# *CHEVRON* AND *BLACKFEET*: THE BATTLE FOR DEFERENCE IN THE SIXTH CIRCUIT

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## I. INTRODUCTION

In present day United States legal theory, the *Chevron* Doctrine[1] is a well-known canon of interpretation for dealing with an ambiguous statute. A less-recognized, yet equally important, canon of construction is the *Blackfeet* Presumption,[2] which requires courts to defer to Native American tribes when faced with an ambiguous statute. While scholars often discuss the benefits and pitfalls of *Chevron*, few have discussed the importance of the *Blackfeet* Presumption in United States legal history. The issue of which doctrine should take precedent when the two conflict has received even less attention, particularly in the Sixth Circuit.

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1. *See* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Counsel, Inc., 467 U.S. 837 (1984).
2. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

Despite the silence on this important issue, disputes between administrative agencies and Indian tribes continue to emerge. There is currently a circuit court split on this matter,[3] and it is therefore imperative that the Sixth Circuit take a stance. The Sixth Circuit is the home of numerous Native American tribes,[4] and it should take a definitive position on an issue that may likely reach the Supreme Court in coming years.

This Note takes the position that the Sixth Circuit should grant deference to Native American tribes when there is a dispute with an administrative agency over the interpretation of an ambiguous statute. This Note begins by discussing the two Supreme Court decisions that gave rise to the *Chevron* and *Blackfeet* doctrines.[5] This Note then reviews the circuit court split[6] and analyzes which doctrine would best serve the interests of the Sixth Circuit,[7] ultimately concluding that *Blackfeet* should prevail due to Supreme Court precedent, the Sixth Circuit's history with Indian tribes, and the inherent weaknesses of *Chevron*.[8]

## II. BACKGROUND

### *A. Chevron, U.S.A., Inc. v. NRDC, Inc. and the Chevron Doctrine*

*Chevron, U.S.A., Inc. v. NRDC, Inc.*[9] focused on a provision of the Clean Air Act Amendments of 1977,[10] which Congress enacted to address issues with certain 1states ("nonattainment states") that had failed to meet the Environmental Protection Agency's (EPA) standards for national air quality.[11] The statute required nonattainment states to "establish a permit program regulating 'new or modified major stationary sources' of air pollution."[12] The issue before the Court in *Chevron* involved the EPA's definition of "stationary sources."[13] Specifically, the

3. *See infra* Part II.C.1.

4. *See Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (last updated Feb. 2015).

5. *See infra* Parts II.A–B.

6. *See infra* Part II.C.1.

7. *See infra* Part II.C.2.

8. *See infra* Par III.

9. 467 U.S. 837 (1984).

10. Clean Air Act Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1402.

11. *Chevron*, 467 U.S. at 839–40.

12. *Id.* at 840.

13. *Id.* The EPA's definition allowed states to take a plant-wide view, and therefore "an existing plant that contains several pollution-emitting devices may install or modify

Court had to determine whether the EPA's definition of "stationary sources" was a reasonable construction of the Act.[14]

The Supreme Court set forth a two-part test to determine whether an agency's construction of a statute warrants deference.[15] The first question is whether Congress has expressed a clear intent on the matter.[16] If Congress has clearly discussed the matter and its intent is clear, then the Court and administrative agency must follow this intent.[17] The Court only applies the second part of the test if Congress did not set forth a clear intent on the issue.[18] If Congress has not discussed the issue, the court reviewing the statute cannot determine its own definition and construction of the statute.[19] Instead, the court must ask "whether the agency's answer is based on a permissible construction of the statute."[20] If the agency based its answer on a permissible construction, then the court must defer to this construction.[21]

The Court further explained that if Congress explicitly leaves a gap within the legislation for the agency to fill, then the Court must give deference to the agency's explanation unless it is "arbitrary, capricious, or . . . contrary to the statute."[22] If Congress implicitly, rather than explicitly, gives interpretative power to an agency, then the court must apply the two-part test set forth above.[23]

The *Chevron* Court discussed the statutory language of the Clean Air Act Amendments of 1977 and determined that the statute was vague as to the definition of "stationary source."[24] The Court then reviewed the legislative history surrounding the Clean Air Act Amendments of 1977 and determined that Congress did not set forth a clear intent for the definition of "stationary source."[25] This meant that the Court had to determine whether the administrative agency's construction of the term was reasonable. The Court went on to determine that the EPA's

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one piece of equipment without meeting the permit conditions," as long as the modification would not increase emissions. *Id.*

14. *Id.*
15. *Id.* at 842.
16. *Id.*
17. *Id.*
18. *Id.* at 843.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 844.
23. *Id.*
24. *See id.* at 861.
25. *See id.* at 862–64.

definition of "source" was a reasonable construction of the statute and therefore deserved deference from the Court.[26]

For the purposes of this Note, the crux of *Chevron* is the two-part test, which first seeks to determine Congress's statutory intent.[27] Upon a determination that the intent is not clear, the test then mandates the court to give deference to the administrative agency charged with implementing the statute, as long as the agency's interpretation is reasonable.[28] This test has become known as the *Chevron* Doctrine.

### *B. The Blackfeet Presumption*

In *Montana v. Blackfeet Tribe of Indians*,[29] the Blackfeet Tribe sought declaratory and injunctive relief from Montana state tax statutes. The State of Montana applied taxes to the Tribe's royalty interests in oil and gas produced under leases granted to non-Indian lessees.[30] These leases were granted under the Indian Mineral Leasing Act of 1938.[31] The Blackfeet Tribe argued that the taxes were unlawful as the Act of 1938 did not grant a taxing power over these leases to the states.[32] Montana maintained that a previous statute, the Act of May 29, 1924,[33] authorized these taxes and that the 1938 Act did not repeal that provision of the 1924 Act.[34]

The Supreme Court reviewed the two acts and acknowledged that the 1924 Act did authorize states to tax the oil and gas leases at issue.[35] However, the court determined that the 1938 Act set forth new rules regarding these leases. The 1938 Act did not discuss taxes, but did state that "[a]ll Act or parts of Acts inconsistent herewith are hereby repealed."[36] The issue before the Court was whether the 1938 Act incorporated the tax authorization from the 1924 Act.[37]

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26. *Id.* at 866. In determining this, the Court discussed the fact that Congress looked at two competing interests when enacting this statute. *Id.* at 851–52. Congress wanted to allow for continued economic growth within the states, while also improving overall air quality. *Id.* at 851. Therefore, the interpretation was reasonable. *Id.* at 866.

27. *See supra* note 16 and accompanying text.

28. *See supra* notes 20–21 and accompanying text.

29. 471 U.S. 759 (1985).

30. *Id.* at 761.

31. 25 U.S.C.A. § 396a (West 2014).

32. *Blackfeet*, 471 U.S. at 761.

33. 25 U.S.C.A. § 398 (West 2014)

34. *Blackfeet*, 471 U.S. at 762.

35. *Id.* at 763.

36. *Id.* at 764 (citation omitted).

37. *Id.*

Montana argued that based on "sound principles of statutory construction," the Court should find that the 1938 Act continued to authorize the States to tax Indian Tribe royalties as was allowed under the 1924 Act.[38] However, the Court explained that "the standard principles of statutory construction do not have their usual force in cases involving Indian law."[39] The Court went on to explain the two canons of construction that applied in the case: "[F]irst, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[40] The Court applied these canons of construction to find that the 1938 Act did not continue the tax authorization that the 1924 Act had granted to the States.[41]

The second canon of construction discussed by the Court—that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit—has become known as the *Blackfeet* Presumption.

### *C. When Chevron and Blackfeet Conflict*

The *Chevron* Doctrine has the potential of conflicting directly with the *Blackfeet* Presumption, because when an administrative agency's interpretation of an ambiguous statute (under the *Chevron* Doctrine) conflicts with a tribe's construction of that statute (under the *Blackfeet* Presumption), resulting in a statute interpretation unbeneficial to the tribe, this presents a distinct problem, as only one side can receive the court's ultimate deference. This conflict is not only a possibility, but has occurred a number of times in the various Circuit Courts of Appeal, as explained below.

#### *1. The Circuit Court Split on Tribal Deference*

The split among the circuits is a telling indication of the various concerns that courts deal with in determining whether to grant deference

38. *Id.* at 766.

39. *Id.* at 766. ("The Court explained '[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." (citation omitted)).

40. *Id.* (citation omitted).

41. *See id.* ("Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act.").

to Indian tribes or administrative agencies. The circuits have based their decisions on a number of issues, ranging from tribal self-determination, to issues of statutory construction.

The Tenth Circuit has varied in its application of the two competing doctrines, taking a case-by-case approach in determining which doctrine to apply. In *Ramah Navajo Chapter v. Lujan*, the Tenth Circuit discussed the conflicting statutes, and found that the *Blackfeet* Presumption should trump.[42] While acknowledging that the *Chevron* Doctrine applies when there is an ambiguous federal statute, the court explained that a different statutory interpretation occurs when a Native American tribe is involved.[43] The court looked at the statute in question, The Indian Self-Determination and Education Assistance Act,[44] and determined that the statute's goal was similar to the goal of the *Blackfeet* Presumption.[45] The court explained that "the policy of self-determination, which is the driving purpose behind the Act, is derived from the same source as the canon of construction favoring Native Americans, i.e., the unique trust relationship between the federal government and Native Americans."[46] Therefore, the court held that Indian tribes should receive deference.[47]

Similarly, in *EEOC v. Cherokee Nation*, the Tenth Circuit again applied the *Blackfeet* Presumption in the face of an ambiguous federal statute.[48] The issue in the case was whether the Age Discrimination in

42. Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

43. *See id.* at 1461 ("When faced with an ambiguous federal statute, we typically defer to the administering agency's interpretation as long as it is based on a permissible construction of the statute at issue. In cases involving Native Americans, however, we have taken a different approach to statutory interpretation, holding that 'normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue.' Instead, we have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.").

44. 25 U.S.C. §§ 450-450n (West 2014).

45. *See Ramah Navajo Chapter*, 112 F.3d at 1461–62 ("As noted in the Senate Report accompanying the 1988 amendments, '[t]he Act was intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities.' S.Rep. No. 274, 100th Cong., 1st Sess. 1–2. This purpose is consistent with '[t]he federal policy of Indian self-determination [which] is premised upon the legal relationship between the United States and Indian tribal governments,' and with '[t]he right of tribal self-government [which] is . . . protected by the trust relationship between the Federal Government and Indian tribes.'" (alteration in original)).

46. *Id.* at 1462.

47. *Id.*

48. Equal Emp't Opportunity Comm'n v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

Employment Act (ADEA)[49] granted jurisdiction to the Equal Employment Opportunity Commission over the Cherokee Nation.[50] The court explained the test as follows:

> [I]n cases where ambiguity exists . . . and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.[51]

Using this test, the court held that the ADEA did not apply to the Cherokee Nation, as the statute did not mention Indian Nations.[52] Therefore, the court could not assume that Congress had intended to abrogate Indian sovereignty rights.[53]

However, in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, the Tenth Circuit took the opposite approach of its previous cases and applied the *Chevron* Doctrine without discussing *Blackfeet*.[54] The court discussed the two-part *Chevron* test in interpreting the Johnson Act[55] and the Indian Gaming Regulatory Act (IGRA),[56] two Acts which address gaming and gambling practices on Indian land. The court applied *Chevron* without a discussion of *Blackfeet* and without any deference to Indian tribes at all.[57]

The Ninth Circuit, on the other hand, has consistently chosen to apply the *Chevron* Doctrine over *Blackfeet*. In *Williams v. Babbitt*,[58] the Ninth Circuit applied the *Chevron* Doctrine in reviewing the

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49. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C.A. §§ 621–34 (West 2014)).

50. *Cherokee Nation*, 871 F.2d at 937.

51. *Id.* at 939.

52. *Id.*

53. *Id.*

54. Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003).

55. Johnson Act, Pub. L. No. 73-151, 48 Stat. 574 (1934) (codified as amended at 15 U.S.C. §§ 1171–78 (West 2014)).

56. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–19 (West 2014)).

57. *See Seneca-Cayuga Tribe of Okla.*, 327 F. 3d at 1036-1039. ("Underlying this judicial deference to administrative agencies is the notion that the 'rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny.' With regard to classifying devices under IGRA, the NIGC's specialization warrants such deference.").

58. 115 F.3d 657 (9th Cir. 1997).

constitutionality of the Reindeer Act of 1937,[59] which preserved the native nature of the reindeer industry in Alaska.[60] In discussing how to interpret the statute, the court acknowledged the canon of construction, which calls for a liberal interpretation in favor of Indian tribes, but decided that this canon was more of a guideline, as opposed to a substantive rule.[61] Based on this interpretation of the canon, the court did not feel obligated to give any deference to native tribes and applied the *Chevron* Doctrine instead.[62]

In contrast, the D.C. Circuit has chosen to apply the *Blackfeet* Presumption when the two doctrines clash. In *Albuquerque Indian Rights v. Lujan*,[63] the D.C. Circuit reviewed a provision of the Indian Reorganization Act (IRA).[64] While the court ultimately dismissed the case, stating that the appellants lacked standing to bring the suit, the court discussed the *Blackfeet* Presumption in some detail.[65] The court acknowledged the inconsistencies between *Chevron* and *Blackfeet*, noting that the Department of Interior's interpretation of the IRA may run into problems with *Blackfeet* down the line[66] and that the Department should therefore consider other processes for constructing its interpretations.[67]

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59. Reindeer Act, 25 U.S.C.A. § 500 (West 2014).

60. *Id.*

61. *See Williams*, 115 F.3d at 663 n.5 ("The IBIA's interpretation gains little extra weight from the rule that statutes must be construed liberally in favor of natives. While at least one of our sister circuits regards this liberal construction rule as a substantive principle of law, we regard it as a mere 'guideline and not a substantive law.' We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because Chevron is a substantive rule of law." (citations omitted)).

62. *See also* Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1351 (9th Cir. 1990) (declining to apply canon of construction which favors Indian tribes over the *Chevron* Doctrine); Haynes v. United States, 891 F.2d 235, 238–39 (9th Cir. 1989) (stating that *Chevron* deference applies when it clashes with Indian deference).

63. Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991).

64. 25 U.S.C. § 472 (West 2014).

65. *See Albuquerque Indian Rights*, 930 F.2d at 58 ("Notably, certain canons of construction may apply with greater force in the area of American Indian law than do other canons in other areas of law. More specifically, DOI's interpretation may compel it to confront the longstanding canon that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (citations omitted)).

66. *See id.* at 59. ("[I]n the area of American Indian law, the Department may wish to consider that the liberality rule applied in *Blackfeet Indians* and other cases involving Native Americans derives from principles of equitable obligations and normative rules of behavior, rather than from ordinary statutory exegesis.").

67. *See id.* ("We certainly do not rule and do not intend to imply that the Department cannot successfully defend its new interpretation. We merely suggest that in order to prepare for doing so, should a justiciable case arise, the Department might give serious

The D.C. Circuit further discussed the matter in *Muscogee (Creek) Nation v. Hodel*,[68] in which the court reviewed the Oklahoma Indian Welfare Act of 1936[69] to determine whether the Muscogee Nation had the power under the Act to establish tribal courts.[70] The court discussed *Blackfeet* in detail[71] and explained:

> If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA *must* be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be

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consideration to re-examining its interpretation in a forum providing more due process, allowing more opportunity for input from interested parties, and creating a more reviewable record, rather than simply adopting an *ex parte* memorandum followed by the posting of an employment notice.").

68. 851 F.2d 1439 (D.C. Cir. 1988).

69. 25 U.S.C.A. § 501 (West 2014).

70. *Muscogee (Creek) Nation*, 851 F.2d at 1440.

71. *See id.* at 1444–45. The court discussed the important provisions of *Blackfeet* before applying it to the issue at hand:

> However, the standard principles of statutory construction do not have their usual force in cases involving Indian law. In [*Montana v. Blackfeet Tribe*], Congress passed a statute dealing with mining leases on Indian land. The Act contained no reference to taxation of royalties by the states and contained only a general repealer clause. An earlier statute had permitted taxation of the royalties by the states. Montana made the same argument Interior makes here—since the two statutes did not directly conflict, the provision allowing taxation had not been repealed and was therefore applicable to leases executed under the subsequent Act. The Court focused on two rules of statutory construction applicable in Indian law cases. First, it discussed the rule providing that states may tax Indians only where Congress has clearly manifested its consent to such taxation. The Court held that the statute did not meet this requirement. More importantly, the Court in *Blackfeet* went on to hold that the State's interpretation would not satisfy the rule *requiring statutes to be construed liberally in favor of the Indians.* The Court did not rest its holding on the repeal of the 1924 Act. Rather, it held that the taxation provision of the 1924 Act could not be implicitly incorporated into the 1938 Act and was therefore inapplicable to leases executed under the 1938 Act (although it remained in effect for leases executed under the 1924 Act).
>
> Nevertheless, the Court's reasoning is instructive as to the application of the varying and conflicting rules of statutory construction. "[I]n [Interior's] view, sound principles of statutory construction lead to the conclusion that [the Curtis Act was not repealed by the OIWA]. [Interior] fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law . . . . '[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.'. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

*Id.* (alteration in original) (citations omitted).

> construed as the Tribe would have it construed, it *must* be construed that way.[72]

The court's discussion of the *Blackfeet* Presumption indicates a strong preference for applying it over the *Chevron* Doctrine.

In *San Manuel Indian Bingo & Casino v. NLRB*,[73] a more recent case, the D.C. Circuit again discussed the *Blackfeet* Presumption[74] but appeared to narrow the doctrine's scope.[75] The court affirmed the doctrine's requirement that ambiguous statutes be construed in favor of Indians but declined to apply it to the case at hand, stating that the doctrine may not apply to statutes of general application, which were not enacted with Indians in mind.[76] This narrows the scope of the *Blackfeet*

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72. *Id.* at 1445.

73. San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd., 475 F.3d 1306 (D.C. Cir. 2007).

74. *Id.* at 1311 ("When we begin to examine tribal sovereignty, we find the relevant principles to be, superficially at least, in conflict. First, we have the Supreme Court's statement in *Tuscarora* that 'a general statute in terms applying to all persons includes Indians and their property interests.' In *Tuscarora,* the Court applied this principle to permit condemnation of private property owned by a tribal government, finding a general grant of eminent domain powers applicable to the tribe. This *Tuscarora* statement is, however, in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty . . . ." (citations omitted)).

75. *See id.* at 1307–08 ("In this case, we consider whether the National Labor Relations Board (the 'Board') may apply the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the 'NLRA'), to employment at a casino the San Manuel Band of Serrano Mission Indians ('San Manuel' or the 'Tribe') operates on its reservation. The casino employs many non-Indians and caters primarily to non-Indians. We hold the Board may apply the NLRA to employment at this casino, and therefore we deny the petition for review.").

76. The court explained:

> Each of the cases petitioners cite in support of the principle that statutory ambiguities must be construed in favor of Indians (as well as the cases we have found supporting the principle) involved construction of a statute or a provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs. We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application.
>
> With regard to the alternative principle relied on by petitioners, that a clear statement of Congressional intent is necessary before a court can construe a statute to limit tribal sovereignty, we can reconcile this principle with *Tuscarora* by recognizing that, in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty.

*Id.* at 1312.

Presumption within the D.C. Circuit to apply only to statutes that Congress passed with the intent to affect Indian tribes.

*2. Blackfeet and Chevron in the Sixth Circuit*

The Sixth Circuit has yet to definitively decide the issue of whether the *Blackfeet* Presumption trumps the *Chevron* Doctrine when the two conflict. The only treatment of the issue provided by the Sixth Circuit is the acknowledgement of the *Blackfeet* Presumption. This occurred in *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan* (*Grand Traverse III*).[77] The court reviewed provisions of the IGRA[78] to determine whether the tribe, the Grand Traverse Band of Ottawa and Chippewa Indians, was considered a "restored" tribe under the Act.[79] The court acknowledged the importance of giving deference to the Native American interpretation of ambiguous statutes by reviewing the Supreme Court precedent in *Blackfeet*.[80]

The Court applied the *Blackfeet* Presumption and found that the tribe was a "restored tribe" for purposes of the IGRA[81] and could therefore

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77. *See* Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Atty. for the Western Dist. of Mich. (Grand Traverse III), 369 F.3d 960, 971 (6th Cir. 2004).

78. 25 U.S.C.A. § 2710 (West 2014).

79. *Grand Traverse III*, 369 F.3d at 971–72.

80. *See id.* at 971. The Court explained:

> [E]ven assuming, *arguendo*, that the State has "muddied the waters" with respect to the meanings of the terms "restored" and "acknowledged," the Supreme Court repeatedly has held that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" This canon is "rooted in the unique trust relationship between the United States and the Indians." The force of this interpretive canon can be overcome only when "other circumstances evidencing congressional intent" demonstrate that "the statute is 'fairly capable' of two interpretations . . . [or] that the [conflicting] interpretation is fairly 'possible.'"
>
> The State has pointed to no evidence of Congressional intent that would forbid this Court from invoking the canon of statutory construction applied to statutes affecting Indians and their trust relationship with the United States. Indeed, the only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it.

*Id.* at 971 (alteration in original) (citations omitted).

81. *See id.* at 972 ("The State has pointed to no evidence of Congressional intent that would forbid this Court from invoking the canon of statutory construction applied to statutes affecting Indians and their trust relationship with the United States. Indeed, the only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it. Although § 2719 creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA, that bar should be

"conduct casino-style gaming at a site which is located off of the Band's initial reservation."[82] This case represents the Sixth Circuit Court of Appeals' most detailed discussion of the issue. Further, the Sixth Circuit has not specifically addressed what courts should do when there is a conflict between *Blackfeet* and *Chevron*.

While the Sixth Circuit Court of Appeals has yet to decide on the issue, the Western District of Michigan has discussed the matter in some detail. The Western District of Michigan, Northern Division, considered the issue in *Sault Ste. Marie Tribe v. United States*.[83] In *Sault Ste. Marie Tribe*, the court discussed the existing circuit court split[84] and acknowledged the Sixth Circuit's failure to conclusively address the issue.[85]

The court first described the two doctrines and explained that it was not clear which controls when the two conflict.[86] The court reviewed the various ways the sister circuits have handled the matter[87] and held that

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construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purpose of the IGRA, which is to encourage gaming." (citations omitted)).

82. *Id.* at 961.

83. Sault Ste. Marie Tribe v. United States, 576 F. Supp. 2d 838 (W.D. Mich. 2008).

84. *See id.* at 848. The court explained:

> Defendants assert that their opinions must be upheld under the *Chevron* doctrine because the opinions reflect a permissible construction of IGRA. Plaintiffs disagree. They argue that the statute is ambiguous and that Defendants are ignoring the application of the Indian canon of construction.
>
> Federal courts have outlined what is commonly known as the Indian canon of construction. As the Supreme Court noted in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, "[w]hen we are faced with two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" This is also known as the *Blackfeet* presumption. As the Ninth Circuit has determined,
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> > [t]he *Blackfeet* presumption simply requires that, when there is doubt as to the proper interpretation of an ambiguous provision in a federal statute enacted for the benefit of an Indian tribe, "the doubt [will] benefit the Tribe, for '[a]mbiguities' in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

*Id.* at 848–49 (citations omitted).

85. *Id.* at 849.

86. *See Id.* at 851.

87. *See Id.* at 850 ("The issue of whether the Indian canons should trump Chevron deference is a difficult one. There is a circuit split on the issue with at least two circuits carefully skirting around it. The Sixth Circuit has not provided this court with any explicit guidance regarding its position on this issue; however, the *Grand Traverse III* decision suggests, in a discussion of the Indian canon, that the purpose of the IGRA is to promote Indian gaming.").

the *Blackfeet* Presumption takes precedent when it conflicts with the *Chevron* Doctrine.[88] The court based this decision on the argument that *Chevron* is more of a general rule, whereas *Blackfeet* provides specific guidance.[89] The court applied the *Blackfeet* Presumption to interpret ambiguous sections of the IGRA[90] in favor of the tribe, in lieu of applying *Chevron*, which would have resulted in a victory for the National Indian Gaming Commission.[91]

Further, the Western District of Michigan, Southern Division discussed the matter in *Little River Band of Ottawa Indians v. NLRB*.[92] The court reviewed the discussions in *Blackfeet* and *Grand Traverse III*.[93] However, the court found that the statute at issue in the case was not ambiguous and therefore, the *Blackfeet* Presumption did not apply to begin with.[94] The court also explained that the *Blackfeet* Presumption should apply only when a statute impedes tribal sovereignty in some way.[95]

*Little River Band of Ottawa Indians* and *Sault Ste. Marie Tribe* are two examples of how courts within the Sixth Circuit have addressed the issue of the *Blackfeet* Presumption. However, the Sixth Circuit Court of

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88. *Id.* at 851.

89. *Id.* ("Even apart from the fact that the Sixth Circuit has cited to the Indian canon with favor and expressed that the purpose of IGRA is to promote Indian gaming, there is good reason for applying the Indian canon over *Chevron* deference. Whereas *Chevron* promotes a general rule of deference to agency determinations, the Indian canon provides specific guidance regarding the interpretation of statutes relating to Indian tribes. For these reasons, this court will apply the Indian canon of construction in this action to interpret ambiguous provisions of the IGRA where it conflicts with Chevron deference." (citation omitted)).

90. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C.A. §§ 2701–21 (West 2014).

91. Sault Ste. Marie Tribe v. United States, 576 F. Supp. 2d 838, 861 (W.D. Mich. 2008).

92. Little River Band of Ottawa Indians v. Nat'l Labor Relations Bd., 747 F. Supp. 2d 872 (W.D. Mich. 2010).

93. *Id.* at 884.

94. *See id.* ("Here, however, there is no ambiguity in the text of § 1362. Rather, as previously stated, what is most telling about § 1362 is its adoption of the plain wording of the jurisdictional grant in § 1331. Where, as here, there are no 'doubtful expressions to resolve,' rejecting plaintiff's insupportably broad view of jurisdiction under § 1362 does not violate the canon that 'statutes passed for the benefit of Indian tribes . . . are to be liberally construed.' (citation omitted)).

95. *Id.* at 884–85 ("[T]he Court observes that application of a canon that construes statutes in favor of Indian tribal sovereignty assumes relevance in a case where the government enacts a law that impedes tribal sovereignty. Section 1362 does not impede tribal sovereignty but was passed to give tribes access to the federal courts, albeit not to the extent plaintiff advocates here, but when the other jurisdictional requirements of that section are also met.").

Appeals has yet to make a definitive decision as to which doctrine trumps when *Blackfeet* conflicts with *Chevron*. Considering the long, important relationship that states within the Sixth Circuit have had with Native American tribes, along with Supreme Court precedent, the Sixth Circuit should apply the *Blackfeet* Presumption.

## III. ANALYSIS

When a court within the Sixth Circuit faces a conflict between the *Chevron* Doctrine and the *Blackfeet* Presumption, the court should apply the *Blackfeet* Presumption. In other words, the court should construe the law in question to the benefit of the tribes, as *Blackfeet* requires that courts give deference to an Indian tribe's interpretation of an ambiguous statute.[96]

### *A. Review of Sister Circuits' Reasoning*

The Circuit Courts of Appeals that have addressed this issue differ in their reasoning and outcomes. The reasoning set forth by the circuit courts has included encouraging the self-determination of Indian tribes, preserving the trust relationship between the United States and Indians, and expressing a desire to apply Supreme Court precedent.[97] Reviewing the reasoning of the various courts in choosing a particular doctrine and comparing it to the needs of the Sixth Circuit is relevant in the analysis of which doctrine would work best for the Sixth Circuit..

The Tenth Circuit has cited self-determination, specifically the importance of preserving the trust relationship between the United States government and Native American tribes, as its main reason for applying the *Blackfeet* Presumption over the *Chevron* Doctrine.[98] The Supreme Court has expressed the importance of this trust relationship various times during the nation's history. For example, in *County of Oneida v. Oneida Indian Nation*,[99] the Court explained that the Indian canons of construction "are rooted in the unique trust relationship between the United States and the Indians."[100] Further, precedent shows the Court should construe laws and treaties favorably toward Indian tribes based on

96. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).
97. *See supra* Part II.
98. *See supra* Part II.
99. 470 U.S. 226 (1985).
100. *Id.* at 247.

"the full obligation of this nation to protect the interests of a dependent people."[101]

This reasoning—that the United States has a duty to Indian tribes to ensure that laws benefit the tribes in a way that preserves the trust relationship between the nation and the tribes—highlights the importance of utilizing the *Blackfeet* Presumption. The Supreme Court, as indicated above, has stated on numerous occasions the importance of preserving the important relationship that the United States has created with Indian tribes. In particular, the Court has recognized that the trust relationship has created a situation in which the federal government has undertaken the task of protecting these Indian tribes and should construe laws and treaties in a way that does not injure the group it has promised to protect.[102] The Court has chosen to accomplish this goal by construing statutes and treaties in favor of the tribes.[103]

Along with this important trust relationship, the Supreme Court has also expressed the importance of recognizing and respecting the independence and self-determination of Indian tribes. In *McClanahan v. Arizona State Tax Commission*,[104] the Court acknowledged the existence and importance of Indian sovereignty, especially when preserving tribal relations and regulating internal relations.[105] The *Blackfeet* Presumption

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101. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1942) (citation omitted); *see also* Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (stating that language in treaties between the United States and Indian tribes "should never be construed to their prejudice;" on the contrary, "how the words of the treaty were understood . . . rather than their critical meaning, should form the rule of construction."). In *Choctaw Nation v. United States*, the Court went on to explain that there is an inherent responsibility that the United States owes to Indian tribes, due to the fact that the United States is in a superior position to the tribes and should act as their protector. *Id.* at 28. Because of this, courts should not construe treaties to prejudice the tribes. *Id. See also* Tulee v. Washington, 315 U.S. 681, 684 (1942) (finding that the Court has a responsibility to ensure terms of treaties are enacted "in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (stating that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith" and furthermore, words "must be construed not according to their technical meaning but 'in the sense in which they would naturally be understood by the Indians'" (citation omitted)).

102. *See supra* note 101.

103. *See Choctaw Nation of Indians*, 318 U.S. at 431–33; *County of Oneida*, 470 U.S. at 246–54.

104. 411 U.S. 164 (1973).

105. *Id.* at 173. The Court explained that Indian tribes:

> [W]ere, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as

embodies and furthers the respect and tribal self-determination that the Supreme Court has found to be such an important aspect of relations with tribal governments.[106] By construing ambiguous statutes in favor of Indian tribes, the doctrine allows tribes to have a say in the way that laws are applied to their societies. Tribes are better equipped to understand the impact that a statute may have on their way of life, and therefore, when a statute is ambiguous, the tribe can decipher it in a way that most efficiently achieves the statute's intended purpose. Furthermore, when courts give deference to a tribe's interpretation of a statute, they are giving veneration to the tribe's independent nature.

This important trust relationship and respect for tribal self-determination is no less important for the Sixth Circuit than it is for other circuits. In fact, as discussed previously in this Note, the Sixth Circuit, in its only discussion of *Blackfeet*, acknowledged the Supreme Court's desire to preserve the trust relationship that the United States has established with Indian nations.[107] This indicates that while the Sixth Circuit has not expressly determined whether the *Blackfeet* Presumption should trump the *Chevron* Doctrine, it has expressed concern for the ongoing goal of preserving the trust relationship.

The Ninth Circuit, as previously noted, has consistently chosen to apply *Chevron* over the *Blackfeet* Presumption.[108] This has occurred because the court has found *Blackfeet* to be a mere guideline, as opposed to a concrete rule, and it therefore did not feel compelled to apply it.[109] This abrupt reasoning applied by the Ninth Circuit is misguided, however, as *Blackfeet* is precedent set down by the Supreme Court and should be followed as a substantive rule by all circuits. It is unquestionable that the Court's ruling in *Blackfeet* is precedent for the circuits to follow, and therefore, neither the Ninth Circuit, nor any other circuit, should dismiss the doctrine so summarily.

While the Supreme Court has not yet ruled on the issue of which doctrine trumps when the two conflict, Supreme Court rulings have consistently addressed the importance of granting deference to tribal interpretations of law.[110] Not only has the Court acknowledged this importance, but it has applied that dogma in the rulings of those cases

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> possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

*Id.* (citation omitted).

106. *See supra* note 105.

107. *See supra* Part II.

108. *See supra* note 62.

109. Williams v. Babbit, 115 F.3d 657 (9th Cir. 1997).

110. *See supra* note 101.

and found for the tribal governments when in conflict with state and federal entities over treaties, acts, and agreements.[111] The Supreme Court's willingness to grant deference to Indian tribes indicates that the doctrine is not merely a guideline to be disregarded at a moment's notice. On the contrary, the *Blackfeet* Presumption is a substantive rule, and courts must treat it as such.

In fact, the Western District of Michigan, Northern Division, took the opposite viewpoint of the Ninth Circuit in *Sault Ste. Marie Tribe v. United States*,[112] stating that "whereas *Chevron* promotes a general rule of deference to agency determinations, the Indian canon provides specific guidance regarding the interpretation of statutes relating to Indian tribes."[113] Therefore, while the Ninth Circuit has interpreted the case law to find that *Blackfeet* is a general guideline, courts within the Sixth Circuit have found quite the opposite. This interpretation by the Western District of Michigan, along with the clear precedent set forth by the Supreme Court, highlights the Ninth Circuit's misguidance in dismissing the *Blackfeet* Presumption as a mere guideline and gives credence to the argument that the Sixth Circuit should grant deference to tribes.

### *B. Preserving the Trust Relationship in the Sixth Circuit*

Preserving the trust relationship between the United States and Indian nations has been an important goal for federal courts. This is especially important in the Sixth Circuit, as several of the states within the circuit have distinct and important histories with Native American tribes.[114] In order to further this preservation and prevent damage to these essential relationships, the Sixth Circuit should grant deference to Indian interpretation of ambiguous statutes by applying the *Blackfeet* Presumption when in conflict with *Chevron*. To better understand this important relationship, this Note will review the history of Indian tribes

111. *Id.*; *see* Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943) (finding for the Choctaw Nation over the United States in a treaty dispute); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (awarding payments to the Choctaw Nation from an agreement between the tribe and the federal government); Tulee v. Washington, 315 U.S. 681 (1942) (finding for defendant member of Yakima Tribe rather than the State of Washington after reviewing a treaty between the two entities); Carpenter v. Shaw, 280 U.S. 363 (1930) (finding for the Choctaw Indians against Oklahoma after analyzing an Act between the tribe and the state).

112. Sault Ste. Marie Tribe of Chippewa Indians v. United States, 576 F. Supp. 2d 838 (W.D. Mich. 2008).

113. *Id.* at 851.

114. *See infra* Parts III.B.1–4.

in the four states located in the Sixth Circuit: Michigan, Ohio, Tennessee, and Kentucky.

*1. Native Americans in Michigan*

Historically, Michigan was the home of numerous Indian tribes. These tribes included the Fox and Sauk tribes, Kickapoo tribe, Menominee tribe, Miami tribe, Chippewa tribe, Potawatomi tribe, Huron tribe, and the Ottawa tribe.[115] According to the Michigan Department of Human Services, Michigan currently recognizes twelve Native American tribes.[116] Estimates from the early 1990s indicate that Native Americans represent approximately 0.6% of Michigan's population, with a possible population figure of 62,000.[117]

It is clear from the number of tribes, and their locations within the state, that Michigan is a very important state for Native Americans, because there is such a widespread population. Because Michigan is in the Sixth Circuit, this opens up the possibility that the courts of the Sixth Circuit will be exposed to numerous issues regarding these tribes and have the ability to set forth important precedent.

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115. *Native American Tribes of Michigan*, NATIVE LANGUAGES OF THE AMERICAS, www.native-languages.org/michigan.htm (last visited Mar. 6, 2015).

116. *Federally Recognized Tribes in Michigan*, MICH. DEPARTMENT HUM. SERVICES, http://www.michigan.gov/dhs/0,4562,7-124-5453_7209-216627--,00.html (last visited March 6, 2015). These tribes are as follows: Bay Mills Chippewa Indian Community (Brimley, MI), Grand Traverse Bay Band of Ottawa and Chippewa Indians (Suttons Bay, MI), Hannahville Indian Community (Wilson, MI), Nottawaseppi Huron Band of Potawatomi Indians (Fulton, MI), Keweenaw Bay Indian Community (Baraga, MI), Lac Vieux Desert Band of Lake Superior Chippewa Indians (Watersmeet, MI), Little River Band of Ottawa Indian (Manistee, MI), Little Traverse Bay Bands of Odawa Indians (Harbor Springs, MI), Match-e-be-nash-she-wish Band of Potawatomi Indians of Michigan (Dorr, MI), Pokagon Band of Potawatomi Indians (Dowagiac, MI), Saginaw Chippewa Indian Tribe (Mt. Pleasant, MI), and Sault Ste. Marie Tribe of Chippewa Indians (Sault Ste. Marie, MI). *Id.*

117. CHARLES E. CLELAND, RITE OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN'S NATIVE AMERICANS 287 (1992) ("It is difficult to calculate exactly how many people of Indian descent live in Michigan. The 1990 federal census lists 55,638 based upon self-identification, but the Michigan Commission on Indian Affairs believes this to be an undercount and suggests that a figure of 62,000 would be more accurate. At any rate, Indians represent only about 0.6 of Michigan's total population. While the 80.0 percent of the Indian population that resides in the urban areas of the Lower Peninsula seems invisible by virtue of their relatively small numbers, the 20.0 percent who reside in the north are a more noticeable segment of the population.").

*2. Native Americans in Ohio*

While the last Indian tribe left Ohio in 1843, it was originally home to a number of Native Americans.[118] This list includes the Shawnee, Chippewa, Ojibwa, Delaware, Wyandot, Iroquois, and the Potawatomi.[119] Ohio's Indian tribes "played a vital role in shaping the policy of the U.S. government toward the settlement of the lands west of the Allegheny Mountains."[120]

In 1795, Indian tribes remaining in Ohio following the Revolutionary War signed the Treaty of Greenville.[121] This treaty relocated the remaining Indians to the northern part of what would later become Ohio.[122] The Battle of Tippecanoe (1811) and the Battle of Thames (1813) were two battles which further diminished the presence of Native Americans in Ohio.[123] This reduction in population of Indians continued with the treaty of Maumee Rapids in 1817, and the treaty of St. Mary's in 1818.[124] The last of the Native American tribes left Ohio and moved west by 1842.[125]

*3. Native Americans in Tennessee*

Tennessee, like many of the states in the United States, was once the home of several Native American tribes. These tribes included the Cherokee tribe, the Chickasaw tribe, the Creek tribe, the Koasati tribe, the Quapaw tribe, the Shawnee tribe, and the Yuchi tribe.[126] The majority of the Indians in these tribes left the state, by force, during the Indian Removals in the 1800s.[127] While some descendants may still live in Tennessee, the majority of the tribes now live in other states, including Oklahoma.[128]

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118. *American Indians in Ohio*, OHIO SECRETARY OF STATE (2011), http://www.sos.state.oh.us/sos/profileohio/americanindiansinohio.aspx.

119. *Id.*

120. *American Indians in Ohio*, OHIO MEMORY, http://www.ohiohistoryhost.org/ohiomemory/wp-content/uploads/2014/12/TopicEssay_AmericanIndians.pdf (last visited Mar. 6, 2015).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Native American Tribes of Tennessee*, NATIVE LANGUAGES OF THE AMERICAS, www.native-languages.org/tennessee.htm (last visited Mar. 6, 2015).

127. *Id.*

128. *Id.*

*4. Native Americans in Kentucky*

At the time Kentucky became a state in the year 1792, at least twenty tribes resided in the area.[129] These tribes included the Miami, Ottawa, Eel River, Potawatomi, Shawnee, Cherokee, Chickasaw, Delaware, and the Chippewa.[130] The Native American tribes of Kentucky participated in the Revolutionary War and the French and Indian War.[131] The remaining Indian tribes after these wars ceded the last of their land in 1818.[132] While Indians still resided in Kentucky after ceding their lands over to the United States government, thousands were forcibly removed in 1830 after Congress passed the Indian Removal Act.[133] This Act required the removal of Indians in the east to lands west of the Mississippi River.[134]

*5. Reconciling the Application of Blackfeet with the Present Lack of Indian Tribes in Some Sixth Circuit States*

As indicated above, while the four states within the Sixth Circuit have a varied history with Native American Tribes, Ohio, Tennessee, and Kentucky do not presently recognize any tribes within their borders.[135] This does not change the fact that the Sixth Circuit should adopt the *Blackfeet* Presumption when faced with a conflict between *Blackfeet* and *Chevron*.

A lack of tribes in certain states within the circuit simply means that the Sixth Circuit Court of Appeals will likely not receive a case from district courts in those particular states. The Sixth Circuit Court of Appeals will, and indeed does, receive numerous cases involving Native American tribes.[136] While these cases often come from district courts in Michigan, they still require a decision by the court, and when they involve an ambiguous statute interpreted by an administrative agency, the court will have to determine whether to apply *Blackfeet* or *Chevron*. It is important for the Sixth Circuit to set forth precedent regarding this matter, not only to stay consistent with the goals of the Supreme Court

129. *American Indians of Oneida & Kentucky*, ONEIDA, KENTUCKY, http://oneidakentucky.homestead.com/nativeamericans.html (last visited Mar. 6, 2015).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See supra* Parts III.B.2–4.

136. *See, e.g.*, Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan (Grand Traverse III), 369 F.3d 960 (6th Cir. 2004); Michigan v. Bay Mills Indian Cmty., 695 F.3d 406 (6th Cir. 2012).

regarding the preservation of the tribal trust relationship, but also to grant deference to tribes within the Sixth Circuit, considering the widespread population distribution, particularly in Michigan. Furthermore, due to the existing split among the Circuit Courts, the Supreme Court may rule on this matter in the near future. As a circuit that serves as home to numerous Indian tribes, it is important for the Sixth Circuit to take a definitive stance on the matter and set forth reasoning that the Supreme Court may analyze in its own consideration of the matter.

### *C. Implications of Applying Chevron over Blackfeet*

The history of the Sixth Circuit with Native American tribes is not the sole reason why the Sixth Circuit should choose to apply the *Blackfeet* Presumption over the *Chevron* Doctrine when the two conflict. There are also implications that may arise from choosing to apply *Chevron* over *Blackfeet*. The Sixth Circuit should take the following factors into consideration when making this very important decision.

At the outset, applying the administrative agency's interpretation of an ambiguous statute over the interpretation of a Native American tribe would ultimately deteriorate the Supreme Court's holding in *Blackfeet* that courts should interpret statutes in the best interest of the tribes.[137] This could lead to a further break down of the relationship between the tribes and the states. Unfortunately, tribes have suffered a poor record when it comes to the treatment of tribes in the United States court system.[138]

*Chevron*, on the other hand, would not be deteriorated by granting deference to Indian tribes. *Chevron* is still applied in the vast majority of cases in which there is a question concerning administrative agency construction.[139] In fact, as one scholar has noted, "Chevron has become the most cited case in modern public law."[140] It continues to be strong, unlike Native American relations with the United States, which have been deteriorating over the years.

David Getches, in his article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream*

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137. *See supra* Part II.B.

138. *See infra* Part III.

139. *See, e.g.*, Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2439 (2014); Florez v. Holder, 779 F.3d 207, 210–11 (2d Cir. 2015); United States v. McGee, 763 F.3d 304, 312 (3d Cir. 2014).

140. Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2045 (2010) (citing Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006)).

*Value*, discussed the change that the court system has undergone over the past several decades in regard to the treatment of Native American tribes.[141] Getches focused on the Supreme Court and the unfortunate way in which it has recently ignored the tribes' best interest.[142] Getches acknowledged that while prior precedent has not been overruled, Indian tribes have not fared well during the past couple decades in the Supreme Court.[143]

For example, during the Burger Court, from 1969–1985, 58% of cases found in favor of Indian tribes.[144] On the other hand, during the Rehnquist Court, from 1986–2000, Indian tribes succeeded in the Supreme Court only 23% of the time.[145] This means that the Court ruled against the Indian tribes in 77% of cases.[146]

The Supreme Court has yet to reverse its decision in *Blackfeet* or minimize it in any way. While certain Supreme Court decisions including many decided by the Rehnquist Court,[147] have unfortunately

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141. *See* David Getches, *Beyond Indian Law: The Rhenquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Value*, 86 MINN. L. REV. 267 (2001).

142. *Id.* at 266–67 ("Until the mid-1980s, the Court's approach in Indian law was to construe laws in light of the nation's tradition of recognizing independent tribal powers to govern their territory and the people within it. In interpreting ambiguous treaties and laws, the Court regularly employed canons of construction to give the benefit of doubt to Indians, and it deferred to the political branches whenever congressional policy was not clear. Now, these legal traditions are being almost totally disregarded. Now . . . [T]he court is following a subjectivist approach in Indian law, a mission that has been characterized by Justice Scalia as determining 'what the current state of affairs *ought* to be.'" (emphasis added) (citations omitted)).

143. *Id.* at 280–81.

144. *Id.*

145. *Id.* at 280.

146. *Id.* at 280–81 ("Beyond the departures from settled law, the cases show a stunning record of losses for Indians. Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82% of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases. It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court. Convicted criminals achieved reversals in 36% of all cases that reached the Supreme Court in the same period, compared to the tribes' 23% success rate." (footnotes omitted) (citations omitted)).

147. *Id.* at 282–83 ("The Rehnquist Court's decisions have prevented tribes from trying and punishing non-Indian criminal defendants, from regulating nonmembers' fishing and hunting on non-Indian land, from zoning nonmember land in white communities on the reservation, from taxing non-Indian hotel guests on the reservation when the hotel is on non-Indian land, from hearing personal injury lawsuits between non-Indians for accidents on non-Indian land within the reservation, and from hearing suits brought by tribal members for torts committed against them on tribal land by non-Indian state officials. Moreover, even in cases where non-Indian interests were more attenuated, the Court has retreated from the deeply-rooted judicial approaches of respecting tribal

given little weight to Native American interests,[148] the precedent remains. Therefore, to disregard the *Blackfeet* Presumption would be to ignore this important precedent and participate in its deterioration. Until the Supreme Court backtracks on its stance of giving deference to tribes and preserving the trust relationship, the circuits should strive to meet these goals as well.[149]

While the Supreme Court has yet to alter its stance on *Blackfeet*, the Court *has* attempted to restrict *Chevron*. This endeavor to limit *Chevron* occurred in *United States v. Mead Corp.*[150] "The *Mead* Court held that the *Chevron* doctrine is only applicable if the interpretation at issue is made by an agency with the authority to make rules with the 'force of law,' and if the interpretation in question is made in the exercise of that authority."[151]

Therefore, the Court attempted to limit *Chevron* to situations which satisfied two requirements—first, that the agency had the power to set forth rules that had the force of law, and second, that the interpretation of those laws was made in the process of exercising its law-making authority.[152] This justification was rooted in the belief that if Congress grants certain administrative agencies the power to essentially create laws, then the Supreme Court should give deference to Congress's grant of power and that furthermore, not all agencies' "interpretations have the force of law . . . ."[153] However, the holding of *Mead* has resulted in some confusion among courts, as judges have difficulty determining which interpretations have such force and which do not.[154] This could become problematic, as it creates another step in the *Chevron* reasoning, rendering the doctrine complicated to apply.

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sovereignty and deferring to congressional power in the field. The venerable principles that had guided the field since the nation's founding have been invoked only when a treaty or statute left little doubt about Congress's intent, and the result would only indirectly affect non-Indian expectations, or when the Court would have had to overrule a well-established decision to decide otherwise." (citations omitted)).

148. *See supra* notes 146–147 and accompanying text.

149. *See supra* note 90 and accompanying text.

150. 533 U.S. 218 (2001).

151. *Justifying the Chevron Doctrine*, *supra* note 140, at 2049.

152. *Id.* at 2049–50. ("[In *Mead*: t]he Court seems to suggest that if an agency has been given the power to issue rules with the force of law, then that implies that Congress would want the agency to be able to use this power when interpreting ambiguities and filling gaps. There is some sense to this: certainly if Congress has not explicitly granted the power to make legislative rules to an agency, it is unlikely to have intended that the agency use such a power when issuing interpretations.").

153. *Id.* at 2050–51.

154. *Id.*

*Chevron* has received further criticism[155] based on two Constitutional principles that it appears to conflict with. First, the Constitution intended that legal questions, including statutory interpretation, be made by the court system, an apolitical body.[156] However, *Chevron* appears to delegate at least part of this power to administrative agencies, through granting deference to agency interpretation.[157]

The second Constitutional principle that *Chevron* appears to conflict with is the idea that Congress cannot delegate its powers, known as the "nondelegation doctrine."[158] This doctrine, found in Article 1, Section 1 of the United States Constitution, states that the powers listed in that

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155. *Id.* at 2049 ("Chevron has become 'the most cited case in modern public law.' The rather unsubstantial nature of the Court's justifications for the doctrine suggests, however, that the Court was unaware of its significance. Justice Stevens, writing for a unanimous Court, offered four possible reasons why the judiciary should defer to reasonable agency interpretations of ambiguous statutes. None has, in its original incarnation, proved strong enough to justify an agency's right to exercise the conventional judicial authority to 'say what the law is.' (citations omitted)).

156. *Id.* at 2044 (citing U.S. CONST. ART. III, §1) ("It is not necessary to alter the Chevron doctrine in order to find a theoretical foundation for it. It is only necessary to enrich our understanding of one of the doctrine's original rationales: political accountability. As initially articulated in the Chevron opinion, this justification relied on the fact that resolving statutory ambiguities typically requires some sort of policy choice. 'The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."' The obvious problem with this formulation is that the Constitution also vested 'judicial Power' in politically unaccountable courts. If statutory interpretation, a core judicial role, requires the exercise of policy discretion, then it seems odd to argue that policy responsibility was only constitutionally vested in the politically accountable branches." (citations omitted)).

157. *Id.* ("Certainly in a pre-Chevron world it would be inaccurate to say that Congress would be aware that, by including an ambiguous word in a statute, it was delegating its legislative power to the agency. Professor Peter Strauss has demonstrated that, in reality, pre-Chevron courts typically gave no deference to agency interpretations in the absence of an express delegation or some other factors that spoke strongly in favor of the agency interpretation. Thus, to the extent Congress was paying attention to the courts' treatment of administrative statutes, it would have little reason to suspect that ambiguity would be considered a delegation. If Chevron deference is justified only with reference to congressional intent, then it would seem that such deference should, at a minimum, be denied to pre-Chevron statutes." (citations omitted)).

158. *Id.* at 2051. ("Under the nondelegation doctrine, because Article I, Section 1 of the Constitution states that 'All legislative Powers herein granted shall be vested in Congress,' these powers may not be exercised by the other branches. In particular, Congress may not delegate these powers to agencies. The general tension between this doctrine and Chevron deference has been discussed almost since Chevron was first handed down. How can Chevron deference be based on Congress's implied delegation of legislative authority to an agency if such a delegation is a constitutional violation in and of itself?" (citations omitted)).

section of the Constitution are to be held by Congress alone.[159] This would seem to imply that Congress cannot delegate its law-making powers to administrative agencies. Therefore, under this logic, the Court cannot grant deference to agencies under *Chevron* in the way it laid out in *Mead* (with deference granted to agencies which have the power to make statutes with the force of law),[160] as that would be unconstitutional, since agencies cannot constitutionally create laws.[161]

While the criticism surrounding *Chevron* does not conclusively indicate that it is on shaky ground, it is something that the Sixth Circuit should consider in choosing whether to give this doctrine deference over the *Blackfeet* Presumption. Based on *Mead*, it is important for the court to determine whether the agency setting forth the interpretation of a statute impacting Native Americans has the power to set forth rules with the force of law. The Sixth Circuit must also keep in mind the criticism surrounding *Chevron* and *Mead* and the possibility that *Chevron* may be further restricted based on the constitutional concerns surrounding it.

## IV. CONCLUSION

*Chevron* and *Blackfeet* represent important Supreme Court precedent and each serves an important role in United States legal history. Unfortunately, these two doctrines of statutory interpretation not only have the capability of conflicting, but do so with regularity.[162] When a conflict occurs, the question becomes which canon should prevail over the other.

While the Supreme Court has yet to rule on the matter, several circuits have rendered decisions, resulting in a split among the circuits.[163]

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159. *Id.*

160. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001).

161. *See Justifying the Chevron Doctrine, supra* note 140, at 2051 (The article explains: "Indeed, this tension, along with the increasing prevalence of administrative rulemaking, might lead to the belief that the nondelegation doctrine is largely defunct. But while the Court has not invalidated a congressional grant of regulatory power under the nondelegation doctrine since 1935, it has consistently reiterated that the nondelegation doctrine still has constitutional force. The Court's adherence to the idea that the Constitution permits 'no delegation of those [legislative] powers' coupled with its refusal to invalidate statutes that permit agencies to make legislative rules suggests that the Court sees legislative rules as distinguishable from congressionally issued laws, even if those rules may hold the force of law. Chevron deference, therefore, cannot really be owed because some agency interpretations are the equivalent of legislative enactments as such interpretations would violate the nondelegation doctrine." (footnote omitted) (citations omitted).

162. *See supra* Part II.C.

163. *See supra* Part II.C.1.

The Sixth Circuit, however, has not definitively ruled on the matter,[164] despite the presence of Native American tribes within its borders.[165]

The Sixth Circuit should definitively rule on this issue in favor of the *Blackfeet* presumption. Liberally construing statutes in favor of Native American tribes is an important and long-standing Supreme Court precedent.[166] This canon of construction has cultivated and protected the vital trust relationship between the United States and Indian tribes, and the Sixth Circuit should consider this important history when addressing this conflict. Furthermore, the criticism surrounding *Chevron* has placed the doctrine on shaky ground and exposed it to limitation by the court system.[167] The Sixth Circuit should not entrust the future of the important relationship between this nation and Native American tribes to a doctrine as controversial as *Chevron*.

There is little doubt that the current circuit court split will continue to expand as time goes on. Therefore, the Supreme Court will likely address this issue in due course. The Sixth Circuit should consider the history and factors and conclude that the *Blackfeet* Presumption should prevail when conflicting with the *Chevron* Doctrine, not only to protect Indian tribes within the circuit, but to bring forth reasons to be considered when this issue eventually reaches the Supreme Court.

164. *See supra* Part II.C.2.
165. *See supra* Part III.B.
166. *See supra* Part II.B.
167. *See supra* notes 150–161.