IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Plaintiff, v. DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE INTERIOR, Federal Defendants, and SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, *et al.*, Defendant-Intervenors.	Case No. 1:18-cv-2035

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Introduction

The Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) brought this action to compel the Department of the Interior to take 71 acres of land near Detroit—the Sibley Parcel—into trust as a possible location for Tribal gaming. Under the Michigan Indian Land Claims Settlement Act (the Michigan Act), the Tribe may use interest from a special fund for "social welfare" purposes or "enhancement of tribal lands." Pub. L. No. 105-143, §§ 108(c)(4), (c)(5), 111 Stat. 2652, 2661 (1997). "Any lands acquired using amounts from interest of other income of the Self-Sufficiency Fund shall be held in trust by [Interior] for the benefit of the [T]ribe." *Id.* § 108(f), 111 Stat. 2662.

In a 2017 decision, Interior acknowledged that § 108(f) imposes a mandatory duty to take lands into trust when § 108(c)'s conditions are met. But Interior declined to take the Sibley Parcel into trust, finding that the purchase of land for a casino was "too attenuated" to fall within § 108(c)(4)'s limits. Interior also stated that there was insufficient evidence to show that the Sibley Parcel—which is located more than 300 miles from the Tribe's headquarters in Michigan's Upper Peninsula—would "enhance" the Tribe's existing lands.

The Court previously granted summary judgment for the Tribe. Interior appealed and the D.C. Circuit reversed. Now, the Court has permitted the parties to file renewed summary judgment motions.

Interior is entitled to summary judgment on the Tribe's remaining claims. The Michigan Act's plain language supports Interior's interpretation of § 108(c)(4)'s "social welfare" requirement. Interior's interpretation is also consistent with the restrictions Congress imposed in the Michigan Act. Indeed, the D.C. Circuit confirmed that the Act "delineates distinct uses" for Fund interest. *Sault Ste. Marie Tribe of Chippewa v.*

Haaland, 25 F.4th 12, 15 (D.C. Cir. 2022). It can be spent "for *only* five uses." *Id.* (emphasis added). The Tribe's "broad, sweeping" interpretation of the Act fails to account for such limits. In addition, the Tribe cannot show that Interior's decision was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). The Tribe misreads the record in suggesting that Interior failed to consider the evidence or accord the Tribe's statements sufficient weight. Applying the APA's deferential standard of review, the Court should uphold Interior's decision.

Background

I. The Sault Ste. Marie Tribe

The Sault Ste. Marie Tribe descends from Chippewa bands that historically occupied lands in the Upper Peninsula of Michigan. *See Sault Ste. Marie Tribe*, 25 F.4th at 15. The Tribe and other Michigan tribes ceded virtually all their lands in an 1836 Treaty with the United States. *Id.* More than a century later, Congress created the Indian Claims Commission, with authority to hear, among other things, Tribal claims that federal officials engaged in misconduct in acquiring Indian lands. *Id.* In an action filed by several Michigan Tribes, the Commission held that the 1836 Treaty paid only 15 percent of fair value for the ceded lands and was "unconscionable." *Id.* (citing *Bay Mills Indian Community v. United States*, 26 Ind. Cl. Comm. 538, 542, 560 (1971)). The Commission awarded damages in excess of $10 million. *Id.* Payment of the judgment, however, was long delayed, due to a disagreement among the Tribes over the division of the judgment and the need to develop distribution plans. *Id.*; Pub. L. No. 105-143, § 102(a) (2), 111 Stat 2653; *see also* 25 U.S.C. §§ 1401–1408.

In the meantime, in 1972, Interior formally acknowledged the Tribe as a federally-recognized Tribe, and in 1975, Interior oversaw the Tribe's organization under

the Indian Reorganization Act (IRA). *See Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 841 (W.D. Mich. 2008); 25 U.S.C. §5123. Pursuant to authority granted in the IRA, 25 U.S.C. §§ 5108, 5110, Interior took several parcels of land in the Upper Peninsula into trust for the Tribe, including lands to serve as the Tribe's reservation. *See Sault Ste. Marie*, 576 F.Supp.2d at 840–41; AR 3113.

Under federal law, Indian Tribes possess certain sovereign rights and privileges over trust lands, including freedom from state taxation, rights of self-regulation, and, under certain conditions, opportunities for Tribal gaming. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785 (2014); 25 U.S.C. §5108. Interior has adopted regulations to implement its land acquisition authority that "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 220–21 (2005). Under these regulations, Interior must consider economic and jurisdictional impacts to state and local governments and must give ever increasing scrutiny to proposed acquisitions the farther they are in distance from a Tribe's existing reservation. *See* 25 C.F.R. §§ 151.10, 151.11.

In 1993, the Tribe entered a compact with the State of Michigan to enable gaming by the Tribe under the Indian Gaming Regulatory Act (IGRA). *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1077 (6th Cir. 2013); AR 3213; AR 3224. The Tribe now operates several casinos on its existing trust lands in the Upper Peninsula. *Michigan*, 737 F.3d at 1077. The Tribe agreed in the compact not to apply to take additional land into trust for IGRA gaming without first entering an agreement with the State's other federally-recognized Tribes over revenue sharing. AR 3224.

II. The Michigan Act

In 1997, after the affected Michigan Tribes resolved their impasse on the division of funds awarded by the Indian Claims Commission regarding the 1836 Treaty, Congress enacted the Michigan Act "to provide for the fair and equitable division" of those funds. *See* Pub. L. No. 105-143, §102(b), 111 Stat. 2653. The Act allocates the funds among the beneficiary Tribes, *id.* § 104, 111 Stat. 2653–55, and codifies separate "plan[s] for use and distribution" of the amounts specified for each Tribe, *id.* § 105, 111 Stat. 2655. Section 108 constitutes the distribution plan for the Sault Ste. Marie. *Id.* §§ 105(a)(3), 108, 111 Stat. 2655, 2660–61.

Section 108 directs Interior to transfer the Tribe's share to a "Self-Sufficiency Fund" (Fund) to be administered by the Tribe through its governing body, which is called the Tribe's Board of Directors (Board). *Id.* §§ 108(a), 108(e), 111 Stat. 2655, 2660–61. Under Section 108, the Board may expend moneys from the Fund without Interior's approval and Interior "shall have no trust responsibility for the investment, administration, or expenditure" of the Fund. *Id.* § 108(e)(2), 111 Stat. 2661.

But the Michigan Act "delineates distinct uses for Fund principal and interest." *Sault Ste. Marie Tribe*, 25 F.4th at 15 (citing § 108(b)–(c)). "Fund interest may be expended for only five uses." *Id.* (citing § 108(c)). Specifically, § 108(c) provides that:

> [t]he 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*.

§ 108(c), 111 Stat. 2661 (emphasis added).

"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." § 108(f), 111 Stat. 2661–62. So, "[i]f the Tribe acquires land with Fund interest, . . ., Interior must determine whether its mandatory trust obligation under Section 108(f) has been triggered." *Sault Ste. Marie Tribe*, 25 F.4th at 21. "As part of the determination to hold lands in trust, Interior may evaluate whether the land was acquired for one of the exclusive uses of Fund interest in Section 108(c)." *Id.*

III. Interior's decision regarding the Sibley Parcel

In 2014, the Tribe "tendere[d]" to Interior a "submission for mandatory fee-to-trust acquisition" of the Sibley Parcel. AR 3112.[1] The parcel is outside Detroit, AR 2150, 2162, more than 300 miles from the Tribe's headquarters in Michigan's Upper Peninsula. AR 1933. The Tribe explained that it had contracted to purchase the parcel and anticipated using it for gaming under IGRA. AR 3112 & n.1.

Citing what the Tribe believed to be Interior's "non-discretionary duty" under § 108(f) of the Michigan Act "to take lands in trust when [the Act's] requirements are otherwise satisfied," the Tribe asserted that the Act's requirements were met because the Tribe would purchase the parcel with "interest or income from the Self-Sufficiency Fund for the 'enhancement or consolidation of tribal lands' within the meaning of . . . § 108(c)(5)" of the Act. AR 3112. In the alternative, the Tribe contended that "acquisition is also independently justified under Section 108(c)(4)" because it is "an expenditure for educational, social welfare, health, cultural, or charitable purposes." AR 3119.

In response, Interior advised the Tribe, among other things, that the Tribe needed to present evidence that the proposed acquisition would in some manner

[1] Citations are to the administrative record and are included in the joint appendix submitted by the parties, ECF No. 64.

enhance the value of existing Tribal lands. AR 2243. In a supplemental submission, the Tribe asserted that acquiring the Sibley Parcel would: (1) increase the Tribe's overall landholdings, (2) provide revenue that the Tribe could use to improve its existing trust lands in the Upper Peninsula; and (3) increase the value of a 7-acre parcel that the Tribe had recently purchased (using Fund principal) approximately two miles from the 71-acre Sibley Parcel. AR 2152–60. The Tribe also contended that the Sibley purchase would address "unmet social welfare, health and cultural needs" because the "planned economic development" on the parcel would provide employment for Tribal members and "new revenue" to fund services. AR 2164; AR 2167.

Two Michigan Tribes with established gaming interests in the Lower Peninsula—the Nottawaseppi Huron Band of the Potawatomi and the Saginaw Chippewa Indian Tribe of Michigan—objected, arguing that the proposed acquisition did not meet the terms of the Michigan Act. AR 180–217. The State of Michigan also objected, arguing that the Tribe had violated the 1993 compact provision requiring it to obtain the consent of other Michigan Tribes before seeking a new trust acquisition for off-reservation gaming. AR 1482–85; *Michigan*, 737 F.3d at 1077–78.

In January 2017, Interior issued an interim determination and rejected a number of the Tribe's arguments as to why acquisition of the parcel would satisfy §§ 108(c)(4) and (c)(5). AR 969–74. But Interior noted that the Tribe's argument that acquisition of the Parcels would make Tribal fee lands nearby or Tribal lands in the Upper Peninsula "more valuable" was consistent with the definition of "enhancement" adopted by the agency. AR 973. Because the administrative record did not contain sufficient evidence showing that the purchase of the Sibley Parcel would "enhance" the value of these landholdings, Interior gave the Tribe an opportunity to present such evidence. AR 974.

No new evidence was submitted, and, on July 24, 2017, Interior declined to take the Sibley Parcel into trust. AR 1930–33. Interior incorporated the findings of its interim determination including, among other things, its rejection of the Tribe's claim that acquisition of the parcel would be for "social welfare" purposes under § 108(c)(4). AR 1931. Interior reiterated its view that an expenditure "enhances" Tribal lands for purposes of § 108(c)(5) only if the Tribe's proposed land acquisition increases the value of its existing lands. AR 1937. Interior determined that increasing overall land holdings or buying lands for commercial purposes that might generate revenue to improve existing lands was not within the statutory intent of "enhancement of tribal lands" and that the Tribe had provided no evidence of actual enhancement. AR 1932–33.

IV. Procedural background

The Tribe filed suit in 2018, challenging, among other things, Interior's authority to interpret the Michigan Act, generally, and Interior's interpretation of §§ 108(c)(4), (5), as well as Interior's evaluation of the Tribe's submission. Compl. ¶¶ 73–90, ECF No. 1. The Nottawaseppi and Saginaw Tribes and private casino operators in Detroit were permitted to intervene as defendants (collectively, Defendant-Intervenors). ECF No. 36. In March 2020, the Court granted summary judgment for the Tribe and vacated Interior's 2017 decision. ECF No. 72. But the Court declined to compel Interior to take the Sibley Parcel into trust on the ground that Interior had not yet confirmed that the parcel had been acquired with Fund interest. *Id.* at 48–53.

Interior and Defendant-Intervenors appealed, and the D.C. Circuit reversed. The Circuit held that the Michigan Act plainly gives Interior authority to decline trust acquisitions that do not meet the conditions of § 108(c), and that § 108(c)(5) requires proof of some "increas[e]" in the "quality or value of existing tribal lands." *Sault Ste.*

Marie Tribe, 25 F.4th at 17–24. It then remanded to this Court for further proceedings. *Id.* at 24. The Court allowed the parties to file renewed motions for summary judgment addressing Interior's interpretation of § 108(c)(4) and Interior's assessment of the Tribe's submissions. Minute Entry, ECF Entry of Sept. 28, 2022.

Standard of Review

The Tribe's claims are primarily evaluated using the scope and standard of the APA, 5 U.S.C. § 706(2)(A). Thus, the Court must uphold Interior's § 108(c) determinations unless the Tribe can demonstrate that Interior's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 719, 722 (D.C. Cir. 2009).

Judicial review is "narrow" and the Court "'is not to substitute its judgment for that of the agency.'" *Judulang v. Holder*, 565 U.S. 42, 52–53 (2011) (citations omitted). The Court need not find that Interior's decision "is the only reasonable one, or even that it is the result [the court] would have reached." *Am. Paper Inst., Inc., v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983). Indeed, the Court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Hence, the Court reviews Interior's reasoning only to determine whether the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983).

The Tribe also challenges Interior's interpretation of a statute. In that respect, "it is under *Chevron*, not the APA arbitrary and capricious standard, that a court considers

'whether the agency's construction of the statute is faithful to its plain meaning, or, if the statute has no plain meaning, whether the agency's interpretation 'is based on a permissible construction of the statute.'" *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 92 (2020) (quoting *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995), and referring to *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984)). "Under the *Chevron* two-step framework, we first consider 'whether Congress has directly spoken to the precise question at issue.' If Congress's intent is clear, 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If 'Congress has not directly addressed the precise question at issue,' however, we proceed to step two and will uphold the [agency's] interpretation if it is 'based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 842–43; citations omitted). "*Chevron* deference does not disappear from the process of reviewing an agency's interpretation of those statutes it is trusted to administer for the benefit of the Indians, although that deference applies with muted effect." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009).

Argument

Interior properly interpreted the Michigan Act based on its plain meaning and the limitations included in the statute. Then, after reviewing the Tribe's trust application, supplemental information, third party arguments, and all the Tribe's submissions, Interior concluded that the Tribe had not met its burden of showing that the Sibley purchase met the Michigan Act's § 108(c)'s requirements. The agency reasonably found that the purchase of land for a casino was "too attenuated" to satisfy § 108(c)(4)'s "social welfare" purposes requirement and that the Tribe had not otherwise provided evidence meeting § 108(c)(4). Additionally, Interior determined that the Tribe

had not demonstrated that the Sibley Parcel would "enhance" the Tribe's other lands in Michigan's Lower and Upper Peninsula. The Tribe presents no compelling arguments to set aside Interior's well-reasoned decision. Hence, the court should grant summary judgment to Federal Defendants on all of the Tribe's remaining counts.

I. The Tribe fails to show that Interior acted arbitrarily in concluding that the purchase of the Sibley Parcel did not satisfy the Act's "social welfare" requirement.

A. Interior's reading of § 108(c)(4) is consistent with the Michigan Act's plain language and, in any event, a reasonable interpretation.

Interior concluded that the purchase of land for a casino was too attenuated to satisfy the Michigan Act's § 108(c)(4) "social welfare" purposes requirement. The plain language of § 108(c)(4) favors Interior's conclusion. The statute does not state that Fund interest can be used for economic development, development of Tribal resources, or for the Tribe's financial benefit. Interior's reading of § 108(c)(4) is also consistent with the statutory context, which provides only "limited uses for Fund interest." *Sault Ste. Marie Tribe*, 25 F.4th at 18. The Tribe argues for a "broad, sweeping" reading of § 108(c)(4), ECF No. 91 at 10. But that interpretation is neither supported by the Michigan Act's text, nor reflects Congress's choice to include limitations in the Act. However, if the Court concludes that § 108(c)(4) is ambiguous, Interior's interpretation is reasonable and therefore is entitled to deference.

Because the Tribe challenges Interior's interpretation of § 108(c)(4), the Court "first consider[s] whether Congress has directly spoken to the precise question at issue by looking to the statutory text." *Sault Ste. Marie Tribe*, 25 F.4th at 17 (cleaned up). "If the statute unambiguously resolves the question, that is the end of [the] inquiry." *Id.* The terms used in § 108(c)(4) are not defined in the Michigan Act. So, they are given "their

ordinary, contemporary, common meaning, as informed by the context of the overall statutory scheme." *Id*. at 21 (cleaned up).

Under § 108(c)(4), the Tribe may spend Fund interest "for educational, social welfare, health, cultural, or charitable purposes." § 108(c)(4), 111 Stat. 2661. The Tribe acquired the Sibley Parcel with plans to conduct Class II gaming on the property, and if permitted, Class III gaming.[2] AR 3112 & n.1. But the Tribe asserted that the acquisition satisfied § 108(c)(4), in part, because revenue generated by the planned gaming enterprises would be used for "social welfare" purposes. AR 2164–67; AR 3119.

Interior interpreted § 108(c)(4) on its face, and concluded that the purchase of the Sibley Parcel for a casino was too "attenuated" to satisfy the Act's "social welfare" purposes requirement. AR 971–72, n. 25; AR 1931 (incorporating finding). Specifically, Interior determined that the Tribe could not satisfy § 108(c)(4) by starting "an economic enterprise, which may generate its own profits, which profits might then be spent on social welfare purposes." AR 972, n. 25. Instead, the acquisition itself must be for a social welfare purpose. To explain this statutory reading, Interior drew a contrast between the Tribe's intended use of Fund interest and the purchase of land for the purpose of having a direct social-welfare effect, such as for the construction "of a school, a job training center, a health clinic, or a museum," which "may fall within the scope of § 108(c)(4)." *Id*.

Plain language and context. Interior's reading of § 108(c)(4) is consistent with the Michigan's Act's plain language and context. The statute's instruction that Fund interest

[2] IGRA divides gaming into three classes. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996). "Class II gaming" includes, with certain limitations, bingo and card games. 25 U.S.C. § 2703(7). "Class III gaming" includes casino-like games, such as blackjack, roulette, and slot machines. *Id*. § 2703(8); *see also Michigan*, 572 U.S. at 786.

can be used "for educational, social welfare, health, cultural, or charitable purposes" plainly does not include a land acquisition that will be used for an economic enterprise. Indeed, § 108(c)(4) does not state that it can be satisfied by using Fund interest for "economic development," "economic enterprises," or "gaming." "Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).

This reading also makes sense in the context of the Michigan Act as a whole. As the D.C. Circuit held, "Section 108(c) lists permissible uses for Fund interest, which necessarily excludes other uses." *Sault Ste. Marie Tribe*, 25 F.4th at 18. Considering these limitations, the text cannot encompass the Tribe's broader interpretation of § 108(c)(4). *See also* AR 210 (arguing that land acquisition cannot be bootstrapped into § 108(c)(4)).

Additionally, the "limited uses for Fund interest contrast with the more expansive uses for Fund principal." *Sault Ste. Marie Tribe*, 25 F.4th at 18. Fund *principal* can be used for "investments or expenditures," which the Tribe's Board determines "are reasonably related to—economic development beneficial to the [T]ribe" or "development of [T]ribal resources." § 108(b)(1)(A), 111 Stat. 2661. Fund *principal* can also be used if it is "otherwise financially beneficial to the [T]ribe and its members." § 108(b)(1)(B), 111 Stat. 2661. In distinction, § 108(c)(4) makes no mention of spending Fund *interest* for economic development, development of Tribal resources, or for the Tribe's financial benefit. Rather, it limits the Tribe's use of Fund interest to expenditures "for educational, social welfare, health, cultural, or charitable purposes." § 108(c)(4), 111 Stat. 2661. A "negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamden v. Rumsfeld*, 548 U.S. 557,

578 (2006). Section 108(c)(4) reflects the different ways in which Congress has specified that Fund principal and interest can be used and is "consistent with the legislative purpose" of the Act. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002).

The Tribe attempts to overcome the statutory language by arguing that the "purposes" for which the Tribe may spend Fund interest are "expansive and flexible." ECF No. 91 at 10. But § 108(c) is not "written in broad, sweeping language," as the Tribe contends. *Id.* (quoting *Consumer Electronics Ass'n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003)). Rather, the "Michigan Act *limits* the Tribe's use of Fund interest, and these limitations *circumscribe* the land that must be taken into trust by the government." *Sault Ste. Marie Tribe*, 25 F.4th at 17 (emphasis added). Indeed, Congress has specified only "*limited* uses for such interest in Section 108(c)." *Id.* at 14 (emphasis added). Hence, *Consumer Electronics Ass'n v. F.C.C.* does not support the Tribe's argument. That case considered a statute's use of "*all*" and found that it "militates strongly in favor of giving [the Act] broad application." *Consumer Electronics Ass'n*, 347 F.3d at 299. Here, Congress chose to impose restrictions in the Michigan Act and did not permit the Tribe to use Fund interest for "all" purposes.

The Tribe also makes a second textual argument, contending that § 108(c)(4)'s use of "*for*" should be read as "*with the object or purpose of*." ECF No. 91 at 10 (emphasis added). According to the Tribe, this shows that the Act's requirements can be satisfied if its "ultimate objective" or "goal" is to use any revenue made on the Sibley Parcel for "social welfare" purposes. *Id.* But the Tribe's reading of "*for*" makes little difference. As actually written, the statute does not permit Fund interest to be spent to "*generate revenue to be used*" "with the object or purpose of" or the "ultimate objective"

or "goal" of meeting one of § 108(c)(4)'s conditions. The Tribe's interpretation is still "too attenuated" to fall within the limits of § 108(c)(4). AR 972, n. 25.[3]

The Tribe's further discussion of § 108(c)(4) illustrates this point. In the Tribe's view, it is "perfectly natural to say that using money for" a revenue-creating project designed to meet a community's needs "is an investment 'for . . . social welfare . . . purposes.'" ECF No. 91 at 11. But the statute does not allow Fund interest to be expended for "an investment" that potentially might generate revenue to then be spent, in or whole or in part, on "social welfare" purposes. Congress's "choice of words is presumed to be deliberate," *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 353, and Congress did not include this sort of "intervening step" in the statute. ECF No. 91 at 11. Instead, as Interior explained, § 108(c)(4) requires a more direct social-welfare effect. AR 972, n. 25. The Tribe's expansive interpretation (ECF No. 91 at 11)—where it must *only* take a "critical step toward the goal of enabling the Tribe to provide benefits of the kind listed in § 108(c)(4)"—does not respect the Michigan Act's limitations.

Lastly, the Tribe looks to principles of Tribal self-sufficiency and sovereignty to support its interpretation of § 108(c)(4). ECF No. 91 at 11–12. But Congress created the Fund, and Congress set parameters for its use. *See Michigan*, 572 U.S. at 788 (recognizing that Tribes "are subject to plenary control by Congress"). Congress has

[3] *Mortensen v. United States* (ECF No. 91 at 10) is clearly distinguishable. There, the Supreme Court held that the Mann Act's "for the purpose of" prostitution requirement was not met because the travel at issue was "innocent recreation" "disassociated" from prostitution. 322 U.S. 369, 375 (1945). *Mortensen* provides little support for a capacious interpretation of § 108(c)(4), when the D.C. Circuit has already interpreted the Michigan Act's § 108(c) and concluded that it is limited to "distinct uses." *Sault Ste. Marie Tribe*, 25 F.4th at 15. *Cf. United States v. Torres*, 894 F.3d 305, 315–16 (D.C. Cir. 2018) (concluding that *Mortensen* did not control when the case involved a different statute that "calls for a different approach").

given the Tribe a wide range of options for using Fund principal and interest, but those options are not limitless. Nothing about § 108(c)(4) takes away from Tribal self-sufficiency or sovereignty. Rather, it gives effect to the restrictions Congress built into the Act.

Deference. As demonstrated above, § 108(c)(4)'s plain meaning and context leave Interior's reading as the only possible one. But if the Court decides that it cannot discern Congress's intent using those traditional tools of statutory interpretation, then it should still defer under *Chevron* to Interior's reasonable interpretation.

In the face of ambiguity, Interior's interpretation—as a reasonable agency interpretation of an ambiguous statute—would be entitled to deference under *Chevron* step two, 467 U.S. at 843–44. Interior acknowledges that when previously analyzing the statute, the Court stated that the "Indian canon of construction trumps *Chevron* deference." ECF No. 72 at 29; *see also id.* at 37. But Interior respectfully contends that, even where the Indian canon has some application, *Chevron* nonetheless applies.

The "Indian canon" requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Even so, the Indian canon is but one factor to be considered in determining the statute's meaning. For example, the D.C. Circuit has used "the familiar *Chevron* analysis," while still being "mindful" of the canon. *Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016). The Tribe contends that the canon should be employed over any other "normally-applicable" deference. ECF No. 91 at 13 (quoting *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006)). But when considering the interaction

of *Chevron* and the canon, the D.C. Circuit specified that *Chevron* deference "does not disappear" in that context; rather, it applies "with muted effect." *Cobell*, 573 F.3d at 812.

And, even where the canon applies, as the Court recognized, it does not cause an unreasonable interpretation to trump a reasonable one. *See* ECF No. 72 at 39 (discussing *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)); *see* 851 F.2d at 1444–45 (noting canon's application where statute can "reasonably be construed" as Tribe interprets it). The canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Indeed, courts cannot "accept as conclusive the canons on which" a Tribe relies where they would "produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." *Chickasaw Nation v. United State*s, 534 U.S. 84, 94 (2001). Here, the Indian canon cannot save the Tribe's expansive interpretation of § 108(c)(4). As described above, the Tribe's construction of the statute is not in keeping with the limits Congress imposed in § 108(c).

To the extent that the Court concludes that the Tribe's interpretation is nonetheless reasonable, the agency's superior interpretation should control, under the "muted" application of *Chevron*. Even "muted" deference is enough to elevate the agency's more reasonable interpretation here. Deference makes sense for contextual reasons as well. The Department of the Interior is the agency charged with managing Indian affairs generally, and it maintains a general trust obligation to federally recognized Tribes across the country. *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016). And the "decision to take tribal land into trust implicates an elaborate

patchwork of statutory and regulatory provisions," which Interior is responsible for considering. *Sault Ste. Marie Tribe*, 25 F.4th at 18.

Here, the Tribe's position (ECF No. 91 at 13)—which argues for the preeminence of the Indian canon over *Chevron* deference—would not benefit Tribes generally. Instead, it would elevate a single Tribe's interests over others. This is precisely the type of situation in which Interior's judgment is appropriately brought to bear, and in which deference to the agency is appropriate.

In sum, it is plain from § 108(c)(4) of the Michigan Act that Congress intended to limit the Tribe's expenditures of Fund interest under this provision for "social welfare" purposes. The statute cannot be stretched to allow the Tribe to satisfy § 108(c)(4) by acquiring land for an economic enterprise that might generate profits that the Tribe could then spend on "social welfare" purposes. And, even if the statutory term were ambiguous, Interior's reasonable interpretation reflects the limitations that Congress included in the Act, while the Tribe's interpretation does not. The Court should find that Interior correctly construed § 108(c)(4).

B. The Tribe fails to demonstrate that Interior's § 108(c)(4) determination is arbitrary and capricious

In keeping with the APA, Interior also carefully assessed whether the Sibley Parcel was acquired for "educational, social welfare, health, cultural, or charitable purposes." § 108(c)(4), 111 Stat. 2661. Interior reasonably concluded that it was not. The expenditure of potential revenue from the parcel did not satisfy § 108(c)(4), and the Tribe did not substantiate its claim that the Sibley purchase would provide a land base for the provision of services to and employment for Tribal members. The Tribe has not shown that Interior's determination is arbitrary and capricious.

As noted above, the Tribe may spend Fund interest for "educational, social welfare, health, cultural, or charitable purposes." *Id*. The Tribe asserted that the acquisition satisfied § 108(c)(4) because revenue generated by the planned gaming enterprises would be used for "social welfare purposes," or the parcel's acquisition would facilitate the delivery of services and Tribal employment opportunities. AR 2164–67; AR 3119.

Here, Interior determined that the expenditure of potential future gaming revenue from Sibley Parcel was too uncertain and "attenuated" to satisfy the Michigan Act's requirement that Fund income be spent on "social welfare" purposes. AR 974, n.25; AR 1931 (incorporating this finding). Additionally, Interior found that the Tribe did not provide evidence to support its other contentions. AR 973; AR 1932.

Potential revenue. The Tribe raises a handful of complaints regarding Interior's analysis of the Tribe's submissions (ECF No. 91 at 15–18), but none of them show that Interior's conclusion was arbitrary or capricious. For example, the Tribe disagrees with Interior's determination, arguing that "record evidence" shows the Sibley acquisition meets § 108(c)(4). ECF No. 91 at 15–16. But Interior analyzed the Tribe's submissions, allowed the Tribe to provide additional information, and considered Defendant-Intervenor Tribes arguments on § 108(c)(4).[4] Interior's conclusion that the Sibley Parcel's acquisition did not meet § 108(c)(4)'s conditions is well-supported in the

[4] *See, e.g.,* AR 973–74; AR 1931–32 (Interior's § 108(c)(4) determination); AR 3165–85 (additional submission from the Tribe); AR 448–50 (Tribe's reply arguing that § 108(c)(4) is satisfied); AR 209–210 (Defendant-Intervenor Tribes' argument that § 108(c)(4) does not apply and the Tribe has not provided any factual support to show it is satisfied); AR 1848–85 (the Tribe's summary regarding mandatory trust acquisition); AR 2160–67 (Tribe's supplemental information); AR 3010–109 (trust application).

record. And it is not appropriate for the Court to reweigh or reinterpret the evidence considered by Interior. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Tribe argues that Interior should not have treated gaming as "the ultimate reason 'for' (or 'purpose' of) purchasing the parcel." ECF No. 91 at 14. But Interior's determination is buttressed by the fact that the weight of the Tribe's submissions, which were all considered by the agency, were focused on potential *economic revenue* rather than direct social-welfare effects. For example, the Tribe's application included a Tribal resolution stating that if a gaming enterprise on the Sibley Parcel begins to generate income, 3% of the annual income will be set aside for Tribal services and 2% will be used to establish a college scholarship program. AR 3150; ECF No. 91 at 14. The Tribe also provided an affidavit from the CFO of casino operations opining that the Tribe's gaming revenue and income will continue to decline "unless the Tribe is able to acquire gaming operation[s] outside of its current markets." AR 2214. The Tribe contends that there is a "nexus between tribal gaming and the provision of tribal services" and that IGRA's restrictions on the use of gaming revenue also show that the Tribe satisfies § 108(c)(4). ECF No. 91 at 14 (internal quotation marks and citation omitted). And in its decision, Interior did acknowledge that the agency has "previously linked revenues from gaming operations to address[ing] unmet social and economic needs of tribal members" when making an IGRA determination. AR 1932, n.19 (internal quotation marks omitted); *see also* AR 834–35. But this is in the IGRA-context of the agency considering whether a gaming establishment is "in the best interest" of the Tribe. 25 U.S.C. § 2719(b)(1)(A). It does not address the question of whether the Michigan Act's requirements are satisfied "so as to trigger mandatory trust acquisition." AR 1932, n.19.

Services and employment. The Tribe also contends that Interior did not "meaningfully" respond to its statements that "the purchase would provide a land base for the provision of services to and employment for members." ECF No. 91 at 15, 17. Contrary to the Tribe's claim, Interior did not "pretend" these statements "did not exist." *Id*. at 17. Rather, the Tribe made the same points regarding § 108(c)(5), *see, e.g.*, AR 2159; AR 3118, and the agency addressed them in that context, AR 973; AR 1932. First, in the interim determination, Interior explained that "evidence" was needed to substantiate the Tribe's claim that the Sibley Parcel's acquisition "would allow for economic development and delivery of services to tribal members." AR 973.[5] Then, after providing the Tribe with an opportunity to provide such evidence—an opportunity the Tribe did not take—Interior found that the Tribe failed "to cite any evidence" to support these propositions "and without such evidence we cannot find that the requirements of MILCSA [the Michigan Act] are satisfied." AR 1932. And Interior reviewed opposing views in the record that had argued the Tribe failed to explain why it needed trust land to provide a land base for services and why the Tribe's nearby fee land would not be adequate for that purpose. AR 209–10.

The Tribe suggests that Interior cannot rely on these findings because they were addressed as part of the agency's discussion of § 108(c)(5), rather than § 108(c)(4). *See* ECF No. 91 at 17. But Interior "can consider all the evidence without directly addressing in [the] written decision every piece of evidence submitted by a party." *NLRB v. Beverly*

[5] (citing U.S. Department of Interior Memorandum: *Updated Guidance on Processing of Mandatory Trust Acquisitions*, (Apr. 6, 2012)); *see* https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf (pp. 54–60 of 100).

Enterprises-Massachusetts, Inc., 174 F.3d 13, 26 (1st Cir. 1999). Further, the Court's "task is to enforce a standard of agency reasonableness, not perfection." *Nw. Airlines, Inc. v. U.S. Dep't of Transp.*, 15 F.3d 1112, 1119 (D.C. Cir. 1994). So, an agency's failure to specifically cite an issue in one section of a decision document does not undercut its findings when it "clearly considered" the issue. *Stand Up for Cal.! v. Dep't of Interior*, 919 F. Supp. 2d 51, 69 (D.D.C. 2013).

Additionally, the Tribe argues that Interior should have accorded more weight to the Tribe's statements. ECF No. 91 at 17–18. In the Tribe's view, it should not be required to "substantiate every relevant point." *Id.* at 17. But, as the D.C. Circuit noted, "before assuming a trust obligation, Interior has the authority to verify that the Tribe properly acquired the land with Fund interest, consistent with the limited uses for such interest in Section 108(c)." *Sault Ste. Marie Tribe*, 25 F.4th at 14. Hence, Interior is not required to simply take the Tribe's word for the legality of its expenditures when Interior is asked to take title to lands that were the subject of those expenditures.

In this case, Interior examined the Tribe's application, later submissions, and § 108(c)(4) arguments, and Interior reasonably concluded that the purchase of the Sibley Parcel did not satisfy § 108(c)(4)'s "social welfare" purposes requirement. In doing so, Interior examined the "relevant" issues and provided "a satisfactory explanation" as to why the Sibley purchase was too attenuated to meet § 108(c)(4). *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Interior's § 108(c)(4) determination was neither arbitrary nor capricious, and it should be upheld.

II. The Tribe fails to show that Interior acted arbitrarily in concluding that the purchase of the Sibley Parcel did not satisfy the Act's "enhancement of tribal lands" requirement.

Interior also complied with the APA by carefully analyzing whether the Tribe provided sufficient evidence to meet § 108(c)(5)'s "enhancement of tribal lands" requirement. After examining the evidence presented by the Tribe, requesting additional information, and considering the submissions of third parties, Interior reasonably concluded that the Tribe had not satisfied § 108(c)(5). Specifically, the Tribe failed to show that the acquisition of the Sibley Parcel would make the Tribe's existing lands more valuable in either Michigan's Lower Peninsula, where the Tribe owns fee land near parcel, or in the Upper Peninsula, where the Tribe's headquarters and primary landholdings are located. The Tribe contends that Interior disregarded two of the Tribe's affidavits. ECF No. 91 at 18–20. But Interior considered the Tribe's submissions and found them lacking for good reason. The Tribe presents no persuasive reasons to find that Interior acted arbitrarily or capriciously.

The Michigan Act specifies that the Tribe may spend Fund interest for the "enhancement of tribal lands." § 108(c)(5), 111 Stat. 2661. The D.C. Circuit noted that, in order to satisfy § 108(c)(5), the Tribe must demonstrate that the acquisition of the Sibley Parcel "improves the quality or value of [its] existing tribal lands." *Sault Ste. Marie Tribe*, 25 F.4th at 21.

The administrative record demonstrates that Interior undertook a thorough examination of whether the Tribe could satisfy § 108(c)(5). Namely, Interior evaluated the Tribe's evidence, explained why that evidence was insufficient, provided the Tribe with an opportunity to submit additional evidence, considered Defendant-Intervenors

Tribes' submissions on this issue, and ultimately issued a well-considered decision detailing why the Tribe had not satisfied § 108(c)(5).[6]

In the interim determination, Interior explained that, although the Tribe's conclusory statements that the acquisition would make Tribal fee lands near the parcel or Upper Peninsula Tribal lands more valuable was consistent with § 108(c)(5)'s "enhancement" requirement, evidence was needed to support this contention. AR 973. "To conclude that a request for mandatory land-into-trust meets the requirements of the authorizing legal authority, we need more; we need evidence," the agency emphasized. *Id.*

Lower Peninsula. After Interior provided the Tribe with another opportunity to provide evidence (which the Tribe did not), Interior again analyzed whether the Sibley Parcel's acquisition would meet § 108(c)(5). AR 1931–33. Interior explained that the purchase would not "enhance" the Tribe's Lower Peninsula fee lands because there was: no supporting documentation that the Sibley Parcel would create a critical mass of lands on which the Tribe could serve nearby members; no real estate appraisals or assessments showing a resulting increase in value of the Tribe's existing lands; and no

[6] *See, e.g.*, AR 1931–33 (Interior's § 108(c)(5) determination); AR 2153–60 (the Tribe's supplemental information on enhancement of Tribal lands); AR 190–97 (Defendant-Intervenor Tribes' argument that the acquisition does not enhance existing Tribal lands); AR 440-46 (Tribe's reply arguing that § 108(c)(5) is satisfied); AR 812 (request from Interior for additional information on whether the Parcels could meet the definition of enhance as set forth in Bay Mills Indian land opinion); AR 833–37 (the Tribe's response); AR 843–849 (Defendant-Intervenor Tribes' response regarding the scope of § 108(c)(5)); AR 1744–49 (Interior's interim determination); AR 1848–85 (the Tribe's information about the parcel's location, development plans, and gaming revenues); AR 1888–89 (the Tribe's summary discussing why the parcel "enhances" Tribal lands); AR 2242–43 (explanation from Interior regarding "enhancement" and request for additional information from the Tribe); AR 3010–109 (trust application).

evidence to show how revenues generated by the parcel's acquisition would allow for development of the existing lands to provide employment and Tribal services. AR 1932.

Upper Peninsula. The agency also found that the acquisition of the Sibley Parcel would not "enhance" the Tribe's Upper Peninsula lands. AR 1932–33. In doing so, Interior noted that the Tribe's headquarters in the Upper Peninsula are "approximately 305 miles (365 miles by road) from the Sibley Parcel." AR 1933. Interior's determination was informed by the reasoning in a previous Michigan Act opinion (the Bay Mills land opinion; AR 454–69), where the land at issue was approximately 85 miles from the Bay Mills Indian Community's existing lands. AR 1932–33. Emphasizing the need for evidentiary support, Interior stated that "[i]f Bay Mills could not, without supporting evidence of a tangible increase of value, 'enhance' land from 85 miles away, then the Tribe cannot do so from more than 200 miles away without such evidence." AR 1933.

Interior also analyzed the Tribe's assertion that gaming on the Sibley Parcel would provide revenue to improve the Upper Peninsula lands. The agency concluded that the Tribe could not satisfy § 108(c)(5) by relying on "the attenuated reasoning that 1) the acquisition[] allow[s] for economic development, *then* 2) that economic development *might* generate revenue, *then* 3) that the revenue *might* be used to enhance lands in the Upper Peninsula." *Id*.

In response, the Tribe does not challenge the majority of Interior's conclusions. It argues only that Interior "fail[ed] to account for" affidavits from the CFO of casino operations and the Director of the Tribal Housing Authority. ECF No. 91 at 19–20. But the agency did not overlook these affidavits. Rather, Interior examined the affidavits and found them insufficient to satisfy § 108(c)(5). AR 1931–33; AR 2212–15; AR 2227–28. In doing so Interior explained, "[t]he conclusory statements offered by the Tribe are

not evidence." AR 1932, n.16 (citing *Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002)).

These submissions merely contained brief statements that the Tribe planned to use potential gaming revenue to make improvements to the Tribe's "existing facilities" on Upper Peninsula lands and increase "housing services." AR 2215; AR 2228. Contrary to the Tribe's claim, ECF No. 91 at 19–20, Interior explained why it considered these affidavits unpersuasive. As well as being too attenuated to satisfy § 108(c)(5), AR 1933, Interior found that: the Tribe did not offer "any *evidence of its plans* to use the gaming revenue to benefit its existing lands or its members." *Id.* (emphasis added). In the Tribe's view, Interior's statements that the Tribe submitted "no evidence" means that the agency denied that the affidavits "even existed." ECF No. 91 at 19–20. This is inaccurate. The record clearly shows that Interior evaluated the documents submitted by the Tribe and concluded that they failed to demonstrate the requisite "enhancement" of Tribal lands. AR 1931–33.

The Tribe points to several cases to suggest that Interior's analysis was arbitrary and capricious. ECF No. 91 at 20. Yet, far from demonstrating that Interior violated the APA, these cases confirm that the agency considered the evidence and reached a reasonable conclusion. The circumstances here do not present a situation where the agency received new information on a matter that was still pending and merely stated it was "not inclined to revisit [its earlier] decision." *Butte Cnty. Cal. v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010). Nor did Interior rely on portions of the affidavits, while—at the same time—"ignoring" and minimizing statements in the affidavits that did not support the agency's position. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 314 (D.C. Cir. 2018).

Here, Interior adequately supported and explained its conclusion that the Tribe failed to demonstrate that the Sibley Parcel would improve the quality or value of the Tribe's existing lands. The APA requires only that the agency's "decision minimally contain a rational connection between the facts found and the choice made." *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (cleaned up). Interior's § 108(c)(5) determination should be upheld.

III. The Tribe fails to show it is entitled to its proposed remedy.

For the reasons described above, summary judgment should be granted in favor of Federal Defendants on the Tribe's remaining claims and, as a result, the Tribe's request that the Court vacate Interior's decision, *see*, *e.g.*, ECF No. 91 at 3, should be denied. But if the Court concludes that Interior's decision was arbitrary or capricious, the remedy should be an order remanding to Interior to make a new decision on § 108(c)(4) or (c)(5). *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002). Not, as the Tribe suggests, a § 108(f) source-of-funds determination examining only "whether the Tribe used Fund interest to purchase the land at issue." ECF No. 91 at 3. If the record does not support the agency action, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Conclusion

Federal Defendants are entitled to summary judgment on the Tribe's remaining claims. Throughout the case, the Tribe has argued for a "broad, sweeping" interpretation of the Michigan Act. But the D.C. Circuit has rejected the Tribe's expansive read of the statute and held that the Act "limits the Tribe's use of Fund interest, and these limitations circumscribe the land that must be taken into trust by the government."

Sault Ste. Marie Tribe, 25 F.4th at 17. Here, Interior exercised its authority and concluded that the Tribe did not acquire the Sibley Parcel for a statutorily permissible use. Thus, it was not obligated to take the Sibley Parcel into trust. In doing so, Interior correctly interpreted § 108(c)(4) and evaluated the Tribe's submissions in compliance with the APA. The Tribe fails to show that Interior's determinations were either arbitrary or capricious, and Interior's decision should be upheld.

Respectfully submitted this 28th day of November, 2022.

TODD KIM
Assistant Attorney General

/s/Sara E. Costello
SARA E. COSTELLO
Senior Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0484
Fax: 202-305-0506
Email: sara.costello2@usdoj.gov

OF COUNSEL:
BRITTANY M. BERGER
Attorney-Advisor
Branch of Environment & Lands
Office of the Solicitor, Division of Indian Affairs
U.S. Department of the Interior