IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, *Plaintiff*, v. DAVID L. BERNHARDT, in his official capacity as Acting Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE INTERIOR, *Defendants.*	Case No. 1:18-cv-2035

PLAINTIFF'S OPPOSITION TO PROPOSED INTERVENORS' MOTIONS TO INTERVENE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 4

A. Relevant Statutory Background 4

B. The Sault Tribe's Fee-To-Trust Submissions And This Litigation 8

C. Intervention Motions 9

ARGUMENT 10

I. PROPOSED INTERVENORS LACK ARTICLE III STANDING 11

II. PROPOSED INTERVENORS DO NOT SATISFY THE REQUIREMENTS OF RULE 24(a)(1) 17

A. Proposed Intervenors Have No Legally Protectable Interest In The Trust Status Of The Parcels That Would Be Impaired Absent Party Status 17

B. Proposed Intervenors Have Failed To Demonstrate The Possibility Of Inadequate Representation By The Department 20

III. THIS COURT SHOULD DENY PERMISSIVE INTERVENTION 24

IV. IF THE COURT GRANTS INTERVENTION, IT SHOULD IMPOSE REASONABLE CONDITIONS ON INTERVENORS' PARTICIPATION 26

TABLE OF AUTHORITIES

CASES

Page(s)

Alameda Water & Sanitation District v. Browner, 9 F.3d 88 (10th Cir. 1993).....6

ANR Storage Co. v. FERC, 904 F.3d 1020 (D.C. Cir. 2018).....21

Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015).....11

∗ *Bay Mills Indian Community v. Snyder*, 2017 WL 7736934 (W.D. Mich. Mar. 8, 2017).....18, 19

∗ *Bay Mills Indian Community v. Snyder*, 720 F. App'x 754 (6th Cir. 2018).....18, 20

Board of Commissioners of Cherokee County v. Jewel, 956 F. Supp. 2d 116 (D.D.C. 2013).....7

Center for Biological Diversity v. EPA, 274 F.R.D. 305 (D.D.C. 2011).....13

∗ *Cigar Ass'n of America v. FDA*, 323 F.R.D. 54 (D.D.C. 2017).....11, 24, 25

City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003).....23

∗ *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013).....2, 11, 14, 15, 17

Cobell v. Jewell, 2016 WL 10704595 (D.D.C. Mar. 30, 2016).....24

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996).....22

Connecticut v. Department of Interior, 344 F. Supp. 3d 279 (D.D.C. 2018).....16

County of Amador v. Department of Interior, 2007 WL 4390499 (E.D. Cal. Dec. 13, 2007).....14

Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013).....24

∗ *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189 (D.C. Cir. 2013).....11, 24

Doe 1 v. FEC, 2018 WL 2561043 (D.D.C. Jan. 31, 2018).....20

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985).....21

Forest County Potawatomi Community v. United States, 317 F.R.D. 6 (D.D.C. 2016).....15, 16

Fund for Animals, Inc. v. Norton, 322 F.3d 728 (D.C. Cir. 2003).....20, 24

GTE Service Corp. v. FCC, 782 F.2d 263 (D.C. Cir. 1986) 21

Housing Authority of Te-Moak Tribe of Western Shoshone Indians v. HUD, 85 F. Supp. 3d 1213 (D. Nev. 2015) 22

Jones v. Prince George's County, 348 F.3d 1014 (D.C. Cir. 2003) 17

Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001) 6

Keepseagle v. Vilsack, 307 F.R.D. 233 (D.D.C. 2014) 24

Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) 22

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 11

Medical Liability Mutual Insurance Co. v. Alan Curtis LLC, 485 F.3d 1006 (8th Cir. 2007) 18

Michigan v. EPA, 135 S. Ct. 2699 (2015) 3

Michigan v. Sault Ste. Marie Tribe of Chippewa Indians, 737 F.3d 1075 (6th Cir. 2013) 8, 15, 20

National Ass'n of Regulatory Utililty Commissioners v. Interstate Commerce Commission, 41 F.3d 721 (D.C. Cir. 1994) 22

National Fair Housing Alliance v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018) 11, 24

Nucor Steel-Arkansas v. McCarthy, 2014 WL 10999271 (D.D.C. Oct. 24, 2014) 24

Osage Producers Ass'n v. Jewell, 2016 WL 80660 (N.D. Okla. Jan. 7, 2016) 20

Philadelphia Gas Works v. FERC, 989 F.2d 1246 (D.C. Cir. 1993) 21

SEC v. Chenery Corp., 332 U.S. 194 (1947) 21

∗ *Seminole Nation of Oklahoma v. Norton*, 206 F.R.D. 1 (D.D.C. 2001) 23

Sierra Club v. McCarthy, 308 F.R.D. 9 (D.D.C. 2015) 13

Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941 (7th Cir. 2000) 15

Solenex LLC v. Jewell, 2014 WL 2586938 (D.D.C. June 10, 2014) 21

South Dakota ex rel. Barnettv. Department of Interior, 317 F.3d 783 (8th Cir. 2003) 23

Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) 17

∗ *Stop the Casino 101 Coalition v. Salazar*,
2009 WL 1066299 (N.D. Cal. Apr. 21, 2009) 13

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Stuart v. Huff, 706 F.3d 345 (4th Cir. 2013).....25

Tripp v. Executive Office of the President, 194 F.R.D. 344 (D.D.C. 2000) 25

Ungar v. Arafat, 634 F.3d 46 (1st Cir. 2011) 18

United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980).....17, 20

United States v. City of New York, 198 F.3d 360 (2d Cir. 1999).....20

USPS v. NLRB, 969 F.2d 1064 (D.C. Cir. 1992) 21

Wagdy v. Sullivan, 2018 WL 2304785 (D.D.C. May 18, 2018).....17, 18

STATUTES, RULES, AND REGULATIONS

25 U.S.C.
§ 2702.....5
§ 2703.....5, 6
§ 2704.....6
§ 2710.....6, 7
§ 2714.....14
§ 2719.....6, 19

25 C.F.R.
§ 151.11.....8
§ 292.3.....8
§ 292.5.....14
§§ 522.1-522.12 6
Part 559 7
§ 559.1.....7
§ 559.2.....7

Fed. R. Civ. P. 24.....3, 10, 17, 18, 20, 23, 24

D.C. Cir. R.
Rule 32 26
Rule 28 26

Michigan Indian Land Claims Settlement Act,
Pub. L. No. 105-143, 111 Stat. 2652 (1997).....4, 5

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INTRODUCTION

In this case, the Sault Tribe seeks an order directing the Department of the Interior to take certain land—the Sibley and Lansing Parcels—into trust for the Tribe, as the Michigan Indian Land Claims Settlement Act ("MILCSA") requires. That relief would have *no legal effect* on the tribes and commercial casino interests who are now seeking to block it. Likewise, an order upholding the Department's decision and denying the Sault Tribe the relief it seeks would have *no legal effect* on proposed intervenors. The only thing at issue in this case is the manner in which title to the land will be held: in fee simple by the Tribe (or a third party who has granted the Tribe a binding purchase option) or in trust by the United States on behalf of the Tribe. Proposed intervenors have not articulated—because they cannot articulate—any harm at all that they would suffer if the land were taken into trust. Because proposed intervenors would not be injured by the relief the Sault Tribe seeks, they have no Article III standing and should not be permitted to interject themselves and the extraneous issues they seek to raise into this case.

Rather than explaining how the relief sought in this case would harm them, proposed intervenors attempt to justify their proposed intervention based on a theory of "competitor standing." They argue that if, in the future, the Sault Tribe were to conduct gaming on the Parcels, the Sault Tribe's casinos would compete with their existing casinos, potentially causing them economic harm. And they cite cases permitting intervention where the agency action in question directly affected intervenors' ability to compete on an equal playing field.

But this is not such a case. Contrary to the impression that the motions to intervene convey, this litigation is not about gaming at all. It is about the trust status of land. The Sault Tribe has never hidden its hope that, someday, it will be able to engage in vitally needed economic development, including gaming, on the Sibley and Lansing Parcels. But merely taking land into trust does not enable the Tribe to game on it. The Indian Gaming Regulatory Act ("IGRA") bars

tribal gaming on land acquired in trust after 1988 unless the land qualifies for one of several specific statutory exceptions to that rule. Before the Sault Tribe could ever game on the Sibley or Lansing Parcels, therefore, the Tribe has determined that it will need to obtain a determination from the Department or the National Indian Gaming Commission ("NIGC") that the lands fall within one of those statutory exceptions. As the Department itself emphasized, its decision under review here did not address that issue. The Department's decision relates only to whether the lands should be taken into trust under MILCSA—not to the entirely separate question of whether those lands might later be deemed eligible for gaming under IGRA.

That forecloses proposed intervenors' claim to standing. Competitor standing must at a minimum be premised on a *direct* injury to competition—as the Supreme Court has repeatedly put it, an injury that is "'concrete, particularized, and actual or imminent.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). An agency decision that gives one competitor a market advantage over another, for instance, might create such an Article III injury. Here, however, requiring the Department to take the Sault Tribe's land into trust would not affect the playing field for competing casinos at all—it would not even introduce another competitor into the market. That will occur, if at all, only after a separate agency determination that the land is gaming-eligible, and the Tribe may well have to surmount additional obstacles (identified below).

To be sure, the land must be taken into trust before the Tribe can game on it. But that does not give proposed intervenors standing to oppose the trust acquisition based on a speculative competitive injury that will not, and cannot, occur unless and until the Tribe prevails in future agency proceedings and that may never occur at all. Because proposed intervenors will suffer no actual or imminent injury if the land is taken into trust, they lack Article III standing.

Apart from that dispositive jurisdictional barrier to intervention, proposed intervenors cannot satisfy Rule 24(a) standards. For one thing, proposed intervenors have no legally protectable interest in whether the Parcels are held in trust by the federal government rather than in fee simple by the Tribe. Moreover, even if proposed intervenors had identified such a legally protectable interest, the Department will adequately represent it. There is no reason to believe that the Department will fail to defend agency decisions vigorously, particularly given that the Department has repeatedly reaffirmed the interpretation of MILCSA at the heart of this case.

Nor could proposed intervenors add anything legally relevant to the Department's defense. Under the Administrative Procedure Act ("APA"), this Court's review is presumptively limited to the administrative record and governed by the familiar rule that agency action may be upheld "only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). In view of those well-established constraints, it is far from clear how *post hoc* explanations advanced by intervening, non-agency parties could matter to judicial review, especially because this case turns on interpreting a statute, MILCSA, enacted to benefit the Sault Tribe. Proposed intervenors have no legitimate interest in, let alone any special insight into, the manner in which MILCSA entitles the Tribe to use its settlement funds. Indeed, proposed intervenors implicitly acknowledge that point by announcing that they will raise extraneous issues regarding whether the land is gaming-eligible under IGRA and consistent with the Tribe's gaming compact with the State of Michigan—issues that have nothing to do with this Court's review of the Department's trust determination under MILCSA. That avowed intention to complicate this litigation with irrelevant disputes is sufficient reason by itself to deny intervention.

For similar reasons, there is no sound basis for permissive intervention. If proposed intervenors believe they have views that are legally relevant, they may seek leave to participate as

amici curiae. But there is no justification for taking the significant step of conferring party status on entities that lack any legally cognizable interest in what is truly at issue in this case—the trust status of land—and that seek to litigate gaming-eligibility questions not at issue.

BACKGROUND

A. Relevant Statutory Background

The Sault Tribe's complaint sets forth the full background of this dispute. For purposes of resolving the intervention motions, the Tribe briefly summarizes two federal statutes that proposed intervenors consistently conflate: MILCSA, which governs whether the United States must hold the Sibley and Lansing Parcels in trust for the Tribe, and IGRA, which governs the Tribe's ability to conduct Indian gaming on trust lands. This case is about MILCSA, not IGRA.

1. The Michigan Indian Land Claims Settlement Act

Congress enacted MILCSA in 1997 to settle the long-standing land claims of the Sault Tribe and certain other Michigan tribes stemming from the federal government's unlawful dispossession of their lands in the nineteenth century. MILCSA mandates the distribution of outstanding judgment funds awarded to those tribes on account of those land claims. Through MILCSA, Congress sought to "provide … the opportunity for [certain Michigan] tribes to develop plans for the use or distribution of their share of the funds" to promote tribal economic self-sufficiency, including through the acquisition of land. Pub. L. No. 105-143, § 102(b), 111 Stat. 2652, 2653 (1997); *see id.* at 2655. Notably, proposed tribal intervenors are not among the tribes for whose benefit MILCSA was enacted.

Section 108 of MILCSA governs the "Plan for Use of Sault Ste. Marie Tribe of Chippewa Indians of Michigan Funds." 111 Stat. at 2660. It creates a "Self-Sufficiency Fund" that can be used for various purposes, depending on whether the relevant funds are "principal" or "interest." *Id.* at 2660-2662. Under Section 108(c), "interest and other investment income" may be

"distributed" by the Tribe's Board of Director for any of five purposes, including "for educational, social welfare, health, cultural, or charitable purposes which benefit" the members or "for consolidation or enhancement of tribal lands." *Id.* at 2661. Importantly, Congress gave the Secretary no role in determining whether the Tribe's Board properly expended funds under Section 108(c). The Secretary's approval is not required "for any … distribution from the principal or income of the Self-Sufficiency Fund," and the Secretary "shall have no trust responsibility for the investment, administration, or expenditure of the principal or income of the Self-Sufficiency Fund." *Id.* at 2661.

Section 108(f) of MILCSA, in turn, mandates that lands acquired with interest by the Tribe's Board "shall be held in trust by the Secretary [of the Interior] for the benefit of the tribe." 111 Stat. at 2661-2662. Trust status carries "substantial legal, jurisdictional, economic, political, and cultural … benefits" for tribes. McCoy, *The Land Must Hold the People*, 27 Am. Indian L. Rev. 421, 474 (2003); *see id.* at 474-489 (describing benefits). As explained below, one relevant benefit of trust status is the potential, under certain circumstances, to conduct gaming on trust lands consistent with IGRA. Trust status, however, does not give a tribe any right to construct a casino at a particular site, and as explained below, "several obstacles must be overcome before land taken into trust … may be used to host Indian gaming." *Id*. at 480.

2. The Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA divides gaming into three "classes." Class I includes social games solely for prizes of minimal value. *Id.* § 2703(6). Class II generally

includes bingo, certain similar games, and certain card games. *Id.* § 2703(7)(A), (B). Class III includes everything else and is sometimes referred to as "casino-style" gaming. *Id.* § 2703(8).

Under IGRA, any class of gaming must be conducted on "Indian lands," defined to include "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). IGRA does not govern when or how land is taken into trust; rather, it sets out "separate and independent requirement[s] to be considered before gaming activities can be conducted[.]" *Oversight Hearing on Taking Lands into Trust Before the S. Comm. on Indian Affairs*, 109th Cong. 28 (2005) (statement of George T. Skibine, Acting Deputy Assistant Sec'y—Indian Affairs for Pol'y & Econ. Dev., Dep't of Interior). As relevant here, IGRA bars gaming on Indian lands taken into trust after October 17, 1988 (IGRA's effective date), subject to certain exceptions, including an exception for lands taken into trust as part of "a settlement of a land claim." 25 U.S.C. § 2719(a), (b)(1)(B)(i). Such land is gaming-eligible if, and only if, it fits into one of those exceptions.

Class II gaming is subject to federal regulation, and Class III gaming is subject to both federal and at least limited state regulation. To engage in either Class II or Class III gaming, a tribe must secure federal approval of a tribal gaming resolution or ordinance from NIGC—an agency created by IGRA that has "exclusive authority to regulate Indian gaming conducted pursuant to IGRA." *Kansas v. United States*, 249 F.3d 1213, 1218 n.1 (10th Cir. 2001); *see* 25 U.S.C. § 2704; *id.* § 2710(b)(2) (detailing requirements for NIGC approval of Class II gaming); *id.* § 2710(d)(1)(A) (to conduct Class III gaming, tribe must have resolution or ordinance approved by NIGC); 25 C.F.R. §§ 522.1-522.12 (regulations governing NIGC review and approval of gaming ordinances and resolutions). To engage in Class III gaming, the tribe must also be party to a

gaming "compact" with the State in which the gaming will occur. *See, e.g.*, 25 U.S.C. § 2710(d)(1)(C).

There are different ways for a tribe to secure a determination that land is gaming-eligible. For land that is already held in trust, a tribe may "submit a request for an opinion" regarding the gaming eligibility of particular land to NIGC. 25 C.F.R. § 292.3(a).[1] Such a determination is known as an "Indian lands opinion" or "Indian lands determination." Although "there is no legal requirement that [NIGC] issue a formal determination (also known as an Indian lands determination) prior to a tribe gaming on a specific site," "[i]f a tribe opens a facility on lands not eligible for gaming, it does so at the risk of violating IGRA and other applicable laws." Final Rule, National Indian Gaming Commission, *Facility Notifications and Submissions*, 77 Fed. Reg. 58,769, 58,770 (Sept. 24, 2012). If an Indian tribe submits a site-specific gaming ordinance for approval, NIGC will determine whether covered sites are eligible for gaming under IGRA. *See, e.g.*, Washburn, *Agency Conflict and Culture*, 42 Ariz. St. L.J. 303, 334-335 (2010) (discussing NIGC's responsibility to make Indian lands determinations); *see also Board of Comm'rs of Cherokee Cty. v. Jewel*, 956 F. Supp. 2d 116, 122 (D.D.C. 2013). In addition, a tribe must provide NIGC with notice 120 days before opening a Class III gaming facility, *see* 25 C.F.R. § 559.2(a), a time during which NIGC may also evaluate whether proposed gaming would take place on gaming-eligible land, *see, e.g.*, *id.* § 559.1 (purpose of Part 559 "is to ensure that each place, facility, or location where class II or class III gaming will occur is located on Indians lands eligible for gaming"); Washburn, 42 Ariz. St. L.J. at 335 ("NIGC has … sought to create a regulatory structure that requires tribes to consider routinely the status of land on which they intend to

[1] In addition to securing an Indian lands determination through NIGC, a tribe may seek such an opinion through the "Office of Indian Gaming" within the Department of the Interior. 25 C.F.R. § 292.3(a); *see generally* Dep't of Interior, Indian Affairs, *Office of Indian Gaming: Overview*, https://www.bia.gov/as-ia/oig (visited Feb. 22, 2019).

conduct gaming and to provide notice to the [agency] in advance of commencing gaming on such lands.").

As explained below, the Sault Tribe intends to seek an Indian lands determination affirming that the land is gaming-eligible before engaging in gaming activity on the Sibley or Lansing Parcels. *See* Declaration of Aaron A. Payment ¶ 3 ("Payment Decl.") (filed as an exhibit with this brief).

B. The Sault Tribe's Fee-To-Trust Submissions And This Litigation

In 2012, the Sault Tribe's Board—exercising its authority under tribal law as well as its responsibilities under MILCSA—decided to purchase property in two locations in Michigan's Lower Peninsula. In June 2014, the Tribe presented two mandatory fee-to-trust submissions to the Department, one submission for the Sibley Parcel and one for the Lansing Parcel.[2]

In those submissions, the Tribe explained that "[t]he Secretary's non-discretionary duty to take land into trust [under MILCSA] does not depend in any way on the purposes for which the land may be used. *See* 25 C.F.R. § 151.11." *E.g.*, Sibley Submission 1-2 n.1 (Dkt. 1-2). Nonetheless, to be transparent, the Tribe explained that it anticipated conducting lawful gaming activities on the properties to the extent consistent with IGRA, in addition to "engag[ing] in other lawful activities" on the land, including "provid[ing] educational, health and welfare services to thousands of tribal members who reside in the surrounding area." *Id.* In making the trust submissions, the Tribe did not seek an Indian lands determination regarding the Sibley and

[2] The Sault Tribe was delayed in filing the trust submissions as a result of litigation brought by the State of Michigan alleging that filing a trust submission would breach Section 9 of the gaming compact between the Tribe and Michigan. The Sixth Circuit held that Michigan's suit was barred by sovereign immunity, but that Michigan would have later opportunities to raise compact-based objections to any Class III gaming on the property. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1080 (6th Cir. 2013).

Lansing Parcels' eligibility for gaming—an inquiry that would have required analysis under IGRA, not MILCSA.

In rejecting the Tribe's trust submissions in the January Denial Letter and the June Denial Letter (collectively, the "Trust Denial Orders"), the Department emphasized, correctly, that IGRA gaming eligibility was *not* at issue in the agency proceedings and that the Parcels' gaming eligibility was unrelated to whether they qualified for trust status under MILCSA. The January Denial Letter thus explained that "the Tribe does not at this time ask for a gaming eligibility determination, and the Tribe's use of the Parcels for gaming is not relevant to whether the acquisitions qualify for mandatory land-into-trust acquisitions by the Department." January Denial Letter 3 n.24 (Dkt. 1-5). The Department repeated those qualifications in the July Denial Letter. *See* July Denial Letter 2 n.11 (Dkt. 1-6).

In August 2018, the Sault Tribe filed suit challenging the Trust Denial Orders and the Department's failure to take the land into trust, as contrary to MILCSA and the APA.

C. Intervention Motions

Proposed intervenors filed their motions to intervene (Dkts. 16, 18, 20) within three days of each other in late December 2018—after the Department had already answered the Sault Tribe's complaint and after the parties had negotiated and this Court had adopted a scheduling order. Specifically, the Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Tribe") moved to intervene in defense of the Department on Sunday, December 23, 2018. *See* Saginaw's Mem. in Supp. of Mot. to Intervene (Dkt. 16-1) ("Saginaw Mot."). The next day, December 24, three Michigan commercial casinos—MGM Grand Detroit, Detroit Entertainment, and Greektown Casino—moved to intervene. *See* MGM's Mem. in Supp. of Mot. to Intervene (Dkt. 18-1) ("MGM Mot."). Finally, on December 26, 2018, the Nottawaseppi Huron Band of the Potawatomi ("NHBP") moved to intervene. *See* NHBP's Mot. to Intervene (Dkt. 20) ("NHBP Mot.").

The Sault Tribe files this consolidated opposition in response to all three motions.

ARGUMENT

The Court should deny the intervention motions. First, intervention—whether as a matter of right or by this Court's permission—requires Article III standing. Proposed intervenors cannot satisfy Article III's requirements. Vacatur of the Trust Denial Orders would result only in the Department taking the Sibley and Lansing Parcels into trust, as required by MILCSA—an outcome that would not harm proposed intervenors in any way. Proposed intervenors' only claimed injury is the possibility that, if the Parcels are taken into trust under MILCSA, the land might at some later date be deemed eligible for gaming under IGRA, and if so, the Tribe might construct gaming facilities on the Parcels that would compete with proposed intervenors' casinos. That purported injury is far too contingent and speculative to support Article III standing. Second, proposed intervenors have no right to intervene under Rule 24(a). They lack any legally protectable interest in the trust status of the Parcels, and they have failed to demonstrate either how the Department may inadequately defend the challenged Trust Denial Orders or how, consistent with APA constraints, proposed intervenors could add anything legally relevant to the Department's defense of its own orders. Third, permissive intervention would be inefficient and disruptive: Two proposed intervenors have already announced their intention to interject collateral issues that are not relevant to the Department's orders under review. With respect to the issues actually presented, proposed intervenors may seek leave to participate as *amici curiae* to provide their perspectives, and they identify no reason why such participation would be insufficient to safeguard any conceivable interest they may have in this litigation.[3]

[3] The Sault Tribe alternatively requests that the Court impose reasonable conditions on any grant of intervention in order to promote the orderly and efficient resolution of this case. *See infra* pp. 26-27.

I. PROPOSED INTERVENORS LACK ARTICLE III STANDING

"For either intervention as a matter of right or permissive intervention, … the movant must establish Article III standing." *National Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 64 (D.D.C. 2018); *see Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) ("It is … circuit law that intervenors must demonstrate Article III standing[.]"). Standing, moreover, "is required regardless of whether the person asks to intervene as a plaintiff or defendant." *Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54, 59 (D.D.C. 2017); *see Deutsche Bank*, 717 F.3d at 193. The "'irreducible constitutional minimum of standing contains three elements': injury in fact, causation, and redressability." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Where, as here, proposed intervenors are not themselves "the object of the [challenged] government action …, standing … is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Proposed intervenors cannot satisfy the first condition for Article III standing—namely, injury-in-fact. That is because they have not demonstrated, and cannot demonstrate, any "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent," *Lujan*, 504 U.S. at 560 (internal citations omitted), that would result from the outcome of this case. The injury-in-fact imminence requirement "'ensure[s] that the alleged injury is not too speculative for Article III purposes.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Thus, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Id.* at 409.

Proposed intervenors cannot satisfy that requirement. The sole issue presented in this case is whether the Department acted unlawfully in failing to take the Sibley and Lansing Parcels into trust under MILCSA. Proposed intervenors identify no harm to them from having the land held in

trust rather than in fee simple—because there is none. Rather, they seek to intervene based on the possibility of a "competitive injury" to their casinos at some later date. *E.g.*, Saginaw Mot. 17 (claiming standing based on theory that "reversal of the Federal Defendants' decision will open the door for the Sault Ste. Marie Tribe to open a casino that will directly impact the Saginaw Tribe's revenue streams"); MGM Mot. 1 (claiming standing based on "increased competition" in gaming); NHBP Mot. 8 (claiming standing based on "competitive injury NHBP will suffer if the Sault Tribe is allowed" to game on trust properties).

That theory is much too speculative and attenuated to support standing. The question at issue here—whether the Parcels are held in *trust* under *MILCSA*—is legally, factually, and procedurally distinct from the question of whether those properties are *gaming-eligible* under *IGRA*. And an order requiring the Department to take the Parcels into trust (the relief the Sault Tribe seeks in this case) would not authorize the Tribe under IGRA to build a casino that would compete with proposed intervenors' existing gaming facilities. Indeed, as NHBP (alone among the proposed intervenors) acknowledges, the Department was clear in the Trust Denial Orders that it was not passing on "the legality of gaming on these sites." NHBP Mot. 3; *see* January Denial Letter 3 n.24; July Denial Letter 2 n.11.

That should be the end of the standing inquiry. As the Ninth Circuit explained in nearly identical circumstances, "[i]njuries related to the possible building of a casino are hypothetical and not fairly traceable to an agency action that affirmatively declined to determine whether or not a casino could be built on the Property." *Stop the Casino 101 Coalition v. Salazar*, 384 F. App'x 546, 548 (9th Cir. 2010). The Ninth Circuit accordingly held that an anti-gaming group lacked standing to object to the Department's determination to take land into trust for a tribe pursuant to a mandatory trust statute like MILCSA where the Department had made no finding of

gaming-eligibility, even though the tribe intended to build a casino on the land. *Id.* "Until the Tribe obtains … approval [of its gaming project], plaintiffs' injuries remain too anticipatory to create standing." *Stop the Casino 101 Coalition v. Salazar*, 2009 WL 1066299, at *4 (N.D. Cal. Apr. 21, 2009), *aff'd*, 384 F. App'x 546 (9th Cir. 2010).[4]

It is true that trust status is one of many legal and practical preconditions to any potential gaming on the Parcels, and in that sense a necessary "first step" before the Sault Tribe may game. Saginaw Mot. 1. And it is also true that the Tribe has never hidden its hope that someday it will be able to engage in lawful gaming activities on the Parcels. *See* MGM Mot. 1, 5, 9 (repeatedly citing complaint's allegation that taking land into trust would "pav[e] the way for potential gaming"). But that is all irrelevant for standing purposes. The Tribe's "hope" that trust approval will lead to "eventual" gaming on the Parcels "does not make it so," and it is the existence of "the intervening contingenc[ies]," not the Tribe's "aspirations," that "governs" Article III's "imminence and causation inquiries." *Center for Biological Diversity v. EPA*, 274 F.R.D. 305, 311 n.7 (D.D.C. 2011); *see also Stop the Casino 101*, 2009 WL 1066299, at *4 ("Irrespective of the Tribe's intentions—and the Tribe does not dispute that it seeks to use the parcel to operate a casino—the Secretary's [trust decision] did not approve the Tribe's [gaming] plan.").

A critical "intervening contingency" here is whether the lands will be deemed gaming eligible under IGRA. As explained above, regulation of tribal gaming on Indian lands falls to

[4] In holding that injuries due to prospective gaming were "hypothetical and not fairly traceable" to the trust determination, the Ninth Circuit based its standing analysis on lack of "a concrete injury" as well as lack of causation. 384 F. App'x at 548. Judges in this District have likewise denied intervention where, as here, the "alleged injury" depends on future events and "not on any order of this Court," explaining that such harm is both "too hypothetical and too far removed from a judgment of this Court to constitute a 'certainly impending,' causally connected injury for standing purposes." *Center for Biological Diversity v. EPA*, 274 F.R.D. 305, 310 (D.D.C. 2011) ("alleged injury thus fails both the injury-in-fact and causation prongs of the standing test"); *accord Sierra Club v. McCarthy*, 308 F.R.D. 9, 12 (D.D.C. 2015). Whether viewed through the lens of injury-in-fact or causation, the result here is the same.

NIGC—a separate decisionmaker that is "only nominally part of the" Department. *County of Amador v. Department of Interior*, 2007 WL 4390499, at *2 (E.D. Cal. Dec. 13, 2007). As part of its regulatory duties, NIGC may issue an "Indian lands" determination addressing whether or not trust land is gaming-eligible under an exception to IGRA's general bar on gaming on lands acquired in trust after October 17, 1988. *See supra* pp. 6-8. Without an Indian lands determination, a gaming facility runs "the risk of violating IGRA and other applicable laws." Final Rule, 77 Fed. Reg. at 58,770. For those legal and practical reasons, the Sault Tribe's intention is to seek an Indian lands determination before commencing gaming on the Parcels. *See* Payment Decl. ¶ 3. As part of that separate process under IGRA, the Tribe will need to show that the Parcels were acquired "under a settlement of a land claim." 25 C.F.R. § 292.5. NIGC would then engage in a separate decisional process and issue a final decision regarding gaming eligibility—a decision that could itself be challenged in litigation. *See* 25 U.S.C. § 2714 (providing for judicial review of NIGC decisions).

In fact, one of the intervention motions stakes out the position that the Parcels are not gaming-eligible under IGRA. *See, e.g.*, NHBP Mot. 3 (asserting "the Sault Tribe has not and cannot establish that [an IGRA exception] applies" to the Parcels). The Sault Tribe disagrees, but NHBP's argument merely illustrates that the Tribe's ability to game on the Parcels does not turn on their trust status; it depends on the resolution of a distinct question under IGRA—one that has nothing to do with the interpretation of MILCSA at issue here and will be decided, if at all, in a different and later proceeding. That forecloses Article III standing. The Supreme Court has made clear that courts should be "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413-414. The Tribe's entitlement to game depends on the outcome of an independent decision to be made in the

future. For that reason, any "threat of competition" (MGM Mot. 11) is neither "imminent" nor "fairly traceable" to the relief sought here, as required by Article III. *Clapper*, 568 U.S. at 409.[5]

This case is thus nothing like—much less "materially indistinguishable" (MGM Mot. 11) from—those on which proposed intervenors rely. NHBP Mot. 8-9; MGM Mot. 11-12. *Forest County Potawatomi Community v. United States*, for example, involved a challenge by a tribe to the Department's decision "to disapprove an amendment to a gaming compact" between the tribe and Wisconsin. 317 F.R.D. 6, 8 (D.D.C. 2016). The provision that was disapproved, and that the Tribe sought to compel the Department to approve, effectively created a "'50-mile non-competition zone' around Potawatomi's facility in Milwaukee." *Id.* at 9. A different tribe, the Menominee, had been pursuing a casino in Kenosha "approximately thirty-three miles" from the Potawatomi facility, within the proposed non-competition zone. *Id.* The court concluded that the Menominee had Article III standing because a judicial order requiring approval of the non-competition zone would directly "impede the Menominee's efforts to obtain" approval for future gaming and "would thereby impede their efforts to develop a gaming facility." *Id.* at 12. By contrast, the Sault Tribe's right under IGRA to game on the Sibley and Lansing Parcels is not at issue here, and proposed intervenors therefore do not stand to "'gain or lose by the direct legal

[5] Other contingencies pervade intervenors' standing theories. Construction of a gaming facility takes time and requires significant financing. None of that is guaranteed, particularly given the potential for litigation after an Indian lands determination. Before gaming may commence on the Parcels, the Tribe will likely need to resolve the State's allegations that Class III gaming would violate the Sault Tribe's gaming compact. *See Michigan*, 737 F.3d at 1080. And any economic effect on proposed intervenors from a "competing" gaming facility on the Sibley or Lansing Parcel would depend on myriad factors, such as the types of gaming conducted; the nature of the gaming facilities and their amenities; the specific gaming markets at issue; and whether the casinos actually succeed. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947-948 (7th Cir. 2000) (affirming district court's denial of competing gaming tribe's motion to intervene in suit by other tribes challenging refusal to take land into trust for gaming and explaining that "any effect on [the competing tribe's] interest from the [plaintiffs' proposed] project is too speculative to support intervention in this suit").

operation and effect of the judgment'" in this case. *Id*. at 13 n.8. A decision by this Court ordering the Department to take the Parcels into trust would neither preclude a new competitor from entering the gaming market—as in *Forest County*—nor introduce a new competitor into the gaming market. Accordingly, it gives rise to no "competitive harm."

Connecticut v. Department of Interior is equally off point. There, Connecticut and a tribe (the Mashantucket Pequot) sought to "amend the federally-imposed procedures authorizing gambling on Pequot land within Connecticut under [IGRA]." 344 F. Supp. 3d 279, 288 (D.D.C. 2018). The amendment was "necessary for Pequot to operate a commercial casino on Connecticut land," but the Department refused to approve the amendment. *Id.* The court found that MGM had standing to intervene in that dispute because the amendment would have created a significant competitive disadvantage for MGM by permitting the Pequot to "build casinos elsewhere in the state without causing the state to forfeit the royalty payments it receives from the tribal casinos' gaming operations; payments the state would forfeit if it approved casinos operated by private developers," such as MGM. *Id.* at 298. In addition, the court found that approval of the amendment "would 'directly affect the market' by removing the final hurdle to" a new casino less than 20 miles from an MGM facility. *Id.* at 301. That case thus involved *direct* competitive injury to MGM. By contrast, here, the only issue is the Sault Tribe's right to have land taken into trust. And mere trust acquisition of the land does not permit the Sault Tribe to build a casino; it does not introduce a competitor into the gaming market, or affect the market, at all. Proposed intervenors cite no authority holding that prospective competitors have Article III standing to intervene in such circumstances.

In short, proposed intervenors' "speculative chain of possibilities does not establish that injury based on potential future [gaming competition] is certainly impending or … fairly traceable" to any outcome of this case. *Clapper*, 568 U.S. at 414.

II. PROPOSED INTERVENORS DO NOT SATISFY THE REQUIREMENTS OF RULE 24(a)(1)

In addition to lacking Article III standing, proposed intervenors cannot satisfy the requirements for intervention as of right. Because Congress has not established their "right to intervene by … statute," Fed. R. Civ. P. 24(a)(1), they may intervene as of right only if they can satisfy four requirements: "timeliness, interest, impairment of interest, and adequacy of representation," *Jones v. Prince George's County*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *see* Fed. R. Civ. P. 24(a)(2). Proposed intervenors "must satisfy all four elements of the Rule in order to intervene as of right." *Jones*, 348 F.3d at 1019. Here, they fall short for at least two reasons: (1) intervenors lack a legally protectable interest in the trust status of the Sault Tribe's Parcels that would be impaired absent party status; and (2) intervenors have not shown that the Department may inadequately represent their interests.

A. Proposed Intervenors Have No Legally Protectable Interest In The Trust Status Of The Parcels That Would Be Impaired Absent Party Status

"Rule 24(a)(2) requires the intervenor to demonstrate 'an interest relating to the property or transaction which is the subject of the action.' The rule impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one." *Southern Christian Leadership Conference (SCLC) v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). Under D.C. Circuit precedent, a legally protectable interest is one that is "'of such a direct and immediate character that [the proposed intervenor] will either gain or lose *by the direct legal operation and effect of the judgment*.'" *Wagdy v. Sullivan*, 2018 WL 2304785, at *4 (D.D.C. May 18, 2018) (emphasis added); *see United States v. AT&T*, 642 F.2d 1285, 1292 (D.C. Cir. 1980).

Proposed intervenors lack any interest of that type here. Again, this is a case about the trust status of lands under MILCSA, not the lands' gaming eligibility under IGRA. Just as proposed intervenors would suffer no Article III injury if the Sibley and Lansing Parcels were taken into trust, they have no legally protectable interest that would be "direct[ly] and immediate[ly]" impaired by an order requiring the Department to hold those properties in trust. *Wagdy*, 2018 WL 2304785, at *4. Intervenors will not "gain or lose" anything "by the direct legal operation and effect" of such a judgment: They will not be affected in any way by the manner in which title to the Sault Tribe's land is held. *Id*.

Proposed intervenors assert an interest in preventing future gaming on the Parcels. *See, e.g.*, Saginaw Mot. 1 (citing "important and legally protectable interest" in stopping "off-reservation gaming"). But, as explained above, gaming will hardly be the "direct and immediate" result of a trust acquisition; rather, gaming will require, at a minimum, further agency proceedings to determine the lands' gaming eligibility. And a general interest in blocking *potential* future gaming does not satisfy Rule 24(a). *See Ungar v. Arafat*, 634 F.3d 46, 51-52 (1st Cir. 2011) ("An interest that is too contingent or speculative … cannot furnish a basis for intervention as of right."); *Medical Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) ("An interest that is 'contingent upon the occurrence of a sequence of events before it becomes colorable' is … not sufficient to satisfy Rule 24(a)(2).").

For similar reasons, another district court (affirmed by the Sixth Circuit on appeal) rejected the Saginaw Tribe and NHBP's attempts to intervene in litigation involving another MILCSA tribe. *See Bay Mills Indian Cmty. v. Snyder*, 2017 WL 7736934, at *2, *4 (W.D. Mich. Mar. 8, 2017), *aff'd*, 720 F. App'x 754 (6th Cir. 2018). There, the Bay Mills Tribe sought a declaratory judgment that a parcel of land it had bought with MILCSA funds was "Indian lands," with a view

toward gaming on that land. *Id.* at *1. The district court explained that "[t]he Saginaw Tribe's interest in minimizing economic competition is simply not sufficient to merit intervention." *Id.* at *2. The court reasoned that "[t]he outcome of this lawsuit might well affect the Saginaw Tribe's revenue streams," but that the effect was not sufficiently "'direct and substantial'" to give rise to "a significantly protectable legal interest." *Id.*

The same is true here. In fact, intervenors' attenuated concept of a legally protectable interest would permit them to intervene in any dispute that might someday affect the Tribe's ability to game—for example, commercial litigation between the Tribe and a bank over the terms of financing for property that one day might be used for gaming. That stretches the concept of a legally protectable interest beyond its breaking point.

Two intervenors (the Saginaw Tribe and NHBP) attempt to manufacture a legally protectable interest by recycling allegations that the Tribe's filing of the trust submissions violated Section 9 of the Sault Tribe's compact with Michigan. These allegations are unfounded.[6] They are also irrelevant. Those two tribes made the same legal objections to the Department, but the Department did not pass on them—rightly so, as they have no bearing on the proper application of MILCSA. Further, as explained below, given that the Department did not address these claims, they are not relevant to judicial review of the Trust Denial Orders. In fact, the tribes' obvious

[6] For several reasons, § 9 of the Compact does not apply to the Tribe's MILCSA submissions. As both state and federal officials have recognized, the provision applies only to a discretionary fee-to-trust application that seeks to have land taken into trust for class III gaming purposes pursuant to a two part-determination under 25 U.S.C. § 2719(b)(1)(A). Section 9 does not apply to mandatory trust acquisitions like those at issue here, which do not contemplate any assessment of the purpose for which the land will be used or any contemporaneous determination regarding gaming eligibility. *See, e.g.*, *H.R. 2176, To Provide for and Approve the Settlement of Certain Land Claims [etc.]: Hearing Before the H. Comm. on Nat. Resources*, 110th Cong. 58 (2008) (statement of Carl Artman, Assistant Sec'y—Indian Affairs, Dep't of Interior) (explaining that § 9 "requires that no application for land to be taken into trust for a two-part determination shall be submitted" without a revenue-sharing agreement, and that "we would need to see if this [acquisition] would require a two-part determination" to determine whether § 9 applies).

intention to introduce these collateral issues into this case weighs against, not in favor of, intervention. *See United States v. City of New York*, 198 F.3d 360, 365 (2d Cir. 1999) ("[i]ntervention ... cannot be used as a means to inject collateral issues into an existing action" (internal quotation marks omitted)); *Osage Producers Ass'n v. Jewell*, 2016 WL 80660, at *2 (N.D. Okla. Jan. 7, 2016) (denying intervention where intervenors would "inject legal issues collateral to the dispute between the existing parties"). Finally, the Sixth Circuit has held that Michigan—the counterparty to the compact the Tribe has allegedly breached—may have remedies later. *Sault Ste. Marie Tribe*, 737 F.3d at 1080. This case is not the proper forum for that dispute.[7]

B. Proposed Intervenors Have Failed To Demonstrate The Possibility Of Inadequate Representation By The Department

Apart from their lack of standing and their failure to identify a legally protectable interest in the trust status of the Parcels, proposed intervenors have not shown inadequate representation. Intervention as of right is improper where "existing parties adequately represent" the asserted "interest" of a proposed intervenor. Fed. R. Civ. P. 24(a)(2). Although the burden of making the showing that existing parties may not be adequate representatives is "'not onerous,'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003), "it is not satisfied when 'it is clear that the party will provide adequate representation for the absentee,'" *Doe 1 v. FEC*, 2018 WL 2561043, at *5 (D.D.C. Jan. 31, 2018) (quoting *AT&T*, 642 F.2d at 1293). "Adequacy of representation must be assessed in relation to the specific purpose that intervention will serve" in the case. *AT&T*, 642 F.2d at 1293. "[P]roposed intervenors have … failed to meet [their burden]

[7] For similar reasons, any supposed interests held by proposed intervenors in IGRA or gaming compacts are irrelevant. *See* Saginaw Mot. 12-13. Neither IGRA nor the Sault Tribe's compact with Michigan is at issue in this suit, as the Sixth Circuit held in rejecting intervention theories similar to those advanced by putative intervenors here. *See Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 758 (6th Cir. 2018) ("[A]s the district court correctly noted, the court is actually interpreting MILCSA, not IGRA. Since Saginaw is not a party to the MILCSA, nor to the Bay Mills-Michigan compact, it does not share any common questions with this case.").

here because the federal defendants will, in fact, adequately protect" their "interests." *Solenex LLC v. Jewell*, 2014 WL 2586938, at *2 (D.D.C. June 10, 2014).

Most importantly, proposed intervenors do not explain how their participation as parties in an APA case could remedy any perceived inadequacies in the Department's defense of its decision. Judicial review under the APA is presumptively limited to the administrative record, *see Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985), and an agency action may be upheld only based on the reasons offered by the agency in the order under review, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (under APA, courts must "focus on the reasons stated in the orders under review"; courts "neither supply [their] own reasoning for the agency decision, nor consider the agency's post-hoc rationalizations" (internal citations omitted)). After-the-fact defenses advanced by agency counsel are thus ordinarily insufficient; it follows *a fortiori* that *post-hoc* justifications offered by non-agency intervenors have little, if any, weight. *See, e.g.*, *Philadelphia Gas Works v. FERC*, 989 F.2d 1246, 1250 (D.C. Cir. 1993) (rejecting intervenors' arguments "under *Chenery*"); *USPS v. NLRB*, 969 F.2d 1064, 1069 (D.C. Cir. 1992) (rejecting argument raised by intervenor on *Chenery* ground where it was a "'rationale [not] set forth by the agency itself'"); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 n.11 (D.C. Cir. 1986) ("[a]ffirmance on any of these [alternative] grounds [advanced by intervenors] would … run contrary to [*Chenery*]").

This principle undercuts—if not eliminates—any rationale for intervention. For example, NHBP vaguely asserts that, "[a]s NHBP will show if allowed to intervene, Interior's properly circumscribed interpretation of MILCSA is consistent with Section 9 of the Sault Tribe's compact." NHBP Mot. 5. Even if there were any merit to NHBP's claim that MILCSA's enacted text could be varied by a tribal-state compact—a bizarre proposition on its face—that argument

could not sustain the agency orders on review here, because the agency did not make that argument below. *Cf. Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 91 (10th Cir. 1993) (denial of intervention was proper where judicial review is "confined solely to the reasons cited in the administrative record" and "court may not uphold an agency action on grounds not relied on by the agency"). NHBP also voices disagreement with the Department's holding that MILCSA is a mandatory trust statute, NHBP Mot. 11, but it has not sought judicial review of that holding and cannot seek to litigate that issue as an intervenor on the Department's behalf. *See National Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 729 (D.C. Cir. 1994) (intervenors "may only argue issues that have been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review"); *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (intervenors "cannot expand the proceedings"). NHBP also laments that the Department "did not address NHBP's argument that the Sault Tribe's trust acquisition requests could not even be considered by Interior unless and until the Sault Tribe satisfied the condition prescribed in Section 9 of its tribal-state compact." NHBP Mot. 11. But the fact that the Department "did not address" that (unfounded) theory precludes this Court from passing on it under well-settled *Chenery* principles discussed above.[8]

[8] NHBP further argues that it is entitled to intervene so that it can argue that the Indian canon of construction is inapplicable. NHBP Mot. 11-12. That is also not a basis for intervention. In *Confederated Tribes of Chehalis Indian Reservation v. Washington*—the case NHBP relies on—the Ninth Circuit rejected invocation of the Indian canon by tribes who claimed rights under a treaty enacted for the benefit of a different tribe, the Quinault, where the competing tribes' reading of the treaty "would [have] adversely affect[ed] Quinault interests." 96 F.3d 334, 340 (9th Cir. 1996). But the reasoning there, if anything, supports application of the canon here. Congress enacted MILCSA § 108 for the benefit of the Sault Tribe, not NHBP. *Confederated Tribes* did not remotely hold that the mere "presence" (NHBP Mot. 12) of competing tribes in a lawsuit defeats application of the Indian canon. Nor is MILCSA a statute that balances competing tribal interests. *See, e.g.*, *Housing Auth. of Te-Moak Tribe of W. Shoshone Indians v. HUD*, 85 F. Supp. 3d 1213, 1221 (D. Nev. 2015) (rejecting application of Indian canon to statute allocating "annual appropriations amongst all eligible Indian tribes" because "one statutory interpretation would

Seminole Nation of Oklahoma v. Norton, 206 F.R.D. 1 (D.D.C. 2001), is instructive. There, despite finding the first three Rule 24 requirements satisfied, the court denied intervention on adequacy-of-representation grounds. The court reasoned that "[r]eview pursuant to the APA 'is to be based on the full administrative record that was before the Secretary at the time he made his decision'" and that "[t]he Court may not consider 'post-hoc rationalizations' for agency conduct." *Id.* at 10. "Given the APA's constraints, any new theories presented to this Court by the [putative intervenor] which did not comprise the basis for the DOI's decision necessarily fall outside of the scope of the administrative record, and thus, are improper for [judicial] consideration." *Id.* The court reasoned that the only basis for a finding of inadequacy could be evidence that "DOI will not vigorously defend itself against Plaintiff's APA claim," but the court found "no indication … that any such risk exists." *Id.*

The same is true here. Proposed intervenors have pointed to nothing suggesting that the Department will fail to defend the Trust Denial Orders vigorously and faithfully. On their face, the Trust Denial Orders hardly suggest that the Department might waver in defending its interpretation of MILCSA, which it adopted in 2012 and has adhered to since then. And intervenors point to no other evidence that the Department might be infirm in its defense of the Trust Denial Orders. *Cf. South Dakota ex rel. Barnett v. Department of Interior*, 317 F.3d 783, 786 (8th Cir. 2003) (Indian tribe's interest was adequately represented by the United States in suit challenging land-into-trust decision involving that tribe; "the Tribe has not identified any specific Tribal interest implicated in this litigation that the United States cannot or will not adequately protect").

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favor one tribe, but would also adversely affect another tribe's interest"). To the contrary, MILCSA was enacted to support the economic development specifically of the Sault Tribe (and the other tribes for whom settlement funds were established). It is well settled that any ambiguity in statutes like this, enacted for the benefit of a particular tribe, must be "resolve[d] … in favor of the tribe." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (construing Auburn Indian Restoration Act).

III. THIS COURT SHOULD DENY PERMISSIVE INTERVENTION

Proposed intervenors have also failed to demonstrate any basis for permissive intervention.

As a threshold matter, proposed intervenors' lack of Article III standing forecloses permissive intervention. *See supra* pp. 11-17. The D.C. Circuit held in *Deutsche Bank* "that intervenors must demonstrate Article III standing," 717 F.3d at 193—a statement that, by its terms, encompasses both those seeking to intervene by right and those seeking permission to intervene. And that holding postdates earlier D.C. Circuit precedent stating that "'[i]t remains ... an open question in [the D.C.] Circuit whether Article III standing is required for permissive intervention." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013). Thus, Article III standing is required for permissive intervention.[9]

Even if proposed intervenors could overcome that Article III barrier, the Court should deny permissive intervention. Although permissive intervention is a "matter of [judicial] discretion," it should be refused where proposed intervenors' "participation as parties … is not essential for the 'just and equitable adjudication of the legal question[s] presented.'" *Cigar Ass'n of Am.*, 323 F.R.D. at 66; *see* Fed. R. Civ. P. 24(b). That is the case here for multiple reasons.

First, as discussed above, proposed intervenors do not explain what legally relevant arguments they would advance that the Department—the agency that issued the Trust Denial Orders—will not. *See Nucor Steel-Arkansas v. McCarthy*, 2014 WL 10999271, at *2 (D.D.C. Oct.

[9] To the extent that this Court believes the question remains open, this Court should hold that lack of Article III standing bars permissive intervention. Several judges on this Court have held that a lack of Article III standing defeats both forms of intervention. *See, e.g.*, *Carson*, 330 F. Supp. 3d at 64; *Cobell v. Jewell*, 2016 WL 10704595, at *2 (D.D.C. Mar. 30, 2016); *Keepseagle v. Vilsack*, 307 F.R.D. 233, 245 (D.D.C. 2014). And those decisions are correct because Article III standing is a constitutionally required baseline for party status of any type, *see Fund For Animals*, 322 F.3d at 732, and a contrary rule would be "intolerable at the district court level, where individual parties have substantial power to direct the flow of litigation and affect settlement negotiation," *Deutsche Bank*, 717 F.3d at 195 (Silberman, J., concurring).

24, 2014) (denying permissive intervention where putative intervenor had "nothing more to offer at this point than the legal arguments that [the parties] have already made and are already litigating"). There is no reason to believe the Department "will not defend [the Trust Denial Orders] to the fullest." *Cigar Ass'n of Am.*, 323 F.R.D. at 66 (considering this factor in denying permissive intervention). Those considerations weigh heavily against permissive intervention.

Second, if proposed intervenors have anything to say that is legally relevant to the disposition of this case, *amicus* status would ensure that those "views … will receive a full hearing." *Cigar Ass'n of Am.*, 323 F.R.D. at 66. There is no reason party status is necessary. As the Fourth Circuit explained:

> While a would-be intervenor may prefer party status to that of friend-of-court, the fact remains that amici often make useful contributions to litigation. The availability of such alternative avenues of expression reinforces our disinclination to drive district courts into multi-cornered lawsuits by indiscriminately granting would-be intervenors party status and all the privileges pertaining thereto.

Stuart v. Huff, 706 F.3d 345, 355 (4th Cir. 2013).

Third, there is every reason to believe party status here would unduly complicate the case. Two proposed intervenors have already signaled their intentions to interject collateral, extraneous issues into the litigation. *See, e.g.*, Saginaw Mot. 3-4 (discussing § 9 of the Sault Tribe's gaming compact with Michigan); NHBP Mot. 5, 11 (same). That alone warrants denial of permissive intervention. *See Tripp v. Executive Office of the President*, 194 F.R.D. 344, 348 (D.D.C. 2000) (denying permissive intervention based on "collateral issues and undue complications").

More generally, the burdens on the Court and the Sault Tribe of adding three additional parties to the case would be significant. For example, proposed intervenors apparently coordinated the filing of their motions with one another, yet they chose not to file a joint motion, instead filing three separate motions totaling, with attachments, almost 250 pages. And, if granted

status as three independent intervening parties, they apparently plan to file six separate full-length briefs in support of the Department—additional evidence that their participation will complicate, rather than facilitate, efficient resolution of this case.

IV. IF THE COURT GRANTS INTERVENTION, IT SHOULD IMPOSE REASONABLE CONDITIONS ON INTERVENORS' PARTICIPATION

Finally, if this Court grants the motions to intervene—and, for the reasons set out above, it should not—the Court should impose reasonable conditions on intervenors' participation to ensure an orderly, efficient resolution of the case.

The proposed intervenors had stated that they would abide by the original scheduling order. *See* Saginaw Mot. 7 ("Saginaw Tribe agrees to abide by the scheduling order recently set in the case"); MGM Mot. 15 ("The Detroit Casino will have no difficulty fully complying with this schedule."); NHBP Mot. 7 ("NHBP will follow" scheduling order "if allowed to intervene"). By that, they appear to mean that they intend to file three separate summary judgment oppositions/cross-motions and three separate replies, in addition to the two briefs that will be filed by the Department. That would impose significant and unnecessary burdens on the Sault Tribe and the Court, and will almost certainly result in duplicative and redundant briefing, the interjection of irrelevant collateral issues, or both.

To alleviate those burdens at least somewhat, the Sault Tribe respectfully submits that any intervenors should be required to file a single joint summary judgment opposition/cross-motion and a single joint reply. *Cf.* D.C. Cir. Rule 28(d)(4) ("Intervenors on the same side must join in a single brief to the extent practicable."). Moreover, the Court should limit the joint summary judgment opposition/cross-motion to 30 pages, and the joint reply to 15 pages—as intervenors easily will be able to incorporate or rely on general background and other legal or factual discussions in the Department's papers. *Cf.* D.C. Cir. R. 32(e)(2) (granting intervenors' briefs

significantly less words than principal party briefs). If intervenors believe that filing joint briefs is impracticable, they should be required to divide the aggregate totals of 30 pages and 15 pages among themselves.

If the Court does impose those restrictions, the Sault Tribe respectfully submits that the page limit for its combined opposition and reply in support of its motion for summary judgment should be increased from 50 pages to 65 pages, as the Tribe will need to respond to at least two summary judgment oppositions/cross-motions. If the Court does not impose the restrictions on intervention suggested above, the Sault Tribe respectfully submits that the page limit for its combined opposition and reply in support of its motion for summary judgment should be expanded to 85 pages to permit the Tribe to respond adequately to four separate summary judgment oppositions/cross-motions.

CONCLUSION

The Court should deny the motions for intervention.

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Respectfully submitted,

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