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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDDING RANCHERIA, Plaintiff, v. KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior, and LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of the Interior, Defendants.	Case No. CV 11-01493 SC NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: December 2, 2011 Time: 1:00 p.m. Ctrm.: 1, Hon. Samuel Conti

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TO THE DEFENDANTS, KENNETH SALAZAR AND LARRY ECHO HAWK, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Samuel Conti, Judge of the United States District Court for the Northern District of California, Courtroom 1, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff, Redding Rancheria ("Tribe"), will move the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), Local Rule 16.5 and Local Rule 56.

RELIEF SOUGHT BY THE PLAINTIFF

Plaintiff seeks the following relief from the Court:

1. A declaration that the regulations set forth at 25 C.F.R. Part 92 ("Regulations"), which were promulgated by Defendant Kenneth Salazar, Secretary of the United States Department of the Interior ("Secretary"), are inconsistent with the plain wording of 25 U.S.C. § 2719 (b)(1)(B)(iii), the "Restored Lands Exception" ("Restored Lands Exception") to the general prohibition on the United States taking land into trust for gaming purposes after October17, 1988, 25 U.S.C. § 2719(a) ("Prohibition") and, therefore, violate the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA"), and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA");

2. A declaration that the December 22, 2010, Decision ("Decision") of Larry Echo Hawk, Assistant Secretary--Indian Affairs ("Assistant Secretary"), that the properties known as "Strawberry Fields" and "Adjacent 80 Acres Property" ("Property"), that the Tribe seeks to have taken into trust for gaming purposes does not fall within the Restored Lands Exception because it is not the Tribe's first request to have land taken into trust since the Tribe was restored to federal recognition and because the Tribe is currently conducting gaming on that land is inconsistent with the plain wording of 25 U.S.C. § 2719. The Tribe's existing trust land is located within the boundaries of the Tribe's last known reservation and therefore falls within a different exception to the Prohibition.

3. A declaration that the Regulations effectively overruled extensive federal court

precedent interpreting the Restored Lands Exception and the Department of the Interior's ("DOI") and the National Indian Gaming Commission's ("NIGC") long-standing interpretation of the Restored Land Exception, and, therefore, violated the APA;

4. A declaration that the Secretary lacked the authority to promulgate the Regulations, which restrict the scope of the 25 U.S.C. § 2719 (b)(1)(B)(iii) Restored Lands Exception to the Prohibition.

5. A declaration that, by promulgating the Regulations without the authority to do so, the Secretary violated the IGRA and the APA;

6. A declaration that the Decision determining that the Property does not qualify as restored lands under the Restored Lands Exception, the Assistant Secretary failed or refused to consider important information presented by the Tribe in support of its request, and, therefore, violated the APA; and

7. An order declaring the Regulations void, setting aside the Assistant Secretary's Decision, and directing the Secretary to take the Property into trust for the Tribe for gaming purposes.

ISSUES TO BE DECIDED

1. Are the Regulations inconsistent with the plain wording of the Restored Lands Exception, and, therefore, in violation of the IGRA and the APA?

2. Do the Regulations constitute a violation of the IGRA, because they effectively overrule the applicable federal court precedent interpreting the Restored Lands Exception and the long-standing interpretation of the Exception by both the NIGC and the DOI?

3. Does the Secretary lack the authority to promulgate the Regulations?

4. In issuing his Decision, did the Assistant Secretary's failure or refusal to consider significant supporting evidence and legal arguments presented by the Tribe in support of its request constitute a violation of the APA?

STATEMENT OF FACTS

1. The Tribe is a federally recognized Indian tribe organized under the provisions of a written constitution, which designates the Redding Rancheria Tribal Council ("Council") as the

governing body of the Tribe. The Tribe is the beneficial owner of 8.5 acres of tribal trust land, which are within the boundaries of the Redding Rancheria ("Reservation") located in Shasta County, California. Declaration of Jason Hart in Support of Redding Rancheria's Motion for Summary Judgment ("Hart Declaration"), p. 2, ¶ 3, AR 5406.

2. On August 10, 1992, the United States created the Reservation through the purchase of land located in Shasta County, California, with funds appropriated by Congress pursuant to the Act of March 3, 1921, 41 Stat. 1225. Hart Declaration, p. 2, ¶ 4; AR 5445-5455.

3. On August 18, 1958, Congress enacted the California Rancheria Act, 72 Stat. 619 ("Act"). Pursuant to the Act, on June 20, 1962, the Tribe's status as a federally recognized Indian tribe and the Reservation's status as an Indian reservation, which was created on August 10, 1922, and the title to which was owned by the United States of America in trust for the Tribe, were illegally terminated by the United States. Hart Declaration, p. 2, ¶ 5; AR 6267-6268.

4. As part of the illegal termination process, the United States, acting through the Secretary, divided the Reservation into eighteen parcels of land and conveyed each parcel to an individual adult member of the Tribe to be owned by each in fee simple pursuant to the Plan for the Distribution of the Assets of the Redding Rancheria ("Distribution Plan"), effective October 8, 1959. Hart Declaration, p. 2, ¶ 6, AR 5456-5462.

5. On August 2, 1983, the Tribe's status as a federally recognized Indian tribe was restored by order for entry of judgment ("Judgment") of this Court in the case of *Tillie v. United States* ("*Hardwick*"), United States District Court for the Northern District of California ("District Court"), Case No. C-79-1710 SW. Hart Declaration, p. 2, ¶ 7; AR 6240-6253.

6. On October 14, 1985, pursuant to the Judgment, the United States accepted title to a parcel of land within the Reservation ("Lot 6") in trust for Lorena Forman Butler, a member of the Tribe. Hart Declaration, p. 3, ¶ 9; AR 5466. The Tribe subsequently purchased beneficial ownership of Lot 6 and, on November 2, 1992, the United States approved the trust-to-trust transfer of Lot 6 to the Tribe, pursuant to the provisions of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201, et seq. ("ILCA"). Hart Declaration, p. 3-4, ¶ 9; AR 5477-5478.

7. On January 31, 1986, pursuant to the Judgment, the United States accepted title to

two parcels of land located within exterior boundaries of the Reservation ("Lots 4 and 5") in trust for Arthur K. Hayward, Mac Hayward, Orval Hayward, William Hayward, and Karen Hayward Hart, all members of the Tribe. The Tribe subsequently purchased beneficial ownership of Lots 4 and 5 and, on October 7, 1992, the United States approved the trust-to-trust transfer of Lots 4 and 5 to the Tribe, pursuant to the provisions of the ILCA. Hart Declaration, p. 3, ¶¶ 10-12; AR 5477-5478.

8. On May 20, 1992, the District Court entered a "Judgment as to Shasta County" in the *Hardwick* case. Pursuant to the May 20, 1992, judgment, the original boundaries of the Reservation were restored and all the land within the boundaries of the Reservation was declared "Indian Country" as that term is defined in 18 U.S.C. § 1151. Hart Declaration, p. 3, ¶ 8, AR 6102-6111.

9. On September 10, 1999, the Tribe entered into a Tribal-State Compact with the State of California ("Compact") and, pursuant to the Compact, began conducting gaming on Lots 4, 5, and 6 at the Win River Casino ("Casino"), a gaming enterprise on the Rancheria that is wholly owned and operated by the Tribe. Hart Declaration, p. 3, ¶ 13. AR 6415-6474. Lots 4, 5 and 6 are located within the original boundaries of the Redding Rancheria as established in 1922 and reestablished in 1992. AR 5406.

10. On November 12, 2003, the Tribal Council adopted Tribal Resolution No. 055-11-12-03 requesting that the United States accept land that the Tribe was then in the process of purchasing, commonly referred to as the "Strawberry Fields" property ("Strawberry Fields"), in trust for the Tribe. Hart Declaration, p. 3, ¶ 14; AR 5651-5652.

11. On March 22, 2004, the Tribe purchased the Strawberry Fields. Strawberry Fields is located in Shasta County, California, and consists of five separate parcels totaling approximately 152 acres. The property is located approximately 3.7 miles driving distance (1.6 miles as the crow flies) from the Reservation. Hart Declaration, p. 4, ¶ 15; AR 5410, 5670-5671.

12. On December 22, 2008, the Tribe submitted a letter to Paula Hart ("Hart"), as the Acting Director for the DOI, Office of Indian Gaming ("Office of Indian Gaming"), requesting an opinion that the Strawberry Fields Property qualified for the Restored Lands Exception of the

IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). Hart Declaration, p. 4, ¶ 16; AR 5416-5650.

13. On July 24, 2009, the Tribe submitted a letter to Hart addressing the effect of the decision in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), on the Secretary's ability to accept land in trust for the Tribe, and supplementing the Tribe's arguments regarding its status as a "restored tribe" under 25 C.F.R. § 292.7. Declaration of Sara Dutschke Setshwaelo in Support of Redding Rancheria's Motion for Summary Judgment ("Setshwaelo Declaration"), p. 2, ¶ 2; AR 6065-6066.

14. On April 2, 2010, the Tribe purchased the "Adjacent 80 Acres" consisting of two parcels adjacent to the Strawberry Fields in order to provide improved ingress and egress to Strawberry Fields, as well as additional space for the Tribe's economic development activities. Hart Declaration, p. 4, ¶ 17; AR 6067-6073.

15. On July 27, 2010, the Tribe amended its Request to the DOI to include the Adjacent 80 Acres in the DOI's determination as to whether Strawberry Fields falls within the Restored Lands Exception. Hart Declaration, p. 4, ¶ 18; AR 6067-6073.

16. On September 10, 2010, in response to concerns raised by the DOI, the Tribe submitted a second letter to Hart, in her official capacity, amending the Tribe's restored lands request by providing a more detailed explanation of the reasons why the Tribe believed that conducting gaming at the Casino, did not preclude the DOI from issuing an opinion that the Property qualified as restored lands under the IGRA. Setshwaelo Declaration, p. 2, ¶ 3; AR 6080-6086.

17. On October 29, 2010, in support of its Request, the Tribe amended its Request by submitting written comments and supporting documents to the DOI, demonstrating that, because the lands upon which it was currently gaming were within the boundaries of the Reservation on October 17, 1988, those lands did not constitute "newly acquired lands" for purposes of the Restored Lands Exception analysis. Setshwaelo Declaration, p. 2-3, ¶ 4,; AR 6093-6120.

18. On November 29, 2010, following discussions with Deputy Assistant Secretary - Indian Affairs, Del Laverdure, and his staff, on November 15, 2010, the Tribe submitted a letter to Mr. Laverdure amending the Tribe's restored lands request by presenting additional arguments

demonstrating that, as a result of the Stipulation for Entry of Judgment and Order in *Hardwick*, the trust acquisition of two (2) on-reservation non-gaming parcels, commonly referred to by the Tribe as the "Head Start" and "Memorial" parcels, did not preclude the DOI from issuing an opinion that the Property qualified for the Restored Lands Exception. Setshwaelo Declaration, p. 3, ¶ 5; AR 6150-6157.

19. On December 14, 2010, the Tribe sent a letter to Mr. Laverdure reiterating the discussions that occurred during the November 15, 2010 meeting, and summarizing many of the Tribe's arguments supporting its position that the Property fell within the Restored Lands Exception. Hart Declaration, pp. 4-5, ¶ 20, and Exhibit I thereto; Setshwaelo Declaration, p. 3, ¶ 6; 6812-6815.

20. On December 22, 2010, the Assistant Secretary, acting pursuant to delegated authority from the Secretary, rendered his Decision denying the Tribe's Request and holding that neither the Strawberry Fields nor the Adjacent 80 Acres qualified for the Restored Lands Exception and, therefore, the Tribe could not lawfully conduct gaming on the Property. Hart Declaration p. 5, ¶ 21; AR 5405-5413.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

INTRODUCTION

This action was brought by the Tribe to challenge the Decision of the Assistant Secretary that the Property did not qualify as restored lands under the Restored Lands Exception to the Prohibition, 25 U.S.C. § 2719(a). The Decision was based on the Regulations promulgated by the Secretary ostensibly to implement the provisions of the Restored Lands Exception.

In this brief, the Tribe will demonstrate: (1) the Regulations and the Assistant Secretary's implementation of the Regulations are inconsistent with the plain wording of the Restored Lands Exception; (2) the Regulations effectively overruled years of federal court precedent interpreting the Restored Lands Exception and reversed the NIGC's and the DOI's interpretation of the Restored Lands Exception; (3) the Secretary lacked the authority to promulgate the Regulations; (4) in rendering the Decision, the Assistant Secretary failed or refused to consider important evidence and argument presented by the Tribe in support of its request; and (6) as a result, the Secretary and the Assistant Secretary's actions violated the IGRA and the APA.

I.

SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.

The Tribe moves for summary judgment pursuant to Rule 56 which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). See also *Gasplus, L.L.C. v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C 2007) ("*GasPlus*").

The Defendants have filed an answer in this case. They do not deny any of the material facts set forth in the Tribe's complaint. As Sections II-VI of this brief will demonstrate, the

Tribe is entitled to judgment as a matter of law.

II.

THE DECISION MUST BE REVIEWED PURSUANT TO THE STANDARDS SET FORTH IN THE APA.

The Tribe's claims challenging the actions of the Defendants must be reviewed pursuant to the standards set forth in the APA. Under the APA, the court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995). The relevant analysis for review under the "arbitrary and capricious" standard was summarized by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983):

> 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 its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc*. v. *United States, 371 U.S. 156, 168 (1962)*. In reviewing that 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." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, [419 U.S. 281 (1974)] *at 285*; *Citizens to Preserve Overton Park v. Volpe,* [401 U.S. 402, 414 (1971)] *at 416*. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)*.

Id.

As this brief will demonstrate, in promulgating the Regulations and in issuing the Decision, the Defendants have violated the APA.

III.

BACKGROUND TO THE LAWSUIT AND SUMMARY OF ARGUMENT.

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. The IGRA established a regulatory structure for gaming on Indian lands. That structure involves both federal regulation through the implementation of the provisions of the

IGRA, and tribal and state regulation of gaming through the negotiation and implementation of tribal-state gaming compacts. Congress assigned most of the federal responsibility for regulating Indian gaming to the NIGC, an agency that was established by the IGRA. 25 U.S.C. § 2704. The powers delegated to the NIGC by Congress included the authority to promulgate regulations: "The Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act." 25 U.S.C. § 2706(b)(10). The IGRA does not authorize the Secretary to promulgate regulations implementing the IGRA. The IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." Sen. Rpt. 100-446 at 6 (August 3, 1988).

Congress included in the IGRA a prohibition that title to the lands upon which gaming can be conducted had to be taken into trust by the United States for the benefit of the tribe seeking to conduct gaming by October 17, 1988, the date of enactment of the IGRA. 25 U.S.C. § 2719(a). Congress was aware, however, that numerous Indian tribes had lost their status as federally recognized Indian tribes as a result of misguided policies and illegal federal action and that many of those tribes were or would be seeking to have their status restored. Congress also understood that many unrecognized Indian groups would eventually qualify for federal recognition pursuant to the federal recognition process and that an essential element of the restoration and recognition processes is the restoration or establishment of a land base for the restored and newly recognized tribes. Congress recognized that these tribes, already the victims of highly destructive federal policies, would be prevented from engaging in gaming, because their land bases would be restored or established after October 17, 1988. Congress, therefore, included in the IGRA exemptions from, and exceptions to, the Prohibition, which allow restored tribes and newly recognized tribes to conduct gaming on lands taken into trust after October 17, 1988. "Indeed, the exceptions in IGRA *§ 20(b)(1)(B)* serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C.C. 2003). The exemptions from the Prohibition are set forth in 25 U.S.C. § 2719(a) ("Exemptions"). The exceptions to the Prohibition are set forth in 25 U.S.C. § 2719(b) ("Exceptions").

For the purposes of the present litigation, the relevant Exemption is § 2719(a)(2)(B), which states that the Prohibition applies "unless . . . (2) the Indian tribe has no reservation on the date of enactment of this Act [IGRA enacted Oct. 17, 1988] and . . . (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." The relevant Exception is the Restored Lands Exception, 25 U.S.C. §2719(b)(1)(B)(iii), which states that the Prohibition "will not apply when. . . (B) lands are taken into trust as part of. . . (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."

Significantly, Section 2719 does not provide that land can be taken into trust for gaming purposes under *either* a § 2719(a) Exemption or a § 2719(b) Exception, *but not both*. Nor does § 2719 provide that land can be taken into trust for gaming purposes under only one of the § 2719(b) Exceptions.

In 2008, the Secretary promulgated the Regulations. The Regulations impose restrictions on the Exemptions under § 2719(a) and the Exceptions in § 2719(b), including the Restored Lands Exception, that are neither stated in the IGRA nor consistent with its provisions or the intent of Congress.

On December 22, 2010, the Assistant Secretary issued the Decision, in which he refused to take the Property into trust for gaming purposes for the Tribe pursuant to the Restored Lands Exception. In the Decision, the Assistant Secretary initially set forth a statement of the relevant facts of the case. AR 5405-5407.[1] The Assistant Secretary then set forth the provisions of the IGRA that established the exceptions to the Prohibition, § 2719(b)(1)(B). AR 5407. Next, the Assistant Secretary addressed whether taking the Property into trust qualifies as a "restoration of lands for an Indian tribe that is restored to Federal recognition" pursuant to § 2719(b)(1)(B)(iii). In order to make that determination, the Assistant Secretary applied the Regulations to the Tribe's request. AR 5409-5412.

The Assistant Secretary first addressed whether the Property met the requirements of 25

[1]The Assistant Secretary's statement of facts is consistent with the Statement of Facts set forth above.

C.F.R. § 292.7. The Assistant Secretary concluded that the Tribe was a federally recognized tribe that had illegally lost its government-to-government relationship with the federal government as a result of the implementation of the California Rancheria Act, 72 Stat. 619 (1958), as amended by 78 Stat. 390 (1964), and that the Tribe was restored to federal recognition pursuant to the stipulated judgment in *Hardwick*. The Assistant Secretary concluded, therefore, that the requirements of Section 292.7(a)-(c) were met. AR 5407-5409.

Second, pursuant to 25 C.F.R. § 292.11(c), the Assistant Secretary concluded that, because the Tribe's status as a federal recognized tribe was restored as a result of a federal court judgment, the Tribe must meet the requirements of 25 C.F.R. §
. AR 5409. Section 292.12 requires that the Tribe have a "modern," "historical," and "temporal" connection to the land that it seeks to have taken into trust for gaming purposes. The Assistant Secretary concluded that the Tribe had both a modern and a historical connection to the land. AR 5410-5411. The final and deciding issue, therefore, was whether the Tribe had the "temporal" connection to the Property.

25 C.F.R. §292.12(c) states:

> The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:
> (1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or
> (2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

The Assistant Secretary concluded that, because the Tribe, as part of the un-termination process, requested that the United States take title to certain parcels of land into trust for the Tribe before it sought to have the Property taken into trust for gaming purposes, the Property was not the Tribe's "first request for newly acquired lands" within the meaning of §292.12(c)(1). AR 5411. He further concluded that, because the Tribe is presently engaging in gaming on other tribal lands, the Property did not qualify for the Restored Lands Exception pursuant to §292.12(c)(2). AR 5411-5412. The Assistant Secretary, therefore, denied the Tribe's request. AR 5412.

IV.

THE REGULATIONS UPON WHICH THE DECISION WAS BASED ARE NOT VALID, SO THE DECISION MUST BE OVERTURNED.

The Assistant Secretary's Decision that the Tribe's request must be denied was based on the conclusion that the Property did not meet the requirements of the Regulations, in particular 25 C.F.R. §§ 292.2 and 292.7-292.12. The validity of the Decision, therefore, depends on the validity of the Regulations. As the following arguments will demonstrate, 25 C.F.R. §§ 292.2 and 292.7-292.12 are not valid because they conflict with the plain wording of the IGRA, the federal court precedent interpreting the Restored Lands Exception, and the DOI and the NIGC's long-standing interpretation of the Restored Lands Exception. The Regulations are also not valid because the Secretary did not have the authority to promulgate the Regulations.

A. The Regulations Conflict with the Plain Wording of the IGRA.

In *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), the Supreme Court established the standard for judicial review of administrative interpretations of statutes, including the promulgation of regulations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* 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.

Id., 467 U.S. at 842-843. (Emphasis added.)

In evaluating in this case whether the Regulations are valid, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. The Restored Lands Exception is unambiguous. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.,* 198 F. Supp. 2d 920 at 933, note 2 (W.D. Mich. 2002).

In order to be valid, under the *Chevron* analysis, the Regulations must be consistent with

§ 2719. Section 2719(b)(1)(B)(iii) states: "Subsection (a)[2] will not apply when . . . (B) lands are taken into trust as part of . . . (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." Section 2719(b)(1)(B)(iii) does not include any preconditions for or qualifications to the Restored Lands Exception. It states only that the Prohibition does not apply when the lands are taken into trust as part of the restoration of lands to a restored tribe. Section 2719 does not impose any restrictions on the Restored Lands Exception beyond the plain language of § 2719(b)(1)(B)(iii).

The Regulations, by contrast, impose requirements for qualification for the Restored Lands Exception that are not found in § 2719(b)(1)(B)(ii). The Regulations also effectively make the Exemptions set forth in the § 2719(a) Prohibition and the Exceptions to the Prohibition set forth in § 2719(b)(1)(B) mutually exclusive. These restrictions are in direct conflict with the plain wording, structure, and purpose of § 2719.

25 C.F.R. § 292.12 of the Regulations requires that a tribe seeking to have land taken into trust pursuant to the Restored Lands Exception have three "connections" with the land that is to be taken into trust, "modern," "historical," and "temporal." None of these "connections" is required under § 2719(b)(1)(B)(ii). They derive from a series of federal court decisions,[3] which are discussed below:

> Given the plain meaning of the language, the term "restoration" may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion. For example, land that could be considered part of such restoration might appropriately be limited by the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration.

Grand Traverse II, 198 F. Supp. 2d at 935 (Emphasis added).

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[2]The Prohibition, § 2719(a).

[3]*Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp.2d 689 (W.D. Mich. 1999) ("*Grand Traverse I"*); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.,* 198 F. Supp. 2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*"); and *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty.*, 369 F.3d 960 (6th Cir. Mich. 2004) ("*Grand Traverse III*"), along with their progeny are discussed in detail below.

The crucial connection for the purpose of the Decision is the "temporal" connection. "The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration." Section 292.12(c). The Regulations require that: (1) the request must be the "tribe's first request for newly acquired lands since the tribe was restored to Federal recognition," 25 C.F.R. 292.12(c)(1); or (2) "the tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition; and (3) the tribe is not gaming on other lands." 25 C.F.R. § 292.12(c)(2).

There is nothing in § 2719(b)(1)(B)(iii) to support a restriction that the request be "the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition." There is nothing in § 2719(b)(1)(B)(iii) that requires that applications to have land taken into trust pursuant to the Restored Lands Exception be submitted within 25 years of the restoration of the tribe to federal acknowledgment. There is nothing in § 2719(b)(1)(B)(iii) that prohibits land being taken into trust for gaming purposes for tribes that are already gaming on other lands. Had Congress intended to impose restrictions on the Restored Lands Exception or any other exception to the Prohibition, it would have done so explicitly.[4] "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).

The *Grand Traverse* decisions and the cases that applied the *Grand Traverse* analysis, nevertheless, require courts to apply certain factors or considerations in making a Restored Lands determination. The *Grand Traverse* Court proposed the inclusion of the "temporal" factor as a way of ensuring that there would be some limit to the time within which a tribe could seek to

[4]Significantly, of the three new requirements included in the Section 292.12(c), only the first two were published in the proposed rule making, 71 Fed. Reg. 58769, at 58774 (Oct. 6, 2006). The third, "the tribe is not gaming on any other trust lands" was added only in the final rule, which precluded any opportunity for comment.

have lands taken into trust for gaming purposes under the Restored Lands Exception.[5] However, the Regulations are not consistent with the *Grand Traverse* analysis. Neither the restriction that the Restored Lands Exception applies only to the first land taken into trust nor the restriction that the tribe not be currently gaming on other tribal land are related to the concept of "temporal."

25 C.F.R. § 292.12(c)(1)'s limitation to a "tribe's first request for newly acquired lands since the tribe was restored to Federal recognition," relates to the sequence in which land is taken into trust, not the length of time after federal recognition is restored that the request is made.[6]

Section 292.12(c)(1), furthermore, relates to land taken into trust for any purpose, not just gaming. Section 292.2 defines "newly acquired lands" as "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." It does not restrict the definition to lands taken into trust for the benefit of an Indian tribe *for gaming purposes*. Section 292.12(c)(1), therefore, effectively forces a restored tribe to make gaming its first priority after restoration. Rather than establish a tribal land base and tribal institutions based on the tribe's initial needs and resources, a tribe that is restored after the Regulations were promulgated will be compelled to first address having land taken into trust for gaming purposes. If a tribe attempts to establish a land base and basic tribal institutions before considering what a gaming establishment will require, the tribe risks being prevented from making a good business decision later. This imposes pressure on tribes to enter into contracts with investors and developers at a time when the tribe's governmental institutions are barely established, the tribe's long term needs are not yet fully understood, and its resources extremely limited. Decisions made under such circumstances are far more likely to be to the advantage of the developers than the tribes. That, of course, is in direct conflict with the one of the stated

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[5]The District Court for the District of Columbia in *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp. 2d 155 (D.D.C. 2000) noted that the *Grand Traverse* limitations would avoid a result that "any and all property acquired by restored tribes would be eligible for gaming." *Id.*, 116 F. Supp. 2d at 164.

[6]The limitation of the restored lands exception to the first request for the taking of land into trust after restoration was also expressly rejected by the *Grand Traverse II* court. *Grand Traverse II*, 198 F. Supp. At 940.

purposes of the IGRA, "to ensure that the Indian tribe is the primary beneficiary of the gaming operation," 25 U.S.C. §2702(2).

The negative impact of Section 292.12(c)(1) is far worse for tribes that made their initial decisions concerning having land taken into trust before the Regulations were promulgated. Requests to have land taken into trust based on a tribe's overall needs, not based on an exclusive focus on gaming, because there were no regulations requiring the tribe to do so, will result in tribes being punished for taking a broader view of tribal development.

The Tribe is an example of just such a tribe. Well before the Regulations were promulgated, the Tribe, having been recently restored, initially sought to have several small parcels of land taken into trust to establish a land base for non-gaming governmental offices because it could only afford to purchase a few small parcels of land. The Tribe also established a gaming facility on a small parcel of land so that it could develop a source of tribal revenue that would allow the Tribe to develop basic tribal institutions sufficient to allow it to engage in long term planning for tribal development.

> The Tribe's pattern of land acquisition and development is based on its priorities of self-governance, the social and economic needs of its members, and economic development. That pattern is consistent with the stated goals of IGRA and with the federal policies of self-determination and self-governance since 1973.
>
> When the Tribe makes decisions on acquiring land, it proceeds like a prudent business person and a trustee for its members. The Tribe has taken care of community health needs, young children's early education needs, and basic governmental operations first, before major expenditures on gaming development. It buys what is available at an affordable price. Whether it acquires land in trust status depends on several factors, including whether the land is on or off the Reservation, whether a deed of trust is required to secure financing for purchase and development of the land, and whether the seller is a tribal member already owning the land in trust.
>
> Accordingly the Tribe's first major expenditures after restoration of its tribal boundaries in 1992 were the acquisition of a tribal clinic in April 1994 ($1.2 million) and construction of the tribal administration building in April 1997 (also $1.2 million). These expenditures were preceded by a 2-year lease of the clinic building in 1992, and land purchases for later construction of the Head Start and administration buildings in June and September 1994. During this same time period (1992-97), the Tribe began the acquisition process for its bingo hall, and obtained transfers in trust to those lands in October and November 1992. The Tribe's first major bingo hall financing was obtained by the Tribe entering into a management contract with a private lender and developer.

* * * *

The Tribe recognized that payment of debt was key to obtaining and maintaining control of our bingo casino operations. We paid our debt on the bingo hall within seventeen months of opening, asked the Manager to leave, and have run the business ourselves ever since.

* * * *

Since the restoration of the Tribe to federal recognitions, nothing has changed in the Tribe's priorities. Likewise, nothing significant has changed in the plain language of the IGRA or in the federal policies of self-determination and self-governance, except the DOI's promulgation of an invalid restored lands regulation that attempts to undermine decades of both federal Indian policy and the Tribe's policies toward land acquisition and development of tribal institutions.

Declaration of Barbara Murphy in Support of Redding Rancheria's Motion for Summary Judgment, pp. 4-6, ¶¶ 25-27 and 30.

Now, with the promulgation of the Regulations, the Tribe is being punished for its careful, responsible approach to the development of the Tribe, its resources and its land base. Such a result simply cannot be reconciled with the plain meaning or stated purpose of the IGRA.

25 C.F.R. 292.12(c)(2) is also in conflict with the IGRA: "The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands." While the first clause of Section 292.12(c)(2) imposes a 25 year limit on taking land into trust for gaming purposes, the second clause is entirely unrelated to any "temporal" considerations. It is simply an unwarranted restriction on the number of parcels of land upon which the tribe is permitted to engage in gaming. If a tribe is a restored tribe and it is conducting gaming, it is barred from exercising any rights under the Restored Lands Exception, regardless of how soon after restoration it attempts to exercise any such rights. There is no basis for such an interpretation in § 2719(b)(1)(B)(iii) and, because it is unrelated to the "temporal" relationship between the time of restoration of recognition and the restoration of land, it is also not supported by the *Grand Traverse* analysis.

These restrictions on the Restored Lands Exception, unwarranted and unjustifiable though they are, are not the most significant violation of the IGRA arising from the Regulations. As a consequence of the definition of "newly acquired lands" set forth in 25 C.F.R. §292.2, the Regulations imposes a drastic restriction on all of the Exemptions and Exceptions set forth in § 2719. 25 C.F.R. §292.2 states: "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."

This definition, encompasses all land taken into trust after October 17, 1988. It makes no distinction between land taken into trust pursuant to the Exemptions set forth in § 2719(a) and the Exceptions set forth in § 2719(b). It also makes no distinction among the Exceptions set forth in § 2719(b). When this definition is applied to 25 C.F.R.§ 292.12(c)(1) "The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition," it prohibits a [gaming] tribe from having any lands taken into trust under the Restored Lands Exception if it has had land taken into trust under one of the § 2719(a) Exemptions, or any of the other § 2719(b) Exceptions. The effect of 25 C.F.R.§ 292.2, when combined with 25 C.F.R.§ 292.12(c)(1), thus, is to restrict Indian tribes that were landless on October 17, 1988, to gaming on land included in its first request to have land taken into trust, even if the tribe qualifies under a § 2719(a) Exemption or more than one § 2719(b) Exception. There is absolutely no basis for such a restriction to be found in § 2719.

The § 2719(a) Exemptions were set forth in a separate subsection from the § 2719(b) Exceptions. Each § 2719(b) Exception is stated as a separate exception. No provision of § 2719 states that a tribe is limited to having land taken into trust pursuant to one Exemption or one Exception. Section 2719 does not state that the Exemptions in § 2719(a) and the Exceptions in § 2917(b) are mutually exclusive or that the different categories of Exceptions within § 2719(b) are mutually exclusive. Had Congress intended that tribes only be permitted to have one parcel of land taken into trust for gaming purposes, it would have listed the Exemptions and Exceptions as mutually exclusive options, not as non-exclusive categories giving rise to a right to have land taken into trust for gaming purposes. 25 C.F.R. § 292.2 and § 292.12(c) are, therefore, in conflict with the plain wording of the IGRA and with the intent of Congress.

The consequences of this violation of the IGRA are not theoretical. The lands upon which the Tribe is presently conducting gaming are located within the boundaries of the Tribe's Reservation as established by the United States on August 10, 1922, 41 Stat. 1225, and reestablished by the "Judgment as to Shasta County" in the *Hardwick* case in May 20, 1992. AR 5406. Those lands, therefore, "are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe

is presently located." Gaming on that land, therefore, is permissible under the Exemption set forth in § 2719(a)(2)(B). Under the plain language of § 2719, gaming on reservation lands pursuant to § 2719(a)(2)(B), is unrelated to whether the Tribe is permitted to engage in gaming under the Restored Lands Exception.

The Tribe raised this issue in its application. AR 5406, 6095. The Assistant Secretary did not even address the issue in the Decision. The Decision merely states that the Tribe fails to qualify under the Restored Lands Exception because the request to have the Property taken into trust is not the Tribe's first request, thus barring the trust transfer under § 292.12(c)(1), and, in the alternative, the Tribe is engaged in gaming on tribal land, which bars the trust transfer pursuant to § 292.12(c)(1). The Decision is, therefore, clearly in conflict with the provisions of § 2719, because it prohibits the Tribe from having land taken into trust for gaming purposes under both the § 2719(a)(2)(B) Exemption and the § 2719(b)(1)(B)(iii) Restored Lands Exception. As will be discussed in the next section, for the same reason, the Regulations and the Decision are also in conflict with the federal court decisions interpreting the IGRA and the DOI's and the NIGC's own legal opinions.

By promulgating Regulations that directly conflict with the plain wording and the evident intent of Congress in enacting 2719, the Secretary is attempting to overturn legislation through regulation. It is well settled law that the Secretary may not do so. *Morrill v. Jones*, 106 U.S. 466, 467 (1883); *Bong` v. Alfred S. Campbell Art Co.*, 214 U.S. 236 (1909); *Roberts v. United States*, 44 Ct. Cl. 411, 418 (Ct. Cl. 1909).

The Regulations and the Decision based on the Regulations are in direct conflict with the plain language of the IGRA. Because they are "not in accordance with the law," the Regulations and the Decision must be declared unlawful and set aside, 5 U.S.C. § 706(2)(A).

B. The Regulations Conflict with the Federal Court Decisions that Have Interpreted the Restored Lands Exception.

Federal Courts interpreting the Restored Lands Exception have repeatedly concluded that a restrictive interpretation of that provision is inconsistent with the plain language of § 2719 and the intent of Congress. Those courts have also specifically concluded that the Exemptions and

Exceptions set forth in Section 2719 are not mutually exclusive. Finally, Federal Courts have also found that land can be taken into trust pursuant to the Restored Lands Exception even where the tribe is already gaming on other tribal trust land.

The seminal federal court ("Federal Court") decisions interpreting the Restored Lands Exception are the *Grand Traverse* cases.[7] In *Grand Traverse I,* the Grand Traverse Band ("Band"), which was conducting Class III gaming at a casino on one parcel of tribal trust land, sought a declaratory judgment concerning the legality of conducting Class III gaming on a second parcel of tribal trust land, based on a number of the Exemptions and Exceptions set forth in § 2719, including the Restored Lands Exception. The United States, joined by the State of Michigan, sought a declaration that the second gaming facility was illegal and an order removing and confiscating the gambling devices from the second site. The United States argued that the Restored Lands Exception only applied to lands restored as part of legislation restoring the tribe to recognition, and that gaming could not be conducted on the second parcel, because it had been taken into trust after the enactment of the IGRA. The district court denied the United States's motion for a preliminary injunction and referred the matter to the NIGC, based on its conclusion that the government had not demonstrated a substantial likelihood of success in proving that the second parcel of land did not qualify under the Restored Lands Exception. *Grand Traverse Band I*, 46 F. Supp.2d at 702-704.

In *Grand Traverse II*, the United States abandoned its opposition to the Turtle Creek casino and withdrew from the litigation. The District Court, after considering the NIGC's interpretation of the Restored Lands Exception, again rejected the argument that the Restored Lands Exception had to be narrowly construed. The court ruled that the Band could conduct gaming on the second parcel of trust land based on the Restored Lands Exception.

In *Grand Travers III*, the Court of Appeals for the Sixth Circuit upheld the District Court's interpretation of § 2719.

The *Grand Traverse* analysis is essential to the present dispute, for a number of reasons.

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[7]See footnote 3, above.

First, the Court found that the purpose of the § 2719 Exemptions and Exceptions was to allow tribes that were unrecognized or who lacked a land base at the time the IGRA was enacted to enjoy the benefits of the statute: "Tribes which are belatedly recognized or acknowledged, however, have not had the ability to have lands placed in trust by the Secretary for the purpose of establishing or preserving a reservation. As a result, the statute appears to allow belatedly recognized tribes to have lands exempted by way of certain other exceptions." *Grand Traverse II*, 198 F. Supp. 2d at 931.

Second, the District Court rejected the assertion that the Restored Lands Exception was ambiguous:

> Congress is presumed to intend that words used in a statute will have their ordinary meaning. 'Absent a clearly demonstrated legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' [*American Tobacco Co. v.*] *Patterson, 456 U.S.* [63] *at 68* [(1982)]. Here, no such contrary intent is demonstrated and the NIGC made no finding of a clearly demonstrated legislative intent to use a term-of-art. As a result, the statute cannot be considered ambiguous and the plain meaning must be applied. The court therefore rejects the NIGC's finding of ambiguity.

Grand Traverse II, 198 F. Supp. 2d at 933, note 2.

The court further stated: "I . . . find no basis for giving the terms 'restored' and 'restoration,' as used in *§ 2719*, anything other than their ordinary meanings." *Id*., at 934.

Third, the District Court found that implied restrictions on Indian gaming were inconsistent with the IGRA and the intent of Congress:

> As Congress clearly stated, the purpose of the IGRA was not to limit the proliferation of Indian gaming facilities. Instead, it was to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming. . . . The 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. . . . As a result, the chronological limitation on the ability of tribes to game [Section 2719(a)] must itself be deemed an exception to the grant of general authority to game and the stated purpose to authorize gaming as a method of promoting tribal economic development and self-sufficiency.

Id., at 933-934. (Citations omitted.)

Fourth, the Court explicitly rejected the argument that the Exceptions to the Prohibition are mutually exclusive: "I find no evidence of Congressional intent to establish mutually

exclusive categories of exceptions under *§ 2719(b)(1)(B)*." *Id,* at 934.

Finally, the court found that the IGRA did not limit restoration of land to one parcel of land or one request to have land taken into trust. The language of § 2719(b)(1)B)(iii) "implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event." *Id,* at 936. As a result, the District Court found that the Restored Lands Exception applied to the Band's request to have land taken into trust for gaming purposes, even though, as is true in this case, the Band was already conducting gaming on another parcel of trust land. *Grand Traverse II*, 198 F. Supp. 2d at 940.

The *Grand Traverse* decisions were not appealed to the Supreme Court nor brought into question by a decision of another circuit. Nor were they in any way overturned by statute. Rather, the *Grand Traverse* analysis provided the foundation for all, or nearly all, of the court decisions addressing the Restored Lands Exception.

In *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000) ("*Confederated Tribes*"), the Confederated Tribes challenged a ruling by the Secretary denying a request to have land taken into trust for gaming purposes pursuant to the Restored Lands Exception. The Secretary argued, as he had in *Grand Traverse I*, that the Restored Lands Exception only applied to lands restored as part of legislation restoring the tribe to recognition. Applying the court's analysis in *Grand Traverse I*, the *Confederated Tribes* court stated "After considering the plain meaning of the statute, the statutory context, and the principle of liberal construction in favor of Indians, the Court finds that the defendants used an unduly restrictive analysis in determining that the [land at issue] was ineligible for gaming." *Id.*, 116 F. Supp. 2d at 164.

The *Confederated Tribes* court also expressly ruled that the Exemptions and Exceptions in § 2719 are not mutually exclusive:

> The defendants also argue that the plain meaning of the word "restoration" would subvert the structure of the other express limited exceptions in *section 2719*, and they point specifically to *section 2719(b)(1)(B)(ii)* and *section 2719(a)(2)(B)*. With respect to *section 2719(b)(1)(B)(ii)*, the defendants assert that the "initial reservation" limit would be nullified. The Court is not persuaded that the limited exception contained in *section 2719(b)(1)(B)(ii)* would be nullified by giving *section 2719(b)(1)(B)(iii)* its natural meaning. Not all tribes acknowledged under

> the federal acknowledgment process could be considered "restored to federal recognition." *See Grand Traverse, 46 F. Supp. 2d at 699*. Thus, although there might be some overlap, *section 2719(b)(1)(B)(ii)* would continue to have independent bite. The same is true of *section 2719(a)(2)(B)*, which is limited to the tribe's "last recognized reservation"; the exception would continue to have independent bite for tribes that could not be considered "restored to federal recognition."

Confederated Tribes, 116 F. Supp. 2d 163-164.

Likewise, in *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), the cities of Roseville and Rocklin ("Cities") challenged the Secretary's ruling that the Auburn Band could engage in gaming on land taken into trust for the tribe pursuant to the Restored Lands Exception. The Cities argued that the gaming on the land was subject to the gubernatorial concurrence provision under § 2719(b)(1)(A), because the land in question was not the land that the Auburn Band had occupied before it was terminated. The Court rejected the Cities' analysis, finding that the § 2719(b)(1)(A) Exception did not apply. The Court found a broad reading of the statute was appropriate, because it was consistent with the purposes of the IGRA and the language of the Restored Lands Exception:

> The IGRA plainly includes exceptions to its general prohibition of gaming on off-reservation sites, and Congress' purpose in enacting IGRA includes the promotion of tribal economic self-sufficiency, *see 25 U.S.C. § 2702(1)*, a purpose with which Congress' enactment of [Auburn Indian Restoration Act] is entirely consistent. Moreover, the syntax of the statute, which discusses not simply the restoration of the lands themselves, but their restoration "for an Indian tribe," fits more comfortably with the concept of restitution. . . . Even assuming that the Cities' definition of "restore" as to "bring back to an original state" is the more common meaning of the word, the statutory context makes broader readings of *§ 20(b)(1)(B)(iii)* more plausible. That a "restoration of lands" could easily encompass new lands given to a restored tribe to re-establish its land base and compensate it for historical wrongs is evident here, where much of the Auburn Tribe's Rancheria is, as a practical matter, unavailable to it.

Id., 348 F.3d at 1027.

As with the *Grand Traverse* and *Confederated Tribes* courts, the *City of Roseville* court also recognized that the Exemptions and Exceptions set forth in 2719 are not mutually exclusive:

> Under the Cities' plain meaning interpretation whereby the only lands that can be part of a "restoration" are those in a tribe's former reservation, the exception would be virtually bereft of meaning because gaming on such lands is not prohibited in the first place. If the Auburn Tribe had reacquired some of the land on its former reservation, the Rancheria, it would have no need to look to the "restoration of lands" exception in *§ 20(b)(1)(B)(iii)* in order to use the land for

> commercial gaming because *§ 20(a)(2)(B)* would have excluded its Rancheria from *§ 20(a)*'s ban on gaming.

City of Roseville, 348 F.3d at 1028.

The *City of Roseville* decision, thus, explicitly recognizes that the federal government's taking land into trust for gaming purposes that is located within the tribe's former reservation is a separate issue from that of whether the land qualifies under the Restored Lands Exception. That situation must be addressed under § 2719(a)(2)(B) and taking land into trust under that provision does not foreclose the taking of land into trust pursuant to § 2719(b)(2)(B)(iii).

In *Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003), the District Court, again based on the *Grand Traverse* analysis, rejected a restrictive interpretation of the Restored Lands Exception: "I find that the phrase 'restoration of lands' was not intended by Congress to be narrowly construed and limited to the lands included in the congressional enactments which restore tribal status. Therefore, the Secretary's interpretation [that the land at issue qualified under the Restored Lands Exception] is a permissible and reasonable construction of the statute." *Id*., 271 F. Supp. at 1280.

Other courts have rejected an interpretation of the Restored Lands Exception that would imposed restrictions or conditions unstated in the IGRA. *Wyandott Nation v. NIGC*, 437 F. Supp.2d 1193 (D. Kan. 2006); *Sault St. Marie Tribe v. United States*, 546 F. Supp. 2d 838 (W.D. MI 2008).

Thus, Federal Courts analyzing the Restored Lands Exception have consistently found that the Restored Lands Exception is not subject to a narrow interpretation. Federal Courts have repeatedly rejected interpretations that impose conditions on the application of the Restored Lands Exception that are not stated in the IGRA. Federal courts have repeatedly dismissed the argument that the Exemptions and the Exceptions to the Prohibition are mutually exclusive. See *Grand Traverse I,* 46 F. Supp.2d at 697-701; *Confederated Tribes*, 116 F. Supp. 2d at 161-164; *City of Roseville*, 348 F.3d at 1026-1027, *Oregon v. United States*, 271 F. Supp. 1279-1280.

The Regulations, by imposing restrictions and conditions on the Restored Lands Exception that are not set forth in the IGRA, and by effectively making the Exemptions and

Exceptions set forth in § 2719 mutually exclusive, have overturned a decade of Federal Court decisions interpreting the Restored Lands Exception. This the Secretary is not permitted to do. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996). "*Chevron* [*USA Inc., v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)] does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body." *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991). "It is a fundamental principle of Constitutional law that the duty to interpret the statutes as set forth by Congress is a duty that rests with the judiciary . . . . In executing this duty, we may not give the IRS or any executive branch agency the power to overrule an established statutory construction of the court--a power that, with regard to our prior precedents, even a later panel of this court lacks." *Bankers Trust New York Corporation v. United States*, 225 F.3d 1368 (D.C. Cir. 2000).

C. The Regulations are also Inconsistent with the NIGC's and the DOI's Long-standing Interpretation of the Restored Lands Exception.

The DOI and NIGC began reviewing restored lands questions in 1996. For more than a decade, with only one deviation, which was later overturned, both agencies consistently employed the dictionary definition of "restored" lands and did not include in the analysis extraneous factors such as existing gaming on tribal trust lands. Suddenly and without explanation, the DOI drastically altered its interpretation of the Restored Lands Exception by promulgation of the Regulations.[8]

The DOI and NIGC's analysis of restored lands began with the September 19, 1997, legal

[8]The DOI and NIGC lands opinion, cited herein, are all available on the NIGC's website: http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

opinion of John Leshy, Solicitor for the DOI on the Pokagon Band of Potawatomi Indians request to have land taken into trust for gaming purposes. In that opinion, Solicitor Leshy adopted the dictionary definition of "restored"("1) to give back (as something lost or taken away); make restitution of: return; 2) to bring back (as into existence or use"), citing Webster's Third New International Dictionary.) and concluded that "Since the lands proposed for acquisition lie within this ten county area and are thus part of the territory the Bands' predecessors ceded to the U.S. in earlier treaties, these proposed acquisitions made pursuant to the [Pokagon] Restoration Act are properly characterized as 'restored' lands.")

Shortly thereafter, in a November 12, 1997 legal opinion on the Little Traverse Bay Band of Odawa Indians, regarding the Mackinaw City Tract, Associate Solicitor for the DOI, Derril Jordan, again adopted the dictionary definition of restored lands.

The DOI briefly deviated from the plain meaning analysis after the *Grand Traverse I* decision was issued. Unwilling to rely on the *Grand Traverse I* decision, in an October 21, 1999, memorandum concerning the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians' regarding the Hatch Tract, the Solicitor abandoned his reliance on the dictionary definition of restored, and concluded that the Hatch Tract could not qualify as restored lands because the lands were not mentioned in the tribes' restoration legislation.

After the remand from the *Grand Traverse I* court and the 2000 decision in *Confederated Tribes, supra*, which adopted the reasoning of *Grand Traverse I*, NIGC and DOI thereafter followed those courts' decisions. Consequently, in an August 31, 2001, letter opinion to the Honorable Douglas Hillman, Senior United States District Judge, from Kevin Washburn, NIGC General Counsel re: Grand Traverse Band of Ottawa and Chippewa Indians, the NIGC adopted the plain meaning of "restored" and concluded that the Grand Traverse trust land was "restored land". The DOI concurred in that opinion.[9]

In a December 15, 2001, memorandum, the Associate Solicitor overturned his October

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[9]In 2007, the NIGC and the DOI entered into a Memorandum of Agreement in which the two agencies agreed that the DOI would interpret the IGRA for purposes of taking land into trust for tribes.

1999 opinion and determined that the Coos Hatch Tract qualified as Indian lands under the IGRA. Thereafter, the DOI and NIGC consistently employed the reasoning of the *Grand Traverse I and II* courts and *Confederated Tribes*.[10] See August 5, 2002 memorandum from Penny Coleman, Acting General Counsel to Chairman, NIGC re: Bear River Band, Rohnerville Rancheria (concluding that the Tribe's lands were restored lands.

> Federal courts, U.S. Department of the Interior, and NIGC have recently grappled with the concept of restoration of land. In so doing, they have established several guideposts for a restoration-of land analysis. First, 'restored' and 'restoration' must be given their plain, primary meanings . . . . Nonetheless, there are limits to what constitutes restored lands. . . . All three courts [*Grand Traverse I and II* and *Confederated Tribes*] proposed that land acquired after restoration be limited by 'the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal 'restoration'.

Id. at 9-10. (DOI concurred).

The only exception to the plain wording analysis were cases in which another statute made it clear that the application of the dictionary definition of "restored" was unnecessary. See

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[10]See also, March 14, 2003, memorandum from Acting General Counsel Coleman to Chairman, NIGC, regarding the Mechoopda Indian Tribe of the Chico Rancheria (DOI concurred); July 19, 2004 memorandum from General Counsel Coleman to Chairman, NIGC, and September 10, 2004, decision of the NIGC regarding the Wyandotte Nation; October 12, 2004, letter from Acting General Counsel Coleman to Bradley Bledsoe Downes regarding the Karuk Tribe of California; November 23, 2005 memorandum from Acting General Counsel Coleman to Chairman, NIGC, regarding the Cowlitz Tribe; July 31, 2006, memorandum from Acting General Counsel Coleman to Chairman , NIGC, and September 1, 2006, Final Decision of the NIGC regrading Sault Ste. Marie Tribe of Chippewa Indians (DOI concurred.); July 13, 2007, memorandum from Kaush Arha, Associate Solicitor to Carl Artman, Assistant Secretary – Indian Affairs re: Elk Valley Rancheria Martin's Ranch (NIGC concurred.); October 22, 2007, memorandum from Associate General Counsel Michael Gross to Chairman, NIGC, regarding Ponca Tribe of Nebraska, Carter Lake Site; October 25, 2007, Memorandum from Staff Attorney John Hay to Chairman, NIGC, regarding Mooretown Rancheria of Maidu Indians of California, Feather Falls Site (DOI concurred.); November 21, 2007, memorandum from Associate Solicitor Arha to Assistant Secretary – Indian Affairs Artman regarding the Habematolel Pomo of Upper Lake, Highway 20 Site (NIGC concurred.); November 31, 2007, Final Decision of the NIGC regarding the Ponca Tribe of Nebraska, Carter Lake , (reversing the October 2007, Chairman's decision that the Tribe's lands were not restored lands and relying on *Grand Traverse* decisions to conclude that the lands were restored lands); May 19, 2008, letter from Chairman, NIGC, to Buford Rolan, Tribal Chairman, regarding the Ponca Band of Creek Indians Tallapoosa Site (later withdrawn and then reinstated); and May 19, 2008, memorandum from Acting General Counsel Coleman to Chairman, NIGC, regarding the Ft. Sill Apache Tribe of Oklahoma, Akela Flats (DOI concurred.)

November 22, 2002 memorandum from Deputy Associate Solicitor to the Regional Director, Great Plains Regional Office, BIA regarding the Ponca Tribe of Nebraska (concluding that the Crofton parcel was restored lands and opining that "when congress provides 'concrete guidance regarding what lands are to be restored to the tribe pursuant to the restoration act, those lands qualify as 'restored lands' under §20 'regardless of dictionary definition.'" *Id*., 3)

After eight years of consistent analysis and long after the Tribe initially requested that the Reservation parcels be taken into trust, the DOI issued the Regulations. Even after the Regulations were enacted, the NIGC resisted changing the restored lands analysis. See October 7, 2008, Final Decision of the Commission re: Lower Lake Rancheria Koi Nation gaming ordinance (adopting the analysis of the *Coos* and *Grand Traverse I and II* courts and concluding that the Koi Nation was not a restored tribe). The NIGC's analysis did not reference the Regulations, but noted the possibility of inconsistent determinations as to whether tribal lands might be considered restored lands.) See also, April 30, 2009, memorandum from Acting General Counsel Coleman to Chairman, NIGC, regarding the Ft. Sill Apache Tribe of Oklahoma, Akela Flats (revisiting the earlier General Counsel opinion that the Tribe was not a restored Tribe.) The opinion noted that the Tribe objected to the application of the Regulations. The opinion agreed with that concern but included the Regulation, 292.7, in the analysis because it was not substantively different from the analysis of the *Grand Traverse I and II* and *Confederated Tribes* courts.)

The *Grand Traverse* analysis, furthermore, provided the basis for the Secretary to take land into trust for gaming purposes for tribes that were already engaging in gaming on other parcels of trust land. In 2007, for example, the Assistant Secretary concluded that the Tolowa Indians of the Elk Valley Reservation were eligible to have land taken into trust for gaming purposes outside its existing reservation, pursuant to the Restored Lands Exception, despite the fact that the tribe was already engaging in gaming on other reservation land. See July 13, 2007, memorandum from Kaush Arha, Associate Solicitor, Indian Affairs to Carl J. Artman, Assistant Secretary– Indian Affairs, regarding Elk Valley Indian Lands Determination.

Thus, for a decade, the DOI applied the same *Grand Traverse* analysis to applications to

have land taken into trust for gaming purposes. The Regulations were a dramatic departure from those decisions and inconsistent with the IGRA and the applicable Federal Court precedent, yet the Secretary promulgated the Regulations without any reasoned explanation for the sudden and drastic change in the Secretary's interpretation of the IGRA. See Federal Register notice of final rule, "Gaming on Trust Lands Acquired After October 17, 1988," 73 Fed. Reg. 29354-29379.

The Federal Courts have long held that an agency may not alter its interpretation of a statute without providing a reasoned explanation for such a change:

> When an agency reverses a prior policy or statutory interpretation, its most recent expression is accorded less deference than is ordinarily extended to agency determinations. . . . The agency will be required to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice.

Seldova Native Association v. Lujan, 904 F.2d 1335, 1345 (9th Cir.1990). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983), citing *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)*." Such an explanation must be provided by the agency at the time the decision is made, not in the course of litigation. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50, ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). See *Williams Gas Processing-Gulf Coast Company v. Federal Emergency Regulatory Comm'n*, 475 F.3d 319, 326 (D.C.Cir. 2006), ("Arbitrary and capricious review 'demands evidence of reasoned decisionmaking *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes.'") The Secretary failed to provide any explanation for adopting the Regulations contrary to Federal Court precedent and, in doing so, violated the APA. *Burlington Truck Lines*, 371 U.S. at 167.

D. The Secretary Lacked the Authority to Promulgate the Restored Lands Exception Regulations.

The first step of the *Chevron* analysis "includes challenges to an agency's interpretation of a statute, as well as whether the statute confers agency jurisdiction over an issue." *Texas v.*

U.S., 497 F.3d 491, 501 (5th Cir. 2007). "The court is first required to decide whether the Secretary acted within the scope of his authority. . . . This determination naturally begins with a delineation of the scope of the Secretary's authority and discretion." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 413-414 (1971). "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000).

Challenges to an agency's jurisdiction includes challenges to the agency's authority to issue regulations. In upholding a challenge to regulations promulgated by the Secretary relating to the IGRA's compact negotiation dispute provisions, the Court of Appeals for the Fifth Circuit stated:

> When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken. See *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458, 94 S. Ct. 690, 693, 38 L. Ed. 2d 646 (1974)* ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (quoting *Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379, 66 Ct. Cl. 776, 1929-1 C.B. 279 (1929))*. Accordingly, administrative agencies and the courts are "bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4, 114 S. Ct. 2223, 2232 n.4, 129 L. Ed. 2d 182 (1994)*.

Texas v. U.S., 497 F.3d at 502.

Through the IGRA, Congress created a structure for the comprehensive regulation of gaming activities on Indian lands. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). IGRA was intended to preempt the field of the regulation of gaming on Indian lands. Sen. Rpt. 100-446 at 6 (August 3, 1988); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991). As part of that regulatory structure, Congress established the NIGC and gave it jurisdiction to regulate and protect Indian gaming. 25 U.S.C. § 2704(a). *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 751 (9th Cir. 2009), accord, *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 322 (W.D.N.Y. 2008) ["In enacting the IGRA, Congress established the NIGC as an independent agency charged with exclusive regulatory authority for Indian gaming on Indian lands.". Among the powers expressly

delegated to the NIGC is the authority "to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the IGRA]." 25 U.S.C. § 2706(b)(10). Federal courts have even been reluctant to grant the NIGC, let alone the Secretary, rulemaking authority pursuant to the IGRA where that authority was not explicitly granted. *State of Texas v. United States*, 497 F.3d 491 (5th Cir. 2007); *Colorado River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2007).

The promulgation of regulations implementing the Restored Lands Exception clearly falls within the NIGC's express delegation of authority. By contrast, § 2706(b)(10) does not grant the DOI, the Secretary, or the Assistant Secretary any authority to promulgate any regulations pertaining to the IGRA. Under the provisions of the IGRA, thus, the promulgation of the Regulations by the Secretary is in conflict with Congress' delegation of authority to the NIGC to promulgate regulations and, therefore, was *ultra vires*.

In his May 20, 2008, Federal Register Notice, the Secretary sets forth the ostensible authority for the promulgation of the Regulations: "The authority to issue this document is vested in the Secretary of the Interior by *5 U.S.C. 301* and *25 U.S.C. 2*, *9*, and *2719*. The Secretary has delegated this authority to the Assistant Secretary--Indian Affairs by part 209 of the Departmental Manual." 73 Fed. Reg. 29354.

Those statutes, however, do not support the Secretary's claim of authority to issue the Regulations.

Enacted in 1966, 5 U.S.C. § 301 ("§ 301") provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Id.

Enacted in 1832, 25 U.S.C. § 2 ("§ 2 ") provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Enacted in 1834, 25 U.S.C. § 9 ("§ 9") provides:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

Section 301 is a general statute empowering the heads of departments of the Executive Branch to promulgate regulations. It is not specifically related to Indian, Indian tribes, Indian lands or Indian gaming. Section 2 and § 9 are all general statutes, empowering, in general terms, officials of the Executive branch to issue regulations or manage Indian affairs. All three of the statutes were enacted long before the IGRA.

By contrast, the IGRA is a highly specific statute addressing Indian gaming, a subject that Congress could not have conceived of in enacting § 301, § 2, and § 9. The right of Indian tribes to engage in gaming on Indian lands was not established until the United States Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), more than a hundred years after § 2 and § 9 were enacted and two decades after § 301 was enacted.

It is a fundamental cannon of statutory construction that a more specific statute takes precedence over a more general one: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). See also, *Bulova v. United States*, 365 U.S. 753, 758 (1961); *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998).

With regard to the field of Indian gaming, the IGRA is the later statute, the more specific statute and its provisions comprehensively regulate Indian gaming. *Barona Band of Mission Indians v. Yee*, 528 F.3d at 1192. Significantly, Congress explicitly stated that the IGRA was designed to preempt the field of the regulation of Indian gaming. The IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." Sen. Rpt. 100-446 at 6 (August 3, 1988).

Clearly, 25 U.S.C. § 2706(b)(10)'s delegation to the NIGC of the authority "to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the IGRA]" take precedence over §301, § 2, and § 9.

Moreover, § 2 and § 9 must be interpreted *in pari materia* with the IGRA. "Federal policy toward Indians is often contained in several general laws, special acts, treaties, and executive orders, and these must be construed *in pari materia* in ascertaining congressional intent." *Yellowfish v. Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982). See *Stevens v. Commissioner*, 452 F.2d 741, 744 (9th Cir. 1971). Clearly, the IGRA was enacted for the specific purpose of regulating gaming on Indian lands. When § 2 and § 9 are construed in the context of the later enacted, specific, comprehensive statute, it is indisputable that Congress intended regulatory authority over Indian gaming be delegated to the NIGC, not the Secretary.

Finally, Federal courts interpreting § 2 and § 9 have repeatedly found that those statutes, standing alone, do not provide sufficient authority to allow the Secretary to promulgate regulations. *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir 1987), ["Given the language of the statute and the fact that hunting on the reservation has historically been a matter of tribal self-regulation, we are reluctant to hold that *sections 2* and *9* by themselves could support the regulations"]; *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) ["In keeping with the policy of almost total tribal self-government prevailing when these statutes [§ 2 and § 9] were passed . . . the Interior Department itself is of the opinion that the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians -- not a general power to make rules governing Indian conduct."]; *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) ["It has been held that neither provision [§ 2 and § 9] grants general regulatory powers to the Secretary of the Interior; to be valid a regulation must be reasonably related to some other specific statutory provision."]; United States Department of the Interior, FEDERAL INDIAN LAW (1958), pp. 54-55; Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1945), p. 102. Here, given the fact that § 2 and § 9 are in conflict with the later, more specific, and comprehensive statute, there is no basis for concluding that they provide the Secretary the authority to issue the regulations.

As was demonstrated above, § 2719 also does not include any delegation of authority to promulgate regulations implementing the IGRA. There are only two references in § 2719 to the

Secretary. The first is § 2719(b)(1)(A), which authorizes the Secretary to make a determination that taking land into trust for a tribe for gaming purposes after October 17, 1988, would be in the best interests of the tribe (and thereby exempt the transaction from the Prohibition), provided that the governor of the state concurs in that finding. That provision, which is an independent exception under § 2719(b), has nothing to do with the Restored Lands Exception and is unrelated to the delegation of authority to the NIGC to issue regulations.

The second reference to the Secretary is found in § 2719(c): "Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." The Secretary's authority to take land into trust for tribes arises from the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 and the Indian Lands Consolidation Act ("ILCA"), 25 U.S.C. § 2201, et seq. Taking land into trust for tribes is usually a necessary step in order for tribes to do gaming,[11] but that authority is unrelated to the authority to issue regulations under the IGRA.

The fact that Congress delegated broad authority to the NIGC to regulate gaming under the IGRA, including the specific authority to promulgate regulations to implement the IGRA, while delegating no such specific authority to the Secretary, supports the conclusion that, if Congress intended to grant the Secretary authority to issue regulations implementing the IGRA, it would have done so explicitly. "'Agency authority may not be lightly presumed.'" . . . 'Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.'" *Texas v. United States*, 497 F.3d at 502-503, citing *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) and *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)**.** Clearly, where Congress specifically delegates to the Secretary specific authority under § 2719(b)(1)(A) and § 2917(c), a Court has no basis for inferring that Congress intended to delegate further authority through silence: "When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas v. United States*, 497 F.3d at 502.

[11]There are some exceptions to this requirement, 25 U.S.C. § 2703(4)(a).

A number of federal courts have concluded that the Secretary has the authority to interpret the provisions of the IGRA for the purposes of evaluating whether to take land into trust pursuant to the IRA. See e.g. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1278 (D. Or. 2003). Congress has also enacted an appropriation bill that apparently granted the Secretary the authority to determine whether land constitutes reservation land for the purposes of the IGRA: "The authority to determine whether a specific area of land is a "reservation" for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988 . . ." Pub. L. 107-63, November 6, 2001.

While the *Citizens Exposing Truth About Casinos* and *Oregon v. Norton* cases and the 2001 appropriations bill support the Secretary's limited authority to interpret the IGRA, they do not authorize the Secretary to promulgate the Regulations. The authority to interpret provisions of the IGRA arises from the Secretary's obligations under the IRA, ILCA, and their implementing regulations, 25 C.F.R. Part 151, not from the IGRA. The Part 151 regulations provide that the Secretary may take land into trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). The fact that this limited authority to interpret the IGRA arises from the Secretary's obligations under the Part 151 regulations is further evidenced by the fact that, in 2007, the NIGC and DOI entered into a Memorandum of Agreement in which the two agencies agreed that DOI would interpret the IGRA for the purposes of implementing 25 C.F.R. Part 151 regulations. "[B]y Memorandum of Agreement, the Secretary and the National Indian Gaming Commission, which administers IGRA, *25 U.S.C. § 2706(b)(10)*, agreed that the Secretary is to determine whether a tribe meets one of IGRA's exceptions when the Secretary decides to take land into trust for gaming. *See* Mem. of Agreement between the Nat'l Indian Gaming Comm'n and the Dep't of the Interior (Feb. 26, 2007)." *Citizens Exposing Truth about Casinos*, 492 F.3d at 462. Second, none of the courts that have concluded that the Secretary has the authority to interpret the IGRA for the purpose of taking land into trust under the IRA or ILCA has concluded that the Secretary has the authority to issue regulations implementing the

IGRA.

The Secretary's sudden assumption of the authority to promulgate regulations amounts to a case of mission creep.[12] The Secretary has attempted to expand his authority, not based on a statutory delegation or even a reasonable extrapolation from the IGRA. It is simply an effort to take over more of the regulation of Indian gaming, in violation of the IGRA.

The IGRA directly confers authority on the NIGC to promulgate regulations applicable to Indian gaming. The IGRA does not confer on the Secretary any authority to issue regulations implementing the IGRA in general or, in particular, implementation of the Restored Lands Exception. The Secretary had no authority to promulgate the Regulations. His promulgation of the Regulations, therefore, violated the IGRA. Because the Secretary's promulgation of the Regulations was in conflict with the law, it also constitutes a violation of the APA. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. at 413-414.

V.

THE ASSISTANT SECRETARY'S DECISION VIOLATES THE APA, BECAUSE HE REFUSED TO CONSIDER IMPORTANT INFORMATION AND ARGUMENTS SUBMITTED BY THE TRIBE.

Finally, the Decision constitutes a violation of the APA because the Assistant Secretary failed to consider essential evidence and argument presented by the Tribe in support of its request for a ruling. Specifically, the Tribe presented evidence and argument demonstrating that the land that had previously been taken into trust for the Tribe, including the land upon which the Tribe is presently conducting gaming, does not affect the Restored Lands Exception analysis. Under cases interpreting the APA, an agency cannot simply ignore information submitted to the agency as part of the decision making process.

On September 10, 2010, the Tribe's legal counsel, Sara Dutschke Setshwaelo, submitted a letter to Hart, in which the Tribe argued that the trust lands upon which the Tribe was

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[12]Wikipedia defines the term"Mission Creep" as "the expansion of a project or mission beyond its original goals, often after initial successes. Mission Creep is usually considered undesirable due to the dangerous path of each success breeding more ambitious attempts, only stopping when a final, often catastrophic, failure occurs." Http:llen.wikipedia.org/wiki/Mission_Creep.

conducting gaming were returned to trust status by order of this Court, after they had been illegally terminated, as a result of the Stipulated Judgment in *Hardwick*, not in response to a request by the Tribe. As a result, the Tribe argued, the Strawberry Fields was the Tribe's first request that the United States take into trust title to "newly restored lands." Setshwaelo Declaration, p. 2, ¶ 3; AR 6080-6086.

On October 29, 2010, Ms. Setshwaelo, submitted another letter to Hart in which the Tribe argued that the trust lands upon which the Tribe was conducting gaming were not "newly acquired lands" as defined in 25 C.F.R. §292.2. The Tribe based this argument on that fact that the lands upon which the Tribe was conducting gaming were lands within the Tribe's Reservation that were illegally terminated and returned to trust status as a result of the *Hardwick* Judgment. The lands, therefore, had been taken into trust for the Tribe before October 17, 1988 and, therefore, did not fall within the Prohibition. The Tribe further argued that, because the lands upon which the Tribe was conducting gaming were located within the boundaries of the Tribe's original reservation,[13] those lands did not constitute "restored land" or "newly acquired lands" for the purposes of the Restored Lands Exception analysis. Those lands, therefore, were not relevant to the determination as to whether the Strawberry Fields qualified under the Restored Lands Exception. Setshwaelo Declaration, pp. 2-3, ¶ 4; AR 6093-6120.

On November 29, 2010, the Tribe, through its legal counsel, sent a letter to Deputy Assistant Secretary Laverdure, in which the Tribe provided additional support for its arguments made in its October 29, 2010, letter. In that letter, the Tribe demonstrated that certain parcels within the Reservation boundaries that were returned to trust for the Tribe as a result of the *Hardwick* litigation were not "newly acquired lands" as that term is defined in § 292.2. Rather, the parcels were merely returned to the trust status they had before they were illegally terminated. The request that those parcels be returned to their previous trust status, thus, did not constitute the Tribe's first request to have "newly acquired lands" taken into trust. Setshwaelo Declaration, p. 3, ¶ 5; AR 6150-6157.

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[13] The reservation boundaries were re-established by the May 20, 1992, Stipulation for Entry of Judgment between the Tribe and Shasta County, California, in the *Hardwick* litigation.

Finally, in addition to its December 14, 2010, letter, the Tribe, through its Vice Chairperson, sent another letter to Deputy Assistant Secretary Laverdure, in which the Tribe repeated its arguments concerning the effect of the *Hardwick* litigation on the Restored Lands Exception analysis as applied to the Property. Hart Declaration, pp. 4-5, ¶ 20; Setshwaelo Declaration, p. 3, ¶ 6; AR 6812-6815.

Despite the submission of documentation and arguments that the Tribe made on the subject of the status of the Tribe's existing trust lands, the Assistant Secretary summarily rejected those arguments, without any discussion of the *Hardwick* litigation or the argument that the reestablishment of the reservation lands was not a request for fee-to-trust acquisition of "newly acquired lands:"

> The Tribe asserts that the trust-to-trust transfers giving the Tribe its first trust holdings in 1992 should not be considered newly acquired lands, as the land was already held in trust by the Secretary in trust before October 17, 1988. I do not have to reach that issue. As detailed in the Background section, after the Tribe received its trust to trust transfers, the Tribe made two requests for fee-to-trust acquisitions that predate its request relating to the Strawberry Fields Property. Whether we consider the Tribe's first request for newly acquired lands to be the trust-to-trust request, it is evident that the subject Parcels were not included in either of those requests. Therefore, the Parcels were not, "included in the [T]ribes' first request for newly acquired lands since the [T]ribe was restored to Federal recognition" and that they cannot meet the standard in 25 C.F.R. § 292.12(c)(1).

AR 5411.

The Decision makes no reference whatsoever to the Tribe's argument that, because the lands upon which the Tribe was conducting gaming were within the original boundaries of the Tribe's Reservation, that gaming had no effect on the Tribe's request that the Property be taken into trust pursuant to the Restored Lands Exception. Ignoring the Tribe's argument entirely, the Assistant Secretary summarily stated: "the Tribe's existing gaming facility precludes a finding under" 25 C.F.R. §292.12(c)(2). AR 5412.

As was demonstrated above, the last recognized reservation Exemption set forth in § 2719(a)(2)(B) and the Restored Lands Exception under § 2719(b)(1)(B)(iii) are separate bases for conducting gaming on Indian lands. There is no provision of § 2719 that supports the conclusion that the Exemptions and Exceptions listed in § 2719(a) and (b) are mutually exclusive. The decisions of the Federal Courts interpreting the Restored Lands Exception have held just the

opposite. *Grand Traverse II*, 198 F. Supp. 2d at 934; *Confederated Tribes*, 116 F. Supp. 2d 163-164; *City of Roseville*, 348 F.3d at 1028.

The Assistant Secretary's failure to consider the evidence and argument set forth in the Tribe's September 10, 2010, letter to Hart (AR 6080-6086), its October 29, 2010, letter to Hart, (AR 6093-6120), the November 29, 2010, letter to Del Laverdure (AR 6150-6157), and its December 14, 2010, letter to Del Laverdure (AR 6812-6815), violated the APA and must be set aside. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

In *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010) ("*Butte County* "), the Court of Appeals for the District of Columbia set aside a decision by the Secretary to take land into trust for gaming purposes for the Mechoopda Tribe, because he had failed to consider important evidence and argument submitted in opposition to the request to have the land taken into trust.

The Court of Appeals's reasoning in *Butte County* provides the standard for the evaluation of the Assistant Secretary's decision in the present case:

> under *§ 555(e)*, the agency must provide an interested party -- here Butte County -- with a "brief statement of the grounds for denial" of the party's request. As this court held in *Tourus Records, Inc. v. DEA, 259 F.3d 731, 737, 347 U.S. App. D.C. 262 (D.C. Cir. 2001)*, the agency must explain why it decided to act as it did. The agency's statement must be one of "reasoning"; it must not be just a "conclusion"; it must "articulate a satisfactory explanation" for its action. 259 F.3d at 737.

Id., 613 F.3d at 194.

The Court continued, "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of *§ 706*." *Id.*

Based on these fundamental standards, the Court of Appeals found, first:

> The Interior Department managed to violate the minimal procedural requirements [5 U.S.C.] § 555(e) imposed. When Butte County furnished the Interior Secretary's office with a copy of the Beckham Report and gave numerous reasons why the Tribe's land did not constitute "restored land," that issue was still pending before the Secretary. The Secretary's final determination did not come until two years later, on March 14, 2008. Yet the entirety of Interior's response to Butte County was this: "We are not inclined to revisit this decision [the opinion of the Gaming Commission] now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination of March 14, 2003." . . .
>
> This response violates *§ 555(e)* for the same reason the response in *Tourus Records* violated that provision. The response "provides no basis upon which we could conclude that it was the product of reasoned decision making." *259 F.3d at 737*.

Id., 613 F.3d at 194-195.

Finally, the Court of Appeals concluded:

> Interior's response was also arbitrary. . . . The very point of Butte County's submission was that the information it submitted called into doubt the judgment of the Gaming Commission. To refuse to evaluate that information because the Solicitor -- who never looked at it - agreed with the Gaming Commission is totally irrational.

Id., 613 F.3d at 195.

The parallels between the *Butte County* case and the present one are striking. Here, the Tribe submitted evidence and argument demonstrating that: (1) the land upon which the Tribe is currently conducting gaming was never restored because it was never legally taken out of trust, so it did not fall within the Prohibition; and (2) the land upon which the Tribe is currently conducting gaming is within the exterior boundaries of the Tribe's original reservation and, therefore, it does not affect the restored lands analysis as applied to the Property. In the Decision, the Assistant Secretary gave no indication that he had considered the evidence or argument submitted by the Tribe and he provided no reasoned explanation for his apparent rejection of that evidence and argument.

The Tribe's argument in this case is, in fact, more compelling than the circumstances in *Butte County*. In the *Butte County* case, the Secretary could have considered the evidence submitted by the plaintiffs and still reasonably concluded that the information did not compel him to refuse to take the land in trust. In this case, the evidence that the land upon which the Tribe is conducting gaming is within the Tribe's original reservation, that its trust status was illegally terminated, combined with applicable provisions of the IGRA and the case law addressing whether the provisions of § 2719(a) and (b) are mutually exclusive, compelled the Assistant Secretary to conclude that the Property qualified under the Restored Lands Exception.

The Assistant Secretary provided "no basis upon which [the Court] could conclude that" the rejection of these arguments "was the product of reasoned decision making." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001). His refusal to consider evidence bearing on the issue before him constitutes arbitrary agency action. Thus, the Assistant Secretary's Decision was arbitrary and a violation of the APA.

CONCLUSION

"A 'restoration of lands' compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim." *City of Roseville*, 348 F.3d at 1029. The Tribe's efforts to have the Property taken into trust for gaming purposes is consistent with Congress' expressed intention to give tribes an opportunity to promote tribal economic development through gaming. It is not an unwarranted attempt to double dip or gain a benefit denied to other tribes. The Tribe is simply seeking to improve the lives of its members based on the plain meaning of the IGRA.

The Secretary cannot be permitted to rewrite the IGRA through the unauthorized promulgation of the Regulations that are in conflict with the plain meaning of the IGRA, to overturn the decisions of the Federal Courts interpreting the IGRA, to drastically alter the NIGC's interpretation of the IGRA without reasoned explanation, or to ignore the evidence and argument presented to him by the Tribe in support of their meritorious request to have the Property taken into trust for gaming purposes. For these reasons, the Tribe respectfully requests that the Court grant its motion for summary judgment.

DATED: September 30, 2011

Respectfully submitted,

RAPPORT AND MARSTON

/s/ Lester J. Marston

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2011, my office electronically filed the Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support thereof, and accompanying declarations, using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the following:

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