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, *et al.*,

Defendants.

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

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI'S REPLY IN SUPPORT OF CROSS-MOTION TO DISMISS IN PART FOR LACK OF JURISDICTION AND 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 (Doc. No. 36), counsel for all Intervenor-Defendants met and conferred telephonically on August 23, 2019, to discuss whether it would be possible to file a single reply brief. Counsel determined that in light of the variations in the emphasis and approach of each Intervenor-Defendant, as well as the disparate arguments to which each is replying, filing a single reply brief would not be feasible or helpful to the efficient determination of this matter. The Intervenor-Defendants committed to minimize overlap between briefs, and subsequently exchanged preliminary drafts with one another in furtherance of this objective.

Dated: August 28, 2019

/s/ Merrill C. Godfrey
Merrill C. Godfrey

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INTRODUCTION

Intervenor/Defendant the Nottawaseppi Huron Band of the Potawatomi ("NHBP") files this reply in support of its cross-motion to dismiss the complaint as it relates to the Lansing Parcels for lack of subject-matter jurisdiction, and for summary judgment on all claims in the complaint. The Sault Tribe has presented no evidence to counter NHBP's showing that the complaint as it relates to the Lansing Parcels is moot and must be dismissed. Further, the Sault Tribe contradicts the language of the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143 (1997), and its own prior statements when it attempts to require Interior to take land into trust without regard to § 108(c). Finally, in attempting to defend its misreading of the term "enhancement," the Sault Tribe violates common usage, creates irremediable problems of surplusage, and wreaks havoc on the interaction of MILCSA and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. For all these reasons, the Court should grant summary judgment on all claims in favor of the defendants.

ARGUMENT

I. THE SAULT TRIBE'S CLAIMS AS TO THE LANSING PARCELS ARE MOOT AND THE SAULT TRIBE FAILS TO SHOW OTHERWISE

The Sault Tribe admits reluctantly that what it calls the "Lansing Parcel" is "technically" two parcels, the Corner Parcel and the Showcase Parcel. Doc. 56 ("Sault Opp.") at 63. It does not dispute that it lacks title to the Showcase Parcel and that the option to acquire the parcel has expired. Nor does it dispute that it is contractually obligated to reconvey the Corner Parcel to Lansing. This Court therefore must dismiss the complaint as it relates to the Lansing Parcels.

The Sault Tribe nonetheless argues that because it still has not complied with its contractual duty to reconvey the Corner Parcel, and because it has decided to lump the two Lansing Parcels together for purposes of jurisdiction, "[t]he Tribe currently holds title to the Corner Parcel and thus

has an ongoing legal interest in the Lansing Parcel." *Id*. at 64. This reasoning fails.

First, as to the Corner Parcel, the Sault Tribe does not dispute that under the Comprehensive Development Agreement ("CDA"), its obligation to "take all reasonable steps to re-convey the Corner Parcel to the City," AR3031, has already matured. *See* Sault Opp. at 63-64. It states only that "as of this filing" it still holds title to the Corner Parcel and that "the CDA has not formally been wound up." *Id*. at 64-65. Regardless, it has no colorable claim of a legal right to retain title, so this Court cannot order the property into trust.

Second, as to the Showcase Parcel, to which the Sault Tribe has never held title, the Sault Tribe cannot create jurisdiction by referring to the two parcels (ostensibly "for ease of exposition") together as the "Lansing Parcel." *Id*. at 63. Nor does it create jurisdiction for the Sault Tribe's lawyers to speculate that "the Tribe and Lansing could well negotiate an extension of the option for the Showcase Parcel." *Id.* at 65. That is especially true given the city's repeated, unconditional statements that it will not grant any more extensions. *See* Doc. 48-1 at 2. The Sault Tribe has provided no evidence to the contrary, and its lawyers' speculations should be given no weight.

II. THE SAULT TRIBE DOES NOT HAVE UNREVIEWABLE AUTHORITY UNDER SECTIONS 108(C)(4) OR 108(C)(5)

The Sault Tribe attempts to avoid having to defend its counterintuitive reading of the phrase "consolidation or enhancement of tribal lands" by asserting for itself unreviewable authority to interpret § 108(c)(5). It argues, in effect, that Interior and this Court must ignore the statute in the situation in which the Board has misapplied it. The Board is granted no such power or immunity.

The Sault Tribe makes its argument by setting up a false dichotomy. It argues that "[t]he Tribe's Board, not the Department [of the Interior], has the responsibility to determine compliance with § 108(c)." Sault Opp. at 16. To the contrary, *both* the Tribe's Board *and* the Department of the Interior must respect the restrictions of § 108(c). Section 108(c) describes all valid

expenditures of interest. It does so generally, not only for the Board but also for Interior. When Congress provided for Interior to accept into trust only those lands that were "acquired using amounts from interest or other income of the Self-Sufficiency Fund," it was in plain language requiring the Secretary to ensure that the lands were acquired under § 108(c), which is the only provision under which such a purchase could lawfully be made. Congress did not provide for Interior to take into trust any lands purchased *under color of* § 108(c), or such lands *as the Tribe's Board may determine* were acquired under § 108(c). It stated instead that the Secretary must determine whether the lands were "acquired using amounts from interest or other income of the Self-Sufficiency Fund," as described in § 108(c)(5). Interior has no authority under the statute to take into trust lands purchased outside § 108(c).

Indeed, the Sault Tribe has recognized since its earliest submissions to Interior that it would have to demonstrate to Interior that it had complied with § 108(c) in purchasing the lands. Both of its initial submissions are in large part dedicated to this issue. *See* AR362–365; AR372–375. As the Tribe itself argued, "[t]he Secretary must take lands into trust for the benefit of the Tribe when—as here—the Tribe uses interest or other income of the Self-Sufficiency Fund to acquire lands *for the purposes set forth in Section 108(c),* including the 'consolidation or enhancement of tribal lands.'" AR361; AR371 (emphasis added). This is especially true where there is an unsegregated fund and the Sault Tribe is asking this Court to force Interior to take the land into trust as though it had complied with § 108(c). If the retroactive accounting that the Tribe seeks to impose were permissible, it would certainly entail a degree of judgment that includes evaluating whether the properties were purchased under § 108(c) rather than § 108(b).

The Sault Tribe now acts offended that the Secretary would have any authority to comply with the requirements of a governing federal statute. But just as the Sault Tribe "has the inherent

authority to manage its own funds and to decide for itself what is in its best interest and that of its members," Sault Opp. at 22, so too the United States is a sovereign and has inherent authority, and statutory responsibility, to determine whether a purchase is a lawful expenditure of interest under MILCSA before taking the purchased land into trust under MILCSA. *See, e.g.*, U.S. Dep't of Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (2016) at 33; Doc. 48 at 18.

Nor can the Sault Tribe explain why § 108(b)(1) is worded differently, where the standard for purchases with principal is applied solely as "the board of directors determines." Section 108(c)(5) gives no such power to the Board. The Sault Tribe attempts to explain away the difference with reference to "an earlier version of MILCSA," as though this Court could avoid the plain distinction between these two provisions based on Sault's speculative reading of legislative history. Sault Opp. at 18 n.1. But the Sault Tribe cannot explain why, if §108(c)(5) is to be read as granting exclusive authority to the Board, Congress still worded the two sections differently, and did not simply delete all references to Board determinations when revising § 108(b)(1). The earlier draft did not include § 108(b)(4) or § 108(f), describing land purchases with principal or interest, respectively. When Congress added those provisions, it also included a contrast between §§ 108(b)(1) and 108(c)(5), in light of § 108(f), which applies only to purchases under § 108(c)(5).

Section 108(e) does not save the Sault Tribe's argument. The plain language of § 108(e) says only that "after the transfer" of the Self-Sufficiency Fund out of federal accounts to the Sault Tribe, "[t]he approval of the Secretary *for any payment or distribution* from the principal or income of the Self-Sufficiency Fund shall not be required and the Secretary shall have no trust responsibility for the investment, administration, or expenditure of the principal or income of the Self-Sufficiency Fund." The Secretary is doing none of these things by refusing to take into trust

land that was purchased outside the confines § 108(c). No Secretarial approval was required for "payment" for the parcels at issue here. Saying that approval is not "required" for "payment" is not the same as saying the Secretary must take into trust land purchased outside §108(c).[1]

III. THE SAULT TRIBE DISTORTS THE STATUTORY LANGUAGE FAR BEYOND ANYTHING THAT COMMON USAGE OR CONTEXT PERMITS

Buying casino sites hundreds of miles away from the Sault Tribe's existing tribal lands is not a "consolidation or enhancement" of those tribal lands. The phrase is not ambiguous and does not require the dozens of pages of analysis the Sault Tribe provides. In American English, when one speaks of enhancing a piece of real estate, it means improving *that* real estate. It does not mean buying unrelated real estate hundreds of miles away. The Sault Tribe plays word games with the isolated word "enhance," and then insists that everyone else is ignoring the "plain language" of the statute. Usage, context, and precedent require that the Sault Tribe's approach be rejected.

A. The Sault Tribe's attempt to shoehorn its casino plans into the statutory language defies common sense and common usage of the word "enhance."

As the Sault Tribe's own belabored brief bears witness, its goal-oriented interpretation of "consolidation or enhancement of tribal lands," to try to cover the purchase of casino sites hundreds of miles away, defies common usage and strains meaning beyond the breaking point. To "enhance" is a transitive verb whose meaning and usage varies widely depending on its object. Yet the Sault Tribe ignores all nuances of usage and argues that an increase in sheer quantity is necessarily an "enhancement." That is false, as a matter of usage as well as logic. For example, although one might claim that makeup enhances a person's features, that is not a claim that makeup gives the person extra eyes, cheeks, or noses. And giving someone an extra nose could not be said to

[1] The Sault Tribe strains to suggest that this reading of the statute reintroduces trust liability in § 108(f), *see* Sault Opp. at 19 n.2, but cannot explain how it could ever plead or establish breach-of-trust liability for "erroneous § 108(c) determinations." *Id.*

enhance the person's facial features, even though it would increase their quantity.

The Sault Tribe's position is only somewhat less preposterous. When one speaks of enhancing a piece of real estate, that does not mean buying a different piece of property hundreds of miles away. Adding a garage, or buying an adjacent or nearly adjacent lot, or making other improvements or expansions of a principal residence would be enhancements of the property. But the mere fact that a different, faraway property is acquired by the same person or entity does not make that faraway property an enhancement of the existing property. Common ownership of disparate parcels is not what a speaker of American English means when speaking of "enhancing" real estate. The Sault Tribe is asking this Court to command Interior to use language in an extremely unnatural way. Rejecting this demand is not "supply[ing] a geographic limitation Congress omitted," Sault Opp. at 46, but rather respecting the language Congress chose.

The Sault Tribe spends many pages trying to make its misuse of language sound reasonable, but its explanations are strained, counterintuitive, and ultimately illogical. Although enhancement can in some contexts refer to an augmentation, and to augment sometimes means to increase in quantity, it does not follow as matter of logic that an increase in quantity is necessarily an enhancement. "Enhance" equals "augment" equals "increase" is not a true statement. Usually, if you have to take two leaps through the dictionary to get to a word, those two degrees of separation mean that you are not looking at a synonym. Obviously, such a mode of statutory interpretation applied generally would have drastic effects. And dictionaries do not substitute for knowledge of how words are actually used by native speakers, which everyone who has ever attempted to speak a foreign language and used a bilingual translation dictionary understands. In common usage, the phrase "consolidation or enhancement of tribal lands" does not refer to merely taking common ownership of lands elsewhere. What the Sault Tribe calls "plain language" is an illogical expansion

that drains the term "enhancement" of meaning.

The Sault Tribe's arguments here are similar to those rejected by the D.C. Circuit in *Safari Club Int'l v. Zinke*, 878 F.3d 316 (D.C. Cir. 2017), where plaintiffs attacked the U.S. Fish and Wildlife Service's interpretation of the word "enhance." At issue was a regulation requiring an agency determination as to whether "the killing of the trophy animal will enhance the survival of the species." *Id.* at 322-23. The agency made a negative determination, and plaintiffs argued that it had misinterpreted "enhance" because that term included "*any* potential benefit to the survival of elephants from sport hunting." *Id.* at 326. The court rejected this attempt to restrict the agency to a simple dictionary definition of "enhance" to mean "heighten, increase"; the dictionary definition could not preclude the agency from "taking into account the full biological and institutional context bearing on the health of the species." *Id.* at 327.

B. The Sault Tribe's attempt to avoid the rule against surplusage fails.

The Sault Tribe's expansive distortion of the term enhancement, so as to cover all land purchases, creates an insurmountable problem of surplusage, because such a reading of "enhancement" would make its companion term, "consolidation," unnecessary. The Sault Tribe counters that the word "consolidation" was included to cover any land exchanges that both *reduce* the Sault Tribe's overall acreage and bring together noncontiguous parcels. This reasoning is implausible, not because land exchanges never happen, but because Congress cannot possibly have included the word "consolidation" to cover only land purchases that *reduce* tribal acreage. Tribes do not go about attempting to reduce their landholdings, and Congress in distributing judgment funds to tribes does not go out of its way to be sure they have the authorization to do so. And even if one were concerned with that scenario, and had for some reason determined to use the phrase "enhancement of tribal lands" instead of simply saying "land purchases," one *still* would not then describe a small category of acreage-reducing land exchanges by tacking the word "consolidation"

on the front. Nor does it make any difference that consolidation can refer to purchase of fractionated interests. Again, to do what the Sault Tribe seeks, Congress could simply have provided that all land purchases with interest must be taken into trust. It did not. Instead, it limited trust-eligible purchases to those that consolidate or enhance the tribe's existing lands.

The Sault Tribe also offers the bizarre argument that disjunctive terms cannot be read as closely related terms. Sault Opp. at 40. Its sole citation in support of this argument is *Loughrin v. United States*, 573 U.S. 351, 357 (2014). In *Loughrin,* the Supreme Court held that where two clauses in a criminal statute were disjunctive, the second clause should not be read as "a mere subset of its first," wholly subsumed, because this would turn the word "or" into the word "including." *Id.* Here, interpreting "consolidation" and "enhancement" as close correlates, each connoting some geographic relationship to existing lands, makes linguistic and intuitive sense, comports with common usage, and does not make either a subset of the other. *See* Doc. 48 at 15.

C. The Sault Tribe's other arguments contravene controlling law.

The Sault Tribe assembles nothing less than a wholesale attack on the required approach to statutory interpretation: interpreting a statute as a whole, in context, in light of existing legislation. It derides this approach, which is mandated by controlling precedent, as "policy-based" (Sault Opp. at 15), because it does not like the consequences. But the Sault Tribe's protestations notwithstanding (*id*. at 49-50), the principle identified in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), that Congress does not "hide elephants in mouseholes," remains a fundamental check on all litigants (not just agencies) who seek implausible windfalls from distorted interpretations of federal statutes. For example, in *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 702–03 (D.C. Cir. 2016), the court upheld the FCC's reliance on the "mouseholes" principle in rejecting the plaintiff trade association's attempt to impose its overly broad reading of the statutory term "interactive computer service" on the agency. Here, Congress should not be

presumed to have hidden in the term "enhancement" the *carte blanche* that the Sault Tribe seeks to upend Indian gaming in Michigan and violate § 9 of its compact. *See* Doc. 48 at 24-25.

Nor is the Court prevented from considering MILCSA here in the context of other existing law including IGRA, merely because the agency did not rely on that ground. *See* Sault Opp. at 54. To the contrary, as discussed in briefing on the motion to intervene, the Sault Tribe itself put the legality of gaming at issue, and Interior assumed the lawfulness of such activity in its decisions. Doc. 33 at 9-10. Moreover, for reasons NHBP previously explained, "[t]he rule established in *Chenery only applies* to agency actions that involve policymaking or other acts of agency discretion," not statutory interpretation. *Id*. at 13 (quoting *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304–06 (D.C. Cir. 2015)) (emphasis original).

The Sault Tribe falls back to the position that Congress was aware of IGRA and made a "considered choice" to allow gaming on all its MILCSA lands purchased with interest. Sault Opp. at 42. But this undercuts Sault Tribe's entire argument, because MILCSA does not mention gaming and Congress would not have smuggled such a sea change into the word "enhancement."

Despite its criticisms of contextual interpretation, the Sault Tribe argues that the rejection of its own strained interpretation would frustrate Congress's purposes in enacting MILCSA. Sault Opp. at 41, 46. But there is no support for the Sault Tribe's argument that Congress intended for MILCSA to expand Sault Tribe's landholdings into the Lower Peninsula. Congress could have said, but did not say, that the Sault Tribe may have land purchased with interest taken into trust wherever its members reside. Instead, Congress expressly referenced the Sault Tribe's existing tribal lands and commanded that interest purchases must consolidate or enhance those existing tribal lands. It is only the Sault Tribe that claims a policy of expanding its lands into the Lower Peninsula. There is no support for the Sault Tribe's attempt to attribute that policy to Congress.

Further, the Sault Tribe cannot prevent the Court from considering IGRA and § 9 by invoking Rule 19. If, as the Sault Tribe argues, Michigan is a required party that cannot be joined, then the remedy is to dismiss the Sault Tribe's case, not to ignore the gaming consequences of a decision here. And if the record lacks information about the meaning of § 9 that the Sault Tribe thinks is relevant, that is its own fault. The Sault Tribe itself put the legality of its gaming at issue, and the issue was addressed below by the Intervenor Tribes. AR183-184; AR214-217.

Nor does it aid the Sault Tribe to resort to § 108(c)(4). Building a casino is not an expense "for educational, social welfare, health, cultural, or charitable purposes," under § 108(c)(4), but is for "economic development beneficial to the tribe," under § 108(b)(1). It cannot evade this distinction in the statute by pledging to spend a portion of *casino profits* "for educational, social welfare, health, cultural, or charitable purposes." Sault Opp. at 61-62. Again, the Sault Tribe is asking the Court to use language in a way that American English speakers do not. The *interest* funds would still have been spent "for" a casino no matter what the casino profits were spent on.

Finally, this Court has declined "to apply the Indian law canon where the interests of all tribes are not aligned." *Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018), *appeal dismissed*, No. 18-5327, 2019 WL 2563220 (D.C. Cir. June 19, 2019). And *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003), is not to the contrary, because the court there did not consider competing tribal trust interests; instead it balanced the interests of one tribe against those of local municipalities.

CONCLUSION

The Court should dismiss the complaint as to the Lansing Parcels, deny the Sault Tribe's motion for summary judgment, and grant all defendants' cross-motions for summary judgment.

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