IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff,

v.

DAVID L. BERNHARDT, Secretary, United States Department of the Interior; *et al.*

Defendants.

Case No. 1:18-cv-2035-TNM

Hon. Trevor N. McFadden

Saginaw Chippewa Indian Tribe of Michigan's
Reply in Support of its Cross-Motion for Summary Judgment

Sean J. Reed (Bar ID: MI0080)
General Counsel of Soaring Eagle Gaming and Intergovernmental Affairs
Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858
Phone: (989) 775-4032
E-mail: SReed@sagchip.org

William A. Szotkowski (Bar ID: N0004)
Jessica Intermill (Bar ID: MN0007)
Leah K. Jurss (Bar ID: MN0006)
Hogen Adams PLLC
1935 W. County Rd. B2, Ste. 460
St. Paul, MN 55113
Phone: (651) 842-9100
E-mail: bszotkowski@hogenadams.com
jintermill@hogenadams.com
ljurss@hogenadams.com

Counsel for Intervenor Saginaw Chippewa Indian Tribe of Michigan

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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 brief. Through a continuing discussion of the issues raised in this case and in the Plaintiff Sault Ste. Marie Tribe of Chippewa Indians' responsive brief, it remained evident 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. In addition to the reasons described in the Saginaw Tribe's initial certificate of compliance, a separate brief allows the Saginaw Tribe to address responsive arguments that that the Sault Tribe directed solely to the Saginaw Tribe. The Intervenor-Defendants did, however, commit to minimizing overlap between briefs to the fullest extent possible, and have exchanged preliminary drafts with one another in furtherance of this objective.

This brief addresses the issues of most immediate concern to the Saginaw Tribe. The Saginaw Tribe incorporates by reference the arguments set forth in the briefs filed today by the Detroit Casinos and the Nottawaseppi Huron Band of the Potawatomi.

Dated: August 28, 2019

Respectfully submitted,

/s/ Jessica Intermill
Jessica Intermill

Counsel for Saginaw Chippewa Indian Tribe of Michigan

Introduction

If you ask the Sault Ste. Marie Tribe of Chippewa Indians (the Sault Tribe), what it says goes—regardless of the facts or the law. In its view, only its Board of Directors (the Sault Board) can decide whether a particular fund dollar is principal (that is eligible for Michigan Indian Land Claims Settlement Act (MILCSA) § 108(b) purchases) or interest (for § 108(c) purchases)—even though it did not segregate the interest from the principal and cannot separately trace either. Sault MSJ Opp., ECF No. 56 at 55 n.12 (Sault MSJ Opp.).[1] According to the Sault Tribe, only its Board at its sole, unreviewable discretion can decide whether its § 108(c) purchasing decisions *also* trigger Interior's § 108(f) trust authority—even though the duties and sections are distinct. *Id.* at 4-11. The Sault Tribe crows that its aggrandized unilateral authority to create unlimited gaming-eligible "Indian lands" *anywhere* in the United States is not *so* absurd because that authority is cabined by restrictions the Sault Tribe is already working to evade. *Compare id.* at 36 *with* Saginaw MSJ, ECF No. 51 at 6-19 (Saginaw MSJ). And indeed, the Sault Tribe tells this Court that it must reject Interior's reasoned interpretation of MILCSA even as it *rewrites* that decision to impose restrictions that Interior did not. *Compare* Sault MSJ Opp., 41 (describing "immediate" and "direct" requirements of enhancement) *with* AR1933 (lacking either).

But neither the facts nor the law are as the Sault Tribe says. As the Saginaw Tribe's summary-judgment motion demonstrated, an on-the-ground view of *all* the statutes at play here demonstrates that—unlike the Sault Tribe's offered say-so—the Department of Interior's (Interior) reading of MILCSA is faithful to that statute's text *and* harmonizes MILCSA with the statutory landscape that the Sault Tribe contorts. For the reasons addressed in the Saginaw Tribe's opening motion, the briefing of its codefendants, and as further detailed here, the Sault

[1] Throughout this brief, the Saginaw Tribe cites to page numbers at the bottom of docket entries.

Tribe cannot meet the "particularly deferential" standard that it must overcome to overturn Interior's decision, which "balance[d] competing statutory mandates and involve[d] technical, predictive judgments within the agency's special area of expertise." *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 85 F. Supp. 3d 436, 446 (D.D.C. 2015) (citing *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 377 (1989)).

I. The Sault Tribe offers this Court a false choice between MILCSA and IGRA.

A. IGRA and the Sault Tribe's IGRA-required state-tribal compact matter because the Sault Tribe's uses MILCSA to reach its Indian Gaming goal.

From the jump, the Sault Tribe connected its MILCSA arguments to what it hopes will be their IGRA effects. Its complaint averred that the Sault Tribe intended the land purchases at issue here to "trigger[]" a MILCSA trust determination that would, in turn, "create[e] 'Indian lands' for purposes of IGRA." Compl., ¶35, ECF No.1. Expressly linking its MILCSA questions to IGRA, the Sault Tribe argued that the Sault Board exercised "its responsibilities under MILCSA" when it "elected to purchase property in two locations in Michigan's Lower Peninsula to be used for gaming consistent with IGRA." *Id.* at ¶36. And throughout this litigation, the Sault Tribe has continued to pin its IGRA hopes onto this MILCSA question. Sault Intervention Opp. at 7, ECF No. 28 (Sault Intervention Opp.) ("The Sault Tribe has never hidden [this] hope[.]"); *id.* at 19 (same). Indeed, this Court has already rejected the Sault Tribe's argument that the "'sole issue presented in this case is whether the Department acted unlawfully in failing to take [the parcels of land] into trust under MILCSA.'" *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 10-11 (D.D.C. 2019). (quoting Sault Intervention Opp., 17).

Against this record, the Sault Tribe's demur that the Court should skip over its work to gut IGRA and its IGRA-required compact with a MILCSA hacksaw because "IGRA and MILCSA are different statutes governing distinct subjects and accomplishing separate ends" falls

flat. Sault MSJ Opp., 14. Indeed, for all its bluster, the Sault Tribe does not once dispute that it seeks the IGRA effects the Saginaw Tribe described. *See* Saginaw MSJ, 13-1. And its response to Section 9 Compact concerns with feigned frustration that Intervenors did not quote the full section is easily disproven but offers sound evidence of the Sault Tribe's cavalier approach to its IGRA-required promises and this litigation. *Compare* Sault MSJ Opp., 14 *with* Saginaw MSJ, 10. At bottom, this case sits squarely at the intersection of IGRA and MILCSA because the Sault Tribe framed it that way.

B. There is no implicit MILCSA exception to IGRA.

Rather than address that Interior offers the only read of MILCSA that harmonizes that law with Congress's considered policy decisions disfavoring expansion of off-reservation in IGRA, the Sault Tribe offers distractions.

First, the Sault Tribe coyly shrugs that because Congress did not say that the Sault Tribe *couldn't* manufacture off-reservation lands eligible for Indian gaming anywhere in the United States, MILCSA must have silently allowed that result. Indeed, it argues that "if Congress had intended MILCSA to incorporate existing statutory authority, it would have said so." Sault MSJ Opp., 11. The Sault Tribe's willingness to guess at congressional motives is, at best, inconsistent. Even as the Sault Tribe insists that it is not courts' role to speculate on congressional objectives that undercut its argument, Sault MSJ Opp., 37, it speculates that "Congress certainly would have understood" arguments the Sault Tribe makes in its own favor. *Id.* at 36. But on the question of implied repeal, the Sault Tribe's supposition is precisely backward—a point evidenced by the Sault Tribe's inability to support its proposition with anything other than a single *c.f.* citation to inapposite case law concerning statutory amendments. *Id.*

The law is this: even where a court is confronted with "two different statutes, enacted to address different problems," courts must work to harmonize the statutes. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 76 n.1 (2014) (Roberts, J., concurring) (citing *National Assn. of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662-69 (2007). In doing so, courts may not "read the congressional silence as effectuating a repeal by implication." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Rather, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* (citation omitted). It is true that "Statutory interpretation does not require this Court to *speculate* about what (if anything) members of Congress may have thought about MILCSA's interaction with IGRA." Sault MSJ Opp., 15 (emphasis added). Instead, controlling rules of statutory interpretation require that this Court conclusively presume that Congress *did not* intend MILCSA to affect a one-off repeal of IGRA's off-reservation gaming prohibitions.

Second, the Sault Tribe seeks to dismiss the substantial questions of MILCSA's interaction with IGRA and of its proffered collision of those statutes as unimportant "after-the-fact policy concerns[.]" Sault MSJ Opp., 37. In IGRA's Section 20, Congress set a loud-and-clear prohibition against most off-reservation gaming expansion. 25 U.S.C. § 2719(a). And although the Saginaw Tribe agrees with the Sault Tribe that trust acquisition is a necessary first step for Indian gaming on the Parcels, it disagrees that trust acquisition alone is sufficient to satisfy IGRA's 25 U.S.C. § 2719 "Section 20" off-reservation gaming requirements. The Saginaw Tribe reserves argument on those questions because its own arguments on those points are not relevant here. What *is* relevant to decision of the Sault Tribe's claims is its demonstrated expectation that it can use MILCSA to drive a semi-truck through the limited Section 20 IGRA

exceptions. It is that expectation that triggered the Saginaw Tribe's intervention interest and is relevant to the reasonableness of Interior's interpretation (and rejection of the Sault Tribe's read) of MILCSA. The Sault Tribe's Rule 19 digression to defend its compact violations is misplaced for the same reason. Sault MSJ Opp., 42-44. The Saginaw Tribe does not ask this Court to enforce Section 9 or enjoin the already-filed trust application. Rather, where the Sault Tribe works to show seriatim courts only a bit of MILCSA here and a slip of IGRA there, the Saginaw Tribe offers a ground-level view of the full effect of the Sault Tribe's MILCSA arguments on IGRA and on multiple tribes' IGRA-required state-tribal compacts. That full statutory context compels support for Interior's reasonable interpretation of MILCSA.

The mandate that courts harmonize interrelated statutes is no question of policy preference—it is a tried and true rule of statutory interpretation. *Morton*, 417 U.S. at 550. Ignoring this principle, the Sault Tribe's tour of spliced caselaw insisting that courts leave policy decisions to Congress is misplaced. The bulk of the cases it relies on do not address the interaction of competing statutes. *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1357-58 (2018) (refusing to considerer efficiency concerns when interpreting statutory Patent Office processes without reference to another statute); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (interpreting "debt collectors" in Fair Debt Collections Practices Act without reference to another statute); In *Lewis v. City of Chicago*, 560 U.S. 205, 216 (2010) (refusing to consider "practical problems" for employers in its interpretation of Title VII "employment practices" without reference to another statute); *Union Bank v. Wolas*, 502 U.S. 151 (1991) (interpreting amendment to Chapter 7 bankruptcy code without reference to another statute). And the only commonality between this case and *Washington State Dep't of Licensing v. Cougar Den, Inc.* is that both cases involved tribal parties. 139 S. Ct. 1000 (2019). It strains reason and

the Supremacy Clause to suggest that Justice Gorsuch's concurrence emphasizing the primacy of treaty rights vis-à-vis state legislation, *id.* at 1021, is any support for the Sault Tribe's effort to replace sections of MILCSA with the co-equal IGRA.

Just one of the Sault Tribe's "policy" cases concerned the question relevant here: interpreting co-equal statutes together. Sault MSJ Opp., 37 (citing *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 237-238 (2007)). But that case *undercuts* its argument. *Powerex* considered whether 28 U.S.C. § 1447(d), a civil-procedure statute that refuses appellate review of a post-removal remand order (with limited exceptions), applies when a party removes a case under the Foreign Services Immunities Acts (FSIA). *Id*. at 236-238. The *Powerex* Court "assume[d] that Congress is aware of the universality of the practice of denying appellate review of remand orders[,]" noted that "Congress has repeatedly demonstrated its readiness to exempt particular classed of remand orders from § 1447(d) when it wishes[,]" and refused to imply an unwritten FSIA exception into 28 U.S.C. § 1447(d). *Id.* (quotation and alteration omitted).

So it is here. Just as the *Powerex* court presumed congressional familiarity with established law, this Court should assume congressional familiarity with IGRA's near-universal prohibition on gaming on off-reservation lands acquired after IGRA's passage. *Powerex,* 551 U.S. at 237. And as in *Powerex*, Congress has demonstrated its readiness to exempt limited after-acquired trust lands by process and by name. 25 U.S.C. §§ 2719(b)(1), (2). Because Congress creates Section 20 exemptions expressly "when it wishes" but did not address MILCSA's impact on IGRA at all, as a matter of statutory construction, Congress did not silently allow the Sault Tribe—but only the Sault Tribe—to leap frog the very limited contours of Section 20 review. *Powerex,* 551 U.S. at 237-38.

Importantly, the *actual* policy questions the Sault Tribe poses are not ones that the Intervenors ask this Court to answer. *Contra* Sault MSJ Opp., 36. They are precisely the ones that Congress asked the National Indian Gaming Commission to answer in IGRA's Section 20 review. It is the *Sault Tribe* that asks this Court to short-circuit the agency-committed policy questions of where and how much gaming any one tribe can conduct, not any Defendant, and the Sault Tribe's reliance on *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States* to avoid this point is misplaced. There, a district court rejected the Sault Tribe's argument that reading another tribe's federal-reaffirmation statute to require mandatory trust acquisition for purchases within two counties would allow that tribe "unlimited" purchases within those counties, relying on "practical limits" on tribal resources and available properties to naturally cabin the purchases. 78 F. Supp. 2d 699, 704 (W.D. Mich. 1999), *remanded on other grounds*, 9 Fed. Appx. 457 (6th Cir. 2001). Certainly, similar practical limits would prevent the Sault Tribe from taking into trust *all* land nationwide. But under the Sault Tribe's read of MILCSA, those practical limits would not prevent it from unilaterally acquiring *any* parcel anywhere in the U.S.—whether in the Saginaw Tribe's ancestral territory, across the street from Michigan's governor's mansion, or on Constitution Avenue—and calling it an "enhancement" of existing tribal lands that would unilaterally trigger trust status under MILCSA's § 108(f). Because there is no express MILCSA exception to the general IGRA rule against off-reservation gaming, and controlling law does not allow the Sault Tribe to imply one, *Morton*, 417 U.S. at 550, this absurd result does not follow from MILCSA.

Third, when the Defendants offered a clear picture of the IGRA-shredding effects of the Sault Tribe's absolutist arguments, the Sault Tribe retreated. *Today* it argues that of course it would follow IGRA's Section 20 process just like any other tribe. Sault MSJ Opp., 4-5. But the

Sault Tribe has not always taken this tack. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 1:12-CV-962, at *19 (W.D. Mich. Mar. 5, 2013), *available at* ECF No. 31-2, *rev'd on other grounds*, 737 F.3d 1075 (6th Cir. 2013) (describing the Sault Tribe's argument that trust acquisition will automatically "trigger an IGRA Section 20 exception based on settlement of a land claim."). And as this Court has recognized, "the Sault Tribe admits, 'there is no legal requirement that it obtain a formal determination' that the lands are gaming eligible under the IGRA[,]" and "the [Sault] Tribe suggest[ed] it would be legally required only to 'provide [the National Indian Gaming Commission] with notice 120 days before opening a casino." *Bernhardt*, 331 F.R.D. at 11 (quoting Sault Intervention Opp., 7) (internal alteration omitted).

But this court need not guess what turn the Sault Tribe will next take. The relief the Sault Tribe seeks here already sets it at odds with Congress's carefully crafted off-reservation gaming requirements because the Sault Tribe's banner argument is that it—and only it—can decide whether land it purchases for its own reasons on its own terms with monies it says (but doesn't prove) are fund interest (not income) *must* become gaming-eligible trust lands within the meaning of IGRA even though Congress did not expressly delegate that authority to the Sault Tribe. There is no reason to believe that congressional silence abrogated decades of background law. But there is every reason to presume that Congress knew that law and did not impliedly repeal it for just one tribe. *Morton*, 417 U.S. at 550.

II. Interior's interpretation of MILCSA harmonizes it with IGRA's requirements.

In contrast, Interior's interpretation is faithful to the text and structure of MILCSA for all the reasons that the Defendants and Intervenors have already described, but it *also* harmonizes competing statutes. Only Interior's interpretation of MILCSA affords the Sault Board MILCSA § 108(c) purchasing independence *and* harmonizes that independence with IGRA's longstanding

requirements for gaming on newly acquired off-reservation land by leaving a § 108(f) federal check on whether a purchase actually met MILCSA's § 108(c) requirements before Interior takes land into trust, or whether, as here, a purchase is a bald effort to leapfrog IGRA's Section 20 process with a purchase that neither consolidates nor enhances under MILCSA's § 108(c). This "balance [of] competing statutory mandates" merits "particularly deferential" review. *Delta Air Lines, Inc.*, 85 F. Supp. 3d at 446.

The Sault Tribe, though, continues to rail against agency deference, doubling down on its early assertion that Interior's interpretation of "enhancement" describes a "null set." Sault MSJ Opp., 41. To do so, it must take aim at the Saginaw Tribe's boots-on-the-ground demonstration that its own land portfolio includes purchases that "enhanced" existing lands without "consolidating them. *Id.* The Sault Tribe sidles that Saginaw's example proves the null set because its "acquisition of the marina did not immediately or directly enhance the value of an existing parcel of land—which is what the Department's standard requires. *See, e.g.*, Sault MSJ 27-28." Sault MSJ Opp., 41. But following this citation trail, the Sault Tribe cites *itself* for a "*direct* and *immediate*" requirement. Sault MSJ, ECF No. 43, 27 (emphasis in original) (citing "*See* AR 1933; supra p.16"). AR1933 does not say anything about "direct" or "immediate." The Sault Tribe italicizes for emphasis the words Interior did not write.

Although the Saginaw Tribe noted this discrepancy in its motion, Saginaw MSJ at 5, the Sault Tribe still tells this Court that that Interior "requires" limitations it never wrote. Sault MSJ Opp., 41. *Sault Tribe on MILCSA* is not a reliable treatise. In its actual decision, Interior refused to conclude that any parcel could "enhance" landholdings 200 miles distant without concrete evidence of such enhancement, and rejected the Sault Tribe's twice-contingent "attenuated reasoning." AR1930-33. In contrast, the Saginaw Tribe described precisely the sort of situation

and precisely the sort of evidence that can satisfy Interior's reasonable interpretation of enhancement by adding amenities to increase traffic and revenue at the Saginaw Tribe's *existing* casinos; not *potential* revenue at a new casino that *might* be used to improve a distant pre-existing landholding. That the Sault Tribe can only "disprove" Saginaw's real-life example with a caricatured misinterpretation of Interior's decision further demonstrates that it is Interior, not the Sault Tribe, that reached a reasonable interpretation of MILCSA.

Conclusion

In this high-stakes casino competition for real-life governmental revenues, the Sault Tribe argues that Congress dealt it—but only it—an ace that it can play to build an IGRA casino any time anywhere. And the Sault Tribe's arguments belie its protest that this result is "wildly exaggerated[.]" Sault MSJ Opp., 4. Its reading of MILCSA sets intentional blinders to IGRA, and would turn the Sault Board's § 108(c) purchasing discretion into a federal license to upset a decades-old statutory landscape—and neighboring tribes' reliance interests—without even a whisper that Congress meant that result or why it would offer this prize to the Sault Tribe alone.

But Interior's interpretation of MILCSA is reasonable. It is neither arbitrary nor capricious. And in accounting for and harmonizing competing statutes, it deserves deference. Accordingly, the Saginaw Tribe respectfully requests that this Court enter summary judgment against the Sault Tribe on all counts.

Dated: August 28, 2019

/s/ Jessica Intermill

William A. Szotkowski (Bar ID: MN0004)
Jessica Intermill (Bar ID: MN0007)
Leah Jurss (Bar ID: MN0006)
Hogen Adams PLLC
1935 W. County Rd. B2, Ste. 460
St. Paul, MN 55113
Phone: (651) 842-9100
E-mail: bszotkowski@hogenadams.com
jintermill@hogenadams.com
ljurss@hogenadams.com

Sean J. Reed (Bar ID: MI0080)
General Counsel of Soaring Eagle Gaming
and Intergovernmental Affairs
Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858
Phone: (989) 775-4032
E-mail: SReed@sagchip.org

Counsel for Intervenor Saginaw Chippewa Indian Tribe of Michigan