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 Secretary of the Interior, and **United States Department of the Interior**,

Defendants,

Saginaw Chippewa Indian Tribe of Michigan, Nottawaseppi Huron Band of the Potawatomi, MGM Grand Detroit, L.L.C., Detroit Entertainment, L.L.C., and **Greektown Casino, L.L.C.**,

Intervenor-Defendants.

No. 18-cv-2035-TNM

INTERVENOR-DEFENDANTS DETROIT CASINOS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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Consistent with this Court's Order granting the Motions to Intervene (ECF No. 36), counsel for all Intervenor-Defendants met and conferred telephonically on June 14, 2019, to discuss whether it would be possible to set forth the parties' positions in a single consolidated brief. Through an extensive discussion of the issues raised in this case, it became clear that each Intervenor-Defendant intended to address particular issues that the other Intervenor-Defendants did not intend to address, and/or to address some similar issues in different levels of detail and with different points of emphasis, all consistent with the Intervenor-Defendants' distinct interests in the subject of this litigation. Accordingly, counsel for the Intervenor-Defendants determined that it would not be feasible or efficient to file a single brief. The Intervenor-Defendants did, however, commit to minimizing overlap between briefs to the fullest extent possible, and subsequently exchanged preliminary drafts with one another in furtherance of this objective.

This brief addresses the issues of most immediate concern to the Detroit Casinos—namely, the statutory-interpretation questions before the Court. The Detroit Casinos incorporate by reference the arguments set forth in the briefs being filed today by the Saginaw Chippewa Indian Tribe of Michigan ("Saginaw") and the Nottawaseppi Huron Band of the Potawatomi ("NHBP").

Dated: June 27, 2019

Respectfully submitted,

/s/ William D. Coglianese
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Counsel for MGM Grand Detroit, L.L.C., Detroit Entertainment, L.L.C., and Greektown Casino, L.L.C.

INTRODUCTION

The Sault Ste. Marie Tribe of Chippewa Indians ("Sault" or "the Tribe") asks this Court to hold that the Secretary of the Interior of the United States serves, in the Tribe's words, a merely "ministerial" role when making the profound decision whether to take certain lands into trust on behalf of the United States, for the benefit of the Tribe and its members. This boundless assertion is irreconcilable with the straightforward statutory provisions at issue here.

Through the Michigan Indian Land Claim Settlement Act ("MILCSA"), Congress established a trust fund ("the Self-Sufficiency Fund" or "the Fund") to be administered by Sault's Board of Directors, authorized the Tribe to spend the Fund's interest only for certain enumerated purposes, and directed the Secretary to take into trust any lands purchased specifically with Fund interest. As this Court has noted, a decision taking land into trust would represent a consequential victory for Sault, as it would enable the Tribe to clear "the last significant hurdle preventing [it] from opening new gaming facilities" on that land. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, No. 1:18-cv-2035, -- F.R.D. --, 2019 WL 1789458, at *5 (D.D.C. Apr. 24, 2019).

Notwithstanding the significant ramifications of a decision to take land into trust, Sault contends that the Secretary has no authority whatsoever to confirm that Sault in fact purchased land for one of the enumerated purposes, and instead must simply rubber-stamp the Tribe's request for trust status (thereby rendering the land eligible for gaming). Moreover, Sault insists that even if the Secretary *does* have such authority, a provision allowing it to spend Fund interest on the "enhancement of tribal lands" enables it to secure trust status for any land it acquires, anywhere.

Either position would represent a substantial derogation of the Secretary's authority, and would open the door for the Tribe to open casinos on virtually any land it purchases with Fund interest. But both positions are irreconcilable with the statute Congress actually enacted. Under that statute's plain text, the Secretary must ensure that any land the Tribe purportedly acquired

with Fund interest actually furthers one of the purposes that Congress specifically authorized. And to satisfy the provision allowing expenditures that enhance tribal lands, a land acquisition must, straightforwardly enough, itself make those existing lands more valuable. These conclusions only become clearer in light of the broader regulatory context in which MILCSA was enacted, which reflects a comprehensive set of restrictions on tribes' ability to conduct gaming—restrictions that belie Sault's attempt at securing a blank check for its casino endeavors. Sault's arguments, in short, would require the Court to commit the cardinal sin of reading key provisions entirely out of MILCSA, and to altogether ignore the broader regulatory context governing tribal gaming.

The Court should deny Sault's request for summary judgment and enter summary judgment for Defendants.

BACKGROUND

A. Statutory framework.

This case centers on two federal statutes, the Indian Gaming Regulatory Act ("IGRA," 25 U.S.C. § 2701 *et seq.*), and MILCSA (Pub. L. No. 105-143, 111 Stat. 2652 (1997)).

IGRA erects a "comprehensive scheme of regulation over Indian gaming." *Colo. River Indian Tribes v. N.I.G.C.*, 383 F. Supp. 2d 123, 126 (D.D.C. 2005), *aff'd*, 466 F.3d 134 (D.C. Cir. 2006). Relevant here, IGRA authorizes Indian tribes to conduct Class III gaming (which includes blackjack, slots, and similar casino-style games) only on "Indian lands." 25 U.S.C. § 2710(d)(1); *see also id.* § 2703(6)–(8) (defining the classes of gaming). IGRA defines "Indian lands," in turn, as including "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe." *Id.* § 2703(4)(B). Thus, the federal government's taking of land into trust is one means by which a tribe can gain the right to operate a casino on that land. Even then, however, IGRA generally prohibits gaming on lands taken into trust after the statute's effective date (October 17, 1988), unless a statutorily enumerated exception applies. *Id.* § 2719(a), (b).

Here, Sault is seeking to secure "Indian land" status for land it allegedly acquired or agreed to acquire using money from the Self-Sufficiency Fund established under MILCSA. That statute places different restrictions on Sault's use of amounts from the Fund, based on whether it spends principal or "interest and other investment income." This case involves only alleged expenditures of interest, which § 108(c) of MILCSA provides "shall be distributed" only for five enumerated purposes: (1) "as an addition to the principal"; (2) "as a dividend to tribal members"; (3) as a "per capita payment" to a subset of tribal members; (4) "for educational, social welfare, health, cultural, or charitable purposes which benefit" the Tribe's members; or (5) "for consolidation or enhancement of tribal lands." MILCSA also provides that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." § 108(f). This would then qualify the land as Indian land under IGRA, thus allowing Class III gaming on that land (if the land satisfies an exception for lands taken into trust after IGRA's effective date and certain other requirements).

B. Sault purportedly acquires interests in three parcels in Michigan's Lower Peninsula, and asks Interior to take the parcels into trust.

The parcels at issue here—the "Sibley Parcel" and the two "Lansing Parcels" (collectively, "the Sault Parcels")—are all in Michigan's Lower Peninsula. Sault's other land is all in the Upper Peninsula. Compl. ¶ 18. Sault's objective has always been to open casinos on the Sault Parcels. Compl. ¶ 35; AR3102 n.1; AR2971 n.1. To that end, on June 10, 2014, it submitted two applications (one for the Sibley Parcel and one for the Lansing Parcels) asking the Secretary to take the parcels into trust. AR3100–64; AR2979–3099.[1] As this Court has noted, trust status would mean Sault "will likely be free to open casinos on the parcels." *Sault Ste. Marie*, 2019 WL 1789458, at *4.

[1] As NHBP explains in its summary-judgment brief, Sault lacks title to one Lansing Parcel and is contractually required to convey the other parcel back to the City of Lansing. Sault's claims are thus moot with respect to the Lansing Parcels.

In its applications, Sault argued that the Secretary is "require[d]" to take acquired parcels into trust under § 108(f) of MILCSA "when the statute's requirements are met." AR3104; AR2983. The Tribe thus sought to prove that "those requirements are met here" (*id.*), by explaining why its acquisitions furthered one of the purposes authorized in § 108(c). AR3106–09; AR2985–88. Primarily, the Tribe argued that each acquisition was or would be an "enhancement of tribal lands" under § 108(c)(5), because each would "increas[e] the total land possessed by the Tribe." AR3107; AR2986. Sault also contended that, even under a "narrow reading of 'enhancement,'" the acquisitions were proper because each "would increase the value of the Tribe's existing landholdings" by "generat[ing] revenues that will be used to improve, restore, or otherwise increase the usefulness or value of the Tribe's existing lands." AR3108–09; AR2987. Sault anticipated that these revenues would come from gaming. AR3102 n.1; AR2971 n.1.

Sault also argued that the acquisitions complied with § 108(c)(4), the provision authorizing interest expenditures "for educational, social welfare, health, cultural, or charitable purposes which benefit" the Tribe's members. AR3109; AR2987–88. Sault claimed the parcels would "provide a land base" for tribal members, "facilitate the delivery of services" to those members, "generate revenues" needed to provide social services, and "create hundreds of jobs for those members." *Id.*

C. Interior denies Sault's applications.

The January Letter. After engaging with Sault for two-and-a-half years, Interior issued an initial letter on January 19, 2017 ("the January Letter"), concluding that Sault had submitted "insufficient evidence" supporting its applications. Interior agreed that, "*if* lands are acquired using Self-Sufficiency Fund income in accordance with the provisions of Sections 108(c) and (f)," the Secretary would be "required to hold those lands in trust for the Tribe." AR971 (emphasis added). But it found that Sault had failed to show that the acquisitions satisfied those provisions.

As to Sault's primary argument—that the acquisitions represented an "enhancement of tribal lands" under § 108(c)(5)—Interior rejected Sault's interpretation of "enhancement" as encompassing any purchase that increased the Tribe's land holdings. AR972. As Interior explained, this interpretation would authorize "*any* acquisition of land" using Self-Sufficiency Fund interest—a conclusion inconsistent with the provision requiring such expenditures to "consolidate[] or enhance[]" tribal lands. *Id.* Interior also was unpersuaded by Sault's argument that the acquisitions would enhance its lands by generating revenue that could be used to make the lands more valuable, finding that Sault had not made "a sufficient showing" that the acquisitions actually *would* do so. AR973. Finally, Interior rejected Sault's contention that the acquisitions furthered "educational, social welfare, health, cultural, or charitable purposes" under § 108(c)(4), finding "too attenuated" the theory that the acquisitions would yield these benefits by enabling the Tribe "to start an economic enterprise" on the Sault Parcels, "which may generate its own profits, which profits might then be spent on social welfare purposes." AR971–72 n.25.

Because Sault had not shown that its acquisitions furthered one of the purposes for which MILCSA authorizes the use of Fund interest, Interior concluded that it "need not consider" whether the Sault Parcels had in fact been acquired with Fund interest. AR974. It explained that it would "keep the Applications open so that the Tribe may present evidence of an enhancement." *Id.*

The July Letter. Sault did not submit additional evidence. Accordingly, after waiting six months, Interior issued a letter officially denying the Tribe's applications on July 24, 2017 ("the July Letter"). AR1930–33. Interior noted that, despite "bear[ing] the burden of demonstrating" an enhancement of its existing lands, the Tribe had "made no such demonstration even after being offered the additional opportunity to do so," and had in fact indicated that it "did not believe [it]

could provide such evidence." AR1932; AR1930 n.4. On the basis of the evidence Sault had previously provided, Interior rejected the argument that the Sault Parcels would increase the value of the Tribe's existing lands. For one thing, Interior noted the parcels' substantial distance from the Tribe's headquarters: "260 miles (287 miles by road) from the Lansing Parcels, and approximately 305 miles (356 miles by road) from the Sibley Parcel." AR1933. Additionally, Interior again rejected Sault's "attenuated" theory that the acquisitions could enhance the Tribe's existing land's value by "allow[ing] for economic development" that "*might* generate revenue" that "*might* be used to enhance lands in the Upper Peninsula." *Id.*

D. Sault files this lawsuit.

Sault filed this lawsuit on August 30, 2018. Among other things, it asks this Court to "vacate the final decision denying the Tribe's trust submissions," and "order Defendants to take the parcels into trust." ECF 1 at ¶ 5. This Court subsequently granted the Detroit Casinos' motion to intervene as Defendants, along with Saginaw and NHBP. ECF 36.

ARGUMENT

In one fell swoop, Sault seeks to eliminate all meaningful constraints on its ability to buy land wherever located and open casinos, notwithstanding the comprehensive framework Congress has erected to govern Indian gaming. Sault's position violates basic principles of statutory interpretation (not to mention common sense), and should be rejected.

I. Interior Correctly Concluded that the Secretary Cannot Be Forced to Take Land into Trust Under § 108(f) of MILCSA Without Verifying that the Land Was Properly Acquired.

Sault insists that the Secretary cannot even inquire into whether the Tribe has acquired land for one of the few congressionally authorized purposes, before taking that land into trust and rendering it eligible for casino gaming. This attempt at turning the Secretary into a mere clerk runs contrary to the plain text of § 108(f) and the broader statutory framework governing tribal gaming.

A. Section 108(f)'s plain text, particularly in light of the statutory scheme, requires the Secretary to verify that Sault used Self-Sufficiency Fund interest to acquire land for an authorized purpose before the Secretary takes the land into trust.

1. Statutory interpretation of course, "begins with the text." *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 591 (D.C. Cir. 2015). Notwithstanding that the Secretary's duty to take land into trust turns on the meaning of § 108(f), Sault puts off confronting that provision until the last pages of its analysis of this issue, and instead centers its analysis on various other MILCSA provisions. Sault Br. 18–24. This evasion fails. Section 108(f)'s plain text—particularly when read in harmony with the rest of § 108—demonstrates that the Secretary, before exercising his important and legally consequential authority to take land into trust, must confirm that the land acquired with interest from the Fund was *lawfully* acquired with interest from the fund—i.e., did not affirmatively violate the statute's specific restrictions on permissible uses of Fund interest.

The relevant text is straightforward. First, MILCSA provides for the creation of a trust, the Self-Sufficiency Fund, "for the benefit of the Sault Ste. Marie Tribe." MILCSA § 108(a)(1). Second, the statute authorizes the Fund's principal and "interest and other investment income," respectively, to be used only for certain enumerated purposes. *Id.* § 108(b), (c). Sault does not dispute that these lists of enumerated purposes are exclusive. Sault Br. 7–8. Finally, the statute addresses the implications for land purchased with interest or other investment income: "Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." MILCSA § 108(f).

Reading these provisions in harmony, as the Court must (*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)), the only reasonable conclusion is that the Secretary's obligation to take land into trust is triggered *only* after the Secretary verifies that the Tribe's acquisition of that land was proper under the statute—that is, that the acquisition was for one of the purposes for which Self-Sufficiency Fund interest "shall be distributed." MILCSA § 108(c). After

all, even Sault accepts that section 108(f) requires the Secretary to verify that the land was in fact acquired with Self-Sufficiency Fund interest. Sault Br. 3, 8, 22–23, 45. Section 108(f) does not explicitly state this duty; it merely establishes the use of Fund interest as a prerequisite for trust status. But as Sault rightly concedes, the existence of this prerequisite necessarily implies the Secretary's obligation to "ensur[e] that the source-of-funding requirement is satisfied." *Id.* at 22–23.

Thus, all agree that the Secretary need not—indeed, may not—take land into trust until he is satisfied it is a *bona fide* acquisition with Fund interest. And just as the Secretary may concededly deny trust status if an acquisition was not funded with interest, he may, for the same reason, deny trust status because the acquisition was not funded through a *statutorily permissible use* of interest. When Congress gave special (trust and gaming) status to interest-funded land acquisitions, it was obviously not extending that benefit to transactions that affirmatively violate the statutory restrictions on interest-funded land acquisitions. If a statute enumerated what constitutes, for example, a permissible "healthcare" expenditure, and also said "healthcare" expenditures are tax-deductible, that deduction would clearly not extend to *any* expenditure related to health but only those *enumerated* "healthcare" expenditures. Similarly, when Congress extended the benefit of trust status and gaming eligibility to interest-funded acquisitions, it could not have been referring to *any* interest-funded acquisition, but only those which represent *permissible* uses of interest.

Any contrary interpretation would render the statutory language limiting the permissible uses of Fund interest wholly meaningless, because expenditures affirmatively violating those restrictions would engender the same entitlement to trust status as those which scrupulously adhere to those legal constraints—since all that purportedly matters is that the source of funds be interest. There would have been no reason for Congress to allow the use of interest only for *certain* purposes if it intended to make trust status available for land purchased for *any* purpose.

2. This straightforward reading of the text, moreover, is the only interpretation that adheres to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S.Ct. 1743, 1748 (2019) (citation omitted).

First, MILCSA must be understood against the broader backdrop of Indian gaming and IGRA. Sault expresses wonderment that Interior would ever question the Tribe's compliance with MILCSA, as if this were purely a matter of tribal self-governance. But this completely distorts the context of Sault's land-into-trust applications.

As the Court has already recognized, this entire case is about whether Sault can open casinos on the Sault Parcels. *Sault Ste. Marie*, 2019 WL 1789458, at *4. Indian gaming is not some run-of-the-mill activity that tribes can conduct as they please. Quite the opposite, Congress has "created a comprehensive scheme of regulation over Indian gaming with authority divided among the federal government, the States, and the Indian tribes." *Colo. River Indian Tribes*, 383 F. Supp. 2d at 126; *see also* 25 U.S.C. § 2702(1) (IGRA "provide[s] [the] statutory basis for the operation of gaming by Indian tribes …."). Under this "comprehensive scheme," a tribe must satisfy a number of requirements before it can engage in gaming. Among other things, a tribe must enact a gaming ordinance that "satisfies certain statutorily prescribed requirements, and … is approved by the National Indian Gaming Commission," and must enter a gaming compact with the relevant State. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48–49 (1996); 25 U.S.C. § 2710(d)(1)(A), (C). Moreover, and particularly relevant here, the gaming must occur on "Indian lands" (*id.* § 2710(d)(1)), such as lands "held in trust by the United States for the benefit of any Indian tribe" (*id.* § 2703(4)(B)). Even then, gaming is *not* permitted on land taken into trust after IGRA's effective date, unless a statutorily enumerated exception applies. *Id.* § 2719.

Obviously, Congress did not intend this comprehensive set of requirements to be meaningless. *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006) ("[C]ourts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence."). But Sault's position would negate one of the central requirements for Indian gaming, by requiring the Secretary to simply take the Tribe's word for it that it purchased land for a lawful purpose before rendering that land eligible for gaming. It would make no sense to say that, when Sault seeks the federal government's permission to open a casino on its newly acquired lands, the Secretary lacks authority to assess whether the Tribe is actually eligible for this benefit. Nothing in MILCSA—which does not even mention gaming—suggests that Congress sought to remove the hurdles it erected in IGRA.

Second, this conclusion finds further confirmation in background principles of trust. The entire point of § 108(f) is to create a mechanism by which the Secretary becomes a trustee of particular land. And "the trust doctrine is one of the cornerstones of Indian law." 1 Cohen's Handbook of Federal Indian Law § 5.04. Thus, as a general matter, the Supreme Court has long "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with" Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). The Government "has charged itself with moral obligations of the highest responsibility and trust." *Id.* at 296–97. As such, "[i]ts conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should … be judged by the most exacting fiduciary standards." *Id.* at 297.

That trust relationship is made explicit in § 108(f), through which the Secretary takes land into trust, on behalf of the United States, "for the benefit of the tribe"—that is, Sault. "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary

(the Indian allottees), and a trust corpus ([here,] lands …)." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citing Restatement (Second) of the Law of Trusts § 2, Comment *h,* at 10 (1959)).

These principles underscore the significance of a decision by the Secretary to take land into trust, and belie Sault's insistence that this is some "ministerial duty." Sault Br. 22. "[W]here 'the Secretary is obligated to act as a fiduciary[,] his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.'" *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (citation omitted). This means the Secretary is bound by basic fiduciary obligations—including, axiomatically, the foundational duty to ensure that the trust is administered in compliance with the law. Any breach of those fiduciary duties would give rise to a liability against the Secretary for breach of trust. *See Mitchell*, 463 U.S. at 226 ("[T]he existence of a trust relationship between the United States and an … Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."). And it "would be a clear breach of the [Secretary's] fiduciary obligation" (*Seminole Nation*, 316 U.S. at 297) to simply trust that the Tribe purchased land for a legally permissible purpose, without verifying that this requirement has been satisfied before taking the land into trust. It makes no sense to say the Secretary has a mandatory duty to take on the fiduciary obligations of a trustee, but must abdicate a trustee's basic obligation to ensure that the trust complies with the law and benefits the beneficiaries in one of the specific ways that Congress mandated. Sault's position is irreconcilable with "the most exacting fiduciary standards" governing the United States in its relations with the tribes. *Id.*

B. Saults' arguments for departing from § 108(f)'s plain meaning do not withstand scrutiny and would produce absurd results.

Against all of this, Sault insists that the Secretary has a "mandatory duty" to take into trust *any* land that the Tribe establishes was purchased with interest, and has "no role" and "no statutory

authority" to ensure that a purchase actually complies with all applicable legal requirements expressly enumerated in the statute. Sault Br. 2–3. The Tribe's position does not withstand scrutiny.

First, Sault says any assessment of an acquisition's compliance with § 108(c) would interfere with the Board's authority as the Self-Sufficiency Fund trustee. It invokes the provisions making the Board responsible for "administer[ing] the Fund," charging the Board with spending Fund principal or interest for any of the enumerated purposes, and stating that the Secretary "shall have no trust responsibility for the investment, administration, or expenditure of the principal or income." Sault Br. 18–20, 21 (citing MILCSA § 108(a)(2), (b), (c), (e)). But all of those provisions simply mean the Secretary cannot interfere with the Board's purchasing decisions—they in no way address or limit the Secretary's duty to examine whether *prior purchases* satisfy the statutory restrictions triggering trust status. The Secretary here is not interfering with the Board's autonomy as trustee to make purchasing decisions; he is simply asking whether such purchases trigger *his* obligation to take the land into trust. Sault's emphasis on the Board's "decisive role" as trustee (*id.* at 18) thus cuts *against* its argument that the Secretary must ignore *his own* obligations as trustee under § 108(f): In that scenario, the Secretary's role is just as "decisive" as the Board's role in making purchasing decisions, and obligates the Secretary to verify that the statute has been obeyed.

Recognizing this point confirms the invalidity of the legislative history Sault invokes. Sault relies on the fact that, before enacting MILCSA, Congress removed (at Interior's urging) a provision that would have given the Secretary a role in deciding how to invest Self-Sufficiency Fund principal. Sault Br. 20–21. But again, no one contends that the Secretary here took on any such

role in an investment decision. The Secretary's role in deciding whether to take land into trust is an entirely different matter, and is addressed plainly by the statute that Congress enacted.[2]

Second, Sault argues that any assessment of its compliance with the statute is an affront to tribal sovereignty. Sault Br. 21–22. But in the context of land-into-trust applications, Sault is asking a *different* sovereign—the federal government—to confer upon the Tribe a significant benefit, under the regulatory framework established by that other sovereign. And through § 108(f), Congress specifically required the Tribe to obtain the Secretary's authorization of that benefit. In this system of "separate sovereigns" (*Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016)), the federal government has deliberately erected a set of hurdles that tribes must clear before engaging in gaming. Sault cannot simply demand those hurdles' removal in the name of sovereignty, any more than it could require the Secretary to blindly defer to whether an acquisition was funded with interest.

Moreover, crediting Sault's notion that its sovereign status somehow precludes inquiry into whether it has satisfied the statute would produce "absurd result[s]"—an additional reason to reject the Tribe's position. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). Under Sault's interpretation, it could submit a single-sentence land-into-trust application stating that it purchased the land with interest, without even claiming that the purchase furthers an § 108(c) purpose. Indeed, even if the Tribe made clear that its purchase was *not* for one of those purposes, the Secretary would *still* be required to take the land into trust. After all, Sault's view is that, "[b]eyond ensuring that the source-of-funding requirement is satisfied," the Secretary has "no other responsibility." Sault Br. 22–23. Obviously, this is not what Congress intended in enumerating the only

[2] In a similar vein, Sault relies on out-of-Circuit decisions involving disputes *between* federal agencies. Sault Br. 19, 23–24. But those decisions are grounded in the principle that one agency cannot exercise authority delegated to some other agency. Because Congress has given Sault *no* role in deciding whether land can be taken into trust, the "logic" of these cases (*id.* at 19) is irrelevant.

purposes for which Self-Sufficiency Fund interest can be used. In fact, as explained above, taking the land into trust in these circumstances would breach the Secretary's duties as trustee. The Court should not construe MILCSA in a way that negates § 108(c)'s restrictions and requires the Secretary to ignore his fiduciary duties by placing in trust land that was acquired in violation of the statute.

II. Interior Correctly Concluded that an "Enhancement of Tribal Lands," Under § 108(c)(5), Requires a Land Acquisition to Increase the Tribal Lands' Value.

Sault argues that, even if the Secretary has some authority to assess its compliance with § 108(c) before taking land into trust, that authority is essentially meaningless because any acquisition of land will qualify as an "enhancement of tribal lands" within the meaning of § 108(c)(5). Here too, Sault's limitless interpretation should be rejected.

1. This case presents two competing interpretations of the phrase "enhancement of tribal lands." The first is Sault's view that this encompasses *any* land purchase *anywhere*, because "enhancement" covers any purchase that increases the *size* of the Tribe's real-estate portfolio. *See* Sault Br. 9 ("simply an increase in the tribe's landholdings"); *id.* at 24 ("merely requires a purchase to augment or increase the Tribe's aggregate lands"); *id.* ("[l]and acquisitions that increase the Tribe's total land base"). That would mean, of course, that the Tribe could buy a Motel 6 in Texas or a restaurant in Hawaii and then demand that the land be taken into trust. Conversely, Interior has concluded that the phrase encompasses only expenditures that increase the *value* of Sault's extant lands. This means the Tribe is not entitled to trust status for *any* land acquired with Fund interest, and instead must show that the acquisition improves the value of its existing lands.

Interior's view is obviously the correct one, as it is the only construction that adheres to the established rules of statutory interpretation. Under Sault's construction, *every* land acquisition would constitute an "enhancement," because every acquisition, by definition, would increase the

size of the Tribe's real-estate portfolio. This would write "enhancement" out of the statute, in violation of the "cardinal principle of interpretation" that statutes must be construed "so that no provision is rendered inoperative or superfluous, void or insignificant." *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472 (D.C. Cir. 2009) (citation omitted). An interpretation that negates the very term it purports to interpret cannot possibly be correct.

Recognizing the problems inherent in nullifying statutory language, Sault tries identifying any example of an acquisition that would *not* constitute an enhancement under its theory. But it is unable to do so. The only non-enhancing acquisition it comes up with is a transaction in which the Tribe *diminishes* its real-estate holdings by "exchanging a large tract of land for a smaller parcel." Sault Br. 31 n.8. But a land swap would not implicate Fund interest, and so sheds no light on § 108(c). Sault also insists that, even though its interpretation would mean Congress has authorized it to buy land anywhere and have it taken into trust, the Tribe has its own reasons for not using this unfettered authorization: financial and political constraints on the Board's expenditures, the need for any gaming operations to adhere to a compact with the relevant state, and the "strong connection between native communities and their tribal homeplaces." Sault Br. 33–34 (citation omitted). But none of this changes the fact that Sault's interpretation strips "enhancement" of any meaning. And whether the Tribe for some parochial reason opts *not* to exercise its claimed authority to purchase land in far-flung places is irrelevant to the question whether it has that authority in the first place. It does not.

2. While Sault's negation of the term "enhancement" is alone fatal to its argument, there are other reasons to reject the Tribe's position.

First, in requiring an "enhancement of tribal lands," Congress was clearly requiring an impact on *existing* lands owned by the Tribe, and not just an increase in the Tribe's real-estate

portfolio. Otherwise, even if Sault owned no land at the time of MILCSA's enactment, a purchase of a single parcel would constitute an "enhancement," because the Tribe would be increasing its holdings from nothing to something. But even Sault concedes this would not be an enhancement: "one cannot enhance nonexistent 'tribal lands.'" Sault Br. 28. Sault thus accepts the obvious point that, in enacting MILCSA, Congress was acting against the backdrop of the Tribe's existing lands.

This finds confirmation in the broader framework for Indian gaming. As already explained, Congress has established a comprehensive regime governing where Indian gaming can occur, under which lands held by tribes—or held in trust by the federal government for a tribe—at the time of IGRA's effective date are eligible for gaming, but lands taken into trust *after* that date must fall within a particular exception to be gaming-eligible. There is thus a clear distinction between a tribe's existing lands at the time of IGRA's enactment and land the tribe acquires later. It would make no sense to say that, through MILCSA, Congress erased this distinction and allowed Sault to evade the general prohibition on gaming on newly acquired lands by simply purchasing *any* land using Self-Sufficiency Fund interest. The far more logical understanding—which has the virtue of aligning with the statute's plain text—is that Congress was requiring Sault to establish a connection between any land that it acquires with Fund interest and its existing lands. That Sault's position would obviate this required connection is further proof of that position's infirmity.

Second, Sault's interpretation cannot be squared with the ordinary understanding, in "everyday parlance" (Sault Br. 25 (quoting *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012)), of the term "enhancement." The Tribe insists that the term means "increase" or "augment." Sault Br. 9, 24. But that cannot be true, as § 108(c)(5) is in no way limited to land acquisitions, and thus

would apply to all sorts of expenditures that have nothing to do with increasing the Tribe's acreage—for instance, the construction of a parking garage that facilitates increased use of already-owned land. Sault's construction fails to account for these possibilities, and thus cannot be correct.

In any event, the more natural reading of "enhancement" is as requiring an increase in value. Sault itself concedes the reasonableness of reading the term in this manner, as it acknowledges that the term can denote "*qualitative* improvements (for example, in value or utility)." Sault Br. 28. And almost every dictionary that it cites frames the enhancement in qualitative terms. For instance, Sault's preferred definition of "enhance" is to "advance, augment, elevate, heighten, [or] increase." *Webster's Third New International Dictionary of the English Language* 753 (1981 ed.)) (quoted at Sault Br. 24–25). But that just raises the question: increase how? And the examples that *Webster's Third* provides immediately after that definition make clear that the most natural answer is a *qualitative* increase: "our pleasure was *enhanced* by our hostess's care"; "his gracious courtesy *enhanced* his scholarship." *Id.* The very next definition in *Webster's Third* drives the point home: "to increase the worth or value of." *Id.* And the other dictionaries that Sault invokes are even more explicit in framing enhancements as necessitating a qualitative increase—and, in fact, primarily an increase in value. *See American Heritage Dictionary* 611 (3d ed. 1996) ("[t]o make greater, *as in value*, beauty, or reputation; augment" (emphasis added)); *Webster's New Collegiate Dictionary* 375 (1979) ("to make greater (*as in value*, desirability, or attractiveness)" (emphasis added)).

This understanding of "enhancement" makes perfect sense. The Self-Sufficiency Fund's entire point, tautologically enough, was to help Sault increase its "economic self-sufficiency." Sault Br. 6–7. That does not happen by grabbing up far-off land regardless of its worth; it happens through an acquisition that itself—not its later intended use—actually increases the value of the

Tribe's pre-MILCSA holdings. Section 108(c)(5) quite reasonably requires the Tribe to pursue only those value-increasing transactions.

3. Sault argues that Interior's interpretation wrongly reads into § 108(c)(5) requirements that: (1) a land acquisition lead to a "direct and immediate increase in the value of existing lands," and (2) the enhanced lands be "near[]" the acquired land. *Id.* at 27–29. This misunderstands Interior's ruling. Interior did not add substantive requirements to § 108(c)(5); rather, it merely asked the Tribe to demonstrate *how* its land acquisitions actually enhance the value of the Tribe's existing lands. Sault woefully failed in this effort, offering an attenuated causal chain that came nowhere near establishing that the acquisition of lands in the Lower Peninsula somehow increased the value of the Tribe's lands hundreds of miles away in the Upper Peninsula. Once it is accepted that the Secretary must ensure that an acquisition *was* for a valid purpose, this necessarily entails verifying that the purpose is actually being served.[3]

In a similar vein, Sault argues that, by considering the proximity of the Tribe's existing lands, Interior renders the term "consolidation" superfluous. *Id.* at 30–31. But Interior never said acquired land must be *adjacent to* existing lands (as consolidation would require). Again, its point was that the showing of enhancement must be plausible—an issue on which the proximity of the Tribe's existing lands obviously has some bearing. Interior rightly recognized that a "consolidation … of tribal lands" requires an acquisition that "unite[s] various units into one mass or body."

[3] For the same reason, Sault is wrong in its interpretation of § 108(c)(4), which authorizes purchases that advance "educational, social welfare, health, cultural, or charitable purposes which benefit" the Tribe's members. *Id.* at 42–44. Nobody seriously believes that a casino *itself* furthers any of these purposes, and Sault did not claim otherwise. Instead, it argued that it would (1) use the lands to operate casinos, and then (2) use revenues from those casinos to advance the purposes enumerated in § 108(c)(4). But the statute does not speak of permissible uses of revenue derived from businesses operated on land purchased with Fund income; it speaks of permissible uses of Fund income. Once again, Sault's position is at war with the statutory text.

AR972 n.25 (citation omitted). This is clearly different from an expenditure that increases the value of (i.e., enhances) existing lands, and thus does not render "consolidation" superfluous.

The bottom line: If Congress had intended to authorize any purchase that "augment[s] or increase[s]" the Tribe's lands (Sault Br. 24), "it 'could simply have said that'" (*id.* at 23 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 (2002))). But it did not—understandably, as doing so would have defeated the entire point of enumerating an exclusive list of authorized purposes. Sault misconstrues § 108(c)(5) just like it misconstrues § 108(f).

III. On Both Interpretive Questions, Interior's Reading of MILCSA Warrants Deference.

For all the reasons set forth above, Interior was entirely correct both in interpreting § 108(f) as requiring it to ensure that Sault has complied with MILCSA's requirements before taking land into trust, and in interpreting § 108(c)(5) as requiring any use of Self-Sufficiency Fund income to increase the value of existing tribal lands in order to qualify as an "enhancement" of those lands. But even if the statutory text did not resolve these issues, Interior's decision was still correct because, at a minimum, it reflects a reasonable interpretation of any ambiguity in MILCSA. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).[4]

Sault claims deference is unwarranted because Congress did not delegate "rulemaking, adjudicatory, or interpretive authority under MILCSA § 108." Sault Br. 37. But MILCSA does not concern merely the regulation of private activities (the typical context for deference to an agency's pronouncements); rather, the statute specifically addresses the Secretary's *own duties* with respect

[4] Sault argues only that the Court should not defer to Interior's interpretation of "enhancement of tribal lands"; it says nothing of the deference owed to Interior's construction of § 108(f) as "requir[ing]" the Secretary "to hold … lands in trust for the Tribe" only "*if* [those] lands are acquired using Self-Sufficiency Fund income in accordance with the provisions of Sections 108(c) and (f)." AR971 (emphasis added); Sault Br. 37–39. But Interior's interpretation of § 108(f) is entitled to deference for the same reasons as its interpretation of § 108(c)(5). Moreover, for the reasons explained in Saginaw's and NHBP's briefs, the Indian canon of construction does not override the deference owed to Interior's interpretation of MILCSA. *Contra* Sault Br. 36–37.

to tribal lands. By definition, a provision requiring the Secretary to take lands into trust under certain circumstances—and thus to assume fiduciary duties with respect to those lands—delegates authority to determine when those circumstances exist. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016) (deferring to Interior's "reasonable interpretation" of another land-into-trust statute "it is charged to administer"). The basis for deferring to the Secretary's interpretation is thus *stronger* than with respect to some congressional mandate to promulgate rules.

This is underscored by the fact that Congress has charged Interior with "prepar[ing] and submit[ting] to Congress a plan for the use and distribution of [] funds" paid in accordance with judgments entered by the Indian Claims Commission, like the judgment that generated the funds distributed under MILCSA. 25 U.S.C. § 1402(a); Sault Br. 6–7. More specifically, MILCSA itself requires Interior to review each covered tribe's—including Sault's—"plan[] for the use and distribution of its respective share of the judgment funds," and, where appropriate, to "approve the plan." MILCSA § 105(b). As Sault notes, its own plan—as approved by the Secretary and then authorized by Congress—is the set of provisions enacted as § 108 of MILCSA. Sault Br. 7. Given Interior's role in developing, approving, and implementing the provisions at issue, its interpretation of those provisions is entitled to considerable deference.[5]

CONCLUSION

The Court should deny judgment for Sault and enter judgment for Defendants on all claims.

[5] Even if *Chevron* deference did not apply, Interior's interpretation of MILCSA would still be "entitled to respect" in light of its "power to persuade." *Orton Motor, Inc. v. HHS.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018) (citation omitted). The letters that Interior issued reflect a careful consideration of the relevant text and Saults' arguments. Interior's ultimate rejection of those arguments is "consisten[t] with [its] earlier … pronouncements" in resolving the Bay Mills Indian Community's separate application. *Id.* (citation omitted); Sault Br. 8–9. And, again, Interior's reading of MILCSA honors the relevant text, particularly in light of the broader regulatory framework that serves as the backdrop for the statute and for Sault's land-into-trust applications.

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Respectfully submitted,

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