[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 20-5123, 20-5125, 20-5127, 20-5128

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
PLAINTIFF-APPELLEE,

v.

DAVID LONGLY BERNHARDT, in his official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants-Appellants,

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN and NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,
Appellants,

MGM GRAND DETROIT, L.L.C., DETROIT ENTERTAINMENT, L.L.C., and GREEKTOWN CASINO, L.L.C.,
Appellants.

On Appeal from the United States District Court for the District of Columbia, Case No. 1-18-cv-02035-TNM (Hon. Trevor N. McFadden)

BRIEF OF PROFESSORS ALEXANDER T. SKIBINE, RICHARD B. COLLINS, AND ROBERT J. MILLER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for *amici* certifies the following:

A. Parties and Amici. Except for *amici*, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Federal Appellants.

B. Rulings under Review. References to the rulings at issue appear in the Brief for Federal Appellants.

C. Related Cases. Counsel is not aware of related cases other than those consolidated in this action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(b) and 26.1 and D.C. Cir. R. 26.1, *amici* certify that they are not corporate entities for which a corporate disclosure statement is required.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Fed. R. App. P. 29(a)(3) and D.C. Cir. R. 29(b), *amici* certify as follows. Plaintiff-Appellee Sault Ste. Marie Tribe of Chippewa Indians and Appellant Nottawaseppi Huron Band of the Potawatomi consent to *amici's* participation as *amicus curiae*. Federal Appellants indicate that they have no objection to such participation provided that *amici* observe Fed. R. App. Pro. 29. Appellants MGM Grand Detroit, L.L.C, Detroit Entertainment, L.L.C., and Greektown Casino, L.L.C have indicated that they do not oppose *amici's* participation. Counsel for *amici* requested consent from Appellants Saginaw Chippewa Indian Tribe of Michigan, but did not receive a response. Accordingly, a motion for leave to participate as *amici curiae* has been submitted concurrently with this brief.

Pursuant to D.C. Cir. R. 29(d), *amici* certify that this amicus brief is necessary because it explores an essential framework of statutory interpretation unique to Indian law – the so-called "Indian canon of statutory construction" – that

has significant bearing on this case and the field of Federal Indian law generally, and that has not fully been addressed in the parties' briefs.

/s/ Samuel F. Daughety
Samuel F. Daughety

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici curiae*, contribute money that was intended to fund preparing or submitting this brief.

s/ Samuel F. Daughety
Samuel F. Daughety

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GLOSSARY

Settlement Act	Michigan Indian Land Claims Settlement Act
Fund	Self-Sufficiency Fund
Interior	U.S. Department of the Interior
Indian canon	Indian canon of statutory construction
Sault Tribe	Sault Ste. Marie Tribe of Chippewa Indians

INTEREST OF *AMICI CURIAE*

Amici are professors of Federal Indian law, and have extensive experience studying and teaching on various aspects of Federal Indian law, Administrative law, and matters of statutory interpretation. They share a scholarly interest in the normative canons of statutory interpretation specific to the field of Indian law, and their proper application in cases involving a federal agency's interpretation of statutes enacted for the benefit of Indians. *Amici* offer a unique perspective on the history and modern-day application of the so-called "Indian canon of statutory construction" that has significant bearing on this case and the field of Federal Indian law generally, and that has not been fully addressed by the parties. *Amici's* participation will aid the Court as it considers this important doctrine and its application to this case. *Amici* submit this brief solely on their own behalf and not as representatives of their universities. *Amici* are listed below, with institutional affiliations provided for purposes of identification only:

Alexander T. Skibine, S.J. Quinney Professor of Law

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SUMMARY OF ARGUMENT

Amici agree with Appellees that the District Court below was correct to determine that the Sault Ste. Marie Tribe's ("Sault Tribe's") land claim settlement statute is not ambiguous in that the proposed transfer of land into trust would clearly "enhance" tribal landholdings. Were this Court to find the language at issue ambiguous, however, it should apply the Indian canon of statutory construction ("Indian canon") to determine the meaning of the Michigan Indian Land Claim Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997) ("Settlement Act"). This brief provides the context for the development of the Indian canon in determining ambiguities in statutes, like the Settlement Act, enacted for the specific benefit of Indians, and how the canon should be applied in this case. First, the Indian canon is a normative or substantive canon that must be applied to resolve ambiguities in such statutes, irrespective of the views of tribes that are not beneficiaries under the statute. Second, *Chevron* deference is not applicable to this case. Finally, even if *Chevron* deference applies, the Department of the Interior's interpretation is not a permissible or reasonable interpretation of the statute.

ARGUMENT

I. The Indian canon of statutory construction should be applied to resolve ambiguities in the Settlement Act in favor of the Sault Tribe.

A. *The Indian canon of statutory construction is a normative canon applied to resolve ambiguities in the interpretation of statutes, such as the Settlement Act, specifically enacted for the benefit of Indians.*

The Indian canon has its origin in *Worcester v. Georgia,* 31 U.S. 515 (1832), where Chief Justice John Marshall construed the treaty protecting the sovereignty of the Cherokee Nation liberally and according to how the Cherokees would have understood the treaty at the time of its signing. Chief Justice Marshall's "methodology of Indian treaty interpretation" gives rise to the modern Indian canon of statutory construction, which is generally "taken to be beyond serious jurisprudential doubt," and "much of federal Indian law scholarship" likewise "rests on a positive allegiance to the perceived techniques of *Worcester* and later cases." Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 398 (1993).

As demonstrated by Professor Frickey, Justice Marshall grounded the Court's interpretation of the treaty in the values of structural sovereignty, viewing the treaties as organic documents integrating the Indian Nations into the United States. *Id.* at 408. Professor Frickey further demonstrated how from the treaty canons, the rule emerged that Indian treaties could only be abrogated by clear

evidence of congressional intent. As the Supreme Court explained in *United States v. Dion*, 476 U.S. 734 (1986), any intention by Congress to diminish Indian treaty rights must "be clear and plain" because such rights "are too fundamental to be easily cast aside." *Id.* at 738-740. The idea behind the rule was that while the Court acknowledged that Congress possessed plenary authority to abrogate such treaties, it would insist that tribal rights not be taken accidentally or by mistake through congressional legislation when the Congress in fact had never actually considered the effect of the statute on treaty rights.

Although *Worcester* involved the interpretation of a treaty, the Court in *Choate v. Trapp,* 224 U.S. 665 (1912) extended the reasoning in *Worcester* to the interpretation of statutes enacted specifically for the benefit of Indians. The issue in *Choate* was whether the State of Oklahoma could tax Indian lands, and the ambiguity derived from what appeared to be conflicting statutes. Acknowledging the "general rule that tax exemptions are to be strictly construed," the Court nevertheless ruled in favor of the Indians because:

> [I]n the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation . . . This rule of construction has been recognized without exception, for more than a hundred years . . .

Id. at 674-75; *see also*, *Alaskan Pac. Fisheries v. U.S.*, 248 U.S. 78, 89 (1918).

Although *Choate* and some other early cases rely on similarly outdated "weak and defenseless" rationales to explain the canon, scholars have shown that the Court eventually used the same kind of reasoning initially applied to treaty abrogation to make sure that statutes did not unintentionally abrogate tribal rights in non-treaty interpretation contexts. *See,* Scott C Hall, *The Indian Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn L. Rev. 495, 538-543 (2004), Frickey, *supra*; *see also, Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51-52 (1978); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982).

In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), which concerned whether the State could tax tribal royalties from oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C §§ 396a-396g, the State invoked the presumption against implied repeals to argue that its taxation power remained intact. The Court disagreed:

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."

Id. at 766 (quoting *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985))); *see also*, *County of Yakima v. Confederated Tribes and Bands of the*

Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (quoting *Blackfeet Tribe*, 471 U.S. at 766).

The fact that the Indian canon is "rooted in the unique trust relationship between the United States and the Indians," makes it, in essence, a normative canon. As Professor Frickey notes, normative canons:

> [G]o outside the document and create an exception to the basic interpretive approach for cases that implicate certain important values. In most instances, these policy-based canons operate either as tiebreakers at the end of the basic interpretive analysis or as rebuttable presumptions at the outset of the interpretive process. The force this kind of canon has in a given case is likely to be linked to how well a vigorous application of it would promote the canon's underlying purposes on the facts."

Frickey, supra, at 414.

The Indian canon is a normative canon because it recognizes that the trust relationship constitutes a background norm that should be respected when interpreting statutes enacted pursuant to Congress's role as a trustee for the tribes. There is a consensus that the trust relationship arose from the treaties signed

between the United State and the tribes,[1] as well as doctrines of federal common law such as the doctrine of discovery and the plenary power doctrine, and the many statutes governing Indian affairs that Congress enacted pursuant to this plenary power.[2] In this fashion, because the plenary power of Congress initially derived from the trust relationship, it was logical to assume that this plenary power was being exercised by the trustee for the benefit of the tribes.

Of course, the Indian canon, or for that matter any other normative canon of construction, only comes into play if there is an ambiguity. For instance, in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), the issue was whether tribal gaming revenues were exempted from federal taxation under the Indian Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988),Justice Breyer for the Court stated that although canons are "designed to help judges determine the Legislature's intent as embodied in particular statutory language . . . other circumstances evidencing congressional intent can overcome their force. In this instance, to accept as conclusive the canons on which the Tribes rely would

[1] In most of these treaties, the tribes agreed to lay down their weapons and cede huge amounts of territory to the United States. In return, the United States agreed to "protect" the tribes and guarantee the integrity of their remaining territories.
[2] *See United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Although the focus on the trust relationship as giving Congress plenary power has in more recent times migrated to the Indian Commerce Clause, U.S. Const., Art. 1 § 8, the power remains plenary unless it affects other parts of the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." 534 U.S. at 94. Finding no ambiguity, the Court ruled that the tribal revenues were taxable.

Finding the statute ambiguous, Justice O'Connor in dissent thought that the Indian canon should have decided the case: "'[R]ooted in the unique trust relationship between the United States and the Indians,' the Indian canon presumes congressional intent to assist its wards to overcome the disadvantages our country has placed upon them. Consistent with this purpose, the Indian canon applies to statutes as well as treaties: The form of the enactment does not change the presumption . . . ." 534 U.S. 84, 99–100 (2001).

The Sault Tribe's section of the Settlement Act is in many ways the modern equivalent of a treaty. It was vigorously negotiated by the Tribe and the United States before being enacted by the Congress. As with a treaty interpretation case, not only must ambiguities be resolved to the benefit of the Indians but the language must be construed the way the Indians would have understood its terms at the time of the signing. *See Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999).

B. *The fact that tribes that are not beneficiaries under the Settlement Act disagree with the Sault Tribe's interpretation of the statute is irrelevant to the application of the Indian canon.*

Intervenors in this case—two tribes with existing casinos and three non-tribal commercial casinos—object to the application of the Indian canon on the ground that not all tribal interests are aligned. But those objections rest on a fundamental misunderstanding of statutory interpretation and the role of the Indian canon. A statute is not a "chameleon" that changes meaning based on the identity of the litigants. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). The canons are "means of giving effect to congressional intent, not of subverting it" based on particular claims by particular parties in a given case. *Id.* at 382. The Indian canon is likewise a rule for "choosing between competing plausible interpretations of a statutory text." *Id.* at 381. It is not about identifying the interests of the parties, but about discerning the intent of Congress in enacting the statute. The Supreme Court has never refused to apply the Indian canon just because tribes are not united in their interpretation of the statute in question. The closest the Court came to this issue was in *Negonsott v. Samuels*, where the Court in refusing to apply the Indian canon stated:

> It is not entirely clear to us that the Kansas Act is a statute "passed for the benefit of dependent Indian tribes." But if it does fall into that category, it seems likely that Congress thought that the Act's conferral of criminal jurisdiction on the State would be a "benefit" to the tribes in question. We see no reason to equate

> "benefit of dependent Indian tribes," as that language is used in *Bryan,* with "benefit of accused Indian criminals," without regard to the interests of the victims of these crimes or of the tribe itself.

507 U.S. 99, 110 (1993) (quoting *Bryan*, 426 U.S. at 392).

As *Negonsott* recognized, the crucial question in applying the Indian canon is to determine whether a statute was enacted for the benefit of Indians or Indian tribes, and if so, which Indian tribe(s). The cases declining to apply the canon due to intertribal conflict either have involved a tribe trying to claim another tribe's treaty rights by "affiliation," *see Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334, 340 (9th Cir.1996), or statutes like the Indian Gaming Regulatory Act that already balance competing tribal interests and were enacted for the benefit of all tribes, not for the benefit of any particular tribe. See *Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015).

In contrast, the sections of the Settlement Act at issue here were enacted only for the benefit of the Sault Tribe, and no other tribe. This fact is conclusive. In this way the Sault Tribe's settlement is similar to the dozens of Indian water rights settlements that have been enacted by Congress in the last 45 years. In the arid West, more water for one tribe may mean less available water for other Indian tribes. Despite this fact, no court has ever indicated that ambiguities in one of these settlements should not be construed to the benefit of the tribe for which Congress enacted the settlement.

In many respects, this case is strikingly similar to one involving the Tohono O'odham Nation. There, as in this case, Congress enacted a settlement statute (the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. 99-503, 100 Stat. 1798 (1986)) to benefit a particular tribe (the Tohono O'odham Nation). The Nation sought to take land into trust under the statute, and other tribes sought to block the trust acquisition because they were concerned that the land would become gaming-eligible and that a new casino would compete with their existing casinos. Faced with these competing tribal interests, the Department of the Interior nevertheless had no trouble applying the Indian canon to interpret the statute to allow the Nation to take the land into trust. *See* Letter from Interior to Tohono O'odham Nation (July 3, 2014), https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-027180.pdf. As Interior explained, the statute "was enacted for the benefit of and to remedy the impaired rights of one tribe." *Id*. at 12. An interpretation that furthers the tribe's "self-sufficiency and self-determination through the acquisition" of trust land ensures that the statute's "intended beneficiary . . . receives the intended benefits." *Id*. Interior specifically rejected the same arguments made by the objecting tribes here, and instead found that the Indian canon does not apply where objecting tribes offer a competing statutory interpretation to serve their own interests. *See id*. at 15-17.

In short, the point of the Indian canon is to discern the meaning of the statute that Congress enacted – not the interests of different litigants in cases that may later arise concerning the statute. The Settlement Act was enacted in relevant part to remedy egregious wrongs done to the Sault Tribe when its lands were taken without adequate consideration in violation of the United States' trust responsibilities. Ambiguities in the legislation should be interpreted to the benefit of the Sault Tribe regardless of whether other tribes might prefer that the Tribe have fewer or less significant rights under the language the Tribe negotiated with Congress.

II. The Indian canon is applicable at *Chevron* Step one, and is determinative of the interpretive issue here.

Justice Scalia described the *Chevron* framework as follows:

> [W]e begin with a description of that case's now-canonical formulation. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 296 (2013), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Because Interior is generally entitled to *Chevron* deference for reasonable interpretations of ambiguous provisions of statutes it administers, there is a recurring issue over how courts should resolve the conflict between Interior's claim to *Chevron* deference and a competing statutory interpretation dictated by a normative canon like the Indian canon. The conflict exists because both the *Chevron* framework and the Indian canon only come into play where there is a statutory ambiguity to resolve. In this case, controlling Circuit precedent resolves the conflict: the Indian canon controls, and Interior's interpretation receives no *Chevron* deference.

A. *This Court consistently has found that the Indian canon trumps a contrary interpretation claimed by an agency.*

As one noted scholar has observed, "The largest group of cases to consider the place of normative canons in review of agency interpretations treats them as the type of 'traditional tools' that courts may use to resolve textual ambiguity, even when faced with an agency construction that might otherwise be entitled to deferential *Chevron* review."[3]

[3] Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 77 (2008).

While as noted above the Supreme Court has never had occasion to squarely address the issue, this Court has held that the Department of the Interior must consider the Indian canon when interpreting ambiguous statutes enacted for the benefit of Indians and Indian tribes, *see, e.g.*, *California Valley Miwok Tribe v. United States*, 515 F.3d 1262,1266 n.7 (D.C. Cir. 2008), and that, "even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation 'careful consideration' but 'we do not defer to it.'" *Cobell v. Norton,* 240 F.3d 1081, 1101 (D.C. Cir. 2001), quoting *Muskogee Nation v. Hodel*, 851 F.2d 1439, 1445 n. 8 (D.C. Cir. 1988); *see also Albuquerque Indian Rights v. Lujan,* 930 F.2d 49, 59 (D.C.Cir.1991).

Other circuits, including the Tenth Circuit, have endorsed this Court's view. *See, e.g., Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1461–62 (10th Cir.1997). Because, as noted above, Congress acts as a trustee for the benefit of the Indians when enacting statutes for their benefit, an agency charged with interpreting an ambiguous statute enacted for the benefit of a tribe also acts in a trust capacity. As Tenth Circuit Judge Seymour put it:

> The Supreme Court has implicitly recognized that stricter standards apply to federal agencies when administering Indian programs. When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best

> interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator.

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984) (Judge Seymour concurring). Put another way, a Congress that enacted such a law could not have intended to delegate to the agency the power to interpret the ambiguous provision without considering and applying the Indian canon.

Like the Tenth Circuit, this Court's approach is normatively sound. As stated in Part I, the Indian canon is a substantive rule of statutory interpretation that requires courts to construe Indian-affairs statutes, where possible, to the benefit of tribes for whom the statutes were enacted. It accordingly forecloses interpretations that diminish or impair tribal interests or rights unless that was plainly the intent of Congress. The reason the Indian canon trumps *Chevron* at step one is therefore simple: Where Congress has not spoken clearly, the agency lacks a sufficient basis for an interpretation adverse to the tribe. In other words, unlike in other statutory contexts, ambiguity in Indian-affairs statutes will not support agency gap-filling that would work to the harm of Indians if there is a reasonable alternative construction that does not entail such harm.

The closest analogy is the canon of constitutional avoidance, which serves a similar function by ensuring that only Congress can take action that goes up to the constitutional line. In that context, the Supreme Court has made clear that the canon of constitutional avoidance prevents agencies from relying on statutory

ambiguity to invite a constitutional problem where an alternative construction avoids the problem. Instead, the canon requires that courts—without deference to the agency—adopt any reasonably available construction that avoids the constitutional problem. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75, 577 (1988) ("Even if [the agency's] construction of the [statute] were thought to be a permissible one . . . we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute]."). The avoidance canon serves the value of constitutionalism by requiring Congress to be the one who goes up to the constitutional line if it wishes to do so, leaving agencies no discretion to fill gaps in a potentially unconstitutional direction. Instead, agencies only have discretion to interpret statutes in a manner that moves away from the constitutional line.

The Indian canon provides a similar role against agency action that interferes with tribal rights. It allows the Congress to impose its will on Indian tribes but only where that is the clear intent of Congress. Application of the Indian canon at step one thus preserves the unique trust relationship between the United States and tribes by "promot[ing] the ongoing sovereign-to-sovereign relationship" and by ensuring that Congress alone bears "responsibility to determine expressly whether future exercises of colonialism should occur." Philip P. Frickey, *Marshalling Past*

and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 428 (1993).

The majority of courts and commentators have therefore conceived normative canons like the Indian canon as playing an important step-one role in resolving ambiguity before courts identify any gap that may be filled by an agency. *See* Bamberger, *supra* note 3.

B. *The Indian canon is applicable in this case at Chevron Step one, and thus this Court need not proceed any further.*

The court below correctly found the statute not to be ambiguous. Op. 28. The court further correctly found that, even if the stature were ambiguous, the Indian canon favored the Tribe's interpretation. Op. 29. In doing so, the court noted that, in *Cobell v, Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (*Cobell XXII*), this Court acknowledged that when faced with a conflict between *Chevron* deference and the Indian canon, "*Chevron* deference does not disappear . . . although that deference applies with muted effect." *Id.* at 812. After noting that during the next eleven years the D.C. Circuit never explained what this "muted effect" meant, the District Court (at Op. 40-41) essentially adopted the reasoning used by Chief Judge Howell in *Koi Nation of N. Cal. v, Dep't of Interior*, 361 F. Supp. 3d 14 (D.D.C. 2019), stating:

> The most sensible way to reconcile *Cobell XXII, Muscogee*, and other decisions in between is to say that "muted *Chevron* deference" requires the Court to

> give the Department's interpretation "careful consideration." *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140, (1944) (holding that agency interpretations "not controlling upon the courts by reason of their authority" are still "entitled to respect" insofar as they have "power to persuade.")

Op. 41. The lower court concluded, however, that while this "careful consideration" may in some cases reveal that a tribe's interpretation is unreasonable, the Sault Tribe's interpretation was reasonable and therefore, "the Indian canon trumps *Chevron* deference here." *Id.* (brackets and quotations omitted).

The court's reasoning is correct. In *Cobell XXII*, this Court correctly held that the Indian canon requires that courts adopt any reasonable interpretation of an ambiguous Indian-affairs statute that favors the Indians—even in the face of a contrary agency interpretation. However, it rejected an interpretation that would have deprived Interior of any discretion as to the methodology or scope in conducting an accounting of the trust funds in that case so as to provide "the trust beneficiaries the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." 573 F.3d at 813. *Cobell XXII*'s reference to "muted effect" meant only that the agency had some discretion in that context to make the judgment calls necessary to fulfill its statutory duty while being conscious of the cost and resources at its disposal.

The statute at issue here, however, is nothing like the statutes involved in the *Cobell* litigation. The Settlement Act imposes on the Secretary a single duty as to the Sault Tribe: to take land into trust for the benefit of the Sault Tribe after verifying that the funds used to purchase the land came from the special "Self Sufficiency Fund" created under the Settlement Act. That is enough to dispense with the use of any "muted effect" deference at issue in *Cobell*. And even if the District Court's citation to *Skidmore v. Swift* suggests that "muted effect" deference is comparable to so-called "Skidmore deference,"[4] Interior's reasoning here would not have the force to persuade under *Skidmore* for essentially the same reasons that it is not a permissible or reasonable interpretation under *Chevron* step two (discussed in the next section).

"However one construes the relationship between *Chevron* and *Skidmore* deference, a few things are certain . . . *Skidmore* is less deferential than *Chevron*." Hickman and Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, at 1249 (2007). Therefore, if as argued below, Interior's

[4] Under *Skidmore v. Swift*, even if there was no delegation of interpretive authority to the agency, a court is required to give appropriate consideration to the administrative interpretation based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

interpretation is not permissible under Chevron step two, a fortiori, it will not prevail under *Skidmore* deference.

C. *Even if the relevant language in the Settlement Act is ambiguous, Interior's interpretation is not permissible under Chevron step two.*

As noted above, the relevant language at issue in the Settlement Act is not ambiguous, and even if it were, the Indian canon controls, rendering consideration of *Chevron* step two unnecessary. Were this Court to proceed beyond step one, however, consideration of the Indian canon reveals Interior's interpretation to be unreasonable. Although there is a perception that agencies usually prevail at *Chevron* step two, members of this Court have recently called for a "muscular use" use of step two to prevent "inappropriate administrative adventure." *Glob, Tel Link v. FCC* 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman J., concurring). Judge Silberman further added "Chevron's second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Id.* at 418**.**

Consistent with this approach, Interior's interpretation here is not permissible under *Chevron* step two because in its reasoning, Interior failed to follow applicable background norms such as the ones reflected in the Indian canon or statutory interpretation. As scholars have demonstrated, *Chevron* step two has not been well developed by the Supreme Court and the methodology used at step

two differs among the Circuits.[5] Some influential scholars have argued that the step two inquiry is very similar to the APA's arbitrary and capricious inquiry,[6] and as others have noted, the Supreme Court seems to endorse this approach.[7] For instance in a 2011 opinion, Justice Kagan, speaking for the Court, stated "Were we to [use *Chevron* step two], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance." *Judulanger v. Holder*, 565 U.S. 42, 52 (2011). Although a court's inquiry under the arbitrary and capricious standard may take many forms, one generally accepted formulation is that an agency's decision can be set aside if the decision was made without taking into account all the "relevant factors," or if it failed to consider important aspects of the problem. *See Motor Vehicle v. State Farm*, 463 U.S. 29 (1983).

Scholars have argued that one sensible way to reconcile *Chevron* with other normative canons is to require agencies to take into account these normative canons at *Chevron* step two. *See* Bamberger, *supra* note 3. Other scholars have

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[5] *See* Ken Barnett and Christopher J. Walker, Chevron *Step Two's Domain*, 93 Notre Dame L. Rev. 1441 (2018).

[6] *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step II Reconsidered*, 72 Chi. Kent L. Rev. 1253 (1997), Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 Fordham L. Rev. 2359 (2018).

[7] *See* Barnett and Walker, *supra* at note 5 ("Indeed, the Supreme Court may have held as much in decisions between *Iowa Utilities Board* and *Utility Air Regulatory Group*. In *United States v. Mead Corp.*, the Court quoted the APA's arbitrary-review provision immediately after describing *Chevron* step two." *Id.* at 1455)

argued for the same principle to be specifically applied to the Indian canon.[8] Under such an analysis, in order to be considered permissible or reasonable under step two, an agency would have to reasonably explain why it had not applied such normative canons in coming up with its interpretation of an ambiguous statute. In contrast, an agency's explanation for its interpretation that does not account for the Indian canon would be arbitrary and capricious.

In her December 21, 2010, letter, rejecting the proposed land transfer for the Bay Mills Indian Community, the Solicitor for the Department of Interior mentioned the Indian canon with respect to defining the meaning of the words "held as Indian lands are held," and proceeded to provide a detailed explanation why she believed that this expression could not reasonably be interpreted to mean lands held in trust for the benefit of Indians as advocated by Bay Mills. *See* AR462. Interestingly, with respect to determining the meaning of the words "consolidation and enhancement of tribal landholdings," the Solicitor never mentioned the Indian canon, preferring instead to argue that the term "enhancement" was not ambiguous and could not possibly mean what the tribe was arguing. *See* AR460. The January 19, 2017 decision letter on the Sault Tribe land

[8] *See* Hall, *supra*, at 563-565; Alex Tallchief Skibine, *The* Chevron *Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the 'Tribes as States' Section of the Clean Water Act?*,11 St. Thomas L. Rev. 15, 25 (1998)).

transfer application similarly dismissed the Indian canon in a mere footnote, stating "We, however, see no ambiguity in Congress's use of the word "enhance" and therefore, do not look to the Indian canon." AR973 n.31.

The Indian canon renders consideration of *Chevron* step two unnecessary, but in the event this Court chooses to undertake a step two analysis, Interior's misapplication of the Indian canon clearly is unreasonable in light of the foundational background norms that have shaped federal Indian law throughout history. These background norms include the policy of self-determination and the general trust relationship existing between Indian nations and the United States, both of which are reflected in the Indian canon of statutory construction, and both of which clearly counsel in favor of the Sault Tribe's interpretation of the statute. Interior's interpretation, on the other hand, is inconsistent both with the Indian canon and the purpose of the Settlement Act: to remedy the historic taking of the Sault Tribe's land. Interior's interpretation is thus not entitled to deference at *Chevron* step two.

III. Congress did not intend to delegate interpretive authority to Interior in this case.

Under *United States v. Mead*, 533 U.S. 218, 229 (2001), before *Chevron* deference can be applied, a court must find that Congress intended to delegate to the agency the authority to interpret the statute with the force of law. Normally, such delegation can be presumed if the agency has used somewhat formal

administrative proceedings, such as rulemaking or on the record adjudication, to interpret the statute. As stated by the Court in *Mead* "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 229-31. The *Mead* Court did add that "as significant as notice-and-comment is in pointing to *Chevron* authority . . . we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," 533 U.S. at 231. However, as in *Mead*, there are strong reasons to doubt that Congress intended to delegate interpretive authority to the Secretary here.[9]

As noted above, the sole duty delegated to the Secretary under the Settlement Act is to accept land in trust acquired by the tribe using certain funds. *See* Section 108(f). No duty (and no interpretive authority to carry out such duty) is delegated to the Secretary in any other provision. Indeed, if anything, the

[9] *Mead* concluded that "[t]here are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Custom's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here." 533 U.S. at 231.

statutory text underscores the deference that should be *afforded to the Sault Tribe*. For instance, Section 108 (a)(2) specifies that it is the (Tribal) Board of Directors, and not the Department of the Interior, that shall be the trustee of the Self–Sufficiency Fund and that shall be in charge of administering the Fund. Section 108 (b)(1) provides that "The principal of the Self–Sufficiency Fund shall be used exclusively for investments or expenditures *which the board of directors determines*… will consolidate or enhance tribal landholdings." (Emphasis added). And Section 108 (2) provides that "Notwithstanding any other provision of law, after the transfer required by paragraph (1) the 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." (Emphasis added).

The minimal role given to the Secretary argues against a finding that Congress delegated to Interior the power to interpret any ambiguities within the statute with the force of law.

CONCLUSION

The judgment of the District Court should be upheld.

Respectfully Submitted,

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December 29, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because it contains 6,057 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1).

December 29, 2020

/s/ Samuel F. Daughety
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CERTIFICATE OF SERVICE

I certify that on December 29, 2020 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

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