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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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CERTIFICATE OF COMPLIANCE WITH MEET-AND-CONFER REQUIREMENT

Consistent with this Court's Order granting the Motions to Intervene (ECF No. 36), counsel for all Intervenor-Defendants met and conferred telephonically on August 23, 2019, to discuss whether it would be possible to set forth the parties' positions in a single consolidated cross-reply brief. As with the parties' initial briefs, each Intervenor-Defendant intends to address particular issues that the other Intervenor-Defendants do 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. Additionally, Plaintiff Sault Ste. Marie Tribe of Chippewa Indians made a number of arguments responding to points raised by particular Intervenors, further necessitating separate replies. 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.

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: August 28, 2019

Respectfully submitted,

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INTRODUCTION

The Sault Ste. Marie Tribe of Chippewa Indians ("Sault" or "the Tribe") posits interpretations of the Michigan Indian Land Claims Settlement Act ("MILCSA") that would create wholly illogical results. According to Sault, MILCSA requires the Secretary of the Interior to take into trust any land Sault acquires with Self-Sufficiency Fund ("Fund") interest ("Fund Interest"), thus rendering the Secretary an automaton who must provide this benefit regardless of whether the land was acquired through a lawful or blatantly impermissible use of Fund Interest. Sault further argues that a provision allowing it to spend interest for the "enhancement of tribal lands" would mean the Tribe can use Fund Interest to buy any land, anywhere in the United States, and then seek to open a casino on that land. Sault claims these results are required by MILCSA's plain language. The truth, however, is the opposite: Sault's position requires extreme *departures* from MILCSA's text.

The question is thus not, as Sault wrongly suggests, whether to apply MILCSA's plain text—of course the Court must. The question is how to interpret that text, in light of normal English usage, MILCSA's context, and common sense. Such analysis unequivocally supports the Secretary's ruling. By restricting the permissible uses of Fund Interest but requiring the Secretary to take land bought with those funds into trust, Congress charged the Secretary with verifying that Fund Interest was in fact used and that the expenditure was lawful. By allowing Fund Interest expenditures that "enhance[] … tribal lands," Congress did not grant broad authority to acquire any land Sault wants, but restricted such expenditures to those that positively affect Sault's existing lands. The Court should reject Sault's effort to rewrite MILCSA, and enter judgment for Defendants.

ARGUMENT

I. Under § 108(f), the Secretary's Duty to Take into Trust Lands that Sault Acquired with Fund Interest Does Not Apply to Lands that Sault Did Not Properly Acquire with Fund Interest.

A. Sault does not dispute that, under its interpretation of § 108(f), it could inform Interior

that its Board of Directors ("Board") did *not* purchase the land in question for an authorized purpose under § 108(c), and yet compel Interior to take that land into trust. Detroit Casinos' Opening Br. 13–14. While the Tribe claims this possibility is "far-fetched" (Sault Cross-Opp. 18), it nonetheless effectively concedes that this is the way the statute would operate under its interpretation.

This is untenable. It is not remotely plausible that Congress simultaneously restricted Sault to making only certain kinds of Fund Interest expenditures but, in the same short statute, rewarded tribes even if they flouted those restrictions by conferring the substantial benefit of having those lands taken into trust. Rather, Congress clearly required the Secretary to take into trust only lands that were *actually* and *properly*—not *falsely* or *fraudulently*—bought with Fund Interest.

Recognizing this reality, Sault concedes that the Secretary is empowered to determine whether an expenditure is a *bona fide* Fund Interest acquisition in one respect—namely, that it was actually paid for with Fund Interest. Sault Cross-Opp. 10. Nevertheless, Sault insists the Secretary is somehow simultaneously disabled from verifying whether an expenditure is *bona fide* in another respect—namely, that it was a *legal* Fund Interest expenditure. The Tribe cannot coherently explain why the Secretary may exercise judgment on the former question but must blindly defer on the latter. It makes two efforts at supporting this distinction; neither withstands even passing scrutiny.

First, Sault claims that whether land was purchased with Fund Interest is a "condition precedent" to the Secretary's trust responsibility, such that the Secretary is empowered to exercise judgment on this issue rather than credulously accepting the Tribe's claim. *Id.* This purported distinction simply assumes its own conclusion, and is irreconcilable with Sault's explanation of why the Secretary cannot question its assertion that a purchase was for a lawful purpose. On that issue of lawfulness, Sault claims "[t]he question is not … *whether* MILCSA limits the use of Fund principal or … interest" but "*who* decides whether those statutory purposes are satisfied: the Board or

the Department?" *Id.* And Sault insists that *other* MILCSA provisions give the Tribe exclusive authority over Fund expenditures, such that any second-guessing by the Secretary as to a purchase's legality would be an affront to both tribal sovereignty and the Board's role as trustee of the Fund. *E.g.*, *id.* at 6 (citing MILCSA, Pub. L. No. 105-143, 111 Stat. 2652, § 108(a)(2), (e)(2) (1997)). If this were right, the Secretary would *also* be foreclosed from second-guessing the Tribe's representation that the acquisition was financed with Fund Interest. Indeed, such second-guessing would be an even greater insult to tribal sovereignty, since questioning the Tribe on this "objective, binary (yes/no)" and "ministerial" inquiry would necessarily "posit[] bad faith." *Id.* at 18, 54.

Thus, the Tribe's concession that it is the Secretary "who decides" whether a land acquisition was financed with Fund Interest also necessarily means it is the Secretary who decides whether the acquisition was a *lawful* use of Fund Interest. In neither case is the Secretary interfering with the Tribe's authority under the provisions Sault invokes, which have nothing to do with taking land into trust and instead relate exclusively to the Board's authority to make purchasing and investment decisions. *See* MILCSA § 108(a)(2) ("The board of directors … shall administer the Fund in accordance with the provisions of this section."); *id.* § 108(e)(2) ("[T]he Secretary shall have no trust responsibility for the investment, administration, or expenditure of [Fund] principal or income …."). A land-into-trust decision is an exercise of *the Secretary's* discretion, not Sault's.

Second, Sault seems to contend that the Secretary can examine whether a purchase was made with Fund Interest because that word appears in § 108(f), but is barred from analyzing whether a purchase is consistent with the restrictions on Fund Interest expenditures because those restrictions are set forth in a different (but closely related) provision, § 108(c). Sault Cross-Opp. 1, 8. But once it is established that the Secretary must verify a Fund Interest expenditure before taking land into trust (Sault's invocations of tribal sovereignty notwithstanding), it cannot possibly

be the case that he must confine himself to looking only at one subsection of MILCSA, and ignore all other provisions bearing on the validity of a Fund Interest expenditure. Sault's atomistic attempt at quarantining § 108(f) runs contrary to every principle of statutory interpretation. "A court must … interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole'"—not pluck out individual provisions to be read in isolation. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

Obviously, when Congress instructed the Secretary to take lands purchased with Fund Interest into trust, it did not want him to ignore the restrictions on Fund Interest set forth three subsections earlier in the same statute. Congress does not impose restrictions but then leave it to the regulated entities to decide whether they have complied with those restrictions; federal law is not an honor system. Sault cannot possibly deny that, if the restrictions on Fund Interest expenditures had been set forth in a definitional provision entitled "interest or other income of the Self–Sufficiency Fund," the Secretary would be authorized to confirm that Sault had complied with that definition—set forth in a separate section—before taking land into trust. And ignoring that definitional section would be no different than ignoring § 108(c)(5); in either case, the Secretary would be turning a blind eye to the parameters Congress set. There is no valid basis for concluding that Congress intended the Secretary to look at § 108(f) and *only* § 108(f).

B. This reading of § 108(f) is confirmed by the very principles of trust law Sault emphasizes when discussing its Board's authority over expenditures. While Sault stresses the "comprehensive powers" that the Board wields—"except as limited by statute or the terms of the trust"—when making such decisions (Sault Cross-Opp. 5–6 (quoting Restatement (Third) of Trusts § 70)), the Secretary's authority is similarly "comprehensive" when the Tribe asks him to become trustee of land purportedly acquired with Fund Interest. Sault is autonomous in one sphere (administering

the Fund); the Secretary is autonomous in another (taking lands into trust). When asked to become the trustee of tribal land, the Secretary obviously cannot acquiesce in a fraudulent submission—he has a duty to confirm that the trust's creation would actually comply with the law. The Tribe insists that the Secretary's powers and duties as trustee come into being only "*after* [land] has been taken into trust" (*id.* at 17), but this makes no sense: A trust *created* on the basis of a violation of the law is just as problematic as one *administered* in violation of the law. Sault's interpretation would make the Secretary complicit in any breach of trust that the Tribe's Board commits in buying new land. There is no reason for the Court to strain to adopt such an interpretation of § 108(f), when the statute is much more naturally read as avoiding that deeply problematic result.[1]

II. Under § 108(c), "Enhancement of Tribal Lands" Does Not Mean "Any Lands that Sault Acquires."

A. With § 108(c)(5), as with § 108(f), Sault cannot deny the boundlessness of the reading it asks the Court to adopt: Under its reading of "enhancement of tribal lands," *any* land acquisition, anywhere, would qualify. Sault again claims that non-statutory "significant limitations" would deter it from making purchases it is purportedly entitled to make under § 108(c)(5) (Sault Cross-Opp. 35–36)—but it fails to identify a single acquisition that would *not* satisfy its reading of the statute. In fact, Sault insists that "using interest to purchase land should typically satisfy § 108(c)." *Id.* at 18.[2]

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[1] Although Sault claims Interior's interpretation of § 108(f) is not entitled to deference (Sault Cross-Opp. 13–14), it waived that argument by failing to raise it in its Opening Brief. Detroit Casinos' Opening Br. 19 n.4. In any event, Congress obviously delegated authority to the Secretary to determine when the conditions requiring him to take land into trust are met. *Infra* at 9–10. And to the extent Sault seeks to cast doubt on the directive in § 108(f), Interior's interpretation of that provision as requiring compliance with the law is undoubtedly "based on a permissible construction of the statute." *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[2] Sault again conjures up a hyper-specific example of a land acquisition that would *not* fit its understanding of "enhancement," in which: (1) Sault exchanges one parcel for a smaller parcel; (2) the smaller parcel is "closer to existing reservation property" than the larger parcel; and (3) the Tribe uses Fund Interest "to pay unpaid debt or taxes on the purchased land." *Id.* at 27. But Sault claims this transaction would still "satis[fy] the consolidation prong" of § 108(c)(5) (*id.*), confirming there is no land acquisition that would fall outside its reading of that provision.

This implausible result cannot be squared with the most natural interpretation of § 108(c)(5)'s language. If MILCSA's drafters wanted to allow Fund Interest to be used for any land acquisition, they would have provided that such interest may be used for "land acquisitions." But no English-language speaker would attempt to convey an authorization of all land acquisitions by permitting only expenditures that accomplish a "consolidation or enhancement of tribal lands." Yet Sault seeks to rewrite the latter to mean the former.

In its effort to inject into § 108(c)(5) the "broad terms" its position requires, Sault places dispositive weight on the fact that "enhancement" can "encompass[]" both "an increase in value" and "an increase in size or amount." *Id.* at 10, 23. But this "overlooks … th[e] fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Section 108(c)(5) does not speak of "enhancements" in a vacuum; it speaks of "enhancement[s] of tribal lands." And that phrase cannot be read as encompassing any and all land acquisitions, regardless of their effect on the value of Sault's existing lands.

Thus, the real question is not whether "enhancement" denotes qualitative or quantitative increases, but whether "tribal lands" denotes tribal property *at the time of* or *after* the enhancement. If Congress had intended to allow any land acquired with Fund Interest to be taken into trust, it would not have referred to "tribal lands," because *any* land Sault acquires is, *ipso facto*, tribal land. Thus, "tribal lands" must refer to a specific, existing body of land: the land Sault owned at the time of the putative consolidation or enhancement. By contrast, that phrase cannot mean the real-estate portfolio that would exist after the consolidation or enhancement, because *all* acquisitions inherently "consolidate" or "enhance" the Tribe's post-acquisition portfolio. Consolidation or enhancement is the *test* for whether an expenditure is lawful, and so cannot be assessed relative to tribal

landholdings that exist if one *assumes* the expanded portfolio resulted from a lawful consolidation or enhancement. Sault's analysis is wholly circular and pointless —which is why it is forced to concede that, under its interpretation, § 108(c)(5) authorizes all land acquisitions.[3]

Sault, for its part, *agrees* that "tribal lands" means *existing* lands when it attempts to explain how "enhancement" would have meaning even if it embraced every land acquisition: Sault contends that another way it could satisfy § 108(c)(5) would be by "improv[ing] *land already owned by the Tribe*." Sault Cross-Opp. 26 (emphasis added). This obvious point is further confirmed by § 108(c)(5)'s authorization of expenditures that "consolidat[e] … tribal lands," as Sault of course cannot consolidate land it does not own. Given Sault's (correct) recognition that "tribal lands" refers to the Tribe's existing landholdings, it cannot possibly deny that the phrase must have the same meaning when assessing whether those lands have been enhanced by some land acquisition.

Thus, when read not in isolation but in context, "enhancement of tribal lands" clearly requires an effect on Sault's existing body of land at the time of the purported enhancement. Section § 108(c)(5) does not permit enhancements of the Tribe's real-estate portfolio by acquiring a Motel 6 in Texas; it only permits enhancements of the Tribe's existing lands. The problem with Sault's position is not some "policy objection[]" that it would allow Sault to engage in too much gaming (*id.* at 30–31), but that "enhancement of tribal lands" cannot possibly mean "any land acquisition," as that strained reading is contrary to the phrase's natural meaning and would render both "enhancement" and "tribal lands" meaningless.

[3] Sault's understanding of "enhancement of tribal lands" renders that term meaningless even if "enhancement" is (correctly) defined as an increase in value rather than in amount. Under Sault's interpretation, *any* purchase would "increase[] the total value of the Tribe's lands" by increasing the value of Sault's real-estate portfolio. Sault Cross-Opp. 23 n.5.

B. The plain meaning of § 108(c)(5) finds support in the broader backdrop of Indian gaming, as regulated by IGRA. Sault's insistence that IGRA is irrelevant to the interpretation of MILCSA (*id.* at 3, 14–17, 29–30) is contradicted by its own repeated recognition that it *must* be "presume[d] that 'Congress [was] aware of existing law" when it enacted MILCSA. *Id*. at 30–31 (quoting *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014)). This is especially true of a closely related statute like IGRA, which, indeed, must be interpreted consistently with MILCSA so as to reconcile any potential inconsistencies between the two. *See, e.g.*, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) ….'" (citation omitted)).

Sault's effort to rip MILCSA out of its context contradicts not only this interpretive rule but also reality and common sense. As the Court has recognized, this case exists only because Sault wants to use MILCSA's land-into-trust procedure to secure its goal of opening casinos under IGRA. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 11 (D.D.C. 2019). In fact, gaming is the only reason Sault (purportedly) acquired the Lower Peninsula properties with Fund Interest rather than Fund principal. The much looser restrictions on principal would have allowed Sault to buy Lower Peninsula land for any number of purposes—but, critically, could never have triggered a land-into-trust designation that would render the land potentially gaming-eligible under IGRA. *See* MILCSA § 108(b)(1).[4] Given that the transactions at issue here were structured to enable gaming and that Sault's avowed purpose is to open casinos, it borders on the

[4] Indeed, the only conceivable reason for MILCSA to distinguish between permissible uses of Fund Interest and Fund principal was to more tightly restrict the lands that could be eligible for land-into-trust status, and thus potentially gaming. This confirms both that IGRA is directly relevant here and that Congress obviously intended the permissible uses set forth in § 108(c) to bear on the application of the land-into-trust procedure under § 108(f).

bizarre for the Tribe to claim that the statute governing Indian gaming is somehow irrelevant.

Thus, IGRA does and must provide important context for analyzing MILCSA, and further reveals why Sault's reading of § 108(c)(5) is not only atextual but wholly irrational in context. IGRA draws a bright line: Gaming may occur on tribal lands taken into trust *before* October 17, 1988, but not on those taken into trust *after* that date. 25 U.S.C. § 2719(a). As Sault itself notes, the only exceptions for land acquired after that date simply "put tribes whose entitlement to lands should have been, but was not, recognized before 1988 on an 'equal footing' with tribes whose land was already in trust by 1988, so that the government's failures do not unfairly disadvantage the former group of tribes." Sault Cross-Opp. 30 n.8. Thus, under everyone's interpretation of IGRA, tribes may conduct gaming on lands they controlled—or should have controlled—when IGRA was enacted, but have no special authority to conduct gaming on lands taken into trust later.

Applying this concept, MILCSA opens the door to gaming on lands that consolidate or enhance *existing* tribal lands—but not on property unrelated to the tribal lands for which Sault's claims were settled in MILCSA. This is powerful corroboration that "tribal lands" in § 108(c)(5) means *existing* tribal lands, not a Texas Motel 6 wholly unconnected to the tribal lands being addressed in MILCSA (and on which IGRA clearly forecloses gaming). Sault's interpretation, in contrast, would grant Sault a special preference—unavailable to any other tribe—to conduct gaming on property that was acquired after 1988 and that has nothing to do with putting the Tribe on "equal footing" with the position it should have held in 1988. Since Sault cannot provide any rational explanation why Congress would have so dramatically undermined the basic foundations of both IGRA and MILCSA to generate this irrational exception for Sault alone, its strained and atextual interpretation of § 108(c)(5) must be rejected.

C. If there were any doubt as to whose reading of § 108(c)(5) should prevail, *Chevron*

deference would break that tie in Interior's favor. *Chevron*'s first step is easily satisfied: *First*, the delegation of authority could not be clearer, as Congress specifically charged the Secretary with administering MILCSA insofar as Sault asks to have land taken into trust. E.g., *Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016). *Second*, although "enhancement of tribal lands" is unambiguous, to the extent that Sault tries creating ambiguity by rewriting that phrase as "any land acquisition," it is the Secretary's duty to resolve that ambiguity. *Third*, the Indian canon does not apply, because Sault's interpretation would give it a substantial advantage over every other tribe, including the other beneficiaries of MILCSA. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Ore. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) ("[T]he Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe."), *aff'd,* 830 F.3d 552 (D.C. Cir. 2016).

Chevron's second step similarly is satisfied, as Interior's construction of § 108(c)(5) is eminently reasonable. Contrary to Sault's claim that this construction would create "a virtual null set" (Sault Cross-Opp. 41), there are many ways Sault could spend Fund Interest to increase the value of its existing lands, such as an acquisition that enables the opening of a marina or parking garage that benefits facilities on the Tribe's existing lands. Saginaw's Opening Br. 5–6; *see also* Sault Cross-Opp. 26 (noting that Sault could spend Fund Interest to "improve land already owned by the Tribe").[5] But Interior was entirely correct—and entirely within the bounds of its delegated authority—in concluding that Sault does not "enhance[] [its] tribal lands" merely by acquiring new land.

CONCLUSION

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

[5] Such uses of Fund Interest would increase the value of existing land without consolidating any tribal lands, refuting Sault's claim that Interior's interpretation "blurs the lines between 'enhancement' and 'consolidation.'" Sault Cross-Opp. 28.

Dated: August 28, 2019

Respectfully submitted,

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