[ORAL ARGUMENT NOT YET SCHEDULED]

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

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff-Appellee,

v.

DAVID LONGLY BERNHARDT, in his official capacity as Secretary of the Interior, et al.,
Defendants-Appellants,

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

On Appeal from the United States District Court
for the District of Columbia, No. 1:18-cv-2035-TNM
Before the Honorable Judge Trevor N. McFadden

BRIEF FOR PLAINTIFF-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellee Sault Ste. Marie Tribe of Chippewa Indians certifies as follows:

A. Parties And Amici

All parties, intervenors, and amici appearing in this court are listed in the Brief for Federal Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Federal Appellants.

C. Related Cases

This case has not previously been before this Court or any other court. The parties' appeals in this case have been consolidated, and there are no other related cases as that term is defined by Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE MATERIALS

REGULATIONS AND AGENCY DECISIONS

OTHER AUTHORITIES

GLOSSARY

Settlement Act	Michigan Indian Land Claims Settlement Act
Casinos	MGM Grand Detroit, Detroit Entertainment, and Greektown Casino
Fund	Self-Sufficiency Fund
Interior	U.S. Department of the Interior
Tribal Intervenors	Nottawaseppi Huron Band of Potawatomi Indians and Saginaw Chippewa Indian Tribe of Michigan
Tribe	Sault Ste. Marie Tribe of Chippewa Indians

INTRODUCTION

Congress enacted the Michigan Indian Land Claims Settlement Act in 1997 to satisfy decades-old judgments against the United States for its unlawful taking of ancestral lands from the Sault Ste. Marie Tribe of Chippewa Indians and other Michigan tribes. The Settlement Act was intensively negotiated between Congress and the tribes. Three tribes, including the Sault, negotiated specific provisions authorizing them to use their settlement funds to promote tribal self-sufficiency and economic development according to the tribes' own plans.

Section 108 of the Act codifies the Sault Tribe's plan. It appoints the Tribe's governing body, its Board of Directors, the "trustee" of the "Self-Sufficiency Fund" created to receive the Tribe's settlement funds. § 108(a)(2).[1] And it grants the Tribe's Board the power to "administer the Fund" and to determine how Fund principal and interest will be invested and spent to promote tribal welfare and self-determination, consistent with broad purposes set out in the Act. *Id.* Among other things, § 108 authorizes the Board to expend Fund interest on "enhancement of tribal lands." § 108(c)(5).

Congress assigned the Department of the Interior no role in administering the Self-Sufficiency Fund or superintending expenditures of Fund principal or

[1] Unless otherwise noted, statutory citations in this brief refer to the Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997).

interest. Indeed, the Act expressly strips Interior of any such authority, providing that Interior "shall have no trust responsibility," and its "approval … shall not be required," for such expenditures. § 108(e). Congress gave Interior a single, mandatory task under the Act, requiring 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." *Id.* § 108(f).

The Tribe's Board purchased land outside Detroit, referred to as the "Sibley Parcel," with Fund interest after determining that the purchase would enhance the Tribe's lands, promote tribal economic development, and address the unmet needs of the Tribe's many members who live in the area. But Interior refused to take the Sibley Parcel into trust. It acknowledged that § 108(f) imposed a mandatory trust obligation. But, despite § 108(f)'s language, Interior concluded it was not required to take into trust "any" land acquired with interest. Rather, Interior reasoned that it had the power to reject a trust submission if, in its view, the Tribe's Board erred in concluding that the land purchase would be an "enhancement of tribal lands" under § 108(c). And Interior read "enhancement of tribal lands" to exclude the purchase of new land unless that land is geographically proximate to, and increases the value of, a parcel of land already owned by the Tribe. Applying that definition, Interior concluded that the Sibley Parcel was too far away from the Tribe's existing lands

in Michigan's Upper Peninsula to "enhance" those lands, and was thus ineligible for trust acquisition.

Interior's decision contravenes the plain text of the Settlement Act and is contrary to law for two principal reasons, as the district court correctly held in a thorough opinion vacating the agency order.

First, it is axiomatic that an agency has power to act only when Congress has granted it that power. But the Settlement Act does not give Interior the authority to police the Tribe's compliance with § 108(c)—either when the funds are expended or when the Tribe seeks to have land taken into trust. The Act reasonably entrusts decisions about how to use the Tribe's own settlement funds for the benefit of the Tribe—a quintessentially sovereign function—to the Tribe's elected leaders, not to agency officials. And it expressly divests Interior of any power to oversee the Tribe's expenditures. Section 108(f), in turn, directs Interior to take land into trust so long as one, and only one, precondition is met: The land must have been acquired with Fund interest. It makes no reference to § 108(c), and it does not permit Interior to refuse to take land into trust based on disagreement with the Board's determinations under § 108(c). Interior's efforts to assert a power Congress never gave it disregard the Act's unambiguous text, defy settled principles of statutory interpretation, and upend basic limits on agency authority.

Second, even if Interior had authority to override the Board's determination that the purchase of the Sibley Parcel was an "enhancement of tribal lands" under § 108(c)(5), Interior's decision flouted the plain meaning of that provision. All parties agree that "enhance" means "increase" or "augment." The phrase "enhancement of tribal lands" thus unambiguously permits the use of Fund interest to increase or augment the Tribe's lands. As the district court held, purchasing additional lands does just that. Interior and Intervenors struggle against § 108(c)(5)'s text, searching for any possible limiting reading that would support Interior's refusal to comply with the Act. But their arguments merely highlight that they are rewriting, rather than interpreting, the statute. In their view, the phrase "enhancement of tribal lands" should be read as if it said "enhancement [*of the value*] of [*an existing parcel of nearby*] tribal land[]." That is not the statute Congress wrote. In ordinary English, "enhancement" is not limited to "enhancement in value." It also encompasses "enhancement" in size or amount. Likewise, "tribal lands," in the plural, is not limited to a specific parcel of land, but refers to the Tribe's total landholdings. And Interior's "geographic proximity" gloss on the statute has no textual or other basis at all.

Even if the Settlement Act were ambiguous on either of these points—Interior's lack of authority or the broad meaning of "enhancement of tribal lands"—Interior's decision still could not stand. The Act resolves claims for the

taking of the Sault Tribe's land. It was negotiated between two sovereign governments. And Congress enacted the provisions at issue specifically to promote the Tribe's self-sufficiency and self-determination. As the district court held, the Indian canon of construction thus trumps any principle of agency deference that might otherwise apply and requires that any ambiguity be resolved in the Tribe's favor.

Ultimately, Interior and Intervenors are reduced to contending that, if the Settlement Act's plain language is given effect, the Tribe could end up with what they view as too much potentially gaming-eligible trust land too far away from the Tribe's existing lands in the Upper Peninsula. While Interior and Intervenors raise the specter of an unlimited number of casinos scattered across the country, their parade of horribles is rhetoric, not reality. There are substantial legal and financial constraints on the Tribe's ability to expand its gaming operations. And to date, decades after the passage of the Settlement Act, the Sault Tribe has had *no* land taken into trust under the Act and has *no* gaming—or other economic development—in the Lower Peninsula to benefit the thousands of its members who live there. In any event, even if Interior's and Intervenors' policy concerns were legitimate, the consequences of the Act's express and bargained-for provisions would be for Congress, not Interior or the courts, to address. Congress chose in the Settlement Act to respect the Sault Tribe's sovereignty and remedy the unlawful

taking of its lands by granting the Tribe's Board exclusive oversight of its Self-Sufficiency Fund and by directing Interior to take into trust "any lands" purchased with Fund interest. Interior's and Intervenors' policy preferences cannot overcome Congress's choice.

RELEVANT STATUTES AND REGULATIONS

Applicable statutes can be found in the addendum bound with this brief.

STATEMENT OF ISSUES

1. Whether § 108(f) of the Settlement Act authorizes Interior to refuse to take land purchased with Self-Sufficiency Fund interest into trust on the ground that the purchase did not comply with the conditions set out in § 108(c) of the Act.

2. Whether the phrase "enhancement of tribal lands" in § 108(c)(5) of the Settlement Act is limited to land acquisitions that are geographically proximate to, and increase the value of, specific parcels of land the Tribe already owns on Michigan's Upper Peninsula.

STATEMENT OF THE CASE

A. The Sault Ste. Marie Tribe Of Chippewa Indians

The Sault Tribe is "the largest Indian Tribe east of the Mississippi River, with more than 43,000 enrolled members." AR72; *accord* AR3103. The Tribe is economically distressed and acutely land-starved—problems that go hand in hand. The Tribe's trust lands, which are concentrated in the sparsely populated Upper

Peninsula of Michigan, are unable to support significant economic development and thus are inadequate to meet the basic needs of the Tribe's members for employment, housing, health care, and social services. AR2164-2165. More than one-third of the Tribe's members live downstate, in the Lower Peninsula of Michigan, and those 14,500 members alone exceed the total population of any other Michigan tribe. AR2161. Yet the Tribe has no meaningful land base in the Lower Peninsula to provide for the needs of its members there, who currently "have no tribal employment opportunities." AR2163.[2]

History explains the challenges the Tribe faces today. The Sault Tribe descends from a group of Chippewa bands who historically occupied and used a wide area in the Upper Great Lakes region, bordering Lake Superior, Lake Michigan, and Lake Huron. *See* AR3103; *see also Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 840 (W.D. Mich. 2008). In the nineteenth century, however, the United States coerced the Tribe's ancestors into relinquishing most of their lands. Under the Treaty of March 28, 1836 (7 Stat. 491), for example, the Ottawa and Chippewa surrendered vast territories, including large parts of the Upper Peninsula and the northern half of the Lower Peninsula, to the United States for negligible compensation. *See* AR1852 (map). While the

[2] Apart from the parcel at issue here, the Tribe's only land in the Lower Peninsula is a 7-acre parcel of fee land in Wayne County. AR2152.

Chippewa generally occupied the Upper Peninsula and the Ottawa occupied the Lower Peninsula, in enacting the Settlement Act, Congress found that "[a] number of sites in both [the Upper and Lower Peninsulas] were used by both the Ottawa and Chippewa Indians," who "intermarried," creating "villages composed of members of both tribes." § 102(a)(4); *see also United States v. Michigan*, 471 F. Supp. 192, 220 (W.D. Mich. 1979).

By 1946, when Congress created the Indian Claims Commission to help remedy tribes' historic land claims against the United States, the Sault Tribe was entirely landless. AR2150. The lack of a tribal land base resulted in an exodus of tribal members to the Lower Peninsula, in pursuit of economic opportunity that was lacking in the isolated and rural Upper Peninsula. AR2162-2163. This diaspora was also encouraged by federal policy, specifically Interior's "Voluntary Relocation Program," which actively urged Indians, including Tribe members, to leave their rural homes to find work in urban areas. AR2163. Deemed a failure, the program ended in 1975. But by that time, many tribal members could not afford to return home, and so remained in the cities, often in cultural isolation and poverty, *id.*—one major reason that one-third of the Tribe's members today live in the Lower Peninsula. AR2154.

In 1971, the Indian Claims Commission held that the terms of the 1836 treaty and a prior treaty were "unconscionable." *Bay Mills Indian Community v.*

United States, 26 Ind. Cl. Comm. 550, 553 (1971). The Commission found that the signatory tribes ceded land worth approximately $12.1 million, for which the United States paid them only $1.8 million. *Id.* at 560-561. To remedy that injustice, the Commission awarded more than $10 million in damages. *See id.* at 561; *Bay Mills Indian Community v. United States*, 32 Ind. Cl. Comm. 303, 309 (1973); *Ottawa-Chippewa Tribe of Michigan v. United States*, 35 Ind. Cl. Comm. 385 (1975). Despite overwhelming tribal economic need, however, the federal government failed to pay those damages awards for decades. *See* H.R. Rep. No. 105-352, at 8 (1997).

B. The Settlement Act

Congress enacted the Settlement Act in 1997 to "compensate"—and finally settle—certain tribes' claims for the wrongful "19th-century takings of … ancestral lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 786 (2014). The Settlement Act established a formula "for the fair and equitable division of the judgment funds" awarded by the Indian Claims Commission among the various tribes and sought to "provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds" to promote economic self-sufficiency, including through land acquisitions. § 102(b).

The Act was a "negotiated compromise between the tribes" and the federal government. *Judgment Funds of the Ottawa and Chippewa Indians of Michigan:*

Hearing on H.R. 1604 Before the S. Comm. on Indian Affairs, 105th Cong. 27 (1997) (statement of Rep. Kildee), 1997 WL 702876. And different tribes struck different bargains.

Section 108 of the Act sets forth the Sault Tribe's plan, as approved by Congress, for the use of its share of the funds. § 105(a)(3). Section 108(a) 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 Act. § 108(a)(1). It also designates the Board as the sole "trustee" of the Fund, responsible for "administer[ing] the Fund in accordance with the provisions of" the Tribe's plan. § 108(a)(2).[3] Section 108(e) correspondingly directs the Secretary of the Interior to transfer the Tribe's portion of the settlement funds and thereafter to "have no trust responsibility for the investment, administration, or expenditure of the principal or income of the Self-Sufficiency Fund." § 108(e)(2). Congress specified that "[n]otwithstanding any other provision of law, … approval of the Secretary for any payment or distribution from … the Self-Sufficiency Fund shall not be required." *Id.*

[3] The Board is the Tribe's "governing body," Const. of the Sault Ste. Marie Tribe of Chippewa art. IV § 1, with the power, among other things, to "expend funds for public purposes of the tribe," *id.* art. VII § 1(d), and to "manage, lease, sell, acquire or otherwise deal with the tribal lands," *id.* art. VII § 1(k).

The Settlement Act authorizes the Tribe's Board to use principal and interest of the Fund for several "broad purposes" related to improving the economic and general well-being of the Tribe and its members, including for land acquisition. H.R. Rep. No. 105-352, at 10. In fact, Interior has previously acknowledged that during negotiations over the Settlement Act, the Sault Tribe had express "land acquisition goals" and that, during those negotiations, the Tribe was able to secure "significant changes" to original drafts of the Act "for land acquisition purposes." AR464.

Section 108(b) governs the use of Fund principal. It authorizes, 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; or … will consolidate or enhance tribal landholdings."

Section 108(c) governs the Board's use of "interest and other investment income" earned from Fund principal. This subsection authorizes the Board to expend interest for five broadly articulated purposes, including as a "dividend to tribal members," § 108(c)(2), and "for educational, social welfare, health, cultural, or charitable purposes which benefit" the Tribe's members, § 108(c)(4). Most relevant here, the Board may also expend Fund interest for the "consolidation or enhancement of tribal lands." § 108(c)(5).

Finally, § 108(f) mandates that "[a]ny lands acquired using … interest … of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Section 108(f)'s mandatory nature is no accident. Interior has long had discretionary authority to take land into trust on behalf of tribes. *See* 25 U.S.C. § 5108; 25 C.F.R. pt. 151. In response to earlier drafts of the Act, Interior objected to the mandatory trust language, asking Congress to revise the text so that Interior "retain[ed] discretion" over whether to take land into trust "under existing regulations." Dkt. 43-1 at 3; Dkt. 43-2 at 2. Congress chose not to revise the Act and instead to retain the mandatory trust acquisition requirement.

C. The Department's 2010 Interpretation Of The Settlement Act

Interior did not have occasion to apply the Settlement Act until 2010. Bay Mills, another Settlement Act tribe, had acquired land under § 107 of the Act, which authorizes Bay Mills to use funds from its Land Trust for "the consolidation and enhancement of tribal landholdings" and provides that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." § 107(a)(3). Bay Mills asked Interior for confirmation of Bay Mills' view that such land would be gaming-eligible under the Indian Gaming Regulatory Act. AR455-456.

Interior rejected Bay Mills' position, opining that "*any lands acquired* [in § 107(a)(3)] should not be interpreted to include lands that were acquired contrary

to the parameters of the statute." AR460. According to Interior, Bay Mills' land purchase was "contrary" to § 107(a)(3) because it was not "for … the consolidation and enhancement of tribal landholdings." AR457-460. Interior reasoned that "*enhancement* … means that any … purchase must somehow enhance (*i.e.*, make greater the value or attractiveness) some other tribal landholding already in existence." AR459. Interior also engrafted a geographic-proximity element onto that definition, claiming that because Bay Mills' newly purchased land "is very far from all other tribal landholdings, it cannot be said to enhance any of them." *Id.*

D. The Tribe's Land-Into-Trust Submission

1. In 2012, to improve its dire financial position and remedy the shortcomings of its current land base, the Sault Tribe elected to use interest from its Self-Sufficiency Fund for economic development. Exercising its authority under tribal law as well as its responsibilities under the Settlement Act, the Tribe's Board voted to purchase property in the Lower Peninsula, with the hope that the Tribe would eventually be able to engage in lawful Indian gaming there. The Board specifically "determine[d]" that the purchase would "consolidate or enhance tribal lands" and "generate an economic development opportunity beneficial to the Tribe and its members." AR3149.

In June 2014, the Tribe presented a mandatory fee-to-trust submission to Interior for the Sibley Parcel, 71 acres of land located near Detroit.[4] The Tribe explained that Congress had "vested exclusively in the Tribe's Board" "[t]he decision to expend funds" under § 108 of the Settlement Act and that the Board's decision was "not subject to the review or approval of the Secretary." AR3105. It attached a tribal resolution reflecting the Board's judgment that the acquisition satisfied § 108(c), AR3149, and an affidavit from the Tribe's CFO confirming that the Sibley Parcel would be purchased with Fund interest, AR3163-3164. The Tribe explained that the Board's determination, along with the confirmation that the land would be acquired using Fund interest, "trigger[ed] [Interior's] mandatory duty to take the Parcel into trust" under § 108(f). AR3106.

In light of Interior's *Bay Mills Opinion*, the Tribe also argued that the acquisition satisfied § 108(c). The Tribe explained that the acquisition would "enhance tribal lands" within the plain meaning of that phrase because it would "augment [the Tribe's] land base by increasing the total land possessed by the Tribe." AR3107. In the alternative, the Tribe argued that, even if Interior's interpretation of "enhancement" in its *Bay Mills Opinion* were correct, that standard was met, because the Sibley Parcel would "generate revenues that will be

[4] The Tribe also sought trust acquisition of a second parcel of land in Lansing, Michigan, but that parcel is no longer at issue here. *See* Op. 6.

used to improve, restore, or otherwise increase the usefulness or value of the Tribe's existing lands." AR3108.

Over the next two years, at Interior's request, the Tribe provided multiple additional submissions supporting its argument that the Sibley Parcel satisfied the terms of § 108. To establish that the purchase would be made with Fund interest, the Tribe submitted a report from an independent accounting firm. *See* AR2139-2147. And to show that the purchase would satisfy § 108(c) even under Interior's interpretation, the Tribe submitted multiple pieces of evidence, including affidavits from senior tribal officers attesting that gaming revenue from the Sibley Parcel would increase the value of the Tribe's existing landholdings by allowing the Tribe to invest in and upgrade existing operations. AR2215.

2. In January 2017, Interior sent the Tribe a letter setting out the agency's position on the Tribe's submission. AR969-974. Interior agreed that § 108(f) imposes a mandatory duty to take land into trust, explaining that "shall" is "'ordinarily the language of command.'" AR971. But it asserted that the Tribe's entitlement to a mandatory trust acquisition turned not only on § 108(f)'s requirement that the land be purchased with interest, but also on a showing that the parcel was "acquired … in accordance with … [§] 108(c)." AR971. In determining whether acquisition of the Sibley Parcel would "enhance[] tribal lands" under § 108(c)(5), Interior applied its "definition of 'enhance'" from the

Bay Mills Opinion, under which a land purchase must "make greater the value or attractiveness [of] some other tribal landholding already in existence." AR972; *see* AR459. Without discussing the evidence the Tribe had submitted, Interior opined that the Tribe had not made "a sufficient showing of how the lands in the Upper Peninsula will be enhanced by the acquisition of the parcels." AR973. Nonetheless, it stated that it would not deny the Tribe's trust submission outright, but would allow the Tribe to submit additional evidence.

Interior did not explain what evidence would constitute "a sufficient showing" of enhancement. Nor did it explain why the evidence the Tribe had already submitted, showing that revenues from gaming on the Sibley Parcel would be used to invest in and improve the Tribe's existing lands and facilities in the Upper Peninsula, was insufficient. Given Interior's view that such evidence could not satisfy the statute, it appeared unlikely that any evidence could ever demonstrate to Interior's satisfaction that a purchase of land in the Lower Peninsula would enhance tribal lands in the Upper Peninsula. The Tribe accordingly met with Interior to clarify the agency's position and asked that Interior either provide some guidance as to the type of evidence that could satisfy its interpretation or provide a final decision regarding the submission. AR1919.

In July 2017, Interior issued a final decision denying the Tribe's trust submission. AR1930-1933 ("Trust Denial Order"). The Trust Denial Order

rejected the Tribe's interpretation of "enhancement" and reaffirmed Interior's "increase in value" definition of "enhancement" from the *Bay Mills Opinion*. AR1931. Applying that definition, Interior noted that the Sibley Parcel was far from the Tribe's existing Upper Peninsula lands: "[T]he distances are even greater [than in the *Bay Mills Opinion*]—the Tribe's headquarters is … approximately 305 miles (356 miles by road) from the Sibley Parcel." AR1932-1933; *see also* AR1933 n.23. Interior reasoned that the acquisition of the Sibley Parcel therefore could not create "a tangible increase of value" of the Tribe's existing lands in the Upper Peninsula. AR1933.[5]

E. The District Court's Decision

In August 2018, the Tribe sued Interior, seeking vacatur of the Trust Denial Order and an order compelling Interior to take the Sibley Parcel into trust. Op. 10. Three Detroit-area casinos (the "Casinos") and two tribes with gaming operations in the Lower Peninsula (the "Tribal Intervenors") intervened to defend the agency's decision. *Id.* In March 2020, the district court granted summary judgment to the Tribe, vacating the Trust Denial Order on the ground that

[5] Without addressing the Tribe's evidence, Interior also rejected the Tribe's argument that, even under Interior's interpretation of "enhancement," the acquisition would enhance the Tribe's existing Upper Peninsula lands because revenues from gaming would enable investment in and improvement of those lands. AR1933.

Interior's interpretation of the Settlement Act was contrary to law, in two independent respects.

First, the district court held that § 108(f) of the Settlement Act imposes a mandatory duty on the Secretary to take land into trust, subject to only one precondition—that the Tribe acquired the land with Fund interest. As the district court put it, Congress "gave the Secretary no authority to scrutinize anything else, including whether Sault spent the income for a proper purpose under § 108(c)." Op. 12. Second, the district court held that even if Interior did have authority to refuse to take land into trust based on the Tribe's alleged noncompliance with § 108(c), Interior had misapprehended the plain meaning of "enhancement of tribal lands," which "unambiguously includes any land acquisition that increases the Tribe's total landholdings." Op. 29-30. The court further explained that, although both provisions of § 108 were unambiguous, the Indian canon of construction would compel the same reading. *See* Op. 28-29, 38-42.[6]

[6] The district court did not reach the Tribe's remaining arguments—(1) that Interior acted arbitrarily and capriciously in concluding that the Tribe's land acquisition would not "enhance[] … tribal lands" under Interior's definition and (2) that Interior wrongly rejected the Tribe's argument that the acquisition satisfied a separate provision of the Act, § 108(c)(4). Op. 11. If the Court reverses, it should remand to the district court to address those claims in the first instance.

The district court vacated the Trust Denial Order and remanded to Interior "to determine whether [the Tribe] acquired the [parcel] with Fund income." Op. 51.[7] Interior and Intervenors appealed.

SUMMARY OF ARGUMENT

As the district court held, Interior's Trust Denial Order misapprehended the plain language of the Settlement Act in two respects, each of which independently warrants vacatur.

First, § 108(f) of the Settlement Act does not authorize Interior to superintend the Tribe's compliance with § 108(c). Section 108(f) mandates that Interior take into trust "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund." It thus imposes a single statutory precondition on Interior's trust obligation—that the land was purchased with Fund interest. Section 108(f) does not allow Interior to interpose additional preconditions or to refuse to take land purchased with interest into trust based on asserted noncompliance with § 108(c).

Beyond the clear text of § 108(f) itself, multiple provisions of the Settlement Act compel that conclusion. Congress granted the Tribe's Board the authority to administer the Self-Sufficiency Fund and ensure that expenditures from the Fund

[7] The district court denied the Tribe's request for an order compelling Interior to take the land into trust, Op. 48-53, and that ruling is not before this Court.

comply with the broad purposes set out in § 108(c). And Congress expressly stated that Interior lacked such authority, providing that the agency has "no trust responsibility for the … expenditure" of Fund principal or interest and no power to approve or disapprove such expenditures. § 108(e). As the district court held, the Settlement Act plainly assigns to the Tribe, not Interior, the power to determine whether Fund expenditures comply with § 108(c)—consistent with basic principles of tribal sovereignty and the Act's legislative history.

Interior and Intervenors identify no sound reason to depart from the district court's conclusion. Interior claims the "inherent authority" to superintend the Tribe's use of its own money under § 108(c), but such a claim runs contrary to basic principles of administrative law, which recognize that an agency has only the power that Congress assigns to it. Nor can Interior point to any provision of the Settlement Act granting it the power to police compliance with § 108(c). Interior and Intervenors therefore advance a form of absurdity argument, contending that § 108(c)'s guideposts would be meaningless if Interior lacked the authority to enforce them. But there is nothing absurd in Congress's decision to allow the Tribe to determine whether spending the Tribe's settlement funds would advance the broad purposes identified in the Tribe's plan. The Settlement Act simply recognizes that, as a sovereign, the Tribe—and not a federal agency—is entitled to control its own affairs. Interior and Intervenors also suggest that other statutes, or

principles of trust law, grant Interior the authority to review the Tribe's expenditure of Fund interest, but those arguments fail as well. None of the cited statutes or common-law principles does any such thing, and in any event, the Settlement Act deprives Interior of any power to oversee the Tribe's expenditures, "[n]otwithstanding any other provision of law." § 108(e).

Second, even if Interior were correct that it has the authority to oversee the Tribe's expenditures of interest, Interior's reading of § 108(c)(5)—which allows the Tribe to use interest "for consolidation or enhancement of tribal lands"—cannot be squared with the statute's text. As Interior concedes, "enhance" means "increase" or "augment." And while Interior and Intervenors insist that, in the Settlement Act, "enhancement" can only mean an increase in *value*, that contention is baseless. As the district court held, in ordinary English, "enhancement" also encompasses an increase in size or amount. The purchase of the Sibley Parcel thus "enhance[d] … tribal lands" by increasing the Tribe's total landholdings. That interpretation is not only compelled by the Act's plain text, but also supported by its structure, context, and purposes. As a negotiated remedy for the unlawful taking of the Tribe's ancestral lands, the Act allows the Tribe to use its settlement funds in various ways that will promote its welfare, economic development, and self-determination, including by augmenting the Tribe's unjustly diminished tribal lands.

Interior and Intervenors propose a shifting array of contrary interpretations, claiming, in essence, that a land purchase cannot "enhance[] … tribal lands" unless it is near to, and increases the value of, a specific parcel of Upper Peninsula land already owned by the Tribe. But that ostensible interpretation of the statute in fact rewrites it. Nothing in the phrase "enhancement of tribal lands"—or any other words in the Settlement Act—suggests that a land purchase must somehow increase the value of a nearby parcel of land in the Upper Peninsula, as opposed to simply increasing the Tribe's lands. And no principle of statutory interpretation licenses Interior to engraft these extratextual limitations onto the broad language Congress chose.

The Settlement Act is clear: Interior must take into trust "any land" purchased with Fund interest, without second-guessing the Tribe's determination that the purchase enhances tribal lands. In any event, the purchase of the Sibley Parcel did "enhance[] … tribal lands," by increasing the total lands owned by the Tribe. This Court need go no further to affirm the district court. But even if the Act's text left any doubt on those points, any ambiguity would necessarily be resolved in the Tribe's favor under the Indian canon of construction. Interior's appeal for *Chevron* deference fails; as this Court has squarely held, the Indian canon trumps any deference an agency's statutory interpretation might otherwise be afforded. Ambiguity in a statute like the Settlement Act—a negotiated

resolution of the Sault Tribe's claims against the federal government for the wrongful taking of its land—must be construed in favor of the tribe, not in favor of the government.

STANDARD OF REVIEW

A court must "set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). In interpreting the scope of an agency's authority, this Court "decide[s] all relevant questions of law," *id.* § 706, and where an agency acts without authority or beyond constraints "prescribed by Congress," "what [it] do[es] is ultra vires" and must be vacated, *City of Arlington v. FCC*, 569 U.S. 290, 297-298 (2013).

When, "after 'employing traditional tools of statutory construction,'" a court can "discern Congress's meaning," it "owe[s] an agency's interpretation of the law no deference." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Where "it's clear enough" what a statute means, there is no "ambiguity for [an] agency to fill." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Moreover, when a statute implicates the relationship between the United States and an Indian tribe, the Indian canon "trump[s]" any "normally-applicable deference" due to an agency's interpretation of ambiguous text, requiring that any ambiguity be resolved in the tribe's favor. *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006).

This Court reviews the district court's grant of summary judgment "de novo." *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 88 (D.C. Cir. 2020).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT § 108(f) OF THE SETTLEMENT ACT REQUIRES INTERIOR TO TAKE LAND ACQUIRED WITH FUND INTEREST INTO TRUST WITHOUT POLICING THE TRIBE'S EXPENDITURES UNDER § 108(c)

Section 108(f) of the Settlement Act 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." As Interior has recognized, § 108(f) imposes a mandatory duty, requiring Interior to take land into trust for the Tribe when the statutory preconditions are met. AR971. And, as the district court held, the statute imposes one, and only one, precondition: The land must have been "acquired using amounts from interest or other income of the Self-Sufficiency Fund." Op. 12. "*Any*" such lands "*shall* be held in trust." It is that simple.

Interior and Intervenors refuse to accept that the Act means what it says. In their view, "any" does not in fact mean "any," and Congress's seemingly clear mandate to Interior has an unwritten exception: Interior may refuse to take land purchased with interest into trust if, in Interior's opinion, the Tribe's Board wrongly decided that the expenditure satisfied one of the broad purposes—including "enhancement of tribal lands"—set out in § 108(c). According to

Interior (Br. 15), it has "inherent authority," when taking land into trust, to second-guess the Board's judgment that an expenditure of interest from the Tribe's Self-Sufficiency Fund "enhance[s] … tribal lands."

Interior is wrong. Like any agency, Interior has only the authority Congress gives it, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), and the Settlement Act does not grant it the power it claims. Section 108(f), by itself, forecloses Interior's expansive view of its authority by requiring it to hold in trust for the Tribe *any* land acquired with interest, with no reference to § 108(c). And the Act as a whole makes clear that Congress granted the Tribe—not Interior—the authority and responsibility to determine whether expenditures of the Tribe's own money from its Self-Sufficiency Fund serve "the broad purposes" identified in the Act. H.R. Rep. No. 105-352, at 10. Indeed, in § 108(e), Congress expressly stated that Interior has *no* authority to oversee expenditures of Fund principal or interest. That makes sense, since the Act is a negotiated resolution of the Tribe's claims against the United States for the wrongful taking of the Tribe's land. As the district court put it, the Settlement Act "is a restitution scheme, not a regulatory scheme," Op. 21, and its provisions allowing the Tribe to decide how best to use that restitution appropriately respect tribal sovereignty and self-determination. The district court thus correctly rejected Interior's attempt to arrogate to itself the right to review and disapprove the Tribe's expenditures of interest under § 108(c).

A. The Settlement Act Allocates Exclusive Authority Over § 108(c) Expenditures To The Tribe

The Act's plain text, along with basic principles of tribal sovereignty and the Indian canon of construction, make clear that Congress vested "exclusive[]" "authority" to determine whether Fund interest expenditures comply with § 108(c) in the Tribe's governing body—its Board—not Interior.

1. Statutory text

Whether the Act grants Interior the authority to superintend the Tribe's interest expenditures under § 108(c) is a pure question of statutory interpretation. That inquiry "begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). And where, as here, the statutory text is clear, "this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Section 108's text unambiguously demonstrates that Interior has no power to review expenditures under § 108(c).

a. Section 108(f), by itself, proves the point. That provision 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" (emphasis added). "The word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (reading "any" to mean "all"). Congress's command that *all* lands "of whatever kind"—if purchased with interest—shall be taken into trust forecloses Interior's argument

that it may refuse to take such land into trust if, in Interior's view, the expenditure of interest did not satisfy § 108(c).

As the district court put it, § 108(f) "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." Op. 12. Congress imposed no other preconditions to Interior's trust-acquisition duty. It therefore "gave the Secretary no authority" to add further preconditions or "to scrutinize … whether Sault spent the income for a proper purpose [under] § 108(c)." *Id.*; *see, e.g.*, *HUD v. Rucker*, 535 U.S. 125, 130-131 (2002) (rejecting other statutory qualifications given "Congress' decision not to impose [them] in the statute, combined with its use of the term 'any'"); *United States v. Monsanto*, 491 U.S. 600, 606-607 (1989) (same).

Had Congress wanted Interior to determine compliance with § 108(c) before taking land into trust under § 108(f), it "could simply have said that." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 (2002). For instance, it could have provided that "[a]ny lands *acquired in accordance with the requirements of § 108(c)* shall be held in trust." Or it could have included broad oversight language in § 108, as it has done in other settlement acts. *See* Pub. L. No. 98-602, tit. I, § 105(a)(2), 98 Stat. 3149, 3151 (1984) ("Wyandotte Tribe Act")

(Secretary has authority to take actions "necessary and appropriate to enforce" act). But Congress did neither.

That decision should be deemed intentional; as the district court noted, "Congress knows how" to impose conditions on Interior's "trust dut[ies]" when it wishes. Op. 18. Take, for example, the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("Gila Bend Act"). Section 6(c) of that Act authorizes a tribe "to acquire by purchase private lands in an amount not to exceed" 9,880 acres; § 6(d) requires Interior to hold in trust "any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection," including geographic limitations on the location of the land.[8] By contrast, § 108(f) contains no such language, making clear that Congress did not grant Interior the authority to police compliance with § 108(c) when taking land into trust.

[8] Other settlement statutes contain similar express preconditions. *See* Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act, Pub. L. No. 101–618, 104 Stat. 3289 (1990) (authorizing fund income to be used for "[a]cquisition of lands," among other purposes, *id.* § 102(C)(1)(e), but including several conditions in mandatory trust provision, including that lands must be "acquired under section 102(C)(1)(e)," must lie within one of two counties, and must not exceed total acreage amount, *id.* § 103(A)); Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (authorizing use of settlement funds for purpose of "acquiring land or natural resources," but extending trust status only to lands acquired with those funds "within the State of Maine," *id.* § 5(a)) ("Aroostook Band Settlement Act").

b. Other provisions of the Settlement Act confirm that Interior lacks such authority.

To start, the Act's stated purpose is "to provide the opportunity for the [beneficiary] tribes to develop plans for the use or distribution of their share of the funds," thus empowering tribal self-government. § 102(b). With respect to the Sault Tribe specifically, Congress directed the creation of a "Self-Sufficiency Fund" by and for the Tribe "through its board of directors." § 108(a)(1). The term "self-sufficiency" previews the role of the Board, as the Tribe's democratically elected governing body, in making spending decisions regarding the Tribe's own settlement funds. The Act then makes that role explicit by designating the Board as the Fund's sole "trustee" and by assigning the Board the responsibility to "administer" the Fund "in accordance with [§ 108's] provisions." § 108(a)(2). As trustee, the Board "has, except as limited by statute or the terms of the trust, the comprehensive powers … to manage the trust property and to carry out the terms and purposes of the trust." *Restatement (Third) of Trusts* § 70 (2007). Section 108(a)'s provisions regarding the establishment and administration of the Self-Sufficiency Fund make no reference to Interior.

The Settlement Act's provisions concerning the use of Fund principal and interest, maintenance of the Fund in a separate account, and recordkeeping and auditing of the Fund likewise make no reference to Interior. *See* §§ 108(b)-(d).

Instead, these tasks are all assigned to the Tribe's Board as trustee. Thus, while § 108(b) and (c) respectively require that principal and interest be used for particular purposes, those requirements apply *to* and are applied *by* the Board. It is accordingly the Board, not Interior, that must determine whether, for example, a particular use of Fund interest is "for consolidation or enhancement of tribal lands," § 108(c)(5), or "for educational, social welfare, health, cultural, or charitable purposes which benefit the [Tribe's] members," § 108(c)(4). Nothing in the Settlement Act suggests that Interior may countermand the Tribe's judgment on those issues. As the district court held, the Act makes clear that "the purposes in § 108(c) are spending instructions for the Tribe, not the Secretary." Op. 12.

Congress's decision expressly to assign the Tribe's Board, not Interior, the power to administer the Fund and approve expenditures is fatal to Interior's claim of "inherent authority." "Congress's express delegation" of responsibility to one agency to perform a specific task "overcomes any implied … authority claimed by" another agency to perform the same task. *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 823 (8th Cir. 2017); *see also Bayou Lawn & Landscape Servs. v. Secretary of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) ("[W]e would be hard-pressed to locate [a] power in one agency where it had been specifically and expressly delegated by Congress to a different agency."); *see generally Gonzales v. Oregon*, 546 U.S. 243, 265 (2006) (rejecting claimed authority by

Attorney General as "inconsistent with the design of [a] statute" that "allocates decision-making powers" regarding those specific issues to another agency). Although the Tribe is not an agency, that same logic applies with even more force here, given that the Tribe is a sovereign government: Where Congress has "express[ly]" charged the Tribe's Board with the authority and responsibility to ensure that the Tribe's money is spent for the purposes set out in the Tribe's plan, that defeats a claim by Interior to "implied … authority" to override the Board's judgment.

c. Finally, § 108(e) unambiguously forecloses Interior's claim to implied authority. It provides that Interior's "approval" of "any payment or distribution from the principal or income" of the Fund "*shall not be required*," and "the Secretary shall have *no trust responsibility for the [Fund's] investment, administration, or expenditure*." § 108(e)(2) (emphasis added). As the district court put it, "[i]n stark terms, this provision strips the Secretary of any say over how the Tribe spends Fund income under § 108(c)." Op. 13. That is, § 108(e)(2) expressly denies Interior the very "implied authority" it now claims.

Congress underscored the importance of § 108(e)(2)'s directive by providing that it applies "notwithstanding any other provision of law"—"clearly signal[ing]" Congress's intent to "override conflicting provisions" of law. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Congress thus not only stripped Interior of the

authority to superintend the Tribe's expenditures; it also directed that this divestiture of authority "supersede all other laws." *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991). It is "'difficult to imagine'" a "'clearer statement'" of congressional intent. *Id.*

Moreover, § 108(e) flatly denies Interior *any* responsibility over, or authority to disapprove, expenditures of Fund interest. It does not bar Interior from disapproving an expenditure of interest for land when the purchase is made, yet permit Interior to disapprove that same expenditure later when performing its trust-acquisition duty. As the district court explained in rejecting Interior's contrary argument, any claimed distinction between disapproving a land purchase when it is made and holding that purchase unlawful when acting on a trust submission "is a distinction without a difference." Op. 13.

The implications of Interior's position prove the point. Interior repeatedly acknowledges that the necessary premise of its Trust Denial Order is that the Board's purchase of the Sibley Parcel was an unlawful use of Fund interest. *See, e.g.*, Gov't Br. 14 ("Interior reasonably determined that the land was not a lawful use of Fund income under [§] 108(c)(5)"); *id.* at 30 (claiming Interior determined the Sibley Parcel was "an unlawful acquisition of land by the Tribe with Fund income"). But Interior's claimed authority to determine whether a land purchase is "lawful" under § 108(c) necessarily entails the power to "approv[e]" expenditures

of Fund interest—the very power Congress chose to withhold from the agency. If Interior has the authority it claims, as a practical matter the Board would need to seek Interior's prior approval of all expenditures of interest for land or risk that Interior could subsequently rule those expenditures "unlawful." That is not how the Settlement Act works. *Any* time Interior purports to determine that a land purchase is or was not a "lawful use of Fund income"—no matter when that determination is made—Interior contravenes § 108(e)'s directive that it has "no trust responsibility" for Fund expenditures and no right to "approv[e]" them.

2. Legislative history

The Settlement Act's legislative history confirms that Congress's choice to deny Interior the authority it now claims was by design. An earlier draft of § 108(b)(2) granted Interior some authority over the investment of Fund principal, requiring that at least half of the principal must be invested "without undue speculation or risk, *unless, for good cause shown by the … Tribe, the Secretary determines that a lesser amount may be invested in that manner*." H.R. Rep. No. 105-352, at 6 (emphasis added). Interior urged Congress to delete the italicized language, arguing that the Secretary "should not be involved in … decisions regarding [Fund] administration." Dkt. 43-2 at 2. Congress obliged. Having successfully asked Congress to make clear that it lacks any authority over "decisions regarding … administration" of the Fund, Interior should not now be

heard to claim that it has such authority. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded[.]'").

3. Principles of tribal sovereignty

Basic principles of tribal sovereignty, which informed the drafting and must inform the interpretation of the Settlement Act, likewise support the conclusion that Interior has no authority to second-guess the Board's § 108(c) decisions. "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Absent congressional abrogation, tribes "retain" their historic character as "self-governing sovereign political communities," *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978), with "extensive powers over their property," 1 *Cohen's Handbook of Federal Indian Law* § 4.01 (2019) ("*Cohen's Handbook*"). It is thus "an enduring principle of Indian law" that "courts will not lightly assume that Congress … intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790.

As discussed above, the Settlement Act expressly denies Interior the power it now asserts to oversee expenditures of the Tribe's settlement funds, instead granting that power solely to the Board. That is unsurprising: Congress has often

granted power to administer federal statutory schemes governing tribal affairs to tribes themselves, in light of their "independent tribal authority" and the strong federal policy favoring tribal self-determination and self-sufficiency. *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *see also* 1 *Cohen's Handbook* § 4.03 (describing examples of such grants of power). And the Act's allocation of authority makes particular sense here, as part of a negotiated resolution of the Tribe's claims against the United States. But foundational principles of federal Indian law dictate that even if the Act were silent on the question of authority over expenditures, the "'proper inference from silence'" would be that the Tribe's "'sovereign power … remains intact,'" and that the Tribe thus retains the authority to control expenditures of its own money. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (ellipsis in original); *see* Op. 20 (invoking similar principles).

4. The Indian canon of construction

Relatedly, as the district court held, even if the Act were "'ambiguous'" as to "whether the Department has authority to police the Tribe's compliance with § 108(c)," the Indian canon would require the reading of the Act that favors the Tribe. Op. 29.

The Supreme Court has "consistently admonished that federal statutes … relating to tribes and tribal activities must be 'construed generously in order to comport with … traditional notions of [Indian] sovereignty and with the federal

policy of encouraging tribal independence.'" *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982) (alterations in original). Under this precedent, even were there "two possible constructions" of Interior's authority under § 108(f), the Indian canon would dictate the "choice between them" and compel the Tribe's reading. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

Moreover, the Indian canon "trump[s]" any "normally-applicable deference" due under *Chevron*. *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006). That is so because the Indian canon is a substantive rule of statutory interpretation, "rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). It "arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior'" inherent in that trust relationship. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). Although it originally developed in the treaty context—where it has sometimes been compared to the doctrine of *contra proferentem*—the Indian canon is best understood as a "quasi-constitutional" clear-statement rule that any diminishment of tribal rights must be unequivocally directed by Congress. Frickey, *Marshalling Past and Present*, 107 Harv. L. Rev. 381, 406-417 (1993). The Indian canon thus works "to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government" by

ensuring that Congress, not agencies construing purported ambiguities in federal law, makes significant decisions regarding Indian affairs. *Id*. at 428.

As discussed, the Settlement Act's plain text demonstrates that Interior lacks the power to oversee the Tribe's compliance with § 108(c). But even if there were any ambiguity on that point, because the Act "can reasonably be construed as the Tribe would have it construed," the Indian canon requires that it "be construed that way." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 & n.8 (D.C. Cir. 1988).

B. Arguments That Interior Has "Inherent Authority" To Police The Tribe's § 108(c) Expenditures Fail

Interior and Intervenors recognize that the Settlement Act does not expressly authorize Interior to review the Tribe's expenditures for compliance with § 108(c). Instead, they argue that Interior has "inherent authority" to police the Tribe's expenditures and the Settlement Act does not strip Interior of that "inherent authority." Gov't Br. 15; *see also* Tribal Br. 11-12, 14; Casinos Br. 3-4, 19-25.

The most fundamental problem with this argument is that Interior has no "inherent authority" other than the powers Congress grants it. Interior has "no constitutional or common law existence or authority." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). It "is 'a creature of statute,' and has 'only those authorities conferred upon it by Congress'; 'if there is no statute conferring authority, a federal agency has none.'" *North Carolina v. EPA*, 531 F.3d 896, 922

(D.C. Cir.), *vacated in part on other grounds on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam). Nor can Interior ask this Court "to presume a delegation of power" based on the absence of "an express withholding of such power"—an approach this Court has long rejected, as "agencies would" otherwise "enjoy virtually limitless hegemony." *Railway Labor Execs. Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994).

Interior and Intervenors accordingly rely on a grab-bag of sources and doctrines to support their claim of inherent authority. All of those arguments fail. The Settlement Act contains no implied grant of authority to Interior. Grants of authority in other statutes are irrelevant. Trust law provides no basis for Interior's claim. Nor can Interior's appeal to *Chevron* deference fill the gap.

1. Interior's "inherent authority" claim finds no support in the Settlement Act

Interior does not claim—nor could it—that the Settlement Act expressly grants it the power to review the Tribe's interest expenditures under § 108(c). Instead, it attempts to tether its asserted "inherent authority" to the broader "context" of the Settlement Act, contending (Br. 29-30) that its interpretation "gives meaning to the limitations in § 108(c)," avoids "absurd results," and "makes sense in the context of fee-to-trust applications." Those arguments are untenable.

Interior's central contention (Br. 14-15; *see id.* at 34-36) is that it must have inherent authority to review the Tribe's compliance with § 108(c), or else

§ 108(c)'s limits would be "meaningless." This refrain—which undergirds most of Interior's and Intervenors' arguments—is not only illogical, but fundamentally misapprehends the Settlement Act. As the district court explained, "[s]tatutory requirements are not 'wholly meaningless' simply because a federal agency has no power to enforce them." Op. 19. And the purposes identified in § 108(c)—which sets out the Tribe's plan for spending the interest of the Tribe's settlement funds to benefit the Tribe—are hardly meaningless simply because the Tribe's Board, and not Interior, has the power to determine whether a particular expenditure serves those purposes.

The question is thus not whether the Settlement Act limits the use of Fund interest under § 108(c); it does, albeit in broad terms. The question is "who decides" whether an expenditure of interest falls within those broad parameters: "the Federal Government or tribal leaders"? Op. 1. Reading § 108, in keeping with its text and structure, to entrust decisions about how to expend tribal funds to the Board does not render those limits "meaningless." For example, Interior disclaims any power to determine compliance with Fund expenditures under §§ 108(c)(1)-(3), yet no one would say those limits lack "real meaning." Gov't Br. 35. Rather, as the district court put it, "§ 108(c) has meaning because it constrains how the *Tribe* chooses to spend Fund income." Op. 1.

As discussed, that makes sense because the Settlement Act was designed to allow the Tribe to develop and implement its own plan for the use of the funds it received in compensation for the unlawful taking of its land, with the goal of promoting self-sufficiency. *See supra* pp. 6-12. And the Act contemplates accountability, and therefore enforceability, by requiring the Board—a democratically elected body—to account for its use of Fund interest to tribal members. *See* § 108(d)(2).[9] Congress's choice to grant the Tribe the responsibility to further the broad purposes the Tribe and Congress worked together to identify does not render those purposes "meaningless." To the contrary, as the district court recognized, it is entirely reasonable, and certainly not "absurd" (Gov't Br. 30), "that the statute would leave it to the Tribe—and not Interior—to determine whether expenditures *of its own funds* fall within certain parameters." Op. 21.

The same point disposes of the Casinos' argument (Br. 23-24) based on a "constellation of doctrines"—ranging from the Take Care Clause to the presumption of regularity to the presumption favoring judicial review of federal agency action—that even Interior does not embrace. There is irony in for-profit

[9] Whether tribal members would have judicial remedies against the Board for misuse of Fund interest would be principally a question of tribal law, likely resolvable in tribal courts. *Cf.* Op. 20 n.10. Congress would have understood this in vesting authority under § 108(c) in the Tribe's Board.

casinos championing "rule-of-law principles" (Br. 25) to diminish tribal sovereignty and stamp out free-market competition. Regardless, the Casinos' view that the "rule of law" requires unelected agency officials, rather than elected tribal leaders, to make the final decision about the legality of the use of the Tribe's own funds under a negotiated settlement of the Tribe's claims against the United States betrays a dismissive view of tribal sovereignty that finds no support in federal Indian policy or Supreme Court precedent. *E.g.*, *Bay Mills*, 572 U.S. at 788.

Nor does Interior's discussion of the "status of trust lands generally" (Br. 31) aid its position. Interior asserts that, in making trust acquisitions, it "at a minimum" reviews a "transaction" to be sure it is "free of fraud and to ensure that there are no title defects." Gov't Br. 32; *see also id.* at 34 ("Interior always assesses the legality of a purchase before taking land into trust."). But the agency materials Interior cites do not fairly support that assertion: They say nothing about generalized "fraud" review, and they demonstrate that the title requirements generally applicable to discretionary trust acquisitions do *not* apply to mandatory acquisitions. *See* AR2951. In fact, Interior recognizes that "requiring full title review" of the type done for discretionary acquisitions "would potentially frustrate the intent of Congress" for mandatory trust acquisitions; it therefore requires only the minimal "current evidence of title ownership" necessary to ensure that the United States can hold title in trust for the tribe. AR2951-2952. That ministerial

step is part and parcel of the transaction that the Settlement Act mandates—taking land into trust "for the benefit of the tribe," § 108(f)—and not remotely analogous to the authority Interior now claims to inquire into every aspect of the propriety of the use of funds to purchase land.[10]

Interior's and Intervenors' remaining points regarding the Settlement Act are equally unpersuasive. Interior notes (Br. 39) that § 108(b), which governs expenditures of principal, uses the phrase "the board of directors determines," while § 108(c), which governs expenditures of interest, does not. By negative implication, Interior contends, the Board has exclusive authority only over expenditures of principal, and Interior must thus have authority over expenditures of interest.

Interior reads far too much into the "slight textual distinction," Op. 22, between § 108(b) and § 108(c). Congress's decision to assign exclusive authority

[10] For similar reasons, the Casinos' hypotheticals involving Fund interest "stole[n]" by "a dissident group" demanding trust status for land not owned by the tribe (Br. 4, 25) do not support Interior's claimed inherent authority. The Casinos claim that the text of § 108(f) would not allow Interior to verify that the land in question is actually owned by the Tribe, but that is untrue. While the Casinos omit the relevant language in making their argument, § 108(f) requires Interior to take land into trust "*for the benefit of the tribe*" (emphasis added). Land owned not by the Tribe but by some "dissident group" trying to obtain the benefit of trust land for itself cannot be taken into trust for the benefit of the Tribe. The Casinos' far-fetched scenarios thus do nothing to support the claim that Interior has "inherent authority" to review the Tribe's compliance with § 108(c).

over both principal and interest expenditures to the Board is explicit in neighboring provisions, which not only name the Board as the Fund's "trustee," § 108(a)(2), but expressly divest Interior of any "approval" authority or "trust responsibility" for "expenditure[s] of principal or income," "notwithstanding any otherwise applicable law," § 108(e)(2). Those provisions demonstrate that § 108 "entrusts spending decisions"—whether of principal or interest—"to the Tribe." Op. 22. Moreover, Interior has "concede[d]" that it has no role in policing expenditures under "the first three subparagraphs of § 108(c)," *id.*—making clear that not even Interior believes the modest textual difference between § 108(b) and § 108(c) matters.[11]

Reaching farther afield, the Casinos claim (Br. 26) that because § 108(f) does not include the same "notwithstanding" clause as § 108(e)(2), Congress did not "abrogate" Interior's power to review the "legality" of § 108(c) expenditures. This is a puzzling position. Interior must identify "a textual commitment of authority" to act, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001);

[11] The textual difference is almost certainly due to the fact that § 108(c) never granted Interior any authority in connection with interest expenditures, while an earlier version of the Settlement Act granted Interior limited authority to waive § 108(b)(2)'s requirement that "at least one-half of the principal" be invested without undue risk. *Supra* pp. 33-34. Adding "the board of directors determines" to § 108(b)(1) avoided a potential implication that Interior had a broader role over expenditures of principal. But no parallel clarification was needed for § 108(c), which never featured overlapping authority.

it has no inherent powers, and a failure to withhold authority is not a delegation, as discussed above, *see* pp. 37-38. It was thus not incumbent on Congress in § 108(f) to abrogate a nonexistent background authority to review the legality of § 108(c) expenditures—particularly given that § 108(e)(2) already explicitly strips Interior of the authority it is claiming.

Similarly, the Casinos incorrectly criticize (Br. 3) the district court for "flyspeck[ing]" the Act "for affirmative and express authorization" of the power Interior claims. In their view (Br. 20-21), Congress did not need to "reiterate a background principle" that Interior may "review illegality." That gets the law backwards. An agency "literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374. And § 108 confers no authority on Interior, other than requiring it to take into trust land purchased with Fund interest. If Congress had intended to grant Interior the power to oversee compliance with § 108(c), it would be reasonable to expect some textual indication of that in § 108(f). There is none. In any event, as discussed, § 108(e) expressly denies Interior that power.[12]

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[12] Citing *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008), the Casinos argue (Br. 23) that Interior always has authority to weigh "the legality of the tribe's action." In *California Valley*, this Court affirmed a decision by Interior not to approve a tribe's constitution "because it was not ratified by anything close to a majority of the tribe." 515 F.3d at 1263. The statute there, however, provided a clear textual basis for that decision: It required a majority vote by the tribe's adult members, and it made Interior's obligation to

2. Other statutes do not grant Interior the authority to superintend § 108(c) expenditures

Having failed to find any footing in the text of the Settlement Act, Interior contends that its "obligations" under the Act should be "read in light of Interior's broad responsibilities concerning Indian tribes" under other statutes. Gov't Br. 31-32 (citing 43 U.S.C. § 1457; 25 U.S.C. §§ 2, 9). The Casinos take that argument to its logical extreme, claiming that, under those general statutes, Interior has limitless power over anything relating to Indians "unless Congress withdraws that power." Casinos Br. 19. This argument fails for four reasons.

First, if Congress had intended the Settlement Act to incorporate existing statutory grants of authority to Interior, it would have said so. Congress instead chose to make the Act "a freestanding enactment," not "an amendment" to an existing law that already granted authority to Interior. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.5 (1999). The Act is not, for example, codified in Titles 25 or 43 of the U.S. Code. And nothing in the text links Interior's mandatory trust duty under § 108(f) to general discretionary authority it has under other statutes.

Second, even were these general authorities relevant, "reliance on these statutes proves too much," as the district court explained. Op. 24. "They do not give the Secretary the power to do whatever he wants in matters of Indian affairs."

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approve the constitution contingent on compliance with "applicable laws." *Id.* at 1264. There is no analogous textual anchor in § 108 of the Settlement Act.

Id. As the Tenth Circuit has held, for example, Interior's "'general authority' under 25 U.S.C. §§ 2, 9"—which assigns management of Indian affairs to Interior subject to regulation by the President—does not empower the agency to "rewrite" a statutory scheme. *New Mexico v. Department of Interior*, 854 F.3d 1207, 1225-1226 (10th Cir. 2017). "'It is a commonplace of statutory construction that the specific governs the general,'" *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012), and the general grants of authority Interior cites cannot reorder the Settlement Act's specific division of authority between the Tribe's Board and Interior. As the district court held, these "general authority statutes are exactly that—general. They merely prompt the question of what 'management' of Indian affairs entails. Statutes like [the Settlement Act] fill in the details." Op. 24.

Third, § 108(e)(2)'s "notwithstanding any other provision of law" clause resolves any doubt about whether other statutes can grant Interior the authority § 108(e) takes away: They cannot. And, as explained above, § 108(e) prohibits Interior not only from reviewing § 108(c) compliance when Fund interest is expended, but also from reviewing § 108(c) compliance when taking land into trust. Interior and Intervenors rely on an asserted distinction between the two situations. *See* Gov't Br. 36-37; Tribal Br. 13-14; Casinos Br. 25-26. But, as the district court put it, that "is a distinction without a difference": "Either way, the

Secretary is purporting to negate the board's use of Fund income." Op. 13; *see supra* pp. 32-33.

Fourth, a comparison with statutes that do grant Interior the kind of authority it claims here cuts against, not in favor of, Interior's reading of § 108. Congress may delegate to agencies "under broad general directives," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), or more narrowly, *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). Some statutes thus do give Interior broad, discretionary authority. *See, e.g.*, 43 U.S.C. § 1457; 25 U.S.C. § 2. Other statutes intentionally circumscribe agency authority by creating mandatory duties. *See, e.g.*, 25 U.S.C. § 2216(c); AR2953.

The Settlement Act is the latter type of statute, not the former. Section 108(f) creates a mandatory, non-discretionary duty, as Interior has held. AR969. Interior lobbied Congress to make this trust provision "discretion[ary]," consistent with "existing regulations" and other statutes that grant Interior such discretionary authority. Dkt. 43-1 at 3. But Congress declined. Interior's holdings in the Trust Denial Order—that it has authority to determine § 108(c) compliance and that the Sibley Parcel does not satisfy Interior's shifting, ill-defined interpretation of § 108(c)—create precisely the type of discretionary authority that Congress rejected. That, too, weighs against Interior's broad reading of § 108(f), as the district court held. *See* Op. 16.

3. Background trust principles do not support Interior's claimed authority

With no basis in the Settlement Act or other statutes for Interior's claimed authority, Interior and Intervenors are left to appeal to background principles of trust law, contending that the United States, as trustee, cannot take land into trust that has been acquired illegally. Gov't Br. 32; Casinos Br. 21-23; Tribal Br. 12. Both the premise and conclusion of this argument are deeply flawed.

To start, the United States' trust obligations to tribes are "defined and governed by statutes rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-174 (2011). Congress may thus structure the trust relationship as it sees fit. Here, Congress specified that the Tribe's Board, not the federal government, is the "trustee" responsible for determining compliance with § 108, including § 108(c). *See supra* pp. 29-31. Indeed, Congress affirmatively stripped Interior of any "trust responsibility for [Fund] investment, administration, or expenditure," and did so "notwithstanding any other provision of law." § 108(e). And § 108(f)'s requirement that Interior take land into trust does not create any trust responsibility over Fund expenditures. While Interior may have certain fiduciary responsibilities for land *after* it has been taken into trust, it does not follow that Interior has the authority to determine compliance with § 108(c) *before* taking land into trust. The Settlement Act plainly states that Interior has no such "trust responsibility" over "expenditure[s]," § 108(e), and

"[t]he 'general trust relationship' does not override [that] clear [statutory] language," *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 757 (2016).

In any event, whatever the scope of Interior's trust responsibility when deciding whether to take land into trust under § 108(f), adhering to the Settlement Act's plain text would not offend any principle of trust law. The Act assigns the Tribe's Board the sole responsibility to determine compliance with the broad mandates of § 108(c). That Interior lacks the authority to reevaluate that decision under § 108(f) does not mean that "Interior [is] *forced* to act *unlawfully*." Casinos Br. 3; *see* Tribal Br. 3. As the district court held, the Settlement Act "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)." Op. 26.

4. Interior's assertion of inherent authority is not entitled to *Chevron* deference

Finally, Interior makes a bid for *Chevron* deference. Gov't Br. 40-43; *see also* Casinos Br. 27-28. Its appeal to *Chevron* is doubly misplaced.

To begin with, the predicate for *Chevron* deference—statutory ambiguity—is lacking. The Settlement Act makes "clear enough" what it means, "leaving no ambiguity for the agency to fill." *Wisconsin Cent. Ltd.*, 138 S. Ct. at 2074. Interior does not point to ambiguous words in the Act that it purports to construe.

Nor does it identify a necessary gap in the Act's operation for Interior to fill. "Policy" preferences about who should make § 108(c) decisions cannot "create an ambiguity when the words on the page are clear." *SAS Inst.*, 138 S. Ct. at 1358; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-126 (2000). And, contrary to Tribal Intervenors' argument (Br. 14-15), the fact that § 108(f) does not expressly forbid Interior from reviewing compliance with § 108(c) creates no ambiguity. "[T]he failure of Congress to use 'Thou Shalt Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); *see also American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995). The "commands" of § 108(f) are clear, and leave "no room" for Interior to exercise "a wholly unmentioned … power" to determine § 108(c) compliance. *SAS Inst.*, 138 S. Ct. at 1358.

Moreover, even if the Settlement Act were ambiguous, the Indian canon would trump *Chevron* and require reading the Act in the Tribe's favor. *See supra* pp. 35-37. Interior argues that *Chevron* deference "applies 'with muted effect'" in the Indian-law context, and that "muted effect" is sufficient for it to prevail. Gov't Br. 27-28 (quoting *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009)). In *Cobell*, however, reference to "a muted *Chevron* deference" addressed unique circumstances, involving "careful stewardship of limited government resources."

573 F.3d at 812. Although Interior characterizes its exercise of § 108(c) oversight as "careful stewardship," there is nothing at all analogous here to the special concerns in *Cobell* regarding the federal fisc. Absent those unique circumstances, this Court's precedent is clear: If ambiguity can reasonably be resolved in favor of the Tribe, it must be resolved that way, with no deference afforded to a competing agency interpretation.[13]

For their part, the Casinos argue (Br. 15-16) that "[t]his is not a case at the Indian canon's core" because it does not involve a treaty. But, as described above, the Settlement Act is a negotiated resolution of the Tribe's claim against the United States for the historical taking of ancestral lands accomplished through treaties. *E.g.*, Treaty of March 28, 1836, 7 Stat. 491. It is hard to imagine a statute closer to "the Indian canon's core." In any event, the canon applies, without distinction, to statutes as well as treaties. *See Blackfeet*, 471 U.S. at 766.

Lastly, the Casinos and Tribal Intervenors contend that the Indian canon does not apply because the Tribe's reading might lead down the road to gaming on the land, thus adversely affecting Tribal Intervenors' interests. *See* Casinos Br. 16-

[13] The Casinos rely (Br. 4, 15) on language in *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), to argue that the Court applies *Chevron* in the Indian-law context while remaining "mindful" of the Indian canon. But *Confederated Tribes* does not address this question; Interior's interpretation there redounded to the Tribe's benefit, and there was thus no conflict between *Chevron* and the Indian canon to resolve.

17; Tribal Br. 27. But the Settlement Act was not enacted for the benefit of Tribal Intervenors; it was enacted to settle land claims with specific tribes, including the Sault Tribe, and to support *those* tribes' sovereignty and economic development. Ambiguity in a statute like this—enacted for the benefit of a particular tribe—must be "resolve[d] … in favor of the tribe." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (construing Auburn Indian Restoration Act). Indeed, Interior itself has applied the Indian canon in strikingly analogous circumstances, interpreting a land claims settlement statute enacted for a particular tribe to permit a trust acquisition for that tribe, notwithstanding the objections of other tribes with competing gaming facilities. Interior discussed at length and rejected the argument that other tribes' opposition made the Indian canon inapplicable where the statute at issue was not enacted for those tribes' benefit.[14] The same logic applies here.

II. THE DISTRICT COURT CORRECTLY HELD THAT § 108(c)(5) OF THE SETTLEMENT ACT PERMITS THE TRIBE'S USE OF FUND INTEREST FOR ACQUISITION OF THE SIBLEY PARCEL

Even if Interior had the authority to determine whether the Tribe's purchase of the Sibley Parcel "enhance[d] … tribal lands" under § 108(c)(5), its denial of the Tribe's trust submission would still be contrary to law. As the district court held, a

[14] *See* Letter from Kevin K. Washburn, Ass't Sec'y for Indian Affairs, U.S. Dep't of the Interior to Hon. Ned Norris, Jr., Chairman, Tohono O'odham Nation 11-12, 15-17 (July 3, 2014), https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-027180.pdf.

land acquisition that "increases the Tribe's total landholdings," as the Tribe's purchase of the Sibley Parcel did, is an "enhancement of tribal lands" within the ordinary meaning of that phrase. Op. 30.

Against that straightforward reading of the statutory text, Interior and Intervenors advance a shifting array of alternative readings, all of which rewrite, rather than interpret, the Settlement Act. In their view, "enhancement of tribal lands" means "enhancement [*of the value*] of [*an existing parcel of nearby*] tribal land[]." That, quite obviously, is not the statute Congress enacted. And Interior's and Intervenors' appeals to policy preferences and deference provide no justification for their effort to redraft § 108(c)(5).

A. "Enhancement Of Tribal Lands" Encompasses Land Acquisitions That Augment The Tribe's Total Lands

All relevant tools of statutory construction establish that "enhancement of tribal lands" in § 108(c)(5) unambiguously encompasses a land acquisition that adds to or increases the size of the Tribe's total landholdings.

1. Statutory text

Because the Settlement Act does not define "enhancement of tribal lands," the phrase must be given its "'ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). The Supreme Court has "stated time and again" that the plain-meaning canon is foundational. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002). Courts and agencies "'must

presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id.* Neither courts nor agencies may "alter the text in order to satisfy … policy preferences." *Id*.

As the district court held (Op. 30), a land acquisition that "increases the Tribe's total landholdings" is an "enhancement of tribal lands" within the plain meaning of that phrase. The ordinary meaning of "enhance" is "advance, augment, elevate, heighten, [or] increase." *Webster's Third New International Dictionary of the English Language* 753 (1981 ed.); *see Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) (identifying *Webster's Third New International* as one of "the most authoritative dictionaries"). Multiple dictionaries—including those relied on by Intervenors, *see, e.g.*, Casinos Br. 9—agree. *See, e.g.*, *American Heritage Dictionary* 611 (3d ed. 1996) (defining "enhance" as "[t]o make greater, as in value, beauty, or reputation; augment"); *Black's Law Dictionary* 646 (10th ed. 2014) (defining "enhancement" as "[t]he act of augmenting"); *Webster's New Collegiate Dictionary* 375 (1979) (defining "enhance" as "to make greater (as in value, desirability, or attractiveness)"). In fact, the dictionary definition Interior relied on in the Trust Denial Order and cites again here is to the same effect. *See* Gov't Br. 22 (enhance means to "make greater" or "augment").

All parties thus agree, as they must, that enhance means to increase, augment, or make greater. The text of the Settlement Act also makes clear *what*

must be increased or augmented, modifying the word "enhancement" with the phrase "of tribal *lands*." "Lands," in the plural, means "[t]erritorial possessions." *Oxford English Dictionary* 617 (2d ed. 1989); *accord American Heritage Dictionary* 987 (5th ed. 2011) ("[t]erritorial possessions or property"). Section 108(c)(5) therefore permits the use of Fund interest to increase or augment the Tribe's territorial possessions. As the district court held, it thus "unambiguously includes any land acquisition that increases the Tribe's total landholdings." Op. 30.

That is also how the only other federal court to address the issue has interpreted "enhancement of tribal lands" in the Settlement Act. *Michigan v. Bay Mills Indian Cmty.*, Nos. 1:10-cv-1273, 1:10-cv-1278, 2011 WL 13186010, at *5 (W.D. Mich. Mar. 29, 2011), *vacated on other grounds*, 695 F.3d 406 (6th Cir. 2012), *aff'd*, 572 U.S. 782 (2014). As that court noted, "'enhance' means 'to improve or make greater' or 'to augment.'" *Id*. The court explained that Bay Mills' land purchase was therefore "[o]bviously … an enhancement of tribal landholdings, as the additional land augmented, or made greater, the total land possessed by" Bay Mills. *Id*. Acquisition of the Sibley Parcel is likewise "[o]bviously … an enhancement" of tribal lands because it augments the Tribe's total landholdings.

Put another way, as a matter of "everyday parlance," *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012), "enhance" denotes an increase in the size, number, or amount of the thing enhanced. For instance, phrases such as "enhanced coverage" or "enhanced benefits" are understood to mean an increase in the amount of coverage or benefits. *See, e.g.*, *Gruber v. PPL Ret. Plan*, 520 F. App'x 112, 117 (3d Cir. 2013) (construing "to enhance early retirement benefits" as "to increase the retirement benefits"). "[T]he term 'sentence enhancement' is used to describe an increase" in the length of a term of imprisonment, *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000); enhancement is commonly used as shorthand for an increase in the size of awarded attorney's fees, *e.g.*, *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) ("enhancement of a lodestar amount"); and in antitrust cases, courts refer to "enhance[d] market power" to describe an increase in the amount of a firm's market power, *e.g.*, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004). In ordinary English, we could thus say that the purchase of Alaska "enhanced" the United States' territorial possessions, by increasing those possessions in size and amount.

To be sure, "enhancement" may also encompass an increase in some other attribute of the item being enhanced—as in the definition on which Interior relies (Br. 22), which defines "enhance" as "to make greater, as in cost, value, attractiveness, etc." But nothing in the ordinary usage of "enhancement" restricts

its meaning to an increase in a *specific* attribute, such as value. Rather, "enhancement" can refer to an increase in any number of attributes—including not only "cost, value, [or] attractiveness," but also utility, size, number, or amount, for example.

Indeed, during the process of drafting the Settlement Act, even Interior understood "enhancement" of tribal lands to encompass the purchase of new land—that is, an increase in the size or amount of tribal lands. The final version of § 107(a)(3) (part of the Act's plan for Bay Mills) distinguishes between "improvements on tribal land" and "the consolidation and enhancement of tribal landholdings," but an earlier draft referred only to "consolidation and enhancement." In response to the earlier draft, Interior asked that Congress "clarif[y] whether enhancement" refers "*only* [to] the *acquisition of additional land*" or also includes "improvements" on existing lands. Dkt. 43-1 at 3 (emphasis added). Congress then added the reference to "improvements." Interior itself thus understood "at the time of enactment" that the "plain meaning," *Tanzin v. Tanvir*, No. 19-71, 2020 WL 7250100, at *4 (U.S. Dec. 10, 2020), of "enhancement" of tribal lands encompasses "the acquisition of additional land."

2. Statutory structure and context

Considerations of "statutory context" cement the Tribe's interpretation of § 108(c)(5). *Michigan v. EPA*, 576 U.S. 743, 753 (2015). The other enumerated

purposes for which the Board may expend interest under § 108(c) are broad and open-ended. For example, the Tribe may use interest "for educational, social welfare, health, cultural, or charitable purposes," § 108(c)(4), as a "dividend to tribal members," § 108(c)(2), or as a "per capita payment to some group … of tribal members designated by the board," § 108(c)(3). Congress likewise swept broadly in crafting § 108(c)(5) to cover expenditures "for the … enhancement of tribal lands," without qualification.

"[S]tatutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (Roberts, J.). Section 108(c)(5)'s statutory context thus provides no basis for artificially limiting the plain meaning of "enhancement of tribal lands."

3. Statutory purpose

The Settlement Act's purposes likewise support the Tribe's reading of § 108(c)(5). *See Stafford v. Briggs*, 444 U.S. 527, 535-536 (1980) (statutory interpretation must take account of "'objects and policy of the law'").

Congress enacted the Settlement Act to redress the historic land claims of the Sault and other tribes, and to distribute judgment funds in a manner that would promote economic self-sufficiency. §§ 102(b), 108(a). Congress recognized in the Act that the Tribe's Chippewa ancestors lived in the Lower as well as the Upper Peninsula. *See* § 102(a)(3)-(4). And today, "about 14,500 (more than a third) of

[the Tribe's] 42,000 members live in the Lower Peninsula"—a downstate population "almost three times greater than the *total* membership of the next largest tribe in Michigan." AR2161; *supra* pp. 6-7. Yet the Tribe has no significant landholdings in the Lower Peninsula from which "to provide employment and tribal services to the Tribe's significant down-state population." AR2159-2160; *see* AR2182-2193.

Reading the Settlement Act, consistent with its plain meaning, to permit land acquisitions that increase the Tribe's total landholdings advances Congress's purposes. The Act was "compensation for a land grab" and it "makes sense, then, that [the Tribe] may use this compensation to expand its landholdings." Op. 32. It also furthers the Act's self-sufficiency purposes to permit those acquisitions where significant numbers of the Tribe's members live—both to generate employment and to enable the provision of governmental services for those members.

Conversely, reading the Act to limit § 108(c)(5) to improvements to existing lands or to land acquisitions only in the remote and sparsely populated Upper Peninsula would impair the Tribe's ability to generate meaningful economic development and to provide for the needs of its members in the Lower Peninsula—thwarting the Act's purpose. "A statute should ordinarily be read to effectuate its purposes rather than to frustrate them." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983). So too here.

4. The Indian canon of construction

Finally, even if the ordinary tools of statutory construction above left doubt as to the meaning of § 108(c)(5), "the Court must interpret § 108(c)(5) according to [the Tribe's] interpretation" pursuant to the Indian canon of construction. Op. 39; *see County of Yakima*, 502 U.S. at 269; *supra* pp. 35-37.

B. Interior's And Intervenors' Alternative Interpretations Of § 108(c)(5) Are Not Defensible

The Tribe's reading of § 108(c)(5) simply gives the words of the statute their plain meaning—a meaning that makes sense in light of the Settlement Act's structure, context, and purpose. Dissatisfied with the statute as Congress drafted it, Interior and Intervenors propose to rewrite it. In their view, the phrase "enhancement of tribal lands" means not what it says, but instead "enhancement [*of the value*] of [*an existing parcel of nearby*] tribal land[]." Among them, Interior and Intervenors insist that "enhancement of tribal lands" is limited to increases in the value, rather than size, of tribal lands; is limited to increasing the value of or improving a specific parcel or parcels of land owned by the Tribe, rather than the Tribe's total "lands"; and is restricted to acquisitions of land geographically proximate to existing tribal lands in the Upper Peninsula.

Few, if any, land acquisitions could satisfy all of these proposed limitations on § 108(c)(5). It is unclear how a purchase of one parcel of land, without more, could increase the value of a separate, noncontiguous parcel of land, even if the

two parcels are near one another. Interior's reading of the statute would thus forbid land acquisitions under § 108(c) except in the most unusual of circumstances, making lands eligible for trust acquisition under § 108(f) a virtual null set. That alone is significant evidence that Interior's interpretation has gone astray. *See DePierre v. United States*, 564 U.S. 70, 82 (2011) (it "obviously was not Congress' intent" for provision "effectively [to] describ[e] a null set"). In any event, settled principles of statutory interpretation defeat each proposed atextual limit on § 108(c)(5). And appeals to policy concerns or agency deference do not change that outcome.

1. Interior's and Intervenors' proposed limitations on § 108(c)(5) are baseless

a. Section 108(c)(5) is not limited to uses that increase the value of tribal lands

Interior has never disputed that the ordinary meaning of "enhance" is to augment, increase, or make greater. To the contrary, the definition Interior relied on below (and relies on here) gives "enhance" that meaning: "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment." Gov't Br. 22; *see also* AR972; AR1931. Interior nevertheless argues (Br. 17-18) that "enhancement

of tribal lands" permits only land acquisitions that increase the "value" "and not mere acreage" of tribal lands.

That is not a defensible reading of § 108(c)(5). Interior's own definition makes clear that "enhance" does not mean "make greater [only in] value [or] attractiveness." It simply means "make greater." "Value" and "attractiveness" are *examples* of attributes that may be made greater, as the definition evidences by saying "*as in* cost, value, attractiveness, *etc.*" If Congress had intended "enhance" to mean only "make greater in value," and not to make greater in size or amount, it would have added qualifying language, such as "enhance *the value of* tribal lands." It did not.

In support of its position that "enhancement" cannot mean an increase in the size or amount of tribal lands, Interior maintains that had Congress intended to permit any land acquisition, it could have authorized "'the acquisition of land,'" (Br. 19) or "'enlargement' or 'expansion'" of tribal lands" (Br. 22). The Tribe's interpretation, Interior argues (Br. 14), thus "read[s] 'consolidation or enhancement' out of the statute." That is incorrect. By using "enhancement," Congress preserved the Tribe's flexibility to increase different attributes of tribal lands—for example, to spend Fund interest on land acquisitions that increase the size of the Tribe's landholdings *or* on improvements to existing tribal lands that increase the lands' value, utility, or function. If § 108(c)(5) instead provided that

Fund interest may be used for "the acquisition of land," the latter use would be impermissible.

In fact, Interior concedes (Br. 25-26) that "enhancement" is broad enough to include an increase in amount or size, acknowledging that "[t]he district court doubtless identified a *possible* interpretation of [§] 108(c)(5)." It simply insists on reading "enhancement" as limited to an increase in a single attribute (value). Rather than apply the ordinary meaning of "enhance"—to increase in value, size, utility, or any number of other attributes—Interior manufactures a new, previously unknown definition under which "enhance" means "to increase, but only in value."

That is not how statutory interpretation works. Under the "general-terms" canon, "general words … are to be accorded their full and fair scope"—not "arbitrarily limited." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012). It follows that a capacious term (such as "enhancement") is not ambiguous and may not be arbitrarily limited because of breadth or a range of applications: "[B]readth" is different from "ambiguity." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *see also Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016) ("a word or phrase is not ambiguous just because it has a broad general meaning"); *United States v. Slatten*, 865 F.3d 767, 783 (D.C. Cir. 2017) (similar).

As these principles of statutory interpretation show, an agency may not engage in "interpretive gerrymanders." *Michigan v. EPA*, 576 U.S. at 754. Just as an agency may not "keep[] parts of statutory context it likes while throwing away parts it does not," *id.*, it may not keep parts of a definition it likes, while discarding parts it does not, *see* Scalia & Garner, *supra*, at 101 ("[t]raditional principles of interpretation reject" reading "ad hoc exceptions" into "general words"). Congress enacted a statute that allows the Tribe to use Fund interest to "enhance[] … tribal lands"—a capacious phrase that covers increasing a variety of attributes of tribal lands, including size or amount. Interior's creation of a novel definition that artificially restricts the broad term Congress chose is not a permissible exercise of statutory interpretation.

Finally, Interior's appeal to the canon against superfluity does not support its argument. Interior claims that the Tribe's interpretation of § 108(c)(5) would read "consolidation" out of the Act, because (it says) "there would be no acquisition that would 'consolidate' tribal lands but not also 'enhance' such lands." Gov't Br. 23-24; *see* Tribal Br. 16-17 (similar). Not so.

"Enhancement" and "consolidation" perform different work in § 108(c)(5). An enhancement increases tribal lands, *see supra* pp. 53-57, while consolidation "combine[s]" lands "into a single more effective or coherent whole." *New Oxford American Dictionary* 363 (2d ed. 2005); *see* Op. 34. Obviously, not all

enhancements of tribal lands would combine the lands. And not all consolidations would increase the Tribe's total landholdings. Congress would have understood that the Tribe might use Fund interest as part of a land exchange to consolidate lands by swapping a larger piece of land far from its existing lands for a smaller piece of land closer to those lands. That transaction would consolidate, but not enhance, tribal lands. *See* Op. 33 n.15. Interior objects that this scenario is too "creativ[e]" (Br. 19), and Tribal Intervenors call it "farfetched" (Br. 17), but exchanges are hardly an unusual mechanism for stewarding tribal landholdings. Interior's trust regulations contain specific provisions for land exchanges. *See* 25 C.F.R. § 151.6 ("Exchanges"); *cf.* Settlement Act § 107(a)(3) (recognizing that Bay Mills may "consolidat[e] and enhance[]" tribal landholdings through "purchase or exchange").

Interior's surplusage argument fails for an additional reason: In federal Indian law, "consolidation" has a specialized meaning—referring to reuniting lands divided during allotment, *e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020), or uniting fractionalized interests in the same property, *e.g.*, *Babbitt v. Youpee*, 519 U.S. 234, 235 (1997); *see also* 25 U.S.C. § 2203(a). The Settlement Act's use of the term "consolidation" thus "performs a significant function simply by clarifying" that Fund interest may be used for that specialized purpose, even if

those uses might also be said to enhance tribal lands. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007).

Finally, "the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute.'" *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). But Interior's interpretation suffers from significant surplusage problems. As Interior sees it, to be an "enhancement," a land acquisition must increase the value of nearby land. But it is difficult to conceive of such an acquisition that would not also be a "consolidation," since ordinarily the purchase of land will not increase the value of a separate parcel of land unless the two parcels are adjacent and the new purchase thus expands the potential uses for the original parcel. Interior's reading thus blurs, if not eliminates, the distinction between consolidation and enhancement, *see* Op. 36, disregarding Congress's decision to permit expenditures for "consolidation *or* enhancement of tribal lands." *See Loughrin v. United States*, 573 U.S. 351, 357 (2014) ("'or'" "is almost always disjunctive" and "the words it connects are to be given separate meanings").

b. Section 108(c)(5) is not limited to increases in the value of or improvements to an existing parcel of tribal land

Interior and Intervenors seek to distort the statute's text in a second way, by effectively reading § 108(c)(5) to require an increase in the value of "*an existing*

parcel of tribal land[],” rather than “tribal *lands*,” the broader term the statute actually uses.

This is seen most obviously in arguments advanced by the Casino Intervenors. The Casinos resist the ordinary meaning of “enhancement of tribal lands,” offering a handful of examples (Br. 8-9) that, they say, demonstrate that the statute should be limited to acquisitions that “make [existing] lands better—more appealing, higher-quality, [or] more valuable.” But those examples depend on a sleight of hand with respect to *what* is being enhanced. Even if, as the Casinos suggest, a landowner’s directive to use money “for the ‘enhancement of Blackacre’” could not encompass the purchase of Whiteacre, a command to use money “for the enhancement of my real estate holdings” certainly could.

Section 108(c)(5) of the Settlement Act is analogous to the latter example, not the former. It allows the expenditure of interest for the “enhancement of tribal lands,” a mass noun that means “[t]erritorial possessions.” *Oxford English Dictionary* 617 (2d ed. 1989); *supra* p. 55. Properly read, “enhancement of tribal lands” enables the Tribe either to purchase land to increase its total tribal landholdings *or* to make improvements on specific parcels of land that are part of the whole. This makes sense in context because the Tribe did not own just a single parcel of trust land (analogous to “Blackacre”) when Congress enacted the Settlement Act, but rather a collection of lands scattered across the Upper

Peninsula. *See* AR3103. The Casinos identify no basis either in the text of the Act or its context to restrict "enhancement of tribal lands" to improvement of a specific parcel.

The Casinos' examples undercut their interpretation in other ways. The Casinos assert (Br. 8) that an actor hiring a photographer for "enhancement of my promotional portraits" would expect "better portraits, not more," but that does not follow. Just as one would enhance an art collection through the addition of new art, one could surely enhance a collection of photographs through the addition of more photographs. Nothing in the word "enhancement" would restrict the photographer to airbrushing or altering existing photographs, rather than adding new photographs to the portfolio.

To take another example, the Casinos concede (Br. 9) that a new branch of a library could serve as an "enhancement of [a] library," but they insist this is only because a new branch would "make the *existing* library better." That highlights the error in their interpretation: A new branch would increase the value of the library *as a whole*, not the value of the *old branch*, as Interior's interpretation would require. Here, the Tribe's purchase of the Sibley Parcel for more than $1.8 million, AR3172, obviously increased the value of "tribal lands" *as a whole*.

Relatedly, the Casinos argue (Br. 10-11) that when "'enhance'" is used "in the context of land," it refers exclusively to "quality or value, not amount."

Because the Casinos assume that "tribal lands" means specific parcels of land the Tribe already owns, rather than the Tribe's total landholdings, they draw the conclusion that § 108(c)(5) does not permit the acquisition of new land at all, but is limited to improvements to the Tribe's existing land. That demonstrates just how far wrong the Casinos have gone. Not even Interior embraces that view, and "[a]ll" parties below "agree[d]" that § 108(c)(5) "encompasses land acquisitions." Op. 30.

The Settlement Act could not be clearer on this point. In addition to the plain text of § 108(c)(5), § 108(f)'s mandate that Interior hold lands purchased with interest in trust demonstrates that Congress contemplated that the Tribe could use § 108(c) to acquire new lands, consistent with the Act's purpose of remedying the taking of the Tribe's ancestral lands. Section 107(a)(3), governing the Bay Mills Tribe, confirms the point by addressing "consolidation and enhancement" separately from "improvements on tribal land"—text added after Interior asked Congress to clarify whether "enhancement" meant only acquiring new land or also included improving existing land. *See supra* p. 57. The Casinos' contrary position is thus foreclosed by the statutory text and drafting history.[15]

[15] In support of their artificially restricted reading, the Casinos also argue (Br. 16) that only a clear statement from Congress can "oust state jurisdiction by compelling Interior to take land into trust." But Congress did speak clearly: It commanded, in § 108(f), that land purchased with Fund interest be taken into trust. Congress's intent to "oust state jurisdiction" is thus not in dispute. The dispute is

c. Section 108(c)(5) is not limited to land acquisitions geographically proximate to existing lands

Finally, Interior contends (Br. 18-19) that § 108(c)(5) requires an undefined "geographic nexus between the Tribe's existing lands and the land to be acquired." *See also* Casinos Br. 1-2. This geographic-proximity reading of § 108(c)(5) is baseless; it lacks any footing in the text, context, or purpose of the Settlement Act.[16]

Obviously, Interior has a policy preference for geographic limitations in trust-acquisition statutes. But that is not "the text Congress enacted" in *this* statute. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008). The Settlement Act does not restrict expenditure of Fund interest to "enhancement of *nearby* tribal lands"; it simply says "enhancement of tribal lands." And neither courts nor agencies should "lightly assume that Congress has omitted from its adopted text

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about how to interpret § 108(c)(5); and with respect to that provision, Congress also spoke clearly. It permitted the "enhancement of tribal lands," which naturally includes land acquisitions. That the Act, like much federal legislation, may have "derivative implications for traditional state functions" does not call into question § 108(c)(5)'s plain meaning. *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1152 (9th Cir. 2013).

[16] Before the district court, Interior represented that, contrary to the *Bay Mills Opinion* and the Trust Denial Order, its interpretation "did *not* limit … land acquisitions to the Upper Peninsula." Dkt. 53-1 at 22 (emphasis added). That Interior has shifted its position yet again suggests the agency is not faithfully interpreting the text, but seizing upon any rationale to deny the Tribe's submission.

requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005).

Congress knows how to put geographic limits on tribes' acquisition of trust land when it sees fit to do so. The *Bay Mills Opinion* cited numerous statutes enacted before the Settlement Act that do just that. *See* AR459; *see also infra* pp. 71-72 nn.17-20. From those examples, Interior inexplicably drew the conclusion that Congress silently intended to impose similar geographic limits in the Settlement Act. But that defies basic principles of statutory construction: Congress's inclusion of geographic requirements in similar statutes "demonstrat[es] that it knows how to impose such a requirement when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216-217 (2005). Its decision *not* to impose a geographic-proximity limitation here must be presumed deliberate, and Interior is not free to "override that choice." *Id*. at 217.

For the same reason, Interior's and Intervenors' claims (Gov't Br. 21-22; Casinos Br. 12-13) that respecting the Settlement Act's plain terms would grant the Tribe a right that no other tribe possesses are beside the point. They are also incorrect. Some settlement statutes require a connection to a tribe's aboriginal

area.[17] Others impose different geographic limits, both narrow[18] and broad.[19] At least one settlement act imposes no geographic limit at all.[20]

The sheer diversity of these provisions puts beyond doubt that Congress knows how to negotiate settlement acts and that it understands the function of geographic restrictions in them. Against that backdrop, the fact that Congress and the Tribe, after sovereign-to-sovereign negotiations, did not include an express geographic-proximity restriction here must be presumed an intentional decision that Interior is not free to disregard.

Interior also appeals (Br. 22-23) to "context," claiming that its geographically restricted reading "makes sense in the context of [the Settlement Act] and the history of the Sault Ste. Marie." But contextual and historical considerations strongly support the Tribe. Congress enacted the Settlement Act to

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[17] *See* Seneca Nation Settlement Act, Pub. L. No. 101-503, § 8(c), 104 Stat. 1292, 1297 (1990) (authorizing acquisition of land "within [the Nation's] aboriginal area in the State or situated within or near proximity to former reservation land"); Santo Domingo Pueblo Claims Settlement Act, Pub. L. No. 106-425, § 5(b)(1)(B), 114 Stat. 1890, 1894 (2000) (allowing acquisition of settlement lands "within the exterior boundaries of the exclusive aboriginal occupancy area").

[18] *See* Seminole Indian Land Claims Settlement Act, Pub. L. No. 100-228, § 6(c), 101 Stat. 1556, 1560 (1987) (authorizing Tribe to acquire settlement land subject to four express limitations); Gila Bend Act § 6(d) (requiring trust land to be in defined geographic areas).

[19] Aroostook Band Settlement Act § 5(a).

[20] Wyandotte Tribe Act § 105(b)(1).

"compensate" tribes for the wrongful dispossession of their "ancestral lands." *Bay Mills*, 572 U.S. at 786. The Act was designed to remedy that historic injustice, in part by permitting land acquisitions. And, as the district court explained, Congress found in the Settlement Act that these dispossessed lands were located in "'both' the Upper and Lower Peninsulas" and that the ancestors of affected tribes, including the Sault Tribe, were located in villages in both parts of Michigan. Op. 36 (citing §§ 102(a)(3)-(4)).

Moreover, in negotiating the Act, Congress and the Tribe would have understood that achieving the Act's self-sufficiency objectives might require land acquisitions outside the Upper Peninsula, given the location of thousands of tribal members in the Lower Peninsula and the limited opportunities for economic development in the sparsely populated Upper Peninsula. That context, historical and statutory, demands reading § 108(c)(5), consistent with its plain text, to permit land purchases that increase the Tribe's lands, including through acquisitions in the Lower Peninsula.

Finally, the Tribal Intervenors invoke the *noscitur a sociis* canon to argue (Br. 13-14) that "enhancement" connotes geographic proximity by association with the neighboring term "consolidation." But the two nouns in the phrase "consolidation or enhancement," § 108(c)(5), are "too few and too disparate to qualify as 'a string of statutory terms' or 'items in a list' for *noscitur a*

sociis purposes." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 281 (2010) (citations omitted); *see also, e.g.*, *United States v. Lauderdale Cnty., Mississippi*, 914 F.3d 960, 967 (5th Cir. 2019) (rejecting *noscitur* canon for "A or B" phrase); *United States v. Franklin*, 785 F.3d 1365, 1369 (10th Cir. 2015) (same). Indeed, the relevant canon of construction supports the opposite conclusion: Congress used the disjunctive "or" between "consolidation" and "enhancement" to convey *distinct* meaning. *See supra* p. 66. Tribal Intervenors' interpretation, by contrast, collapses "consolidation" and "enhancement," in violation of ordinary principles of statutory interpretation and common sense.

2. Policy concerns do not justify rewriting the Settlement Act

Ultimately, Interior's and Intervenors' proposed limitations on the Settlement Act's text "fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020). Interior thus grounds its interpretation of § 108(c)(5) in purported concerns about the prospect of the Tribe "acquir[ing] land *anywhere*" and then conducting gaming activities on it. Gov't Br. 20-22; *see also* Casinos Br. 1-2, 11-13; Tribal Br. 3, 17-22 (framing these same policy appeals in terms of

"context"). Such concerns are misdirected and, in any event, provide no basis for rewriting the Settlement Act.

a. Interior's and Intervenors' claims about unlimited gaming overlook the many constraints—practical and legal—on the Tribe's ability to acquire and game on trust lands.

To begin, Congress imposed a substantial constraint on mandatory trust acquisitions by limiting them to lands purchased with Fund "interest or other income." § 108(f). Contrary to the Casinos' suggestion (Br. 11) that such funds are "unlimited," interest depends on the success of investments made by the Board, and the Tribe has many pressing needs, including payments to tribal elders, to which the Fund's interest is allocated, *see* AR2146-47 (showing that a significant percentage of interest goes to elder payments); § 108(c)(3). The idea that the Board could dedicate finite tribal resources to endless land purchases in the face of other tribal needs blinks reality.

What is more, Interior's and Intervenors' speculations about far-flung land purchases in "New York" or "Virginia" (*e.g.*, Casinos Br. 16 n.5) misapprehend "the strong connection between native communities and their tribal homeplaces." McCoy, *The Land Must Hold the People*, 27 Am. Indian L. Rev. 421, 424 (2003). The Tribe's members do not live and work everywhere. The vast majority of the Tribe's members reside in Michigan, and almost one-half of its Michigan members

reside in the Lower Peninsula. AR2184. The Tribe has used its existing Upper Peninsula casinos—and seeks to use the Sibley Parcel—to provide services to and employment for nearby tribal members. *E.g.*, AR2152, 2159-2160, 2163-2164; *see also* Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 Gonz. L. Rev. 1, 112-113 (2005) (tribes typically operate casinos in part to "provide critical employment opportunities for tribal members"); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205, 218-219 (1987) (similar). Exaggerated rhetoric about distant land acquisitions ignores these facts.

Finally, fears that honoring the Settlement Act's plain text would permit the Tribe to engage in more gaming than Interior or Intervenors would prefer ignore the legal constraints on gaming under the Indian Gaming Regulatory Act. As the district court explained (Op. 42-46), those constraints are substantial. Having land taken into trust does not entitle the Tribe to game on that land. Rather, to conduct any gaming, the Tribe will still need to establish that the land would qualify for one of the exceptions to a prohibition against gaming on land acquired after 1988. *See* 25 U.S.C. § 2719(a). And the Tribe could use the land for casino gaming only in accord with the terms of a tribal-state gaming compact negotiated with the state of Michigan and approved by Interior. *See id.* § 2710(d). Given all of those constraints, Interior's and Intervenors' claims that the Tribe's reading of

§ 108(c)(5) will lead to an unlimited number of casinos strewn across the country have no basis in the real world.[21]

b. In any event, even if the Settlement Act and the Indian Gaming Regulatory Act, fairly read, did create more land-into-trust or gaming opportunities than Interior or Intervenors would prefer, that would not justify their proposed distortion of the statutory text. Congress is assumed to be "'aware of existing law [*e.g.*, the Indian Gaming Regulatory Act] when it passes legislation [*e.g.*, the Settlement Act].'" *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014). It should thus be presumed that Congress understood how the statutes would interact. But even if that presumption were misplaced, it is irrelevant whether all members of Congress who voted for the Settlement Act understood its potential interaction with the Indian Gaming Regulatory Act or none did. "The

[21] Below, Tribal Intervenors defended Interior's decision on the ground that the trust submission violated the Tribe's compact with Michigan, *see* Op. 46-47—an argument they reprise here, *see* Tribal Br. 2, 19-22. As the district court explained, that argument is "irrelevant." Op. 46. Interior did not so much as refer to the compact in its decision, so it cannot be a basis for affirming the agency here. *See Michigan v. EPA*, 576 U.S. at 758; *New York v. EPA*, 964 F.3d 1214, 1225 (D.C. Cir. 2020). While the Tribe disagrees with Intervenors' misreading of the compact, that dispute has no bearing on the meaning of § 108(c)(5) and is not before this Court. The Tribe's compact establishes procedures for dispute resolution, and these issues will be litigated if and when Michigan renews a claim under the compact. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1080, 1083 (6th Cir. 2013) (recognizing availability of dispute resolution).

fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991); *accord Bostock*, 140 S. Ct. at 1749; *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010) (if law's "effect was unintended, it is a problem for Congress").

As the Supreme Court held in another case involving the Settlement Act, the Indian Gaming Regulatory Act, and speculation about what Congress could and could not have intended, courts and agencies have "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. That principle controls here.[22]

Enforcing the settled rule that an agency may not override the statutory text based on its policy preferences is especially important in this case. The Settlement

[22] Although courts and agencies have "extraordinary power" to depart from the plain text if "adherence to the plain text leads to an 'absurd' result," *United States ex rel. Totten v. Bombadier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) (Roberts, J.), this is "an exceptionally high burden," *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006). Interior's passing reference to absurdity (Br. 26) cannot satisfy that standard. An interpretation is not absurd because it "may seem odd," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005), and the doctrine is not a tool to address perceived "errors arising from a drafter's failure to appreciate the effect of certain provisions," Scalia & Garner, *supra*, at 238. Here, there is nothing odd about applying the Settlement Act—a statute designed to help redress the wrongful dispossession of land so that the Tribe can attain economic self-sufficiency—to permit acquisitions beyond the immediate vicinity of the Tribe's existing lands, but near a third of its population.

Act is a compromise negotiated between sovereigns to remedy the federal government's past misdealing toward the Tribe. *See supra* pp. 6-12. "[P]romises were made" by Congress in the Settlement Act in order to recompense the Tribe for those historic injustices, and Interior should not be permitted to break those statutory commitments now based on its after-the-fact assessment that "the price of keeping them [is] too great." *McGirt*, 140 S. Ct. at 2482; *cf. Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).

In the end, if Interior or Intervenors have genuine policy concerns regarding the Settlement Act, the Indian Gaming Regulatory Act, or the interaction of the two, that is a "debate that belongs in the halls of Congress, not in the hearing room of [a court]." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 237-238 (2007). More than twenty years ago, the Tribe challenged a decision to take land into trust under a different statute based on fears that mandatory acquisitions could be "unlimited as to duration and to amount." *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 704 (W.D. Mich. 1999). The district court declined to consider those fears, explaining that "Congress does not appear to be concerned with this possibility, and neither is this Court." *Id*. at 704-705. The court added that there are practical constraints on land acquisitions and that, in any event, "Congress can … amend the statute to eliminate

the mandatory provision if a concern arises about the extent of the property being acquired." *Id.* at 705. The lesson of the Tribe's defeat then applies to Interior's interpretation of the Settlement Act now: Revision of the Settlement Act, if it is justified at all, is a job for Congress, not the agency.

3. Interior's interpretation cannot be sustained under *Chevron*

Finally, Interior claims (Br. 25-26) that § 108(c)(5) is "ambiguous" and that its resolution of that ambiguity is "entitled to deference under *Chevron* step two." That is wrong for three reasons.

First, "[e]ven under *Chevron*, [courts] owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' [courts] find [themselves] unable to discern Congress's meaning." *SAS Inst.*, 138 S. Ct. at 1358; *see also Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (agency receives "no deference at all" as to "whether a statute is ambiguous"). Here, there is no genuine ambiguity in § 108(c)(5) to resolve, as explained above.

Second, as also explained above, the Indian canon "dictate[s]" that any ambiguity in § 108(c)(5)—if one exists—must be resolved in the Tribe's favor, *County of Yakima*, 502 U.S. at 269; Part II.A.4, *supra*, and the canon thus operates to defeat resort to *Chevron*. *See* Op. 38-42.

Third, even were this Court to reach *Chevron*'s second step, the Trust Denial Order requires vacatur because, for all the reasons set out above, Interior's reading of § 108(c)(5) is not "'a permissible construction of the statute,'" *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005), and strays far beyond "'the bounds of reasonable interpretation,'" *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2018).

Ambiguity does not give an agency "carte blanche" to rewrite a statute. *United States Postal Serv. v. Postal Regulatory Comm'n*, 886 F.3d 1253, 1257 (D.C. Cir. 2018). And Interior's and Intervenors' varied limitations on "enhancement of tribal lands"—the limitation to increases in value alone; the restriction to enhancing specific parcels of existing land; and the geographic-proximity standard—do not represent a choice among potentially competing definitions of an ambiguous phrase. Those contrived limitations are interpolations from outside the text, rather than interpretations of the text.

In addition, Interior's interpretation thwarts Congress's purposes in the Settlement Act. Interior's reading confines the Board's use of Fund interest for land acquisitions to land proximate to the Tribe's existing lands in the Upper Peninsula, eviscerating the Tribe's ability to address the pressing needs of its downstate members and to achieve economic self-sufficiency. *See supra* pp. 6-12. For that reason, too, its interpretation is an unreasonable resolution of any

ambiguity. *See Shays v. FEC*, 528 F.3d 914, 932 (D.C. Cir. 2008) (agency's "restrictive definitions" "fail at *Chevron* step two because they conflict with [statutory] purpose"); *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994) (similar). Interior's Trust Denial Order cannot be sustained.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as modified by the Court's scheduling order.

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 19,393 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Danielle Spinelli
DANIELLE SPINELLI

December 22, 2020

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

Michigan Indian Land Claims Settlement Act,
Pub. L. No. 105-143, 111 Stat. 2652

An Act

To provide for the division, use, and distribution of judgment funds of the Ottawa and Chippewa Indians of Michigan pursuant to dockets numbered 18-E, 58, 364, and 18-R before the Indian Claims Commission.

* * *

§ 102. Findings; purpose.

(a) FINDINGS.—Congress finds the following:

(1) Judgments were rendered in the Indian Claims Commission in dockets numbered 18–E, 58, and 364 in favor of the Ottawa and Chippewa Indians of Michigan and in docket numbered 18–R in favor of the Sault Ste. Marie Band of Chippewa Indians.

(2) The funds Congress appropriated to pay these judgments have been held by the Department of the Interior for the beneficiaries pending a division of the funds among the beneficiaries in a manner acceptable to the tribes and descendency group and pending development of plans for the use and distribution of the respective tribes' share.

(3) The 1836 treaty negotiations show that the United States concluded negotiations with the Chippewa concerning the cession of the upper peninsula and with the Ottawa with respect to the lower peninsula.

(4) A number of sites in both areas were used by both the Ottawa and Chippewa Indians. The Ottawa and Chippewa Indians were intermarried and there were villages composed of members of both tribes.

(b) PURPOSE.—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 or distribution of their share of the funds.

* * *

§ 107. Plan for use and distribution of Bay Mills Indian Community funds.

(a) TRIBAL LAND TRUST.

* * *

(3) 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. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

* * *

§ 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.