdings-under the expansive reading of Chevron, the law would be more efficient. Tribes and entities invested capital under the rules created by the cases only to have their expectations changed under a few of the Regulations defining the exceptions. Unfortunately for efficiency, the rules were slightly changed.

These inefficient legal rules subvert the federal government's policy goals and hinder tribal economic development. Fortunately, this is only a small portion of § 2719. These rules precipitate inefficient use and allocation of resources because they are vague, disrupt settled expectations,***183** or inhibit tribal economic development, law and economics would suggest that they will be litigated again in the future.

Fortunately, Brand X Internet Services is only the Supreme Court's latest word on this issue; it is not the latest case in a line of cases. An appellate court, even the Supreme Court, may not-by itself, in one case-declare a rule to be super-precedent and ossified by stare decisis. [FN196] Thus, Brand X Internet Services may be overturned. [FN197] "Stare decisis is not an inexorable command." [FN198] Instead, it is a principle that a court may or may not choose to apply. [FN199] Additionally, courts do not mechanically apply the rule of the latest case when they invoke the doctrine. [FN200] So, with "selective litigation," the possibility exists that the inefficient interpretations discussed above could in the future be overturned.

***184** C. The Fourth Exception is a "Catch All" That Allows a Tribe to Game if Local Stakeholders and the Secretary Approve

The final exception for putting land into trust for gaming is the two-step "section 20 process" of § 2719(b)(1)(A). [FN201] In the first step, the Secretary must be convinced that conducting gaming on newly acquired lands would be in the tribe's best interests. [FN202] Also, the Secretary must be convinced that this "would not be detrimental to the surrounding community." [FN203] In the second step, the Governor of the state where the tribe would conduct gaming on newly acquired lands must concur with the Secretary's determination. [FN204]

The section 20 process is quite straightforward. Courts have disposed of issues arising out of this section using its plain language. In Keweenaw Bay Indian Community v. United States, the court considered whether a tribe must comply with § 2719(b)(1)(A) despite the existence of a valid tribal-state compact. [FN205] Prior to the case, a tribe had purchased a parcel of land, which was taken into trust by the federal government in September 1990. [FN206] The tribe then entered into a tribal-state compact with the State of Michigan on August 20, 1993. [FN207] In August 1994, the tribe submitted an application for approval to game on the parcel it had put into trust in 1990. [FN208] Because the parcel had been put into trust after 1988, and the tribe had not completed the section 20 process, the BIA denied the application. [FN209]

The tribe filed an action for declaratory and injunctive relief. [FN210] It argued that Class III gaming should be allowed on the parcel at issue ***185** under the tribal-state compact. [FN211] The federal government counterclaimed. [FN212] It argued that § 2719 prohibited gaming on land put into trust after the effective date of the IGRA, unless the section 20 process was completed or another exception was met. [FN213]

The district court held that the tribal-state compact made the gaming on the parcel legal and that the section 20 process was unnecessary. [FN214] The Federal Government appealed.

The Sixth Circuit reversed the district court. The Sixth Circuit held that because the land at issue was taken into trust after 1988, the tribe was required to satisfy the section 20 process. [FN215] The Sixth Circuit held that the statute was unambiguous and that a plain language reading was appropriate. [FN216]

D. The Regulation Interpreting This Section

Section 292.2 of the Regulations-the definitions section-defines §2719(b)(1)(A). The section reads in part as follows:

> Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.
>
> . . .
>
> Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.
>
> . . .
>
> Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:
>
> (1) Would be in the best interest of the Indian tribe and its members; and
>
> ***186** (2) Would not be detrimental to the surrounding community.

. . .

> Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government of nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment. [FN217]

There are no major inconsistencies between the statute, judicial interpretations, and the Regulations. Except for missing the criterion that the State's Governor concur with the Secretary, the two-part Secretarial Determination contains the other elements of the section 20 process. The section also defines "[a]ppropriate State and local officials" to include "the Governor of the State . . . ." [FN218] Thus, the definitions section includes the elements and major players included in the statute. These definitions do not deviate from the plain language of the statute or judicial interpretations.

The DOI's definition clarifies that "[a]ppropriate . . . local officials" means those from municipalities and tribes within 25 miles of the proposed gaming site. [FN219] Moreover, this section also makes it possible for nearby Indian tribes beyond the 25-mile radius limit to "petition for consultation" if they can show they will be adversely impacted by a proposed gaming operation. [FN220] This is not necessarily inconsistent with the statute's plain language. [FN221] It only sets a 25-mile limit. [FN222] It also provides the means for being included in a consultation with the Secretary even though a tribe is beyond the limit. [FN223] This may change the Secretary's determination from whether the proposed***187** gaming site will have a detrimental impact on the surrounding community to whether it will have an impact on communities that are farther in proximity from the proposed site. Ultimately, this will not have an impact on how the statute is interpreted and applied or the deference extended to the Secretary's determination.

E. Section 2719 is a Land Use Limitation That Does Not Affect The Secretary's Authority to Take Land Into Trust for Tribes

Section 5 of the IRA authorizes the Secretary to take land into trust for Indians. [FN224] Section 5 provides as follows:

> 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 . . . for the purpose of providing land for Indians . . . Title to any land or rights acquired . . . 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. [FN225]

Typically, Congress delegates authority to an agency with an attached intelligible standard or "principle to which the person or body authorized to act is directed to conform." [FN226] However, beyond the requirement that an interest be acquired for an Indian tribe or individual, section 5 lacks any such standards. Several suits have been brought claiming "that [section] 5 of the IRA is an unconstitutional delegation of legislative power because . . . 'completely devoid of intelligible standards to guide or limit the Secretary's discretion."' [FN227]

***188** Recently, in response to this claim, the court in Michigan Gambling Opposition v. Kempthorne (MichGO), held that section 5 does not violate the non-delegation doctrine. [FN228] The Supreme Court found that the delegation in section 5 is similar to other statutes upheld by the Court that only "direct agencies to act in

the 'public interest,' [FN229] or in a way that is 'fair and equitable."' [FN230] The Court found that in light of the intent and purpose of the IRA-to promote Indian economic development and self-governance-section 5 is an acceptable delegation of authority. [FN231]

The Court could have upheld section 5 as a recognition and delegation of discretionary authority, such as Executive discretionary authority-similar to pardons. Such delegations, by definition, do not have intelligible standards attached to them. The Court addressed the issue of whether intelligible standards are always necessary in Lincoln v. Vigi. [FN232]

In Lincoln, persons receiving clinical services as part of an Indian Health Service ("IHS") program brought suit against its Director challenging the program's cancellation. [FN233] IHS had funded the program from a lump sum congressional appropriation. [FN234] Congress had not specified how the funds were to be spent. [FN235] However, Congress had increased IHS's funding to expand and develop the program. [FN236] The plaintiffs argued that the power to terminate the program was not within the discretionary authority of IHS. [FN237] Moreover, they contended***189** that the decision to terminate the program was reviewable under the Administrative Procedure Act ("APA"). [FN238]

The Court held that the continuation or termination of the program was within the discretion of the IHS. [FN239] Moreover, it determined that the IHS's decision was precluded from review under the APA. [FN240] The Court reasoned that agencies have expertise, which makes them best suited to make complicated decisions pursuant to Congress' enactment of a statute to achieve its purpose. [FN241] Moreover, an agency's expertise better equips it, rather than a court, to decide how to properly fulfill its statutory mandate. [FN242] These agency decisions should further the statute's purpose or intent but do not need a delegation of authority with intelligible standards and are not reviewable by courts.

Recently, with its denial of certiorari on the section 5 non-delegation issue in Carcieri v. Norton, the Supreme Court may have signaled the end of this claim being heard. [FN243] After Carcieri v. Salazar, [FN244] tribes acknowledged after 1934 are limited. They cannot have the Secretary take any lands into trust for them. However, they may still exercise the § 2719 exceptions discussed above to game on lands if the authority to take land into trust is expressly stated in the Acknowledgment Act. Except for tribes acknowledged after 1934, the Secretary may now exercise his delegated discretionary authority to take land into trust. After this, a tribe may then use one of the options above to game on that land.

However, absent specific language in acknowledgment legislation empowering the Secretary to take land into trust for a newly acknowledged tribe that is not restored, Carcieri makes such tribes ineligible ***190** for any of the exceptions to § 2719. Only restored tribes could still exercise an exception.

III. Conclusion

The courts promulgated several rules concerning whether land falls within the three statutory exceptions. These rules created settled expectations. Tribes and businesses invested money and conducted business with these settled expectations.

Several years later, the DOI promulgated the Regulations, which interpret the § 2719 exceptions and add requirements. Section 292.12(c) may be inconsistent with case law interpretations of § 2719(b)(1)(B)(iii). The Regulations add the requirement that a tribe demonstrate a modern connection to the land in question for pur-

poses of the exceptions of §§ 2719(b)(1)(B)(ii) and 2719(b)(1)(B)(iii), which is beyond what courts have previously held.

The DOI's Regulations narrow the exceptions and impair the settled expectations of tribes and businesses to an extent that is not yet known. Despite these problems, Brand X Internet Services requires courts to defer to agencies that were the first to interpret and define statutes. [FN245] However, Justice Scalia's strong dissent states that Chevron deference, as applied in the Brand X Internet Services case, may be unconstitutional because it reallocates authority from Article III to Article II. [FN246] Further, because of the difference of circumstances between the Brand X and Chevron cases, courts should not refer to the DOI's interpretation. Lastly, the discipline of law and economics tells us that the majority's opinion in Brand X Internet Services promulgates an inefficient legal rule that should be-and may be-changed in the future.

Because the exceptions are contingent on the Secretary taking land into trust for a tribe for the purpose of gaming, Carcieri eliminates the possibility of exercising these exceptions for tribes acknowledged***191** after 1934. [FN247] However, tribes that are legislatively acknowledged and have affirmative language that empowers the Secretary to take land into trust for them will still be able to exercise these exceptions. [FN248] Moreover, restored tribes will still be able to exercise the “restored lands” for a “restored tribe” exception. [FN249]

Ultimately, the Regulations' additions and inconsistencies with case law definitions and interpretations of § 2719 narrow the exceptions and are more burdensome for tribes to meet. This will stifle efficient use of resources and tribal economic development while the Regulations' differences with the cases and rule of Brand X Internet Services persist. This is the last thing Indian Country and the United States need in the current economic environment.

[FN1]. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

[FN2]. § 2719(c).

[FN3]. § 2719.

[FN4]. § 2719(b)(1)(A); § 2719(b)(1)(B)(i)-(iii).

[FN5]. See 25 C.F.R. § 292.6 (2009).

[FN6]. § 292.6(d), 2.92.12(c).

[FN7]. Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs., 545 U.S. 967 (2005).

[FN8]. Id.

[FN9]. 25 U.S.C. § 2719 (a)-(b) (emphasis added).

[FN10]. § 2719(a).

[FN11]. § 2719(b)(1)(A); § 2719(b)(1)(B)(i)-(iii).

[FN12]. See generally Connecticut Indian Claims Settlement Act, 25 U.S.C. §§ 1751-1760 (2006).

[FN13]. See generally Timbisha Shoshone Homeland Act § 410aaa note (2008).

[FN14]. See Maine Indian Claims Settlement Act, 25 U.S.C. § 1721, Sec. 8 (2009).

[FN15]. See Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 789 (1st Cir. 1996).

[FN16]. See 25 U.S.C. § 177 (2006).

[FN17]. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 229 (1985).

[FN18]. See 25 U.S.C. § 177 (2006).

[FN19]. See City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

[FN20]. 25 U.S.C. §§ 1723(c), 1731; § 1723(a).

[FN21]. Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1205 (D. Kan. 2006) (quoting Williams v. Taylor, 529 U.S. 420, 431 (2000)).

[FN22]. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (discussed below).

[FN23]. City of Roseville v. Norton, 348 F.3d 1020, 1027 (D.C. Cir.2003) (citing Bailey v. United States, 516 U.S. 137, 145 (1995)); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbit, 116 F. Supp. 2d 155, 164 (D.C. 2000).

[FN24]. Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 402, 404 (1950) (stating that "statutes in pari materia are to be construed together" and that "[w]ords are to be interpreted according to the proper grammatical effect of their arrangement within the statute").

[FN25]. William N. Eskridge & Philip P. Frickey, Legislation And Statutory Interpretation 222-28, 250 (2d ed. 2006).

[FN26]. Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Cannons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395, 401-06 (1950).

[FN27]. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (citing Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

[FN28]. Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y for the W. Dist. of Mich., 369 F.3d 960, 971 (6th Cir. 2004) (quoting Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001)).

[FN29]. See Chickasaw Nation v. United States, 534 U.S. 84, 94-95 (2001).

[FN30]. See id.; see also Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Cannons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395, 401-06 (1950).

[FN31]. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984).

[FN32]. Id. at 844.

[FN33]. Id. at 842-44.

[FN34]. Id. at 843 n.11.

[FN35]. Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193 (D. Kan. 2006).

[FN36]. Id. at 1207.

[FN37]. Id. at 1196.

[FN38]. Id.

[FN39]. 25 U.S.C. §§ 70-70v (1976) (Indian Claims Commission terminated Sept. 30, 1978 and laws subsequently omitted from the Code).

[FN40]. Wyandotte, 437 F. Supp. 2d at 1198.

[FN41]. Id. at 1210.

[FN42]. Id. at 1208.

[FN43]. Id.

[FN44]. Id.

[FN45]. Id.

[FN46]. Id.

[FN47]. Id.

[FN48]. Id. at 1210 (distinguishing Huron Group, Inc. v. Pataki, 785 N.Y.S.2d 827 (N.Y.Sup. 2004)).

[FN49]. Id. at 1208. But see Huron Group, Inc. v. Pataki, 785 N.Y.S.2d 827 (N.Y. Sup. Ct. 2004) (finding a conflicting agency decision with the current determination in Wyandotte as well as evidence of inconsistency).

[FN50]. Wyandotte, 437 F. Supp. 2d at 1207.

[FN51]. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[FN52]. 5 U.S.C. § 706(2)(A) (2009) (limiting courts' review to whether rules and decisions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”).

[FN53]. State Farm, 463 U.S. at 43.

[FN54]. Id.

[FN55]. Wyandotte, 437 F. Supp. 2d at 1207.

[FN56]. Id.

[FN57]. Id. at 1210.

[FN58]. Id.

[FN59]. Id. at 1210 (quoting State Farm, 463 U.S. at 43).

[FN60]. Id. at 1219.

[FN61]. Id. at 1212 (citing Pub. L. No. 98-602, Stat. 3151 (1984)).

[FN62]. Id. at 1207 (discussing IGRA § 2719(b)(1)(B)(i)).

[FN63]. 25 C.F.R. § 292.5 (2009).

[FN64]. 25 U.S.C. §§ 1721-1735 (2009); 25 U.S.C. §§ 1751-1760 (2009).

[FN65]. 25 C.F.R. § 292.5(a).

[FN66]. § 292.5(b)(2).

[FN67]. MichGO v. Norton, 477 F. Supp. 2d 1, 8-9 (D.D.C. 2007) (holding "initial reservation" refers to a tribe's initial reservation after federal acknowledgment).

[FN68]. Id.

[FN69]. CETAC v. Kempthorne, 494 F.3d 460 (D.C. Cir. 2007).

[FN70]. MichGO, 477 F. Supp. 2d at 7 (citing Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1293 (D.C. Cir. 2000)); CETAC, 494 F.3d at 462.

[FN71]. City of Roseville v. Norton, 348 F.3d 1020, 1029 (D.C. Cir. 2003) (citing Pub. L. No. 107-63, § 134 (2001)).

[FN72]. CETAC, 494 F.3d at 462-63 (discussing 2002 Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-443 (2001)).

[FN73]. 25 U.S.C § 2719(b)(1)(B)(ii); 25 C.F.R. § 83 (2009).

[FN74]. Roseville, 348 F.3d at 1030 (stating that "[a]cknowledged tribes . . . are those tribes that gain recognition by administrative, rather than Congressional, action").

[FN75]. See 25 U.S.C. § 467 (empowering Secretary to declare land a new reservation).

[FN76]. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

[FN77]. See Governor of Kan. v. Norton, 430 F. Supp. 2d 1204, 1218 (D. Kan. 2006).

[FN78]. Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[FN79]. CETAC v. Kempthorne, 494 F.3d 460, 470 (D.C. Cir. 2007); MichGO v. Norton, 477 F. Supp. 2d 1, 9 (D.D.C. 2007).

[FN80]. 25 U.S.C. § 2703(4)(B) (1992).

[FN81]. See 25 C.F.R. § 151.3 (2009) (containing process for tribe putting land into trust); 25 C.F.R. § 83.10 (2009) (explaining process for tribal acknowledgment); 25 C.F.R. Part 151 (2009) (containing process for tribe putting land into trust). See also CETAC, 494 F.3d at 463-64; MichGO, 477 F. Supp. 2d at 9.

[FN82]. See § 2703(4)(B).

[FN83]. CETAC, 494 F.3d at 468 (quoting Tax Payers of Michigan Against Casinos v. Norton (TOMAC), 433 F.3d 852, 865 (D.C. Cir.2006)). See 25 U.S.C. § 2702 (1998).

[FN84]. CETAC, 494 F.3d at 476 (quoting City of Roseville v. Norton, 348 F.3d 1020, 1030 (D.C. Cir. 2003) (internal quotations omitted)).

[FN85]. MichGO v. Norton, 477 F. Supp. 2d 1, 8 (D.D.C. 2007) (citing Roseville, 348 F.3d at 1032); CETAC, 494 F.3d at 471. See generally Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992).

[FN86]. 25 C.F.R. § 83.7 (containing criteria for acknowledgment under § 83). See 25 U.S.C. § 479 (1934) (defining “Indian” and “Indian Tribe”).

[FN87]. 25 U.S.C. §§ 465, 467 (1934).

[FN88]. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[FN89]. See Roseville, 348 F.3d at 1030.

[FN90]. 25 C.F.R. § 292.6 (2009).

[FN91]. Id.

[FN92]. Id.

[FN93]. § 292.6.

[FN94]. Id.

[FN95]. Id.

[FN96]. 25 U.S.C. § 2703(4)(B) (1992).

[FN97]. § 292.6.

[FN98]. Id.

[FN99]. Id.

[FN100]. Id.

[FN101]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,361 (Dep't of the Interior May 20, 2008) (Comments on the “Initial Reservation” Exception) (codified at 25 C.F.R. § 292.6).

[FN102]. Id.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id.

[FN106]. Id.

[FN107]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,367 (May 20, 2008) (Comments on the “Restored Lands” Exception) (codified at 25 C.F.R. §§ 292.11 and 292.12).

[FN108]. Id. at 29,361.

[FN109]. Grand Traverse v. U.S. Att'y, 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002).

[FN110]. Id.

[FN111]. Id. at 936.

[FN112]. Id. at 935.

[FN113]. 25 C.F.R. § 292.7 (2009).

[FN114]. Grand Traverse, 198 F. Supp. 2d at 936.

[FN115]. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y W. Dist. of Mich., 369 F.3d 960, 967 (6th Cir. 2004).

[FN116]. Grand Traverse, 198 F. Supp. 2d at 928 (citing Webster's Third New International Dictionary 1936 (3d ed. 1976)). See Tax Payers of Michigan Against Casinos v. Norton (TOMAC), 433 F.3d 852, 865-66 (D.C. Cir. 2006).

[FN117]. Grand Traverse 369 F.3d at 967 (quoting Grand Traverse, 198 F. Supp. 2d at 934); TOMAC, 433 F.3d at 865-66.

[FN118]. Id. at 968 (quoting Felix R. Cohen, Handbook of Federal Indian Law 6 (1982)).

[FN119]. Id. at 968-71.

[FN120]. Grand Traverse, 198 F. Supp. 2d at 935.

[FN121]. Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1214-19 (D. Kan. 2006).

[FN122]. Id. at 1214.

[FN123]. Id.

[FN124]. Id. at 1217-19.

[FN125]. DOI Bureau of Indian Affairs, 25 C.F.R. § 292.7(a) (2001).

[FN126]. 25 C.F.R. § 292.8 (2001).

[FN127]. § 292.7(b).

[FN128]. § 292.9.

[FN129]. § 292.7(c).

[FN130]. § 292.10(c).

[FN131]. § 292.7(d).

[FN132]. § 292.11(a).

[FN133]. Id.

[FN134]. See § 292.12.

[FN135]. See § 292.12(a).

[FN136]. Id.

[FN137]. See § 292.12(b).

[FN138]. See § 292.12(c).

[FN139]. Id.

[FN140]. See § 292.11(b).

[FN141]. See § 292.11(c).

[FN142]. Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1214 (D. Kan. 2006).

[FN143]. Id. at 1205-06.

[FN144]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,364-67 (May 20, 2008) (Section 292.11 What are “restored lands?” and Section 292.12 How does a tribe establish its connection to the land?) (codified at 25 C.F.R. §§ 292.11 and 292.12).

[FN145]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,365 (May 20, 2008) (Sec-

tion 292.12 How does a tribe establish its connection to the land?) (codified at 25 C.F.R. § 292.12).

[FN146]. Id.

[FN147]. Grand Traverse v. U.S. Att'y, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002) (citing California v. Cabazon, 480 U.S. 202, 218-19 (1987), aff'd, 369 F.3d 960 (6th Cir. 2004)).

[FN148]. While the intent of § 2719, as a whole, was to regulate what lands tribes may conduct gaming on after 1988, there is no intent to make the exceptions narrower and more difficult to meet by putting an added criterion on them.

[FN149]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,364-67 (Dep't of the Interior May 20, 2008) (Section 292.11 What are "restored lands?" and Section 292.12 How does a tribe establish its connection to the land?) (codified at 25 C.F.R. §§ 292.11 and 292.12).

[FN150]. Id. at 73 Fed. Reg. 29,365.

[FN151]. Id.

[FN152]. Cf. U.S. v. Garcia-Beltran, 443 F.3d 1126, 1129-30 (9th Cir. 2006), cert. denied, 549 U.S. 935 (2006); U.S. v. Cote, 51 F.3d 178, 181 (9th Cir. 1995) (quoting Luckey v. Miller, 929 F.2d 618, 621 (11th Cir. 1991)).

[FN153]. Id. at 1130.

[FN154]. 20 Am. Jur. 2d Courts § 134 (2009).

[FN155]. Id.

[FN156]. § 292.12(c)(2).

[FN157]. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,367 (May 20, 2008) (Section 292.12 How does a tribe establish its connection to the land?) (codified at 25 C.F.R. pt. 292.12).

[FN158]. Id.

[FN159]. Grand Traverse v. U.S. Att'y, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002). (citing California v. Cabazon, 480 U.S. 202, 218-19 (1987)).

[FN160]. While the intent of § 2719, as a whole, was to regulate what lands tribes may conduct gaming on after 1988, there is no intent to make the exceptions narrower and more difficult to meet by putting an added criterion on them.

[FN161]. While the cases do not say so, we can infer this fact by looking to the opening dates of the tribes' first casinos, which preceded the gaming operations in question by more than ten years.

[FN162]. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y W. Dist. of Mich., 369 F.3d 960, 962 (6th Cir. 2004).

[FN163]. Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1197 (D. Kan. 2006).

[FN164]. Id. at 1196-98.

[FN165]. In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶ 9, 2002 WL 407567 (2002).

[FN166]. AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).

[FN167]. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

[FN168]. Id. at 980-82.

[FN169]. Id. at 1003.

[FN170]. Id. at 982.

[FN171]. Id. (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996)).

[FN172]. Id. at 984-85.

[FN173]. Id. at 1002-03 (quoting Nat'l Cable & Telecomm. Ass'n v. Gulf Power, 534 U.S. 327, 339 (2002)).

[FN174]. Id. at 985-86.

[FN175]. Id. at 983.

[FN176]. Id. at 1017-20.

[FN177]. Id. at 1017.

[FN178]. Id. at 1017 (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)).

[FN179]. Chicago & Southern, 333 U.S. 103, 113 (1948).

[FN180]. Brand X Internet Servs., 545 U.S. at 1019.

[FN181]. Id. at 1002-03 (quoting Nat'l Cable & Telecomm. Ass'n v. Gulf Power, 534 U.S. 327, 339 (2002).

[FN182]. Robert Cooter & Thomas Ulen, Law & Economics 68-72 and 472-73 (5th ed. 2007); 20 Am. Jur. 2d Courts § 129 (2009).

[FN183]. Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). See State Oil Co. v. Khan, 522 U.S. 3, 20 (2004) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[FN184]. Cooter & Ulen, supra note 182, at 104-07. See also David Friedman, Law and Economics, in 3 The New Palgrave: A Dictionary of Economics 144 (John Eatwell et al. ed., 1987).

[FN185]. Cooter & Ulen, supra note 182, at 38, 48, 78-80.

[FN186]. Id. at 78-107.

[FN187]. Id. at 4-8, 416-18.

[FN188]. See Richard A. Posner, Economic Analysis of Law, § 2.2 at 25-27 (5th ed. 1998).

[FN189]. Cooter & Ulen, supra note 182, at 469.

[FN190]. Id. at 469.

[FN191]. See Paul H. Rubin, Why is the Common Law Efficient?, 6 J. of Legal Stud. 51, 51 (1977).

[FN192]. Id.

[FN193]. Id. But see Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis, 97 Nw. U. L. Rev. 1551, 1632-33 (2003).

[FN194]. Paul H. Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51, 51 (1977), see also Richard A. Posner, The Behavior of Administrative Agencies, 1 J. Legal Stud. 305 (1972) (discussing agencies litigating or settling cases for their use as precedents); Cooter and Ulen, supra note 182, at 469. But see Todd J. Zywicki, 97 Nw. U. L. Rev. at 1565-81 (discussing weak precedents versus stare decisis and arguing that stare decisis is necessary for common law efficiency).

[FN195]. Cooter & Ulen, supra note 182, at 470.

[FN196]. See Bush v. Gore, 531 U.S. 98 (2000); Roe v. Wade, 410 U.S. 113 (1973); Michael Sinclair, Precedent, Super-Precedent, 14 Geo. Mason L. Rev. 363, 400-01 (2007).

[FN197]. See Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756 (1980).

[FN198]. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[FN199]. American Jurisprudence, Second Edition, provides two formulations of the grounds for deviation from precedent. The first formulation for deviation from a precedent contains seven different grounds. It lists the "obvious or manifest error in the precedent, the unreasonableness or the principle of law established by the precedent, a significant change in circumstances since the adoption of the legal rule, changes in conditions resulting in the disappearance of the rule the precedent established, the likelihood that adherence to precedent would cause greater harm to the community than could possibly result from disregarding stare decisis in a particular case, serious detriment is likely to arise that is detrimental to public interests, inconsistency between the precedent and a constitutional provision." The second formulation contains four questions a court may answer to determine whether to apply stare decisis. First, "whether the precedent is so unworkable as to be intolerable[; second,] whether the parties to the case justifiably relied on the precedent so that reversing it would create an undue hardship[; third,] whether the principles of law have developed to such an extent as to leave the old rule no more than remnant of an abandoned doctrine [; and fourth,] whether the facts have changed in the interval from the old rule to consideration so as to have robbed the old rule of justification."

[FN200]. Payne, 501 U.S. at 828 (citing Helverling v. Hallock, 309 U.S. 106, 119 (1940)).

[FN201]. 25 U.S.C. § 2719(b)(1)(A) (2009).

[FN202]. Id.

[FN203]. Id.

[FN204]. Id.

[FN205]. Keweenaw Bay Indian Cmty. v. United States, 136 F.3d 469, 470 (6th Cir. 1998).

[FN206]. Id.

[FN207]. Id.

[FN208]. Id. at 471.

[FN209]. Id.

[FN210]. Keweenaw Bay Indian Cmty. v. United States, 940 F. Supp. 1139, 1140 (W.D. Mich. 1996).

[FN211]. Id.

[FN212]. Id.

[FN213]. Id. at 1142-44.

[FN214]. Id. at 1145-46.

[FN215]. Keweenaw Bay Indian Cmty., 136 F.3d at 477.

[FN216]. Id. at 474-76.

[FN217]. 25 C.F.R. § 292.2 (2009).

[FN218]. Id.

[FN219]. Id.

[FN220]. Id.

[FN221]. Id.

[FN222]. Id.

[FN223]. Id.

[FN224]. Pursuant to § 2719(c) of the IGRA, the Secretary's authority to take land into trust under § 5 is not affected.

[FN225]. 25 U.S.C § 465 (2006).

[FN226]. MichGo v. Kempthorne, 525 F.3d 23, 30 (D.C. Cir. 2008) (quoting Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 866 (2006)).

[FN227]. Id. (quoting Brief for the Appellant, MichGO, 525 F.3d 23 (07-5092)).

[FN228]. Id. at 33.

[FN229]. Id. at 31 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943)).

[FN230]. Id. (quoting Yakus v. United States, 321 U.S. 414, 420 (1944)).

[FN231]. Id. at 31-2 (The court's decision mirrors the First, Eighth, and Tenth Circuits.). See Carcieri v. Norton, 497 F.3d 15, 41-3 (1st Cir. 2007) (en banc), cert. granted in part, denied in part, 128 S. Ct. 1443 (2008); South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 799 (8th Cir. 2005); United States v. Roberts, 185 F.3d 1125, 1137 (10th Cir. 1999).

[FN232]. See generally Lincoln v. Vigil, 508 U.S. 182 (1993).

[FN233]. Id. at 189.

[FN234]. Id. at 185.

[FN235]. Id. at 187.

[FN236]. Id. at 186.

[FN237]. Id. at 189.

[FN238]. Id.

[FN239]. Id. at 184.

[FN240]. Id. at 193.

[FN241]. Id. at 191 (Stevens, J., concurring in part and concurring in judgment) (quoting Franklin v. Massachusetts, 505 U.S. 788, 817 (1992) (holding that certain administrative decisions are “committed to agency discretion”)).

[FN242]. Id. at 193.

[FN243]. Carcieri v. Kempthorne, 128 S. Ct. 1443 (2008).

[FN244]. Carcieri v. Salazar, 129 S. Ct. 1058 (2009).

[FN245]. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 982-83 (2005).

[FN246]. Id. at 1017.

[FN247]. Carcieri II, 129 S. Ct. at 1063-68.

[FN248]. City of Roseville v. Norton, 348 F.3d 1020, 1030 (D.C. Cir. 2003).

[FN249]. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y W. Dist. of Mich., 369 F.3d 960, 967 (6th Cir. 2004).

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