IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al.*,

Defendants, and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,

Defendant-Intervenors.

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

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI AND SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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CERTIFICATE OF COMPLIANCE WITH MEET AND CONFER REQUIREMENT

Consistent with this Court's orders on intervention (Doc. 36) and the instant briefing schedule (Minute Entry dated Sept. 28, 2022), counsel for Intervenor Defendants met and conferred by email and telephonically to discuss whether it would be possible to file a single brief. Counsel determined that, while the approach of the Intervenor Tribes could be set forth in a consolidated brief, it would not be feasible or efficient for all Intervenor Defendants to file a single brief. Consistent with the divergent interests between the Intervenor Tribes and Casinos, the Tribal Intervenors intend to address particular issues that the Intervenor Casinos do not, and *vice versa*. The Intervenor Defendants nonetheless committed to minimize overlap between briefs, and subsequently exchanged preliminary drafts with one another in furtherance of this objective. This brief addresses the issues of most immediate concern to the Intervenor Tribes within the page limitations had the Tribes filed separately. The Intervenor Tribes note in this brief where they incorporate by reference the arguments set forth in the briefs being filed today by the Intervenor Casinos.

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INTRODUCTION

Intervenor Tribes Nottawaseppi Huron Band of the Potawatomi ("NHBP") and Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Chippewa") hereby jointly oppose Plaintiff's renewed motion for summary judgment and cross-move for summary judgment on Plaintiff's remaining claims. The Department of the Interior correctly rejected Plaintiff Sault Ste. Marie Tribe of Chippewa Indians' ("Sault" or "Tribe") attempt to characterize their plan to open a casino in the Detroit area—hundreds of miles from their reservation—as a "social welfare" project. Interior correctly applied the plain language of the Michigan Indian Land Claims Settlement Act ("Michigan Act"), Pub. L. No. 105-143, 111 Stat. 2652 (1997). The Act distinguishes between expenditures for economic development projects and distributions for social welfare purposes. *Compare* Michigan Act § 108(b)(1)(A), *with* § 108(c)(4), (5). To be eligible for trust status, purchases of land must be made with "interest or other income" of Sault's Self-Sufficiency Fund ("Fund"). *Id.* § 108(f). Distributions for social welfare purposes can come from "interest and other investment income" of the Fund, but economic development expenditures must be paid from Fund principal. *Id.* § 108(b), (c). As Sault repeatedly admits, its purchase of land for a planned casino is an economic development expenditure. Sault cannot transform it into a distribution of Fund income for social welfare purposes by subjectively willing it to be so, or by representing that it intends to transfer a small portion (5%) of net revenues to *other funds* Sault identifies as having charitable purposes. Similarly, Sault's statements about possibly using a portion of casino profits for unspecified future improvements to other properties hundreds of miles away do not transform its purchase of a proposed casino site into an enhancement of those other lands. Moreover, Sault's arguments improperly assume that a casino on the Sibley Parcel could legally generate gaming revenue, when in fact it would violate Sault's compact and the Indian Gaming Regulatory Act.

BACKGROUND

The Indian Gaming Regulatory Act, Sault's Gaming Compact, and the Michigan Act work together to restrict casino locations.

Sault's plans to open a casino on the Sibley Parcel invoke the Indian Gaming Regulatory Act ("IGRA"), which Congress passed in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see also id.* § 2701(4). Under IGRA, tribes may conduct gaming only on "Indian lands," *id.* § 2710(b)(1), (d)(1), meaning "all lands within the limits of any Indian reservation" and "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe," *id.* §§ 2710(b)(1), (d)(1); 2703(4)(A–B). As discussed in prior briefing, Congress was concerned tribes would simply obtain well-situated casino sites in urban areas and then seek to have them recognized as "Indian lands," rather than conduct gaming on existing tribal lands or on lands with a connection to historical and existing tribal lands. *See* Doc. 48 at 9. Therefore, Congress prohibited tribes from locating gaming facilities on lands acquired after IGRA's enactment that are not within or contiguous to a tribe's then-existing or former reservation, subject only to narrow exceptions in Section 20 (25 U.S.C. § 2719). IGRA thus "expressly disfavors . . . off-reservation Indian gaming." *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 85 (D.D.C. 2013).

IGRA also conditions gaming on "conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Seven federally recognized tribes including Sault and Saginaw Chippewa executed identical compacts with Michigan in 1993. AR399; *see also* 58 Fed. Reg. 63,262-01 (Nov. 30, 1993). NHBP executed a substantially similar compact with Michigan in 1998. AR1124; *see also* 64 Fed. Reg. 8,111-01 (Feb. 18, 1999). Each compact included a Section 9 providing that "[a]n application to take land into trust for gaming

purposes pursuant to § 20 of [IGRA] (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written" revenue-sharing agreement with the other tribes. AR3224. Sault has no such agreement for the Sibley Parcel.

The Michigan Act narrowly limits which lands are taken into trust under the Act. The Michigan Act provides for "the fair and equitable division" of certain judgment funds of specified tribes, including Sault. Section 108 requires Sault to establish a Self-Sufficiency Fund to hold its share. Michigan Act § 108(a)(1). "The Act also delineates distinct uses for Fund principal and interest." *Sault Ste. Marie Tribe of Chippewa Indians v. Haaland (SSM)*, 25 F.4th 12, 15 (D.C. Cir. 2022) (citing Michigan Act § 108(b)–(c)). "Fund interest may be expended for only five uses," one of which is "consolidation or enhancement of tribal lands." *Id.* (citing Michigan Act § 108(c)). "If the Tribe acquires lands with Fund interest, those lands 'shall be held in trust by the Secretary for the benefit of the Tribe.'" *Id.* (quoting Michigan Act § 108(f)). "The limited uses for Fund interest contrast with the more expansive uses for Fund principal." *Id.* at 18. For example, Fund principal can be used "for investments or expenditures which the board of directors determines" are "reasonably related to economic development beneficial to the tribe." Michigan Act § 108(b)(1)(A). Economic development projects such as casinos must be purchased with principal. Land purchases that do not enhance or consolidate tribal lands cannot be accomplished with Fund income and are not eligible for trust status under § 108(f). Thus, while there are no provisions addressing Indian gaming in the Michigan Act, "the government's trust decision" applying the Act "implicates whether the Tribe can conduct gaming under IGRA." *SSM*, 25 F.4th at 18.

The Sault Ste. Marie Tribe purchased the Sibley Parcel to attempt to conduct gaming in the Lower Peninsula.

The Sault Tribe has been working with a private real estate developer since 2011 to develop, finance, and construct casinos in the Lower Peninsula under a turn-key agreement. In

litigation with Sault over the agreement, the developer alleges it has expended $9,000,000 on pre-construction costs, including the legal fees associated with Sault's trust application and this ensuing litigation. *See Kewadin Casinos Gaming Authority v. Draganchuk, et al.*, Case No. 22-cv-27, Doc. 1-5 (Complaint) ¶¶ 11, 26–27, 68–69 (W.D. Mich.); *see also id.* Doc. 1-2 Recital I, § 1.2.2 (defining Pre-Construction Period Expenses to include petitioning the United States to acquire the property in trust and asserting through litigation the Tribe's right to engage in gaming).

The Sault Tribe chose to purchase the Sibley Parcel, a 71-acre parcel located in Huron Charter Township, near Detroit and 300 miles from Sault's headquarters, because it believed that locating a gaming facility in the Detroit market would be far more profitable than adding another gaming facility on its existing lands held in trust, which are in Michigan's Upper Peninsula. AR3754–55; AR1939; AR3104; AR3121. "The proximity to a major international airport, and the major highways, and industrial and commercial centers around the New Boston area are all vastly superior in quality to any property currently in the Tribe's inventory." AR2214–15; *see also* AR3759; AR71. Sault holds no trust lands in the Lower Peninsula. AR3102–03. It previously operated a casino in the Detroit area under state law (not IGRA) on land not held in trust, the "Greektown Casino," until, "in order to emerge [from] bankruptcy protection, the Michigan Gaming Control Board voted 4-0 . . . in June 2010 to transfer ownership from [Sault] to new investors." AR1648. Afterward, Sault's "Gaming Authority sought to expand the Tribe's gaming operation by developing casinos in the Lower Peninsula of Michigan." *JLLJ Dev., LLC v. Kewadin Casinos Gaming Auth.*, No. 20-CV-231-RJJ-RSK, 2021 WL 1186228, at *1 (W.D. Mich. Mar. 30, 2021); *see also* AR1648.

Sault's Board of Directors authorized purchase of the Sibley Parcel in Resolution 2012-250 on November 20, 2012. AR3148. In the resolution, the only "authorized purpose[]"invoked

by the Board from the Michigan Act was "the acquisition of land to consolidate or enhance tribal lands." *Id.* The resolution stated that Sault would "seek to have [the Sibley Parcel] placed into . . . trust . . . and establish its legal right to construct and operate a casino gaming enterprise on those lands . . . ." *Id.* The resolution contains a finding that purchase of the Sibley Parcel "will consolidate or enhance tribal lands, and will generate an economic development opportunity beneficial to the Tribe and its members." AR3149. Further, the resolution provides "that at such time as the enterprise contemplated by this resolution begins to generate income from the Gaming Authority to the Tribe, after the payment of all necessary costs and expenses," then in that event, (1) ten percent of the net income from the casino "shall be deposited in the Self-Sufficiency Fund as an addition to principal as authorized by section 108(1)(C) of the Act"; (2) three percent of the casino net income "shall be distributed among and deposited in the following funds: the Elder Health Self-Sufficiency Fund, the Elder Employment Self-Sufficiency Fund, the Funeral Assistance Self-Sufficiency fund, and the Education Assistance Self-Sufficiency Fund"; and (3) two percent of net casino revenue annually "shall be deposited into a fund to establish a college scholarship program for tribal members irrespective of blood quantum." AR3150.

Sault requested that Interior take the Sibley Parcel into trust, emphasizing the economic development benefits, and Interior denied Sault's request.

In June 2014, Sault "sought to have the Sibley Parcel held in trust so that it might build a casino and develop gaming 'if lawfully permitted under [IGRA] and under the Tribe's tribal-state gaming compact with the State of Michigan.'"[1] *SSM*, 25 F.4th at 18; AR3102 n.1. In response to a request from Interior, the Tribe submitted supplemental information on April 22, 2015. *See* AR3744–63. The State of Michigan, NHBP, and Saginaw Chippewa opposed Sault's attempt to

[1] Sault's other application, for the "Lansing Parcels," is no longer at issue. *See* Doc. 71.

build a casino in the Lower Peninsula. In its October 16, 2015 letter to Interior, Michigan explained it "remains strongly opposed to the Tribe's efforts to open gaming operations on isolated parcels hundreds of miles from its reservation lands and completely unrelated to any historical land claim areas of the Tribe." AR1483; *see also* AR1484–87. NHBP and Saginaw Chippewa filed an April 16, 2016 opposition. AR396–433. Sault replied on May 20, 2016. *See* AR434–53. Sault noted it "has never hidden the fact that it intends to use the Parcels at least in part for gaming-related economic development." AR452.

On January 19, 2017, Interior issued an interim decision concluding, among other things, that there was "no evidence that the acquisitions of the parcels would effect a 'consolidation or enhancement of tribal lands.'" AR1749. Interior also determined the Tribe's two arguments here "are legally insufficient to meet the requirements of MILCSA." AR1746 n.25. In particular, "[t]he Tribe . . . may not satisfy the Section 108(c)(4) requirement that Self-Sufficiency Fund interest and income be spend on social welfare purposes by using Self-Sufficiency fund income to start an economic enterprise, which may generate its own profits, which profits might then be spent on social welfare purposes." AR1747 n.25. After the Tribe failed to provide additional information, Interior denied the application on July 24, 2017. The Tribe admitted it could not provide evidence to lend any specificity or concreteness to its general statements about its proposed uses of casino revenues. *See* AR1936 n.4 ("At [the] meeting on April 18, 2017, the Tribe's legal counsel acknowledged they did not believe the Tribe could provide such evidence.").

ARGUMENT

I. SECTION 108(C)(4) AUTHORIZES DISTRIBUTIONS OF FUND INCOME FOR SOCIAL WELFARE, NOT DEVELOPMENT OF CASINOS.

A. The plain language of the Michigan Act forecloses Sault's attempt to characterize its economic development project as social welfare.

Interior correctly denied Sault's application because acquisition of the Sibley Parcel is an "economic development" expenditure, not a distribution of Fund income "for educational, social welfare, health, cultural, or charitable purposes." *Compare* Michigan Act § 108(b)(1)(A)(i), *with* § 108(c)(4). The Michigan Act "delineates distinct uses for Fund principal and interest." *SSM*, 25 F.4th at 15. Fund principal, not interest, may be used for "expenditures which the board of directors determines are reasonably related to economic development beneficial to the tribe." Michigan Act § 108(b)(1)(A)(i). Economic development expenditures are excluded from § 108(c) by their inclusion in § 108(b). "As the Tribe acknowledges, Section 108(c) lists permissible uses for Fund interest, which necessarily excludes other uses. Therefore, land acquired for a use not listed in Section 108(c) would not be properly acquired with Fund interest such that the Secretary must take it into trust under Section 108(f)." *SSM*, 25 F.4th at 18. And Sault's "Board explained the purpose of the [Sibley Parcel] purchase: to engage in gaming on the land and thus 'generate an economic development opportunity beneficial to the Tribe and its members.'" Doc. 91 at 11 (quoting AR3149). Sault's rhetorical attempt to transform its economic development project into a social welfare distribution by pledging a sliver of revenues to various other funds would erase the statutory distinction between uses of Fund principal and interest. Under that misreading, *every* economic development project could be changed to a social welfare expense by the unenforceable promise of a minor future donation from as-yet unearned profits. Statutory compliance cannot be so cynically bought. Accordingly, NHBP and Saginaw Chippewa agree with and join the Detroit casinos' arguments in Sections I and II of their brief, and add the following additional points.

First, Sault itself has repeatedly admitted and emphasized that acquisition of the Sibley Parcel is an economic development project. *See, e.g.*, Doc. 91 at 9 (trust application seeks to remedy inability "to support significant economic development" in Upper Peninsula); AR452; AR2215; AR1888; AR1904; AR3093; AR3149; AR3706; AR3752; AR3877; AR3988. "In an attempt to improve its dire financial position, the Sault Tribe settled on an economic development plan to open a casino in the Lower Peninsula." Compl. (Doc. 1) ¶ 35. It sought "to have the Department take [the Sibley Parcel] into trust—thereby paving the way for potential gaming and other economic development on the land . . . ." *Id*. ¶ 3; *see also id.* ¶ 36.

Second, Sault's own statements and actions show that the only actual social welfare distributions would come *not* from income from the Self-Sufficiency Fund, but rather from other funds, namely, "the Elder Health Self-Sufficiency Fund, the Elder Employment Self-Sufficiency Fund, the Funeral Assistance Self-Sufficiency fund, and the Education Assistance Self-Sufficiency Fund," plus an unspecified "fund to establish a college scholarship program for tribal members irrespective of blood quantum." AR3150. The record contains zero information about these funds other than their charitable-sounding names. It thus would be impossible to conclude from the record that distributions from any of these funds will ever go toward any specific social welfare or charitable purpose. But even if one were to assume, based only on these funds' names, that Sault will make distributions for social welfare purposes from *these* various funds, those would *not* be distributions from income of the Self-Sufficiency Fund, and would not be an expenditure for purchase of the Sibley Parcel. *See* Michigan Act § 108(f). Thus, Interior correctly reasoned that any later expenditure from these other funds would be too "attenuated" to imbue the purchase of a proposed casino site with a "social welfare" purpose. Indeed, even if such derivative expenditures mattered, the analysis of unearned casino profits would be complex, and it would not

be reasonable to allow an earmark of a small 5% sliver of profits to control the analysis; Sault pledged *twice as much* profit (10%) to be returned to the Self-Sufficiency Fund as additions to principal under § 108(c)(1). *See* AR3150.

Even Sault admits that the actual money spent on social welfare purposes must come from interest or other income of the Self-Sufficiency Fund, not some other pot of money. In support of its theory that the Sibley Parcel purchase is itself a social welfare distribution, Sault has submitted forensic accounting data to Interior to attempt to substantiate its claim that the Sibley Parcel was purchased with Self-Sufficiency Fund interest, and admits that Interior has authority to determine this question. It would be strange indeed if the statute required such a showing for the purchase of the Sibley Parcel (which it does) and yet allowed merely the stated *intention* to make a small future donation into some other mystery fund with a nice-sounding name determinative of trust status—with no accounting for whether any money is ever actually spent for a social welfare purpose. Yet that is the illogical, permissive regime that Sault claims the statute provides—one where Interior has no information about or authority to investigate whether any future casino profits actually are spent for social welfare purposes. Interior correctly rejected Sault's attempt to justify its casino site with a promise of expenditures through several "attenuated," hypothetical causal links.

To circumvent this statutory logic and justify its Rube Goldberg causal chain, Sault reads an extra word into the statute. Sault says its subjective, "ultimate" purpose in spending Fund interest is dispositive. Doc. 91 at 16 ("[T]he ultimate objective of the Tribe in making the expenditure is dispositive[.]"); *see also id.* at 8 ("[T]he Tribe's use of Fund interest was 'for' a 'social welfare . . . purpose' because the Tribe intended it to serve a social welfare purpose."). But "[t]o respect the statutory limits on its trust obligation, Interior *must* have the authority to verify

that the land was legitimately acquired with Fund interest for the limited uses detailed in Section 108(c)." *SSM*, 25 F.4th at 18 (emphasis added). If Interior were required to rely on Sault's declarations of intent, its ability to "evaluate whether the land was acquired for one of the exclusive uses of Fund interest in Section 108(c)" would be eviscerated. *Id.* at 21. As Sault admits, under its reading, any land anywhere in the country purchased for a commercial endeavor would have to be taken into trust if Sault pledges a minimal, unverifiable future donation from its profits. Sault has long recognized this absurd consequence of its positions, even proposing a draft agreement to Interior in which it offered a promise *not* to expand gaming beyond the Sibley Parcel and the Lansing Parcels if Interior would just let it have these as casino sites under a boundless and incorrect interpretation of the statute. AR899; AR900; AR1846.

B. Interior cannot take land into trust based on use of illegal revenues.

Even if an unenforceable promise of a future, derivative expenditure of hypothetical profits from a planned economic development project could otherwise satisfy the statute, illegal gaming revenues cannot. *See* Doc. 49 at 26. Interior could not accept Sault's representations that its purchase would result in donations of future casino revenues, because gaming on the Sibley Parcel would be illegal under IGRA and Sault's compact. Sault did not and could not show that its proposed casino would comply with IGRA and with its compact. "When taking lands into trust, the Secretary must ensure the government's trust obligation is established in accordance with law." *SSM*¸ 25 F.4th at 17. "Interior *must* comply with all relevant laws[.]" *Id.* at 20 (emphasis added).

As to IGRA, "Section 20 of IGRA generally provides that regulated Indian gaming is prohibited on off-reservation lands acquired in trust by the United States after October 17, 1988." *TOMAC v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006) (citing 25 U.S.C. § 2719(a)). To prevent tribes from attempting to create new reservations for casino sites, Congress prohibited tribes from locating gaming facilities on lands acquired after IGRA's enactment that are not "located within

or contiguous to the boundaries of the reservation of the Indian tribe." 25 U.S.C. § 2719(a)(1).

There are limited exceptions to IGRA's prohibition on gaming on newly acquired lands, but none applies here. Sault cites 25 U.S.C. § 2719(b)(1)(B)(i), which excepts "lands . . . taken into trust as part of a settlement of a land claim." *See* AR3994–95. But the Michigan Act, despite its name, did not itself *settle* any claims; it merely *distributed* settlement funds from prior litigation. *See SSM*, 25 F.4th at 15; *see also* 25 C.F.R. § 292.5 (legislation must "resolve[] or extinguish[] with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe" to meet settlement exception). And Sault itself takes the position that it did not use distributed settlement funds to purchase the Sibley Parcel. Such settlement funds are Self-Sufficiency Fund *principal*, and Sault claims that the Sibley Parcel was bought with Fund *income*, which, by definition, is distinct from settlement funds and is generated on all Fund principal regardless of source, after settlement funds were distributed. *See* Michigan Act § 108(a)(1)(C).

Sault's proposed casino would also violate Section 9 of its compact, which requires that "[a]n application to take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written" revenue-sharing agreement with the other tribes. AR3224. Interior could not have approved Sault's application because it was in violation of Sault's compact and could not lawfully generate the hypothetical future revenue Sault relies on for its contrived arguments.

There is no indication in the Michigan Act that Congress intended for Sault, alone among tribes, to have free rein in locating casinos. To interpret the Michigan Act as undermining IGRA's limitations on off-reservation gaming for the benefit of a single tribe would mark a serious incursion that Congress could not have contemplated. NHBP, Saginaw Chippewa, and hundreds

of other tribal nations around the country operate Indian gaming establishments under IGRA's constraints and pursuant to valid tribal-state compacts. Sault's attempt to circumvent IGRA's and its compact's limitations on off-reservation gaming fails.

C. The Indian Canon has no application.

Because there was no ambiguity in the statute for Interior to resolve, the Court need not consider questions of deference or the application of the Indian canon of construction. "If Congress has directly spoken to the issue, that is the end of the matter." *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016); *see also Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 145 (D.D.C. 2005) ("[T]he [Indian] canon only has a role in the interpretation of an ambiguous statute."). Context matters in assessing whether there is any ambiguity for the Indian canon to address:

> [E]ven though "legal ambiguities are resolved to the benefit of the Indians," *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal," *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. [658,] 675 [(1979)], clearly runs counter to a tribe's later claims.

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) (citations cleaned up). Here, as in *Klamath,* "[c]areful examination of the entire record in this case," *id.,* including reading the Michigan Act in the context of IGRA, shows there is no indication that Congress intended to grant Sault the ability to locate casinos anywhere in the country.

But, even if the Court were to conclude the Michigan Act is ambiguous, Interior's interpretation warrants deference because the interaction of *Chevron* deference and the Indian canon in this circuit also depends on context. Courts "determine if the agency's interpretation is permissible, and if so, defer to it . . . while mindful of the governing canon of construction requiring that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Grand Ronde*, 830 F.3d at 558 (citation omitted). For example,

"where Congress has entrusted to the agency the duty of applying, and therefore interpreting, a statutory duty owed to the Indians, [courts] cannot ignore the responsibility of the agency for careful stewardship of limited government resources." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009). Interior's rejection of Sault's attenuated § 108(c)(4) arguments makes particular sense given the statutory and regulatory backdrop of Indian gaming against which the Michigan Act was enacted. As noted above, IGRA speaks directly and comprehensively to Indian gaming. *City of Roseville v. Norton*, 348 F.3d 1020, 1021 (D.C. Cir. 2003) (IGRA "prescribes the conditions under which Indian tribes may engage in commercial gaming on their reservations."). The Michigan Act, in contrast, does not. Yet Sault attempts to use the Act to legalize an off-reservation gaming operation—to "creat[e] 'Indian lands' *for purposes of IGRA*." Doc. 1 ¶ 35 (emphasis added); *see SSM*, 25 F.4th at 18 ("As the Tribe recognizes, the government's trust decision implicates whether the Tribe can conduct gaming under IGRA."). But Sault points to nothing in the statutory text, legislative history, or otherwise that Congress intended to trump IGRA's explicit limitations on off-reservation gaming *for a single tribe* in a statute providing for the distribution of certain judgment funds that does not even mention gaming. *See SSM*, 25 F.4th at 15. Against this backdrop, Sault's "interpretation is unreasonable." Doc. 72 at 41. If Congress intended such an extreme departure from the governing regime it created *prior* to the Michigan Act, it would have said so. The Indian canon does not help Sault.

And, given the trust duties that the United States owes to all federally recognized tribal nations, the Indian canon does not apply to the benefit of one and the detriment of others unless the statutory context allows a conclusion that Congress intended such a result. As Intervenor Tribes have previously argued (see Doc. 48 at 27, Doc. 50 at 9), several district courts in this circuit have "decline[d] to apply the Indian law canon where the interests of all tribes are not aligned."

Forest Cnty. Potawatomi Cmty. v. United States, 330 F. Supp. 3d 269, 280 (D.D.C. 2018) (citing *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016)); *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018); *see also Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (declining to apply the Indian canon where an interpretation "would benefit [a] particular tribe" "by allowing unlimited use of restored land for gaming purposes," but "would not necessarily benefit other tribes also engaged in gaming" and "might well work to their disadvantage."). This Court has correctly noted that there are no D.C. Circuit cases on point. *See* Doc. 72 at 42. Although this Court and other district courts have previously declined to find an exception to the Indian canon in some circumstances where the statute at issue applies to only one tribe, *E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, 534 F. Supp. 3d 86, 101 (D.D.C. 2021), or where "the fact that another tribe would be disadvantaged by a decision to take the parcel into trust for the Band [had] not yet been established," *Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, No. 19-1544 (ABJ), 2022 WL 4598687, at *16 (D.D.C. Sept. 30, 2022), such a conclusion is unwarranted here. The Indian canon cannot be applied to the Michigan Act in isolation from the statutory background of which Congress was presumptively aware, including IGRA, a generally applicable statute to benefit all tribes. Congress cannot be presumed under the Indian canon to have intended to harm other tribes to which it owes a trust duty, and for the benefit of which it enacted IGRA, by effectively exempting Sault from the limitations on off-reservation gaming. Yet that is precisely the result that Sault seeks here.

The record shows an interpretation of the Michigan Act favoring Sault would have drastic adverse consequences for other Indian interests, namely those of the Intervenor Tribes whose gaming operations Sault seeks to compete with for customers. As this Court has already noted, a

court order requiring Interior to reverse its decision "would lead to a loss of gaming dollars for the Intervenor Tribes and a consequent reduction in funding for governmental services the tribes provide to their members." Doc. 35 at 8. Sault's own argument goes beyond the Michigan Act, including a "statute[] that benefit[s] all Indians generally," namely "IGRA." Doc. 72 at 41. Sault's attempt to legalize its gaming endeavor to the disadvantage of other Indian tribes counsels against applying the Indian canon here.

D. Interior correctly concluded Sault presented no evidence of plans to use the Sibley Parcel for social welfare.

Although Sault claims it could use the Sibley Parcel for unspecified tribal "services," the record is devoid of any specific plan for Sault to use the Sibley Parcel "for educational, social welfare, health, cultural, or charitable purposes." Michigan Act § 108(c)(4). The materials that Sault claims Interior ignored are nothing more than conclusory statements that Sault could provide unspecified "services" on the Sibley Parcel. Interior correctly found that "the Tribe fails to cite any evidence" supporting its statements that the Sibley Parcel will "provide employment and tribal services" to members nearby. AR1938. There was nothing for Interior to disregard. Sault failed to identify any particular service it intends to provide on the Sibley Parcel, only that the Sibley Parcel "will facilitate the delivery of services to those tribal members" who live in southern Michigan. AR2987–88 (cited at Doc. 91 at 22). Whether that be a vaccination clinic, a school, or something else, Sault does not say, because it has no such plan. *See* Doc. 91 at 9 –10 (purporting to describe uses of existing tribal buildings, but with only a website link and no record citation, and without asserting that the record shows any such use planned for the Sibley Parcel). Sault admitted to the agency it could not provide any further detail. AR1936 n.4. Interior rightfully required more.

It is insufficient for Sault to submit an affidavit from its Tribal Registrar showing 4,500

members live near the Sibley Parcel. Doc. 91 at 21 (citing AR2183–92). That statement does not speak to any *plans* to *provide* specific services on the Sibley Parcel. The only other record support Sault cites are statements of counsel. *Id*. (citing AR2164); *id.* at 22 (citing AR2987). Interior need not rest its decision on self-interested pronouncements. *Veterans Elec., LLC v. United States*, 142 Fed. Cl. 566, 573 (2019) (agency would not need to consider the party's "conclusory statement[s]," and thus the agency "rightly found these omissions to be shortcomings in [the party's] proposal"); *Braga v. Poulos*, No. 06-cv-5105, 2007 WL 9229758, at *5 (C.D. Cal. July 6, 2007), *aff'd*, 317 F. App'x 680 (9th Cir. 2009) (finding the agency correctly determined the "unsupported assertions of counsel [did] not constitute evidence."). Although counsel stated, without legal support, that it cannot provide services to members in the area without securing trust land, AR3760, Sault points to no legal requirement that all tribal services be conducted on trust land. Sault could already have offered "services" on the seven-acre fee parcel it owns in the Lower Peninsula. *See* Doc. 91 at 9 n.2. Its failure to do so underscores the hollowness of its § 108(c)(4) argument. Sault has no concrete plan to *provide* any "services" to its members on the Sibley Parcel.

Nor is a promise to provide employment opportunities at a hypothetical casino sufficient to show the Sibley acquisition was "for educational, social welfare, health, cultural, or charitable purposes." Michigan Act § 108(c)(4). First, Sault's goal here is to increase revenues. *See, e.g.*, AR2215 ¶¶ 14, 15. Every economic development project has the potential to create jobs. The mere possibility of such employment does not convert a revenue generation plan into a social welfare project. "[O]peration of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country." *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007). Second, Sault's only record citation does not support its contention that it plans to employ

members on the Sibley Parcel. Instead, the CFO for the Tribe's casino operations attested the Tribe "anticipates," not plans, "that many visitors and employees," to the *Lansing* property, which is no longer at issue in this litigation, "will be members of the Tribe." AR2214 ¶ 12; *see* Doc. 71. The CFO's affidavit contains no like statement for the Sibley Parcel. AR2214–15 ¶ 13. Sault's other citations are to statements of counsel before the agency, and need not be considered evidence. Doc. 91 at 22 (citing AR2987, 2988, 3118–19); *Hosp. Bus. Servs., Inc. v. Jaddou*, No. 19-0198, 2021 WL 4262653, at *13 (D.D.C. Sept. 20, 2021). Interior correctly concluded Sault presents no evidence of plans to use the Sibley Parcel for the "limited uses" found in § 108(c)(4). *See SSM*, 25 F.4th at 18.

II. SECTION 108(C)(5) DOES NOT APPLY BECAUSE SPENDING MONEY ON LAND FOR AN ECONOMIC DEVELOPMENT PROJECT DOES NOT CONSOLIDATE OR ENHANCE TRIBAL LANDS.

Acquisition of the Sibley Parcel also does not satisfy § 108(c)(5) for similar reasons. Sault's vague, conclusory statements that it intends to use possible future net gaming revenues from an unbuilt, unauthorized casino to improve other tribal lands in some unspecified manner cannot transform its casino site purchase for economic development into a distribution of Fund interest "for consolidation or enhancement of [other] tribal lands." Michigan Act § 108(c)(5). And "[t]he text and context of Section 108(c) confirm that the Michigan Act uses 'enhancement' in the ordinary way—referring to qualitative improvements." *SSM*, 25 F.4th at 22. Thus "to constitute an 'enhancement of tribal lands,' a purchase would have to make the tribal lands better[.]" *Id.* But it is not the *purchase* of lands that Sault argues will enhance existing tribal lands; it is future revenues from future *use* of the lands. Sault disregards the plain meaning of § 108(c)(5).

Moreover, Interior correctly concluded that Sault submitted no evidence of its plans to use gaming revenue to benefit its existing lands. *See* AR1939. Sault's argument here is even worse than its § 108(c)(4) argument, without so much as even a self-serving tribal resolution stating that

a certain percentage of revenue—however small—will be spent on improving existing lands. Sault points only to conclusory statements of the CFO of casino operations that needed improvements to Upper Peninsula gaming facilities "*could* be financed by revenues from new facilities in more populous areas." Doc. 91 at 25 (quoting AR2215). And Sault cites an affidavit from the Director of the Tribal Housing Authority that "increased gaming revenue is the most viable means of increasing housing services availability." *Id*. (quoting AR2228). These vague, non-committal statements—made solely as an attempt to persuade Interior—are not plans. There was *no* evidence of any specific plans to improve existing tribal lands for Interior to disregard. *See Hosp. Bus. Servs.*, 2021 WL 4262653, at *13 (agency did not abuse its discretion when it reasoned that an "unsupported and conclusory statement from the HR manager" had "little, if any, probative value"). Sault admitted that it had no such specific plans when it acknowledged that it could not provide such evidence. AR1936 n.4.

"[T]he Tribe cannot take refuge in the drafting history of the Michigan Act or the broad purposes of the statute." *SSM*, 25 F.4th at 23. The Department correctly rejected Sault's application because, in buying the Sibley Parcel to build an off-reservation casino, the Tribe did not "properly acquire the land with Fund interest for a statutorily permissible use." *Id.* at 24.

III. THERE IS NO BASIS FOR SAULT'S PROPOSED ORDER.

Even if the Court were to remand this case to Interior, Sault is not entitled to the additional relief described in its proposed order. Sault's request for an order that Interior "expeditiously resolve" the interest issue and that the Court retain jurisdiction (Doc. 91-1) should be rejected. This Court has already determined Interior "has not unreasonably delayed a finding on the income issue." Doc. 72 at 51. And Sault failed to request any such relief in its motion. "The Court need not address this because an argument not raised in an opening brief is forfeited." *Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 116 n.10 (D.D.C. 2015); *see also Hunter*

v. Dist. of Columbia, No. 1:18-cv-00813 (JDB/GMH), 2018 WL 6620112, at *4 (D.D.C. Oct. 9, 2018), *report and recommendation adopted*, 2018 WL 6619853 (D.D.C. Nov. 7, 2018) (finding unarticulated arguments forfeited). In any event, "[t]he norm is to vacate agency action that is held to be arbitrary and capricious and remand for further proceedings consistent with the judicial decision, without retaining oversight over the remand proceedings." *Baystate Med. Ctr. v. Leavitt,* 587 F. Supp. 2d 37, 41 (D.D.C. 2008). Courts typically reserve discretion to retain jurisdiction "for cases alleging unreasonable delay of agency action or failure to comply with a statutory deadline, or for cases involving a history of agency noncompliance with court orders or resistance to fulfillment of legal duties." *Id.*; *see also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, No. CV 20-103 (RDM), 2021 WL 14929, at *2 (D.D.C. Jan. 1, 2021). None of those circumstances is present here.

CONCLUSION

The Court should deny Sault's Renewed Motion for Summary Judgment and enter summary judgment for Defendants on all remaining claims.

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