APPENDICES

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated February 4, 2022 ....1a

APPENDIX B: Memorandum Opinion of the United States District Court for the District of Columbia, dated March 5, 2020 .... 33a

APPENDIX C: Order of the United States District Court for the District of Columbia, dated March 5, 2020 .... 93a

APPENDIX D: Judgment of the United States Court of Appeals for the District of Columbia Circuit, dated June 28, 2024 .... 95a

APPENDIX E: Memorandum Opinion of the United States District Court for the District of Columbia, dated March 6, 2023 ....109a

APPENDIX F: Order of the United States District Court for the District of Columbia, dated March 6, 2023 ....143a

APPENDIX G: Decision of the United States Department of the Interior, dated July 24, 2017...145a

APPENDIX H: Decision of the United States Department of the Interior, dated January 19, 2017..153a

APPENDIX I: Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing en banc, dated May 27, 2022 ....165a

APPENDIX J: Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, § 108, 111 Stat. 2652, 2660 (1997) 167a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5123
Consolidated with 20-5125, 20-5127, 20-5128

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Appellee,

v.

DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR AND UNITED STATES DEPARTMENT OF THE INTERIOR,
Appellants.

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia
(No. 1:18-cv-02035)

Argued March 30, 2021
Decided February 4, 2022

OPINION

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* * *

Before: HENDERSON and RAO, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion of the Court filed by *Circuit Judge* RAO.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

RAO, *Circuit Judge*: This case involves a dispute about whether land acquired by the Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") must be taken into trust by the Department of the Interior. The Tribe purchased the Sibley Parcel with interest from its Self-Sufficiency Fund and sought to have the land taken into trust with a view to establishing gaming operations. The Tribe claimed the Parcel was acquired for the "enhancement of tribal lands," one of the permitted uses of Fund interest specified in Section 108(c) of the Michigan Indian Land Claims Settlement Act ("Michigan Act"). Interior concluded, however, that the mere acquisition of additional land was not an "enhancement" under the Michigan Act. Interior declined to take the Parcel into trust because the Tribe failed to demonstrate how the Parcel would improve or enhance tribal lands, particularly because the land was located in Michigan's Lower Peninsula far from the Tribe's existing lands in the Upper Peninsula.

The Tribe sued Interior. The district court granted summary judgment to the Tribe, holding that the Michigan Act imposed a mandatory duty on Interior to take the Parcel into trust, and therefore Interior lacked the authority to verify whether the Tribe's acquisition was a proper use of Fund interest under the Act. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 63 (D.D.C. 2020). The court further held that, even if Interior had such authority, it was unlawfully exercised because the acquisition of land "that increases the Tribe's total landholdings" was an "enhancement" of tribal lands. *Id.* at 73.

Under the plain meaning of the Michigan Act, we hold that before assuming a trust obligation, Interior has the authority to verify that the Tribe properly acquired the land with Fund interest, consistent with the limited

uses for such interest in Section 108(c). Furthermore, in exercising that authority, Interior correctly determined that "enhancement of tribal lands" does not include an acquisition that merely increases the Tribe's landholdings. Rather, to enhance tribal lands, an acquisition must improve the quality or value of the Tribe's existing lands. We therefore reverse and remand for proceedings consistent with this opinion.

I.

A.

With more than 40,000 members, the Sault Ste. Marie Tribe of Chippewa Indians is the largest Indian tribe east of the Mississippi River. The Tribe descends from a group of Chippewa bands that historically occupied lands in the Upper Peninsula of Michigan. The Tribe, however, ceded much of its ancestral lands to the federal government through an 1836 treaty. *See* Treaty with the Ottawa and Chippewa, 7 Stat. 491 (Mar. 28, 1836).

More than a century later, Congress created the Indian Claims Commission and authorized it to hear, among other things, claims that treaties between Indian tribes and the United States were based on unconscionable consideration. Act of Aug. 13, 1946, ch. 959, § 2, 60 Stat. 1049, 1050. The Tribe brought such a claim, along with two other tribes party to the 1836 Treaty. The Commission held that the Treaty was unconscionable and ordered the United States to pay these tribes more than $10 million. *Bay Mills Indian Cmty. v. United States*, 26 Ind. Cl. Comm. 538, 542, 560 (1971) (finding the government paid only fifteen percent of the land's fair value under the Treaty). The United States did not distribute the judgment funds for several decades, in part because the three tribes could not reach an agreement on how to divide the money.

In 1997, the tribes and the federal government negotiated a compromise that resulted in the Michigan Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997).[1] The Act provided for the distribution of the judgment funds among the tribes with separate sections of the statute governing each tribe's use of its judgment funds. Michigan Act § 104.

Section 108 of the Michigan Act requires the Sault Ste. Marie Tribe to establish a "Self-Sufficiency Fund" to hold its share of the judgment. *Id.* § 108(a)(1). The Tribe's Board of Directors is named the trustee of the Fund and makes expenditure and distribution decisions, and "the Secretary [has] no trust responsibility for the investment, administration, or expenditure" of the Fund. *Id.* § 108(a)(2), (e)(2).

The Act also delineates distinct uses for Fund principal and interest. *Id.* § 108(b)-(c). As relevant here, Fund interest may be expended for only five uses: "an addition to the principal"; "a dividend to tribal members"; "a per capita payment to some group or category of tribal members"; "educational, social welfare, health, cultural, or charitable purposes which benefit the [Tribe's] members"; or "consolidation or enhancement of tribal lands." *Id.* § 108(c). If the Tribe acquires lands

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[1] Following the Civil War, the government moved away from negotiating treaties with Indian tribes and instead enacted statutes to govern federal relations with tribes. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[9], at 69 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. Statutes like the Michigan Act, which address only particular tribes, are special provisions not codified in the United States Code. *See generally* 25 U.S.C. ch. 19 codification note (explaining that provisions "relating to settlement of the land claims of certain Indian tribes [were] omitted from the Code as being of special and not general application").

with Fund interest, those lands "shall be held in trust by the Secretary for the benefit of the tribe." *Id.* § 108(f).

B.

This dispute arises out of Interior's refusal to take into trust a parcel of land acquired by the Tribe.

Using Fund interest, the Tribe purchased 71 acres, known as the "Sibley Parcel," in the Lower Peninsula of Michigan. In its application to have Interior take the Parcel into trust, the Tribe acknowledged that it purchased the Parcel in anticipation of conducting gaming activities on the land. The Tribe contended that the Michigan Act gave Interior no authority to determine whether land acquired with Fund interest was for a use allowed by the Michigan Act, leaving that evaluation solely with the Tribe's Board. Because the Board had made the determination that the acquisition would "consolidat[e] or enhance[] … tribal lands" and used Fund interest, the Tribe maintained Interior had a mandatory duty to take the parcel into trust under Section 108(f). The Tribe also argued that the purchase constituted an "enhancement" of tribal lands because it "increas[ed] the total land possessed by the Tribe."

After some back and forth, Interior issued an interim decision concluding that before taking the land into trust it was required to verify both that the purchase of the Sibley Parcel complied with the Michigan Act's requirements for the use of Fund interest and that the Tribe had in fact used interest for the purchase. Relying on an earlier decision concerning the Bay Mills Indian Community, Interior maintained that "enhancement" means only acquisitions that "make greater, as in cost, value, attractiveness, etc.; heighten; intensify; [or]

augment" existing tribal lands.[2] The Tribe had failed to provide sufficient evidence that the Sibley Parcel on the Lower Peninsula would constitute an "enhancement" of the Tribe's existing lands in the Upper Peninsula. Interior gave the Tribe an opportunity to submit further evidence by keeping its application open, but the Tribe did not do so. Interior issued a final decision denying the Tribe's application to take the land into trust, reiterating that the Tribe had failed to establish that the acquisition of this parcel would increase the value of existing tribal lands.

The Tribe filed a claim under the Administrative Procedure Act in the District Court for the District of Columbia, arguing that Interior's decision was contrary to law or arbitrary and capricious. Three casinos and two tribes intervened as defendants.

The district court granted summary judgment to the Tribe. *Sault Ste. Marie*, 442 F. Supp. 3d at 58. It first held that Interior had no authority to determine whether the Tribe's acquisition of the parcel complied with the uses of Fund interest set forth in Section 108(c) because Section 108(f) creates a mandatory duty for

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[2] Section 107 of the Michigan Act, which governs the judgment funds of the Bay Mills Indian Community, provides that Bay Mills may use interest generated from its share for "the consolidation and enhancement of tribal landholdings." Michigan Act § 107(a)(3). After Bay Mills acquired a parcel far away from its existing lands, Interior interpreted "enhancement" to mean an acquisition that "must somehow enhance (*i.e.*, make greater the value or attractiveness) some other tribal landholding already in existence." Although a district court disagreed with Interior's interpretation, the Sixth Circuit vacated that decision because Bay Mills had sovereign immunity from the claims lodged in that case. *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 414-16 (6th Cir. 2012), *aff'd*, 572 U.S. 782 (2014).

Interior to take into trust any land purchased with Fund interest. As an additional and independent ground, the court held that the Tribe's acquisition of the Sibley Parcel was an "enhancement of tribal lands" within the meaning of Section 108(c). The court rejected Interior's interpretation of "enhancement" as an acquisition that only increases the value of existing tribal lands. The court determined that "enhancement" unambiguously includes any acquisition that increases the total amount of tribal lands, even if a parcel does not increase the quality or value of existing tribal lands. The court, however, declined to issue an order compelling Interior to take the Sibley Parcel into trust. Instead, the court vacated Interior's decision and remanded to the agency for further proceedings. Interior appealed.

We review the grant of summary judgment de novo "and therefore, in effect, review directly the decision of the agency." *Purepac Pharm. Co. v. Thompson*, 354 F.3d 877, 883 (D.C. Cir. 2004) (cleaned up). The Tribe challenges Interior's interpretation of the Michigan Act. Therefore, "we first consider 'whether Congress has directly spoken to the precise question at issue'" by looking to the statutory text. *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 92 (D.C. Cir. 2020) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If the statute unambiguously resolves the question, that is the end of our inquiry. *Id.* The plain meaning of the Michigan Act resolves both of the questions on appeal.

II.

The threshold question is whether Interior has the authority to verify that land purchased with Fund interest was for one of the uses listed in Section 108(c) before taking the land into trust. Interior's obligation to take

the land into trust is established by Section 108(f), which provides in full: "Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Michigan Act § 108(f). As the parties agree, this provision imposes a mandatory duty on the Secretary to take into trust land acquired using Fund interest. The Tribe asserts that the only condition the Secretary may consider is whether Fund interest was in fact used to acquire the lands. Interior maintains, however, that its trust obligation also imposes a duty to determine whether the Tribe properly acquired the land using Fund interest, that is, for one of the uses specified by Section 108(c). We agree with Interior's interpretation. Interior's authority to take land into trust under Section 108(f) necessarily includes the authority to determine whether the lands have been lawfully acquired under Section 108(c), which specifies the exclusive uses for which the interest or income of the Self-Sufficiency Fund may be spent.

When a statute establishes a trust obligation of the United States to an Indian tribe, the government acts "not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). The government's sovereign obligations under the Constitution require the Secretary to ensure the faithful execution of the laws. U.S. CONST. art. II, § 3 (President's obligation to "take Care that the Laws be faithfully executed"). When taking lands into trust, the Secretary must ensure the government's trust obligation is established in accordance with law.

The Michigan Act limits the Tribe's use of Fund interest, and these limitations circumscribe the land that must be taken into trust by the government. The Act

restricts the expenditure of Fund interest to five uses: "an addition to the principal"; "a dividend to tribal members"; "a per capita payment to some group or category of tribal members"; "educational, social welfare, health, cultural, or charitable purposes which benefit the [Tribe's] members"; *or* "consolidation or enhancement of tribal lands." Michigan Act § 108(c). 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).

The limited uses for Fund interest contrast with the more expansive uses for Fund principal. The principal may be expended when the "[B]oard … determines" it is "reasonably related to" such general uses as "economic development beneficial to the [T]ribe" or the "development of tribal resources." *Id.* § 108(b)(1)(A). The principal also may be used for expenditures that "are otherwise financially beneficial to the [T]ribe and its members." *Id.* § 108(b)(1)(B). The appropriate expenditures of Fund principal are delineated in terms that arguably leave substantial discretion to the determinations of the Board about whether the expenditure is for a particular use. By contrast, the use of Fund interest in Section 108(c) makes no mention of the Board's determinations, but instead lists five specific uses for which Fund interest "shall be distributed," reinforcing that the Tribe may expend Fund interest exclusively for those uses.

Although both Fund principal and interest and may be used for the "consolidation or enhancement of tribal lands," *only* lands acquired using Fund interest must be taken into trust. *Compare Id.* § 108(f) (lands acquired with interest "shall be held in trust"), *with id.* § 108(b)(4)

(lands acquired with principal "shall be held as Indian lands are held"). The Act constrains the Tribe's use of Fund interest to certain uses. To 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). *Cf. Heckman v. United States*, 224 U.S. 413, 437 (1912) (explaining with respect to limits on the right of alienation of tribal property that "the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States").

The government's obligation to ensure a lawful trusteeship is particularly salient because the decision to take tribal land into trust implicates an elaborate patchwork of statutory and regulatory provisions. For instance, the Tribe sought to have the Sibley Parcel held in trust so that it might build a casino and develop gaming "if lawfully permitted under [the Indian Gaming Regulatory Act ("IGRA")] and under the Tribe's tribal-state gaming compact with the State of Michigan."[3] As the Tribe recognizes, the government's trust decision implicates whether the Tribe can conduct gaming under IGRA. This highlights Interior's interrelated responsibilities for enforcing laws regarding tribal affairs.[4]

[3] Land taken into trust under the Michigan Act might qualify for an exception to IGRA's prohibition on casinos on lands a tribe acquired after its enactment. *Compare* 25 U.S.C. § 2719(a) (prohibiting gaming on lands acquired after October 17, 1988), *with id.* § 2719(b)(1)(B)(i) (creating an exception for "lands [that] are taken into trust as part of … a settlement of a land claim"). We express no opinion on whether land acquired under the Michigan Act would trigger IGRA's exception.

[4] The Secretary of the Interior is also charged generally "with the supervision of public business relating to … Indians." 43 U.S.C.

Ensuring compliance with the Michigan Act and the limits it places on land taken into trust allows Interior to manage its legal obligations comprehensively and to avoid unnecessary conflicts.

We recognize that the Michigan Act confers broad independence on the Tribe to administer the Fund in accordance with statutory requirements, and that the Tribe's expenditures are not subject to the approval of the Secretary. Michigan Act § 108(e)(2). The Secretary's decision, however, does not void the Tribe's purchase of the lands; it simply means the land will not be taken into trust.[5] The Tribe's independence with respect to Fund expenditures does not eliminate the federal government's separate and independent trust obligations. *See Jicarilla*, 564 U.S. at 181 ("While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy."). When undertaking a trust obligation on behalf of the federal government, the Secretary may confirm that the lands were properly acquired using Fund interest or income.

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§ 1457; *see also* 25 U.S.C. § 2 (tasking "[t]he Commissioner of Indian Affairs … under the direction of the Secretary of the Interior" with "the management of all Indian affairs and of *all* matters arising out of Indian relations") (emphasis added).

[5] While this decision may have substantial consequences for how the Tribe is able to use and develop the land for gaming purposes (a question on which we take no position), Interior's decision to decline the trust relationship does not override the Tribe's independent decision to acquire the land using Fund interest. Contrary to the suggestion of our dissenting colleague, Interior's verification that land was acquired for a statutory use before taking such land into trust does not "condition" the Tribe's use of Fund interest. *See* Dissenting Op. at 3-5.

The common law of trusts reinforces that Section 108(f) does not require Interior to take land into trust that the Tribe acquired contrary to law. Because Section 108(f) imposes a trust responsibility on the government, background principles drawn from the common law of trusts may inform our interpretation. *See id.* at 177 (explaining we may "look[] to common-law principles to inform our interpretation of statutes" governing the government's trust relationship with an Indian tribe); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (looking to the common law to determine the United States' duties as trustee).

A bedrock principle of trusts is that "[a]n intended trust or trust provision is invalid if … it is contrary to public policy." RESTATEMENT (THIRD) OF TRUSTS § 29(c). If an invalid trust is created, "[a] trustee has a duty not to comply with a provision of the trust that the trustee knows or should know is invalid because the provision is unlawful or contrary to public policy." *Id.* § 72; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 428 (2014) ("[T]he duty of prudence, under [a statute] as under the common law of trusts, does not require a fiduciary to break the law.").

These principles support Interior's interpretation of the Michigan Act to allow the government to ensure it takes land into trust only when consistent with the public policy established by the Michigan Act. Nothing in the Act obliges the government to assume a trusteeship that would further a violation of the law. When taking land into trust for the Tribe, Interior may consider whether the Tribe spent Fund interest for one of the exclusive uses under Section 108(c) in order to ensure that the government's trust relationship is secured on lawful foundations.

The Tribe raises several arguments in support of its position that the *only* condition the Secretary may consider is whether Fund interest was in fact used to acquire the lands. According to the Tribe, Section 108(f) requires Interior to take any lands acquired with Fund interest into trust without regard to whether the Tribe's acquisition of those lands comports with one of the exclusive uses enumerated in Section 108(c).

First, the Tribe maintains that because Section 108(f) specifies one and only one condition for taking land into trust—that it be acquired with Fund interest—the Secretary lacks the authority to verify if the land was acquired for a use enumerated in Section 108(c). The Tribe attempts to rely on a negative implication, but such an implication should be drawn only "when circumstances support a sensible inference" that a term was deliberately excluded. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (cleaned up). No such inference can be drawn here because acquiring land with Fund interest is not naturally associated with the government's obligation to act lawfully when assuming trust responsibilities. Moreover, the fact that Section 108(f) does not explicitly state that the land must be lawfully or permissibly acquired with Fund interest does not undermine the fundamental principle that the government must follow the law. *Cf. Staples v. United States*, 511 U.S. 600, 605-06 (1994) (explaining that statutory silence does not undermine a "firmly embedded" legal principle). A reminder to act lawfully need not be written into every statutory provision.[6] The Tribe focuses myopically on Section

[6] The dissent would effectively read a limitation into Section 108(f), precluding the Secretary from ensuring the trust obligation is established consistent with the Michigan Act. Nothing in the Act,

108(f), but Interior must comply with all relevant laws, including the other requirements of the Michigan Act.

Second, the Tribe emphasizes that "[*a*]*ny* lands acquired using [Fund] interest … shall be held in trust" and argues that "any" conveys an expansive meaning. Michigan Act § 108(f) (emphasis added). We agree. But the expansiveness depends on what the word "any" modifies, which here is "lands acquired using [Fund] interest." *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) (looking to what the word "any" modifies when considering a statute's meaning). The use of "any" in this context prohibits Interior from imposing additional limitations on what land may be taken into trust; however, it does not eliminate the requirement that Fund interest be spent only for one of the exclusive uses in Section 108(c). Nor does the term "[a]ny lands acquired" require Interior to defer to the Tribe when implementing the government's trust obligations.

Finally, the Tribe maintains that the Act negates Interior's authority to review its acquisition of land because "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." Michigan Act § 108(e)(2). Relatedly, the Tribe suggests that principles of tribal sovereignty counsel reading the Michigan Act as leaving the authority to determine whether a purchase complies with Section 108(c) to the Tribe.

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however, eliminates the Secretary's "sovereign interest in the execution of federal law." *Jicarilla*, 564 U.S. at 165.

We agree that Section 108(e) protects the Tribe's autonomy to decide how to spend Fund principal and interest consistent with the terms of the Act; however, no encroachment on that autonomy occurred here. The Tribe's Board decided to use Fund interest to purchase the Sibley Parcel, and it did so without Interior's approval or interference. Interior does not claim the authority to superintend the Tribe's expenditures, but Interior has an independent sovereign obligation to evaluate whether the lands were legitimately acquired using Fund interest before taking them into trust. By fulfilling the trust responsibilities under Section 108(f), the Secretary does not run afoul of either 108(e)(2), which prohibits the government's interference with the Tribe's spending decisions, or the Tribe's sovereignty. Nor does Interior's authority to verify that the Tribe's acquisition of land was for a statutory use of Fund interest transform the mandatory duty to hold lands in trust into a discretionary one. Interior has no discretion to refuse to hold lands acquired with Fund interest in trust so long as that acquisition comported with statutory requirements.

The Michigan Act imposes distinct responsibilities on the Tribe and on Interior. The Tribe maintains the authority to spend Fund interest for statutory uses, including for the acquisition of land, and the government may not oversee those decisions. If the Tribe acquires land with Fund interest, however, Interior must determine whether its mandatory trust obligation under Section 108(f) has been triggered. As part of the determination to hold lands in trust, Interior may evaluate

whether the land was acquired for one of the exclusive uses of Fund interest in Section 108(c).[7]

III.

Interior may assess whether the Tribe acquired land with Fund interest and for a permissible use; however, Interior's decision must comport with the Administrative Procedure Act. The Tribe applied to Interior to have it take the Sibley Parcel into trust. Interior refused on the ground that the purchase was not a "consolidation or enhancement of tribal lands." The Tribe argues that Interior's decision was based on an erroneous reading of the Michigan Act and thus is contrary to law. We hold that Interior's interpretation is consistent with the Act. The mere acquisition of additional land, without any demonstration that the acquisition improves the quality or value of existing tribal lands, does not constitute an "enhancement of tribal lands" within the plain meaning of Section 108(c).

The Tribe may spend Fund interest "for consolidation or enhancement of tribal lands." Michigan Act § 108(c)(5). Because these terms are not defined in the Michigan Act, we give them "their ordinary, contemporary, common meaning," *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (cleaned up), as informed by the context of the "overall statutory scheme," *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (cleaned up).

"Enhancement" typically refers to a qualitative improvement, meaning "[t]o raise in degree, heighten, intensify (qualities, states, powers, etc.)." 5 OXFORD ENGLISH DICTIONARY 261 (2d ed. 1989); *see also* BRYAN A.

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[7] Because we find no ambiguity in the Michigan Act, we reach neither Interior's claim for *Chevron* deference nor the Tribe's argument that the Indian canon requires an interpretation in its favor.

GARNER, GARNER'S MODERN AMERICAN USAGE 300 (2d ed. 2003) (explaining that "enhance … should refer to a quality or condition"); *Enhanced*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (defining "enhanced" as "[i]ncreased, especially in value"). Put simply, to enhance is "to make better." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 317 (3d ed. 2011). To be sure, "enhance" is sometimes defined as "augmenting," which typically refers to a quantitative increase. *See Enhancement*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "enhancement" as "[t]he act of augmenting"); *see also Augment*, 1 OXFORD ENGLISH DICTIONARY 784 (2d ed. 1989) ("[t]o make greater in size, number, amount, degree, etc."). But the most common definition is qualitative. This indicates, as a starting point, that to constitute an "enhancement of tribal lands," a purchase would have to make the tribal lands better and not just add to them.

The text and context of Section 108(c) confirm that the Michigan Act uses "enhancement" in the ordinary way—referring to qualitative improvements. The object of enhancement here is "tribal lands." The parties agree that "tribal lands" refers, in some manner, to the Tribe's real property.[8] In the context of real property, "enhancement" refers to a qualitative improvement, not a quantitative increase. *See* 5 OXFORD ENGLISH DICTIONARY 261 (2d ed. 1989) (defining "enhance" in the

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[8] The parties disagree about the precise definition of "tribal lands." The Tribe maintains it refers generally to "the Tribe's total landholdings." The intervenors suggest that "tribal lands" is a term of art that refers to lands subject to tribal jurisdiction. We need not determine the precise scope of "tribal lands" as used in the Michigan Act, however, as the different definitions advanced by the parties all refer to real property held by a tribe.

context of property as "[i]n more recent use, (of property, etc.) to increase in value or price").

In other statutes involving Indian lands, Congress has used "enhancement" to refer to qualitative improvements. For example, the National Indian Forest Resources Management Act addresses "the development, maintenance, and enhancement of Indian forest land in a perpetually productive state." Pub. L. No. 101-630, § 305(b), 104 Stat. 4532, 4535-36 (1990) (codified at 25 U.S.C. § 3104(b)(1)). Consistent with development and maintenance, "enhancement" also refers to qualitative improvements. And keeping "land in a perpetually productive state" would not naturally include acquiring additional land. Moreover, in statutes addressing real property, Congress frequently lists the "acquisition" and "enhancement" of property as separate terms, further bolstering the understanding that the acquisition of land alone is not equivalent to an enhancement.[9] In these varied contexts, all involving land, the plain meaning of enhancement is qualitative and distinct from the mere acquisition of additional land.

Furthermore, in statutes addressing tribal land specifically, Congress commonly uses "acquire" when granting general authority for tribes to purchase land.[10] The

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[9] *See, e.g.*, 16 U.S.C. § 1456-1(f)(4)(C) (referring to "[c]osts associated with land *acquisition*, land management planning, remediation, restoration, and *enhancement*") (emphases added); 10 U.S.C. § 2601(e) (providing that the Secretary of a military branch may accept some gifts "consisting of the provision, *acquisition*, *enhancement*, or construction of real or personal property") (emphases added).

[10] *See, e.g.*, Pueblo de San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109-286, § 6(b)(2), 120 Stat. 1218, 1221 (providing that the Pueblo may use settlement funds "to acquire the federally administered Settlement Area Land" or "at the option of the

Michigan Act does not provide the Tribe with general authority to use Fund interest to acquire land. Rather the Act specifies that interest may be used for the "consolidation or enhancement of tribal lands." Michigan Act § 108(c)(5). Reading "enhancement" to include any acquisition or increase in landholdings would eliminate the more specific use of Fund interest for the "consolidation or enhancement of tribal lands."

Finally, the term "consolidation" has a specialized meaning in the context of tribal lands that precludes interpreting "enhancement" to include mere acquisitions of land. To consolidate tribal lands means to join two parcels under tribal ownership or perhaps to combine the fractionated ownership interests in a parcel of tribal land.[11] The Tribe concedes that consolidation refers to the acquisition of land or land interests for these purposes. If we interpreted "enhancement" to include any land acquisition, it would swallow the more particular type of land acquisition for "consolidation." We ordinarily avoid interpreting a statute in a manner that would render a word superfluous or ineffective. If we adopted the Tribe's reading of "enhancement" to include any

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Pueblo, to acquire other land"); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, § 103(F)(1), 104 Stat. 3289, 3291 ("The Tribes are authorized to acquire by purchase … [certain] lands or water rights, or interests therein[.]"); Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, § 8(c), 104 Stat. 1292, 1297 ("Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation[.]").

[11] *See* COHEN'S HANDBOOK § 1.07, at 106. Consolidation seeks to remedy the highly fractionated ownership of tribal lands, which resulted from the government's failed allotment policy. *Babbitt v. Youpee*, 519 U.S. 234, 237-38 (1997).

acquisition of land that increases acreage, then "consolidation" would do no independent work in the statute.[12]

The Tribe's arguments to the contrary fail to comport with the plain meaning of the Michigan Act. The Tribe maintains that "enhancement" can refer to a quantitative increase by analogizing to the term "sentence enhancement" or "enhanced benefits." But upon closer inspection, these examples do not support the Tribe's interpretation. Although enhancing a criminal sentence increases the amount of time a person will serve, that enhancement lengthens an existing sentence but does not add a new sentence.[13] Similarly, an enhancement of benefits would increase existing benefits, but it would not refer to adding a new set of unrelated benefits. The Tribe's examples confirm that "enhancement" must have a nexus to some existing thing, whether real property, a criminal sentence, or welfare benefits. In this appeal, however, the Tribe has not explained how its acquisition connects, geographically or otherwise, to existing tribal lands. Instead, it has merely acquired a separate parcel of land.

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[12] The Tribe suggests that "consolidation" is not superfluous under its interpretation because the Tribe might swap a larger piece of land for a smaller one in order to consolidate lands. For such hypothetical land swaps to inform Interior's trust obligation, however, they would have to involve Fund interest, which seems unlikely. Regardless, enhancement refers to qualitative improvements in the context of land.

[13] The meaning of enhancement in the sentencing context is unusual. Unlike the ordinary meaning of enhancement, which is to make better, the enhancement of a sentence means "to make harsher." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 317 (3d ed. 2011); BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 300 (2d ed. 2003) ("[B]ecause *enhance* has long had positive connotations, it is a mistake to use it in reference to something bad.").

Finally, the Tribe cannot take refuge in the drafting history of the Michigan Act or the broad purposes of the statute. The Tribe contends that Interior's suggested amendments to a different section of the Act demonstrate that Interior understood "consolidation and enhancement" to refer to acquisitions. But Interior's purported understanding does not translate into Congress' meaning and this bit of "drafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history." *Hamdan v. Rumsfeld*, 548 U.S. 557, 668 (2006) (Scalia, J., dissenting). Congress may change language in drafts for any number of reasons, but the law is only what Congress enacts. *See* U.S. CONST. art. I, § 7. The Tribe also maintains that the purpose of the Michigan Act was to promote the Tribe's economic self-sufficiency, and that the Act should be read to "effectuate its purpose." Even if we could identify a single purpose of the Michigan Act, no statute pursues its purpose at all costs, because legislation invariably includes trade-offs between different interests. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (explaining that statutes reflect compromises and do not "pursue a single goal"). The Michigan Act reflects a negotiated agreement between the Tribe and the government regarding the settlement of various land claims, similar to treaties with sovereign tribes. Particularly in this context, we must decline to unravel a legislative deal through resort to imputed purposes.

In sum, Interior's interpretation comports with the plain meaning of the Michigan Act because an "enhancement of tribal lands" does not include an acquisition of lands with no connection to increasing the quality or value of existing tribal lands. We need not define "enhancement of tribal lands" for all purposes, but we reject

the Tribe's argument that "enhancement" necessarily includes *any* acquisition of land.

* * *

The Michigan Act requires the Secretary of the Interior to take into trust land acquired with Fund interest, but the Act does not require the Secretary to violate the law. Therefore, before taking land into trust, Interior has the authority to confirm that the Tribe properly acquired the land with Fund interest for a statutorily permissible use. The Tribe may use Fund interest for the enhancement of tribal lands, but that does not include an acquisition of land that merely increases the acreage of the Tribe's lands without improving the quality or value of existing tribal lands.

For the foregoing reasons, we reverse the district court's judgment and remand for proceedings consistent with this opinion.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting: This case presents a straightforward exercise of statutory interpretation. Under the familiar *Chevron* doctrine, we first assess whether the Congress' intent in § 108(f) of the Michigan Indian Land Claims Settlement Act (MILCSA), Pub. L. No. 105-143, 111 Stat. 2652 (1997), is clear as to the limits of the Department of the Interior's (Interior) Secretary's (Secretary) review before she takes lands into trust for the Sault Ste. Marie Tribe of Chippewa Indians (Sault); only if there is ambiguity does our analysis go further. *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020); *see Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Because MILCSA unambiguously limits the Secretary's review to whether lands were "acquired using amounts from interest or other income of the Self-Sufficiency Fund," MILCSA § 108(f), our analysis should begin and end with the statute's plain text. Accordingly, I would affirm the judgment of the district court.[1]

We begin with the text, "the most traditional tool" of statutory interpretation. *Eagle Pharms.*, 952 F.3d at 330 (alteration adopted) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)). "Indeed, 'the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there.'" *Id.* (alterations adopted) (quoting *Janko v. Gates*, 741 F.3d

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[1] Because I would hold § 108(f) unambiguously limits the Secretary's review before taking lands into trust to whether such lands were acquired using Fund income or interest, I would affirm the district court on that basis and end our analysis there, declining to conduct additional review of whether the Secretary applied the correct understanding of MILCSA § 108(c)(5) when she conducted her unauthorized review of the Sault's land purchase for compliance with § 108(c)(5).

136, 139–40 (D.C. Cir. 2014)). "[W]e 'cannot ignore the text by assuming that if the statute seems odd to us it could be the product only of oversight, imprecision, or drafting error.'" *Id.* at 333 (alteration adopted) (quoting *Engine Mfrs. Ass'n*, 88 F.3d at 1088–89). We also look to the statute's structure and must interpret it as part of a cohesive regulatory scheme, if possible, "but 'reliance on context and structure in statutory interpretation is a subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'" *Id.* at 332 (alteration adopted) (quoting *King v. Burwell*, 576 U.S. 473, 497–98 (2015)). Extrinsic materials "have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Id.* at 338 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

Section 108(f) states: "Any lands acquired using amounts from interest or other income of the Self–Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." MILCSA, § 108(f). The district court concluded that § 108(f) unambiguously limits the Secretary's review to whether the Sault acquired the land using Self-Sufficiency Fund (Fund) interest or income. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 63–73 (D.D.C. 2020). I agree: § 108(f) is unambiguous. Under § 108(f)'s plain text, the Secretary "shall"—mandatorily—hold in trust any lands "acquired using amounts from interest or other income" of the Fund. MILCSA, § 108(f). There is no second condition. The Secretary's review is limited to whether the land at issue was "acquired using amounts from interest or other income" of the Fund. *Id.* The Congress has included language suggesting additional

conditions in similar statutes but did not do so here. *See, e.g.*, The Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection."). Although § 108(f) does not explicitly deprive the Secretary of authority to review the Sault's compliance with § 108(c), it only explicitly authorizes the Secretary to review whether the land was purchased with Fund income or interest and directs the Secretary to take land so purchased into trust.

The plain meaning of § 108(f) is further supported by § 108(e)(2), which provides: "Notwithstanding any other provision of law … 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." MILCSA, § 108(e)(2). Granted, spending Fund income or interest differs from approving a trust application under § 108(f) but § 108(e)(2) makes clear that the Secretary has no role in approving any payment or distribution from the income or interest of the Fund and that the Secretary has no trust responsibility regarding expenditures. Nothing in these provisions authorizes the Secretary to review the Sault's land purchase for compliance with § 108(c) before she takes the land into trust. Under § 108(e)(2) the Secretary has no discretion to approve the Sault's use of Fund income to buy land under § 108(c). Therefore, if the Sault use Fund income to acquire land within its understanding of § 108(c), that land has been acquired using Fund income and the Secretary cannot review the acquisition beyond ensuring it expended Fund income.

The land was unquestionably acquired using Fund income and, accordingly, "shall be held in trust by the Secretary." MILCSA, § 108(f). Under this statutory scheme, allowing the Secretary to review the Sault's land purchase would allow the Secretary to effectively—and without authority—condition that purchase. Considered together with § 108(f)'s clear limitation of the Secretary's review to whether the land was acquired using Fund income or interest, I believe the Congress did not grant the Secretary authority to independently review the Sault's compliance with § 108(c) before taking the acquired land into trust.[2]

The structure of the remainder of § 108 also supports this reading. The Sault Board of Directors (Board)—its governing body—is made the trustee of the Fund and entrusted with the spending decisions under MILCSA § 108(a). MILCSA, § 108(a). Sections 108(b) and 108(c) direct the Board's use of Fund principal (§ 108(b)) and income and interest (§ 108(c)). *Id.* §§ 108(b)–(c). Section 108(d) requires that an annual audit of the Fund be conducted by an independent accountant, which audit is to be made available to any Sault member; § 108(e)

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[2] *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261–62 (10th Cir. 2001) supports this understanding of § 108(e)(2) and § 108(f). In that case, the Secretary adopted the same position as the beneficiary tribe (the Wyandotte Tribe of Oklahoma) that she did not have discretion to review whether the acquisition satisfied other more general fee-to-trust regulations. Addressing an analogous statute with a dollar amount limitation, the Tenth Circuit found that the "notwithstanding" language in a similar law enacted for the benefit of a Native American tribe unambiguously manifests that the Secretary does not have discretion to decide whether to take into trust land purchased by the tribe, as long as the land was purchased using the specified funds. *Sac and Fox Nation*, 240 F.3d at 1261–62.

requires the Secretary to transfer the judgment funds[3] to the Fund and makes clear she has no approval power regarding payment or distribution; § 108(f), like § 108(e), directs the Secretary to act under specified circumstances. *Id.* §§ 108(d)–(f). None of these provisions suggests that § 108(c)'s spending instructions were intended to authorize the Secretary to review the Sault's use of Fund income before taking acquired land into trust.

Granted, § 108(b), which governs the use of Fund principal, provides that "[t]he principal of the Self–Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines" will achieve specified purposes. *Id.* § 108(b)(1). And § 108(c) does not contain similar language providing that the distribution of interest or income is to be determined by the Board. *Id.* § 108(c). Nonetheless, this difference between § 108(b) and § 108(c) does not render the Secretary's role under § 108(f) ambiguous. Section 108(a) gives the Sault Board control of the Fund's spending and § 108(b) and § 108(c) provide the Board guidance in spending the Fund's principal and income and interest. Neither § 108(b) nor § 108(c) indicates that the Secretary is to have any say over the Sault's use of the Fund and § 108(e)(2) makes this unmistakably clear. Interior conceded in district court that the Secretary does not have authority to review any expenditures of income under § 108(c)(1)–(3) notwithstanding those provisions do not include § 108(b)'s "board of directors determines" language.

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[3] To compensate the Sault and other tribes for land the United States government purchased for an "unconscionably low sum," *Sault Ste. Marie Tribe*, 442 F. Supp. 3d at 74, the congressionally-established Indian Claims Commission awarded the Sault and other tribes more than $10 million in damages; MILCSA dictates how these "judgment funds" are to be distributed among the beneficiary tribes, including the Sault, *id.* at 58–59.

Sault Ste. Marie Tribe, 442 F. Supp. 3d at 64, 69. The inclusion or exclusion of that language alone cannot be read to mean that the Secretary has the power to review the Sault's decision or override § 108(f)'s plain text. If § 108(c)(1)–(3) guide the Sault's expenditures without the Secretary's oversight, so too does the rest of § 108(c).[4]

My colleagues are convinced that general trust principles provide a background against which § 108(f) operates and therefore, even if the statute does not explicitly allow for the Secretary's review, taking land into trust is an exercise of sovereign governmental authority and the Sault's reading of § 108(f) would force the Secretary to take land into trust even if that land was acquired contrary to law. Because there is no "evidence that Congress meant something other than what it literally said" in § 108(f), I cannot join my colleagues and depart from the text's plain meaning. *Eagle Pharms.*, 952 F.3d at 332–33 (internal quotations omitted). MILCSA unambiguously gives the Sault the ability to use the Self- Sufficiency Fund's income and interest as it sees fit, consistent with its understanding of § 108(c). MILCSA does not authorize the Secretary to assess independently the Sault's use of Fund income or interest under § 108(c). As the district court correctly explained, notwithstanding the Secretary has a general trust obligation to administer the trust in compliance with the law, "MILCSA gives the Tribe, but not the Secretary, authority to determine compliance with § 108(c)—that is the law. Thus, the Secretary violates no fiduciary obligation by following the letter of § 108(f)." *Sault Ste. Marie Tribe*, 442 F. Supp.

[4] It may be possible for a tribal director to be sued for injunctive relief even if the Sault itself is insulated by sovereign immunity so that tribal members themselves would potentially oversee the Sault's expenditures under § 108(c). *See Sault Ste. Marie Tribe*, 442 F. Supp. 3d at 68 n.10.

3d at 71 (emphasis omitted). For these reasons, I would conclude § 108(f) is unambiguous and affirm the district court's decision on that basis.

Even if consideration of general trust principles supported the conclusion that § 108(f) is ambiguous regarding the Secretary's ability to review the Sault's compliance with § 108(c) before taking land into trust—because it does not *unambiguously* allow the Secretary to do so—we would then move to the next step of *Chevron*. In a traditional statutory interpretation case, we would defer to the agency's reasonable interpretation of the statute. *Eagle Pharms.*, 952 F.3d at 330. Here, we must also address the intersection between *Chevron* and the Indian Canon, which generally provides that in a case involving Indian law, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In *Cobell v. Salazar* we explained that:

> *Chevron* deference can be trumped by the requirement that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. Nonetheless, *Chevron* deference does not disappear from the process of reviewing an agency's interpretation of those statutes it is trusted to administer for the benefit of the Indians, although that deference applies with muted effect. Granted, the Indians' benefit remains paramount. But where Congress has entrusted to the agency the duty of applying, and therefore interpreting, a statutory duty owed to the Indians, we cannot ignore the responsibility of the agency for careful stewardship of limited government resources.

573 F.3d 808, 812 (D.C. Cir. 2009) (internal citations and quotations omitted). *Cobell* suggests that *Chevron*'s "muted effect" supersedes the Indian Canon only in limited contexts. *Cobell* featured one such context. In *Cobell*, the agency was responsible for "careful stewardship of limited government resources"; we rejected an interpretation that would have prevented Interior from exercising discretion as to the methodology or scope of an accounting of funds of a trust with a "unique nature," *id.* at 812–13—that is, made up mainly of "the proceeds of various transactions in land allotted to individual Indians," *id.* at 809 (internal quotations omitted).

This case is distinguishable from *Cobell* and does not support *Chevron*'s application over the Indian Canon, even with "muted effect." *Cobell* involved a trust that required Interior to conduct an accounting "for the daily and annual balance of all funds held in trust by the United States for the benefit of … an individual Indian." *Id.* (internal quotations omitted). We allowed Interior some deference to craft how to "provide the trust beneficiaries the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 813. On the other hand, here the Secretary's duty is relatively straightforward, especially so when we focus on § 108(f): the Secretary must take land into trust for the Sault after it purchases such land using income or interest from the Fund. Further, unlike *Cobell*—which involved management of "limited government resources"—the Secretary's taking of land into trust for the Sault does not require management of similarly limited government resources. Accordingly, the Indian Canon should favor the Sault's reasonable interpretation, without deference to the Secretary's proposed interpretation, even if that interpretation is also reasonable.

Interior also asserts that the Indian Canon does not apply because there are tribes on both sides of the dispute over interpretation. The Indian Canon is rooted in the general trust relationship between the United States Government and Indians. *Blackfeet Tribe*, 471 U.S. at 766. It makes sense that the Indian Canon defers to the specific tribal beneficiary of a statute (or a signatory to a treaty) versus a third-party tribe. As the district court aptly put it, "[i]t would be strange to construe a statute against the only Tribe it seeks to benefit simply because another Indian tribe objects." *Sault Ste. Marie Tribe*, 442 F. Supp. 3d at 80. Had another beneficiary tribe intervened and argued that the Sault's interpretation of § 108 harmed its MILCSA-protected interest, it would make sense not to defer to either tribe's interpretation. Under Interior's approach, even if the Sault were joined by all other beneficiary tribes under MILCSA, and they agreed on the meaning of an ambiguous MILCSA provision, a third-party tribe's objection to that interpretation would nullify the Indian Canon's applicability. Therefore, even if § 108(f) is ambiguous, the Sault's interpretation of § 108(f) is both permissible and reasonable and we should follow that interpretation under the Indian Canon.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-02035 (TNM)

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff,

v.

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

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,
Defendant-Intervenors.

Filed March 5, 2020

MEMORANDUM OPINION

"[T]he central, organizing question of Federal Courts doctrine involves allocations of authority: *Who* ought to have authority to give conclusive determinations of *which* kinds of questions?" Richard H. Fallon, Jr., *Reflections on the Hart & Wechsler Paradigm*, 47 Vand. L. Rev. 953, 962 (1994). This case is about who decides whether an Indian tribe acquired land for a permissible purpose—the Federal Government or tribal leaders. Finding that Congress vested tribal leaders with that decision here, the Court sets aside the Government's refusal to take land into trust for the Sault Ste. Marie Tribe of Chippewa Indians ("Sault" or the "Tribe").

The Tribe contends that this refusal was contrary to law and arbitrary and capricious under the Administrative Procedure Act ("APA"). For relief, the Tribe seeks vacatur of the decision and either an order compelling the Department to take the land into trust or an order directing the Department to issue a new decision on an expedited basis. The Tribe moves for summary judgment. The Department and Intervenors—three commercial casinos ("Casinos"), the Nottawaseppi Huron Band of the Potawatomi ("NHBP"), and the Saginaw Chippewa Indian Tribe of Michigan ("Saginaw Tribe")—cross-move for summary judgment.

The Court agrees with Sault on the merits. The Department overstepped its authority when it denied Sault's request to take land into trust because it believed the Tribe did not acquire the land for a proper purpose. Congress gave the Department no role in policing Sault's land acquisitions. And in any event, the land acquisition here was for a proper purpose under the relevant statute. The Court declines, however, to order the Department to take any land into trust or to issue a new decision on an expedited basis. The upshot is that the Court will grant in part and deny in part each motion for summary judgment, vacate the Department's decision, and remand to the agency for further proceedings.

I.

Sault is a federally recognized tribe with more than 40,000 enrolled members. A.R. 3113.[1] It has a well-documented history. *See Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 840–

[1] Some pages of the administrative record, as they appear in the Joint Appendix, have multiple "AR" page numbers in their bottom right-hand corner. For consistency, the Court will use the page number with the largest font size.

41 (W.D. Mich. 2008). The Tribe descends from a group of Chippewa bands that occupied a large area in the Upper Great Lakes region. *Id.* In the nineteenth century, these ancestors ceded much of their land to the Federal Government. *See* Treaty of March 28, 1836 (7 Stat. 491).

Alexis de Tocqueville starkly described the process by which the Federal Government obtained Indian lands in *Democracy in America*. Government envoys would gather the tribe members together, coax them with promises of riches in lands undisturbed by European encroachment, and bribe them with trinkets like glass necklaces and tinsel bracelets. Alexis de Tocqueville, *Democracy in America* 403 (Simon & Brown ed. 2013) (1835-1840). He continues:

> If, when they have beheld all these riches, they still hesitate, it is insinuated that they have not the means of refusing their required consent, and that the government itself will not long have the power of protecting them in their rights. What are they to do? Half convinced, and half compelled, they go to inhabit new deserts, where the importunate whites will not let them remain ten years in tranquility. In this manner do the Americans obtain, at a very low price, whole provinces, which the richest sovereigns of Europe could not purchase.

Id.

Over a century later, Congress established the Indian Claims Commission to settle tribal land claims against the United States. *See* Act of Aug. 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1050. The Commission found that the 1836 treaty was "unconscionable." 26 Ind. Cl. Comm. 550, 553 (Dec. 29, 1971) (Docket Nos. 18-E and 58). The United States had paid the Chippewa bands

$1.8 million for land worth $12.1 million. *Id.* As a remedy, the Commission awarded Sault and other tribes more than $10 million in damages. *Id.* at 561.

The question remained how to distribute these judgment funds among the beneficiary tribes. The answer came in the Michigan Indian Land Claims Settlement Act ("MILCSA"). *See* Pub. L. No. 105-143, 111 Stat. 2652 (1997). MILCSA is central to this case. Its express purpose is "to provide for the fair and equitable division of the judgment funds" among the beneficiary tribes "and to provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds." *Id.* § 102(b). The beneficiary tribes include Sault and the Bay Mills Indian Community, but not the intervenor tribes. *Id.* § 104.

Section 108 of MILCSA describes the plan for Sault. *Id.* § 105(a)(3). It directs the Secretary of the Interior to transfer the Tribe's share into a trust called the "Self-Sufficiency Fund." *Id.* § 108(a)(1)(A), (e)(1). The Tribe's board of directors is the "trustee" of this Fund and "shall administer the Fund in accordance with the provisions of" section 108. *Id.* § 108(a)(2). The "principal" of the Fund

> shall be used exclusively for investments or expenditures which the board of directors determines … (A) are reasonably related to … economic development … development of tribal resources … (B) are otherwise financially beneficial to the tribe and its members … or (C) will consolidate or enhance tribal landholdings.

Id. § 108(b)(1). The "interest and other investment income" of the Fund, meanwhile,

> shall be distributed … (1) as an addition to the principal of the Fund … (2) as a dividend to tribal members … (3) as a per capita payment to some group or category of tribal members designated by the board of directors … (4) for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the [Tribe] … or (5) for consolidation or enhancement of tribal lands.

Id. § 108(c).

As we will see, the meaning of § 108(c)(5)—specifically, the phrase "enhancement of tribal lands"—is one of the main issues here. Section 108 also provides that "[n]otwithstanding any other provision of law," the Secretary's "approval … for any payment or distribution from the principal or income of the [Fund] shall not be required and [he] shall have no trust responsibility for the investment, administration, or expenditure of the principal or income." *Id.* § 108(e)(2). Finally, MILCSA directs that "[a]ny lands acquired using amounts from interest or other income of the [Fund] shall be held in trust by the Secretary for the benefit of the tribe." *Id.* § 108(f). The meaning of § 108(f) is the other main issue here.

While section 108 of MILCSA takes center stage, it helps to understand section 107, which establishes the plan for Bay Mills. *Id.* § 105(a)(2). Section 107 bears similarities to section 108 but is different in some critical respects. It provides that 20 percent of the tribe's share goes into the "Land Trust." *Id.* § 107(a)(1). The tribe's Executive Council is the "trustee" of the Land Trust and "shall administer the [Trust] in accordance with" section 107. *Id.* § 107(a)(2). "The principal of the [Trust] shall not be expended for any purpose." *Id.* § 107(a)(4). The

Trust's "earnings," meanwhile, "shall be used exclusively for improvements on tribal land or the consolidation *and* enhancement of tribal landholdings through purchase or exchange." *Id.* § 107(a)(3) (emphasis added). "Any lands acquired with funds" from the Trust "shall be held as Indian lands are held." *Id.* And, as with section 108, "[n]otwithstanding any other provision of law, the approval of the Secretary of any payment from the [Trust] shall not be required." *Id.* § 107(a)(6).

II.

A.

Sault describes itself as "economically distressed" and "severely land-starved." Compl. ¶¶ 18–19, ECF No. 1. Its current trust lands are all in Michigan's Upper Peninsula. A.R. 2154. These lands—consisting of 2,200 acres—serve the 15,000 members who live in that region. *Id.* Despite having no trust lands in Michigan's Lower Peninsula, about 14,000 of the Tribe's members live there. *Id.* According to the Tribe, federal policy in the twentieth century encouraged residents of the rural Upper Peninsula to relocate to urban areas in the Lower Peninsula. *Id.* at 2162–63. Once this failed "Voluntary Relocation Program" ended in 1975, many members could not afford to move back to the Upper Peninsula. *Id.* at 2163.

By 2012, the Tribe's situation was "increasingly tenuous." Compl. ¶ 33. It did not have enough land to serve its members in either the Upper or Lower Peninsula. *Id.* And its revenue from casinos in the "remote areas" of the Upper Peninsula had declined by 24.5 percent in the past decade. *Id.* ¶ 34. This was because of "competition from the Michigan State Lottery and new casinos in the Lower Peninsula." *Id.*

To remedy these problems, the Tribe's board approved a plan to open a casino in the Lower Peninsula. *Id.* ¶ 35. The Tribe has been candid from the outset that its endgame here is to open a casino, if allowed under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* A.R. 3112 n.1. Tribes can build casinos only on "Indian lands," 25 U.S.C. § 2710(d)(1), which include lands that the Government holds in trust for their benefit, *id.* § 2703(4)(B). As a first step toward a casino, then, the Tribe needed the Government to take land in the Lower Peninsula into trust. A simple property purchase by the Tribe would not suffice. The Tribe thus turned its attention to MILCSA, which requires the Secretary of the Interior to take into trust "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund." Pub. L. No. 105-143, § 108(f).

With an eye on MILCSA, the Tribe took steps to acquire a 71-acre plot of land in the Lower Peninsula—the "Sibley Parcel"—and asked the Secretary to take this parcel into trust. A.R. 3110, 3114.[2] It informed the Department that it would use income from the Self-Sufficiency Fund to purchase the parcel. *Id.* at 3114.[3] It also assured the Department that the purchase was a proper expenditure of Fund income. *Id.* at 3115.

Recall that § 108(c) of MILCSA specifies five purposes for which Fund income "shall be distributed." Pub. L. No. 105-143, § 108(c). In the Tribe's judgment,

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[2] The Tribe also submitted a trust application for a 2.69-acre plot called the "Lansing Parcel." A.R. 2979, 2983. Sault's claims for the Lansing Parcel are now moot. *See* Order, ECF No. 71.

[3] When it submitted its trust application, the Tribe had a binding right to acquire the Sibley Parcel, and it has since acquired it. A.R. 3114, 3166.

its use of Fund income to acquire the parcel was "for consolidation or enhancement of tribal lands," *id.* § 108(c)(5), and "for educational, social welfare, health, cultural, or charitable purposes," *id.* § 108(c)(4). A.R. 3116–19. But—crucially—the Tribe claimed that its board had exclusive authority to decide that a distribution of Fund income was for one of these purposes, and thus the Secretary had no authority to conclude otherwise. *Id.* at 3115–16. The Secretary's only role under § 108(f) was to verify that the Tribe had purchased the land using Fund income. *See id.*

Still, the Tribe covered its bases. It advanced two reasons why the purchase was an "enhancement of tribal lands" under § 108(c)(5). The lead contention was that "enhance" means "augment," and acquisition of the parcel augmented its total landholdings "by increasing the total land [it] possessed." *Id.* at 3117. The Tribe acknowledged, however, that the Department had once given a different meaning to the term "enhancement" in section 107 of MILCSA. *Id.* The Department opined in 2010 that "enhancement" encompasses only those land purchases that increase the *value* of existing tribal landholdings. *See* Letter from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior, to Michael Gross, Associate General Counsel, Bay Mills Indian Cmty. 4, 6 (Dec. 21, 2010) ("Bay Mills Opinion") (A.R. 457, 459).

The Tribe's alternative argument, then, was that the acquisition would increase the value of its existing landholdings. A.R. 3118. How so? It all came back to the casino it hoped to build. *See id.* A financial officer for Sault claimed the Tribe would use gaming revenue to "improve the value of [its] existing land holdings" by making improvements to existing casinos in the Upper Peninsula and funding more tribal services. *Id.* at 2215. The Director of the Tribal Housing Authority,

meanwhile, asserted that "increased gaming revenue" was "the most viable means of increasing housing services availability." *Id.* at 2228. And the Tribe had passed resolutions requiring that it use some of the new gaming revenues to fund tribal services. *Id.* at 3094, 3150.

Along these lines, the Tribe also urged that its acquisition of the Sibley Parcel was "for educational, social welfare, health, cultural, or charitable purposes" under § 108(c)(4). *Id.* at 3119. It reasoned that extra gaming revenue would enable it to provide additional "social services" for its members in the Lower Peninsula. *Id.* More, the acquisition would generate a "land base" and employment opportunities for those members. *Id.*

B.

Sault submitted its trust application to the Department in June 2014. A.R. 3110. Over the next two and a half years, the Department periodically asked for more information and the Tribe duly supplemented the record. *Id.* at 812, 833–37, 2242–43, 2229–30. The back-and forth centered on two issues: (1) the source of the funds the Tribe used to acquire the parcel and (2) how the purchase would "enhance" tribal lands. *See id.* The Department also entertained opposition briefs from the State of Michigan, the NHBP, and the Saginaw Tribe. *Id.* at 180–217, 1482–83.

The Department eventually sent Sault an interim decision in January 2017. *Id.* at 969–74 ("January Letter"). In its view, the Tribe had to prove both that it acquired the land with Fund income *and* that the land acquisition complied with § 108(c). *Id.* at 971. And as matters stood, the Tribe's acquisition did not comply with § 108(c). *Id.* at 971 n.25, 974. It rejected the Tribe's argument that the acquisition "enhanced" tribal land by increasing the Tribe's total landholdings. *Id.* at 972. The

Department reaffirmed its position from the Bay Mills Opinion that an "enhancement" encompasses only those land acquisitions that increase the value of existing landholdings. *Id.* at 972–73. In its judgment, the Tribe's evidence on that point was wanting. *Id.* at 973. The Department also dismissed the Tribe's contention that the land acquisition was "for educational, social welfare, health, cultural, or charitable purposes." *Id.* at 972 n.25.[4]

The January Letter did not deny the Tribe's application outright. Instead, the Department gave the Tribe another opportunity to present evidence that the land acquisition was an "enhancement of tribal lands." *Id.* at 974. The Tribe responded by asking for either a clarification of what additional evidence the Department required or a final decision denying the application. *Id.* at 1889. It never submitted additional evidence, *id.* at 1930 & n.4, and the Department issued a final decision denying the application in July 2017, *id.* at 1930–33 ("July Letter").

The July Letter reiterated the Department's earlier conclusions and elaborated on the "enhancement" issue. *Id.* at 1931. The Tribe had "not offered real estate appraisals or assessments … suggesting that the value of one tract of land would increase as a result of the acquisition of another." *Id.* at 1932. More, the Tribe had merely offered the "attenuated reasoning" that the acquisition might lead to greater gaming revenues, which it might *then* use to increase the value of existing land. *Id.* at 1933. Even if the Department could accept this reasoning, the Tribe had "not offered any evidence of its

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[4] The Tribe had also urged that the acquisition was a "consolidation … of tribal lands." A.R. 3117 n.3. The Department rejected this argument, *id.* at 972 n.25, and the Tribe does not pursue it here, *see* Compl. ¶¶ 75–81.

plans to use the gaming revenue to benefit its existing lands or its members." *Id.* Earlier in the letter, the Department noted that the Tribe's "conclusory statements" were "not evidence." *Id.* at 1932 n.16.

In neither the January Letter nor the July Letter did the Department address whether the Tribe had acquired the parcel using Fund income. There was no need to do so, in the Department's view, because the Tribe had failed to show compliance with § 108(c). *Id.* at 974, 1932 n.15.

Next, the Tribe filed this suit. It sought vacatur of the July Letter and an order compelling the Secretary to take the Sibley Parcel into trust. Compl. ¶ 101(a), (e). In the alternative, the Tribe sought vacatur and an order directing the Secretary to resolve, within 90 days, whether the Tribe acquired the parcel using Fund income. *Id.* ¶¶ 100, 101(a), (e).

Shortly after the Department answered the Tribe's Complaint, the Casinos, the NHBP, and the Saginaw Tribe all moved to intervene as Defendants. The Court granted these motions. *See* Order at 1,[5] ECF No. 36. A flurry of cross-motions ensued. Sault moved for summary judgment. The Department and all Intervenors cross-moved for summary judgment. These five motions are ripe, and the Court held a consolidated hearing on them all.

III.

Summary judgment is normally appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

[5] For documents not in the administrative record, all page citations are to the page numbers that the CM/ECF system generates.

as a matter of law." Fed. R. Civ. P. 56(a). But this standard does not apply when a court is reviewing a decision by an administrative agency. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006). Instead, the Court reviews the agency's decision under the APA. *See id.* at 89–90.

When a party challenges agency action under the APA, "the district judge sits as an appellate tribunal" and the "entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (cleaned up). The Court must "hold unlawful and set aside" a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

IV.

The Complaint lists three counts. Between Counts I and II, Sault raises four arguments for vacatur of the Department's decision. *First*, the Secretary had no authority to decide whether the Tribe's use of Fund income to acquire the Sibley Parcel complied with § 108(c) of MILCSA. Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at 26–33, ECF No. 43. Section 108(f), in the Tribe's view, requires the Secretary to take land into trust on one—and only one—condition: that the Tribe acquired the land using Fund income, rather than some other source of funds. *Id.* at 31–32. *Second*, even if the Secretary had authority to verify compliance with § 108(c), its interpretation of "enhancement of tribal lands" was not permissible. *Id.* at 33–48. *Third*, in any event, the Tribe produced evidence that satisfied the Department's interpretation of "enhancement," and the Department acted arbitrarily and capriciously in ignoring that evidence. *Id.* at 48–51. *Fourth*, the Department wrongly concluded that the land acquisition was not "for educational, social welfare,

health, cultural, or charitable purposes" under § 108(c)(4). *Id.* at 52–53.

The Court agrees with the Tribe's first two arguments. The Secretary has no authority to verify compliance with § 108(c) before taking land into trust under § 108(f). In any event, the Department applied an impermissible interpretation of "enhancement of tribal lands." Either ground alone warrants vacatur of the Department's decision. *See* 5 U.S.C. § 706(2)(A). The parties briefed and argued these issues in the most depth. The Court therefore need not, and does not, address the merits of the Tribe's remaining arguments.

A.

The Department's decision was contrary to law because it misconstrued its authority under § 108(f) of MILCSA. The Department believed it had authority to verify (1) that the Tribe acquired the land using Fund income and (2) that the Tribe's use of Fund income to acquire the land was proper under the parameters of § 108(c). *See* A.R. 971. The Tribe insists the Department had authority to verify only the first—that it acquired the land using Fund income. Pl.'s Mot. at 31–32.

The text of § 108(f) bears out the Tribe's interpretation. "Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Pub. L. No. 105-143, § 108(f). By its plain language, this provision imposes a mandatory duty on the Secretary to take land into trust on just one condition: that the Tribe acquired the land "using amounts from interest or other income" of the Fund. One condition means just one matter for the Secretary to scrutinize. Congress thus gave the Secretary no authority to

scrutinize anything else, including whether Sault spent the income for a proper purpose under § 108(c).

The Department's contrary reading upends the remainder of section 108, which entrusts spending decisions to the Tribe. The Tribe's board of directors is the "trustee" of the Fund. *Id.* § 108(a)(2). A trustee typically decides how to manage the trust property, here, the Fund principal and income. *See* Restatement (Third) of Trusts § 70 (2007). Congress specified that the Tribe's board "shall administer the Fund in accordance with the provisions" of section 108. Pub. L. No. 105-143, § 108(a)(2). These "provisions" include § 108(c), which lists the purposes for which Fund income "shall be distributed." Thus, the purposes in § 108(c) are spending instructions for the Tribe, not the Secretary. So far, so clear.

But lest there was any doubt about the Secretary's role (or lack thereof):

> *Notwithstanding any other provision of law …* 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.

Id. § 108(e)(2) (emphasis added). In stark terms, this provision strips the Secretary of any say over how the Tribe spends Fund income under § 108(c). Section 108(f), of course, counts as "any other provision of law" that § 108(e)(2) overrides. Yet the Department believes § 108(f) gives it authority to reject a land-to-trust application if it concludes that the land acquisition was an improper use of income under § 108(c). True, rejecting a

trust application under § 108(f) is different from prohibiting the Tribe from spending the income in the first place. But this is a distinction without a difference. Either way, the Secretary is purporting to negate the board's use of Fund income.

Indeed, the Department and the Casinos—who strongly reject this reading of § 108(e)(2)—concede that the agency has no oversight role when the Tribe spends income for purposes other than land acquisition. *See* Mot. Hr'g Tr. at 31–32, 48–49. For example, if the Tribe chooses to distribute income "as an addition to the principal of the Fund," Pub. L. No. 105-143, § 108(c)(1), the Department cannot police whether this "addition" occurred. Matters are different, they insist, when the Tribe asks the Secretary to take land into trust. *See* Casinos' Mot. for Summ. J. ("Casinos' Mot.") at 17, ECF No. 45; Mot. Hr'g Tr. at 31–32, 48–49. When that happens, suddenly the Department can scrutinize the Tribe's use of income. If Congress had written the statute this way, that might have been sensible. Taking land into trust, after all, is no small matter.

But that is not the statute Congress wrote. Indeed, one might expect extra clarity if Congress intended the Department's role in reviewing expenditures to differ so dramatically as between land acquisitions and otherwise. This distinction, however, is not at all apparent from § 108(f) or § 108(e)(2). If anything, the categorical language of § 108(e)(2) forecloses any distinction.

On the meaning of § 108(e), the Court finds some guidance in *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001). That case dealt with a law like MILCSA that Congress enacted for the benefit of the Wyandotte Tribe of Oklahoma. *See* Pub. L. No. 98-602, 98 Stat. 3149 (1984). The law allocated funds to the

Wyandottes and provided that "$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe." *Id.* § 105(b)(1).

The Wyandottes used these funds to purchase a tract of land. *Sac & Fox*, 240 F.3d at 1256. The question arose whether the Department had a mandatory duty to take this land into trust. *Id.* at 1261. The Department concluded that it did, but other tribes argued against a mandatory duty, citing the Indian Reorganization Act, which gives the Secretary general discretionary authority to acquire land in trust. *Id.* The court affirmed the Secretary's interpretation under the first step of *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).[6] *See* 240 F.3d at 1262.

Insofar as § 105(b)(1) by itself was ambiguous, the Tenth Circuit found a different subsection "resolve[d] any potential ambiguities." *Id.* That other subsection mirrors § 108(e)(2) of MILCSA: "[N]othwithstanding any other provision of law, the approval of the Secretary for any payment or distribution by the Wyandotte Tribe … of any funds described in subsection (b) … shall not be required[.]" Pub. L. 98-602, § 105(c)(1). According to *Sac & Fox*, this provision "clearly indicates that the Secretary shall have no discretion in deciding whether to take into trust a parcel of land purchased by the Wyandotte Tribe with Pub. L. 98-602 funds." 240 F.3d at 1262.

[6] Under the *Chevron* two-step framework, a court first considers "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the statute is unambiguous, that ends the analysis. *See id.* at 842–43. If the statute is "silent or ambiguous," the court goes on to step two and must uphold an agency's interpretation if it "is based on a permissible construction of the statute." *Id.* at 843.

Sac & Fox thus undercuts the argument that § 108(e)(2) does not bear on the Secretary's authority under § 108(f). *See, e.g.*, Dep't Mot. for Summ. J. ("Dep't Mot.") at 21, ECF No. 53-1 ("[Sault's] reliance on § 108(e) … is … unconvincing because this provision concerns the scope of Interior's trust duties regarding the Fund and not land acquisition."). The Secretary's lack of say over how the Wyandottes distributed funds reinforced the Secretary's mandatory duty to take into trust lands that the tribe had acquired with those funds. *Sac & Fox*, 240 F.3d at 1262.

To be sure, *Sac & Fox* was addressing a different question than the one here. All agree, unlike in *Sac & Fox*, that the Secretary's trust duty under § 108(f) is mandatory. *See, e.g.*, Dep't Mot. at 11. The dispute is about what conditions trigger this mandatory duty. But similar logic applies. Under § 108(e)(2), the Secretary lacks a say over how Sault uses its income. This reinforces what is already apparent from § 108(f): the Secretary must take into trust land that the Tribe purchases with income, even if the Department thinks this use of income violated § 108(c).[7]

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[7] The Casinos insist that under the Tribe's reading of § 108(e)(2), this provision would also strip the Department of any authority to second-guess whether the Tribe in fact used Fund income to acquire the land. Casinos' Reply at 7, ECF No. 60. Yet the Tribe concedes that the Department can question it on this point. *See* Pl.'s Mot. at 31–32. The Casinos' proposed analogy fails. The mandatory duty under § 108(f) applies only to "lands acquired using amounts from interest or other income." This provision says nothing about the purposes for which Sault acquired the land. Verifying whether the Tribe used income to acquire land does not give the Department a say over *how* the Tribe spends income, so § 108(e)(2) does not override the Department's authority to verify the sole precondition in § 108(f).

Sac & Fox is instructive for another reason. The court characterized the Indian Reorganization Act of 1934 as granting the Secretary "broad discretion … to decide whether to acquire land in trust on behalf of Indian tribes." 240 F.3d at 1261. Against this background of discretion, Congress imposed a mandatory trust duty in § 108(f). Yet allowing the Department to police compliance with § 108(c) would give it much discretion, particularly if the Court were to agree that the purposes in § 108(c) are susceptible to different interpretations. *See* Dep't Mot. at 27. The Department's interpretation thus transforms the mandatory duty in § 108(f) into something that looks much more like a discretionary power. This interpretation "inadequately accounts" for Congress's decision to use mandatory language in § 108(f). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

In sum, section 108 creates a scheme with two basic parts. The first part is all about the Fund and the Tribe's role in administering the Fund. This part mentions the Secretary only twice. *See* Pub. L. No. 105-143, § 108(a)(1)(A), (e). It directs the Secretary to transfer Sault's share of judgment funds into the Self-Sufficiency Fund, *id.* § 108(a)(1)(A), (e)(1), and then divests the Secretary of any authority over how the Tribe administers the Fund, *id.* § 108(e)(2). Section 108(c), meanwhile, concerns (1) Fund income and (2) the purposes for which the Tribe can distribute this income.

If the Tribe uses income to acquire land, the Secretary's trust duty under § 108(f) comes into play. This is the second basic part of section 108, and it concerns the Secretary's role. In defining this role, Congress mentioned only one of the two components in § 108(c): use of Fund income. It did not mention anything about the purposes for which Sault used the income. The Secretary's

role thus has nothing to do with this second component of § 108(c).

Yet the Department and Intervenors insist that § 108(f) gives the Secretary a role in policing the Tribe's compliance with this second component of § 108(c). Notably, few of their objections focus on the actual language of § 108(f). And those that attempt to do so end up relying on words that are absent from this provision. The Department insists, for example, that since the mandate in § 108(f) "applies only to *lands acquired pursuant to § 108(c)*, which in turn limits the purposes for which Fund income can be used," the Secretary must necessarily verify "that the use of Fund income satisfies a purpose in § 108(c)(1)–(5)." Dep't Mot. at 21–22 (emphasis added). In a similar vein, the Casinos urge that "just as the Secretary may concededly deny trust status if an acquisition was not funded with interest, he may, for the same reason, deny trust status because the acquisition was not funded through a *statutorily permissible use* of interest." Casinos' Mot. at 13.

There is simply no textual hook in § 108(f) for the authority that the Department claims. MILCSA does not define the Secretary's trust duty in terms of land "permissibly" acquired or land "acquired pursuant to § 108(c)." Congress knows how to define the Secretary's role in these terms when it wishes. Consider the wording of a different land-into-trust statute. *See* Gila Bend Indian Reservation Lands Replacement Act ("Gila Act"), Pub. L. No. 99-503, 100 Stat. 1798 (1986). The Gila Act authorizes a tribe "to acquire by purchase private lands in an amount not to exceed, in the aggregate, [9,880] acres." *Id.* § 6(c). And the Secretary, "at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires *pursuant to subsection (c) which meets the requirements of this*

subsection." *Id.* § 6(d) (emphasis added). The "requirements" of subsection (d) ("this subsection") include that the land "constitutes not more than three separate areas consisting of contiguous tracts." *Id.*

Section 6(d) contains two sorts of clauses that Congress conspicuously did not include in § 108(f) of MILCSA: (1) "which the Tribe acquires pursuant to subsection (c)" and (2) "which meets the requirements of this subsection." If § 108(f) had directed the Secretary to take into trust "land acquired pursuant to § 108(c)," the Department would have a stronger argument for authority to verify compliance with § 108(c). After all, if the Tribe did not acquire the land for any of the purposes in § 108(c), it did not acquire the land "pursuant to" that subsection.[8] And the Department's argument would be even stronger if Congress had instructed the Secretary to take into trust "land whose acquisition meets the requirements of § 108(c)."[9]

In other words, Congress knows how to define the Secretary's trust duty in terms of a land acquisition that meets certain requirements—including the requirements of a separate subsection. But Congress did not say anything in § 108(f)—the subsection that defines the

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[8] Just consider how the phrase "pursuant to" functions in the Gila Act. Section 6(c) authorizes the Tribe to purchase private lands in an amount not to exceed 9,880 acres. So the purchase of acre number 9,881 would not be "land which the Tribe acquires pursuant to subsection (c)." Pub. L. No. 99-503, § 6(d).

[9] Again, consider how the phrase "which meets the requirements of this subsection" functions in the Gila Act. "Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts[.]" Pub. L. No. 99-503, § 6(d). So if the Tribe acquired land consisting of four separate areas, the land would not meet subsection (d).

Secretary's role—about land acquisitions that meet the requirements of § 108(c). That is powerful evidence against the Department's interpretation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (applying *Russello*'s principle in a comparison of two different statutes).

But, one Intervenor presses, if the Department has no role in policing compliance with § 108(c), the requirements in that subsection would be "wholly meaningless." Casinos' Mot. at 13. "There would have been no reason for Congress to allow the use of [income] only for *certain* purposes, if it intended to make trust status available for land purchased for *any* purpose." *Id.* To show the apparent absurdity of Sault's interpretation, the Casinos posit a hypothetical in which the Tribe shamelessly admits that it did *not* purchase land for any of the purposes in § 108(c), but still demands that the Department take the land into trust. *Id.* at 18.

Statutory requirements are not "wholly meaningless" simply because a federal agency has no power to enforce them. For one, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). So just because a statute imposes requirements, a federal agency does not automatically get to enforce those requirements. For example, the Civil Service Reform Act of 1978 imposed requirements on an Office of Special Counsel relating to investigations of alleged reprisals against whistleblowing. *Wren v. Merit Sys. Prot. Bd.*, 681 F.2d 867, 871–72 (D.C. Cir. 1982). But at the

same time, the Merit Systems Protection Board had "no … authority to enforce these statutory requirements." *Id.* at 872. Congress has enacted other schemes that rely on self-policing. *See Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) ("The FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."). Indeed, the Casinos admit the Department has no authority to police compliance with the first three subparagraphs of § 108(c), yet they do not claim that these subparagraphs are "wholly meaningless." *See* Mot. Hr'g Tr. at 48–49.

Under Sault's interpretation, § 108(c) has meaning because it constrains how the *Tribe* chooses to spend Fund income. Section 108(a)(2) provides that the Tribe's board "shall administer the Fund in accordance with the provisions of this section." So MILCSA envisions that the Tribe will adhere to the restrictions in § 108(c). Whether these restrictions are legally enforceable is separate from whether they have meaning. *See Wren*, 681 F.2d at 872 ("[I]f the [Office of Special Counsel] fails to perform its statutory duties, as here, relief—*if it lies at all*—must be sought in a separate action in the district court to compel the OSC to perform its statutory duties." (emphasis added)); *see also Nielsen v. Preap*, 139 S. Ct. 954, 983 (2019) (Breyer, J., dissenting) (describing the plurality's reliance on cases "holding certain statutory deadlines unenforceable," and citing these cases). The Court thus need not resolve whether and how § 108(c) is legally enforceable against the Tribe's board.[10] The

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[10] When pressed on enforcement mechanisms, Sault posited that tribal members likely would have a claim against the directors if, for example, they gave all the Fund income to themselves. Mot. Hr'g Tr. at 11–12. As Sault pointed out, the statute contains a provision that could allow tribal members to spot any self-dealing. Under this provision, the Fund's "books and records" are subject to an

Tribe ignores a "thou shalt" directive from Congress at its peril. The Department is not the only floorman on the job.

This understanding of § 108(c) as self-policing dovetails with principles of tribal sovereignty. Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (cleaned up). A tribe's inherent sovereign authority encompasses "extensive powers over [its] property." *Cohen's Handbook of Federal Indian Law* § 4.01[2][c] (2019). And "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. A scheme that gives the Department no role in policing how tribal property "shall be distributed" accords with tribal self-government.

The Casinos' appeal to absurdity also falls short. They face "a high bar." *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 505 (D.C. Cir. 2016). "The Supreme Court has equated an absurdity with an outcome so bizarre, illogical, or glaringly unjust that Congress could not plausibly have intended that outcome." *Id.* (cleaned up). The Casinos fail to clear this bar. MILCSA was a special provision for the benefit of select tribes, including Sault. The Tribe claims, and no party disputes, that this legislation represents "a negotiated compromise between sovereigns to remedy decades of failure by the federal

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annual audit and any tribal member can inspect the audit report. Pub. L. No. 105-143, § 108(d)(2). The Department, for its part, questioned the ability of tribal members to enforce § 108(c), noting that MILCSA contains no waiver of sovereign immunity. Mot. Hr'g Tr. at 33. Sovereign immunity, though, would not to apply to individual tribal members or officials. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014).

government to compensate tribes for the nineteenth-century taking of their lands." Pl.'s Reply at 49, ECF No. 56.

The Indian Claims Commission had rendered judgments "in favor of the Sault [Tribe]" and other tribes. Pub. L. No. 105-143, § 102(a)(1). The Department had been holding on to the judgment funds "pending a division … among the beneficiaries in a manner acceptable to the tribes … and pending development of plans for the use and distribution of the respective tribes' share." *Id.* § 102(a)(2). That "division" and "development of plans" came in MILCSA. *See id.* § 102(b) ("It is the purpose of this title to provide for the fair and equitable division of the judgment funds among the beneficiaries and to provide the opportunity for the tribes to develop plans for the use and distribution of their share of the funds.").

MILCSA, then, is a restitution scheme, not a regulatory scheme, and one that Sault helped negotiate for itself. *See* Pl.'s Reply at 41, 49; Mot. Hr'g Tr. at 12–13. It returns to the Tribe its rightful funds. It provides no set of rules for the Tribe to follow and for the Secretary to enforce against the Tribe. Given all this, Sault's understanding of the statute is far from absurd. It is reasonable that the statute would leave it to the Tribe—and not the Department—to determine whether expenditures *of its own funds* fall within certain parameters. It is also sensible that the Tribe would negotiate an arrangement that assumes good faith on its part. This explains the absolute phrasing of § 108(f)—the scheme trusts that any land the Tribe acquires using Fund income will be land that the Tribe acquires within the bounds of § 108(c).

The objections continue. The Department and the NHBP lean heavily on a slight textual distinction

between § 108(b) and § 108(c). Subsection (b) states that Fund principal "shall be used exclusively for investments or expenditures *which the board of directors determines* … will consolidate or enhance tribal landholdings … ." Pub. L. No. 105-143, § 108(b) (emphasis added). Subsection (c), by contrast, directs that Fund income "shall be distributed … for consolidation or enhancement of tribal lands … ." *Id.* § 108(c). It does not use the phrase "which the board of directors determines." The Department and Intervenors say this omission belies Sault's claim that its board has exclusive authority to determine compliance with § 108(c). Dep't Mot. at 21; NHBP's Mot. for Summ. J. ("NHBP's Mot.") at 16–17, ECF No. 49.

The problem with this argument is three-fold. *First*, whatever § 108(c) says, § 108(a)(2) entrusts spending decisions to the Tribe, as discussed above. The Tribe's "board of directors" is the "trustee" of the Fund and "shall administer the Fund in accordance with the provisions" of section 108. Pub. L. No. 105-143, § 108(a)(2). These "provisions" include § 108(b) and § 108(c), which explain how Fund principal "shall be used" and how Fund income "shall be distributed." So just through § 108(a)(2), the instructions in § 108(c) about how income "shall be distributed" are instructions for the Tribe. And recall that the Department concedes that it has no authority to oversee distributions of income for the purposes in the first three subparagraphs of § 108(c). Mot. Hr'g Tr. at 31–32.

Second, § 108(c) does not mention the Secretary either. Indeed, as discussed, § 108(e) clarifies that the Secretary has no say over the Tribe's spending decisions. So even if the Tribe has non-exclusive authority to determine compliance with § 108(c), it is not the Secretary that shares this authority. Who might? Consider again

the example of a tribal member suing the directors over an expenditure (assuming sovereign immunity would not bar suit, *see supra* note 10). If the member challenged an expenditure of principal, perhaps a court would defer to the board's determination that the expenditure falls within the parameters of § 108(b). But if the member challenged a use of income, a court might sensibly not defer to the board's assertion of compliance with § 108(c), given the slight textual contrast with § 108(b).

Third, the focus on § 108(b) versus § 108(c) deflects from the provision at issue, § 108(f). Section 108(f) calls for a single inquiry by the Secretary, whether the Tribe acquired the lands "using amounts from interest or other income" of the Fund. It does not invoke § 108(c) by saying, for example, "land acquired under § 108(c)" or "land acquired pursuant to § 108(c)." If it did, the distinction between § 108(b) and § 108(c) might be relevant.

The Tribe, presumably, would still contend that the Department cannot substitute its judgment, citing the provisions in MILCSA that entrust spending decisions to its board. But the Department could claim—with some force—that the lack of "which the board of directors determines" in § 108(c) means it does not have to take the Tribe's word that expenditures to acquire land were "under § 108(c)" or "pursuant to § 108(c)."

The Department next contends that the Court should read § 108(f) "in conjunction with Interior's general authority statutes," which give the Secretary of the Interior "responsibility over matters pertaining to Indian tribes." Dep't Mot. at 22. It cites three of these "general authority statutes." *Id.* One charges the Secretary "with the supervision of public business relating to … Indians." 43 U.S.C. § 1457(10). Another entrusts

the "management of all Indian affairs" to the Commissioner of Indian Affairs, who works "under the direction of the Secretary." 25 U.S.C. § 2. And the third authorizes the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9.

The Department's reliance on these statutes proves too much. They do not give the Secretary power to do whatever he wants in matters of Indian affairs. This would contradict the many statutes, including MILCSA itself, that impose mandatory duties on the Secretary, *see* Pub. L. No. 105-143, § 108(e)(1), and prohibit him from taking certain actions, *see id.* § 108(e)(2). Here, the "[n]otwithstanding any other provision of law" clause in § 108(e)(2) explicitly overrides any authority the Secretary otherwise might have—including from generally applicable statutes—when it comes to policing how this Tribe spends its Fund income.

Even setting aside § 108(e)(2), the general authority statutes are exactly that—general. They merely prompt the question of what "management" of Indian affairs entails. Statutes like MILCSA fill in the details. So, under MILCSA, part of the Secretary's management role is to take into trust any lands the Tribe acquires using Fund income. *Id.* § 108(f). The question is what specific authority the Secretary has under § 108(f). It is circular to go back to the general statutes to determine the extent of this authority.

Apparently recognizing that its focus should be more granular, the Department insists that MILCSA is one of many "mandatory acquisition statutes" that require it to make "eligibility determinations" before taking land into trust. Dep't Reply at 9–10, ECF No. 62. It points to a section of the Indian Land Consolidation Act,

see 25 U.S.C. § 2216(c), as an example. Dep't Reply at 9. A look at that statute, however, reveals a telling contrast with MILCSA, much like the contrast between MILCSA and the Gila Act, *see supra*:

> [A] … tribal government … in possession of an interest in trust or restricted lands, at least a portion of which is in trust or restricted status on November 7, 2000, and located within a reservation, may request that the interest be taken into trust by the Secretary. Upon such a request, the Secretary shall forthwith take such interest into trust.

25 U.S.C. § 2216(c). This structure noticeably differs from § 108(f). Before taking an interest into trust, the Secretary must verify that the tribe has made "such a request." And, under the first sentence, the tribe has not made "such a request" if, for instance, the interest is located outside a reservation. So the Secretary likely must verify, before exercising his mandatory trust duty, that the interest is "located within a reservation."

Section 108(f) of MILCSA would be comparable if it said something like this: "If the Tribe acquires land in conformity with § 108(c), it may request that the Secretary take the land into trust, and the Secretary, upon such a request, shall take the land into trust." Under this language, if the Tribe did not acquire land in conformity with § 108(c), an application to take that land into trust would not be "such a request," likely leaving the Secretary free to deny the application. But, of course, § 108(f) says nothing of the sort.

Consider also the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act ("Fallon Act"), another statute that the Department cites. Dep't Mot. at 10; *see* Pub. L. No. 101-618, 104 Stat. 3289 (1990). It

provides that the Fallon tribes may use income from a settlement fund for "[a]cquisition of lands, water rights or related property interests located outside the Reservation from willing sellers, and improvement of such lands." Pub. L. No. 101-618, § 102(C)(1)(e). And it instructs that "[t]itle to all lands, water rights and related property interests *acquired under section 102(C)(1)(e)* within the counties of Churchill and Lyon in the State of Nevada, shall be held in trust by the United States." *Id.* § 103(A) (emphasis added).

The difference between this language and § 108(f) of MILCSA is stark. If § 108(f) said "lands acquired under § 108(c)" instead of "land acquired using amounts from interest or other income," the Department's claim of authority would be stronger. If the Tribe acquired land outside the parameters of § 108(c), it likely did not acquire it "under § 108(c)."

In short, the Department's citations to other "mandatory acquisition statutes" show simply that Congress phrases them in different ways. The differences between MILCSA and the Gila Act, the Indian Land Consolidation Act, and the Fallon Act are instructive, and they support Sault's interpretation of § 108(f).

Two additional objections run far afield of MILCSA, let alone § 108(f). The Casinos argue that "background principles of trust" support the Department's claim of authority. Casinos' Mot. at 15. Specifically, as a future trustee of the Tribe's land, the Secretary "is bound by basic fiduciary obligations—including, axiomatically, the foundational duty to ensure that the trust is administered in compliance with the law." *Id.* at 16. The Casinos cite no statutory authority for this obligation. *See id.* at 15–16; Casinos' Reply at 8–9, ECF No. 60. That is a problem for them, because the Government's fiduciary

obligations to tribes are "defined and governed by statutes rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011). The Casinos have no response to the Tribe's citation to *Jicarilla*. *See* Casinos' Reply at 8–9.

Even if the Department does have a general "background" obligation to administer the trust in compliance with the law, that just raises what "compliance with the law" entails. MILCSA gives the Tribe, but not the Secretary, authority to determine compliance with § 108(c)—*that* is the law. Thus, the Secretary violates no fiduciary obligation by following the letter of § 108(f).

Most creatively, the NHBP protests that under Sault's interpretation, § 108(f) would violate the Appointments Clause of the Constitution, art. II, § 2, cl. 2. NHBP's Mot. at 18–19. How so? Because § 108(f) would be "an unconstitutional congressional delegation to the Sault Tribe's board of directors of the function of taking land into trust." *Id.* at 18. This argument—which the NHBP did not pursue in its reply brief, *see* NHBP's Reply at 6–9, ECF No. 63—is unconvincing. To start, it relies on the incorrect premise that the Tribe has "the function of taking land into trust." All agree that § 108(f) delegates to the Secretary the duty to take land into trust. The Tribe gets the ball rolling when it acquires land under § 108(c), but the trust duty still lies with the Secretary. And all agree that § 108(f) requires the Secretary to verify that the Tribe in fact used Fund income. The Secretary must therefore take a step in between the Tribe's acquisition of land and the final act of taking the land into trust. The Tribe thus does not have "the function of taking land into trust."

The NHBP also fails to cite any clear authority supporting its constitutional argument. The best it can

muster is an out-of-circuit decision opining that a statute allowing "a state governor to have land taken in trust by the Federal Government" would "no doubt run afoul of the Appointments Clause." *Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 698 (9th Cir. 1997).

But there is authority going the other way. The Department of Justice's Office of Legal Counsel, relying on Supreme Court precedent, has long held that the Appointments Clause "simply is not implicated when significant authority is devolved upon non-federal actors." *The Constitutional Separation of Powers Between the President and Congress*, 20 O.L.C. 124, 145 (1996) (citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1868)). Perhaps that is why the Department did not discuss the Appointments Clause either in its final agency decision or here. And whatever the implications of the Appointments Clause for state actors, the Supreme Court has upheld delegations of federal authority to Indian tribes. *See United States v. Mazurie*, 419 U.S. 544, 546 (1975).

As a last resort, the Department pleads for deference under *Chevron*. *See* Dep't Mot. at 23. The Tribe suggests that the *Chevron* framework does not apply to § 108(f). *See* Pl.'s Reply at 25. Why? Because Congress gave the Department a largely "ministerial" role in § 108(f). *See* Mot. Hr'g Tr. at 26–28. But that is the conclusion the Tribe wants the Court to reach on the meaning of § 108(f), so it is somewhat circular to cite this as why the *Chevron* framework does not apply at all. For their part, the Department and the Casinos invoke decisions that applied the *Chevron* framework to other land-into-trust statutes. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558–59 (D.C. Cir. 2016).

Even if the *Chevron* framework applies to § 108(f), the Department does not get deference here. A court does not defer to an agency's interpretation of a statute if that interpretation contradicts the unambiguous terms of the statute. *See Chevron*, 467 U.S. at 842–43. And, for all the reasons given, § 108(f) is unambiguous—it grants the Department no authority to verify the Tribe's compliance with § 108(c).[11] More, § 108(f) is not "ambiguous" or "silent" under *Chevron* just because it does not affirmatively disavow the Department's authority on this score. *See Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) ("To suggest … that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is … flatly unfaithful to the principles of administrative law[.]").[12]

More, even if § 108(f) is "ambiguous" or "silent" on whether the Department has authority to police the Tribe's compliance with § 108(c), the Department likely would still lose. When Congress enacts a statute for the benefit of a tribe, the Indian canon of construction

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[11] These reasons include the Court's responses to the objections based on IGRA and Sault's gaming compact with Michigan. *See infra* Section IV.C.

[12] The Casinos suggest that the Tribe "waived" its "no-deference" argument "by failing to raise it in its Opening Brief." Casinos' Reply at 9 n.1. They are right that the Tribe's opening brief omitted any mention of *Chevron* on the § 108(f) issue. *See* Pl.'s Mot. at 26–33. But the Tribe's argument was—and remains—that § 108(f) is unambiguous. *See id.* at 27–29. This is the same as saying that the Tribe wins under *Chevron*'s first step. *See Chevron*, 467 U.S. at 842–43. The Tribe had no need to address the entire *Chevron* framework until the Department claimed *Chevron* deference in its opening brief, which came after the Tribe's opening brief.

trumps *Chevron* deference and requires that courts defer to the tribe's reasonable interpretation of any ambiguity. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 & n.8 (D.C. Cir. 1988); *infra* Section IV.B. At a minimum, the Tribe's interpretation of § 108(f) is reasonable.

As we will see, the Indian canon permits an alternative holding for the proper interpretation of "enhancement of tribal lands" in § 108(c)(5). *See infra* Section IV.B. Having invoked the Indian canon for § 108(c)(5), the Tribe surprisingly failed to invoke it for § 108(f). *See* Pl.'s Mot. at 26–33; Pl.'s Reply at 16–32. But the Court sees no reason why the canon would not likewise permit an alternative holding for the § 108(f) issue: insofar as this provision is ambiguous, the Court should defer to the Tribe's reasonable interpretation of it. And under Sault's reasonable interpretation, the Department had no authority to deny the trust application on the ground that the Tribe did not acquire the Sibley Parcel for any purpose that appears in § 108(c).

B.

In any event, the Tribe did acquire the Sibley Parcel for a purpose that appears in § 108(c): the "enhancement of tribal lands," Pub. L. No. 105-143, § 108(c)(5). The Department's contrary conclusion rested on an erroneous interpretation of this phrase. This is a separate and independently adequate reason for vacating the Department's decision.

All agree that "enhancement of tribal lands" encompasses land acquisitions. The dispute is about what types of land acquisitions count. The Department says the phrase encompasses only those land acquisitions that "make greater" the value of the Tribe's existing landholdings. *See* Dep't Mot. at 25–27. The Tribe contends

that the phrase reaches further, covering any land acquisitions "that increase the Tribe's total land base." Pl.'s Mot. at 33.

The Tribe is correct: "enhancement of tribal lands" unambiguously includes any land acquisition that increases the Tribe's total landholdings. The Department erred by concluding that this phrase encompasses only land acquisitions that increase the value of existing landholdings.

MILCSA does not define "enhancement," so the Court looks to the word's ordinary meaning. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012). The parties point to several dictionaries that define "enhance" in virtually identical ways. *See* Pl.'s Mot. at 33–34. Two are representative. The Department relies on a dictionary that defines "enhance" as "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment." Dep't Mot. at 27 (quoting *Webster's New Twentieth Century Unabridged Dictionary* (2d ed. 1979)). This is the definition the Department used in its Bay Mills Opinion, A.R. 457, and then adopted in its final decision here, *id.* at 1931. Sault, meanwhile, defines "enhance" as "[t]o make greater, as in value, beauty, or reputation; augment." *American Heritage Dictionary* 611 (3d ed. 1996). Other dictionaries agree. *See, e.g.*, *Webster's Second New International Dictionary* 849 (2d ed. 1950) ("To advance, augment, or elevate[;] To make greater, as in value or desirability.").

The import of these definitions is clear: "enhancement" means some sort of increase or augmentation; one *example* is an increase in value. The definitions are non-exhaustive—they leave open the possibility of other types of increases. The question, then, is whether an

increase in the size, number, or amount of something counts—in other words, a quantitative increase.

The answer is yes. Consider criminal sentencing, an area where courts often encounter variations on the word "enhance." In this context, Congress has used the phrase "enhanced punishment," 18 U.S.C. § 924(c)(1)(A), (c)(5), and the Supreme Court has referred to an "enhanced sentence," *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000). The word "enhancement" pervades the U.S. Sentencing Guidelines. In this context, everyone understands that an "enhancement" means a quantifiable increase in a criminal sentence.

The ordinary meaning of "enhancement," then, is an increase in size, amount, value, beauty, and any number of other quantitative and qualitative attributes. Plug this meaning into "enhancement of tribal lands." The result is a phrase that encompasses both "an increase in the value of tribal lands" and "an increase in the amount of tribal lands." A land acquisition that increases the amount of the Tribe's total landholdings accomplishes the latter, so it is an "enhancement of tribal lands."[13]

Context reinforces this conclusion. The whole point of MILCSA was to distribute judgment funds that the

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[13] The only other court to address the meaning of "enhancement" in MILCSA reached the same conclusion. In analyzing the meaning of "enhancement" in § 107(a)(3), the court reasoned: "Obviously, the purchase of the Vanderbilt Tract is an enhancement of tribal landholdings, as the additional land augmented, or made greater, the total land possessed by Bay Mills." *Michigan v. Bay Mills Indian Cmty.*, No. 1:10-cv-1273, 2011 WL 13186010, at *5 (W.D. Mich. Mar. 29, 2011). This was *dictum*, however, since the court ultimately determined that the purchase of the Vanderbilt Tract was not a "consolidation," and § 107(a)(3) requires both "consolidation and enhancement. *See id.* at *5–6. So the Court notes this case but does not lean heavily on it.

Indian Claims Commission had awarded to Sault and other tribes. *See* Pub. L. No. 105-143, § 102. Why had the Commission awarded Sault these funds? Because the Government took the land of Sault's ancestors for an unconscionably low sum. 26 Ind. Cl. Comm. 550, 553, 561 (Dec. 29, 1971) (Docket Nos. 18-E and 58). MILCSA was compensation for a land grab. It makes sense, then, that Sault may use this compensation to expand its landholdings.

More still, the other term in § 108(c)(5)—"consolidation"—is about bringing together divided tracts, not expanding landholdings. The Department's implementing regulations for the Indian Reorganization Act permit the Secretary to take into trust land that is "within a tribal consolidation area." 25 C.F.R. § 151.3(a)(1); *see Sac & Fox*, 240 F.3d at 1261. One purpose of the Act was to remedy the failed policy of allotment, when the Federal Government carved reservation land into individually owned parcels. *See Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 40–41 (D.D.C. 2008), *vacated on other grounds*, 573 F.3d 808 (D.C. Cir. 2009). When Congress enacted MILCSA, Sault's "existing tribal land base" was in the Upper Peninsula. NHBP's Mot. at 21. Yet Congress understood that Sault had members in the Lower Peninsula as well. *See* Pub. L. No. 105-143, § 102(a)(3)–(4). So it makes sense that Congress would have given the Tribe flexibility to buy new land in the Lower Peninsula, not just unite existing parcels in the Upper Peninsula.

Sault even got special treatment relative to other MILCSA tribes. Congress used the disjunctive for Sault: "consolidation *or* enhancement of tribal lands." *Id.* § 108(c)(5) (emphasis added). But Congress the conjunctive for the Bay Mills Community. "The earnings generated by the Land Trust shall be used exclusively

for improvements on tribal land or the consolidation *and* enhancement of tribal landholdings through purchase or exchange." *Id.* § 107(a)(3) (emphasis added). The Court must "give[] effect" to this linguistic distinction. Scalia & Garner, *supra*, at 174.[14] If the use of "or" as opposed to "and" has any meaning, it must be easier for Sault to show a "consolidation or enhancement" than for Bay Mills to show a "consolidation and enhancement."

Here, a definition of "enhancement" that incorporates both a quantitative and qualitative component maximizes Sault's flexibility relative to Bay Mills. Under that definition, if Bay Mills just acquires a new parcel, that is not enough—the acquisition must also "consolidate" tribal land. The parties agree that a "consolidation" encompasses, at a minimum, uniting individual units into one mass. *See* Pl.'s Mot. at 40 n.8; Dep't Reply at 13. So Bay Mills must acquire a new parcel that unites two or more other plots.

But there's more. Bay Mills must also prove that it acquired the new parcel as part of a transaction that increases the amount or value of the tribe's landholdings. Bay Mills accomplishes this, of course, if the entire transaction is simply the purchase of the uniting parcel. But if the transaction also involves selling a larger tract, that transaction would decrease, not increase, the size of its total land base, and the tribe would need to show an increase in land value.[15]

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[14] The Department acknowledged in the Bay Mills Opinion that it must presume the distinction between § 107(a)(3) and § 108(c)(5) "was intentional" and "makes a difference." A.R. 459.

[15] This reasoning shows why Intervenors are wrong to suggest that Sault's interpretation of "enhancement" makes "consolidation" superfluous. They contend that any consolidation of land necessarily involves acquiring new land, which increases the Tribe's total

Under § 108(c)(5), Sault does not have to worry about any of these details. If it engages in a land exchange that unites separate parcels, that is a "consolidation," and it need not worry about the quantitative or qualitative effect on its total land base. And if it simply purchases a new parcel, that parcel need not unite existing plots. In short, if we define "enhancement" to cover land acquisitions that increase the Tribe's total landholdings, Sault has maximum flexibility relative to Bay Mills—this honors Congress's choice to a tee.

Still, the Department and Intervenors try to show that MILCSA commands the Department's restrictive interpretation of "enhancement." Their efforts fail. They argue that Sault's interpretation renders the word "enhancement" itself superfluous. Dep't Mot. at 28–29; Casinos' Mot. at 19–20. The Casinos put it this way: "Under Sault's construction, *every* land acquisition would constitute an 'enhancement,' because every acquisition, by definition, would increase the size of the Tribe's real-estate portfolio." Casinos' Mot. at 19–20. The objection, then, seems to be that if Congress wanted the Tribe to spend income for any land acquisition, it

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landholdings. *E.g.*, NHBP's Mot. at 23. But the land exchange example illuminates how a consolidation can be part of an overall transaction that causes a net decrease. The Casinos protest that a land exchange "would not implicate Fund interest." Casinos' Mot. at 20. Sault points out, however, that it could use Fund income "to pay unpaid debt or taxes on the purchased land." Pl.'s Reply at 39. This would be a use of Fund income as part of a transaction that consolidates tribal lands. Intervenors also complain that the land exchange hypothetical is "hyper-specific" and "strained." Casinos' Reply at 9 n.2; NHBP's Mot. at 23. But land exchanges are not uncommon in Indian affairs—the Department's own regulations permit tribes to acquire land in trust "by exchange." *See* 25 C.F.R. § 151.6.

would have said that, rather than use a more elaborate phrase like "enhancement of tribal lands."

This objection suffers at least two defects. *First*, it misunderstands Sault's interpretation of "enhancement." Sault is not saying that all land acquisitions qualify, just those that increase the size of the Tribe's total landholdings. *See* Pl.'s Mot. at 33, 40 n.8. That covers most land acquisitions, but not all. For example, if the Tribe acquired a small parcel in exchange for a larger parcel, that would decrease the size of tribal landholdings. And if the new parcel did not unite two or more other parcels, that would not be a consolidation either. So it is incorrect to think that Congress could have achieved the same meaning by saying Fund income "shall be distributed … for land acquisitions."

Second, even if "enhancement" covers any land acquisition, that does not make this word superfluous—it just means Congress was inartful. So long as "enhancement of tribal lands" and "land acquisitions" have the same meaning, it does not matter that one phrase is clunkier than the other. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.").[16]

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[16] A possible third reason this objection fails is that "enhancement of tribal lands" could encompass more than just land acquisitions, such as improvements that increase the value of tribal land. The Court is mindful that § 107(a)(3) uses the phrase "improvements on tribal land" while § 108(c)(5) does not, but "enhancement" could still fairly encompass improvements *not* on tribal lands. For example, the Tribe might help fund a private or governmental project adjacent to tribal land that increases the land's value. This understanding of "enhancement" fits with the theme of Congress giving Sault maximum flexibility.

The Casinos ultimately try to shift focus onto the phrase "tribal lands": "the real question is not whether 'enhancement' denotes qualitative or quantitative increases, but whether 'tribal lands' denotes tribal property *at the time of* or *after* the enhancement." Casinos' Reply at 10. In their view, "Congress was clearly requiring an impact on *existing* lands owned by the Tribe." Casinos' Mot. at 20. The Casinos fail to explain, though, why this understanding of "tribal lands" commands the Department's restrictive definition of "enhancement." Just substitute Sault's definition of enhancement into § 108(c)(5): "for consolidation or [increase in the amount of or increase in the value of] [existing] tribal lands." There is nothing amiss about that phrasing.

Even if we think in terms of the Casinos' word "impact"—a word that does not appear in § 108(c)(5)—an increase in the amount of tribal land does "impact" "existing lands." It impacts them by adding to them. Think of an enhancement of a criminal sentence. The enhancement impacts the "existing" sentencing range by adding to it.

Doubling down, the NHBP claims that § 108(c)(5) is about consolidating and enhancing lands in the Upper Peninsula only. MILCSA's focus, it insists, was on "strengthening the Sault Tribe's existing tribal land base in 1997 *where it was*, not on further fragmenting its trust lands for business ventures." NHBP's Mot. at 21. For that reason, the NHBP urges the Court to interpret "enhancement" as a "close correlate to consolidation," which would limit the places where Sault could buy land. *See id.* at 22.

This objection founders for several reasons. First, interpreting "enhancement" as a "close correlate" to "consolidation" reduces the daylight between those

terms. That would in turn reduce the daylight between "consolidation *and* enhancement" in § 107(a)(3) and "consolidation *or* enhancement" in § 108(c)(5), which undermines the greater flexibility that Congress gave Sault.

More, the NHBP's proposed geographic restriction appears nowhere in § 108(c)(5). Indeed, textual evidence cuts against any geographic restriction. Congress found that the Chippewa Indians, the ancestors of the Sault Tribe, used sites in "both" the Upper and Lower Peninsulas. *See* Pub. L. No. 105-143, § 102(a)(3)–(4). It recognized that the Chippewa had "intermarried" with the Ottawa Indians, who had land in the Lower Peninsula, "and there were villages composed of members of both tribes." *Id.* Given these findings, Congress certainly could have used language expansive enough to allow Sault to buy land in the Lower Peninsula.

Finally, Congress has included geographic restrictions in other statutes governing acquisition of lands. *See, e.g.*, Seneca Nation Settlement Act, Pub. L. No. 101-503, § 8(c), 104 Stat. 1292 (1990) (authorizing the Seneca Nation to acquire land "within its aboriginal area in the State or situated within or near proximity to former reservation land"). Congress therefore "knows how to impose such a requirement when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

For all these reasons, "enhancement of tribal lands" is unambiguous—it encompasses land acquisitions that increase the Tribe's total landholdings.[17] The statute thus forecloses the Department's attempt to cabin "enhancement" to land acquisitions that increase the value

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[17] These reasons include the Court's responses to the objections based on IGRA and Sault's gaming compact with Michigan. *See infra* Section IV.C.

of tribal lands. Having applied an impermissible interpretation of "enhancement," the Department's final decision was contrary to law. This conclusion is enough to justify vacatur.

The Department protests that at the very least, "enhancement of tribal lands" is ambiguous, and so it should receive deference under the second step of *Chevron*. *See* Dep't Mot. at 25–31. This claim of house advantage suffers from two flaws. First, it misunderstands ambiguity. Second, the *Chevron* framework does not apply at all—if § 108(c)(5) is ambiguous, the Indian canon requires that the Court defer to the *Tribe's* reasonable interpretation of this provision.

The Department's argument for ambiguity goes something like this: if "enhancement" covers several meanings, that creates ambiguity and the Department reasonably chose *one* of the meanings to the exclusion of the others. *See id.* at 27. This confuses breadth with ambiguity. They are not the same. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). The Department and Intervenors do not seriously dispute that the ordinary meaning of "enhancement" encompasses *both* increases in amount and increases in value (and increases in several other types of attributes). *See* Dep't Mot. at 27; Casinos' Mot. at 19. So if we encounter "enhancement" in a vacuum, we must take as a starting point that the word refers to all its meanings simultaneously. For example, if all we see is the phrase "enhancement of food," we must assume, until knowing more, that this phrase refers both to an increase in the quality of food and an increase in the amount of food. Once we know more about the surrounding context and apply the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, it may become apparent that the phrase refers only to one of the options. Or the ambiguity may persist.

So too here. The only difference is that we do know the context that surrounds "enhancement of tribal lands" and have considered how the "traditional tools of statutory construction" bear on its meaning. For the reasons discussed, the Department and Intervenors fail to show ambiguity on whether the phrase refers to (1) increases in land amount *and* increases in land value versus (2) *only* increases in land value.

Arizona v. Tohono O'odham Nation, 818 F.3d 549 (9th Cir. 2016), is instructive. That case dealt with the meaning of "land claim" in IGRA, 25 U.S.C. § 2719(b)(1)(B)(i). *See* 818 F.3d at 556. Citing a dictionary definition, the court observed that the phrase "has a broad, general meaning." *Id.* at 557. A "land claim" could be "a claim for impairment to title of land" or "a claim for damage to land." *Id.* But, the Ninth Circuit stressed, "a word or phrase is not ambiguous just because it has a broad general meaning." *Id.* The court found that "land claim" was unambiguous—"a claim for impairment to title of land, a claim for dispossession of land, and a claim for damages to land *would all be encompassed by it*." *Id.* (emphasis added) (citing Scalia & Garner, *supra*, at 101 ("Without some indication to the contrary, general words … are to be accorded their full and fair scope.")). The same reasoning applies here.

In any event, *Chevron* would not save the Department even if it could show that "enhancement of tribal lands" is ambiguous. The Indian canon of construction provides that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The Court's choice between "two possible constructions … must be dictated by [this] principle." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992). In *Yakima*, the

tribe's proposed interpretation was "eminently reasonable," so the Supreme Court was "require[d] … to apply that interpretation for the benefit of the Tribe." *Id.* Along these lines, the D.C. Circuit has held that if a statute "can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." *Muscogee*, 851 F.2d at 1445. It was "for this reason" that the court gave "careful consideration" to Interior's interpretation of the statute, but "d[id] not defer to it." *Id.* 1445 n.8.

The D.C. Circuit has since reaffirmed this interaction between the Indian canon and the *Chevron* framework. *See, e.g.*, *Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1101 (D.C. Cir. 2001). In *Cobell VI*, the court held that even if the statute at issue were ambiguous, *Chevron* deference would be "not applicable" because the Indian canon was the "governing canon of construction." *Id.* "Therefore, 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." *Id.* (cleaned up). So too here. Having given "careful consideration" to the Department's interpretation of "enhancement of tribal lands," the Court still concludes, for all the reasons given, that Sault's interpretation is reasonable at a minimum.[18] Thus, the Court must interpret § 108(c)(5) according to Sault's interpretation, even if the statute is ambiguous. *Muscogee*, 851 F.2d at 1445.

The Department and Intervenors raise two objections to this alternative holding. Neither succeeds. *First*, the Department cites *Cobell v. Salazar* ("*Cobell XXII*"), 573 F.3d 808 (D.C. Cir. 2009), which said that

[18] These reasons include the Court's responses to the objections based on IGRA and Sault's gaming compact with Michigan. *See infra* Section IV.C.

"*Chevron* deference does not disappear from the process of reviewing an agency's interpretation of those statutes it is trusted to administer for the benefit of the Indians, although that deference applies with muted effect." *Id.* at 812. This means, in the Department's view, that "an agency's legal authority to interpret a statute appears to trump any practice of construing ambiguous statutory provisions in favor of Indians." Dep't Mot. at 31 (quoting *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015)).

Whatever "muted effect" means, it is different from saying that *Chevron* "trumps" the Indian canon. Indeed, right before the "muted effect" sentence, *Cobell XXII* observed that "*Chevron* deference can be trumped by the requirement that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 573 F.3d at 812 (cleaned up). So the question becomes how to reconcile *Cobell XXII* with earlier Indian cases declaring that "*Chevron* deference is not applicable," *Cobell VI*, 240 F.3d at 1101, and that a statute "*must* be construed" according to a tribe's interpretation if that interpretation is reasonable, *Muscogee*, 851 F.2d at 1445.

On this, the case law is scarce. In the eleven years since *Cobell XXII*, the D.C. Circuit has not explained what "muted *Chevron* deference" entails. And only one other judge in this District has referenced this language. *See Koi Nation of N. Cal. v. U.S. Dep't of the Interior*, 361 F. Supp. 3d 14, 48–49 (D.D.C. 2019). As Chief Judge Howell saw it, the "muted effect" sentence in *Cobell v. XXII* "clarified" *Muscogee*'s statement that a court "*must*" defer to a tribe's reasonable interpretation while still giving "careful consideration" to an agency's interpretation. *See id.* at 48.

This essentially reflects the Court's thinking. 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"). This "careful consideration" of an agency's construction may reveal that a tribe's interpretation is unreasonable, overcoming the Indian canon. But the Tribe's interpretation of § 108(c)(5) is reasonable, so the Indian canon "trump[s]" *Chevron* deference here. *Cobell XXII*, 573 F.3d at 812.

Second, the Department and Intervenors urge that deference to Sault is inappropriate because its interpretation of "enhancement" would harm the interests of the NHBP and the Saginaw Tribe. *See* Dep't Mot. at 30–31; Saginaw's Mot. for Summ. J. ("Saginaw's Mot.") at 9, ECF No. 51. They rely on out-of-circuit precedent holding that the Indian canon does not apply when "all tribal interests are not aligned." *Rancheria*, 776 F.3d at 713. They cite no D.C. Circuit cases that have adopted this exception to the Indian canon, nor has the Court found any. But other judges in this District have done so, citing Ninth Circuit case law. *See Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018).

In any event, this exception to the Indian canon does not apply here. All but one of the cases the Department and Intervenors cite for this exception dealt with statutes that benefit all Indians generally, such as IGRA. *See, e.g.*, *id.* The other case involved a treaty, and the tribe with countervailing interests was a signatory to—and beneficiary of—the treaty. *See Confederated Tribes*

of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 338, 340 (9th Cir. 1996). Congress enacted MILCSA for the benefit of select tribes—the NHBP and the Saginaw Tribe are not among them. *See* Pub. L. No. 105-143, §§ 102, 104. Indeed, the section at issue, § 108, is for the benefit of only one tribe—the Sault Tribe. *See id.* § 108(a)(1). The Department and Intervenors have cited no cases applying the "not all tribal interests aligned" exception in an analogous circumstance. That is unsurprising. It would be strange to construe a statute against the only Tribe it seeks to benefit simply because another Indian tribe objects.

C.

Consider next two additional objections the Intervenors raise on both the § 108(f) issue and the § 108(c)(5) issue. Both objections—which concern IGRA and Sault's 1993 gaming compact with Michigan—fall short.

All three Intervenors vigorously contend that Sault's interpretation of MILCSA would upset the regulatory framework in IGRA. Sault has been frank that it hopes to build a casino on the Sibley Parcel; a casino would count as Class III gaming under IGRA. *See Bay Mills*, 572 U.S. at 785. The Intervenors point out that an Indian tribe can conduct Class III gaming only on "Indian lands." 25 U.S.C. § 2710(d)(1). "Indian lands" include "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe." *Id.* § 2703(4)(B). Thus Sault's attempt to invoke § 108(f) of MILCSA and get the Secretary to take the Sibley Parcel into trust.

What, though, does IGRA have to do with the Court's interpretation of MILCSA? Everything, the Intervenors insist. If the Court accepts Sault's interpretation of either § 108(f) or § 108(c)(5), the Secretary would

have to take virtually any land Sault acquires into trust. *E.g.*, Saginaw's Mot. at 18. That would, in turn, give Sault "alone among tribes, unfettered ability to locate an unlimited number of casinos anywhere in the country." NHBP's Mot. at 24. This is no good, the Intervenors say, because IGRA embodies a "federal policy … against the proliferation of off-reservation gaming." *Id.* They cite several provisions in IGRA that restrict off-reservation gaming. Saginaw's Mot. at 12–15.

But these very restrictions cut against the Intervenors' parade of horribles. To start, IGRA generally prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). If the Secretary ever takes the Sibley Parcel into trust, this will of course occur after 1988. To get around the general prohibition, Sault would need to satisfy one of several exceptions. One of these exceptions is for lands "taken into trust as part of … a settlement of a land claim." *Id.* § 2719(b)(1)(B)(i). Sault believes the Sibley Parcel would satisfy this exception if the Secretary takes it into trust under § 108(f). A.R. 452–53. But one Intervenor goes out of its way to argue that any land Sault acquires under MILCSA would *not* satisfy this exception. *See* NHBP's Mot. at 26. If the NHBP is right, MILCSA would not, as it claims earlier in its brief, give Sault "unfettered ability to locate an unlimited number of casinos anywhere in the country." *Id.* at 24. The NHBP cannot have it both ways.

In any event, the meaning of the "settlement of a land claim" exception is a question for another day—the point is that Sault still has some work to do. This case is not Sault's last stop on its quest for a casino, as several parties conceded at oral argument. Mot. Hr'g Tr. at 6–7 (Sault), 34 (Department), 46 (Casinos), 61 (Saginaw Tribe).

IGRA places yet more restrictions on Class III gaming. Sault's board of directors must pass "an ordinance or resolution" that meets many requirements and receives approval from the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2710(d)(1)(A). Sault must also conduct its gaming activities "in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1)(C). This proviso cripples the Casinos' suggestion that Sault could launch casinos in far-flung states like Florida. Mot. Hr'g Tr. at 43. Sault does have a gaming compact with Michigan, but as we will soon see, two Intervenors believe that Sault's trust application *violates* this compact. Again, Sault still has some obstacles to overcome before it gets to rake in the chips.

It is also not so absurd to think that Congress intended MILCSA to expand Sault's casino opportunities. Consider the special treatment that Sault received relative to Bay Mills. A conspicuous difference between § 107(a)(3) and § 108(f) is that lands Bay Mills acquires with its trust funds "shall be held as Indian lands are held," a more generic phrase than "shall be held in trust by the Secretary." It is not settled whether lands "held as Indian lands are held" are "Indian lands" under IGRA. The Department concluded a decade ago in its Bay Mills Opinion that they were not, A.R. 460, but the ensuing litigation never resolved that question, *see Bay Mills*, 572 U.S. at 786–87.

By contrast, no one disputes that lands "held in trust" are "Indian lands" under IGRA. 25 U.S.C. § 2703(4)(B). "Congress must be presumed to have known of its former legislation." *St. Louis, I.M. & S. Ry. Co. v. United States*, 251 U.S. 198, 207 (1920). So, in passing MILCSA, Congress knew that it was giving Sault the tools to acquire "Indian lands" under IGRA.

Congress was also aware of the "settlement of a land claim" exception that allows certain land acquired in trust after 1988 to be gaming-eligible. *See* 25 U.S.C. § 2719(a), (b)(1)(B)(i). Yet it still gave Sault a land-into-trust provision in a statute called the "Michigan Indian Land Claims Settlement Act." To be clear, the Court takes no view on the applicability of the exception. The point is that it is not so "bizarre" or "illogical" that Congress intended for Sault to circumvent some of IGRA's limitations. *Stovic*, 826 F.3d at 505.

The Intervenors insist on a narrow interpretation of § 108(f) and § 108(c)(5) because Congress would not have wanted to give Sault "unfettered ability" to build as many casinos as it wants, wherever it wants. NHBP's Mot. at 24. But they ignore the many legal and practical limitations on how much land Sault can acquire with Fund income. The full phrase is "interest and other investment income." Pub. L. No. 105-143, § 108(c). So the amount of "Fund income" Sault can spend on casino-building will depend on the success of its investments. And, of course, Sault will always have finite income.

The NHBP complains that Sault will just pour the new casino revenues into its Fund, generating enough income for the next casino project, and so on. *See* Mot. Hr'g Tr. at 72–73. But § 108(c) spells out several other purposes for which Sault can spend Fund income, including "as a dividend to tribal members" and "as a per capita payment to some group or category of tribal members." Pub. L. No. 105-143, § 108(c)(2)–(3). One might expect tribal dissent if Sault's board ignored these other uses of Fund income and focused only on building casinos in far-flung lands. Political accountability within the Tribe thus provides another check.

One final point on the IGRA objection—taking land into trust is not significant only for its gaming benefits, as one Intervenor concedes. Mot. Hr'g Tr. at 65. According to the Bureau of Indian Affairs, "many federal programs and services are available only on reservations or trust lands."[19] For example, "trust acquisitions provide tribes the ability to enhance housing opportunities for their citizens."[20] Congress thus had other reasons to give Sault generous treatment through § 108(f) and § 108(c)(5). And it could have reasonably expected that the legal and practical limitations on Sault's gaming would keep *that* pursuit in check. For all these reasons, the Intervenors have failed to show that Sault's interpretation of § 108(f) and § 108(c)(5) makes "nonsense" of IGRA, let alone violates anything in that statute. *Id.* at 55–56.

The Intervenors also claim that Sault's trust application violated its 1993 gaming compact with Michigan (the "Compact"). Section 9 of the Compact states:

> An application to take land in 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 agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

A.R. 3224. The Intervenors believe that Sault has violated Section 9 because it failed to secure revenue-

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[19] U.S. Dep't of the Interior, Bureau of Indian Affairs, *Fee to Trust*, bia.gov/bia/ots/fee-to-trust (last visited Feb. 20, 2020).

[20] *Id.*

sharing agreements with the NHBP and the Saginaw Tribe before submitting its trust application to the Secretary. NHBP's Mot. at 25; Saginaw's Mot. at 17. On this basis, they conclude that Sault's trust application is invalid. NHBP's Mot. at 25; Saginaw's Mot. at 16–17.

Whatever the merits of this argument, it is irrelevant to this case. The Court "may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). The Department's basis for denying Sault's trust application was the Tribe's failure to meet the requirements of MILCSA; its decision did not mention the Compact. *See* A.R. 969–74, 1930–33. Intervenors are just offering an alternative reason to uphold the Department's denial—that Sault's application was invalid under the Compact because it did not first secure revenue-sharing agreements. This has nothing to do with an interpretation of MILCSA. Section 108 does not say anything about requiring Sault to comply with its gaming compacts or to secure revenue-sharing agreements.

This litigation is simply not the appropriate time to decide the meaning of the Compact. That time may well come. As Sault points out, the State of Michigan—not a party to this action—sought to enjoin Sault from submitting its trust application in the first place, based on the Tribe's alleged failure to secure revenue-sharing agreements. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013). The district court there lacked jurisdiction because it was a suit to enjoin a trust submission under MILCSA, not a class III gaming activity, and so the Tribe had sovereign immunity. *See id.* The Sixth Circuit emphasized, however, that its decision did "not affect the legal viability of a later suit to enjoin, as a violation of … § 9 of the Compact … *class III gaming* on the land taken into trust."

Id. at 1080. Sault thus concedes that the State of Michigan, at least, can "renew[] its previous claim that the Tribe breached § 9 [of the Compact]." Pl.'s Reply at 58.[21]

* * *

On these issues of statutory interpretation, the objections of the Department and Intervenors exhibit a recurring theme: Congress could not have possibly intended the meaning that Sault assigns to § 108(f) and § 108(c)(5). This argument does not wash. The Court "has no roving license … to disregard clear language simply on the view that … Congress 'must have intended' something [different]." *Bay Mills*, 572 U.S. at 794. If the Department and Intervenors find this law to be "a ass—a idiot," that is a matter to address to Congress, not the courts. *See A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) ("Often enough the law can be 'a ass—a idiot'—and there is little we judges can do about it, for it is (and should be) emphatically our job to apply, not rewrite, the law enacted by the people's representatives." (citation omitted)).

V.

Since the Department's decision was "not in accordance with law," the Court will vacate it. 5 U.S.C. § 706(2)(A). The normal remedy accompanying vacatur is a remand to the agency for further proceedings. *See N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012). But Sault asks for more. *See* Compl. ¶¶ 92–100 (Count III). It asks the Court to order the Secretary to take the Sibley Parcel into trust. Pl.'s Mot. at 53. Failing that, Sault wants an order requiring the Secretary to

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[21] The NHBP and the Saginaw Tribe may be able to bring this claim as well. *See* 25 U.S.C. § 2710(d)(7)(A)(ii).

decide within 90 days of remand whether the Tribe did in fact acquire the Sibley Parcel with Fund income. In support of these requests, Sault invokes the mandamus statute, 28 U.S.C. § 1361, and the APA's directive that "[t]he reviewing court shall … compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

To begin, Sault's request for a writ of mandamus under § 1361 is, at a minimum, redundant. *See Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The availability of a remedy under the APA technically precludes Mt. Emmons' alternative request for a writ of mandamus … although the mandatory injunction is essentially in the nature of mandamus relief[.]" (citation omitted)). Sault concedes as much. It asserts that "'[b]oth mandamus and injunctive relief [under § 706(1)] are available' to remedy an agency's 'dereliction in discharging a mandatory duty.'" Pl.'s Mot. at 54 n.9 (second alteration in original) (quoting *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981)). More, it views the "substantive requirements" for mandamus relief and relief under § 706(1) as "the same." *Id.* (citing *Carpet*, 656 F.2d at 567). It cites a D.C. Circuit decision that apparently supports this proposition. *See Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) ("The power grounded in 5 U.S.C. § 706(1) to compel agency action can also be effectuated through the use of a writ of mandamus.").

Ultimately, Sault claims that it needs to establish two elements to get its desired relief: that the agency (1) had a clear duty to act and (2) unreasonably delayed in discharging that duty. Pl.'s Mot. at 54 (citing *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (addressing what a party needs to show

when it seeks a writ of mandamus for unreasonable delay under 5 U.S.C. § 706(1))). The Court follows this lead but concludes that Sault has not shown both elements. It is thus not entitled to the extraordinary relief it seeks.

On the first element, Sault contends that the Secretary has a clear duty under § 108(f) to take the Sibley Parcel into trust. *Id.* On its (correct) view of § 108(f), the Secretary has a mandatory duty to take the parcel into trust contingent on whether the Tribe in fact acquired the parcel with Fund income. *Id.* The Secretary thus has a clear duty to take the parcel into trust if—and only if—the Tribe acquired the parcel with Fund income. But this income issue remains unresolved. So as matters stand, the Secretary does not have a clear duty to take the parcel into trust.

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987), is not to the contrary. The court there opined that "[e]xamples of such clear duties to act include provisions that require an agency to take specific action when certain preconditions have been met." *Id.* at 793. Sault posits that § 108(f) is precisely this sort of provision. Pl.'s Mot. at 54–55. The key words, though, are "when certain preconditions have been met." Indeed, *Sierra Club* itself merely cited a decision holding "that statutory preconditions *had been satisfied* so as to compel specific agency action." 828 F.2d at 793 n.70 (emphasis added) (citing *EDF, Inc. v. Ruckelshaus*, 439 F.2d 584, 593–95 (D.C. Cir. 1971)).

Undeterred, Sault insists the income issue is a simple matter that the Court should resolve in the first instance. *See* Pl.'s Reply at 67–68. After rightly charging the Secretary with usurping the Tribe's role under § 108(c), Sault now invites this Court to usurp the Secretary's role under § 108(f). This the Court will not do.

In *EDF*, the *agency itself* had made the findings that triggered its statutory duty. *See* 439 F.2d at 594–95. In a later case that distinguished itself from *EDF*, the agency had made, but then recanted, the findings that triggered its duty. *See PCHRG v. FDA*, 740 F.2d 21, 33 (D.C. Cir. 1984). In that circumstance, the court's only basis for ordering the agency to act would have been a "substantive judgment that the early position was correct and the later position erroneous." *Id.* The court demurred, as "[s]uch a judgment would require [it] to evaluate the scientific evidence before the agency and conclude that this evidence mandated a finding that aspirin products are misbranded." *Id.* This was "precisely the genre of question the resolution of which Congress has entrusted to the agency in the first instance." *Id.*

This case is like *PCHRG*, not *EDF*. The lack of any finding on the income issue is analogous to a situation in which an agency makes a finding but then recants it. And this issue requires a factual inquiry that would benefit from the agency's expertise. After all, Sault's evidence consists of specialized documents such as audits, financial statements, and deeds. Pl.'s Mot. at 55; *see* A.R. 2139–47, 3098, 3163, 3165–85. According to one Intervenor, this evidence establishes the *opposite* of what Sault claims. *See* NHBP's Mot. at 27. Sault fails to offer a persuasive reason why the Court should take the unusual step of resolving this factual issue in the first instance. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The factfinding capacity of the district court is … typically unnecessary to judicial review of agency decisionmaking.").

What's the upshot of all this? The Court will not order the Department to take the Sibley Parcel into trust. If the Department does have a clear duty to act, the duty is to determine whether Sault acquired the Sibley Parcel

with Fund income. This implicates the Tribe's alternative request for extraordinary relief—an order instructing the Department to resolve the income issue within 90 days. The Court will not grant this relief either, though, because the Department has not unreasonably delayed a finding on the income issue.

With claims of unreasonable delay, "[e]ach case must be analyzed according to its own unique circumstances" and "[e]ach case will present its own slightly different set of factors to consider." *Air Line Pilots Ass'n, Int'l v. CAB*, 750 F.2d 81, 86 (D.C. Cir. 1984). Thus, no "ironclad" test exists, but the D.C. Circuit often finds guidance in six factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (cleaned up).

Sault submitted its trust application in June 2014, and the Department issued its final decision in July 2017. A.R. 1930, 3110. The agency thus took about three years to issue a decision that did not address the income issue. But MILCSA does not provide a "timetable or other indication of the speed with which it expects the agency to proceed." *TRAC*, 750 F.2d at 80. More, the Court must consider the three years in context. The Department never resolved the income issue in that timespan because it thought this unnecessary. *See* A.R. 974, 1932 n.15. On its reading of the statute, Sault's failure to show compliance with § 108(c) was enough to deny the trust application.

The Court is mindful that the Department's reading of MILCSA contradicts its unambiguous meaning. *See supra* Section IV. That makes the agency's reading "unreasonable" in a certain sense. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) ("[I]f Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."). But this is not dispositive. None of the six factors from *TRAC* suggests that delay is automatically unreasonable under § 706(1) if it results from the agency's mistaken interpretation of a statute. The Department's reading was far from frivolous and adhered to its own precedent (the Bay Mills Opinion). Its ultimate action was internally consistent—there was no need to decide the income issue since it perceived an independent basis to deny the trust application. The delay on the income issue thus does not reflect a "breakdown of regulatory processes." *Cutler v. Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987).

Three years was not an unreasonable amount of time for the Department to decide the issues it did. The record before the agency consisted of hundreds of pages. It engaged in a backand-forth with Sault about whether acquisition of the Sibley Parcel would increase the value of tribal lands. There is no suggestion that the agency acted in bad faith during this process. It also understandably accepted input from two other Michigan tribes—the NHBP and the Saginaw Tribe. A.R. 64, 180. The three-year span is not comparable to the six-year and nine-year delays in the cases that Sault cites. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (six-year delay in responding to the D.C. Circuit's remand); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (nine-year delay).

Sault focuses on *TRAC*'s third factor about the consequences of agency delay. *See Cutler*, 818 F.2d at 898 ([P]erhaps most critically, the court must examine the consequences of the agency's delay."). "[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d at 80. Sault maintains that the human consequences of delay have been "significant." Pl.'s Reply at 68. Specifically, the delay has deprived the Tribe "of the opportunity to provide crucial employment and fund essential government services for the approximately 14,500 tribal members living in the Lower Peninsula." *Id.*

The Court appreciates these concerns, but they do not strike the Court as so dire to warrant extraordinary relief. Indeed, Sault's urgent tone is difficult to reconcile with its filing of this action more than a year after the Department gave its final decision. If the income issue is as straightforward as Sault claims, there is no reason to suspect that the agency would drag its feet. This is a

situation in which the agency mistakenly thought it was unnecessary to decide the relevant issue. Any additional delay will be at its own peril. But the Court will not order the Department to decide the income issue within 90 days of remand.

VI.

For all these reasons, the Court will grant in part and deny in part the five motions for summary judgment. The Court will vacate the Department's decision and remand to the agency for further proceedings consistent with this opinion. An appropriate Order will issue.

Dated: March 5, 2020 2020.03.05

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TREVOR N. MCFADDEN, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-02035 (TNM)

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff,

v.

DAVID BERNHARDT, *et al.*,
Defendants,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,
Defendant-Intervenors.

Filed March 5, 2020

ORDER

Upon consideration of the parties' motions for summary judgment, together with the pleadings, administrative record, relevant law, and related legal memoranda, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Plaintiff's [43] Motion for Summary Judgment is GRANTED in part and DENIED in part; it is further

ORDERED that the Defendants' [53] Cross-Motion for Summary Judgment is GRANTED in part and DENIED in part; it is further

ORDERED that the Defendant-Intervenors' [45], [49], and [51] Cross-Motions for Summary Judgment are GRANTED in part and DENIED in part; it is further

ORDERED that the Department of the Interior's decision is VACATED, and the matter is REMANDED to the Department for further proceedings consistent with the accompanying Memorandum Opinion.

SO ORDERED.

This is a final, appealable Order.

Dated: March 5, 2020 2020.03.05

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TREVOR N. MCFADDEN
United States Dsitrict Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5076
September Term, 2023
Filed On: June 28, 2024

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Appellant,

v.

DEBRA A. HAALAND, UNITED STATES
DEPARTMENT OF THE INTERIOR, ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02035)

JUDGMENT

Before: WILKINS, RAO, and PAN, *Circuit Judges*.

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is:

ORDERED that the judgment of the district court, entered on March 6, 2023, is **AFFIRMED**.

* * *

The Sault Ste. Marie Tribe of Chippewa Indians ("the Tribe") purchased a parcel of land near Detroit, Michigan. In 2014, the Tribe asked the Department of the Interior ("DOI") to take the land into trust under a provision of the Michigan Indian Land Claims Settlement Act ("the Michigan Act"), in order to advance the Tribe's ambition of operating a casino on the land. The DOI denied the Tribe's land-into-trust application because the land purchase did not meet certain statutory requirements. The Tribe filed suit, seeking review under the Administrative Procedure Act ("APA"). The district court initially granted summary judgment in favor of the Tribe, but we reversed and remanded. *See Sault Ste. Marie Tribe of Chippewa Indians v. Haaland* (*Sault I*), 25 F.4th 12, 16, 24 (D.C. Cir. 2022). On remand, the primary issue was whether the Tribe's land purchase could be considered an expenditure "for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the [Tribe]"—if so, the United States would be required to take the land into trust under Section 108(c) of the Michigan Act. The district court held that purchasing land to build a casino was not covered by the statute and granted summary judgment in favor of the DOI. The Tribe appealed. Because we agree with the DOI and the district court that the Tribe's intention to dedicate a small sliver of the proposed casino's hypothetical profit to promoting the welfare of tribal members is insufficient to make the land purchase a qualifying expenditure, we affirm the judgment of the district court.

I.

A.

The factual background and the procedural history of this case are set forth in our prior opinion. *See Sault*

I, 25 F.4th at 15-17. Accordingly, we provide only an abbreviated overview of the relevant statutory scheme, and briefly summarize the facts relevant to the instant appeal.

Congress passed the Michigan Act in 1997 to remedy historic injustice resulting from unconscionable treaties between certain Indian tribes and the United States government. *See Sault I*, 25 F.4th at 15; Michigan Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997). As relevant here, the statute addressed an 1836 Treaty under which the Tribe, and other related tribes, ceded much of their ancestral land in the Upper Peninsula of Michigan to the federal government. *See Sault I*, 25 F.4th at 15. More than a century later, in 1946, Congress created the Indian Claims Commission to settle land claims against the United States. *See* Act of Aug. 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1050. The Commission determined that "the [1836] Treaty was unconscionable and ordered the United States to pay these tribes more than $10 million." *Sault I*, 25 F.4th at 15. After several decades in which the tribes were unsuccessful in negotiating a way to divide the Commission's award amongst themselves, Congress passed the Michigan Act to "provide[] for the distribution of the [$10 million in] judgment funds among the tribes with separate sections of the statute governing each tribe's use of its judgment funds." *Id.*

Section 108 of the Michigan Act sets forth how the judgment funds for the Sault Tribe should be used and administered. It directs the Tribe's Board of Directors to "establish a trust fund … [to] be known as the 'Self-Sufficiency Fund'" to receive settlement funds distributed by the Michigan Act. Michigan Act § 108(a)(1). Moreover, Section 108(b) describes how the Tribe may use the Fund's principal, while Section 108(c) governs

the Tribe's expenditure of the Fund's "interest and other investment income." *Id.* §§ 108(b), (c).

Specifically, Section 108(b) provides that Fund *principal* "shall be used exclusively for," among other things, "investments or expenditures which the board of directors determines … are reasonably related to … economic development beneficial to the tribe; or … are otherwise financially beneficial to the tribe and its members." Michigan Act § 108(b)(1). Section 108(c), on the other hand, authorizes the Board to spend Fund *interest* only for certain enumerated uses, including "for educational, social welfare, health, cultural, or charitable purposes which benefit" the Tribe's members. *Id.* § 108(c)(4). Another approved use is "for consolidation or enhancement of tribal lands." *Id.* § 108(c)(5). Lastly, Section 108(f) mandates that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary [of the Interior] for the benefit of the tribe." *Id.* § 108(f). In other words, if the Tribe acquires land with the Fund's *interest* for one of the permissible uses under Section 108(c), the DOI is obligated to hold that land in trust; but the agency must independently "verify that the land was legitimately acquired with Fund interest for the limited uses detailed in Section 108(c)." *Sault I*, 25 F.4th at 18.

Land taken into trust by the Secretary of the Interior "might qualify" under the Indian Gaming Regulatory Act ("IGRA") for the operation of a casino. *See Sault I*, 25 F.4th at 18 & n.3 (explaining that "the government's trust decision implicates whether the Tribe can conduct gaming under IGRA"). IGRA, enacted in 1988, provides that Indian tribes in states that allow gaming may operate casinos on specific categories of "Indian lands." 25 U.S.C. § 2710(d)(1). IGRA generally prohibits most casino gaming activities on off-

reservation lands taken into trust after October 17, 1988, except under specific exceptional circumstances. *See id.* §§ 2719(a)-(b); 25 C.F.R. pts. 291-92. One such exception allows gaming on "lands [that] are taken into trust as part of … a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i).

Separately, IGRA provides that casinos may operate on trust lands only "in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that is approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B); *see* 25 C.F.R. pt. 293. The Sault Tribe's Tribal-State compact states that "[a]n application to take land in 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. J.A. 446.

B.

The Sault Tribe is the largest Indian tribe east of the Mississippi River, with more than 40,000 members who descend from a group of Chippewa bands that historically occupied the Upper Peninsula of Michigan. *Sault I*, 25 F.4th at 15. In 2012, the Tribe took steps to purchase a parcel of land, known as the "Sibley Parcel," in the Lower Peninsula of Michigan, near Detroit. *See id.* at 16.[1] The Tribe's Board passed a Tribal Resolution stating that the Tribe would "seek to have those lands placed into mandatory trust pursuant to section[s] 108 (c) and (f) of the [Michigan] Act, and establish its legal

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[1] Along with the Sibley Parcel, the Tribe also sought to acquire land in Michigan's Lower Peninsula near Lansing. The district court, however, found that the Tribe's claims with respect to the Lansing Parcel were moot based on later developments. That parcel is not at issue on appeal.

right to construct and operate *a casino gaming enterprise* on those lands." J.A. 119 (emphasis added). The Resolution further stated that the Tribe would devote five percent of any income from the casino to tribal welfare: three percent would benefit tribal elders and two percent would create a college scholarship program. It also earmarked ten percent of the casino's income to be deposited in the Self-Sufficiency Fund as an addition to the principal of the Fund.

Pursuant to its Resolution, in June 2014, the Tribe submitted a "land-into-trust application" to the DOI, stating that it intended to use interest or other income from the Self-Sufficiency Fund, pursuant to the Michigan Act, to purchase the Sibley Parcel. The Tribe relied on two alternative justifications for using Trust interest to purchase the Sibley Parcel, claiming that the land would be used (1) for the "consolidation or enhancement of tribal lands," under Section 108(c)(5) of the Michigan Act; and (2) "for educational, social welfare, health, cultural, or charitable purposes" benefitting Tribal members, under Section 108(c)(4). J.A. 477-80. The land-into-trust application stated that the "[t]he acquisition of the Parcel will provide a land base for the thousands of tribal members who live in [the area], will facilitate the delivery of services to those tribal members, will generate revenues necessary for the provision of social services, and will create hundreds of jobs for those members." *Id.* at 480. Over the course of the next three years, the DOI requested supplemental information from the Tribe regarding the land acquisition, and the Tribe responded by submitting additional arguments and affidavits.

In January 2017, the DOI made an interim determination that there was insufficient evidence that acquisition of the Sibley Parcel would satisfy Section 108(c)(4) or (5) of the Michigan Act. But the DOI stated that it

would "keep the Applications open" to allow the Tribe to present more evidence about how its proposal satisfied the statute's requirements. J.A. 745. The Tribe submitted no additional evidence to support its land-into-trust application. Thereafter, in July 2017, the DOI sent a final decision letter to the Tribe denying the application. The letter incorporated the findings of the January 2017 interim determination and declined to revisit the DOI's rejection of the Tribe's claims. Specifically, it stated that "[t]he Tribe bears the burden of demonstrating that it has met [the Michigan Act's] requirements for mandatory land-into-trust acquisitions," and that the Tribe "made no such demonstration even after being offered the additional opportunity to do so [after] the [interim determination]." *Id.* at 752.

The Tribe filed suit in the district court, alleging violations of the APA. In March 2020, the district court granted summary judgment to the Tribe, holding that the DOI's rejection of the Tribe's land-into-trust application was contrary to law because (1) the Michigan Act imposes a mandatory duty to grant such an application when a Tribe purchases land with Fund interest; and (2) the acquisition of the Sibley Parcel qualified as an "enhancement of tribal lands" under Section 108(c)(5). *See Sault I*, 25 F.4th at 14. The district court expressly reserved the question whether the Tribe's land-into-trust application also satisfied Section 108(c)(4). We reversed, concluding that, under the plain meaning of the Michigan Act, the DOI has independent authority to verify that the Tribe's acquisition of land with Fund interest is "consistent with the limited uses for such interest in Section 108(c)." *Id.* We further held that the Tribe's purchase of the Sibley Parcel did not qualify as an "enhancement of tribal lands" because it did not "improve the quality or value of the Tribe's *existing* lands." *Id.* at 14-15

(emphasis added). Because the district court had not yet addressed the Tribe's alternative argument—that the land purchase qualified as an expenditure "for educational, social welfare, health, cultural, or charitable purposes"—we remanded for further proceedings.

On remand to the district court, the parties filed cross-motions for summary judgment on the Tribe's remaining claim that the purchase of the Sibley Parcel fulfilled an "educational, social welfare, health, cultural, or charitable purpose[]" that benefits the Tribe's members. This time, the district court granted summary judgment in the DOI's favor. *See Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*, 659 F. Supp. 3d 33 (D.D.C. 2023). The court concluded that Section 108(c)(4)'s meaning is "clear" and that its statutory text does not encompass an expenditure "to purchase land to build a casino and devote a sliver of its income to social welfare." *See id.* at 42-48. Indeed, the court stated, the Tribe's interpretation "could sweep just about any purchase into § 108(c)(4)'s ambit so long as a cent it generates eventually furthers education, health, culture, or charity." *Id.* at 45. The court further held that the DOI did not act arbitrarily and capriciously in rejecting the Tribe's arguments. *Id.* at 48. The Tribe filed a timely appeal. We have jurisdiction under 28 U.S.C. § 1291.

II.

We review the district court's grant of summary judgment de novo under the APA. *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 88-89 (D.C. Cir. 2020). We set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action is contrary to law "[i]n the absence of statutory authorization for its act." *Hikvision USA, Inc. v. FCC*, 97 F.4th

938, 944 (D.C. Cir. 2024) (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)). And an agency's action is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before [it]." *Baystate*, 950 F.3d at 89 (second alteration in original) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But the "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* (quoting *State Farm*, 463 U.S. at 43).

III.

The Tribe takes issue with two aspects of the DOI's denial of its land-into-trust application. First, the Tribe argues that the DOI's interpretation of Section 108(c)(4) was contrary to law. According to the Tribe, its use of Fund interest to purchase land for a casino qualifies as an expenditure for "educational, social welfare, health, cultural, or charitable purposes" because the Tribe intends to use some of the casino's profits to enhance the well-being of Tribal members. Thus, the Tribe asserts, the DOI misinterpreted the statute by requiring a more direct relationship between the funds expended and the requisite purpose. Second, the Tribe contends that even under the DOI's reading of Section 108(c)(4), the agency "arbitrarily failed to address evidence that the Sibley purchase" directly served educational, social welfare, health, cultural, or charitable purposes. Sault Br. 48 (capitalization altered throughout). We reject both arguments in turn.

A.

Section 108(c)(4) authorizes the Board of the Sault Tribe to spend Fund interest "for educational, social

welfare, health, cultural, or charitable purposes which benefit" the Tribe's members. Michigan Act § 108(c)(4). The Tribe seeks to persuade us that acquiring land to operate a casino is an approved use under this subsection. According to the Tribe, its purchase of the Sibley Parcel was "designed to 'enable the Tribe to address the health, educational, welfare, and cultural needs of' tribal members in the Upper and Lower Peninsula, by 'generat[ing] revenues necessary for the provision of social services' through Indian gaming." Sault Br. 26 (alteration in original) (quoting J.A. 479–80). In other words, the Tribe argues that buying land to construct a casino is acceptable because the profits from the casino will help the Tribe accomplish "its objective, goal, or end" of meeting "the unmet social welfare, cultural, health, charitable, and educational needs of the Tribe." *Id.* at 26-27. We are unconvinced by the Tribe's argument because its proposal to channel five percent of casino profits into approved uses is too attenuated and too uncertain to meet the requirements of Section 108(c)(4).

First, the connection between the expended Fund income and the Section 108(c)(4) purpose is remote. Specifically, the Tribe used Trust income to buy land, on which it seeks to build a casino, from which it hopes to make a profit, of which it intends to devote a small portion to qualifying purposes. Although the Tribe now represents that "all net gaming revenues will [] be dedicated to advancing tribal welfare," *see* Sault Br. 22, its initial Tribal Resolution allocated only five percent to the welfare of certain Tribe members, *see* J.A. 121. Thus, even if we assume that the casino will be built and will be profitable, the record supports only a small allotment of the hypothetical profits to promote "social welfare." And that falls far short of demonstrating an "educational, social welfare, health, cultural, or charitable

purpose[]" for the funds expended to purchase land. We need not determine whether an investment by the Tribe in an economic venture that devoted all or substantially all of its profits to tribal welfare might qualify as an approved expenditure under Section 108(c)(4). The arrangement contemplated by the Tribe in this instance is plainly insufficient.

Second, the Tribe faces significant regulatory and legal uncertainty in its quest to build a casino on the Sibley Parcel, further weakening its claim that its plan for the land ultimately will fulfill an approved statutory purpose. IGRA generally prohibits tribes from conducting casino gaming activities on off-reservation lands, such as certain Indian lands held in trust (and placed in trust after October 17, 1988). *See* 25 U.S.C. § 2719(a). Such gaming may occur only under specified circumstances, including when "lands are taken into trust as part of … a settlement of a land claim." *Id.* § 2719(b)(1)(B)(i). Here, the applicability of that exception is unclear because the parties dispute whether the Michigan Act settled any land claims or merely distributed judgment funds. And in any event, the Tribe concedes that "satisfying the exception requires additional steps." Reply Br. 38.

Moreover, IGRA provides that tribes may operate casinos "in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B). In this instance, the Michigan compact requires the Tribe to have a written revenue-sharing agreement with other Michigan tribes before applying for gaming authorization under Section 20 of IGRA.[2] But the Tribe has not entered any such revenue-

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[2] The parties in this case debate whether the Michigan compact applies to the Tribe's land acquisition under the Michigan Act. Regardless of how that disagreement is resolved, the Sault Tribe's

sharing agreement with other tribes pertaining to the proposed casino on the Sibley Parcel. Thus, it is far from certain that the DOI would approve the Tribe's application to operate a casino on the Sibley Parcel, even if the land were taken into trust. This uncertainty further weakens the Tribe's claim that its land acquisition ultimately will fulfill an approved statutory purpose. Indeed, if no casino is built, there will be no profit to spend on "educational, social welfare, health, cultural, or charitable purposes."

B.

The Tribe alternatively argues that the DOI arbitrarily and capriciously failed to consider evidence in the record that the Tribe acquired the Sibley Parcel to directly support "educational, social welfare, health, cultural, or charitable purposes." In particular, the Tribe asserts that it made the land purchase to "(1) secure a land base to provide social services to the Tribe's large, yet unserved, downstate population and (2) create jobs for thousands of nearby tribal members." Sault Br. 48-49. The Tribe points to facts from its land-into-trust application and an affidavit from its Tribal Registrar to support those claims. The land-into-trust application explained that the Sibley Parcel would provide "a geographic base to enable the Tribe to address the health, educational, welfare, and cultural needs of [its] members" in the Lower Peninsula, J.A. 479; while the affidavit averred that the Tribe "will never be able to provide meaningful employment opportunities or services to [a] substantial component of its population base without securing nearby trust land," *id.* at 555. According to the Tribe, the DOI "did not even acknowledge" the cited

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prospects for securing approval of its plan to run a casino on the Sibley Parcel are highly uncertain.

evidence when it rejected the Tribe's application, and instead focused on the "sole reason" that generating casino profits was too attenuated. Sault Br. 51.

We are unpersuaded by the Tribe's arguments for several reasons. First, the DOI did address the Tribe's claim that the purchase of the Sibley Parcel was to secure a land base for social services and to create jobs for nearby tribal members: The agency analyzed this claim under its consideration of the Tribe's Section 108(c)(5) arguments, finding that the Tribe failed to "provid[e] supporting documentation" for its proposition that "acquisition of the Parcels will generate revenue to allow for development of its existing land in the Lower Peninsula, which will 'provide employment and tribal services' to its members nearby." J.A. 752. It concluded that "the Tribe fails to cite any evidence" for this contention. *Id.* As the Tribe acknowledges on appeal, we can "[a]ssum[e]" that the DOI "intended these explanations to carry over to §108(c)(4)," Sault Br. 53, because the basic factual premise—that the Sault's land acquisition will serve as a land base to generate revenue and create jobs—applies equally to either subsection of Section 108(c).

Second, the DOI's rejection of the Tribe's arguments was reasonable: The Tribe's "evidence" consisted of conclusory statements about its intentions for the land and did not include any concrete plans to provide specific services to its members. Lastly, we note that the Tribe did not take advantage of multiple opportunities to provide additional evidence to support its land-into-trust application and to answer the DOI's questions about the land purchase. Most significantly, on January 19, 2017, when the DOI issued its interim determination denying the Tribe's application, the agency stated that it would "keep the Applications open" to allow the Tribe to

present more evidence. J.A. 745. Yet the Tribe submitted no additional evidence after the interim determination.

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For the foregoing reasons, we affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-02035 (TNM)

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff,

v.

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

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,
Defendant-Intervenors.

Filed March 6, 2023

MEMORANDUM OPINION

This case marks the latest chapter in the Sault Ste. Marie Tribe of Chippewa Indians' ("the Sault" or "the Tribe") efforts to compel the Secretary of the Interior to take land into trust for a casino. Interior refused to do so because the Sault had not satisfied the terms of a land settlement statute, which requires purchases to be for "social welfare" or the "enhancement of tribal lands."

The Sault contends that Interior's refusal was contrary to law and arbitrary or capricious under the Administrative Procedure Act. For relief, the Tribe seeks vacatur of the decision and either an order compelling

Interior to take the land into trust or one directing it to issue a new decision. The Tribe pressed—and lost on—its two primary arguments in the D.C. Circuit. It now moves for summary judgment on three other grounds. Interior and Intervenors—three commercial casinos ("the Casinos"), the Nottawaseppi Huron Band of the Potawatomi, and the Saginaw Chippewa Indian Tribe of Michigan (collectively, the "Michigan Tribes")—cross-move for summary judgment.

The Court holds that Interior's refusal to take the land into trust was neither contrary to law nor arbitrary. Interior's decision respects the natural, ordinary meaning of the land settlement statute. And Interior both engaged in reasoned decision-making and adequately explained the basis for its refusal. The Court will thus grant Interior and Defendant-Intervenors summary judgment.

I.

A.

The Sault is a federally recognized tribe with more than 40,000 enrolled members. AR3113.[1] In the nineteenth century, the Sault's ancestors sold much of their land to the Federal Government for pennies on the dollar. *See* Treaty of March 28, 1836 (7 Stat. 491); 26 Ind. Cl. Comm. 550, 553 (Dec. 29, 1971) (Docket Nos. 18-E and 58). A congressional commission found the sale unconscionable and awarded the Sault and other tribes more than $10 million in damages. *See* Ind. Cl. Comm. at 561. Congress then passed the Michigan Indian Land Claims

[1] Some pages of the administrative record, as they appear in the Joint Appendix, have multiple "AR" page numbers in their bottom right-hand corner. For consistency, the Court will use the page number with the largest font size.

Settlement Act ("Michigan Act" or "Act") to distribute those funds. *See* Pub. L. No. 105-143, 111 Stat. 2652 (1997).

Section 108 of the Act directs the Secretary of the Interior to transfer the Sault's monetary share into a "Self-Sufficiency Fund." *Id.* § 108(a)(1)(A), (e)(1). The Fund contains principal and may also generate income through investment or interest. *See id.* § 108(b)(1), (c). The Act delineates different uses for Fund principal and Fund investment income and interest. The "principal" of the Fund

> shall be used exclusively for investments or expenditures which the board of directors determines … (A) are reasonably related to … economic development … development of tribal resources … (B) are otherwise financially beneficial to the tribe and its members … or (C) will consolidate or enhance tribal landholdings.

Id. § 108(b)(1). The "interest and other investment income"[2] of the Fund, meanwhile,

> shall be distributed … (1) as an addition to the principal of the Fund … (2) as a dividend to tribal members … (3) as a per capita payment to some group or category of tribal members designated by the board of directors … (4) for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the [Tribe] … or (5) for consolidation or enhancement of tribal lands.

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[2] For clarity, the Court refers to purchases under this section as made with Fund "income," whether or not that income is interest or generated by investment.

Id. § 108(c). This case turns on the interpretations of uses four and five for Fund income.

Whether land is purchased with Fund principal or income matters. According to the Michigan Act, land acquired using Fund *income* "shall be held in trust by the Secretary for the benefit of the tribe." *Id.* § 108(f). And the Sault can build a casino on the land only if the parcel is held in trust, because trust status helps the Tribe qualify for an exception to the federal law governing gaming. *See Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*, 25 F.4th 12, 18 & n.3 (D.C. Cir. 2022).

B.

Today, the Sault describes itself as "economically distressed and land-starved." Pl.'s Renewed Mot. for Summ. J. ("Sault MSJ") at 3, ECF No. 9. Its current trust lands—on which it operates casinos—are all in Michigan's upper peninsula. AR2154. But revenue from these casinos has declined. *See* Sault MSJ at 3. And about 14,000 of the Tribe's members live in the lower peninsula—far from existing trust lands. *See id.* Thus, the Tribe explains that its current landholdings are "woefully inadequate to meet the needs of" its members. *Id.*

To improve its situation, the Tribe's board voted to use Fund income to purchase a 71-acre plot in the Lower Peninsula—the "Sibley Parcel." *See, e.g.*, AR3149. Recall that if the Sault purchases land with Fund income (rather than principal), Interior "shall" hold such land "in trust … for the benefit of the tribe." Pub. L. No. 105-143, § 108(f). And that would give the Tribe a chance to open a casino, *see Sault Ste. Marie*, 25 F.4th at 18 & n.3—the Sault's plan from the start, AR3112 n.1. So the Sault filed an application in June 2014 asking Interior to take the parcel into trust. AR3110–64.

Over the next two and a half years, Interior periodically asked for more information. *See, e.g.*, AR2242–43 (October 2014 letter). For example, Interior contacted the Sault four months after receiving its application. *See id.* Interior informed the Tribe that it defines "enhancement" in § 108(c)(5)'s "enhancement of tribal lands" as "to make greater, as in cost, value, attractiveness, etc.; heighten, intensify, augment." AR2243 (quoting Webster's New Twentieth Century Unabridged Dictionary). And Interior told the Sault it needed more proof that its planned acquisition meets this definition. *See id.* Following that letter, the Tribe supplemented the record. *See* AR2148–228.

Eventually, Interior sent the Sault an interim decision in January 2017 explaining that the Tribe had provided "insufficient evidence" to warrant taking the land into trust. AR969–74 ("January Letter"). Interior explained that its procedures "require evidence" that the parcel "meet[s] the requirements for mandatory acquisition." AR969. To explain its "procedures," Interior referred the Tribe to a guidance document. *See id.* n.3. That document explains that even if a statute such as the Michigan Act imposes a mandatory trust duty, the agency "will determine whether the parcel meets any additional required criteria … [and] will ensure that those criteria are met" before it takes land into trust.[3] And Interior again asked the Tribe for more evidence. AR974.

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[3] *Updated Guidance on Processing of Mandatory Trust Acquisitions*, Mem. from Larry Echo Hawk, Assistant Secretary-Indian Affairs, to Regional Directors and Superintendents, U.S. Dep't of Interior, (Apr. 6, 2012), accessible at https://www.doi.gov/sites/doi.gov/files/october-2019-qfrs_0.pdf [Updated Guidance].

Recall that the Michigan Act specifies these criteria. The Act instructs that Fund income "shall be distributed … for educational, social welfare, health, cultural, or charitable purposes" or for the "enhancement of tribal lands." Pub. L. No. 105-143, § 108(c)(4–5). According to Interior, the Sault had failed to show that its plans for the Sibley parcel satisfied either end.

First, Interior explained that the Sault failed to show its purchase was for "educational, social welfare, health, cultural, or charitable purposes" under § 108(c)(4). AR971–72 n.25. The Tribe pledged to build a casino on the land and devote five percent of its income "to address the unmet social welfare, health and cultural needs" of tribe members living nearby. AR2160. Three percent would benefit tribal elders and two percent would create a college scholarship program. AR3150. But Interior found these proposals "too attenuated" to satisfy the Michigan Act. AR972 n.25. "Should the Tribe purchase land with Self-Sufficiency Fund income for a school, a job training center, a health clinic, or a museum," Interior explained, "such purpose may fall within the scope of Section 108(c)(4)." *Id.* But as things stood, the Tribe could not satisfy the Michigan Act's requirements by using Fund income "to start an economic enterprise, which may generate its own profits, which … might then be spent on social welfare purposes." *Id.* In other words, Interior found that the Sault's proposed use of the land fell outside the plain text of § 108(c)(4). *See id.*

Second, Interior informed the Tribe that it lacked sufficient evidence to conclude that the Sibley parcel constitutes an "enhancement of tribal lands" under § 108(c)(5). After Interior asked for more "enhancement" evidence in the October 2014 letter, AR2242–43, the Tribe submitted more information in response,

AR2148–228. Relevant here, the Sault submitted two affidavits—one from the Tribe's Chief Financial Officer of Casinos ("the CFO") and the other from the Director of the Tribal Housing Authority ("the Director")—that it claims prove enhancement. AR2156, AR2213–15, AR2227–28. The CFO swore that the Sibley parcel "will allow the operation of casinos that, in turn, will enable the Tribe to improve its existing facilities on tribal lands in the Upper Peninsula." AR2215. And the Director explained that gaming revenue is the most viable means of providing housing to tribal members, which is currently scarce. *See* AR2227–28.

Unconvinced, Interior explained that the Tribe had again failed to "make a sufficient showing" of how the parcel would enhance its existing lands in Michigan's upper peninsula. AR973. And Interior rejected the Sault's claim that the purchase would enhance nearby lower peninsula land by "creating a critical mass of tribal lands" allowing for economic development and the delivery of services. *Id.* Interior again reminded the Tribe that before taking land into trust, "we need more; we need evidence," but so far the Tribe had "provide[d] no evidence" to satisfy § 108(c)(5). So Interior kept Sault's application open for further supplementation. AR974.

A few months later, the Tribe and its counsel met with Interior officials. AR1889. The Sault asked about the "standards that the Department will use and the type of evidence it would require" to decide whether to take the land into trust. *Id.* Nothing in the administrative record details how Interior responded to the Tribe's query. But during this meeting, the Tribe's lawyer "acknowledged they did not believe the Tribe could provide … [any additional] evidence" on the enhancement issue. AR1930 n.4. Interior then denied the Sault's trust

application for the Lansing Parcel in July 2017. AR1930–33 (July Letter).

The July Letter largely reiterated Interior's earlier conclusions. *See id.* It incorporated the agency's finding in the January Letter that "expenditures of potential gaming revenue are too uncertain and attenuated" to meet the Michigan Act's requirement that Fund income be used for "social welfare purposes." AR1931 n.9 (citing AR972 n.25). As for the enhancement issue, Interior explained that the Sault has "not offered real estate appraisals or assessments … suggesting that the value of one tract of land would increase as a result of the acquisition of another." AR1932. Instead, the Tribe merely supplied "attenuated reasoning" that economic development might be possible on the parcel, which might generate revenue, which might then be used to enhance existing tribal lands. AR1933. Even if Interior could accept this multi-step causal chain, it nonetheless reasoned that the Sault "has not offered any evidence of its plans to use the gaming revenue to benefit its existing lands or its members." *Id.* Interior rejected the Tribe's "conclusory statements" on this point—presumably those found in the Tribe's affidavits. *Id.* & n.9 (citing case explaining that lawyers' arguments and statements are not evidence).

The Sault sued. It sought vacatur of the July Letter and an order compelling Interior to take the Sibley parcel into trust. Compl. ¶ 101(a), (e). This Court initially ruled for the Tribe on its threshold argument that the Secretary lacked authority to decide whether the Tribe's use of Fund income complied with the Michigan Act. *See Sault Ste. Marie Tribe of Chippewa Indians v. Berhardt*, 442 F. Supp. 3d 53 (D.D.C. 2020). But the D.C. Circuit disagreed. *See Sault Ste. Marie*, 25 F.4th 12. That leaves the Tribe's fall back arguments for summary

judgment, *see* Sault MSJ, and cross-motions from Interior, the Casinos, and the Michigan Tribes, *see* Mem. in Support of Federal Defs.' Renewed Mot. for Summ. J. (Interior MSJ) at 12, ECF No. 95-1; Intervenor-Defs.' Detroit Casinos' Opp'n and Cross-Mot. for Summ. J. (Casinos' MSJ) at 2, ECF No. 94; Michigan Tribes' Opp'n and Cross-Mot. for Summ. J. (Michigan Tribes' MSJ) at 7, ECF No. 97.[4]

II.

Summary judgment is normally appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). But this standard does not apply when a court is reviewing a decision by an administrative agency under the APA. *See, e.g.*, *Remmie v. Mabus*, 898 F. Supp. 2d 108, 115 (D.D.C. 2012). Instead, this Court "determine[s] whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). In other words, "the district judge sits as an appellate tribunal" and the "entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (cleaned up). Under the APA, courts must "hold unlawful and set aside" a decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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[4] Sault has requested oral argument on the pending motions. *See* Pl.'s Opp'n to Defs.' and Intervenors' Renewed Cross-Mots. for Summ. J. at 1, ECF No. 100. Because the Court finds the parties' motions sufficient and previously heard arguments on the parties' initial briefs, it declines this request. *See* LCvR 7(f).

III.

The Sault says Interior's decision should be vacated for several reasons. First, the Tribe argues that Interior misinterpreted the Michigan Act. Second, it claims that Interior acted arbitrarily and capriciously by disregarding record evidence for the Act's "social welfare" and "enhancement of tribal lands" requirements. Third, the Tribe suggests that Interior failed to adequately explain why it rejected the Tribe's application. The Court addresses each in turn.

A.

Interior's refusal to take the land into trust was not contrary to law. Recall that the Sault justified its use of Fund income by arguing that economic development on the parcel—a casino—would generate revenue, five percent of which would finance scholarships and services for tribal elders. AR3119; AR3150. The Tribe also argued that its purchase would "provide a land base" to facilitate delivery of social services and create jobs. AR3119. Interior found these arguments "legally insufficient" to meet § 108(c)(4)'s requirement that income be used "for … social welfare … purposes" because they were "too attenuated." AR971–72 n.25. Interior explained that "a school, a job training center, a health clinic, or a museum" may qualify. *Id.* But it noted that the Sault cannot satisfy § 108(c)(4) by merely "start[ing] an economic enterprise, which may generate its own profits, which … might then be spent on social welfare purposes." *Id.*; *see also* AR1931 & n.9.

Because the Sault challenges Interior's interpretation of the Michigan Act, this Court "first consider[s] whether Congress has directly spoken to the precise question at issue by looking to the statutory text." *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 92

(D.C. Cir. 2020) (cleaned up). Because the terms in § 108(c)(4) are not defined, this Court gives them their "ordinary, contemporary, common meaning, as informed by the context of the overall statutory scheme." *Sault Ste. Marie*, 25 F.4th at 21. If the statute is clear, the Court's inquiry ends. *See id.*

1.

The Michigan Act permits Fund income to be used "for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the Sault Ste. Marie Tribe." Pub. L. No. 105-143, § 108(c)(4). So does the Sault's plan to use income to purchase land to build a casino and devote a sliver of its income to social welfare qualify?

The Sault first argues that "social welfare" is a broad phrase meriting expansive application. *See* Sault MSJ at 10. The Tribe points to the Oxford English Dictionary (OED) Third Edition, which defines social welfare as "the well-being of a community ... esp. with regard to health and economic matters." *Id.* And the Sault claims that "charitable purposes" include relief of poverty, promotion of health, and governmental or municipal purposes. *Id.* (citing Restatement (Second) of Trusts § 368 (1959)).

The Court does not read "social welfare" so expansively. First, most other dictionaries define social welfare more narrowly without reference to "economic matters."[5] For example, Merriam Webster's Collegiate Dictionary defines "social welfare" as "organized public or private social services for the assistance of

[5] The Court looks to dictionaries from around the time of the Act's enactment to today because few dictionaries in the years right before and after its enactment define the phrase "social welfare."

disadvantaged groups." *Social Welfare*, Merriam Webster's Collegiate Dictionary (10th ed. 1997). And the Cambridge Dictionary defines the phrase as "services provided by the government or private organizations to help poor, sick, or old people."[6] Similarly, the Black's Law Dictionary entry cross-references "social service," defined as "a service that helps society work better; esp. organized philanthropic assistance for those most in need." *Social Welfare*, Black's Law Dictionary (11th ed. 2019). These definitions are narrower than the one the Sault offers and suggest direct, nonprofit charitable activities.

Second, the words listed around "social welfare" inform its meaning: "educational," "health," "cultural," and "charitable." The canon *noscitur a sociis*—that words are known by the company they keep—holds that "words grouped in a list should be given related meanings." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (Scalia & Garner); *see also United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). This canon serves to "limit a general term to a subset of all the things or actions that it covers." Scalia & Garner at 196. So, even if "social welfare" standing alone can be broadly construed, the nearby words in § 108(c)(4) cabin it.

Consider "educational." It means "of or relating to the provision of education," and "education" is defined as the "systematic instruction, teaching, or training in various academic and non-academic subjects."[7] And

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[6] *Social Welfare*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/social-welfare.

[7] *Educational*, Oxford English Dictionary (3d ed. 2022), https://www.oed.com/view/Entry/59586?redirectedFrom=educational#eid;

"health" is "the condition of being sound in body, mind, or spirit," especially "freedom from physical disease or pain."[8] Next, "cultural" is defined as "relating to intellectual and artistic pursuits."[9] Finally, "charitable" is defined as "liberal in benefactions to the needy."[10]

Contra the Tribe's OED definition, none of these words suggest a for-profit venture, let alone a casino. Indeed, these dictionary definitions underscore the obvious. Suppose an ordinary English speaker new to a town asks a local friend for some Saturday-afternoon educational, healthful, cultural, or charitable activities. It would be entirely natural for the friend to suggest visiting a local museum, enjoying a walk in a nature preserve, or volunteering at a local soup kitchen. Only in an alternate America would the friend recommend spinning the roulette wheel or throwing the craps dice.

At bottom, the Sault's argument is that "social welfare" should be read to sweep in anything that benefits a community—including economic development. *See*,

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Education, Oxford English Dictionary (3d ed. 2022), https://www.oed.com/view/Entry/59584#eid5743856. *See also, e.g.*, *Education*, Merriam Webster's Collegiate Dictionary (10th ed. 1997) ("[T]he knowledge and development resulting from an educational process.").

[8] *Health*, Merriam Webster's Collegiate Dictionary (10th ed. 1997); *see also, e.g.*, *Health*, Oxford English Dictionary (3d ed. 2022), https://www.oed.com/view/Entry/85020?rskey=pE5xjw&result=1&isAdvanced=false#eid ("soundness of body" or "[t]he general condition of the body with respect to the efficient or inefficient discharge of functions").

[9] *Cultural*, Oxford English Dictionary (3d ed. 2008), https://www.oed.com/view/Entry/45742?redirectedFrom=cultural#eid.

[10] *Charitable*, Merriam Webster's Collegiate Dictionary (10th ed. 1997).

e.g., Sault MSJ at 9–10. But if that is really what "social welfare" means, "educational," "health," "cultural," and "charitable" become superfluous. *Cf. Yates v. United States*, 574 U.S. 528, 551 (2015) (Alito, J., concurring) (explaining when applying *noscitur a sociis* that reading a word in a list of associated words too broadly could render others in the list superfluous). Because it is this Court's "duty to give effect, if possible, to every clause and word of a statute," it is "reluctant to treat statutory terms as surplusage." *Duncan v. Walker*, 553 U.S. 167, 174 (2001) (cleaned up). Construed in context, the plain meaning of "social welfare" does not encompass a for-profit casino.

2.

Not so fast says the Tribe. Even if Interior is right about the meaning of social welfare, it is wrong that the Tribe's plan to further it is too attenuated. In other words, Fund income need not "immediately result in a specific social welfare (or other benefit)" because "[e]xpenditures do not themselves directly provide the types of benefits listed in § 108(c)(4)." Sault MSJ at 9, 11. The Sault uses the purchase of land to build a health clinic as an example, arguing that only the eventual operation of the clinic achieves one of § 108(c)(4)'s purposes. *See id.* at 11. This pivot allows the Sault to argue that Fund income "need only have the object of attaining, or be a means of facilitating" one of § 108(c)(4)'s purposes. It need not achieve those purposes directly.

To support that reading, the Sault dismembers the text and stitches it back together to broaden its meaning. First, the Tribe separates the words "for" and

"purpose." Sault MSJ at 10–11.[11] It says that "for" means "with the object or purpose of," *id.* (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018)), and "purpose" is "an objective, goal, or end," *id.* (citing Black's Law Dictionary 1250 (7th ed 1999)). Then, it combines those two definitions. *See id.* This textual sleight of hand allows the Sault to conclude that fund income may be spent on anything so long as money eventually trickles down to one of § 108(c)(4)'s enumerated ends. *See* Sault MSJ at 10–11.

That is a tortured reading of the statute. "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text." Scalia & Garner at 356. Indeed, "courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting). "If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word." *Id.* (cleaned up).

With these principles in mind, the Court declines to construe "for" and "purpose"—two extremely broad terms—in isolation. Instead, the Court interprets the phrases "for … social welfare … purposes" and "social welfare" in context. *See supra* Part III.A.1. Doing so

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[11] Casino Intervenors do the same. *See* Casinos' MSJ at 2–4. They define "for" as "indicat[ing] purpose" which largely maps onto Sault's definitions of "for" and "purpose." For the reasons explained, the Court does not find that granular definition of terms particularly helpful.

reveals that Congress required Fund income to "be distributed … for … social welfare … purposes"—full stop. And social welfare has a narrower definition that excludes economic development projects such as a casino. *See id.* Contra the Tribe's reading, the Act does not permit Fund income "to be spent to generate revenue to be used" for one of § 108(c)(4)'s enumerated ends. Interior MSJ at 13–14 (cleaned up). Reading "for" and "purpose" as the Sault requests could sweep just about any purchase into § 108(c)(4)'s ambit so long as a cent it generates eventually furthers education, health, culture, or charity. The statute's text does not permit that result.

While the Sault contends that Interior is reading a directness or immediacy restriction into the statute, *see* Sault MSJ at 12–13; Sault Reply at 3, that argument also fails. The Tribe's argument turns on the fact that Congress could have included "direct" or "immediate" before the enumerated ends. But this Court is wary of drawing inferences from what Congress did not do. *Cf. United States v. Craft*, 535 U.S. 274, 287 (2002) (explaining that "several equally tenable inferences may be drawn from [Congressional] inaction, including the inference that the existing legislation already incorporate[s]" a meaning). Congress's "choice of words is presumed to be deliberate," and this Court's interpretation is faithful to the precise wording. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).[12]

The Sault also argues that the Supreme Court has interpreted a similar phrase—"for the purpose of"

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[12] While Sault argues that no Defendant supplies an "administrable or coherent" standard for applying Interior's interpretation, Sault Reply at 10, that is beside the point. This Court is bound to interpret the enacted text; it is the province of Congress to address any practical concerns that may arise.

broadly. Sault MSJ at 10. In *Mortenson v. United States*, the Court interpreted "for the purpose of prostitution and debauchery" in a criminal statute prohibiting human trafficking. 322 U.S. 369, 373–74 (1944). The Court found it "essential that interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities"—namely, prostitution and debauchery. *Id.* at 374. The Sault thus argues that "'for the purpose of' means that an action must 'have for its object or be the means of … facilitating' an end result." Sault MSJ at 10 (quoting *Mortenson*, 322 U.S. at 374).

But as Interior recognizes, *Mortenson* provides little support for a capacious interpretation of "for … social welfare … purposes" in the Michigan Act. *See* Interior MSJ at 14 n.3. *Cf. United States v. Torres*, 894 F.3d 305, 315–16 (D.C. Cir. 2018) (declining to apply *Mortenson*'s reasoning about "for the purpose of" to a statute criminalizing child pornography that "calls for a different approach"). And *Mortenson*'s reasoning is especially inapposite given the D.C. Circuit's narrowing construction of § 108(c)(4), as the Court now explains.[13]

[13] In its Reply, Sault cites other cases in which "for the purpose of" is read to encompass conduct that seeks to achieve some ultimate end, despite how immediately or likely it is to be achieved. *See* Sault Reply at 5–6. First, the Court is loath to import language from other statutes when the text and structure of this one is clear and the D.C. Circuit has interpreted it. *See infra* Part III.A.3 (discussing *Sault Ste. Marie*, 25 F.4th at 17–18). Second, Sault overstates the persuasiveness of these cases. Their contexts are inapt (for example, the conversion of wetlands) and only one is from the Supreme Court. *See* Sault Reply at 5 (quoting *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501, 505 (1993)). The Court rejects Casino Intervenors' invocation of the Racketeer Influenced and Corrupt Organizations Act's language, *see* Casinos' MSJ at 4–5, for similar reasons.

3.

Circuit precedent hammers the final nail in the coffin. As Interior and Intervenors highlight, the D.C. Circuit reasoned that § 108(c)(4) must be harmonized with its neighbor § 108(b), the provision that governs the use of Fund principal. *See* Interior MSJ at 12; Casinos' MSJ at 2; Michigan Tribes' MSJ at 7. Recall that § 108(b) permits Fund principal to be used for "investments or expenditures" reasonably related to "economic development" or that "are otherwise financially beneficial to the tribe and its members." *Id.* § 108(b). Section 108(c)(4), on the other hand, "restricts the expenditure of Fund [income] to five uses … which necessarily excludes other uses." *Sault Ste. Marie*, 25 F.4th at 17–18; *accord* Scalia & Garner at 107–11 (explaining that under the negative-implication canon "specification of the one implies exclusion of the other"). Key here, Congress included an important use in § 108(b) that it omitted from § 108(c)(4): economic development.

Problematically for the Sault, it has consistently called its acquisition of the parcel an economic development project. *See, e.g.*, AR2215; AR1888; AR3093; AR3149; *see also* Interior MSJ at 11–12 (highlighting this fact); Michigan Tribes' MSJ at 8 (same). Even the Tribe's Complaint states, "[i]n 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. ¶ 35; *see also id.* ¶ 3 (explaining that it asked Interior to take the parcel into trust "thereby paving the way for potential gaming and other economic development on the land").

So its acquisition fits most naturally under § 108(b), which would require the expenditure of Fund principal and does not trigger Interior's duty to take the land into

trust. The Tribe's argument that building a casino falls under "social welfare" because pennies on the revenue dollar may ultimately be spent for education or tribal elders is untenable. That reading upsets the statute's careful distinction between Fund principal and income. *Cf. Sault Ste. Marie*, 25 F.4th at 17–18. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022) (cleaned up). Thus, "[g]iven [§ 108(c)(4)'s] clear language, it would be improper to conclude that what Congress omitted from [it] is nevertheless within its scope." *Nassar*, 570 U.S. at 353. The Sault cannot shoehorn its economic development project into § 108(c)(4)'s text when it is covered by a neighboring subsection.[14]

The Sault argues in its Reply that §§ 108(b) and (c)(4) are not distinct because Fund income may be distributed "as an addition to the principal of the Fund." Pub. L. No. 105-143, 108(c)(1); Sault Reply at 14. While it is correct that these provisions are not hermetically sealed, the Tribe cannot get around Circuit precedent holding that § 108(c) is narrower than § 108(b). *See Sault Ste. Marie*, 25 F.4th at 17–18. And to read § 108(c)(4) to include economic development when § 108(b) clearly speaks to it would violate the common statutory-interpretation maxim that what each section includes, neighboring sections exclude. *Cf. Badgerow*, 143 S. Ct. at 1318.

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[14] The Sault retorts that Interior's suggested uses for § 108(c)(4) funds— a museum or a job training program—are also forms of economic development. *See* Sault Reply at 13. But this misses the point. A college remains "educational" even though it may also be profitable.

4.

The Sault levies a few other arguments. None are persuasive. *First*, the Tribe complains that Interior rejected its § 108(c)(4) arguments in only a footnote and did not conduct textual analysis. *See* Sault MSJ at 9 (citing AR1931 n.9 and AR971–72 n.25).[15] True, Interior does not cite any dictionaries or canons. AR1931 n.9; AR971–72 n.25. But it did provide the Sault an illustrative list of what might qualify for § 108(c)(4): a school, a job training center, a health clinic, or a museum. AR972 n.25. Interior's examples reflect its commonsense view of what counts as a "social welfare" purpose and provide enough explanation to the Tribe. And in any event, this Court focuses on whether the statute answers the question at issue, not the depth or breadth of Interior's textual analysis.

Second, the Tribe suggests that because the Michigan Act was a "negotiated compromise" between the Sault and the Government, it should be given its "full and fair meaning." Sault MSJ at 11–12. The Sault also appeals to tribal sovereignty, arguing that if Congress was silent about something, the Court should draw an inference in favor of the Tribe because it is a co-equal sovereign. Sault MSJ at 12. But as Interior notes, Congress and the Sault negotiated the Michigan Act and it is not a blank check. *See* Interior MSJ at 14–15. Nothing about its terms diminishes Tribal self-sufficiency and sovereignty. *See id.* The Court declines to forgo the best reading of the Act's text simply because the Sault claims it is not the result for which it bargained.

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[15] If the Sault intends to argue that Interior acted arbitrarily and capriciously for failing to "set forth its reasons" for its decision about § 108(c)(4), *Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001); *see also* 5 U.S.C. § 555, the Court addresses that argument in Part III.B.

Third, out of textual options, the Sault appeals to purpose. Arguing that the Michigan Act "is designed to promote self-sufficiency and meet the vast unmet needs of the Tribe," the Sault argues it must be read to further, rather than frustrate, that purpose. Sault MSJ at 12. But "[n]o statute pursues a single policy at all costs, and [this Court] is not free to rewrite this statute (or any other) as if it did." *Bartenwerfer v. Buckley*, 598 U.S. ---, 2023 WL 2144417, at *7 (Feb. 22, 2023). Because the text of the law is clear, the Court "need not consider this extra-textual evidence." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 305 (2017). And in any event, the Circuit has foreclosed this line of argument: "[T]he Michigan Act reflects a negotiated agreement," and thus courts "must decline to unravel a legislative deal through resort to imputed purposes." *Sault Ste. Marie*, 25 F.4th at 21.

Fourth, and finally, the Sault argues that because there is "an essential nexus between tribal gaming and the provision of tribal services," all casino revenue-generation is really "a vital means of advancing the educational, social, health, and cultural well-being of Indian tribes." Sault MSJ at 14 (cleaned up); *see also* Sault Reply at 7–8 (arguing that Indian gaming is not considered "for-profit" by tribal commissions or under federal law). Perhaps so. But the precise question here is narrower: Can Fund income be used to purchase land for gaming, which may generate money, five percent of which will finance social welfare projects? While gaming in general may benefit Indian tribes, the answer is still no.[16]

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[16] Casino Intervenors argue it is speculative that the Sault will even be able to open a casino on the parcel under other federal laws, and that thus its promise of funding social welfare projects "may never materialize." Casinos' MSJ at 8. They also suggest that § 108(c)(4) might not justify land purchases at all. *See id.* at 2 n.1.

Part of the administrative record that no party mentions further undercuts the Tribe's position. The Sault's initial resolution to take the land into trust suggests that the project could *reduce* the money spent for the social welfare of its members. The resolution states: "[W]hile this project necessarily requires the purchase of lands using [] income from the Self-Sufficiency Fund, steps should be taken to ensure that this expenditure will not *adversely affect* the annual distribution to the Tribe's elders[.]" AR3149 (emphases added); *see also id.* (directing that before closing on the parcel, the Tribe's CFO must "identify alternative tribal funds that shall be used to supplement the next … annual distribution to the tribal elders … to avoid *any reduction* in the amount of that distribution that would otherwise result from the acquisition of that parcel") (emphases added).[17] Thus it appears that the three percent Sault claims it is devoting to tribal elders merely compensates them for losses incurred through purchase of the parcel.

For these reasons, the Court finds that Interior did not act contrary to law. Because the Court finds § 108(c)(4) of the Michigan Act clear, there is no need to consider whether Interior's interpretation merits

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And the Michigan Tribe Intervenors take this argument one step further, arguing that gaming on the parcel would be illegal under federal law and Sault's compact. Michigan Tribes' MSJ at 10. The Court need not weigh in on this debate because it finds that the text of the Act does not permit the Tribe's planned use of Fund income even assuming the casino could be built.

[17] The Sault raises additional arguments in its Reply about the history of per-capita payments to tribal members. *See* Sault Reply at 14–16. But this argument fails for the same reason as its purpose ones. This Court "has no roving license … to disregard clear language simply on the view that … Congress 'must have intended' something [different]." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

deference. *See, e.g.*, *Baystate Franklin Med. Ctr.*, 950 F.3d at 92. And there is also no reason to rehash the interplay between *Chevron* deference and the Indian canon. *See generally Sault Ste. Marie*, 25 F.4th at 28–29 (Henderson, J., dissenting).

B.

Interior did not act arbitrarily and capriciously in rejecting Sault's arguments that it met § 108(c)(4)'s "social welfare" and § 108(c)(5)'s "enhancement of tribal lands" requirements. The Sault's secondary argument in its renewed motion for summary judgment is that Interior unreasonably disregarded some of its evidence. *See* Sault MSJ at 15–20.

An agency acts arbitrarily under § 706(2)(A) of the APA when it "refus[es] to consider evidence bearing on the issue before it" or ignores "evidence contradicting its position." *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). This principle is "deduced from case law applying the substantial evidence test, under which an agency cannot ignore evidence contradicting its position." *Id.* While the substantial evidence test applies to formal proceedings, *see* 5 U.S.C. § 706(2)(E), and here Interior conducted informal adjudication, "in their application to the requirement of factual support[,] the substantial evidence test and the arbitrary or capricious test are one and the same." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). But the two tests differ in that it is "permissible … for common sense and predictive judgments to be attributed to the expertise of an agency in an informal proceeding, even if not explicitly backed by information in the record." *Phoenix Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife Serv.*, 998 F.3d 999, 1006 (D.C. Cir. 2021).

But the scope of review under the arbitrary and capricious standard is "narrow" and a court may not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43 (1983). An agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* While courts "may not supply a reasoned basis for the agency's action that the agency itself has not given," *id.*, they will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974).

1.

Consider first the Sault's argument that Interior disregarded evidence related to § 108(c)(4)'s "educational, social welfare, health, cultural, or charitable purposes" requirement. Sault MSJ at 15–18. The key "evidence" the Sault cites are affidavits. *Id.* at 15–17. Interior counters that it assessed all the Tribe's evidence (including the supplements it solicited). *See* Interior MSJ at 17–19.

The core of the Sault's argument is that Interior "addressed only the Tribe's explanation based on gaming revenues," ignoring the Tribe's arguments about job-creation or a new land base to provide services. Sault MSJ at 17. And the Sault points to Interior's statements in its January and July denial letters that the Tribe provided "no evidence" and no "supporting documentation" to show that Interior must have ignored the affidavits it submitted. *Id.* at 17–18.

But in assessing whether Interior engaged in reasoned decision-making under § 706(2)(A) of the APA,

this Court is not limited to the two denial letters. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 924 (D.C. Cir. 2017) ("An agency action need not stand or fall on the last document in the record; if the record as a whole satisfies the APA's requirements" it suffices). The whole record shows that Interior carefully assessed the Tribe's submissions. And Interior reasonably concluded (a) that the expenditure of potential revenue from the parcel did not satisfy § 108(c)(4), and (b) that the Tribe did not prove its land base or employment claims. *See* Interior MSJ at 17.

Start at the beginning. In the Sault's original application, the Tribe devoted most of its nine-page analysis to § 108(c)(5)'s "enhancement of tribal lands" requirement. AR3115–18. At the very end, the Tribe tacked on that its "acquisition is also independently justified" under § 108(c)(4)'s "social welfare" language because it would create employment opportunities, allow for the provision of tribal services, and generate revenue. AR3118–19. In support, it pointed to a resolution from the Tribal Board of Directors noting that five percent of casino revenue would go to social welfare purposes. AR3150. And the Sault submitted an affidavit from the Tribe's CFO in support. AR3163–64. But that affidavit just says that the Sault made a deposit on the parcel using Fund income. *Id.*

As Interior notes, *see* Interior MSJ at 18 & n.4, it considered the Sault's initial submission and then asked the Tribe for more details, AR2242. While that request did not mention the Tribe's terse § 108(c)(4) argument, it asked the Sault for more evidence about how the parcel would enhance tribal lands. AR2243. And Interior stated: "More than a declaration from the Tribe's chief financial officer will be needed to support a request for a mandatory trust acquisition." *Id.*

The Sault then submitted a supplemental application. Flouting Interior's warning that "more than a declaration" was needed, the Tribe submitted more affidavits to bolster its social-welfare argument. One from the Tribal Registrar explained the proximity of tribal members to the Sibley parcel. AR2161. Another from the Director explained that the Sault cannot satisfy the housing needs of its members without the purchase. AR2227–28. Yet another—this time from the CFO of Casinos—explains that the land will provide employment opportunities and a land base to facilitate the provision of social services. AR2214. It is these affidavits that the Sault now argues Interior disregarded in finding that Sault's application did not meet the requirements of § 108(c)(4).

After the Sault submitted its supplement, Interior continued to evaluate its application. The agency even allowed the Michigan Tribes to submit formal oppositions. AR180–217. Those tribes argued that the Tribe's proposed use of Fund income does not comply with § 108(c)(4)'s uses. *E.g.*, AR209. The Sault then submitted a reply, arguing that its application complies with the Act. AR448–50.

In the end, Interior rejected the Sault's plan to buy land, build a casino on it, and contribute five percent of that income to social welfare purposes as "too attenuated" to satisfy that statutory text. AR972 n.25; AR1931 n.9. And Interior reasoned that the Tribe merely "asserts, without providing supporting documentation" that the parcels will create a land base and allow for employment opportunities. AR1932; *see also id.* (noting that the Tribe failed to "cite any evidence" on these

points).[18] More, Interior explained in a footnote that "[t]he conclusory statements offered by the Tribe are not evidence." AR1932 n.16 (citing a case explaining that the statements of counsel are not evidence).

Considering the record as a whole—especially the dialogue between the Tribe and Interior—the Court finds that Interior engaged in reasoned decision-making. Interior neither refused to consider evidence bearing on the issues before it nor ignored contradictory evidence. *Butte County*, 613 F.3d at 194. Rather, Interior gave the Sault multiple chances to provide relevant evidence—evidence that its acquisition would directly benefit educational, social welfare, health, cultural, or charitable purposes. But the Tribe never did so.

The Sault therefore mischaracterizes the record when it asserts that Interior "simply pretended [its] evidence did not exist." Sault MSJ at 17. On the contrary, there is every indication that Interior "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[.]" *State Farm*, 463 U.S. at 43. And the agency's "path may reasonably be discerned." *Bowman Transp., Inc.*, 419 U.S. at 286. The Sault repeatedly failed to submit *probative* evidence that it satisfied § 108(c)(4). *See, e.g.*, Interior MSJ at 19 (noting that the Sault's submissions "were focused on potential *economic revenue*, rather than direct social welfare effects); *see also* Michigan Tribes' MSJ at 15 ("The materials that Sault claims Interior ignored are nothing more than

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[18] The Sault expresses concerns that Interior refuted its § 108(c)(4) arguments in a section of its letter discussing the "enhancement" language of § 108(c)(5). But an agency's "decision need not be a model of analytic precision to survive a challenge," *Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012), and the Court can easily see what Interior was doing here.

conclusory statements that Sault could provide unspecified 'services' on the Sibley Parcel … There was nothing for Interior to disregard."). This Court may not substitute its judgment for that of the agency, *State Farm*, 463 U.S. at 43, and it is satisfied that Interior made a reasoned decision here.

The Sault raises a few counterarguments. None succeed. *First*, the Tribe argues that its affidavits count as evidence, and if Interior disagreed, it had a duty to say why. *See* Sault MSJ at 17. Not so. For its decision to be reasoned, Interior need not reference every document that a party submitted. *Cf. Crooks v. Mabus*, 104 F. Supp. 3d 86, 100 (D.D.C. 2015) ("[I]t is not necessary for the [agency] to cite explicitly and explain away every point raised"). And Interior explained in the July Letter that "[t]he conclusory statements offered by the Tribe are not evidence." AR1932 n.16 (citing case noting that the statements of counsel are not evidence). Indeed, it makes sense that Interior would not spend time refuting various documents that it did not consider evidence *at all*—such as conclusory affidavits. And, in this context, an agency decision to find a piece of evidence credible or not carries much weight. *See Phoenix Herpetological Soc'y, Inc.*, 998 F.3d at 1006.

Second, the Sault claims that if Interior sought evidence "admissible in court proceedings," it "acted under a mistaken view of the law." Sault MSJ at 17–18. While it is true that the "rules of evidence do not apply in informal adjudications," it is also true that "an agency may entirely reject, give credit to, or discount the weight of" affidavits as appropriate. *Phoenix Herpetological Soc'y, Inc.*, 998 F.3d at 1006 n.14; *compare Lacson v. DHS*, 726 F.3d 170, 178 (D.C. Cir. 2013) (holding that an agency could rely on hearsay to support its decision), *with Phoenix Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife*

Serv., No. 17-cv-2584, 2020 WL 3035037, at *8 (D.D.C. 2020) (explaining that the agency "was within its discretion to reject" an affidavit), *aff'd*, 998 F.3d 999 (D.C. Cir. 2021). This is the point of allowing the agency to serve as finder of fact—it collects, weighs, and even discards, documents as it sees fit.

Third, the Sault claims that Interior "is entitled to rely on representations by parties who were uniquely in a position to know" the facts at issue—its affiants. Sault MSJ at 18 (cleaned up). "But that argument comes up snake eyes[.]" *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 792 (2014). Interior cites no case—nor can this Court find any—holding that Interior *must* rely on certain affiants' representations, no matter the depth of their knowledge. The Court declines the Sault's invitation to second-guess how Interior weighed the evidence the Tribe submitted.

For these reasons, Interior did not unreasonably disregard record evidence in deciding that the Sault had not satisfied § 108(c)(4) of the Michigan Act.

2.

The Sault similarly claims that Interior disregarded the CFO and Director's affidavits as evidence that it satisfied § 108(c)(5)'s "enhancement of tribal lands" requirement. Sault MSJ at 18–20. For many reasons just discussed, the Sault is incorrect.

As noted, Interior put the Tribe on notice in October 2014 that it had to submit more information about how the parcel enhanced existing tribal lands. AR2243. The Tribe then submitted more affidavits and reiterated its belief that the parcel enhances tribal lands. *E.g.*, AR2160, AR2213, AR2227. For example, the CFO for Casinos stated, in his "opinion," the parcel "will

substantially enhance the Tribe's current landholdings" by "allow[ing] the operation of casinos that, in turn, will enable the Tribe to make substantial improvements to its existing facilities[.]" AR2215.

Eventually, Interior sent the Sault the January Letter. AR972. Interior explained that its procedures "require evidence" that the parcel "meet[s] the requirements for mandatory acquisition." AR969. To explain its "procedures," Interior referred the Tribe to a guidance document. *Id.* at n.3. That document explains that even if a statute such as the Michigan Act imposes a mandatory trust duty, the agency "will determine whether the parcel meets any additional required criteria … [and] will ensure that those criteria are met" before it takes land into trust.[19] Again, Interior explained that the Tribe had presented "no evidence that the acquisitions of the parcels would effect a consolidation or enhancement of tribal lands." AR974. Even still, Interior gave the Sault another chance. *See id.* The record also reveals that during a meeting between agency officials, the Tribe, and counsel, "the Tribe's legal counsel acknowledged they did not believe the Tribe could provide such evidence." AR1930 n.4.

Finally, in the July Letter, Interior detailed why the Sault's submissions were insufficient. AR1931–33. For example, the Tribe's submission "did not address the value of the underlying land" and it did not provide "evidence … [such as] real estate appraisals or assessments suggesting that the value of one tract of land would

[19] Updated Guidance, *supra* note 4. To be sure, neither this document nor the letter Interior sent to the Tribe in 2014 delineated the precise type of information the agency sought. *See id.*; AR2242–43. But Interior put the Sault on notice as early as 2014 that an affidavit from its CEO alone likely would not suffice. AR2243.

increase as a result of the acquisition of another." AR1932. And Interior reasoned that the Sault could not prove "enhancement" through a speculative causal chain. Proof that the parcel allows for economic development, that might make money, which might be used to enhance existing tribal lands, did not count as evidence of enhancement. AR1933.

Considering the whole administrative record, the Court finds that Interior drew a rational connection between the facts found and the choice made. *See State Farm*, 463 U.S. at 43. While the Sault accuses Interior of ignoring contradictory evidence and minimizing evidence without adequate explanation, *see* Sault MSJ at 20, the opposite is true. Interior evaluated that evidence and explained repeatedly that it was lacking. More, the agency gave the Tribe a few chances to do better. As the Michigan Tribes note, the Sault's affidavits contain "vague, non-committal statements … not plans … [so] [t]here was *no* evidence of any specific plans to improve existing tribal lands for Interior to disregard." Michigan Tribes' MSJ at 18. As in its analysis of the § 108(c)(4) arguments, Interior reasonably rejected the affidavits as the sole evidence of an "enhancement of tribal lands." *Cf. Phoenix Herpetological Soc'y, Inc.*, 998 F.3d at 1006.

For these reasons, Interior did not act arbitrarily or capriciously as to the Tribe's § 108(c)(5) arguments.

C.

At times, the Sault gestures towards a different reason that Interior's rejection of its § 108(c)(4) and (c)(5) arguments was arbitrary and capricious: Interior failed to adequately explain itself. *See* Sault MSJ at 9 (noting that Interior rejected its interpretation of § 108(c)(4) in a footnote); *id.* at 15 (faulting Interior for failing to address certain arguments made by the Tribe); Sault Reply at 22

(arguing that Interior "failed to reasonably explain its rejection" of the Sault's theories); *id.* at 25 (referencing cases holding agency action arbitrary and capricious for failure to adequately explain). The Sault appears to fold these arguments into its claim that Interior failed to engage in reasoned decision-making. But the APA standard applicable to these types of claims is different.

Agencies are subject to the "fundamental requirement" that they "set forth [] reasons for [a] decision." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (cleaned up). Thus, they must provide "a brief statement of the grounds for denial," unless they are "affirming a prior denial or … the denial is self-explanatory." 5 U.S.C. § 555(e). The key is that the agency explain "why it chose to do what it did." *Tourus Records, Inc.*, 259 F.3d at 737. In other words, the agency's statement must be one of reasoning, not merely conclusion. *See Butte County*, 613 F.3d at 194.

But the Supreme Court has upheld "curt" agency explanations that "indicated the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138 (1973). And the D.C. Circuit has described § 555(e)'s "brief statement" requirement as "minimal," *Butte County*, 613 F.3d at 194, and "modest," *Roelofs v. Sec'y of Air Force*, 628 F.2d 594, 601 (D.C. Cir. 1980). Indeed, the statements the Circuit has declared insufficient typically comprise a single conclusory sentence, *see, e.g.*, *Butte County*, 613 F.3d at 195, "simply parrot[] the words" of a statute, *Olivares v. TSA*, 819 F.3d 454, 463 (D.C. Cir. 2016), or provide no explanation at all, *see Roelofs*, 628 F.2d at 596.

Interior satisfies § 555(e)'s "minimal procedural requirements." *Butte County*, 613 F.3d at 194. First, Interior explained in the January Letter that it was

rejecting the Tribe's capacious interpretation of § 108(c)(4) as "too attenuated." AR972 n.25. Interior also listed examples of what might satisfy the provision's requirements. And it explained that the Sault may not use Fund income to start an economic enterprise, whose profits (if any) may eventually be spent on one of these purposes. This is not a mere conclusion. Rather, it explains why Interior cannot accept the Tribe's application—its proposed use of Fund income does not directly promote social welfare, and a speculative, trickle-down theory does not meet the Act's requirements.

To be sure, Interior dispensed with the Tribe's argument in an extended footnote in the January Letter. AR971–72 n.25. And in the final July Letter, Interior merely referred to its prior statement in an even shorter footnote. AR1931 n.9 ("expenditures of potential gaming revenues are too uncertain and attenuated to satisfy" the Michigan Act's requirements); *see also* AR1931 (citing the January Letter and stating that "[n]one of these findings require further explication or explanation").

If all the Court had were the July Letter, and it did not "affirm[] a prior denial," 5 U.S.C. 555(e), the Sault may have a point. But the Court considers the whole administrative record, including the January Letter. *Cf. Tourus Records*, 259 F.3d at 737 (looking beyond a one-sentence final denial letter to the rest of the record). Viewing the whole administrative record, Interior said enough to satisfy § 555(e)'s "modest" requirements. That the Interior's succinct explanation of 108(c)(4) conflicts with the Tribe's preferred interpretation does not render it insufficient.[20]

[20] The Sault faults Interior for "saying nothing" about the Tribe's arguments that the parcel would provide a land base for provision of services to members and employment opportunities. Sault

Second, Interior explained its rejection of the Tribe's arguments that the parcel "enhance[d] tribal lands." Pub. L. No. 105-143, § 108(c)(5). Interior's reasoned explanations on this point easily satisfy § 555(e)'s requirements. The agency defined "enhancement" and summarized the Tribe's three arguments before refuting each one. AR972–73; AR1931–33. Recall also that Interior told the Tribe in the January Letter that it had not provided sufficient evidence of an enhancement to existing tribal lands and permitted supplementation to respond to these deficiencies. AR972–74. Then, in the July Letter, the agency again explained that the Sault failed to provide "supporting documentation" for its enhancement arguments and noted that "conclusory statements offered by the Tribe are not evidence." AR1932. Interior noted that the Tribe failed to "address the value of the underlying land" and demonstrate how the purchase would increase that value. *Id.* The agency thoroughly explained why it rejected the Sault's arguments that it qualified for the "enhancement of tribal lands" language of § 108(c)(5). Interior decisively clears § 555(e)'s minimal procedural hurdle.

IV.

For these reasons, the Court will grant Interior and Defendant-Intervenors summary judgment. A separate Order will issue today.

Dated: March 6, 2023 2023.03.06

/s/ [digital signature] 14:25:24 -05'00'
TREVOR N. MCFADDEN, U.S.D.J.

MSJ at 15. But § 555(e)'s brief statement requirement does not require that the agency note and address every argument in explaining its denial. It is clear from the administrative record why Interior rejected the Sault's § 108(c)(4) arguments. *E.g.*, AR971–72 n.25; AR1931.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-02035 (TNM)

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff,

v.

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

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*,
Defendant-Intervenors.

Filed March 6, 2023

ORDER

Upon consideration of the parties' cross-motions for summary judgment, oppositions, replies, the administrative record, and the law, it is hereby

ORDERED that Plaintiff's [91] Renewed Motion for Summary Judgment is DENIED. It is also

ORDERED that the Department of the Interior's [94] Renewed Motion for Summary Judgment and Defendant-Intervenors' [94] and [98] Renewed Motions for Summary Judgment are GRANTED.

SO ORDERED.

The Clerk of Court is requested to close this case. This is a final, appealable Order. *See* Fed. R. App. P. 4(a).

Dated: March 6, 2023 2023.03.06

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TREVOR N. MCFADDEN, U.S.D.J.

APPENDIX G

THE ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

[STAMP: JUL 24 2017]

The Honorable Aaron A. Payment
Tribal Chairperson, Sault Ste. Marie Tribe
of Chippewa Indians
523 Ashmun Street
Sault Ste. Marie, Michigan 49783

Dear Chairperson Payment:

This letter follows the letter from Ms. Ann Marie Bledsoe Downes, then-Deputy Assistant Secretary—Policy and Economic Development (DAS-PED), dated January 19, 2017 (DAS-PED Letter). The DAS-PED Letter informed the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) that its two applications for "mandatory" land-into-trust acquisitions could not be approved at that time[1] because "the applications lack sufficient evidence to demonstrate that acquisition of the parcels would 'consolidat[e] or enhance' tribal lands, as required by MILCSA [Michigan Indian Land Claims Settlement

[1] One, titled *Submission for Mandatory Fee-to-Trust Acquisition Pursuant to the Michigan Indian Land Claims Settlement Act—The "Corner Parcel" and The "Showcase Parcel"*, sought mandatory land-into-trust of two parcels in Lansing, Ingraham County, Michigan (Lansing Application). The second, titled *Submission for Mandatory Fee-to-Trust Acquisition Pursuant to the Michigan Indian Land Claims Settlement Act—The "Sibley Parcel"*, sought mandatory land-into-trust of a parcel in Huron Charter Township, Wayne County, Michigan (Sibley Application) (together, Applications). The Applications were submitted June 10, 2014, to the Bureau of lndian Affairs ("BIA"), Midwest Region (Region).

Act]."[2] The applications assert that the subject parcels have been or will be purchased with funds from the Tribe's Self-Sufficiency Fund, established pursuant to MILCSA.[3] The applications further assert that the purchases would effect a "consolidation or enhancement of tribal lands," and, therefore, would be subject to mandatory land-into-trust acquisition by the Department of the Interior (Department) in accordance with MILCSA.

I regret to inform you that I must deny the Tribe's request that the United States take into trust, as "mandatory" trust acquisitions, the tracts designated by the Tribe as the "Corner Parcel" and the "Showcase Parcel" in Lansing, and the "Sibley Parcel" in Huron Charter Township (collectively, "Parcels"). In the 6 months since the DAS-PED Letter, the Tribe has submitted no new evidence to demonstrate that acquisition of the Parcels would effect a consolidation or enhancement of tribal lands.[4] After review of the matter, I conclude that the applications fail to demonstrate that acquisition of the Parcels would effect the consolidation or enhancement of tribal lands necessary to trigger MILCSA's mandatory trust provisions.

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[2] DAS-PED Letter at 1-2 (alteration in original).

[3] Pub. L. 105-143, 111 Stat. 2652 (Dec. 15, 1997).

[4] Subsequently, on April 18, 2017, I met with the Tribe's legal counsel, concerning the DAS-PED Letter. I also met with you on June 14, 2017, to discuss the Tribe's applications. In the meetings, the Tribe did not provide any additional evidence in response to the DAS-PED letter. At our meeting on April 18, 2017, the Tribe's legal counsel acknowledged they did not believe the Tribe could provide such evidence.

The DAS-PED Letter described MILCSA's background and statutory scheme,[5] as well as the applications and briefing by both the Tribe and the opposing tribes.[6] I do not revisit those here. In addition, the DAS-PED Letter articulated why MILCSA does constitute mandatory authority for taking land into trust if certain conditions are met.[7] Finally, the DAS-PED Letter explained why the Department cannot accept certain arguments made by the Tribe, including the following: that acquiring the Parcels would effect a "consolidation" of tribal lands;[8] that acquiring the Parcels would satisfy MILCSA section 108(c)(4) because revenue from gaming on the Parcels would be used "for educational, social welfare, health, cultural, or charitable purposes which benefit members of the" Tribe ("social welfare purposes");[9] and that "enhancement" should be construed to include the acquisition of land in areas with a "substantial nexus" to the Tribe and its members.[10] None of these findings require further explication or explanation.

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[5] DAS-PED Letter at 2.

[6] *Id.* at 2-3.

[7] *Id.* at 3.

[8] *Id.* at 3-4 n.25 (parcels must be contiguous to effect a "consolidation," and consolidation of the Tribe's position is not the same as a "consolidation ... of tribal lands" as required by MILCSA).

[9] *Id.* (expenditures of potential gaming revenue are too uncertain and attenuated to satisfy MILCSA's requirement that Self-Sufficiency Fund interest and income be spent on social welfare purposes).

[10] *Id.* at 5, (proposed "substantial nexus" criterion is not among the MILCSA criteria for mandatory trust acquisition), at 5 n.33 (proposed "substantial nexus" criterion lacks intelligible principles for application).

I will, however, further explain why the applications have failed to demonstrate that acquisition of the Parcels would effect an "enhancement" of tribal lands as that term is used in MILCSA.

The Applications Fail to Demonstrate an "Enhancement" of Tribal Lands

To satisfy the mandatory trust acquisition requirements of the MILCSA, the Tribe must demonstrate two distinct things: 1) that the lands were "acquired using amounts from interest or other income of the Self-Sufficiency Fund" in accordance with section 108(f); and 2) that the expenditures from the Self-Sufficiency Fund were in accordance with one or more of the limitations provided in section 108(c), including "for consolidation or enhancement of tribal lands." The Tribe's primary argument that it meets the requirements for mandatory acquisition under MILCSA is that acquisition of each of the Parcels, which it intends ultimately to use for gaming purposes,[11] would constitute "enhancement" of tribal lands.

As explained in the DAS-PED Letter, former Solicitor Hilary Tompkins has defined "enhance" for purposes of MILCSA: "to make greater, as in cost, value, attractiveness, etc.: heighten, intensify; augment."[12] The

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[11] Lansing Application at 2 n.1; Sibley Application at 1 n.1. The Tribe does not at this time ask for a gaming eligibility determination, and the Tribe's use of the Parcels for gaming is not relevant to the determination of whether the acquisitions qualify for mandatory land-into-trust acquisition by the Department. However, the Tribe argues that the revenue it expects to generate from gaming will enhance tribal lands, an argument I address below.

[12] Letter from Hilary C. Tompkins, Solicitor, U.S. Department of the Interior, to Michael Gross, Associate General Counsel,

Department continues to apply that definition here. The Tribe argues that acquisition in trust of the Parcels would "make more valuable ... existing tribal lands," both in Michigan's Upper Peninsula, where the Tribe's headquarters and primary landholdings are located[13] and in the Lower Peninsula, where the Tribe already mvns tracts ofland near the Parcels.[14]

The Tribe bears the burden of demonstrating that it has met MILCSA's requirements for mandatory land-into-trust acquisitions, and that its acquisition of the Parcels effected an "enhancement" of tribal lands.[15] However, the Tribe has made no such demonstration even after being offered the additional opportunity to do so in the DAS-PED Letter.

With respect to the Parcels in the Lower Peninsula, as explained in the DAS-PED Letter, the Tribe has offered no evidence in support of its argument that the Sibley and Lansing Parcels would "enhance" the values of nearby lands. The Tribe asserts, without providing

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National Indian Gaming Commission at 13 (Dec. 21, 2010) ("Bay Mills Letter?).

[13] *The Sibley and Lansing Parcels Fee-To-Trust Acquisition Submission—Supplemental Information Concerning the Consolidation and Enhancement of Tribal lands* at 10-11 (Apr. 22, 2015) ("Tribe's Supplement");

[14] *Id.* at 10-11.

[15] Because I conclude, as did the DAS-PED, that the Tribe has failed to demonstrate enhancement, I need not reach two other outstanding questions under MlLCSA: 1) the definition of "tribal lands" as Congress used that term in section 108(c)(5) of MILCSA, and 2) whether the Parcels were acquired (or would be acquired) "using amounts from interest or other income of the Self-Sufficiency Fund," as required by section 108(f) of MILCSA.

supporting documentation,[16] that the acquisition of the Parcels will create a "critical mass of tribal lands" on which it can better serve its members living nearby.[17] Even assuming the Tribe's statement is correct, it does not address the value of the underlying land. For example, the Tribe has not offered real estate appraisals or assessments, suggesting that the value of one tract of land would increase as a result of the acquisition of another. The Tribe also argues that acquisition of the Parcels will generate revenue to allow for development of its existing land in the Lower Peninsula, which will "provide employment and tribal services" to its members nearby.[18] Again, the Tribe fails to cite any evidence, and without such evidence we cannot find that the requirements of MILCSA are satisfied.[19]

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[16] The conclusory statements offered by the Tribe are not evidence. *See Bancamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593 n. 4 (9th Cir. 2002).

[17] Tribe's Supplement at 10-11.

[18] *Id.*

[19] The Tribe correctly notes that the Department has previously linked revenues from gaming operations to "address[ing] the unmet social and economic needs of tribal members on and off the Reservation" and "conserv[ing] and develop[ing] tribal land and resources." *Sault Ste Marie Tribe of Chippewa Indians Responses to Questions Posted by the Department of the Interior* at 2 (Dec. 9, 2016) (citing Letter from Assistant Secretary Washburn to the Honorable Scott Walker, Governor of Wisconsin at 26 (August 23, 2013). Indeed, one of the purposes of the Indian Gaming Regulatory Act is 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. However, the example provided by the Tribe addressed the question of whether a gaming establishment was in the best interest of the Indian tribe, not whether, in the absence of any evidence,

Furthermore, with respect to the Tribe's argument that its acquisition of the Parcels would enhance its lands in the Upper Peninsula,[20] our analysis is informed by the Bay Mills Letter. In Bay Mills, where the subject parcel was approximately 85 miles from the Bay Mills's existing landholdings,[21] the Solicitor concluded that "[*b*]*ecause* the Vanderbilt site is very far from all other tribal landholdings, it cannot be said to enhance any of them."[22] Here, the distances are even greater—the Tribe's headquarters is approximately 260 miles (287 miles by road) from the Lansing Parcels, and approximately 305 miles (356 miles by road) from the Sibley Parcel.[23] If Bay Mills could not, without supporting evidence of a tangible increase of value, "enhance" land from 85 miles away, then the Tribe cannot do so from more than 200 miles away without such evidence.

Moreover, in arguing that its acquisitions of the Parcels would enhance its Upper Peninsula lands, the Tribe relies on the attenuated reasoning that 1) the acquisitions allow for economic development, *then* 2) that economic development *might* generate revenue, *then* 3) that the revenue *might* be used to enhance lands in the Upper

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acquisition of property could be said to "enhance" other parcels so as to trigger mandatory trust acquisition.

[20] *Id.* at 7.

[21] Bay Mills Letter at 4.

[22] *Id.* at 6 (emphasis added).

[23] Because the Tribe's headquarters is on the northern tip of the Upper Peninsula, the Tribe may have lands in the Upper Peninsula that are not quite so distant from the Parcels that the Tribe seeks to have taken into trust. However, even the closest point on the Upper Peninsula is approximately 218 miles from the Lansing Parcels and approximately 267 miles from the Sibley Parcel.

Peninsula. Even assuming we could accept that the potential for revenues arising from activity on, as opposed to the acquisition of: land satisfied MILCSA's requirements, the Tribe has not offered any evidence of its plans to use the gaming revenue to benefit its existing lands or its members.

Conclusions

The mandatory land-into-trust provision in MILCSA is triggered only when the Tribe acquires lands using Self-Sufficiency Fund income and conforming to the limitations provided in MILCSA section 108(c). Here, the Tribe argues that its acquisitions of the Parcels effected an "enhancement" of tribal lands as required by section 108(c)(5). The Tribe, however, has provided no evidence to support its argument and failed to respond to the DAS-PED's invitation to respond to the deficiencies identified in her letter.

Consequently, I conclude that the Tribe has failed to meet its burden of demonstrating that its acquisition of the Parcels would effect an "enhancement" of tribal lands as necessary to trigger the mandatory land-into-trust provision in section 108(f) of MILCSA. Therefore, the applications are denied.

Sincerely,

[digital signature]

James Cason
Associate Deputy Secretary

APPENDIX H

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington, DC 20240

[STAMP: JAN 19 2017]

The Honorable Aaron A. Payment
Chairman, Sault Ste. Marie Tribe of Chippewa Indians
523 Ashmun Street
Sault Ste. Marie, Michigan 49783

Dear Chairman Payment:

On June 10, 2014, the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) submitted to the Bureau of Indian Affairs (BIA), Midwest Region (Region), two applications for "mandatory" land-into-trust acquisitions. One, titled *Submission/or Mandatory Fee-to-Tntst Acquisition Pursuant to the Michigan Indian Land Claims Settlement Act—The "Corner Parcel" and The "Showcase Parcel,"* sought mandatory land-into-trust of two parcels in Lansing, Ingraham County, Michigan (Lansing Application); the second, titled *Submission/or Mandatory Fee-to-Trust Acquisition Pursuant to the Michigan Indian Land Claims Settlement Act—The "Sibley Parcel,"* sought mandatory land-into-trust of a parcel in Huron Charter Township, Wayne County, Michigan (Sibley Application) (together the "Applications"). The Applications assert that the subject parcels have been or will be purchased with funds from the Tribe's Self-Sufficiency Fund, established pursuant to the Michigan Indian Land Claims Settlement Act (MILCSA).[1] The Applications further assert that the purchases would effect

[1] Pub. L. 105-143, 111 Stat. 2652 (Dec. 15, 1997).

a "consolidation or enhancement of tribal lands," and, therefore, would be subject to mandatory land-into-trust acquisition by the Department of the Interior (Department) in accordance with MILCSA.

We have completed our review of the Tribe's request and supporting documentation. I regret to inform you that, at this time, there is insufficient evidence to allow us to proceed with the Applications. We agree with the Tribe that MILCSA does constitute statutory authority for mandatory land-into-trust acquisition, provided that the statutory requirements are met. One of those requirements is that the acquisition is "for consolidation or enhancement of tribal lands," terms that the Department previously has interpreted with regard to MILCSA.[2] We also are directed by the Department's procedures governing mandatory trust acquisitions,[3] which require evidence demonstrating that the subject parcel (or parcels) meet the requirements for mandatory acquisition. Here, I conclude that, at this time, the Applications lack sufficient evidence to demonstrate that acquisition of the parcels would "consolidat[e] or enhance" tribal lands, as required by MILCSA.

MILCSA

Congress enacted MILCSA in 1997 to provide plans to distribute to the Tribe and others certain Indian Claims

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[2] Letter from Hilary C. Tompkins, Solicitor, U.S. Department of the Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010) ("Bay Mills Letter").

[3] *Updated Guidance on Processing of Mandatory Trust Acquisitions*, Memorandum from Larry Echo Hawk, Assistant Secretary-Indian Affairs, to Regional Directors and Superintendents, BIA (Apr. 6, 2012) ("Updated Guidance").

Commission (ICC) judgment[4] funds that the Department had been holding in trust.[5] MILCSA required the Tribe to establish a Self-Sufficiency Fund, into which the Tribe's share of the judgment funds would be deposited as principle.[6] The MILCSA also sets limits on how the Tribe may expend both Self-Sufficiency Fund principle[7] and income.[8] For example, the Tribe may use Self-Sufficiency Fund income "for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the" Tribe,[9] or 'for consolidation or enhancement of tribal lands,"[10] among other uses.[11] Finally, MILCSA provides that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe."[12]

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[4] ICC Docket Nos. 18-E, 58, and 364 arose from the 1820 and 1836 treaties of cession between the United States and the Ottawa and Chippewa Indian tribes of Michigan. MILCSA at § 102(a)(1); H. Rep. 105-352. The ICC found that the United States' payments for the ceded lands were "unconscionable," and in 1971 awarded the tribes more than $10 million.

[5] MILCSA at § 102(b) (purpose); *see also id.* at § 102(a) (findings).

[6] MILCSA at § 108(a)(1)(A).

[7] MILCSA at § 108(b).

[8] MILCSA at § 108(c).

[9] MILCSA at § 108(c)(4).

[10] MILCSA at § 108(c)(5).

[11] *See generally* MILCSA at § 108(c).

[12] MILCSA at § 108(f) (emphasis added).

<u>The Applications and Briefing</u>

The Lansing Application seeks mandatory trust acquisition of two parcels, designated the "Comer Parcel" and the "Showcase Parcel" (together "Lansing Parcels"); the Sibley Application seeks mandatory trust acquisition of a third parcel, designated the "Sibley Parcel."[13] Approximately one year after submitting the Applications, the Tribe supplemented its submissions.[14] Subsequently, two other Michigan tribes have provided the Department with their opposition to the Applications: the Nottawaseppi Huron Band of the Potawatomi and the Saginaw Chippewa Indian Tribe (together, "Opposing Tribes').[15] The Tribe then submitted a reply brief.[16] Finally, after the Department requested additional evidence and argument on specific questions,[17] both final

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[13] In this letter, I refer to the Comer Parcel, the Showcase Parcel, and the Sibley Parcel collectively as the "Parcels."

[14] *The Sibley and Lansing Parcels Fee-To-Trust Acquisition Submission—Supplemental lnformation Concerning the Consolidation and Enhancement of Tribal Lands* at 11 (Apr. 22, 2015) ("Tribe's Supplement")

[15] *Opposition to the Fee-to-Trust Acquisition Applications of the Sault Ste. Marie Tribe of Chippewa Indians for the Lansing Parcels and the Sibley Parcel* (Apr. 6, 2016) ("Opposing Tribes' Brief").

[16] *The Sibley and Lansing Parcels Fee-to-Trust Acquisition Submissions Reply to Objections Filed by Nottawaseppi Huron Band of the Potawatomi and the Saginaw Chippewa Indian Tribe* (May 20, 2016) ("Tribe's Reply").

[17] Email from Jennifer Turner, Acting Assistant Solicitor, U.S. Department of the Interior, to John Wernet et al. (Nov. 18, 2016); email from Jennifer Turner, Acting Assistant Solicitor, U.S. Department of the Interior, to Robert L. Gips et al. (Nov. 18, 2016) (together, "Final Briefing Emails").

briefs were submitted by both the Tribe[18] and the Opposing Tribes.[19] We have duly considered all of these submissions and the attachments and exhibits submitted with them.

Authority for Mandatory Trust Acquisition

At the outset, we are required to consult with the Office of the Solicitor for a determination of whether "a specific statute or judicial order" in this case, MILCSA—constitutes mandatory authority for taking land into trust.[20] The Opposing Tribes argue that any land-into-trust application under the MILCSA is discretionary, notwithstanding the use of the word "shall" in Section 108(f).[21] We are not persuaded. Courts have long acknowledged that "[t]he word 'shall' is ordinarily the language of command."[22] In addition, the Bay Mills Letter acknowledged that Section 108(f) "called for a mandatory land acquisition."[23] Therefore, if lands are acquired using

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[18] *Responses to Questions Posed by the Department of the Interior Relating to The Fee-To-Trust Petitions for the Sibley and Lansing Parcels* (Dec. 9, 2016) ("Tribe's Final Brief").

[19] Letter from James T. Kilbreth, DrummondWoodsum, to Jennifer Turner, Acting Assistant Solicitor, U.S. Department of the Interior (Dec. 9, 2016) ("Opposing Tribes' Final Brief").

[20] Updated Guidance at 1-2.

[21] Opposing Tribes' Brief at 25-27.

[22] *Alabama v. Bozeman,* 533 U.S. 146, 153 (2001) (quoting *Anderson v. Yungkau,* 329 U.S. 482,485 (1947) (quoting, in turn, *Escoe v. Zerbst,* 295 U.S. 490,493 (1935))).

[23] Bay Mills Letter at 12. Although the Bay Mills Letter hedged that statement by saying that retaining the mandatory language in Section 108(f) while removing it from other provisions of the MILCSA "perhaps was a mistake by Congress," *id.*, the mandatory language nonetheless remains.

Self-Sufficiency Fund income in accordance with the provisions of Sections 108(c) and (f), then the Secretary is required to hold those lands in trust for the Tribe.

Evidence that Requirements of Mandatory Authority Are Satisfied

To satisfy the mandatory trust acquisition requirements of the MILCSA, the Tribe must demonstrate two distinct things: One, that the lands were "acquired using amounts from interest or other income of the Self-Sufficiency Fund" in accordance with Section 108(f); and two, that the expenditures from the Self-Sufficiency Fund were in accordance with one or more of the limitations provided in Section 108(c). The Tribe's primary argument that it meets the requirements for mandatory acquisition under MILCSA is that acquisition of each of the parcels, which it intends ultimately to use for gaming purposes,[24] would constitute "enhancement" of tribal lands.[25]

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[24] Lansing Application at 2 n.1; Sibley Application at 1 n.1. Although the Tribe does not at this time ask for a gaming eligibility determination, and the Tribe's use of the Parcels for gaming is not relevant to the determination of whether the acquisitions qualify for mandatory land-into-trust acquisition by the Department, the Tribe's intended use of the Parcels for economic development is relevant to the Tribe's arguments that the acquisitions satisfy the requirements of MILCSA.

[25] The Tribe advances two other arguments that we conclude are legally insufficient to meet the requirements of MILCSA.

First, the Tribe argues that, because the Lansing Parcels are "less than three hundred feet from one another" and because the Tribe already owns a tract less than two miles from the Sibley Parcel, acquiring the Parcels would constitute a "consolidation" of tribal lands and, thus, satisfy Section 108(c)(5) of MILCSA. The Department previously defined "consolidate" for purposes of MILCSA to mean "to unite (various units) into one mass or body." Bay Mills

The Tribe offers three arguments why acquisition of the parcels constitutes an "enhancement of tribal lands." First, the Tribe argues that the Department should embrace the definition of "enhance" adopted by the U.S. District Court for the Western District of Michigan in *Michigan v. Bay Mills Indian Community*,[26] which opined: "[t]he word 'enhance' means 'to improve or make greater' or 'to augment.' Obviously, the purchase

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Letter at 4 (quoting Webster New Twentieth Century Unabridged Dictionary). Because neither of the Applications would "unite various units into one mass or body," we conclude that the Applications would not effect a "consolidation ... of tribal lands" for purposes of MILCSA. The Tribe offers alternative definitions of "consolidate"—to "reinforce or strengthen one's position," Lansing Application at 6 (quoting New Oxford American Dictionary 373 (2d ed. 2005) (omission in original)), and "to make firm or secure," *id.* (quoting Webster's New Collegiate Dictionary 240), and argues that acquisition of the Parcels will strengthen the Tribe's position by better enabling the Tribe to offer services to members who live near the Parcels. Tribe's Supplement at 3-4. However, even if we were to accept these alternative definitions, consolidation of *the Tribe's position* is not the same as a "consolidation ... of *tribal lands*," which is what MILCSA requires.

Second, the Tribe argues that acquisition of the Parcels would satisfy Section 108(c)(4), because revenue generated by gaming enterprises on the Parcels would be used "for educational, social welfare, health, cultural, or charitable purposes which benefit members of the" Tribe ("social welfare purposes"). We find this argument to be too attenuated to satisfy MILCSA. Should the Tribe purchase land with Self-Sufficiency Fund income for a school, a job training center, a health clinic, or a museum, such purpose may fall within the scope of Section 108(c)(4) and be subject to the mandatory trust language of in Section 108(f). The Tribe, however, may not satisfy the Section 108(c)(4) requirement that *Self-Sufficiency Fund* interest and income be spent 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.

[26] Case No. 1: 10-cv-01273-PLM (W.D. Mich.).

of the Vanderbilt Tract is an enhancement of tribal land-holdings, as the additional land augmented, or made greater, the total land possessed by Bay Mills."[27] We are not yet persuaded. The Department already has adopted a definition of "enhance' for purposes of MILCSA: "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment."[28] The District Court's definition of "enhance" was mere dictum,[29] and ultimately the District Court's decision was vacated (on other grounds) on appeal.[30] Moreover, under the District Court's definition would effectively provide that *any* acquisition of land using income from the Self-Sufficiency Fund would constitute an enhancement, as any acquisition would "ma[k]e greater the total land possessed" by the Tribe. Where Congress specified that Self-Sufficiency Fund income could *only* be spent for "consolidation or enhancement of tribal lands," we

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[27] *Id.,* Op. and Order Granting Mot Prelim. Inj., Dkt. No. 33, at 10-11 (Mar. 29, 2011) ("Injunction Order") (footnote and citation omitted), *rev'd on other grounds* 695 F.3d 406 (6th Cir. 2012).

[28] Bay Mills Letter at 4 (quoting Webster's New Twentieth Century Unabridged Dictionary).

[29] Unlike the Tribe's section of MILCSA, which allows expenditures of Self-Sufficiency Fund income to consolidate *or* enhance tribal lands, the section relevant to the Bay Mills Indian Community requires both consolidation *and* enhancement of tribal lands. MILCSA at § 107(3). Because the District Court concluded that the Bay Mills acquisition did not consolidate tribal lands, Injunction Order at 11-13, 16, the District Court's discussion of enhancement was mere dictum.

[30] 695 F.3d 406, 416-17.

cannot conclude that *any* acquisition of land would satisfy that requirement.[31]

Second, the Tribe argues that "enhancement" must be construed to include the acquisition of any land in areas with a "substantial nexus" to the Tribe and its members.[32] We cannot accept this argument on its own as it is not referenced in MILCSA itself. Section 108(c) of MILCSA defines the uses for which Self-Sufficiency Fund income can be spent, and the acquisition of land with a substantial nexus to the Tribe or its members is not on its own one of the allowed categories, though it could be a factor in our analysis.[33]

Third, the Tribe argues that acquisition of the parcels will "make more valuable existing tribal lands," both in Michigan's Upper Peninsula, where the Tribe's headquarters and primary landholdings are located,[34] and of the tracts of land the Tribe already owns near the

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[31] The Tribe also argues that any ambiguity should be resolved in favor of the Tribe, citing the Indian canon of construction. *See, e.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). We, however, see no ambiguity in Congress's use of the word "enhance" and, therefore, do not look to the Indian canon of construction.

[32] *See, e,g.*, Tribe's Reply at 8-10.

[33] Even if we could consider this option, we fail to see what intelligible principle the Department could use to divine what constitutes such a "substantial nexus." The Tribe offers that approximately one-sixth of its members live within a 50 miles of one or more of the parcels. Tribe's Supplement at 5-6, 12. Although we have no reason to doubt this figure, we also have no basis for concluding that this constitutes a "substantial nexus."

[34] Tribe's Supplement at 7.

parcels.[35] This approach is consistent with the framework the Solicitor set out in her Bay Mills Letter.[36] However, until the Tribe makes a sufficient showing of how the lands in the Upper Peninsula will be enhanced by the acquisition of the parcels we cannot complete our analysis on this point.

Finally, the Tribe's argument that the acquisition of the parcels would enhance nearby tracts already owned by the tribe lacks sufficient evidence to serve as the basis for us to conclude that the acquisitions would meet the requirements of MILCSA. The Tribe argues that acquisition of the Sibley Parcel would enhance the nearby tract owned by the Tribe by "creating a critical mass of tribal lands" that would a1low for economic development and delivery of services to tribal members, and that acquisition of the Lansing Parcels into trust would allow for them to enhance each other.[37] To conclude that a request for mandatory land-into-trust meets the requirements of the authorizing legal authority, we need more; we need evidence.[38] The Tribe provides no evidence that the expenditure of Self-Sufficiency funds for the acquisition the parcels would enhance the Tribe's existing lands.

Because the Applications contain no evidence that the acquisitions of the parcels would effect a "consolidation or enhancement of tribal lands," the Applications

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[35] *Id.* at 10-11.

[36] Bay Mills Letter at 6 ("[E]ven under an interpretation where *enhancement* includes the addition of new land, there must be some connection to benefiting existing tribal landholdings" (emphasis in original)).

[37] Tribe's Supplement at 10-11.

[38] Updated Guidance at 2.

currently do not meet the requirements of Section 108(c){5) of MILCSA. Thus, we need not consider whether the parcels have been (or would be) acquired using Self-Sufficiency Fund income as required by Section 108(f) of MILCSA. We will keep the Applications open so that the Tribe may present evidence of an enhancement.

Sincerely,

[digital signature]

Ann Marie Bledsoe Downes
Deputy Assistant Secretary—
Policy and Economic
Development

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5123
September Term, 2021
Filed On: May 27, 2022
1:18-cv-02035-TNM

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Appellee,

v.

DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR AND UNITED STATES DEPARTMENT OF THE INTERIOR,
Appellants.

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, ET AL.,
Appellees,

Consolidated with 20-5125, 20-5127, 20-5128

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Millett, Pillard, Wilkins, Katsas*, Rao, Walker, and Jackson*, Circuit Judges; and Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellee Sault Ste. Marie Tribe of Chippewa Indians' petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

* Circuit Judges Katsas and Jackson did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Anya Karaman
Deputy Clerk

APPENDIX J

PERTINENT STATUTORY PROVISIONS

Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, § 108, 111 Stat. 2652, 2660 (1997)

SEC. 108. PLAN FOR USE OF SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN FUNDS.

(a) SELF-SUFFICIENCY FUND.—

(1) The Sault Ste. Marie Tribe of Chippewa Indians of Michigan (referred to in this section as the "Sault Ste. Marie Tribe"), through its board of directors, shall establish a trust fund for the benefit of the Sault Ste. Marie Tribe which shall be known as the "Self-Sufficiency Fund". The principal of the Self-Sufficiency Fund shall consist of—

(A) the Sault Ste. Marie Tribe's share of the judgment funds transferred by the Secretary to the board of directors pursuant to subsection (e);

(B) such amounts of the interest and other income of the Self-Sufficiency Fund as the board of directors may choose to add to the principal; and

(C) any other funds that the board of directors of the Sault Ste. Marie Tribe chooses to add to the principal.

(2) The board of directors shall be the trustee of the Self-Sufficiency Fund and shall administer the Fund in accordance with the provisions of this section.

(b) USE OF PRINCIPAL.—

(1) The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines—

(A) are reasonably related to—

(i) economic development beneficial to the tribe; or

(ii) development of tribal resources;

(B) are otherwise financially beneficial to the tribe and its members; or

(C) will consolidate or enhance tribal landholdings.

(2) At least one-half of the principal of the Self-Sufficiency Fund at any given time shall be invested in investment instruments or funds calculated to produce a reasonable rate of return without undue speculation or risk.

(3) No portion of the principal of the Self-Sufficiency Fund shall be distributed in the form of per capita payments.

(4) Any lands acquired using amounts from the Self-Sufficiency Fund shall be held as Indian lands are held.

(c) USE OF SELF-SUFFICIENCY FUND INCOME.—The interest and other investment income of the Self-Sufficiency Fund shall be distributed—

(1) as an addition to the principal of the Fund;

(2) as a dividend to tribal members;

(3) as a per capita payment to some group or category of tribal members designated by the board of directors;

(4) for educational, social welfare, health, cultural, or charitable purposes which benefit the members of the Sault Ste. Marie Tribe; or

(5) for consolidation or enhancement of tribal lands.

(d) GENERAL RULES AND PROCEDURES.—

(1) The Self-Sufficiency Fund shall be maintained as a separate account.

(2) The books and records of the Self-Sufficiency Fund shall be audited at least once during each fiscal year by an independent certified public accountant who shall prepare a report on the results of such audit. Such report shall be treated as a public document of the Sault Ste. Marie Tribe and a copy of the report shall be available for inspection by any enrolled member of the Sault Ste. Marie Tribe.

(e) TRANSFER OF JUDGMENT FUNDS TO SELF-SUFFICIENCY FUND.—

(1) The Secretary shall transfer to the Self-Sufficiency Fund the share of the funds which have been allocated to the Sault Ste. Marie Tribe pursuant to section 104.

(2) 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.

(f) LANDS ACQUIRED USING INTEREST OR OTHER INCOME OF THE SELF-SUFFICIENCY FUND.—Any lands

acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.