S. HRG. 107–925

# BAY MILLS INDIAN COMMUNITY LAND CLAIMS SETTLEMENT ACT

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

## S. 2986

TO PROVIDE FOR AND APPROVE THE SETTLEMENT OF CERTAIN LAND CLAIMS OF THE BAY MILLS INDIAN COMMUNITY, MICHIGAN

OCTOBER 10, 2002
WASHINGTON, DC

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APPENDIX

# BAY MILLS INDIAN COMMUNITY LAND CLAIM SETTLEMENT ACT

**THURSDAY, OCTOBER 10, 2002**

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, DC.*

The committee met, pursuant to notice, at 11:27 a.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senator Inouye.

## STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The Committee on Indian Affairs meets this morning to receive testimony on S. 2986, a bill to provide for and approve the settlement of certain claims to lands in the State of Michigan of the Bay Mills Indian Community.

[Text of S. 2986 follows:]

II

107TH CONGRESS
2D SESSION

# S. 2986

To provide for and approve the settlement of certain land claims of the Bay Mills Indian Community, Michigan.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 20, 2002

Ms. STABENOW introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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# A BILL

To provide for and approve the settlement of certain land claims of the Bay Mills Indian Community, Michigan.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ''Bay Mills Indian Community Land Claim Settlement Act''.

**SEC. 2. DEFINITIONS.**

In this Act:

(1) ALTERNATIVE LAND.—The term ''alternative land'' means the land identified as alternative land in the Settlement of Land Claim.

(2) CHARLOTTE BEACH LAND.—The term ''Charlotte Beach land'' means the land in the Charlotte Beach area of the State, more particularly described as Government Lots 1, 2, 3 and 4 of Section 7, T. 45 N., R. 2 E., and Lot 1 of Section 18, T. 45. N, R. 2 E., Chippewa County, Michigan.

(3) COMMUNITY.—The term ''Community'' means the Bay Mills Indian Community of the State, a federally-recognized Indian tribe.

(4) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(5) SETTLEMENT OF LAND CLAIM.—The term ''Settlement of Land Claim'' means the agreement between the Community and the Governor of the State executed on August 23, 2002, and filed with the Office of the Secretary of State of the State.

(6) STATE.—The term ''State'' means the State of Michigan.

**SEC. 3. ACCEPTANCE OF ALTERNATIVE LAND AND EXTINGUISHMENT OF CLAIMS.**

(a) ALTERNATIVE LAND.—

(1) IN GENERAL.—As soon as practicable after the date of enactment of this Act, and not later than 30 days after the date on which the Secretary receives a title insurance policy for the alternative land

that indicates that the alternative land is not subject to any mortgage, lien, deed of trust, option to purchase, or other security interest, the Secretary shall take the alternative land into trust for the benefit of the Community.

(2) RESERVATION.—On attaining trust status under paragraph (1), the alternative land shall become part of the reservation of the Community.

(b) LAND CLAIM.—The alternative land—

(1) shall be taken into trust under subsection (a) as part of the settlement and extinguishment of the Charlotte Beach land claims of the Community; and

(2) shall be deemed to be land obtained in settlement of a land claim within the meaning of section 20(b)(1)(B)(i) of the Indian Gaming Regulatory Act (25 U.S.C. 2719(b)(1)(B)(i)).

(c) EXTINGUISHMENT OF CLAIMS.—

(1) IN GENERAL.—As of the date of enactment of this Act, any and all claims by the Community to Charlotte Beach land or against the United States, the State (or any political subdivision of the State), the Governor of the State, or any other person or entity based on or relating to claims to the Charlotte Beach land (including claims for trespass damages,

use, or occupancy), whether based on aboriginal or recognized title, are extinguished.

(2) CONSIDERATION.—The extinguishment of claims under paragraph (1) shall be considered to be in consideration for benefits provided the Community under this Act.

**SEC. 4. EFFECTUATION AND RATIFICATION OF AGREEMENT.**

(a) IN GENERAL.—The United States approves the Settlement of Land Claim.

(b) INCORPORATION OF TERMS.—The terms of the Settlement of Land Claim—

(1) are incorporated into this Act; and

(2) shall be in full force and effect.

(c) ENFORCEMENT.—The Settlement of Land Claim may be enforced by the Community or the Governor of the State in accordance with the terms of the Settlement of Land Claim.

(d) JURISDICTION.—The United States District Court for the District of Michigan shall have exclusive jurisdiction over any action under subsection (c) to enforce the Settlement of Land Claim.

(e) PUBLICATION.—The Secretary shall publish the text of the Settlement of Land Claim in the Federal Register.

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The CHAIRMAN. I would like to express my apologies for being late, but as some of you are aware, we are deep in debate on Iraq at this moment.

I am pleased to welcome as our first witness today a great leader in the House, the Honorable Leader, Congressman Bonior.

**STATEMENT OF HON. DAVID E. BONIOR, U.S. REPRESENTATIVE FROM MICHIGAN**

Mr. BONIOR. Good morning, Mr. Chairman, and thank you for the opportunity to appear with you today. It is always good to see you and be with the committee.

I am also delighted to appear this morning with Senator Stabenow and Congressman Stupak in support of S. 2986. As always, it is wonderful to appear with constituents from my home State, which I assume you will hear from shortly.

I am the sponsor of the companion bill in the House of Representatives, H.R. 5459, because I believe this is sound legislation that provides final settlement to a land claim held by the Bay Mills Indian Community. I am pleased that our House bill has bipartisan support and the cosponsorship of Don Young. Our offices have been working closely to move the legislation forward.

S. 2986 and our House companion provide for congressional approval of the agreement reached between the Bay Mills Indian Community and the State of Michigan. In exchange for relinquishing a claim of land in Charlotte Beach, Michigan, the Bay Mills Indian Community receives land in Port Huron, Michigan which, Mr. Chairman, is in my district. The Bay Mills Indian Community is a federally recognized Indian tribe whose ancestors lived in semi-autonomous bands of Chippewa on the shores of the Upper Great Lakes in what is now the State of Michigan and the Province of Ontario. The land-swap issue has focused on the planned gaming facility that would be located in Port Huron. Mr. Chairman, the most important thing I can offer you today in my support for this legislation is that my own community of Port Huron held a referendum on this issue on June 26, 2001. The voters gave approval by a 55- to 45-percent margin. I believe we ought to heed their reasons for supporting this settlement.

Casino gaming would benefit the Port Huron community and the economy. Port Huron's unemployment rates exceed the State and National levels. I was told recently that it is up to 14 percent. The casino will be an $80 million facility creating more than 3,000 jobs in the community. It is expected to provide a $207 million boost to the local economy.

Port Huron, I would note, is the only U.S–Canadian border crossing in Michigan without a casino to compete. Residents in Port Huron have for years watched as residents of Michigan, approximately about 5,000 a day, simply cross the Blue Water Bridge with their money to the gaming facility which is located right across the bridge on the river. The planned casino in Port Huron will be a development close to the downtown area, will make efficient use of existing attractions and infrastructure in the city, and the casino will also generate more than $10 million per year in payments to State and local governments in Michigan.

I also believe it is worth noting that the Bay Mills Indian Community will benefit from the gaming casino in a way that will improve the lives of the tribal members of the larger Native American population in our State. Gaming funds are used for education. The Bay Mills is the only tribe in Michigan, as far as I know, to provide for a community college that serves the entire Indian population of the State. For housing, casino revenue has helped the tribe to provide low- interest loans to its members and the bulk buying of manufactured homes. For health care, the tribe operates a medical clinic that serves the physical and mental health needs of tribal members. For jobs and training, Bay Mills is one of the few tribes in Michigan where a majority of the workers in their casino are tribal members.

In addition to this support for community service programs, there is an existing agreement between the Bay Mills Indian Community and Port Huron for a percentage of the revenue from gaming to be set aside for social service needs of the community. I have heard from the local United Way in support of this legislation because they are pleased that there will be an increase in much needed social service programs for the residents of Port Huron because of this agreement.

I thank you again for the opportunity to appear before you today. Before I close, I want to simply acknowledge Port Huron City Councilmember Cliff Schrader. Mr. Schrader has served on the city council for eight years and has served as mayor pro tem. He has been a Port Huron resident for 51 years. Prior to his service on the city council, he served on the school board. Mr. Schrader gave me this morning a box of over 1,200 preliminary job applications from the citizens of Port Huron. In addition to the reasons cited in my comments and those of my colleagues, I add these 1,200 reasons in support of S. 2986.

I thank my chairman and colleague and friend for the opportunity to speak this morning.

The CHAIRMAN. Congressman, I just have one question, a clarification. Did you say that the United Way favors this?

Mr. BONIOR. That is correct. There is a very close relationship in the City of Port Huron between the United Way—they are a very vital part of the community, and there is going to be a set-aside for them to deal with many of the social issues that a community that has 14 percent unemployment is grappling with.

The CHAIRMAN. Thank you very much.

Now, it is my pleasure to call upon the junior Senator from the State of Michigan, the Honorable Debbie Stabenow.

## STATEMENT OF HON. DEBBIE STABENOW, U.S. SENATOR FROM MICHIGAN

Senator STABENOW. Thank you, Mr. Chairman.

First, I want to thank you personally for your patience and your willingness to take time for yourself and your committee at this very difficult time, as we are debating very weighty matters in the Senate. I appreciate your staff's help and support in focusing on this issue and allowing us this hearing today. So thank you very much for your willingness to do that.

I appreciate the opportunity to appear before the committee to discuss my bill, S. 2986, which as you know was introduced last month. S. 2986, The Bay Mills Indian Community Land Claims Settlement Act, would approve, ratify, and implement, upon approval of the Secretary of the Interior, the terms of a landmark agreement between the Bay Mills Indian Community in Brimley, Michigan and the State of Michigan. I welcome today's hearing as a forum to provide more information to the committee on the details of the land claims settlement and to hear the viewpoints from my constituents.

Mr. Chairman, I want to welcome everyone to the committee hearing today. I know there are those that are on both sides of this issue, and they are sincere individuals and we appreciate their coming and giving their input. I work closely with all the tribes in Michigan on a wide variety of issues, and I look forward to reviewing their testimony on this legislation.

Mr. Chairman, the settlement referenced in S. 2986 was reached this year after much discussion between the State of Michigan and the Bay Mills Indian Community. The agreement settles the tribe's longstanding claim to over 110 acres of land that was once deeded to the Governor of the State to hold in trust for the ancestral bands of the Bay Mills Indian Community. This land, in what is now called Charlotte Beach, Michigan was later sold for unpaid taxes and without the knowledge of the bands or consent of the State.

On the judicial front, the Bay Mills Indian Community has been unable to resolve the tribe's land claim for the tribe and the current Charlotte Beach landowners. I am sure Bay Mills executive council president, L. John Lufkins, will speak more thoroughly today on the legal aspects and the history of the tribe's efforts to remedy this land claim in the court of law. The settlement agreement of S. 2986 would extinguish the Bay Mills Indian Tribe's claims to the Charlotte Beach lands, and in turn provide them with alternative land located in Port Huron, MI.

As noted in the settlement agreement, both the Governor of Michigan and the Bay Mills Indian Community believe that resolution of the tribe's claim will lead to a clearing of the property title for the current Charlotte Beach property owners. As it stands presently, local assessors have reduced the property values of the Charlotte Beach landowners by 90 percent and clouded their property titles. The Governor of Michigan could not attend today's hearing, but I am quite confident that his representative, Lance Boldrey, will effectively convey the State's position on this bill, and its decision to settle the Bay Mills Indian Community's land claim.

Testimony this morning may assert that the Community's claim to the land in Charlotte Beach is unfounded, since some legal avenues have been exhausted. In response to that contention, I do not believe that the State of Michigan would enter into this settlement agreement or potentially others like it if a tribe's land claims were false or historically inaccurate.

Mr. Chairman, S. 2986 would provide for congressional approval of the land claim settlement between the State of Michigan and Bay Mills. As outlined in the settlement, the alternative lands provided to the tribe for the relinquishment of their claim to land are

in Port Huron, Michigan. We are pleased to have leaders from Port Huron with us today.

The voters in the city of Port Huron supported a ballot initiative last year to allow gaming in their city. This settlement outlines the mechanisms which the tribe would follow should off-reservation gaming be conducted on this alternative land. I believe a community's input is vital concerning gaming issues. My legislation deals solely with the agreement reached between the Bay Mills Tribe and the State of Michigan. I believe my Senate colleagues on the committee today should be concerned with the main issue of the land claims settlement. It is a sound and valid agreement, and I would urge that it be approved.

Thank you, Mr. Chairman, very much, and I want to thank my colleagues also—Congressman Bonior, Congressman Bart Stupak—for joining me today and for being involved in initiating this legislation in the House and sharing their testimony today.

Thank you.

The CHAIRMAN. I thank you very much, Senator.

I just have one question. What is the distance between the Bay Mills Reservation and the alternative site?

Senator STABENOW. The exact distance, I am not sure I could tell you. There is certainly some distance between Brimley and Port Huron, 300 and some miles I am told.

The CHAIRMAN. I thank you very much.

Senator STABENOW. Thank you.

The CHAIRMAN. And now it is my pleasure to call upon the Honorable Bart Stupak, Member of the United States House of Representatives. Congressman.

**STATEMENT OF HON. BART STUPAK, U.S. REPRESENTATIVE FROM MICHIGAN**

Mr. STUPAK. Thank you, Mr. Chairman, and thank you for the courtesy of allowing me to testify here today.

I want to thank Senator Stabenow for bringing forth this legislation, and Mr. Bonior for being the sponsor in the House and the work they have both done on this legislation. I hope that after this hearing today, this legislation will be marked up and will move, as I would like to see this legislation passed yet this year.

If I may, Mr. Chairman, I would submit my formal statement for the record, and let me just try to summarize, if I may.

The CHAIRMAN. Without objection, so ordered.

Mr. STUPAK. Thank you.

If I seem anxious to move this legislation, I have been in the House of Representatives now for 10 years, and I have been working on this problem since 1994. I was first contacted in 1994, not by the Native American tribes, but by the landowners. The landowners in Charlotte Beach have, as Senator Stabenow testified, 90 percent devaluation of their property because of the cloud on their title. They cannot get loans to make improvements. When they sell their property, it has to be less than the fair market value. There are many problems. Local assessors have reduced Charlotte Beach property valuation, as I said, by 90 percent. So it was the landowners that contacted me.

In 1996, Bay Mills did file litigation on their land claims to try to get back their land, or at least some equitable settlement. The Sault Sainte Marie Tribe was also involved, however they did not join in the lawsuit. A Federal judge then dismissed the lawsuit, saying the Sault Tribe was an indispensable party, and therefore the claim could not go forward. There have been other legal actions that I will let other people testify to later today.

But I have been working with the tribes, both the Sault Tribe and the Bay Mills Tribe to try to work out a solution. I introduced legislation in 1999 in the 106th Congress. I have reintroduced legislation in the 107th Congress with different boundary lines on where a possible land-swap could take place. To tell you the truth, Senator, it has taken in most of the State of Michigan based upon some treaties from 1856 I believe the year was, and a couple of other treaties. So the distance between Bay Mills and Port Huron was all part of the treaty lands that were ceded to the United States, and at one time was the claimed property of some of the tribes in Michigan. So the fact that it is some 300 miles away did not make any difference then, and I hope it does not in deliberation on this legislation.

This bill, as I said, my bill was introduced in the 107th Congress. We have not had a hearing yet in the House Resources Committee, but the new version, the one that is before us today, we are optimistic that it will move. With the sponsorship of Congressman Dave Bonior and Congressman Don Young, I am confident if we can move it through the Senate, we can get action on the House side yet this year.

The thing is, it is time to bring this logjam to an end. For almost 10 years now, we have been dealing with this legislation. We have tried different locations. We have tried different angles to please everybody. I think it is just one of these situations where not everyone is going to be happy. But because not everyone will get on board, we cannot prevent this legislation from moving forward. It is time to end the logjam. It is time to move this legislation.

Some people will say this thing will not solve anything. I totally disagree. If there is another tribe who would have the same claim as Bay Mills, let's say like the Sault Tribe, I am sure when this legislation moves, they can go back to the Governor who negotiated this and get the same kind of agreement and commitment from that Governor, Governor Engler, to reach out and resolve these land claims.

The settlement is very limited. It is a very specific solution for a localized problem in my district. It was arrived at between negotiations between the Bay Mills Tribe and Governor Engler. I thank Governor Engler for helping to resolve this problem.

I have more Native American tribes, seven of them, in my district than in the rest of the State. There are 12 recognized tribes in Michigan; 7 are in my district. I have worked closely with all of them since I came to Congress in 1993. The Keweenaw Bay Indian Community which is up in the Keweenaw Peninsula has offered a resolution of support of this bill. The Michigan Intertribal Council, a consortium of all 12 recognized Michigan tribes, has stated its support for the bill in writing. I would not support this bill if I did not believe it solved a title problem in my district, and

I do not believe this bill in any way would damage other tribes and my constituents in my district.

So Mr. Chairman, I thank you for bringing forth this hearing during this busy week and once again I would urge you to have the hearing, mark it up and move it. Again, after a decade, I think it is time to move forward with this legislation.

Thank you very much, sir.

The CHAIRMAN. I thank you very much, Congressman.

What is the status of the House bill at this moment? Have you had hearings on it?

Mr. STUPAK. We have not yet, sir.

The CHAIRMAN. Is there a possibility that the committee will consider the measure?

Mr. STUPAK. Mr. Bonior and Mr. Young have been moving it, and I am quite confident that they will have a hearing and they would move this legislation, hopefully in the same manner that this body will today.

The CHAIRMAN. Congressman Bonior, do you have any schedule that you can share with us?

Mr. BONIOR. Mr. Chairman, I do not, but Mr. Stupak is correct. We are hopeful that we can bring something to the floor in short order. A number of the leaders in the House on both sides of the aisle have been supportive of doing this. We expect that it will get done there, and we are hoping to march in lock-step with the Senate in doing it at the same time.

The CHAIRMAN. Well, I can assure you that this committee will do what it can to do the right thing.

Mr. BONIOR. Thank you.

The CHAIRMAN. I thank the Senator and Congressmen. Thank you very much.

Mr. BONIOR. We appreciate you for your time.

Mr. STUPAK. Thank you, Mr. Chairman.

The CHAIRMAN. And may I now call upon the deputy assistant secretary for Indian Affairs of the Bureau of Indian Affairs, Aurene Martin. Welcome to the committee.

**STATEMENT OF AURENE MARTIN, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR**

Ms. MARTIN. Thank you. Good morning, Mr. Chairman.

My name is Aurene Martin and I am the Deputy Assistant Secretary of Indian Affairs at the Department of the Interior. I would like to thank you for the opportunity to testify today regarding the Department's views on S. 2986, which deals with the settlement of land claims of the Bay Mills Indian Community.

S. 2986 would ratify an agreement between the State of Michigan and the Bay Mills Indian Community, settling the tribe's claim to land located in the Upper Peninsula of Michigan. While we are encouraged by the efforts of the State and the tribe to reach agreement on this important issue, the Department cannot support S. 2986 at this time. Under the terms of S. 2986, the Bay Mills Indian Community would extinguish their claim to land located in the Charlotte Beach area of Chippewa County, Michigan. In exchange for this action, the tribe would receive title to lands located in Port

Huron, MI, which is located over 250 miles from the tribe's current reservation. By the express terms of S. 2986, this land is deemed reservation land of the Bay Mills Indian Community as lands received as part of a land claims settlement, as those are defined in the Indian Gaming Regulatory Act.

S. 2986 also directs the Secretary to take those lands into trust within 30 days of receipt of a title insurance policy which shows the land is not subject to certain encumbrances.

Finally, S. 2986 incorporates the terms of the settlement agreement executed by the State of Michigan and the Bay Mills Indian Community into the Act.

Although the Department is continuing to review this legislation, we have three main concerns with the terms of S. 2986 and the incorporation of the underlying agreement. First, the Department is concerned that as part of the settlement agreement, terms are included which govern the operation of class III gaming on Indian lands. The Department, pursuant to the requirements of the Indian Gaming Regulatory Act, is required to review and approve tribal-State compacts before they become effective. Here, no such review is required under the terms of the settlement agreement, even though the operation of class III gaming is clearly contemplated and several citations are made to the Indian Gaming Regulatory Act in the body of the document. It is the Department's position that agreements regarding the operation of class III gaming on Indian lands must be included in an approved tribal-State compact, which is reviewed and approved by the Secretary as required by the Indian Gaming Regulatory Act.

Second, the Department is concerned about the precedent this legislation may set regarding the circumvention of the Indian Gaming Regulatory Act [IGRA]. By authorizing this settlement, Congress could be setting a statutory standard for the payment of class III gaming fees that a tribe may pay to the State and this could also create a dangerous opening for other parties who may wish to access Congress for legislative approval of gaming agreements in the future.

By the terms of S. 2986, the settlement agreement executed by the State of Michigan and the Bay Mills Indian Community are incorporated into the act. The provisions of this agreement include the requirement that the community pay 8 percent of net win profits to an economic development corporation created by the State in exchange for a limited geographic exclusivity. If enacted, S. 2986 would create a threshold payment that could become the minimum for any tribe who enters into negotiations for the operation of class III gaming in the State of Michigan, and could serve as the minimum amount any State would feel justified asking for in any compact negotiation.

Passage of this settlement agreement could also create an incentive for parties wishing to circumvent the Federal review process to approach Congress for legislative approval of gaming agreements. That is, parties who feel their agreement may not find favor or may not be approved by the Department would be more likely to approach Congress for a legislative solution or ratification of their agreement.

Finally, S. 2986 directs the Secretary of the Interior to place land described in the legislation into trust within 30 days of receipt of the title insurance. This would limit or entirely preclude the Department from making other reviews, including environmental reviews and consultation with State and local entities that are currently conducted pursuant to regulations governing the fee to trust process.

In closing, I would like to commend the efforts of the parties here to reach agreement on such serious and oftentimes contentious issues. However, the Department is unable to support this legislation at this time.

Again, I would like to thank the committee for the opportunity to testify and ask that my written statement be entered into the record. I would be happy to answer any questions.

[Prepared statement of Ms. Martin appears in appendix.]

The CHAIRMAN. I thank you very much, Secretary.

You have indicated that the Department cannot support this measure at this time. Does that mean that if certain amendments are incorporated, such as requiring a compact between the government of the State and the government of the tribe, pursuant to the Indian Gaming Regulatory Act [IGRA], and if the appropriate actions are taken to take lands in trust pursuant to the law—would that satisfy the Department?

Ms. MARTIN. I believe that those would address the bulk of our concerns, but we have not completed our review of the bill and the underlying settlement agreement, so I cannot tell you for sure that we would then change our position.

The CHAIRMAN. If the amendment addresses the Department's remaining concerns, would that suffice?

Ms. MARTIN. If the amendment would also address all other concerns we had?

The CHAIRMAN. In other words, would it be the policy of the U.S. Government to try to help Native Americans in settling claims?

Ms. MARTIN. Yes; that is our policy.

The CHAIRMAN. And if such settlement can be achieved through legislation, would you favor that?

Ms. MARTIN. Yes; we would.

The CHAIRMAN. And if this measure meets all of the statutory requirements that you have set forth, would that suffice?

Ms. MARTIN. I believe that it would, and we would be happy to work with the parties to resolve those issues.

The CHAIRMAN. And therefore, in your view, with such amendments, this measure would not set any dangerous precedent?

Ms. MARTIN. I think that if our concerns regarding the Indian Gaming Regulatory Act and the need for agreements which address the conduct of class III operations were addressed, that that would alleviate our concerns.

The CHAIRMAN. With those changes, should the Federal Government be a party to the settlement agreement?

Ms. MARTIN. Generally speaking, I believe that the Department would prefer that tribes and States come to agreement on their own. But in the case of land settlements, I think it is necessary for the Federal Government to be involved, and also in the case of agreements which govern the conduct of class III gaming.

The CHAIRMAN. Will this settlement agreement, as amended as you have suggested, resolve all tribal claims to land in the Charlotte Beach area?

Ms. MARTIN. I do not believe so. My understanding is that the Sault Ste. Marie Tribe also has a claim to those same lands and this settlement agreement does not address those claims.

The CHAIRMAN. If the Sault Ste. Marie Tribe came forth and was able to achieve the same type of agreement with the government of Michigan, would you support it?

Ms. MARTIN. Well, we would be generally supportive. It is our policy to try to assist tribes and States in coming to land settlements.

The CHAIRMAN. Do you happen to have suggested language for amendments?

Ms. MARTIN. Unfortunately, I do not have suggested language for amendments. We are in the preliminary stages of that review, but we would be happy to work with the parties to create such language.

The CHAIRMAN. Some of the witnesses that will follow your presentation will raise concerns about the policy of an Indian Tribe conducting gaming on lands acquired in a land settlement, but located over 250 miles away from the tribe's traditional lands. Is there a policy on such a matter?

Ms. MARTIN. The Administration does not have a specific policy regarding the distance a gaming establishment may be located from a reservation, although the Indian Gaming Regulatory Act does allow for that under section 20. I think the most analogous situation is in regard to the restoration of lands or to an initial reservation created for a newly acknowledged tribe or federally acknowledged tribe. I think that the furthest distance that we have approved for gaming for restored or initial reservation has been less than 25 miles from their aboriginal lands of the group that is involved. As for a set policy or whether we have a specific distance that we would say that is too far away from your aboriginal lands, you cannot conduct gaming, we do not have a set policy on how we would do that.

The CHAIRMAN. Assuming that this measure with the appropriate changes is adopted by the Congress and signed by the President, should amendments to this agreement be subject to approval of the U.S. Government?

Ms. MARTIN. To the extent that they might affect the land settlement or the conduct of Class III gaming, yes I believe that they should.

The CHAIRMAN. Well, I thank you very much, Madam Secretary. I have one more question. Will the enactment of this bill compromise your legal position if the Sault Ste. Marie Tribe decides to bring a claim in the Federal Court against the United States?

Ms. MARTIN. I cannot say for sure that it would. My understanding is that the United States has not certified the claim on behalf of the Bay Mills Indian Community, nor has the Sault Ste. Marie Tribe sought to pursue the land claim, so that has not been certified as well. But I think a congressional approval of this land claim settlement would provide evidence that the claim is indeed valid and could affect our legal position with regard to that claim.

The CHAIRMAN. Have there been other instances in which Indian Tribes have been able to acquire land after October 17, 1988, and use the land for gaming under the land settlement exception of the IGRA?

Ms. MARTIN. I cannot say for sure, but I do believe that prior to my tenure at the Department, the exception was used on one occasion in the late 1990's. I think that may have occurred in the State of Michigan as well.

The CHAIRMAN. So in your mind, this is a precedent.

Ms. MARTIN. There is one other time that that exception has been used, yes.

The CHAIRMAN. Ms. Martin, I thank you very much.

Ms. MARTIN. Thank you.

The CHAIRMAN. And now may I call upon the president of the executive council of the Bay Mills Indian Community of Michigan, L. John Lufkins, and the Deputy Legal Counsel to Governor John Engler, Lance Boldrey.

**STATEMENT OF L. JOHN LUFKINS, PRESIDENT, EXECUTIVE COUNCIL, BAY MILLS INDIAN COMMUNITY OF MICHIGAN**

Mr. LUFKINS. Good morning, Mr. Chairman.

The CHAIRMAN. Mr. President.

Mr. LUFKINS. My name is John Lufkins and I serve as the elected president of the executive council of the Bay Mills Indian Community.

I want to thank you, Mr. Chairman and members of the committee, for allowing me the opportunity to testify here today on S. 2986. I ask that you include my entire written statement in the record, along with other materials that the tribe has prepared for the committee.

The CHAIRMAN. Without objection, so ordered. We will make them part of the record.

Mr. LUFKINS. Thank you, Mr. Chairman.

Our tribe is one of four original tribes in Michigan that has maintained a government-to-government relationship with the United States since treaty times. This legislation is the final step in redressing a great wrong done to our ancestors over 100 years ago. Our tribe is very grateful to Senator Stabenow and to Representatives David Bonior and Don Young for sponsoring bills to settle the tribal land claims. We also want to thank our Congressman Bart Stupak for his unwavering support over the years to resolve this issue.

To give you some history, in 1855 a treaty with the United States set aside lands for our Tribe in what was then known at the Hay Lake Reserve. That area is now referred to as Charlotte Beach. However, just before the land was to be set aside by the United States, it was purchased by two non-Indians in violation of the treaty. To recover the lands, the tribe's annuities under the treaty were used to repurchase the land. No longer trusting the United States, the chiefs decided to convey the property to the State of Michigan to hold in trust for the tribe. That decision was wrong because the property was sold 20 years later for unpaid taxes. There was disbelief among our ancestors that the State of Michigan was

no more able to protect our lands from alienation than the United States had been.

Repeated complaints made by our ancestors to the United States Indian agents went unanswered. Over the next 90 years, my people did not forget this wrong. Unfortunately, we had no idea how to make it right. Our resources went to ensure our physical survival and to protect the remaining lands that we had. Like many tribes during the Claims Commission era, we focused on the accounting claims and eventually received damages, but not until legislation was enacted in 1997 to give a divisional split. I might add that Bay Mills was the only tribe in Michigan under the Treaty of 1855, was the only recognized tribe that had an ongoing government-to-government relationship. And so the claim was filed on behalf of Bay Mills and the descendants of the treaty.

Our tribe has also engaged over the years in pursuing its treaty fishing rights. The original case is now known as *United States* v. *Michigan.* Again, Bay Mills was the leader in that fight to restore our treaty rights.

Because of these battles, our tribe was unable to focus resources on the return of the Charlotte Beach lands until recently. However, our people have never forgotten the loss of these lands and we filed a claim in 1980 under the section 2415 process at that time. The United States declined to assist the tribe because when the land was lost, the State held it in trust, not the United States. This, in fact, is why we are here today. Our Federal case was dismissed in 2000. Again, we lost on technical grounds. We never had a chance to argue the merits of our claim because the Sault Ste. Marie Tribe, only recognized by the United States in 1975, never attempted to participate in the case. The tribe refused to waive sovereign immunity to be named as plaintiff. Instead, it assisted the landowners in their fight to have the case dismissed for failure to join as an indispensable party.

This effort was successful and the cloud remains on the landowners' title. As I am sure you will agree, this is a frustrating history. With this in mind, I ask your support for S. 2986. This legislation ratifies the settlement that the Tribe has reached with the State. It releases the recorded Bay Mills claim to the Charlotte Beach property by having Congress extinguish the claim. By ratifying this settlement, it will provide the tribe with alternative property that will be a substitute for the former Hay Lake Reserve, now known as Charlotte Beach.

The alternate land located in Port Huron, MI will be placed in trust by the Secretary for the benefit of Bay Mills and will be treated as land which should have been in trust for the tribe all along. The land will be used for gaming. The location of Port Huron was agreed to by the people, the State and the people of the tribe, the State and the people of Port Huron who voted, as Congressman Bonior said, in a referendum. The tribe agrees in the settlement to limit class III gaming to two facilities at its present reservation location and to one facility in the alternate land in Port Huron.

The economic benefits to the tribe and the local community will be substantial and very important to our self-determination and sovereignty goals. The settlement does not affect any other tribe.

While there may be some competitive issues, they are not new to Michigan and not a violation of any law, Federal or State.

The settlement expressly incorporates the IGRA exemption that lands taken into trust and settlement of the land claim are exempt from the ban on gaming on lands acquired off-reservation after 1988.

Bay Mills is the first Indian tribe to secure settlement of its land claim since the Act was adopted, and thus we are the first to fall within the terms of the exception. The exception is there for a reason, and we are following the roadmap established by Congress.

We would also like to express our sincere thanks to the Governor of Michigan, John Engler, for his help in achieving this creative resolution to the longstanding land claims. Without his able-bodied support, we would not have gotten as far as we have. The settlement reflects the mutual recognition of the importance of working cooperatively to eliminate old grievances and to develop mutually beneficial solutions. I am proud to have signed the settlement of the land claim on behalf of the Bay Mills Indian Community. I am not boasting when I say that this agreement should be applauded by the Federal Government as an example of what can be achieved when a State and an Indian tribe work together to devise resolutions to disputes that will benefit all citizens, both the State and of the tribe. In fact, I sincerely hope that our settlement will be used as a precedent, furthering tribes with legitimate land claims to bring their issues to the table for resolution. We can achieve more at the table than in all the courts of the land.

Again, I respectfully ask each member of the committee and of the Senate to vote yes on S. 2986. This will end the controversy that has brought pain to my people and uncertainty to the people who live at Charlotte Beach. My people have waited patiently, but with confidence that this wrong would be made right.

I thank you for allowing me to testify and I will be glad to answer any questions, or try to answer any questions you may have.

[Prepared statement of Mr. Lufkins appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. President.

Has any Federal or State court ever ruled that your community does not have a valid potential claim over the Charlotte Beach area?

Mr. LUFKINS. There has been no court that has made any ruling other than the claim is being dismissed on technical grounds.

The CHAIRMAN. So no court has ever ruled that you do not have a claim?

Mr. LUFKINS. They have never ruled that we do not have a claim. As a matter of fact, during the 2415 process, I was the administrative officer for the Bureau of Indian Affairs of the Michigan Agency when Bay Mills brought this claim. When we took it to the solicitor, the solicitor reviewed it and of course they said the land was in trust by the State; your argument is with the State; take it up with the State. It took us a long time from that point to get to this point, where we found a Governor who was willing to recognize the claim and negotiate a settlement with us.

The CHAIRMAN. As other witnesses have testified, this alternative site is not within your traditional tribal area.

Mr. LUFKINS. That is true. It is outside our geographical boundaries.

The CHAIRMAN. Section 9 of the tribal-State gaming compact requires that gaming revenues from a casino facility on newly acquired land be shared amongst all of the Indian Tribes in Michigan. Would the settlement alter the terms of the tribal-State gaming compact and render this provision unenforceable?

Mr. LUFKINS. No, sir; I do not believe it would.

The CHAIRMAN. You were here when the deputy assistant secretary testified. I asked questions as to whether she would change her position if certain amendments were made to the bill before us. Do you have any thoughts on those amendments?

Mr. LUFKINS. I had listened to your questions to the deputy assistant secretary, and while I do not agree with all of her answers, we are prepared to offer some amendments. As a matter of fact, Mr. Boldrey, along with our legal staff, prepared some amendments to be introduced in his testimony.

The CHAIRMAN. Because it was this committee, that drafted the IGRA, we are bound to make certain that the provisions of that statute are upheld.

May I now call upon Mr. Boldrey.

**STATEMENT OF LANCE BOLDREY, DEPUTY LEGAL COUNSEL TO GOVERNOR JOHN ENGLER OF MICHIGAN**

Mr. BOLDREY. Thank you, Mr. Chairman, for inviting me to testify today.

My name is Lance Boldrey and I am here on behalf of Governor John Engler, who sends his regards to this committee and his sincere thanks for moving forward with the hearing on this bill. Governor Engler also sends his thanks to Senator Stabenow and to Congressmen Bonior and Stupak for their tireless efforts on this matter.

We are here today to ask your approval of a settlement between Michigan and the Bay Mills Indian Community of a longstanding land claim. As you have already heard today, by passing S. 2986, you will send a message that this committee and the Congress encourage cooperation between States and tribes. You will also be providing clear title to innocent homeowners and economic opportunity to a depressed community.

The history that led to the Community's claim to land in the Charlotte Beach area has been thoroughly explained by President Lufkins. Litigation of the claim began in 1996 when the Community filed suit in Federal and State court. The Community's attempts at judicial resolution failed when the State suit was dismissed as untimely and the Federal suit was dismissed on the grounds that the Sault Ste. Marie Tribe of Chippewa Indians was a necessary party and the suit could not proceed in their absence.

In making that ruling, it is important to recognize that the district court did not declare the relative interests of the Sault Tribe and the Bay Mills Indian Community, but found only that the Sault Tribe had a claim that in the words of the court was, "not patently frivolous." The Sixth Circuit Court of Appeals subsequently affirmed this decision, finding that the Sault Tribe has a potential claim.

At the end of the day, no court has ever addressed the full substance of the Community's land claim. Today, the families who own land in the area known as Charlotte Beach have a cloud on their title and are unable to obtain title insurance or mortgages, leading the local township to reduce property assessments by 90 percent. Given sovereign immunity of the tribes, the landowners cannot sue to clear title, leaving congressional action as the only means to resolve claims that are having a real impact on the lives of innocent landowners.

For the past several years, the Community has worked with local communities and the State in an attempt to settle its claims. Prior efforts have failed because of impacts they would have had on other tribes. Today, though, we ask you to ratify a settlement that resolves the land claim in exchange for alternative land in an area that welcomes the Bay Mills Indian Community with open arms and in a manner that has no impact on the interests of other tribes.

The bill would extinguish the Community's land claims, direct alternative land in Port Huron be taken in trust for the community, and effectuate the settlement agreement between the Community and the Governor.

Two aspects of the bill merit further discussion and have been raised in questions this morning. First, its effects on the title of the Charlotte Beach property owners, and second, the prospect of a casino in Port Huron. First, the bill would lift the cloud on the titles of the Charlotte Beach homeowners. Some have claimed that this cloud cannot truly be lifted absent a settlement involving the Sault Tribe. However, while the Sault Tribe has asserted that it has a potential claim to the Charlotte Beach property, the simple fact is that no such claim has ever been brought. Only the Bay Mills Indian Community has a recorded challenge causing a cloud on title, and the bill would lift that cloud.

Again, the Federal Courts have not decreed that the Sault Tribe has a viable claim or adjudicated the relative interests of the Sault Tribe and the Bay Mills Indian Community. Despite this, the State is willing to enter into a settlement agreement with the Sault Tribe if it now does assert a claim. State and tribal representatives have been talking about the potential for settlement and I am optimistic and hopeful that we will resolve our differences. Of course, the State does believe that any settlement must fit the general parameters of the Community's settlement, and any resulting gaming location must be in an area where it is welcomed by local residents and where it does not have an impact on another tribe's gaming operations.

As the State continues to discuss settlement with the Sault Tribe, however, this bill should not come to a halt. The Bay Mills Indian Community has expended considerable effort and years of effort in working with local officials to garner support for this settlement, and those efforts should not be jeopardized.

Second, in addition to clearing the property titles of the families who call Charlotte Beach home, the bill will provide economic opportunity to a depressed community. Congressman Bonior's testimony amply covered the benefits for the city of Port Huron, so I would now like to turn my attention to briefly address criticism of

the bill which is based on one valid argument and several faulty ones.

The valid complaint is that the settlement agreement by its terms could be amended without the involvement of Congress. This was a drafting oversight and we suggest that the bill be amended to fix this by inserting language into the bill stating that the sentence in the settlement agreement allowing amendments without the involvement of Congress or any other party be deleted in its entirety.

I would now like to address some of the other arguments you have heard this morning. The first is that the bill would set a precedent for the use of the exception to IGRA's general prohibition on gaming on land acquired in trust after 1988, and that the land claim exception is not available here. The IGRA exception we are talking about states nothing more than that gaming can be conducted on lands acquired after 1988 if, "lands are taken into trust as part of the settlement of a land claim." That is the entirety of the provision. While it is true that no tribe currently operates a gaming facility on land taken in trust in settlement of a land claim, the clear and unambiguous language of IGRA authorizes such an operation. Nothing in IGRA suggests that the land claim exception should be artificially limited, nor would this be in keeping with the longstanding principle that statutes dealing with tribes be interpreted in their favor.

Furthermore, since 1988, there have in fact been five congressional acts directing that land be taken into trust for various tribes to settle tribal land claims. While casino facilities may not be operating on those lands today, under the terms of IGRA those lands are eligible for casinos. Also, it must be noted that the argument that you will hear later today that the section 2719 exceptions and the land claim exception should be construed narrowly was in fact advanced by the State of Michigan in recent litigation in the case of *Grand Traverse Band of Ottawa and Chippewa Indians* v. *United States Attorney in the State of Michigan.* The argument for a narrow interpretation of various exceptions was flatly rejected by that court. That court also specifically addressed the land claim exception describing it as, "unequivocal and unrestricted."

Turning to the distance argument that has been made today, there is no requirement that land be taken in trust in settlement of a land claim only in the immediate vicinity of a tribe's existing reservation. Indeed, the exception is an exception to the general rule that gaming be within or contiguous to 1988 reservation lands. While opponents later today will cite a number of cases and statutes for their claim that a distance limitation should be engrafted onto IGRA's land claim exception, those cases and statutes are utterly irrelevant to the question at hand. Virtually all of them deal with the restored lands exception, a different exception within IGRA that by definition must encompass land previously held by the tribe.

The simple fact is, there is not one single case or one word of text in either IGRA or the Indian Reorganization Act that supports finding some unexpressed geographic limitation in IGRA's land claim exception.

Finally, I would like to respond to the technical objections that were leveled against the bill by the Department of the Interior and that have also been voiced by some other opponents. It has been claimed that the settlement agreement somehow circumvents the Secretary's or the State legislature's role in approving compacts. This is simply untrue. Nothing in the settlement agreement amends the compact in any way. No provisions of the settlement agreement regulate the community's gaming activities. Sections in the agreement providing for revenue payments in exchange for limited exclusivity in the tribe's right to operate electronic gaming do not alter the compact which does not itself even include any such revenue provisions.

In the past, prior revenue sharing provisions between the State of Michigan and the Bay Mills Indian Community, as well as the State and six other tribes, were entered by a Federal court in a consent decree without Interior's involvement. That court found those provisions agreeable. Our State Court of Appeals later held that these provisions were a conditional gift, not required to be in a compact and not required to involve in any way the State legislature. Most importantly, in 2001, just last year, the State of Michigan and the Keweenaw Bay Indian Community entered into a Federal consent decree involving a casino the State contended was operating illegally. That decree contained the exact same provisions found in the agreement between the Bay Mills Indian Community and the State of Michigan. When the Department of Interior argued to the Federal court that these were compact-like provisions requiring the Secretary's concurrence, the Federal court ruled that those objections were without merit. Thus, this argument that Interior raises has been disposed of by the courts not once, not twice, but three separate times.

Second, you raised a moment ago the issue that some opponents have claimed that the settlement agreement nullifies the rights of other tribes found in section nine of their compacts. Section nine of Michigan State gaming compacts is an intertribal revenue sharing provision insisted upon by the State as a disincentive to applications to have the Secretary take off-reservation lands into trust for gaming purposes. It is aimed squarely at a different exception in Section 20 of IGRA than the exception permitting gaming on land taken into trust in settlement of a land claim. The conclusion that this section is inapplicable in this situation is bolstered by the only legal analysis performed by a disinterested party, a 1995 memorandum of the Department of Interior concluding that this compact section is triggered only when a tribe makes application to the secretary to have land taken into trust pursuant to the best interest determination exception.

Last, I would like to address the objection raised by the Department of the Interior with respect to the 30-day requirement for the Department of the Interior to take land into trust. This is a mandatory acquisition that Congress would be directing, so it does not follow the ordinary course of affairs as a discretionary acquisition under the IRA. This in essence is no different than the acquisition process currently followed and mandated by the Congress for acquisitions involving other tribes in Michigan, the Little Traverse Bay Bands and the Little River Band.

In conclusion, I hope the committee will defer to the State's negotiated choice of location for alternative lands and respect an agreement that was reached only after difficult and lengthy negotiations between two sovereign governments. To those who criticize the bill on the grounds that it creates a precedent for the use of IGRA's land claim exception, it should be said that any precedent here is wholly positive. Congress would be approving a land claim that was a settlement negotiated by a State and tribe, where the alternative lands are identified, where there is local support for gaming in an existing market, where it is in the area of the State that would have the least possible impact on other tribal gaming operations, and where the agreement requires congressional approval.

It is no wonder then that a majority of Michigan tribes either support or are silent on this bill, and I urge you to support this bill, too, sending a message to States and tribes to resolve their disputes through reasoned and principled negotiation, rather than simply resorting to the courtroom.

Thank you again for the opportunity to testify, and I would ask that my written testimony be entered into the record. I am happy to respond to any questions you might have.

[Prepared statement of Mr. Boldrey appears in appendix.]

The CHAIRMAN. Your statement will be made part of the record.

This measure, simply put, would ask the Government of the United States, Congress, and the President, to ratify an agreement that was reached by the Governor and the Bay Mills Community. Is that correct?

Mr. BOLDREY. That is correct.

The CHAIRMAN. And in that agreement, if this ratification is forthcoming, would it mean that the community can begin operating a casino?

Mr. BOLDREY. As soon as the land is taken into trust under the existing language of IGRA, that is correct.

The CHAIRMAN. Even without the usual processes requires by the act?

Mr. BOLDREY. That investigatory process has already taken place, by Interior and by the National Indian Gaming Commission. The Tribe currently operates two gaming facilities in Michigan, has already been authorized to operate those facilities and does so pursuant to an existing compact that is in the Federal Register.

The CHAIRMAN. Does the tribe operate a casino now?

Mr. LUFKINS. We operate two casinos, sir.

The CHAIRMAN. But not on the alternative land?

Mr. LUFKINS. Not on the alternative land, no sir.

The CHAIRMAN. So this is a separate casino?

Mr. LUFKINS. A separate casino.

The CHAIRMAN. And you do not think that this should be subject to the laws of the United States?

Mr. BOLDREY. This is entirely subject to the laws of the United States. It would operate under the existing compact.

The CHAIRMAN. Then if a provision is placed in this bill saying that it will be subject to the laws, you will not object to that?

Mr. BOLDREY. Not at all.

The CHAIRMAN. Would you object to the Department and the Congress having the right to approve any changes to the settlement agreement?

Mr. BOLDREY. Absolutely. That is precisely what we propose amending the bill to do.

The CHAIRMAN. And would you concur with the responses made by the deputy assistant secretary to other questions?

Mr. BOLDREY. I do have a difficulty with some of the other questions or responses she made. One concern is that inserting the Department of the Interior into essentially the settlement agreement itself I think is inappropriate in this case because the Department here has declined to prosecute this claim, despite repeated requests by the Bay Mills Indian Community. I think the agreement should stand as it has been negotiated between the two parties that have signed it.

The CHAIRMAN. Just as a matter of curiosity, I believe I know the answer, is it true that the State of Michigan has no liability for this claim, but you have initiated the settlement. Why so?

Mr. BOLDREY. That is correct. At this point, the State has no liability because the tribe's claims against the State were extinguished in State court because they were untimely filed. However, the landowners and the citizens of the State still feel a very real impact from this, and the State feels some peripheral impact from this as well because the State also is a landowner in the Charlotte Beach area so the State currently if we were to try to dispose of those lands, I think we would probably have difficulty finding a buyer.

The CHAIRMAN. As you may be aware, this committee completed its business a few weeks ago, but in order to accommodate the request made by the Senate delegation from the State of Michigan, we reopened our agenda to consider this measure. And as a result, time is of the essence. The Senate may be ajourning 1 week from today. The debate on Iraq is now going on. Would you be willing to sit with the deputy assistant secretary and work out a few amendments?

Mr. BOLDREY. Absolutely.

The CHAIRMAN. Because if the Department is opposed to it, we have almost no choice here.

Mr. BOLDREY. We appreciate that and we are certainly willing to work through this.

The CHAIRMAN. I would suggest that you have lunch with her right away. [Laughter.]

Mr. BOLDREY. Thank you, Mr. Chairman.

The CHAIRMAN. You have a free lunch coming.

I have just one question, Mr. Boldrey. I forgot to ask this. This is an agreement between the State of Michigan Michigan and the tribe.

Mr. BOLDREY. Between the Governor and the tribe, correct.

The CHAIRMAN. Why did you not have the Federal Government involved in it?

Mr. BOLDREY. Again, the Federal Government was asked numerous times to become involved in this and declined. They were asked by the tribe beginning in 1980 to become involved and to prosecute the claim. In the late 1980's and early 1990's, when this claim was

really beginning to become a current issue, it was raised to members of our congressional delegation at that time and the State attempted to get the Federal Government involved, and the Federal Government declined.

Mr. LUFKINS. And also, sir, if I may add, title to any Indian lands has to be cleared by Congress.

The CHAIRMAN. It appears from testimony that the Sault Ste. Marie Tribe may very well have a valid claim to the Charlotte Beach lands. Now, if that claim is asserted you have indicated that the Governor of the State of Michigan would be very happy to once again involve himself in bringing about a settlement. Having heard the testimony and the questions asked, how do you think you would bring about this agreement? In the same way, or with changes?

Mr. BOLDREY. I think we would have to go back, frankly, and take a look at the concerns we have heard raised today and make sure that those are addressed. I think the format that we have followed with the Bay Mills Indian Community would be the same format we would follow with the Sault Ste. Marie Tribe. That has certainly been our contemplation.

The CHAIRMAN. And so I hope you two get together right away.

With that, I thank you very much.

Mr. LUFKINS. Thank you, Mr. Chairman.

Mr. BOLDREY. Thank you.

The CHAIRMAN. And now may I call upon the chairman of the Sault Ste. Marie Tribe of Chippewa Indians of Michigan, Bernard Bouschor, and the tribal councilor and former chair of the Grand Traverse Band of Ottawa and Chippewa Indians, George Bennett.

Gentlemen, welcome.

Mr. Chairman.

**STATEMENT OF BERNARD BOUSCHOR, CHAIRMAN, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN**

Mr. BOUSCHOR. It is a pleasure to see you once again, Senator. When you mentioned the Indian Game Regulatory Act, prior to enactment we were quite actively involved with the development of that particular act that Congress ultimately approved. And we do appreciate your guiding hand in getting that process completed.

What we found over the time of the development of the act itself and our own particular efforts in trying to get a casino in an area such as Detroit, we were one of the few communities that were able to achieve the process of getting it approved through the Indian Gaming Regulatory Act process, with the Governor's approval, almost to the point where the Governor would sign it, but he choose not to at the very last. He set up a commercial gaming operation within the State of Michigan, which I think at this point would have been a more appropriate vehicle to attempt to acquire a casino in the Port Huron area.

Obviously, it is our belief that it does not comply with the Indian Gaming Regulatory Act requirements. The Senate bill, we are opposed to it under the present format. We are opposed to the settlement agreement. This does not alleviate the issue of the Charlotte Beach landowners. We have provided you written testimony from ourselves. We have also provided some testimony from the Char-

lotte Beach attorney that would indicate that they, too, are opposed to the bill itself because it does not clear up the title. It is an opportunity that I think Bay Mills was looking for an economic benefit, and thought that Port Huron would be a way to do that. We can understand and respect each tribal group's view and opinion.

We believe that Bay Mills has contrary—we are not attorneys, I am not an attorney—I have been chairman now for close to 17 years, and have been involved with tribal government for most of my adult life. As a result of that, I have seen many things that have occurred within Indian Country. I do recognize the sovereignty of each of us to agree or disagree, either on Federal legislation or in some cases how tribes view what other tribes are doing.

The reference in saying that it does not have an impact on other tribes we disagree with. We have developed a commercial casino within the Detroit area, which is a large metropolitan area, and that was built and open in November 2000. We are going through a process of looking at building a permanent facility. Obviously, with the development of other casinos in the area, it does put us at a disadvantage. The commercial casino that we built within the State of Michigan is heavily taxed, per the Michigan Gaming Regulatory Act, which we knew when we enter in it, that would be the requirement. The issues related to the particular agreement and settlement of land claims, and as a vehicle in trying to enter this bill, I think tries to find the exception within the Indian Gaming Regulatory Act, but yet there is no lawsuit that exists at this time that would have the vehicle to support this.

So really what it is is a legislative act in Congress attempting to afford the opportunity to the Bay Mills Indian Community to open a casino in Port Huron under the Indian Gaming Regulatory Act that should be more appropriately decided by the State of Michigan legislative bodies to determine if they want to amend the Michigan Gaming Regulatory Act would be more appropriate, in my view.

Again, not an attorney. I have been involved for a number of years with my distinguished gentleman to my left, George Bennett, and former chairman of the Grand Traverse Band Community. We feel that the effort to promote this in this fashion is not appropriate. We are objecting to it. We have provided you testimony. A lot of statements were made here from the Senators which I respect—Senator Stabenow, the reference to the Governor. The Governor has been actually good for Michigan, good for the tribes in developing gaming opportunities and we appreciate that; and good for generally the State of Michigan at this point. But in this case, we disagree with how this bill is being rushed through Congress. We believe that it should be reviewed extensively, affording us the opportunity to delve into a lot of the other testimony that has been provided so we can add more information to provide to you, Senator, and the committee as to our view on this particular matter.

I might point out that Charlotte Beach, which is a community next to Sault Ste. Marie, which is our home community, and Bay Mills Indian Community have a join ancestry. The Charlotte Beach and the landowners that reside in the area, many of which are our own community members put us in a somewhat difficult situation when the title issue kept cropping up, as to do we try to litigate

or fight the issue in relationship to Bay Mills' efforts to look at reason to settle that particular claim. As Mr. Lufkins did indicate, we waded in on the sign of the landowners in that particular case because we felt it was inappropriate for the community to go after this particular site. We knew the claim for over 50 years. We chose not to act upon it, because we knew the impact that it would have on our existing community members who resided in the area.

It is unfortunate that it did have some impact as to the title insurance and value of the land, but we continue to support Charlotte Beach landowners. They continue to support and are opposed to this bill as it is presented because it does not solve their problem. That is the opinion that we have. Obviously, if the State is desirous to work with us, we will attempt to resolve that issue with them.

Thank you.

[Prepared statement of Mr. Bouschor appears in appendix.]

The CHAIRMAN. I thank you very much. Before I ask any questions, may I recognize the former chair, George Bennett.

**STATEMENT OF GEORGE BENNETT, TRIBAL COUNCILOR AND FORMER CHAIR, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, ACCOMPANIED BY MATTHEW FLETCHER, ESQUIRE, STAFF ATTORNEY, GRAN TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS**

Mr. BENNETT. Thank you, Mr. Chairman.

My name is George E. Bennett. I am a graduate of Antioch University with a major in public policy. In addition to that, I cochair the International Advisory Council for Native Nations Institute at the Udall Center for Public Policy at the University of Arizona at Tucson, AZ.

My Indian name is Nii-gott Ma-Gezzi, which means "Leading Eagle." I am here as a tribal councilor and elected official of the Grand Traverse Band of Ottawa-Chippewa Indians. From 1996 to the year 2000, I honorably served as the tribal chairman of our tribal council.

We have come at the request of our tribal council to testify before the Senate Committee on Indian Affairs. Let me say, Mr. Chairman, megwetch, in our language, thank you for the honor of being before your committee today. We are honored to be here.

With that, I would also like to introduce my friend and colleague, Matthew Fletcher, who is attorney-at-law who graduated from the University of Michigan law school. He does the drafting of our legislation and our testimony today, and I would like to give him that recognition. He is also a tribal member. It is a pleasure to see you again, my friend.

Mr. Chairman, members of the committee, we wish to submit our written testimony for the record and in order to save time we would like to summarize our comments before the committee.

The CHAIRMAN. Without objection, your full statement is made part of the record.

Mr. BENNETT. Thank you, Mr. Chairman.

Mr. Chairman, it is somewhat with a heavy heart that we appear before the Senate Committee on Indian Affairs to state that our tribe opposes the enactment of S. 2986, titled the Bay Mills Indian

Community Land Claim Settlement Act, as well as H.R. 5459, its companion bill in the House of Representatives.

Mr. Chairman, although the Bay Mills Community and the Grand Traverse Band have worked together for years striving for sound and reasonable Federal policy, we cannot stand with our friends in this matter. S. 2986, if enacted, sets a dangerous and unhealthy precedent for Federal-Indian fee-to-trust policy. It would unnaturally expand exceptions to the general prohibition against Indian gaming under the Indian Gaming Regulatory Act for acquired lands after October 17, 1988, under the same law; and simply, we feel it is bad congressional policy.

Mr. Chairman, we have not come to oppose our friends, rather, to support what we feel is right. We are not here to oppose Bay Mills' attempt to establish a land claim to the Charlotte Beach properties. We fully recognize that our friends have legitimate government concerns to meet the economic and social needs of its members. Mr. Chairman, we are here to point out that we oppose congressional legislation that coopts established and predictable Federal Indian policy that otherwise prohibits an Indian tribe from opening a gaming facility 257 miles from its home territory.

We oppose the use of the settlement of an Indian land claim exception to IGRA's general prohibition against gaming on after-acquired lands where Federal liability was never established. We oppose the override of the geographic limits inherent in the Indian Reorganization Act fee-to-trust transfer statutes. Finally, we oppose the override of the geographic limits expressed in the Federal statutes creating the Bay Mills Indian Reservation.

Mr. Chairman, we have come here to make some recommendations. First, we support a study commission by your Senate committee to study and determine the Secretary of the Interior's actual past practice regarding geographic and policy limits on fee-to-trust transfers. Secondly, we support a congressional waiver of sovereign immunity regarding indispensable parties to litigate where the Bay Mills Indian Community seeks to establish a valid land claim to the Charlotte Beach properties. Third, we support a requirement that Bay Mills request a formal opinion on these facts from the National Indian Gaming Commission on the application of the settlement of land claims exception to the general prohibition against gaming on after-acquired lands.

With that, Mr. Chairman, I appreciate being here. It is good to see you. We hope you have a happy journey to South Korea.

Thank you.

[Prepared statement of Mr. Bennett appears in appendix.]

The CHAIRMAN. I thank you very much, sir.

If I may ask a question of the chairman of the Sault Ste. Marie Tribe. If your tribe is unable to resolve its claims to the Charlotte Beach lands, does the tribe intend to initiate a court action to resolve its claims?

Mr. BOUSCHOR. I would have to bring that back to the discussion of our Tribal Council. It is an item is near to us. A lot of the Community members do reside in that particular area. We have sought to protect the members in their ownership and their land values over time. The discussions of late that have started with the Governor may achieve that, but at this point in time we have to con-

tinue to express our opposition to this bill, because it does not meet the needs of the Charlotte Beach landowners.

The CHAIRMAN. If the measure before us is amended as suggested by Deputy Assistant Secretary Martin, what would your position be?

Mr. BOUSCHOR. I am not quite sure what all the amendments meant, as you might be—you are the authority on the Indian Gaming Regulatory Act. The specifics that we are concerned about are under the existing format, as I would understand a settlement of a land claim, it has to resolve all of the land claims issues, not just part of it. If they were all resolved, then that would settle that issue at Charlotte Beach and also would settle our claim, which is in part Bay Mills' claims as well. So it has to be a joint solution to resolve that issue. If the State is willing to do that, it is something that could be discussed.

The CHAIRMAN. So your claim must be part of this bill.

Mr. BOUSCHOR. I would think that would be a part of the possibility—no guarantees in that. I don't know.

The CHAIRMAN. Mr. Bennett, you made a suggestion that the Congress waive the sovereign immunity of any indispensable parties to litigation where the Bay Mills Community seeks to establish a land claim. Are you suggesting that the Congress should waive the sovereign immunity of tribal governments without their consent?

Mr. BENNETT. I would have to refer to our attorney on that issue.

Mr. FLETCHER. Mr. Chairman?

The CHAIRMAN. Please have a seat.

Mr. FLETCHER. Thank you.

The CHAIRMAN. Will you identify yourself, sir?

Mr. FLETCHER. Certainly. My name is Matthew Fletcher. I am staff attorney with the Grand Traverse Band.

It is my understanding that Congress has waived sovereign immunity on two separate occasions involving Band disputes and also their land-related disputes in situations like this, such as the Navajo-Hopi land dispute in the 1970's and also in the aftermath of the *Arkansas Riverbed Supreme Court* case.

The CHAIRMAN. Without their consent?

Mr. FLETCHER. I am not sure if it was without their consent, but if the Sault Ste. Marie Tribe is willing to proceed with a land claim or become involved in this bill, then the waiver of sovereign immunity certainly would not be necessary at that point.

The CHAIRMAN. Sovereignty is the most important aspect of the existence of Indian Nations here, and you are willing to give that up?

Mr. FLETCHER. No; absolutely not.

The CHAIRMAN. If the Congress was to waive an Indian tribe's sovereign immunity for a specific court action, do you believe that we would be setting an unhealthy precedent for the instances when someone seeks to sue an Indian tribe, without the tribe's consent?

Mr. FLETCHER. I am sorry, Mr. Chairman. As we have noted before, Congress has waived sovereign immunity for Indian tribes in two other land-related disputes. But Congress has always had the plenary power to waive tribal sovereign immunity in many of the various situations, and it has done so, and certainly against the

various tribes' consent. I mean, Federal Indian policy is replete with instances where the Federal Government waives a tribe's sovereign immunity one way or the other.

The CHAIRMAN. Chairman Bouschor, since time is of the essence as I indicated and the Senate is not going to be in session too much longer, if anything is to occur on this measure, it will have to be approved by all parties, because if the Department of the Interior says no, I do not think this committee will be able to act. Would you be willing to sit with the Bay Mills people, the Interior people, and the both of you sit with that group to come forth with some resolution?

Mr. BOUSCHOR. I would be willing to do that.

The CHAIRMAN. Because otherwise, we would be having nice discussions, and that is about it.

Mr. BOUSCHOR. That is correct.

The CHAIRMAN. So the lunch is getting bigger, Ms. Martin. [Laughter.]

In the testimony that was presented here, you suggested that Congress did not anticipate land approximately 250 miles from a reservation area being acquired in a settlement for purposes of gaming. Where do you find that intent, because I happen to have been the author of the IGRA and I believe I participated in just about every debate on this matter.

Mr. BOUSCHOR. Are you asking me?

The CHAIRMAN. Yes.

Mr. BOUSCHOR. The reference we were looking at, we were looking at the existing treaty land—treaties in which Bay Mills participated as well as Grand Traverse Band, at an area that was originally cut across the State of Michigan and did not include Port Huron within the treaties that we signed with the U.S. Government. Although there is no specific reference to distance, it has been kind of the guidance from those on the Hill that whatever happens would have to stay within that existing treaty land. Obviously, there has been some variation from that as a result of this bill presentation that did not occur when we were dealing with Representative Stupak.

The CHAIRMAN. Maybe I have been operating under a misconception, but at one time all of the lands of the United States were owned by Native Americans, approximately 550 million acres. And by treaty, you ended up with 50 million acres of land. As a result, you will find Cherokees who lived in the Carolinas having been forced to move to Oklahoma—do they not have some claim in Carolina?

Mr. BOUSCHOR. My understanding of the treaties in the lands, the answer is yes, they would have a claim to Carolina.

The CHAIRMAN. And so even if land is 1,000 miles away, if the claim is valid, is not that claim valid?

Mr. BOUSCHOR. If you can get the necessary support in order to develop some similar type of agreement with a governor, obviously that would be something that, and obviously with the delegation that is up here, they fashion some claim at settlement, that could be possible.

The CHAIRMAN. Then you do not suggest that the bill is invalid because of distance?

Mr. BOUSCHOR. I do not believe that in itself is a reason to discount the bill itself. The opposition is more than that. It is not just distance. It is factor, and I believe that you have noticed in other cases, even with the Interior, the reference to distance of taking land in trust, declaring reservations, there has been more of an effort by the Interior to restrict a lot of our opportunities to acquire land, the purpose for the land, the development of the land, and the declaration of these kind of strange statuses that the Government has imposed on our communities throughout the United States.

The CHAIRMAN. I have just been notified that we have another vote. Before I adjourn the hearing, may I suggest that all parties get together—I am saying this very seriously—to work out some sort of agreement. If you do have an agreement, have it delivered to Dr. Patricia Zell who is the chief counsel of the committee by Tuesday, noon, next Tuesday, because I think we are going to go out of session on Wednesday or Thursday. If we have an agreement that all parties can sign onto, then I will expedite and send it out. But if you cannot agree to that, I think we are spinning our wheels. Is that acceptable?

Mr. BOUSCHOR. Thank you for the direction. We will work on that.

Mr. BENNETT. Yes, Mr. Chairman.

The CHAIRMAN. And so time is of the essence. Have a good lunch.

The hearing is adjourned.

[Whereupon, at 12:53 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

### PREPARED STATEMENT OF L. JOHN LUFKINS, PRESIDENT, EXECUTIVE COUNCIL, BAY MILLS INDIAN COMMUNITY

Mr. Chairman, and members of the committee, I am pleased to be invited to present testimony on behalf of the Bay Mills Indian Community on S. 2986. I speak here today in my official capacity as president of the executive council, which is the elected government of the tribe. The legislation before you is extremely important to my people; its importance will be better understood by my description of the history of the tribe and the origin of this controversy.

The Bay Mills Indian Community is comprised of the bands of Sault Ste. Marie area Chippewa who signed treaties with the United States beginning in 1795. Its modern-day reservation is located at the juncture of the St. Mary's River and Lake Superior, in the Iroquois Point area of Michigan's Upper Peninsula, and on Sugar Island, which is just east of Sault Ste. Marie, Michigan, in the St. Mary's River Channel. The tribe is one of four in Michigan which has maintained government to government relations with the United States since treaty times. It adopted a constitution in 1936 under the Indian Reorganization Act, and established as its form of government the traditional Chippewa public forum, in which all adult members comprise the general tribal council. When in session, the general tribal council adopts the laws of the tribe. I represent a direct democracy, which votes every 2 years to select officers, known as the executive council. Total enrollment is approximately 1,500 members. It is on their behalf that I speak today.

I am also very proud to testify on this legislation, as it represents the final step in obtaining redress of a great wrong done to ancestral bands of the Bay Mills Indian Community over 100 years ago. My tribe is deeply grateful to Senator Stabenow for sponsoring the bill, and to Congressmen David Bonior and Don Young for sponsoring the companion bill in the House. I also wish to acknowledge the assistance and support that our Congressman, Bart Stupak has given to the tribe in its efforts to achieve redress.

As do many issues involving Indian tribes, this one was generated in a treaty with the United States, signed in Detroit, MI, on July 31, 1855. Article 1 of that treaty required the United States to withdraw from sale certain public lands for selection by the Indian band signatories. The first clause sets aside certain lands for the "six [Chippewa] bands residing at or near Sault Ste. Marie"; those bands are our ancestors. Among the lands set aside was the property now known as Charlotte Beach. At that time, it was called the Hay Lake Reserve.

One week before the land was withdrawn from public sale, the Charlotte Beach property was purchased by two non-Indians, Boziel Paul and Joseph Kemp on August 1, 1855. Although complaints were made to the resident Indian agent, the sale was not rescinded. In order to recover those lands, annuities received under the 1855 treaty were pooled and the Charlotte Beach lands were purchased from Boziel Paul and his wife on October 12, 1857. This acreage was the only portion of the Hay Lake Reserve that was not marshland; the remaining portion of the Reserve was determined by the Michigan Agency Superintendent to be unfit for allotment.

No longer confidant that the United States would protect their land from loss, the chiefs insisted that title to this property be conveyed to the Governor of the State of Michigan, and his successors in office, in trust for the two bands of which Shawan and Oshawa-no were chiefs. The deed was recorded in the Chippewa County, Michigan, Register of Deeds office on that same date. The property was placed on the tax rolls in 1866, and was sold in the 1880's for unpaid taxes. With the assistance of the Michigan Agency of the Bureau of Indian Affairs and at the express invitation of the three bands already there, band members relocated to the Iroquois Point reserve on Whitefish Bay of Lake Superior—which still comprises a portion of the Bay Mills Indian Community Reservation. (Members of the sixth band primarily reside on the Garden River Reserve in Ontario, Canada.)

Equally a part of my Community's history is the other reason why the bands consolidated in the Iroquois Point reserve—the loss of the fishing encampment ground at the St. Mary's Rapids in Sault Ste. Marie in 1853. The reserve had been created by an 1820 treaty, when lands were ceded to the United States to build Fort Brady. The reserve stood in the way of progress, apparently, for the engineers hired to build the first lock at the Soo determined it should go right through the reserve. The people there were thrown out of their homes by the U.S. Army, and their homes burned to the ground. Many fled to Iroquois Point. By the time the treaty giving up the reserve was signed on August 1, 1855, the encampment ground reserve was under water. The Iroquois Point Reserve received its first refugees before then.

You should be able to understand the disbelief of the Hay Lake Reserve refugees, that the State was no more able to protect their land than had the United States. Both of these stories are part of my Community's history.

My ancestors may have had to swallow the loss of the encampment grounds by signing a subsequent treaty with the United States. Twenty years later, they were less willing to resign themselves to accepting loss of their lands.

Complaints were made to the United States, but no effort was made by Indian agents to recover the land. Letters were sent to the Governor, but no response was ever received. Over the next 90 years, my people did not forget this wrong, but had no idea how to make it right. Whatever resources we had were used to ensure our physical survival, and to protect what lands remained to us.

Our efforts focused on asserting outstanding claims against the United States, resulting in Indian Claims Commission money damages judgments in Dockets 18-E and 58, and 18-R; legislation providing for distribution of those funds did not get enacted until 1997 in Public Law 105–143—and then only after Bay Mills sued the Secretary of the Interior in 1996 to compel the development of a distribution plan.

Our other main focus was to protect our rights to fish in the waters of the Great Lakes ceded in our treaty with the United States on March 28, 1836. The United States brought suit on our behalf in 1972 against the State of Michigan, and we pursued our rights in the Michigan court system. Vindication came from the Michigan Supreme Court in 1976 in *People* v. *LeBlanc.* The Federal case is known as *United States* v. *Michigan,* and following the 1979 decision upholding the rights, the United States, the State and the plaintiff tribes successfully negotiated two (2) allocation agreements; the most recent agreement was reached in August 2000. Both have received Federal funds through the appropriation process, and Congress has also provided the financial support for the tribal management of the treaty fishery since 1981.

Through these battles, the Hay Lake land claim was not forgotten by the people. We thought we would finally obtain justice in 1980, when the claim was filed with the Bureau of Indian Affairs under the so-called 2415 process. As you may remember, Congress sought to identify and correct infringements on Indian land which occurred prior to 1966, by directing the filing of trespass claims against third parties under 28 U.S.C. sec. 2415. The claim was filed in the Federal Register in 1983, but the United States ultimately declined to pursue the Charlotte Beach claim, on the technical ground that the lost land was not in trust with the Federal Government, but with the State. According to the Department of the Interior Field Solicitor, there was no obligation for the United States to seek damages on behalf of the tribe when it was not the trustee. Efforts to reverse this decision went nowhere.

As it was clear that the United States would, or could, do nothing, the task of finding a solution remained the tribe's to carry out. It became imperative to do so, as title insurance companies began to identify the land claim as an exception to the policies issued to property in Charlotte Beach. A lawsuit was finally filed against approximately 140 landowners in the Federal court in 1996; simultaneously, a separate suit was filed in the State Court of Claims against the State of Michigan and other State entities.

The Federal case was ultimately dismissed in 2000. Yet again, technical grounds were the reason. Before that, terms for settlement were negotiated with attorneys

for the landowners, under which a fund was created from contributions from the settling defendants; the contribution amount was an agreed-upon portion of the value of the property owned by each. This method of settlement was preferred by the Tribe, as it had no desire to force people from their homes, and thereby subject innocents to the same type of wrong and hardship as my ancestors endured. Any chance of carrying out the settlement ended with the litigation. To this day, the cloud remains on their title.

The basis for the dismissal of this case was not that the tribe had a baseless claim against the Charlotte Beach land; we never were given the chance to present it. The case was dismissed because the landowner defendants thought another Indian tribe might have a claim to the land, as well. That tribe is the Sault Ste. Marie Tribe of Chippewa Indians, which was recognized by the Department of the Interior in 1973. That tribe never tried to participate in the case, and its lawyer told the judge at a hearing that the Sault Tribe would not waive its sovereign immunity to be named as an additional plaintiff. Its participation in the case was limited to assisting lawyers for the landowners in their fight to have the case dismissed for failure to join an indispensable party. They were successful, and as I have said before, the cloud remains on the landowners' title. To this day, the Sault Tribe has not asserted any claim to the property in any court.

Technical grounds also defeated the Bay Mills case in State court. It was dismissed for failure to bring the case within the Michigan statute of limitations. The Michigan Supreme Court and the United States Supreme Court refused to hear our appeal earlier this year. However, the cloud still remains on title to the Charlotte Beach land.

It is with this frustrating history in mind that I ask you to carefully consider S. 2986. The legislation approves, ratifies and implements the Land Settlement agreement between the Bay Mills Indian Community and the Governor of the State of Michigan. The terms of the Settlement were negotiated earlier this year, and deserve my detailed discussion.

* The Settlement releases the claims of the Bay Mills Indian Community to the Charlotte Beach property, subject to the approval of Congress to the extinguishment of the claims.

The Settlement provides the tribe with alternate property, which substitutes for the Hay Lake Reserve. That Reserve was promised to the tribe's ancestors in solemn treaty in 1855, and it is long past time that the promise is kept. I also like to think that this alternate land finally implements the trust that my ancestors tried to confer on the Governor in 1857.

The alternate land is to be placed in trust with the Secretary of the Interior for the benefit of the Bay Mills Indian Community, thereby acknowledging its substitution for lands which should have been in trust for the tribe all along.

The alternate land is in Port Huron, Michigan. This location was agreed upon by the tribe and the Governor, because it provides significant economic advantages to the area and to the tribe, and is supported by popular vote of the people of Port Huron. This determination is entitled to deference by Federal policymakers.

The Settlement requires the tribe to limit its gaming facilities to two (2) in Chippewa County and the alternate land location. In the absence of the Settlement, the tribe may operate as many class III gaining facilities as it chooses.

The Settlement requires the tribe to provide a proportion of its electronic gaming revenue to the State. The tribe had agreed to do so under a Consent Decree entered in Federal court in 1993, but that obligation ended under its own terms in 1997. The Settlement thus reinstates the prior status quo.

The Settlement expressly upholds the terms of the tribal-State gaming compact executed on August 20, 1993, and published as approved in the Federal Register on November 30, 1993. The State agrees not to seek renegotiation of its terms until 2032. The parties thereby maintain stability in the conduct of gaming by the tribe for a significant period of time—which is a major goal of both tribal and State governments.

The Settlement enables the tribe to establish long-term goals and objectives to provide employment opportunities for its members, diversify its economic base, expand its governmental services in the areas of health, environmental stewardship, adequate housing, and education. Without the Settlement, member reliance on the treaty fishery for income will continue to require periodic, and contentious, allocation disputes with State-licensed fishers and the members of other treaty tribes.

The Settlement and S. 2986 do not affect the rights of any other tribe—in Michigan or elsewhere—whether to land, resources, or economic opportunities. If any other land claim exists, the claimant tribe is free to pursue it. To any concern about additional competition, I must point out that no Indian tribe has a right under Federal law or policy to be guaranteed a particular market share of available cus-

tomers. Under the free enterprise system, competition generates innovation and creation of a better product.

The Settlement and S. 2986 implement an express exemption to the prohibition in the Indian Gaming Regulatory Act of gaming on lands acquired after October 17, 1988. That exemption is for lands obtained in settlement of a land claim. Nothing in the legislative history of the Act, or its implementation by the Bureau of Indian Affairs and/or the National Indian Gaining Commission, establish criteria which this Settlement violates. Bay Mills is the first Indian tribe to secure a settlement of its land claim since the act was adopted, and therefore the first to fall within the exception's terms.

Credit for this creative and advantageous resolution of the Bay Mills Land Claim must go to Governor John Engler of Michigan. Although it was not easy, the Land Claim Settlement was achieved through the mutual recognition of the importance of working cooperatively and respectfully to eliminate old grievances and to develop mutually beneficial solutions. As a further benefit, the State and tribe have created a process by which other, and equally important and difficult, issues can be identified and addressed through negotiation.

I am very proud to say that I signed the Land Claim Settlement on behalf of the Bay Mills Indian Community. I am not boasting when I say that this agreement should be applauded by the Federal Government—in all three of its branches—as exhibit No. 1 of what can be achieved when a State and Indian tribe decide to "bury the hatchet" and devise outcomes to disputes which benefit the citizens of the State, the members of the tribe, and their representative governments.

I hope that the Land Claim Settlement is precedent for other Indian tribes and states to bring their disagreements to the table. I think that they will find that they can achieve more in that manner than fighting in the courts or in the halls of Congress. But all the efforts of my tribe and the State negotiators will be for nothing if Congress does not exercise its plenary power and approve the Settlement by enacting S. 2986. As the duly elected spokesman for my people, I ask each member of the committee to vote favorably on this bill. I ask each member to end this controversy, which has brought pain to my people and uncertainty to the people who have taken their place at Charlotte Beach. I ask each member to right a wrong that was done before any of us were born, but still lives on today. My people have waited patiently and with confidence that this wrong would be made right. Do not make their wait in vain.

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# THE BAY MILLS INDIAN COMMUNITY CHARLOTTE BEACH LAND CLAIM SETTLEMENT S. 2986

## Comments of the Bay Mills Indian Community Submitted in Respectful Response to the Testimony Offered by The Grand Traverse Band of Ottawa and Chippewa Indians

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| 3 | GTB believes the distance between BMIC's current reservation and the proposed replacement lands is too great, and that as such it is inconsistent with federal Indian policy. | 1. There is in fact no articulated federal policy whatsoever imposing geographical limits on lands obtained in the settlement of land claims (no case law, no solicitor's office opinion, no legislative history). The geographical limits described by GTB have always been applied in the context of the "restored lands" exception (discussed in more detail below), which is not applicable to the Charlotte Beach settlement.<br><br>2. Indeed, in other situations the Department has allowed tribes to take land into trust for gaming purposes through the 2-part determination (best interests of the tribe + not detrimental to the surrounding community). For example, through this process the Department accepted land into trust for the Forest County Potawatami Community of Wisconsin which was located about 200 miles from the tribe's reservation; the Department also determined that it was willing to take land into trust for the Sokagoan (Mole Lake) |

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| | | Chippewa, the Red Cliff Chippewa and the Lac Couerte Oreilles Ojibwa Tribe which was in at least one case more than 200 miles (driving distance) from their home reservations when it agreed to take into trust land in Hudson, Wisconsin (though the Govenor never concurred in the Secretary's determination).<br><br>3. Frankly, the two-part determination process, which includes the direct input of the governor of the state, is much more directly analogous to the "settlement of a land claim exception" than is the "restored lands exception," because in both the two-part determination process and in the land settlement process, a consensus has been reached with the governor. In contrast, in the restored lands situation, the state/governor have no input into the Department's decision-making.<br><br>4. Even if there were such a general policy requiring geographical proximity for settlement lands, Congress exercises plenary authority over Indian matters and may act well within its discretion to enact legislation that deviates from the policies otherwise set forth under the IRA or IGRA. Examples of congressional such deviations from either or both statutes are far too numerous to catalogue here. See, e.g., Passamoquoddy Tribe v. State of Maine, 158 F.3d 1335, 1341 (D. Maine 1995) "Finally, in examining a provision in the Catawba Tribe Settlement Act of 1993 ... that explicitly exempts the Catabwa Tribe from [IGRA], the Fifth Circuit found that there was a 'clear intention on Congress' part that the [Gaming Act] is |

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| | | not to be the one and only statute addressing the subject of gaming on Indian lands." See also the recent Torres-Martinez land claim settlement, which sets out a process for acquiring replacement lands for the tribe which is wholly outside the process usually followed for land acquisitions under the Indian Reorganization Act. |
| 3, 10, fn 23, 11 | GTB believes that a "federal liability" for the Charlotte Beach land claim has never been established.<br><br>GTB further argues that the "settlement of a land claim" exception should apply "where liability or potential liability has been found against the federal government ...[where there are] violations of the Non-Intercourse Act (e.g., Eastern Land Claims)" and then GTB cites situations several land claim settlements as examples, including the Maine Indian Land Claims Settlement Act; Rhode Island Indian Land Claims Settlement Act; Connecticut Indian Land Claims Settlement Act).<br><br>GTB further states, "we | 1. There simply never has been any requirement ever articulated by any statute or any federal court to the effect that there must be a "federal liability" in order for the resolution of a land claim to qualify for the "settlement of a land claim exception" under IGRA.<br><br>2. To the contrary, the "classic" land claims cases are those brought by the Iroquois tribes based on Non-Intercourse Act claims in New York (see e.g. County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985)); there is no "federal liability" in any one of the seven ongoing New York land claims, rather, in each of those cases the United States has intervened on behalf of the Iroquois tribes against state and county landowners.<br><br>3. **The Bay Mills Indian Community's *Charlotte Beach claim* is a Non-*Intercourse Act claim***, just as are the New York and other eastern land claims, and as such the settlement of the Charlotte Beach claim is entitled to the same deference given to the settlement of other Non-intercourse Act claims. We trust that GTB is not seriously suggesting that lands acquired by the Iroquois |

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| | believe the land claim settlement exception in section 2719(b)(1)(B)(i) applies only where federal liability or potential liability is established." | in settlement of their land claims would not be eligible for this exception simply because their lawsuits do not include the United States as a defendant.<br><br>4. The land claim settlements upon which GTB relies in making its point that the federal government must have some liability are all settlements that included federal recognition questions. In those cases, the federal government's liability stemmed from the recognition issues rather than from the land claim issues. |
| 4 | GTB asserts that there are "geographic limits" inherent in authority granted to the Secretary in section 5 of the Indian Reorganization Act's fee-to-trust provision (25 U.S.C. section 465) | 1. There is not a single sentence or phrase in Section 5 of the Indian Reorganization Act which supports the assertion that the IRA imposes geographical limitations on the Secretary's authority to take land into trust for Indians.<br><br>2. Indeed, there are several instances in which the Department has acted upon authority granted by the IRA to take land into trust a tribe well outside the tribe's traditional reservation land base. Two gaming-related examples already have been discussed here (Forest County Potawatomi and the Mole Lake/Red Cliff/Lac Courte Oreilles Hudson acquisition); in addition the Department has taken remote lands into trust in the non-gaming context (e.g., it recently accepted trust title to land in News Mexico for an Oklahoma tribe).<br><br>3. **Perhaps more importantly, from neither a *policy standpoint nor a legal standpoint is*** |

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| | | ***the IRA even implicated in the proposed legislation.*** As with most land claim settlement legislation, the Charlotte Beach legislation itself provides the authority to the Secretary of the Interior to acquire trust title for the replacement property; the Indian Reorganization Act is not in any way implicated. (It should be remembered that the IRA simply provides the Secretary with general discretionary authority to take land into trust; when Congress itself is directing the land acquisition, it does so in separate legislation that specifically sets forth Congress' requirements for that particular acquisition. Examples of Congressional directives instructing the Department to accept trust title to lands that are distant from the tribe's main reservation are not uncommon. See, e.g., Congress' directive that the Secretary acquire trust lands for Kickapoos living in Texas even though the main body of that tribe was located in Oklahoma. 25 U.S.C. § 1300b-11 et seq. |
| 4 | GTB supports the concept of a Congressional Study to review Interior's "actual and past practices" regarding geographic and policy limits on fee-to-trust transfers. | No other tribal land claimants have been subjected to this requirement and there is no good reason in law or policy to now impose such a requirement on the Bay Mills Indian Community. |
| 4, 20 | GTB supports a waiver of sovereign immunity regarding any indispensable parties to | GTB appears to be advocating that Congress waive the sovereign immunity of another tribe. Congress should respect other tribes' right to be immune from suit rather than |

| GTB Testimony Page No. | Grand Traverse Band Comment | Bay Mills Indian Community Response |
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| | allow Bay Mills to resolve these issues in court. | arbitrarily waive one tribe's immunity at the request of another. |
| 4 | GTB wishes to require that BMIC obtain an Indian lands opinion from NIGC. | An Indian lands opinion from NIGC is premature at this point because the land claim settlement has not been ratified by Congress. Such opinions are provided by NIGC only after the Tribe is in possession of the land at issue – NIGC does not provide opinions on the validity of pending land claims. An Indian lands opinion from NIGC would be appropriate only after the settlement of the claim has been ratified by appropriate legislation and after the replacement lands have obtained trust status. |
| 7 | GTB compares itself and BMIC, finding that they are in the same position, and accordingly insisting that BMIC should be held to the same "restored lands" standards as was GTB at its Turtle Creek site. | 1. The lengthy comparison between Grand Traverse Band's situation and that of the Bay Mills Indian Community is very misleading. The fact is that Grand Traverse is a tribe that was once recognized, subsequently terminated, then again recognized through the Federal Acknowledgement Process. As such, it had an opportunity as a "restored tribe" to obtain lands under IGRA's "restored lands" exception; GTB further had the opportunity to develop an initial reservation upon which it could game under the IGRA exception allowing gaming to take place on the "initial reservation of a tribe acknowledged by the federal acknowledgement process."<br><br>2. Bay Mills was organized under the Indian Reorganization Act in the 1930s, and never thereafter terminated. Hence Bay Mills does |

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| | | not benefit from access to either the restored lands exception or the initial reservation exception. Had BMIC not been illegally dispossessed of its Charlotte Beach lands in the mid-19th century, it would have the opportunity to game on those lands today.<br><br>3. The only way to make Bay Mills whole for that loss is to provide replacement lands which will be treated (through the settlement of a land claim exception) as if they had been acquired in trust before the enactment of IGRA in 1988. Cf. the recent Torres-Martinez land claim settlement, in which that tribe's replacement lands will be treated as if they had been acquired in 1909 (the date the tribe's original lands were lost). |
| 9 | GTB insists that S. 2986 equates to a "significant amendment" both to the Indian Reorganization Act (giving the Secretary authority to take land into trust) and the Indian Gaming Regulatory Act (governing Indian gaming). | S. 2986 cannot reasonably be characterized as amending either the Indian Gaming Regulatory Act or the Indian Reorganization Act. To the contrary, it is not at all uncommon for Congress to, as it is doing in S. 2986, amend **the applicability** of those Acts as they relate to specific tribes. See, e.g., 25 U.S.C. 1300k-4 (re: the IRA, directing Secretary of the Interior to acquire real property in Emmet and Charlevoix Counties for the benefit of the Little Traverse Bay Bands;) and 25 U.S.C. § 941/ (re: IGRA, providing that state law shall govern gambling on the Catawba Indian Reservation). |
| 10 | "Unlike previous land claim settlement acts, | It is unclear what GTB alludes to here. In the vast majority of instances in which Indian |

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| | Congress is not a party to the negotiations to the Settlement Agreement[.]" | land (and water) claims have been settled through an Act of Congress, the parties themselves have reached consensus on a settlement, and then brought that settlement to Congress for ratification. It is extremely unusual for Congress itself to be involved in settlement negotiations. See, e.g., Congressional Research Service Report from the late 1990s regarding the Cayuga and other Iroquois land claims. |
| 11-13 | GTB discusses, at length, the requirements of the "restored lands" exception, on the theory that those requirements are also applicable to the "settlement of a land claim" exception, including the "restored lands" requirements that there be a historic nexus between the Tribe and the replacement lands;<br><br>GTB further concludes that "Congress could not have imagined that an Indian Tribe would settle a land claim with a state defendant in exchange for the right to game on lands far from the boundaries of Tribe's reservation or territory." | 1. As discussed previously, there is no basis for concluding that the geographical nexus required for a "restored lands" finding is or should be applicable to replacement lands acquired in settlement of a land claim. Indeed, that position is counterintuitive to a plain reading of those two exceptions. The courts (and Interior) will require that "restored" lands in fact be "restored" in some way, meaning that the lands in question must at one time belonged to the tribe, thereafter have been lost, and then subsequently restored. See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, et al. (Grand Traverse I), 46 F. Supp 2d 689 (W.D. Mich. 1999), and Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, et al., (Grand Traverse II) No. 1.96-CV-466, slip op. (W.D. Mich. April 22, 2002). |

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| | | 2. The settlement of a land claim, to the contrary, represents a contractual agreement among parties wherein the moving party (the tribe) agrees to release claims against the defendant party (usually the state and individual landowners) in return for receiving something of value. There is no inherent reason why the "something of value" obtained in return must have a geographical nexus to the lands which give rise to the claims. **Indeed, public policy *in most instances would warrant against such a geographical nexus***, because as a practical matter most lands which are the subject of land claims have been subsequently settled by non-Indians. Public policy is well served, then, by allowing tribal plaintiffs to accept alternative lands which do not interfere with the continued use and occupancy of the subject lands rather than forcing ejectment of the non-Indians living there. See also, Solicitor's Opinion, Sept. 19, 1997, "re: Pokagon Band of Potawatomi Indians," "no legislative history explains the 'restored' lands provision of Section 20. The other exceptions to Section 20, however, indicate a congressional intent to 'grandfather' certain lands acquired after IGRA ... For example, the provision excepting land acquired through settlement of a land claim treats the land as though it were held in trust for Indians in 1988." |
| 14 | GTB concludes, "[w]e believe that Congress intended the settlement of a land claim exception in | 1. GTB misreads the plain language of the statute. Section 2719(b)(1) explicitly provides that the restrictions of 2719(a) do not apply whenever the provisions of |

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| | [section] 2719(b)(1)(A), which expressly provides a whole procedure including consultation with other affected state and tribal parties and independent determinations by the Secretary of the Interior with the concurrence of the state governor in compliance with the law of that state." | either subsection (A) **or** subsection (B) are satisfied. The requirements of consultation with other States and tribes is only a requirement of subsection (A). GTB's argument is contrary to the plain language of the statute and accordingly should be rejected. Indeed, if the requirements of subsection (A) applied to the categories of lands in subsection (B), GTB's own restored lands would not be validly held in trust because the acquisition of those restored lands did not comply with the requirements of Subsection (A).<br><br>2. In addition, as discussed earlier, the two-part determination process of Subsection (A), which includes the direct input of the governor of the state, is in any event much more analogous to the "settlement of a land claim exception" than is the "restored lands exception," because in both the two-part determination process and in the land settlement process, a consensus has been reached with the governor. Hence, though not required by IGRA, BMIC in fact already has garnered the "concurrence" of the governor by virtue of the fact that the state has entered into this settlement agreement, and by the fact that the state fully understands the import of the replacement lands provision of S. 2986. |
| 17 | "Ironically, if Congress enacts S. 2986, a new | 1. The consensual settlement of a century-and-a-half old land claim can hardly be |

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| | removal policy will be created, moving the Bay Mills Indian Community south and east, far from their ancestral homeland. ... The federal government is no stranger to imposing its own notions of private property onto Native Americans. It has been doing so for hundreds of years and S. 2986 marks no drastic change." | equated with the devastatingly destructive federal removal policies of the nineteenth centuries. Unfortunately this argument hardly warrants a serious response.<br><br>2. Further, the federal government can hardly be said to be "imposing its own notions of private property" here. BMIC, of its own volition, has entered into this settlement agreement, which it now asks Congress to ratify. There is no "top down" coercion from the federal government here. |
| 21 | "S. 2986 ratifies a land claim settlement in which no court has validated the underlying land claim." | Federal legislation is often used to ratify land claim settlements where no court has "validated" the land claim. See, e.g., 25 U.S.C. § 1775(a)(5) (settlement of Mohegan Nation land claims in which Congress declared that there was a pending lawsuit involving Indian claims to certain lands); and 25 U.S.C. § 1750 (settlement of pending lawsuit filed by Miccosukee Tribe). **Indeed, there would be no need for a *settlement or federal legislation if a tribe's land claim were fully adjudicated.*** |
| 21 | "S. 2986 constitutes an undisciplined expansion of the Indian Reorganization Act's geographic limitations upon fee-to-trust transfers." | 1. As is discussed in more detail earlier, the Indian Reorganization Act simply does not contain a geographic limitation upon fee-to-trust transfers. |

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| | | 2. Further, as discussed previously, the IRA is not in any way implicated by the proposed legislation settling the Charlotte Beach land claim. |
| 23 | S. 2986 sets a precedent where any non-federal defendant to an Indian land claim could Settle the claim with an Indian tribe even where no federal liability is proven and utilize the land claim settlement exception in sham transactions."<br><br>And, "allowing Bay Mills and the State of Michigan to invoke a federal remedy for an Indian land claim in which there is no federal liability establishes an unprincipled precedent." | 1. This "worse case scenario" is and should be of real concern to both Congress and the Department of the Interior. It is for this reason that the Bay Mills Indian Community agrees with the 1999 opinion issued by the Office of the Solicitor to the effect that federal legislation is a prerequisite to the applicability of the "settlement of a land claim" exception. See November 18, 1998 Opinion from the Associate Solicitor for Indian Affairs to the Director, Indian Gaming Management Staff, Re: 25 U.S.C. § 2719(b)(1)(B)(i) 'settlement of a land claim' under the Indian Gaming Regulatory Act.<br><br>2. In this case the parties are asking for Congressional ratification of their proposed settlement. The parties understand and agree that such ratification is a prerequisite to the applicability of the "settlement of a land claim" exception.<br><br>3. Congressional ratification, by definition, protects against the kind of sham or collusive transactions that are the subject of GTB's concerns. |
| 25 | "S. 2986 Contravenes | 1. S. 2986 is fully consistent with the Indian |

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| | Federal Indian law and creates a significant expansion to the exceptions to the general prohibition on Indian gaming on after-acquired Lands."<br><br>And, "Public policy, federal Indian policy, and federal case law is overwhelmingly arrayed against construing land claim settlements in the manner prescribed by S. 2986." | Gaming Regulatory Act and the federal case law construing land claim settlements. It is common for federal legislation to extinguish tribal claims to certain lands in exchange for the establishment of tribal lands in other areas. See, e.g., 25 U.S.C. § 1750c(4) (providing for the transfer of Florida lands from the State of Florida to the United States in trust for the Miccosukee Tribe).<br><br>3. There is no justification whatsoever for saying that S. 2986 "creates a significant expansions to the exception to the General Prohibition on Indian gaming on after-acquired lands." To the contrary, this sort of consensual, Congressionally-ratified settlement is exactly was intended by the framers of IGRA when they constructed the "settlement of a land claim" exception. The whole point of the exception is to place tribes in the position in which they would have been in 1988 had their lands not been illegally taken from them; further the BMIC promotes the policy goal of not ejecting current occupants from the illegally obtained lands. |
| 27 | GTB says that "Congressional policy behind the enactment of the IRA would also be undermined by the passage of S. 2986" because, as we understand it, GTB takes the position that section 5 of the IRA was intended to serve the sole purpose | 1. As discussed in significant detail in previous sections, the IRA simply is not implicated in any way by the proposed legislation.<br><br>2. Even if the IRA were so implicated, there is no basis on which to take the position that the discretionary authority to take land into trust provided by the IRA was limited to acquiring trust title only to lands |

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| | of restoring reservation land bases that were destroyed during the allotment era. | with which the subject tribe could prove an historical nexus. If that were the case, there would be no authority to acquire land for tribes which have been removed from their traditional homelands. |
| 28 | GTB asserts that "the intersection of the IRA and IGRA creates a sound and predictable public policy that requires Class III gaming to be conducted on or near Indian reservations and Indian Country. | As discussed in more detail above, Congress frequently amends the IRA/IGRA scheme in the context of individual settlements, recognitions, and restorations. The fact that it would again tailor a land acquisition provision for this settlement can not in any manner be said to set some sort of precedent, and certainly cannot be said to interfere with the existing IRA/IGRA framework which otherwise remain in place. |
| 29-31 | GTB cites to several cases dealing with the "restored lands" exception as authority requiring that there be some geographic limitation on lands acquired in settlement of a land claim. | As is discussed in much more detail above, the court decisions relied upon by GTB are related to the "restored lands" exception, and therefore are entirely inapplicable to the "settlement of a land claim" exception. |

October 10, 2002

SENATE COMMITTEE ON INDIAN AFFAIRS

**PREPARED STATEMENT OF GEORGE BENNETT, COUNCILOR AND FORMER CHAIR, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS.**

## I. Executive Summary.

My name is George Bennett and I am a Tribal Councilor, an elected member of the Grand Traverse Band Tribal Council. From 1996 to 2000, I was the elected Chairperson of the Tribal Council. I would like to express my sincere gratitude for the opportunity to testify in this matter on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians and the Grand Traverse Band Tribal Council.[1]

Mr. Chairman, it is with somewhat of a heavy heart that I appear before the Senate Committee on Indian Affairs to state that the Grand Traverse Band of Ottawa and Chippewa Indians opposes the enactment of S. 2986, titled the Bay Mills Indian Community Land Claim Settlement Act,[2] and H.R. 5459, its

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[1] Hereinafter "Grand Traverse Band" or "GTB."
[2] Hereinafter "S. 2986."

companion bill in the House of Representatives.[3] Although the Grand Traverse Band and the Bay Mills Indian Community[4] have worked together for decades, striving for a sound and reasonable Federal Indian policy, we cannot stand with our friends in this matter. S. 2986, if enacted, sets an unhealthy precedent for Federal Indian fee-to-trust acquisitions policy, would unnaturally expand exceptions to the general prohibition against Indian gaming on lands acquired after October 17, 1988, and is simply bad Congressional policy.

The Indian people of Michigan are known as the Anishinabeg, a word that in its most fundamental sense means "people of good intentions."[5] We know that the people of the Bay Mills Indian Community[6] have nothing but good intentions in their hearts by asking Congress to approve S. 2986, but the Grand Traverse Band must respectfully disagree.

Perhaps it is instructive to discuss first what the opposition of the Grand Traverse Band is not.

- The Grand Traverse Band does not oppose Bay Mills' attempt to

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[3] Though the text of House Bill 5459 is slightly different that S. 2986, this Prepared Statement will treat them as having the same meanings and will directly refer only to S. 2986. However, all comments made in this Prepared Statement apply to House Bill 5459 as well.
[4] Hereinafter "Bay Mills" or "BMIC."
[5] Basil Johnston, OJIBWAY CEREMONIES 6 (1982).
[6] Hereinafter "Bay Mills."

improve the economic situation for its people.

- We do not oppose Bay Mills' attempt to establish a valid land claim to the Charlotte Beach properties.
- We do not oppose S. 2986 on the basis that a Port Huron casino would detrimentally affect our own gaming revenues.
- We do not oppose a Port Huron casino as an attempt to circumvent Section 9 the 1993 Compact between the State of Michigan and the seven Michigan Indian Tribes that would require revenue sharing in the event a Michigan Tribe commences gaming in accordance with 25 U.S.C. § 2719(b)(1)(A).
- We recognize that Bay Mills has legitimate governmental concerns to meet the economic and social needs of its members.

What the Grand Traverse Band opposes is the effect S. 2986 would have upon Congressional policy and Federal Indian policy in the context of the Indian Reorganization Act and the Indian Gaming Regulatory Act.

- The Grand Traverse Band opposes Congressional legislation that co-opts established and predictable Federal Indian policy that otherwise prohibits an Indian Tribe from operating a gaming facility 257 miles away from its home territory.
- We oppose the utilization of the settlement of an Indian land claim exception to the Indian Gaming Regulatory Act's general prohibition against gaming on after-acquired lands where federal

liability was never established.

- We oppose the override of the geographic limits inherent to the Indian Reorganization Act's fee-to-trust transfer statute.
- We oppose the override of the geographic limits expressed in the federal statute creating the Bay Mills Reservation.

The Grand Traverse Band has numerous suggestions and proposals to place on the table for this Committee to consider.

- The Grand Traverse Band supports a study commissioned by this Committee to study and determine the Secretary of Interior's actual past practice regarding geographic and policy limits on fee-to-trust transfers.[7]

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[7] A substantial effort has already been made by the previous administration to establish clear guidelines regarding off-reservation acquisitions. See Acquisition of Title to Land in Trust, Final Rule, 66 Fed Reg 3452, 3455 (Jan. 16, 2001) ("[W]e will accept title to land in trust outside a reservation or outside an approved TLAA only if the application shows that the acquisition is necessary to facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection and that meaningful benefits to the tribe outweigh any demonstrable harm to the local community."). However, Neal A. McCaleb, Assistant Secretary for Indian Affairs, withdrew these rules on November 9, 2001. See Acquisition of Title to Land in Trust, Withdrawal of Final Rule, 66 Fed. Reg. 56608. The final rules from the regulation adopted in 1995 remain in effect. See Land Acquisition (Nongaming), Final Rule, 60 Fed. Reg. 32874 (Jun. 23, 1995) and Land Acquisition (Nongaming), Final Rule: Correction, 60 Fed. Reg. 48894 (Sept. 21, 1995), codified at 25 C.F.R. Part 151.

- We support a Congressional waiver of sovereign immunity regarding any indispensable parties to litigation where the Bay Mills Indian Community seeks to establish a valid land claim to the Charlotte Beach properties.
- We support a requirement that Bay Mills request a formal opinion on these facts from the National Indian Gaming Commission on the application of the settlement of a land claim exception to the general prohibition against gaming on after-acquired lands.

The Grand Traverse Band, often standing side-by-side with Bay Mills, has long sought to establish a sound Federal Indian policy regarding the preservation and restoration of traditional lands and our respective cultures. To this day, both Grand Traverse Band and Bay Mills are IRA tribes. Both the Grand Traverse Band and Bay Mills signed identical 1993 Compacts. Both the Grand Traverse Band and Bay Mills litigated against the State of Michigan over treaty hunting and fishing rights.[8] Both the Grand Traverse Band and Bay Mills litigated against the federal government and the state over the right to game on our own lands.[9]

We believe that S. 2986 represents a misguided attempt to reach

[8] E.g., U.S. v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd, 623 F. 2d 448 (6th Cir. 1980); U.S. v. Michigan, 520 F. Supp. 207 (W.D. Mich. 1981).
[9] E.g., United States v. Bay Mills Indian Community, 692 F. Supp. 777 (W.D. Mich. 1988).

goals—including economic security and tribal governmental stability and alleviation of severe economic distress and the accompanying social consequences—that both our people and likely all the people of the Michigan Indian Tribes support. We also believe there are alternatives to S. 2986 that must be explored. Finally, we continue to support Bay Mills' objective—which the Grand Traverse Band shares—to maintain their political status as Indian Tribes in the face of overwhelming historic and modern forces that have sought to destroy us as Indian people.

The Anishinabeg understand the interconnection between human beings and the natural world that surrounds them. That understanding was often expressed when Indian leaders were forced to sign removal agreements or land cession agreements against their will and could not stop crying for the loss of their lands and people. Pokagon, one of the principle chiefs of the Potawatomi, "cried like a child as he signed" an 1833 treaty that caused the removal of hundreds of his people.[10] And who can forget the indelible image of Tribal leaders in the Secretary of Interior's office in the 1940s and 1950s in tears while they were forced to sign away large portions of their reservations to land reclamation and other Bureau of Land Management projects.[11]

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[10] Elizabeth A. Neumeyer, INDIAN REMOVAL IN MICHIGAN, 1833-1855, at 21 (1968) (unpublished M.A. dissertation, Central Michigan University) (on file with author).

[11] Although the [Supreme] Court suggests that the Cheyenne River Sioux consented to the taking of their lands for the Oahe dam and reservoir ..., anyone who doubts that the tribes on whose reservations Pick-Sloan reservoirs were located were under duress

Grand Traverse Band leaders faced the same acute emotional pain at the prospect of losing their homelands. On January 5, 1841, two Grand Traverse Band leaders, Aghosa and Eshquagonabe, appealed to Henry Schoolcraft, asking him to allow members of the Band to remain in the Grand Traverse Bay area. They wrote: "We feel such an attachment to this our native place, from whence we derive our birth, that it looks like certain death to go from it...."[12]

The Grand Traverse Band firmly believes that Indian Tribes should work to preserve their land base and their people's relationship with their respective homelands. However, just as we would refuse to support a federal policy where Indian Tribes would be relocated off their traditional territory, the Grand Traverse Band cannot support a policy where an Indian Tribe deploys itself far outside its traditional territory, regardless of its intentions. For these reasons—most importantly, because of the close connection Michigan Indians

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should examine the photograph of George Gillette, the Tribal Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, who broke down in tears while signing the contract with the Army Corps of Engineers for the Garrison Dam and reservoir.

Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 74 n.56 (1994) (photo reproduced in NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992, 343 (Peter Nabokov, ed., 1991)).

[12] Letter from Peter Dougherty to Daniel Wells (Feb. 6, 1841) (on file with Dr. James McClurken).

have to their traditional territories—the Grand Traverse Band cannot support S. 2986.

## II. Interest of the Grand Traverse Band

Due to misinterpretation of the 1855 Treaty of Detroit in 1872, the federal government administratively terminated its recognition of the Grand Traverse Band and Bay Mills as Indian Tribes. Both GTB and BMIC applied for federal recognition in 1934 upon the passage of the Indian Reorganization Act. Bay Mills achieved federal recognition in 1937,[13] but GTB's recognition was denied for lack of federal funds. However, tribal perseverance eventually prevailed and the Grand Traverse Band had its federal recognition administratively restored on May 27, 1980 by the Department of the Interior. The Grand Traverse Band was the first tribe to receive federal recognition under the Department of the Interior's Federal Acknowledgment Process.

Both the Bay Mills Indian Community the Grand Traverse Band are signatories to the 1836 Treaty of Washington[14] and the 1855 Treaty of Detroit.[15] In the 1836 treaty, the Grand Traverse Band, Bay Mills, and several

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[13] See Charles E. Cleland, RITES OF CONQUEST 289 (1992).
[14] 7 Stat. 491 (Mar. 28, 1836). The federally recognized signatories to the 1836 treaty were the Grand Traverse Band, Bay Mills, the Sault Ste. Marie Tribe of Chippewa Indians of Michigan, the Little River Band of Ottawa Indians, Michigan, and the Little Traverse Bay Bands of Odawa Indians.
[15] 11 Stat. 621 (Jul. 31, 1855).

other Ottawa and Chippewa bands ceded vast amounts of territory in the eastern half of the Upper Peninsula and the northwest third of the Lower Peninsula of the State of Michigan to the federal government in exchange for reservation lands on or near our respective traditional territories. The 1855 treaty set aside parcels of land for the establishment of additional reservations for the Grand Traverse Band, Bay Mills, and the other bands.

In 1860, Congress created the Bay Mills Reservation through the authorization of the purchase of nearly 800 acres of land located about thirty miles west of Sault Ste. Marie, Michigan.[16]

The Grand Traverse Band operates two gaming facilities, one located within the exterior boundaries of our 1855 treaty reservation in Peshawbestown, Michigan and one located within 1.5 miles outside the exterior boundary of our 1836 treaty reservation in Williamsburg, Michigan. The Williamsburg facility, known as Turtle Creek, was the subject of Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District & State of Michigan, decided on April 22, 2002.[17]

The Grand Traverse Band is very interested in establishing and maintaining a sound Federal Indian policy where the Federal Government and Indian Tribes work together to preserve Tribal cultures, Tribal lands, Tribal

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[16] See Cleland, at 289 (citing 12 Stat. 44, 58 (1860)).
[17] 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002).

economic security, and stable Tribal governments.

## III. Overview of S. 2986

S. 2986 contains a legislative remedy provision for a single Michigan Indian Tribe—the Bay Mills Indian Community—that involves what amounts to a significant amendment to both the Indian Gaming Regulatory Act[18] and the Indian Reorganization Act,[19] as well as a deviation from federal Indian gaming and Indian land policy. As both IGRA and the IRA have had profound and wide-ranging impacts on Indian Tribes throughout the United States, Congressional divergence from the public policy behind these influential and fundamental statutes must be carefully and strictly scrutinized by both Indian Tribes nationwide and by Congress.

S. 2986 would ratify an agreement between the Bay Mills Indian Community and the State of Michigan to settle a land claim by Bay Mills to property on or near Charlotte Beach in Chippewa County, Michigan in the Upper Peninsula.[20] Bay Mills and the State of Michigan are asking Congress to ratify a settlement agreement that provides an unprecedented remedy to an Indian land claim—instead of paying monetary damages for trespass or

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[18] Pub. L. 100-497 (Oct. 17, 1988), 102 Stat. 2467, codified at 25 U.S.C. § 2710, et seq. (hereinafter "IGRA").
[19] Act of June 18, 1934, c. 576, 48 Stat. 984, codified at 25 U.S.C. § 461, et seq. (hereinafter "IRA").
[20] Hereinafter the "Settlement Agreement."

providing land on or near Charlotte Beach, the State would give up land far from the Bay Mills reservation and treat that land as part of the settlement of a land claim in accordance with IGRA's exceptions to gaming on lands acquired after the passage of the statute in 1988.[21] We believe that the settlement of a land claim exception should apply only where liability or potential liability has been found against the federal government in the manner of forced fee patents (e.g., the White Earth Reservation Land Settlement Act of 1985)[22] or potential liability for violations of the Non-Intercourse Act (e.g., Eastern Land Claims).[23] Unlike previous land claim settlement acts, Congress is not a party to the negotiations to the Settlement Agreement underlying S. 2986. Congress did not and cannot negotiate the terms of S. 2986—Congress may only ratify the Settlement Agreement hashed out between Bay Mills and the State of Michigan.

We believe the land claim settlement exception in § 2719(b)(1)(B)(i) applies only where federal liability or potential liability is established. That way, Congress is an active negotiator in the terms of the settlement and not simply a ratifying body of settlement agreements over which Congress has no control because no federal liability has been found.

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[21] See S. 2986 § 3(b)(2); Settlement Agreement, at 2.
[22] Pub. L. 99-264, 100 Stat. 61 (1986).
[23] See, e.g., 25 U.S.C. § 1721, et seq. (Maine Indian Claims Settlement Act); 25 U.S.C. § 1701, et seq. (Rhode Island Indian Claims Settlement Act); 25 U.S.C. § 1751, et seq. (Connecticut Indian Land Claims Settlement Act).

## IV. Enactment of S. 2986 Constitutes An Unhealthy Detour From Established Federal Indian Policy.

### A. S. 2986 Would Allow for Gaming on Lands Acquired After October 17, 1988 Approximately 250 Miles from the Bay Mills Reservation

S. 2986 would ratify the Settlement of Land Claim agreement between the State of Michigan and the Bay Mills Indian Community. Of particular note, the Settlement would allow the Bay Mills to acquire from the State of Michigan land in the City of Port Huron, Michigan, near Detroit, to be held in trust by the Secretary of Interior, with the concomitant tribal civil adjudicatory and regulatory jurisdiction, as well as tribal criminal jurisdiction, provided for by applicable Federal and Tribal law.[24] Port Huron is approximately 125 miles from the nearest boundary of the lands ceded in the Treaty of 1836 that both the Grand Traverse Band and Bay Mills signed. Furthermore, the Port Huron parcel is approximately 257 miles from the Bay Mills Reservation in the Upper Peninsula of Michigan.

Dicta from federal cases suggests strongly that Congress intended for geographic limitations on the three exceptions to the general prohibition against gaming on after-acquired property in § 2719(b)(1)(B). In TOMAC v.

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[24] See Settlement Agreement, at 3.

Norton,[25] District Court Judge Robertson noted that the Pokagon Band of Potawatomi Indians' attempt to have land put into trust in accordance with the restored lands exception was justified in part because the land they wished to game upon was within the Band's traditional territory and complied with inherent "geographic and policy limits" of the IRA and IGRA.[26] Additionally, in Sac and Fox Nation v. Norton,[27] the Tenth Circuit adopted a limited definition of the term "reservation" to mean "'any land reserved from an Indian *cession* to the federal government....'"[28]

Congress could not have imagined that an Indian Tribe would settle a land claim with a state defendant in exchange for the right to game on lands far from the boundaries of the Tribe's reservation or territory. A review of the extensive Senate Report accompanying IGRA indicates that Congress did not opine on the possibility that Indian Tribes would establish gaming facilities substantially far from their own reservations or traditional territories.[29] A Ninth Circuit judge argued that Congressional silence on this issue strongly implies that "neither the Senate Committee Report, nor other IGRA legislative history authorizes Indian gaming activity to be played, even in part, off Indian

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[25] 193 F. Supp. 2d 182 (D. D.C. 2002).
[26] Id. at 186 & 192 (citing South Dakota, 69 F. 3d at 882-83 & n.3).
[27] 240 F. 3d 1250 (10th Cir. 2001), cert. denied, Wyandotte Nation v. Sac and Fox Nation of Missouri, 122 S. Ct. 807 (2002).
[28] 240 F. 3d at 1266 (quoting FELIX F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 34 (2nd ed. 1982)) (emphasis added).
[29] See generally S. REP. 100-446 (Aug. 3, 1988).

lands."[30]

The Grand Traverse Band's gaming facilities are situated well within the traditional territory of the Band. The Peshawbestown facility, Leelanau Sands, is located in the heart of the 1855 treaty reservation near the center of the Band's modern government operations in Peshawbestown, Michigan. The Turtle Creek site is well within the Band's traditional territory near the exterior boundaries of the 1836 treaty reservation. In the Turtle Creek decision, Senior District Judge Douglas W. Hillman found that the Turtle Creek site is located "at the heart of the region that comprised the core of the Band's aboriginal territory and was historically important to the economy and culture of the Band."[31] Moreover, Judge Hillman found that Grand Traverse Band members "occupied the region continuously from at least 100 years before treaty times to the present."[32] Finally, Judge Hillman found that the Turtle Creek site, though 1.5 miles outside the 1836 reservation, "was located within the contemplated reservation, which was not designated for four years after the treaty was signed."[33] Therefore, Turtle Creek was subject to the § 2719(b)(1)(B) exceptions.

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[30] AT&T v. Coeur D'Alene Tribe, 295 F. 3d 899, 917 (9th Cir. 2002) (Gould, C.J., dissenting) (discussing S. REP. 100-446 (Aug. 3, 1988)).
[31] Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney, 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002) (citations omitted).
[32] Id. (citation omitted).
[33] Id. (citations omitted).

Unlike the Grand Traverse Band, which has proven in federal court that its off-reservation gaming facility was within the Band's traditional and historical territory, Bay Mills has not shown any traditional or historical connection in any land near Port Huron. Port Huron is far beyond the 1836 ceded territory and none of the current five federally recognized signatories to that treaty had significant traditional or historical connections to that part of the state. We believe that Congress intended the settlement of a land claim exception in § 2719(b)(1)(B)(i) to only include lands where the beneficiary Tribe has a historical connection, unlike § 2719(b)(1)(A), which expressly provides for a comprehensive procedure for such gaming, including consultation with other affected state and tribal parties and independent determinations by the Secretary of Interior with the concurrence of the state governor in compliance with the law of that state.[34]

American Indian policy had its roots in conquest and forced removal

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[34] The Grand Traverse Band participated in an effort to bring Class III gaming to Detroit, Michigan in the mid-1990s in accordance with § 2719(b)(1)(A). This participation was only made after the Band rescinded its previously enacted Resolutions opposing gaming outside the traditional and historic areas of Indian tribes and only after the repeated solicitations and negotiations on a revenue sharing agreement in compliance with Section 9 of the Tribal State Compact signed by all (then seven) Michigan Tribes. The Grand Traverse Band decided at that time to make the attempt to commence gaming in Detroit only because of the revenue sharing protections offered all the Michigan Tribes under Section 9. The Band entered into consultation with the proper parties and followed the comprehensive procedure contained in that exception, only to be denied concurrence by the governor of the State of Michigan.

west and the adoption of S. 2986 would merely change the direction of the removal, without altering its consequences. Indian law scholars described the removal period beginning in 1816 when Andrew Jackson, as a bureaucrat for the United States, attempted to secure a land exchange with the Cherokee Nation in order to move them West.[35] The original removal treaty was voluntary, meaning that the Cherokees were not forced to leave their homeland.[36] Naturally, the Cherokees did not move from their homelands voluntarily. Only when Jackson became President in 1828 did removal become involuntary—and the government resolved to use force to remove the Cherokees.[37] The land grab by non-Indians was described by Dr. Angie Debo as an "orgy of exploitation."[38] Yet, "scholars" to this day argue that the forced Indian removal period actually "saved" the Indians from assimilation in order to justify artificial transfers of Indian land and property rights.[39]

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[35] See FELIX F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 80 (2nd ed. 1982).

[36] See id.

[37] See id., at 91 n.236 (citation omitted).

[38] Angle Debo, AND STILL THE WATERS RUN vii (1st ed. 1940), quoted by Grand Traverse Band Tribal Judge Michael D. Petoskey in George Weeks, MEM-KE-WEH: DAWNING OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 13 (1992).

[39] "To his dying day...," Remini concludes, "Andrew Jackson genuinely believed that what he had accomplished rescued these people from inevitable annihilation. And although that sounds monstrous, and although no one in the modern world wishes to accept or believe it, that is exactly what he did. He saved the Five Civilized Nations from probable extinction."

Remini is wrong on nearly all counts. He is wrong because there is no evidence that it was removal that insured the survival

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Michigan history is no different. An "orgy of exploitation" happened to all the Michigan Indian Tribes, some of whom did not survive. Property speculators used fraud, intimidation, and corrupt federal officials to steal land rightfully belonging to Grand Traverse Band members in the late 19th and on into the mid-20th Centuries. The 1855 treaty marks the first manifestation of the federal government's devastating Allotment Policy, which history states began in 1887 with the passage of the Dawes Act. Not so. The federal government used Ottawa and Chippewa bands in Michigan as guinea pigs for allotment over 30 years before Congressional policy shifted into full gear. The 1855 treaty provided for the allotment in severalty of Indian lands with only a ten-year trust period, fifteen years fewer than the 24 or 25-year trust periods contained in most allotment statutes enacted after 1887. The resulting devastation brought the Grand Traverse Band to the absolute brink of extinction, near the "certain death" that Aghosa and Eshquagonabe feared. They thought they had preserved half of Leelanau County—about five

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> of the "Five Civilized Tribes." It is an assertion he doesn't even bother to support in any systematic way. He is wrong that no one wishes to believe this. There are, unfortunately, plenty of people in the modern world who would be more than happy to believe that removal insured the ultimate survival of the Indians of the Southeast. And it is a comforting lesson for those contemplating similar policies elsewhere. His statement not only sounds monstrous, it is monstrous.

Richard White, *How Andrew Jackson Saved the Cherokees*, 5 GREEN BAG 2D 443, 452 (2002) (reviewing Robert V. Remini, ANDREW JACKSON AND HIS INDIAN WARS (2001)).

townships—for the 1855 reservation, but by 1979, just prior to federal recognition, there remained no land held in trust by the federal government and only a few acres remained in a trust held by Leelanau County.

Michigan Indian Tribes often endured their own versions of the Trail of Tears. In 1837, federal soldiers forced a group of Potawatomi people from Michigan to wade in waist-deep water for a mile during floods in Missouri during their removal march to Oklahoma and Iowa.[40] That particular trip killed over 50 people.[41] In 1838, 300 federal troops roped and tossed recalcitrant Potawatomis into wagons.[42] In 1839, the Swan Creek and Black River Chippewa Band, the band that actually occupied the northern shores of Lake St. Clair and the Black River near Port Huron,[43] endured significant hardships in their removal westward. Their speaker Macoonse wrote to Henry Schoolcraft that:

> [T]he Indians and their little children suffered badly cut feet because they had to walk over 60 miles of newly burnt prairie without any moccasins. He reported that his band did not feel good because they were not fed any fresh meat. She stated that the [Removal Officer] Smith abused them and did not give them blankets to ward off the cold prairie winds. On one occasion

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[40] See Elizabeth A. Neumeyer, INDIAN REMOVAL IN MICHIGAN, 1833-1855, at 22 (1968) (unpublished M.A. dissertation, Central Michigan University) (on file with author).
[41] Id.
[42] Id. at 27.
[43] Id. at 33.

> during the trek, the Indians went without food for two days. Macoonse charged that the food shortage occurred because Smith squandered money on "two bad women," to whom he paid $10 every three nights.[44]

Ironically, if Congress enacts S. 2986, a new removal policy will be created, moving the Bay Mills Indian Community south and east, far from their ancestral homeland. This is the rub of the Grand Traverse Band's argument—moving Indian Tribes into land upon which they never had a historical, legal, or cultural connection does not serve to promote the policies behind reform-minded statutes such as the Indian Reorganization Act.

The federal government is no stranger to imposing its own notions of private property onto Native Americans. It has been doing so for hundreds of years and S. 2986 marks no drastic change. As Bay Mills has no relationship to the Port Huron area, neither had the Cherokees to Oklahoma and other western states. One respected essayist noted that Congress has imposed upon Indian Tribes whatever business paradigm is in fashion in a given era.[45] In the 1870s and 1880s, that paradigm was small-time farming so the Dawes Act, the statute that codified the Allotment Policy, was designed to turn Indians into small-time farmers. In the 1970s, the dominant paradigm was corporations, so

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[44] Id. at 40.

[45] See Monroe Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 U.C.L.A.-ALASKA L. REV. 89, 95-101 (1979), reprinted in Robert N. Clinton, et al., AMERICAN INDIAN LAW: CASES AND MATERIALS 1059-63 (3rd ed. 1991).

the Alaska Native Claims Settlement Act turned nearly all the Native villages in Alaska into corporations. In the current era, the dominant paradigm is gaming, so the Indian Gaming Regulatory Act forces Indian Tribes to provide economically for Indian people by turning to gaming. Just as the Allotment Policy failed for Indian Tribes nationwide and as the Alaska Native Claims Settlement Act is currently failing for Alaska Native Communities, the handwriting is on the wall for S. 2986 as another flawed federal act that imposes artificial policy solutions onto Indian Tribes.

S. 2986 does not reflect the lived realities of Michigan Indian Tribes. The 1855 treaty imposed private property ownership on the Tribes, which amounted to nothing more than thinly disguised theft. Federal Indian policy has attempted to turn Indians into farmers, ranchers, corporate executives and shareholders, and now roving casinos. The common factor in all these policies is the imposition of a paradigm from the top down that does not reflect the lived realities of Indians. Do not get us wrong. Like Bay Mills, we accept the imposition of a paradigm that transfers resources to desperate Tribes suffering the consequences of all the previous federal paradigms designed to destroy Tribal Governments nationwide. However, we believe that a saving paradigm should be tempered and moderated by the lived realities of the Indian Tribes. Tribal Government and Tribal Gaming is not the lived reality of the modern Port Huron residents, the Bay Mills Indian Community, or the Indian peoples that resided there in the 19th Century that could never experience modern Tribal Sovereignty or Self-Determination.

Moreover, statutes such as S. 2986 allow powerful governmental and business interests to use Indian Tribes as pawns in special interest, pork barrel-style lawmaking. Congress enacted IGRA to further very specific purposes.[46] S. 2986 is not designed to further the general purposes of IGRA, but to promote special interests within the State of Michigan.

S. 2986 provides Bay Mills with the opportunity for off-reservation gaming in after-acquired lands in such a manner never contemplated by Congress in 1988. S. 2986 is merely a continuation of a Federal Indian policy that never made sense and continues to be a hodgepodge of unrealistic, artificial "solution" to the "Indian problem."[47]

### B. S. 2986 Creates a Remedy for the Bay Mills Indian Community By Purporting to Settle a Land Claim that Has Never Established Federal Government Liability in Any Court of Law

S. 2986 would ratify a land claim settlement where the underlying land claim has never been proven to be valid. In both state and federal court, the

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[46] See 25 U.S.C. § 2702.

[47] See, e.g., Robert B. Porter, *Kagama and Mahawaha v. United States: Decision and Order of the Court*, 10 KAN. J. L. & PUB. POL'Y 465, 474 (2001) (noting that past Congressional solutions to the "Indian problem" amounted to nothing more than "extinction through assimilation").

Bay Mills Indian Community has attempted to establish a valid land claim to the Charlotte Beach property.[48] The essence of Bay Mills' land claim is that the federal government issued patents to tribal land on or near Charlotte Beach to a non-Indian prior to the Congressional ratification of the 1855 treaty.[49] Bay Mills claims that the land, which was eventually lost to county property tax foreclosure, remained in trust and should never have been subject to state or local taxes.[50]

From the beginning, the Grand Traverse Band has supported Bay Mills' attempts to prove the validity of its claims in a court of law. We would strongly support further attempts by Bay Mills to establish their claim, including a Congressional waiver of the sovereign immunity of any indispensable parties for the purpose of reaching the merits of the land claim.

To this point, however, on each of its attempts to establish a land claim, Bay Mills failed to affirmatively establish a land claim. For example, in Bay Mills Indian Community v. Court of Claims, State of Michigan, a case decided in the Michigan state courts and to which the United States Supreme Court

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[48] See Bay Mills Indian Community v. Western United Life Assurance Co., No. 2:96-CV-275, 26 Indian L. Rep. 3039 (W.D. Mich., Dec. 11, 1998), aff'd, 208 F. 3d 212, 2000 WL 282455 (6th Cir., Mar. 8, 2000)); Bay Mills Indian Community v. Court of Claims, State of Michigan, 244 Mich. App. 739, 626 N.W. 2d 739 (2001), cert. denied, 122 S. Ct. 1303 (2002).
[49] See 626 N.W.2d at 172.
[50] See id.

recently denied certiorari, the Michigan Court of Appeals held that Bay Mills did not establish a prima facie case that the State of Michigan and federal government violated the Non-Intercourse Act.[51] The same court also found that the land at issue was properly subject to county property taxes because the federal government intended for the land to be alienable when it issued the patents.[52] The federal court litigation, entitled Bay Mills Indian Community v. Western United Life Assurance Co., also failed to establish a land claim as it was dismissed for the refusal of the Sault Ste. Marie Tribe of Chippewa Indians of Michigan to waive its sovereign immunity and participate in the litigation.[53] As such, the liability of the State of Michigan or the federal government has never been established by Bay Mills.

The State of Michigan's decision to settle the Charlotte Beach claim on the basis that Bay Mills' land claim negatively impacts land values and the collection of real property taxes by local units of government is questionable. So far, Bay Mills' land claims to Charlotte Beach have all been rejected for the purposes of establishing federal liability.

S. 2986 ratifies a land claim settlement agreement in which no court has validated the underlying land claim.

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[51] See id. at 173-174.
[52] See id. at 172-73 (citing Cass Co., Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)).
[53] See 26 Indian L. Rep. at 3041-42 (finding the Sault Tribe indispensable to further proceedings in the Charlotte Beach land claims litigation).

### C. S. 2986 Constitutes an Undisciplined Expansion of the Indian Reorganization Act's Geographic Limitations Upon Fee-to-Trust Transfers.

In the modern era, when Congress recognized Indian Tribes, it would limit the Secretary's discretion to accept land into trust to lands within the Indian Tribe's service area. Examples from the past several years include the Auburn Indian Restoration Act,[54] the Little Traverse Bay bands of Odawa Indians and the Little River Band of Ottawa Indians Act,[55] the Paskenta Band of Nomlaki Indians of California Act,[56] and the Graton Rancheria Restoration Act.[57] S. 2986 would reverse the disciplined policy Congress has followed for a decade of limiting mandatory fee-to-trust acquisitions to lands acquired

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[54] 25 U.S.C. § 1300*l*-2(a) ("The Secretary may accept any additional acreage in the Tribe's service area pursuant to the authority of the Secretary under [25 U.S.C. § 465].").

[55] 25 U.S.C. § 1300*k*-4(a) ("The Secretary may accept any additional acreage in each of the Bands' service area ... pursuant to the authority of the Secretary under [25 U.S.C. § 465].").

[56] 25 U.S.C. § 1300*m*-3 ("The Secretary may accept any additional acreage in each of the Bands' service area ... pursuant to the authority of the Secretary under [25 U.S.C. § 465].").

[57] 25 U.S.C. § 1300*n*-3 ("Upon application by the Tribe, the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California, for the benefit of the Tribe after the property is conveyed or otherwise transferred to the Secretary and if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes.").

within a Tribe's service area, which in those instances closely corresponds with the Tribe's historic area. Neither Bay Mills' traditional territory nor its service area extends to St. Clair County—nor does it extend to any other county within approximately 200 miles.

Bay Mills has no governmental authority in the area near Port Huron. For the Port Huron tract to qualify as "Indian lands" for the purposes of IGRA, Bay Mills must have jurisdiction over the tract and exercise governmental power over the tract.[58] The purpose of that requirement was to ensure that the gaming Indian Tribe has a history of exerting jurisdiction over the land upon which gaming is intended. By the passage of S. 2986, Bay Mills would begin exerting jurisdiction over lands far from its own homeland and on lands directly within the jurisdiction of the State of Michigan, the City of port Huron, and St. Clair County. Congress should avoid creating jurisdictional morasses as a general rule.[59] For anyone who has journeyed through the jurisdictional maze of Federal Indian policy and is familiar with casino games, "checkerboard" jurisdiction takes on a new meaning.

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[58] See Kansas v. United States, 249 F. 3d 1213, 1228 (10th Cir. 2001).
[59] See generally Robert N. Clinton, *Redressing a Legacy of Conquest: A Vision Quest for A Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 208 (1993) (noting how the Supreme Court, at one time, carefully worked to avoid creating patterns of checkerboard jurisdiction) (citing Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) (quoting Seymour v. Superintendent, 368 U.S. 351, 358 (1962))).

**D. S. 2986 Sets a Precedent Where Any Non-Federal Defendant to an Indian Land Claim Could Settle the Claim With an Indian Tribe Even Where No Federal Liability Is Proven and Utilize the Land Claim Settlement Exception in Sham Transactions.**

Allowing Bay Mills and the State of Michigan to invoke a federal remedy for an Indian land claim in which there is no federal liability establishes an unprincipled precedent. The states are no more than outside parties to IGRA's land claim settlement exception. Congress could not have intended otherwise. If Congress ratifies the Settlement Agreement, then any party—states, counties, local landowners—could settle a land claim of dubious validity with an Indian Tribe and demand to enjoy the benefits of the land claim settlement exception. Large non-Indian gaming interests could see fit to acquire property with the cloud of potential Indian land claims, settle the claim with the Tribe, and then strike a deal with the Tribe to invoke the land claim settlement exception to IGRA's general prohibition.

The Grand Traverse Band's current litigation with the State of Michigan, the State Department of Natural Resources, and Mirada Ranch, Inc. provides an excellent example of how this new precedent could be utilized to expand gaming operations. The Grand Traverse Band has filed affidavits that may have served to cloud title for some purposes on lands located on South Fox Island in Lake Michigan. The affidavits state that Band members may have land

claims to certain parcels on the Island. With this precedent, the Band and its members could cut a deal with the landowners to settle the land claim and then demand land far from South Fox for gaming purposes in accordance with the manner that Congress interpreted § 2719(b)(1)(B)(i) in S. 2986. Like Bay Mills' Charlotte Beach land claims, the South Fox Island land claims were preserved in accordance with 28 U.S.C. § 2415.[60] However, unlike Bay Mills' land claims, which were expressly rejected by the Secretary of the Interior, the Grand Traverse Band's claims remain preserved.

### E. S. 2986 is Inconsistent With Past Congressional Treatment of the Bay Mills Indian Community's Reservation.

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[60] As this Committee knows well, the operation of section 2415 preserved claims is as follows:

> [Section] 2415(c) "provides that there is no limitations period for suits for possession or title brought by the United States." Title 28 U.S.C. § 2415(b) provides that Indian claims that are on a list published by the Secretary of the Interior pursuant to section 4(c) of the Indian Claims Limitations Act of 1982 are not barred until (1) one year after the Secretary publishes, in the Federal Register, a rejection of the claim, or (2) three years after the Secretary submits legislation to Congress to revoke the claim. The present claim was listed by the Secretary in the Federal Register on March 31, 1983 ..., but it has never been rejected, nor has the Secretary submitted legislation to revoke the claim. Thus, the claim was timely....

Seneca Nation of Indians v. State of New York, 26 F. Supp. 2d 555, 573 (W.D. N.Y. 1998), aff'd 178 F. 3d 95 (2nd Cir. 1999), cert. denied, New York v. Seneca Nation of Indians, 528 U.S. 1073 (2000).

Congress created the Bay Mills reservation with its current geographic limitations in 1860 by authorizing the purchase of nearly 800 acres of land owned by the Missionary Society of the Methodist Episcopal Church at Iroquois Point, Michigan.[61] Congress' purchase for the bands that would later become the Bay Mills Indian Community formed the core of the lands that constitute Bay Mills' traditional territory in the modern era. Congress has already spoken as to where Bay Mills must focus its efforts to establish a stable tribal government and provide for its membership. S. 2986 contemplates the reversal of a 142-year old Congressional policy decision to locate BMIC within its traditional territory.

## V. S. 2986 Contravenes Federal Indian Law and Creates a Significant Expansion to the Exceptions to the General Prohibition on Indian Gaming on After-Acquired Lands

While Bay Mills may have a valid land claim to land in Charlotte Beach, the Grand Traverse Band cannot support Bay Mills in a scenario where the tribe exchanges rights to traditional territory for lands hundreds of miles away. Public policy, federal Indian policy, and federal case law is overwhelmingly arrayed against construing land claim settlements in the manner prescribed by S. 2986.

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[61] See Charles E. Cleland, RITES OF CONQUEST 289 (1992) (citing 12 Stat. 44, 58 (1860)).

The policy annunciated by Congress in 1988 by the passage of IGRA would be undermined by the enactment of S. 2986. IGRA provides a general prohibition of gaming on lands acquired after the passage of IGRA on October 17, 1988.[62] Generally, Congress contemplated that gaming on after-acquired lands must be located within or contiguous to the boundaries of a reservation of the Indian tribe.[63] The general prohibition is subject to certain limited exceptions, including where lands are taken into trust as part of a settlement of a land claim.[64] Those limited exceptions, taken into the context of the remainder of the general prohibition, strongly imply that the land claims settlement exception should apply only to lands within or near the boundaries of the reservation or traditional territory.

Contrary to Bay Mills' Port Huron proposal, the Grand Traverse Band's attempt to operate the Turtle Creek gaming facility properly followed the intent and underlying policy of § 2719(b)(1)(B). The Band established in federal court that the Turtle Creek site was within the historical and cultural center of the Grand Traverse Band's traditional territory. However, like the Bay Mills proposal, the Grand Traverse Band sought authority to commence gaming on after-acquired lands in accordance with § 2719(b)(1)(B) and not § 2719(b)(1)(A), which would have invoked the revenue sharing provisions of Section 9 of the 1993 Compact that both the Grand Traverse Band and Bay

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[62] See 25 U.S.C. § 2719.
[63] See 25 U.S.C. § 2719(a)(1).
[64] See 25 U.S.C. § 2719(b)(1)(B)(i).

Mills signed.

The Congressional policy behind the enactment of the IRA would also be undermined by the passage of S. 2986. A major portion of the IRA, section 465, exists to replace lands lost by Indian Tribes, not to create a wholly artificial land base for Indian Tribes. The policy behind the Indian Reorganization Act was to alleviate the ravages of the Congressional allotment policy in 1934 and to "instruct[] the Secretary that land should be acquired to replace the millions of acres of Indian land lost as a result of the allotment policy and placed in trust to prevent its alienation."[65] The policy to restore and replace the lands lost during the allotment era was codified most particularly in 25 U.S.C. § 465 and in Department of Interior regulations implementing § 465.[66] That policy was expressly stated in the regulations governing land acquisition:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status: (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to

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[65] State of South Dakota v. United States Dept. of Interior, 69 F.3d 878, 887 (Murphy, C.J., dissenting), vacated by Department of Interior v. South Dakota, 519 U.S. 919, on remand to State of South Dakota v. United States Dept. of Interior, 106 F.3d 247 (8th Cir. 1996).

[66] See 25 C.F.R. Part 151.

> facilitate tribal self-determination, economic development, or Indian housing.[67]

For example, where an Indian Tribe asks the Secretary of Interior to take off-reservation lands into trust on behalf of that Tribe, the location of the land relative to the Tribe's boundaries is critical and, "as the distance between the tribe's reservation and the land to be acquired increases, the Secretary give[s] greater scrutiny to the tribe's justification of anticipated benefits from the acquisition."[68]

The intersection of the IRA and IGRA creates a sound and predictable public policy that requires Class III gaming to be conducted on or near Indian reservations and Indian Country. As noted above, following this policy prevents a situation where an Indian Tribe exerts jurisdictional authority in a small pocket of trust land far from the Tribe's traditional territory. Courts interpret the exceptions to gaming occurring on lands acquired after October 17, 1988 very narrowly. For example, land taken into trust under the restored lands exception does not extend further than a few miles from the beneficiary tribe's traditional territory. Several recent federal cases, many of them involving Michigan Indian Tribes, highlight this geographic limitation in finding that gaming conducted on or near the reservation may be conducted in accordance with the exceptions to the general prohibition:

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[67] 25 C.F.R. § 151.3.
[68] 25 C.F.R. § 151.11(b).

- In our own case, Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney,[69] the district court for the Western District of Michigan held that our gaming facility located only 1.5 miles from the exterior boundaries of our 1836 treaty reservation constitutes land that is within the restored lands exception to IGRA.
- In TOMAC v. Norton,[70] the district court for the District of Columbia upheld an Interior decision to take a parcel into trust on behalf of the Pokagon Band of Potawatomi Indians of Michigan and Indiana that was located within the Band's traditional territory, specifically citing the "geographic and policy limits" inherent in both the IGRA and the IRA in the context of taking land into trust on behalf of Indian tribes.
- In Sault Ste. Marie Tribe of Chippewa Indians v. United States,[71] the Sixth Circuit upheld a decision by the Secretary of Interior to take into trust a parcel for gaming purposes on behalf of the Little Traverse Bay Bands of Odawa Indians. The land at issue is located within the Band's 1836 treaty reservation area.
- In Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Babbitt,[72] the D.C. district court held that a parcel held in trust for gaming purposes that was contiguous to the Confederated Tribes'

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[69] 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002).
[70] 193 F. Supp. 2d 182, 186 & 192 (D. D.C. 2002) (citing South Dakota, 69 F. 3d at 882-83 & n.3).
[71] 288 F. 3d 910, 912-13 (6th Cir. 2002).
[72] 116 F. Supp. 2d 155, 157 (D. D.C. 2000).

reservation enjoyed the benefits of the restored lands exception.

- In City of Roseville v. Norton,[73] the D.C. district court upheld a Department of Interior decision to take a parcel into trust for United Auburn Indian Community of the Auburn Rancheria of California under the restored land exception that was 40 miles from the boundary of its former rancheria, which had been terminated.

Other federal cases finding that the proposed gaming initiatives do not comply with IGRA exemplify the geographic limitations Congressional policy has placed on Indian gaming:

- In Kansas v. United States,[74] the Tenth Circuit held that the National Indian Gaming Commission acted in an arbitrary and capricious manner by finding that the Miami Tribe of Oklahoma had authority to game on land within the State of Kansas, 180 miles from the tribe's reservation, for which the tribe had received payment in the 1960s settling its claim to the land. The Tenth Circuit found that the Miami Tribe did not have civil regulatory jurisdiction over the parcel and could not game on the land in compliance with IGRA.
- In Confederated Tribes of Siletz Indians of Oregon v. United States,[75]

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[73] __ F. Supp. 2d __, 2002 WL 31027695, at *2 (D. D.C., Sept. 11, 2002).
[74] 249 F. 3d 1213 (10th Cir. 2001), on remand to State of Kansas ex rel. Graves v. United States, No. 99-2341-GTV, 2002 WL 1461978 (D. Kan., Jun. 25, 2002).
[75] 110 F. 3d 688 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).

the Ninth Circuit found that the Confederated Tribes' attempt to have the Secretary of Interior to acquire land in trust for gaming purposes that was located 50 miles from the reservation could not happen without the concurrence of the governor of the State of Oregon in accordance with 25 U.S.C. § 2719(b)(1)(A).

- In AT&T Corp. v. Coeur d'Alene Tribe,[76] while the Ninth Circuit did not reach the merits, the dissent strongly argued that the Coeur D'Alene Tribe's attempt to operate a National Indian Lottery could not comply with IGRA as much of the gaming activity would occur off "Indian lands."
- In Sac and Fox Nation v. Norton,[77] the Tenth Circuit ruled that Wyandotte Nation's effort to compel the Secretary of Interior to take land into trust for purposes of gaming in accordance with the adjacent lands exception (§ 2719(a)(1)), in part, because the property, located in Kansas City, Kansas, was located so far from the Wyandotte Nation in Oklahoma.

Congress did not intend for the land claims settlement exception to be exploited in the manner proposed in S. 2986. The three exceptions contained in § 2719(b)(1)(B) should be read in the same context. One of the fundamental rules of interpreting statutes relating to Indian Tribes is that "Federal policy

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[76] 295 F. 3d 899, 917 (9th Cir. 2002) (Gould, C.J., dissenting)
[77] 240 F. 3d 1250, 1266-67 (10th Cir. 2001), cert. denied, Wyandotte Nation v. Sac and Fox Nation of Missouri, 122 S. Ct. 807 (2002).

toward Indians is often contained in several general laws, special acts, treaties, and executive orders, and these must be construed *in pari materia* in ascertaining congressional intent."[78] The other two exceptions—the restored lands and restored tribes exception[79] and the initial reservation exception[80]—both have been interpreted by the cases listed above as limiting gaming validated by these exceptions to lands on or near the reservation, to which the Indian Tribe has a traditional, historical, and cultural connection and relationship. S. 2986 would create precedent for courts to read all three exceptions in § 2719(b)(1)(B) as including lands put into trust for purposes of gaming far from an Indian Tribe's traditional territory.

The Grand Traverse Band opposes the dramatic expansion of the exceptions to the general prohibition against gaming on after-acquired lands.

## VI. Conclusion and Suggestions for Future Action.

The Grand Traverse Band does not come before the Senate Committee on Indian Affairs with a bone to pick with the Bay Mills Indian Community. On numerous occasions, the Grand Traverse Band has stood side-by-side with Bay Mills on issues of Federal Indian policy, including the U.S. v. Michigan

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[78] Yellowfish v. City of Stillwater, 691 F. 2d 926, 930 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983).
[79] See 25 U.S.C. § 2719(b)(1)(B)(iii).
[80] See 25 U.S.C. § 2719(b)(1)(B)(ii).

litigation and when we stood together to preserve our fledgling gaming interests. We know better than any other Michigan Indian Tribe that Bay Mills has historically been a leader in pursuing self-determination and self-reliance for Indian Tribes nationwide. We also recognize that Bay Mills is situated far from tourist routes and cannot benefit as some other tribes have from gaming on their reservation.

However, Grand Traverse and Bay Mills differ on this one policy point—the land claim settlement exception to the general prohibition against gaming on after-acquired lands must be limited geographically. Sound historical and public policy reasons underlying both the Indian Reorganization Act and the Indian Gaming Regulatory Act compel the Grand Traverse Band to reach this conclusion.

The Grand Traverse Band supports the commission of a study of the past practices of the Department of Interior to determine the geographic standards for taking land into trust. We believe the study would reveal that Congress never intended that the Secretary of Interior could take land into trust for Indian Tribes far from that Tribe's homeland.

The Grand Traverse Band supports a Congressional waiver of sovereign immunity regarding any indispensable parties to litigation where the Bay Mills Indian Community seeks to establish a valid land claim to the Charlotte Beach properties

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The Grand Traverse Band supports an initial requirement of Bay Mills and the State of Michigan to seek a National Indian Gaming Commission opinion on whether the Port Huron-Charlotte Beach exchange would constitute a land settlement for purposes of § 2719(b)(1)(B)(i). The Wyandotte Tribe has stated, for example, that they would seek NIGC's opinion regarding its own land settlement issues on Shriner's Property in Kansas City, Kansas.[81]

The Grand Traverse Band cannot support S. 2986 and urges the defeat of the bill.

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[81] See Bureau of Indian Affairs Determination of Trust Land Acquisition; Correction and Clarification, 67 Fed. Reg. 30953 (May 8, 2002). The Wyandotte Nation's plan for Shriner's Property was the subject of Sac and Fox Nation of Missouri v. Norton, 240 F. 3d 1250 (10th Cir. 2001), cert. denied, Wyandotte Nation v. Sac and Fox Nation of Missouri, 122 S. Ct. 807 (2002).

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

Testimony of R. Lance Boldrey
Deputy Legal Counsel and Policy Advisor on State-Tribal Affairs
Office of Michigan Governor John Engler

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
Hearing on S. 2986

October 10, 2002

Introductory Matters

Mr. Chairman and members of the Committee, thank you for inviting me here today to testify in support of S. 2986, a bill to finally resolve land claims of the Bay Mills Indian Community ("the Community") by ratifying a settlement reached between the Community and Michigan Governor John Engler. Governor Engler sends his regards and his thanks for moving forward with a hearing on this bill. Governor Engler also sends his thanks to Senator Stabenow and Congressmen Bonior and Stupak for their tireless efforts on this matter.

By way of introduction, my name is Lance Boldrey and I have served for the last four years as Governor Engler's Deputy Legal Counsel and Policy Advisor on State-Tribal Affairs. During this time, I have been directly involved in dealing with the land claim at issue in S. 2986, as well as all Indian gaming matters in the State of Michigan.

Home to twelve federally recognized tribes, Michigan has a long history of dealing with state-tribal issues and, frankly, that history has not always been positive. In recent years, however, we have made great strides in resolving disputes and conflicts between state and tribal governments. With the help of the federal government and some of the individuals gathered in this room today, we achieved a landmark science-based agreement to govern state and tribal fishing in the Great Lakes. We have entered into state-tribal gaming compacts to effectuate the intent of the Indian Gaming Regulatory Act ("IGRA"). We recently amended state law to provide for cooperative efforts on law enforcement and homeland security matters. Governor Engler issued the first Governor's Policy Statement on State-Tribal

Affairs and hosted Michigan's first-ever state-tribal summit. We are developing a state-tribal accord to provide a framework for the future of government-to-government relations between the state and tribes. We are nearing conclusion of a comprehensive agreement on taxation that we believe will serve as a model for other states.

And we have reached a settlement of a longstanding land claim that the Bay Mills Indian Community has been actively seeking to resolve for more than twenty years. It is that agreement that we ask you to bless through passage of S. 2986. In doing so, you will send a message that this committee and the Congress continue to encourage cooperation - rather than conflict - between states and tribes. You will also be providing clear title to innocent homeowners and economic opportunity to a depressed community. Finally, you will be respecting the wishes of all of the parties that are directly impacted by this bill. Contrary to the assertions of the very few detractors of S. 2986, you will not be setting some terrible precedent that alters federal Indian policy.

History of the Settlement

The history that led to the Community's claim to land in the so-called Charlotte Beach area of Michigan's Upper Peninsula has been well documented and will, I am sure, be thoroughly explained by other witnesses today. From the state's perspective, this claim first became a current issue in 1980, when the Community began asking for the assistance of the Bureau of Indian Affairs in prosecuting the land claim. By 1984, the nearly 200 landowners in the Charlotte Beach area were well aware of the issue and began turning to the state and to Congress for help. The federal government declined the invitations of the Community, the state and the property owners to become involved. In 1996, the Community filed suit in both federal and state court.

The Community's attempts at judicial resolution of its claims failed. The Michigan Court of Claims dismissed as untimely its suit for damages against the state and the governor, a result later upheld by the Michigan Court of Appeals. The Michigan and United States Supreme Courts declined to review the lower court rulings.

In federal court, the Community's suit against the property owners was dismissed on procedural grounds. The United States District Court ruled that the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe"), which shares some common history with the Bay Mills Indian Community, was a necessary party and that the suit could not proceed without the Sault

Tribe's voluntary involvement.[1] In so ruling, the District Court did not declare the relative interests of the Sault Tribe and the Community, but found only that the Sault Tribe had a claim that was not "patently frivolous."[2] The Sixth Circuit Court of Appeals subsequently affirmed the District Court, finding that the Sault Tribe has a potential claim.[3]

At the end of the day, therefore, no court has ever addressed the substance of the Community's claim for possession of the lands now inhabited by many private landowners. Today, the numerous families who own property in the area known as "Charlotte Beach" have an existing cloud on title and are unable to obtain title insurance or mortgages. Consequently, the local township has reduced their property assessments by 90 percent, a serious devaluation of property values that has also led to a loss of tax revenue for local government services. Given the manner in which the federal court dismissed the land claim and the sovereign immunity of the tribes, the landowners are precluded from suing to clear title, meaning judicial resolution of the claims is not a viable option. Congressional action, therefore, is the only means open to resolve extant claims that are having a real impact on the lives of innocent landowners.

For the past several years, the Community has worked with local communities in Michigan and with the State in an attempt to reach an acceptable settlement of its claims. At one point, through bills introduced by Michigan Congressman Bart Stupak, the Community sought alternative lands in Vanderbilt, Michigan, not far from the Community's existing lands and well within the area ceded by an 1836 treaty to which the Community was a party. These efforts were opposed by another tribe with a gaming facility 50 miles from Vanderbilt that sought assurances from the state that no such settlement would be reached. Last year, though, the State nevertheless sought settlement of the Charlotte Beach land claims by agreeing to alternative land in Vanderbilt through a proposed congressional resolution that would also have explicitly limited future gaming expansion in the state. This proposal too met with strong resistance from other tribes and died on the vine.

Now, in 2002, more than 20 years after the Community revived efforts to obtain federal assistance to remedy its claim, the State and Community are before you with a new approach. We now ask you to ratify a settlement

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[1] Bay Mills Indian Community v. Western United Life Assurance Company, No. 2:96-CV-275 (W.D. Mich., Dec. 11, 1998).

[2] Id. at 10. The Court also found that relief for the Bay Mills Indian Community could impair the Sault Tribe's ability to later secure similar relief. Id. at 11. Obviously, this would not be the case if the Community's claims are resolved by S. 2986.

[3] Bay Mills Indian Community v. Western United Life Assurance Co., 208 F.3d 212 (6th Cir. 2000).

that resolves the Community's land claim in exchange for alternative land in an area that welcomes the Bay Mills Indian Community with open arms and in a manner that has no real impact on the interests of other tribes.

Terms and Benefits of the Settlement

S. 2986 would extinguish the land claims of the Community and, in exchange, direct that alternative land in the city of Port Huron, Michigan, be taken into trust for the Community. It would also ratify and effectuate the settlement agreement reached between the Community and Governor Engler. This agreement contains the following primary provisions:

- The Community voluntarily relinquishes its claims and the Governor concurs in the designation of alternative land in Port Huron which, pursuant to the clear language of IGRA, will be eligible for casino gaming.

- The Community will resume making payments of 8% of electronic gaming revenue to the State, in the same manner as five other Michigan tribes. These payments are in exchange for continued limited exclusivity in the right to offer electronic games and will be made only so long as the State does not enact perennially reappearing legislation to allow electronic games at horse tracks or other locations.

- The Community will make payments of 2% of electronic gaming revenue to local governments, to off-set any increased costs to those governments.

- The Community will voluntarily limit itself to three casinos under its compact with the state.

- The State will, until 2032, forbear from demanding renegotiation of the compact.

The benefits of S. 2986 and the settlement agreement should be self-evident. Nevertheless, since they have been questioned by some, allow me to provide a brief explanation of two facets of the legislation: its effect on the titles of the Charlotte Beach property owners and the prospect of a casino in Port Huron.

First, S. 2986 would lift the cloud on the titles of the homeowners of Charlotte Beach. Some have claimed that this cloud cannot truly be lifted absent a settlement that also involves the Sault Tribe. However, while the Sault Tribe asserts that it has a "potential" claim to the Charlotte Beach property, the simple fact is that no such claim has ever been brought. Only the Bay Mills Indian Community has a recorded challenge that has led to a

cloud on the titles held by dozens of families. Ratification of the settlement agreement by S. 2986 will lift that cloud. Again, the federal courts have not decreed that the Sault Tribe has a viable claim or adjudicated the relative interests of the Sault Tribe and the Bay Mills Indian Community. Rather, the courts have stated that the Sault Tribe has a potential claim that is not "patently frivolous."

Despite the above, the State is willing to enter into a settlement agreement with the Sault Tribe if it now asserts a claim. In fact, the State and tribal representatives have recently been talking about the potential for settlement and I am hopeful that we can resolve our differences. Of course, the State does believe that any settlement must fit the general parameters of the Community's settlement: any resultant gaming facility must be in a location where it is welcomed by local residents and where it does not have a real impact on another tribe's gaming operations.

As the State continues to discuss the possibility of settlement with the Sault Tribe, however, progress on S. 2986 should not come to a halt. The Bay Mills Indian Community has expended considerable effort in working with local officials to garner support for this settlement, and those efforts should not be jeopardized by unwarranted delay. Nothing in S. 2986 impairs in any way the Sault Tribe's ability to seek to resolve any future claims it may one day decide to assert. Should this bill move without resolution of Sault Tribe issues, a future settlement agreement could be ratified by a different vehicle.

In addition to clearing the property titles of the families who call Charlotte Beach home, S. 2986 will provide economic opportunity to a depressed community. Under the terms of IGRA, the alternative land in Port Huron would be eligible for casino gaming. Port Huron currently has an unemployment rate that is more than double that of the rest of the State of Michigan and, in 2001, the Port Huron populace voted in favor of a casino. The city is the only Michigan border crossing with Canada that does not currently have a gaming facility to compete with a neighboring Canadian casino. Port Huron, therefore, is not a new market for gaming; it is already served by a casino that returns no revenue to the United States.

Effect of S. 2986

The few opponents to S. 2986 that have surfaced base most of their charges on strained interpretations of 25 U.S.C. § 2719, otherwise known as Section 20 of IGRA. This section, as the committee well knows, is a "general" prohibition on tribal gaming on lands taken into trust after 1988. The so-called general rule, however, has a number of exceptions. While several of these are inapplicable to lands located within the State of Michigan, a short

recitation of the exceptions that can be used in Michigan is in order. Lands acquired in trust after 1988 may be used for gaming in Michigan if:

- They are located within or contiguous to the 1988 boundaries of the tribe's reservation. § 2719(a)(1).
- The tribe had no reservation in 1988 and the lands are located within the tribe's last recognized reservation. §2719(a)(2)(B).
- The Secretary, after consultation with the tribe, local and state officials and other nearby tribes, determines that a gaming establishment on the lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community, and the governor concurs in this determination. § 2719(b)(1)(A).
- **They are taken into trust as part of the settlement of a land claim. § 2719(b)(1)(B)(i).**
- They are taken into trust as part of the initial reservation of a tribe acknowledged by the Secretary of Interior. § 2719(b)(1)(B)(ii).
- They are taken into trust as part of the restoration of lands for a tribe that is restored to federal recognition. § 2719(b)(1)(B)(iii).

An argument has been voiced that the settlement agreement that would be ratified by S. 2986 would set a precedent because no tribe currently operates a gaming facility on land taken into trust as part of the settlement of a land claim. But the clear and unambiguous language of IGRA would authorize such an operation. Nothing in IGRA suggests that the "land claim" exception should be artificially limited, nor would this be in keeping with the longstanding principle that statutes dealing with tribes must be interpreted in their favor. Furthermore, since 1988, there have been five congressional acts directing that land be taken in trust to settle tribal land claims.[4] While it may be the case that there are not currently any gaming facilities on any of these lands, under the terms of IGRA all such lands are eligible for casinos.

Next, it has been claimed that the "land claim" exception must be read narrowly, and that engrafted onto it should be limitations that appear nowhere in IGRA's language. Specifically, it is argued that, despite the clear language of the statute, the exception is somehow inapplicable (1) if the lands to be taken into trust are not very close to the tribe's reservation, (2) if Congress did not participate in the land claim settlement negotiations, or (3) if federal liability has not been established. It is then contended that use of the "land claim" exception in this case would be poor public policy, because it would lead to checkerboarding, encourage sham transactions and be

[4] See 25 U.S.C. §§ 1773-1778. Washington Indian Puyallup Land Claims Settlement, Seneca Nation New York Land Claims Settlement, Mohegan Nation Connecticut Land Claims Settlement, Santo Domingo Pueblo Land Claims Settlement, Torres-Martinez Desert Cahuilla Indian Claims Settlement.

analogous to this country's shameful policy of removal. These arguments are wholly without merit.

As a threshold matter, it must be noted that the argument that the § 2719 exceptions should be construed narrowly was advanced by this state in recent litigation -- and flatly rejected. See, Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney and State of Michigan, Case No. 1:96-CV-466 (W.D. Mich. Apr. 22, 2002) at 21-22.[5] In that same case, the court addressed the "land claim" exception and described it as "unequivocal and unrestricted." Id. at 20.

Turning now to the specific limitations sought to be created, there is no requirement that the land taken in trust in settlement of a land claim be located in the immediate vicinity of a tribe's existing reservation. Indeed, the "land claims" exception is an exception to the general rule that gaming be within or contiguous to 1988 reservation lands. In this case, while Port Huron is 257 miles from the Community's existing reservation, it is far closer to the Community's lands than Detroit is to many of the Michigan tribes that have sought off-reservation gaming there under a different IGRA exception. Furthermore, while opponents cite a number of cases and federal recognition statutes as support for their claim that a distance limitation should be found within the "land claim" exception, those cases are utterly irrelevant to the question at hand. Virtually all of them deal with the "restored lands" exception that by definition must encompass land previously held by the tribe. The simple fact is there is not one single case, nor one word of text in either IGRA or the Indian Reorganization Act, that supports finding some unexpressed geographic limitation in IGRA's "land claim" exception.

Similarly, there is nothing in IGRA's text that supports the faulty proposition that a land claim settlement must involve the active participation of Congress in negotiations. In fact, in past land claims settlements acts, Congress has done precisely what is asked here - adopted by reference agreements negotiated by states and tribes.[6] All the State of Michigan and the Community is asking Congress to do in this instance is to take a path previously followed and to respect and encourage agreements between states and tribes. Nothing in IGRA or any reported case suggests that land taken in trust as part of a settlement agreement ratified in this manner in some way fails to qualify for IGRA's clear "land claim" exception.

[5] It should be noted that even the State's modest argument for judicial restraint, in the context of seeking to harmonize two different exceptions, would not lead to the narrow interpretations being alleged by opponents to S. 2986.

[6] See, e.g., 25 U.S.C. § 1750c (ratifying settlement agreement between Miccosukkee Tribe and State of Florida), 25 U.S.C. § 1775a (ratifying settlement agreement between Governor of Connecticut and Mohegan Tribe, filed with the Secretary of State of Connecticut), 25 U.S.C. § 1773 (ratifying agreement of Puyallup Tribe of Washington).

Neither does anything in IGRA suggest that the "land claim" exception is somehow inapplicable in the absence of a determination of federal liability. Creating such a new limitation upon IGRA's language would do nothing more than eliminate an incentive to settling land claims in cases where liability was based upon the action of a state or private landowners. It can hardly be good policy to erect barriers to peaceful resolutions of claims, suggesting instead that land claims should be litigated to an unhappy conclusion.

Addressing the public policy arguments last, there is simply no basis for asserting that passage of S. 2986 by this committee and the Congress would somehow encourage sham transactions.[7] Any precedent that would be set here would be wholly positive: Congress would be approving a land claim settlement negotiated by a state and tribe, where alternative lands are identified, where there is local support for gaming in an existing market, where there would be no real impact on other tribes and where the agreement requires Congressional approval. All of these are positive standards to set for future land claims settlements. Congress should defer to the State's negotiated choice of location for the alternative lands and respect the agreement reached only after difficult and lengthy negotiations between two sovereign governments.

Response to Criticisms

Finally, I do wish to respond to two technical objections that have been leveled against S. 2986, as well as one perhaps well-intentioned but misguided suggestion for an alternative approach.

First, in a written communication to members of this committee, one of the few opponents to the bill asserted that the settlement agreement between the Community and the Governor somehow circumvented the state legislature. This is simply untrue. In Michigan, the state legislature's will in Indian gaming matters is effectuated through the state-tribal gaming compacts that it ratified by concurrent resolution. Nothing in the agreement between the Community and Governor Engler amends the compact in any way. Paragraphs of the settlement agreement providing for revenue sharing do not alter the compact - which does not itself even *include* any revenue provisions.[8] Nor is the duration of the compact altered, rather the Governor

[7] To the extent that there is any concern regarding the other public policy argument raised - that this settlement would result in "checkerboarding" for jurisdictional purposes, it should be noted that checkerboarding is already the reality in Michigan. With one or two exceptions, Indian lands in Michigan are widely scattered and the state and tribes are not strangers to this situation. In fact, state law now authorizes cooperative law enforcement agreements and other arrangements to deal with this problem.

[8] In the past, revenue sharing provisions involving Michigan tribes were contained in a federal court consent decree agreed to by the Governor and the Michigan Attorney General - with no legislative

is undertaking a new obligation not to demand renegotiation of the compact's terms for a set period of time. Any argument that the compact is being "altered" was disposed of by the United States District Court for the Western District of Michigan, when it entered a consent decree containing parallel provisions in the case of Keweenaw Bay Indian Community v. United States of America and the State of Michigan (Case No. 2:94-CV-262). In doing so, the Court found that objections to the decree based on a claim that it amended the compact were without merit.

Second, one opponent has claimed that the settlement agreement nullifies the rights of other tribes found in Section 9 of their compacts. Section 9 of Michigan's state-tribal gaming compacts is an intertribal revenue sharing provision insisted upon by the state as a disincentive to applications by tribes to have the Secretary of Interior take off-reservation lands into trust for gaming purposes. It is aimed squarely at a different exception in Section 20 of IGRA than the exception permitting gaming on land taken into trust in settlement of a land claim.[9] The conclusion that Section 9 is inapplicable to this situation is bolstered by the only legal analysis performed by a disinterested party - a 1995 memorandum of the Department of Interior concluding that this compact section is triggered only when a tribe makes application to the Secretary of Interior to have land taken into trust.

Lastly, one opponent to S. 2986 has suggested that as an alternative means of bringing finality to the Charlotte Beach land claims, the committee should enact legislation abrogating the sovereign immunity of the Sault Tribe, thereby allowing the Bay Mills Indian Community to pull the Sault Tribe into a new federal lawsuit and proceed with its lawsuit against innocent landowners. The State is here before this committee because it believes that a negotiated settlement between sovereign governments is a better means of resolving disputes than encouraging litigation between a tribe and homeowners. I will leave to the committee to judge whether it is wise public policy to eliminate a tribe's sovereign status to avoid a result that another tribe might find distasteful.

Conclusion

In conclusion, I hope that the committee sees the merit in S. 2986 and will allow this negotiated compromise, reached within the bounds of existing

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involvement whatsoever. The propriety of such provisions and of the lack of legislative involvement in them was upheld by the Michigan Court of Appeals in Tiger Stadium Fan Club v. Governor, 553 N.W.2d 7 (Mich. Ct. App. 1996).

[9] Section 9 was addressed in the agreement only as a prophylactic measure in case another tribe attempted to trump this section into a basis for challenging the settlement - a decision that appears to be proving prophetic.

law, to come to fruition. To those who criticize the bill on the grounds that it creates a precedent for the use of the land claim exception within IGRA, it should be said that even if this were the case, the precedent would be a good one. Here, you are presented with a tribe that has worked tirelessly to find a solution to a land claim and has earned the support of affected local and state governments. The Community and the Governor have concluded an agreement that will lead to alternative land being eligible for a gaming facility in a community that supports it, that already has a Canadian casino just across the river, and that is located in the area of the state where a new casino would have the *least* impact on other tribes. It is no wonder, then, that a majority of Michigan tribes either support or are silent on S. 2986 and that the Michigan Inter-Tribal Council, an organization with representation from all Michigan tribes, passed a resolution supporting the bill. I urge you to support this bill too, and to send a message to states and tribes that this body supports their efforts to resolve their disputes through reasoned and principled negotiation, rather than simply resorting to the courtroom.

Thank you again for the opportunity to testify.

October 10, 2002

SENATE COMMITTEE ON INDIAN AFFAIRS

**PREPARED STATEMENT OF**

**BERNARD BOUSCHOR, CHAIRMAN**

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS**

For the Hearing on

**S. 2986**

Bay Mills Indian Community Land Claim Settlement Act

My name is Bernard Bouschor, and I am the Chairman of the Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe"), a position that I have held for 17 years. The Sault Tribe opposes S. 2986. This bill purports to settle a land claim, but in reality it would enlist Congress in opening the Indian Gaming Regulatory Act to another casino scam. The Sault Tribe has a stronger claim to the land in question than Bay Mills, but we are not included in the bill. Bay Mills has already lost its claim in court and has no viable claim to settle. The bill will not clear anyone's title, as the alleged beneficiaries of the bill, the Charlotte Beach landowners, have concluded in a statement from their attorney included in the attached exhibits. The bill may well interfere with other Michigan tribes' rights under our tribal-state gaming compacts negotiated and approved

under IGRA. Finally, it is another step in the hijacking of federal Indian policy by non-Indian gaming interests, and would further distort the federal-tribal relationship in a way that tarnishes tribes to their future detriment. I would like to amplify on each of these points.

## I. The Sault Tribe Has a Claim to the Charlotte Beach Lands.

The Sault Tribe has a direct and vital interest in this bill. We share the claim. We are a much larger tribe than Bay Mills. With almost 30,000 members, we are one of the largest Indian tribes in the country and by far the largest in Michigan. In fact, we have more members than all of the other eleven tribes in Michigan combined. Our territory is the eastern Upper Peninsula of Michigan, and our government is headquartered in Sault Ste. Marie, about 20 miles east of the Bay Mills Reservation.

We share a common, overlapping ancestry with Bay Mills. Because of this common ancestry, we have just as strong a claim to the Charlotte Beach lands as does Bay Mills. This is no idle assertion. That very issue was adjudicated in federal court and affirmed by the Sixth Circuit, which stated: [1]

> We are satisfied that the evidence establishes the existence of two separate tribes, both of which trace their ancestry to the two Chippewa bands headed by O-Shaw-Wan-O and Shaw-wan and both of which therefore have a potential interest in the Charlotte Beach property.

[1] Bay Mills Indian Community v. Western United Life Assurance Co., 2000 WL 282455 (6th Cir., March 28, 2000). A copy of the decision is attached as Exhibit A.

Since we share the claim with Bay Mills but did not join in their lawsuit, the federal court dismissed their case, finding that the Sault Tribe was an "indispensable party." Bay Mills could not pursue the claim to the land without us.

## II. The Bill Will Not Help the Landowners.

The bill purports to incorporate a settlement agreement between the State of Michigan and Bay Mills. The agreement recites that the Governor "desires to settle the land claim for the benefit of ... the affected Charlotte Beach landowners," and goes on to state that the parties believe that the settlement will "lead to a clearing of title of the Charlotte Beach lands."[2] These statements are a sham. The bill does nothing for the landowners, and both the State and Bay Mills know it.

You don't have to take the Sault Tribe's word for it. The landowners themselves have reached that conclusion. They have prepared a statement for the Committee through their attorney, which we have attached.[3] That statement captures something of what the landowners have already been through, and just how enactment of the bill will make their situation worse.

Why would the landowners oppose the bill? Because it leaves them worse off than without its passage. They know the Sault Tribe has a claim to their land, and the bill does not address that claim. Since the courts have ruled that we have whatever claim

[2] *Settlement of Land Claim*, attached as Exhibit B. Attached as Exhibit C.

[3] Prepared Statement of Leeanne Barnes Deuman, attached as Exhibit C.

Bay Mills has, and since we haven't settled that claim and have been excluded from this bill, the landowners know that their title will not be cleared. In fact, it will be even more clouded, since Congressional ratification of the claim will only strengthen our own claim. The landowners cannot get relief and clear title unless and until the Sault Tribe is included in the bill.

**III. Bay Mills Has Already Lost its Claim in Court.**

The Sault Tribe claim is in fact a more serious threat to the landowners than is the Bay Mills claim. Bay Mills has already lost on the merits of its claim, in a case that went all the way to the Supreme Court. This is another part of the scam: having lost its claim in court, Bay Mills seeks to enlist Congress in transmuting a lost claim into casino gold.

Bay Mills and the State have been arguing that the claim was dismissed on procedural grounds and so retains vitality. This attempts to confuse and hide the true result of the litigation. The story is somewhat complicated, since it involves two lawsuits, but the result of these cases is clearly the foreclosure of all of the Bay Mills claims.

The claim to Charlotte Beach lands stems from an 1857 deed from a non-Indian couple, Boziel Paul and his wife, to the Governor of Michigan. The deed purported to convey the land to the Governor in trust for the benefit of the two Chippewa bands mentioned in the passage quoted in the 6th Circuit opinion quoted in Section I, above. The Pauls had obtained the land by federal land patent in 1855. The Governor neither

acknowledged nor acted on the deed, and about 30 years later the Charlotte Beach lands were sold for back taxes. The Charlotte Beach claim, then, focuses on actions taken (or not taken) by the governor and the State.[4]

Bay Mills filed two lawsuits asserting a claim to the Charlotte Beach land: a federal action against the Charlotte Beach landowners and their title companies,[5] and a claim against the State filed in the Michigan Court of Claims.[6] The cases did not differ materially on the legal theories or claims presented. In fact, the federal case is replete with claims against the State even though the state was not a party. The difference was in the relief sought: primarily return of the land in the federal suit, damages in the state suit. Two suits were needed because the State could not be sued for damages in federal court, and not because of any difference in the suits based on the facts, applicable law, or legal claims.

The federal action was dismissed on procedural grounds – the absence of the Sault Tribe from the case. That decision does not constitute an adjudication of the claims on the merits and does not by itself preclude litigation of the claims by Bay Mills. However, the same claims were involved in the state case, and in *that* case *all* of the Bay Mills claims were disposed of on the merits or on procedural grounds (primarily statute of limitations) that bar litigation in any court.

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[4] These facts are briefly stated in the 6th Circuit opinion, Exhibit C.
[5] *Bay Mills Indian Community v. Western United Life Assurance Co., et al.*, W.D. Mich. No. 2:96-CV-275. The complaint filed in the case is attached as Exhibit D.
[6] *Bay Mills Indian Community v. State of Michigan, et al.*, Mich. Ct. App. Docket No. 218580. The opinion of the appellate court is attached as Exhibit E.

Since Bay Mills lost on its claims in state court, it cannot relitigate them in federal court or any other forum under well established principles of collateral estoppel. Put simply, Bay Mills had its day in court, and does not get another one. The federal claims (primarily, that the land was not subject to taxation, and that its alienation violated the Indian Nonintercourse Act) were all lost on the merits in state court. Bay Mills had raised a number of state law claims in the federal action, but these are all what is called "pendent" claims, over which the federal court has no independent jurisdiction. They can only be litigated in federal court as ancillary to and arising out of the same circumstances as the federal claims.

These pendent state claims cannot be brought in federal court at this point, because the state courts have already decided them and there are no surviving federal causes of action to which they may be appended. The statute of limitations bars the claims in federal court because the issue was a matter of state law applied to state claims by a state court.

A federal action on the Bay Mills claims is thus no longer viable. It would be futile because collateral estoppel bars relitigation of the claims based in federal law, and the state court has already disposed of the state law claims in a way that precludes their being raised again. Bay Mills simply has no claim left. Whether lost on the merits or forever time-barred, the claims are gone.

The claim to the Charlotte Beach lands is still viable -- but only because the Sault Tribe could litigate them. Bay Mills has no claim, but we do. We were not party to

either of the Bay Mills cases and so are not bound by the results. If there is reason to settle the claim with any tribe, it is with the Sault Tribe, not Bay Mills. Through the pretense of a viable claim, Bay Mills seeks a windfall for its loss. If this bill passes, it would invite tribes who have lost claims in court, perhaps on statute of limitations grounds, to seek "settlement" of those claims in order to obtain a casino. There must be hundreds of such situations just waiting to be resurrected.

## IV. The Bay Mills Case Was a Scam from the Start.

It is clear that Bay Mills filed its claim in order to obtain a casino by exploiting a loophole in the Indian Gaming Regulatory Act that allows tribes to conduct gaming on lands taken in trust after the passage of IGRA if the land is obtained in settlement of a land claim.[7] Congress would be torturing the meaning of this provision of IGRA if it allowed Bay Mills to parlay its situation into a casino on land 300 miles from its reservation to which it has no historic connection. Many of the reasons why this is so are presented in the statement of George Bennett from the Grand Traverse Band and will not be repeated by me. However, we want the Committee to know that the Bay Mills claim was clearly filed *because of* the IGRA loophole.

The Charlotte Beach claim did not originate with Bay Mills. It was the product of a Detroit area attorney who developed it specifically as a vehicle to obtain an IGRA casino. This attorney approached the Sault Tribe first with the claim, but we turned him

[7] 25 U.S.C. §2719(b)(1)(B)(i.).

down. He then took the claim to Bay Mills, who joined him up on his scheme. This attorney, Robert Golden, then represented Bay Mills in both court cases. The goal never was to recover the Charlotte Beach lands.

From its inception, the federal case had the air of a collusive suit. The federal complaint was filed on October 18, 1996. On October 10, 1996 – barely a week before suit was filed – one James F. Hadley purchased land within the Charlotte Beach claim area.[8] A few months later, on March 19, 1997, Hadley, representing himself, entered into a settlement agreement with Bay Mills.[9] Mr. Hadley just happened to own some land in Auburn Hills, a Detroit suburb, that he was willing to give Bay Mills in return for clearing his title to the Charlotte Beach lands, and he was also willing to sell Bay Mills land adjacent to that Auburn Hills parcel. The settlement was conditioned upon the Secretary of the Interior taking the Auburn Hills land into trust. The district court entered a consent judgement incorporating the settlement terms on March 28, 1997.

The goal was, of course, a suburban Detroit casino. Bay Mills soon filed an application to have the Auburn Hills land taken into trust for gaming purposes.[10] The application languished in the Interior Department, which later decided that the IGRA loophole for a land claim settlement required ratification of the settlement by Congress. When it became apparent that the trust approval was not forthcoming, Bay Mills moved

[8] The deed conveying this land is attached as Exhibit G.
[9] The Settlement Agreement is attached as Exhibit H.
[10] The first page of the trust application is attached as Exhibit I.

on to pursue a different casino site, and the consent judgment with Hadley was set aside on August 16, 1999.

Despite mounting opposition to the lawsuit by the Charlotte Beach landowners, Bay Mills tried to obtain other settlement agreements that would result in a casino. They focused on land in the small community of Vanderbilt, Michigan and developed several settlement proposals ofr obtaining the land. These proposals generally provided for the creation of a settlement fund with which the tribe would purchase a casino site. The final such proposal was circulated at the end of 1998.

Most landowners firmly opposed settlement, and they moved to dismiss the federal case because the Sault Tribe was not a party. In order to defend against this motion, Bay Mills attempted to show that the Sault Tribe was not properly recognized as a tribe and so had no rights in the property.[11] Thus Bay Mills tried to prove that we were not a tribe in order to pursue its casino.

The district court dismissed the federal case on December 11, 1998. As we showed earlier, the 6th Circuit affirmed this decision. Bay Mills later lost the state case in the Michigan Court of Claims, lost on appeal in the Michigan Court of Appeals on April 23, 2001, and was denied review by the Supreme Court on March 18, 2002.[12]

Long before the Supreme Court delivered the final blow, Bay Mills had switched from the courts to Congress in search of its casino. The site has changed – first Auburn

[11] See 6th Circuit opinion, Exhibit A, attached. The validity of Sault Tribe organization under federal law was upheld in City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D. D.C. 1980).
[12] Bay Mills Indian Community v. Michigan, 122 S.Ct. 1303 (2002) (mem.)

Hills, then Vanderbilt, now Port Huron – but the goal has always been the same. Bay Mills ginned up a claim, entered into a suspicious settlement with a person who bought into the claim as a defendant eight days before suit was filed, attacked our tribe's very existence, and now seeks to put one over on Congress, all in pursuit of its goal. This is hardly a track record that Congress should reward.

## V. Bay Mills is Apparently Fronting for Non-Indian Interests.

At this point, one could well be wondering why this bill is before Congress, given the points we have raised. Why is the state willing to settle the claim it had won? Why have the landowners been excluded from the process? How is it that two tribes share the claim, but that only one tribe -- and the losing tribe, at that – is included in the bill? The answer is simple: Bay Mills is apparently fronting for a group of non-Indian movers and shakers who have carried Bay Mills along on their casino quest.

The Sault Tribe, on the other hand, is fronting for no one. We have five tribally owned and operated casinos on our Indian land in the eastern Upper Peninsula, and we have never had outside management involved in them in any way. We also own and operate one of the three state-licensed casinos in Detroit, and are proud of the fact that we are the first and so far only tribe to hold a state license for a metropolitan casino, completely unrelated to our tribal status or IGRA. We manage that casino without outside management as well.

It is the shame of current federal Indian policymaking that powerful non-Indian gaming interests, or those who want to become involved in gaming, have latched on to tribes who have proven all too willing to lend themselves out to such interests. Bay Mills is just one of many examples around the country. Non-Indian money and influence has led to a steady expansion of IGRA casinos and an explosion of IGRA loopholes through which those of wealth and power pass, Indian tribes in tow.

We've watched the trend in outside management grow in Michigan. Michigan has five tribes that have obtained federal recognition since IGRA was passed, and all five have outside management. Of the seven tribes in Michigan prior to IGRA's passage, not one has outside management – Bay Mills will become the first if this bill passes. There is a surge of groups seeking federal recognition as tribes in Michigan, and all have deals with outside interests. In fact, it seems that they are seeking federal recognition at the instigation of those outside interests.

Federal Indian policy has been hijacked by these interests, who are increasingly to be found behind every tribal recognition effort, every "settlement" of a land claim, every "restoration" of tribal lands. This distorts Indian policy in favor of these interests and weakens the voice of those tribes who have not been enlisted to front for such interests. The non-Indian gamers trod a familiar path in Indian affairs. Before them others used Indian tribes for their own purposes: there were the coal, oil, and gas interests; before that, land speculators; before that, the fur traders.

IGRA increasingly stands less and less for tribal opportunity and more and more for opportunism. It should be our goal to stem this tide, not assist it in rising.

## VI. The Settlement Agreement May be Legally Flawed.

In addition to all of the problems set forth above, there are a number of legal problems with the bill. The bill will likely be the subject of a legal challenge if passed, by us and by others as well. Some of these problems are highlighted in the statement of George Bennett on behalf of the Grand Traverse Band. I want to address only two of our legal objections here.

Our first objection is that this bill appears to divest our tribe, and the five other tribes who signed gaming compacts simultaneously with us and Bay Mills, from rights secured by the compacts.[13] Section 9 of the compact of each of the tribes provides:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

Since the bill and the settlement agreement it ratifies are specifically based on a provision of 25 U.S.C. §2719 that deals with settlement of a land claim, the taking of the Port Huron lands into trust for gaming purposes appears to fall under Section 9 of the compact. Yet the Governor and Bay Mills have "agreed" that Section 9 does not apply to

[13] Besides Sault Tribe and Bay Mills, these tribes are the Hannahville Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, and Saginaw Chippewa Tribe of Michigan.

the Port Huron lands.[14] This is a blatant attempt to deprive the Sault Tribe and the other compacting tribes of their right to share in the casino revenues under Section 9. The provision is in each of the compacts, and each tribe appears to be a third party beneficiary of the provision in every other tribe's compact. Bay Mills and the Governor cannot wish or waive this contract right away.

It happens that the seven tribes have actually entered into an agreement on revenue sharing that implements Section 9. That Inter-Tribal Agreement, signed by all tribes on May 25, 1994, is attached as Exhibit I. Under the agreement, the Sault Tribe would be entitled to 21% of the net gaming revenues from a Bay Mills casino in Port Huron if that casino falls within Section 9.

This is the only revenue sharing agreement among the tribes. If it does not apply to Port Huron, then it may be that the land cannot be taken into trust for gaming purposes because that action would violate the compact, and hence IGRA. If Congress purports to extinguish rights that are secured by Section 9, that would be an illegal taking or an impairment of our contract rights.

The settlement agreement also purports to make a number of changes that implicate the tribal-state compact. Its provisions effectively double the length of the compact term and change the financial obligations of Bay Mills, all without any legislative approval. The compacts were originally approved by the Michigan

[14] See Ex. ___, ¶ 5, p. 4.

Legislature, as required by Section 11(B) of the compacts. The agreement appears to circumvent the legislature in amending the compact.

**Conclusion**

S.B. 2986 is a very bad idea. It accomplishes nothing that it purports to do and much that should not be done. The bill does not clear anyone's title. It does not include the Sault Tribe and has no effect on our claim. It revives a claim Bay Mills has lost, rewarding shady dealings in the process. Indian policy should suffer no further distortion in favor of non-Indian interests lurking behind tribes like Bay Mills. If Congress sanctions this sham, the lines will grow long of those who will surely follow.

# Bay Mills Indian Community Settlement Act

## Response to Opposition

**Prepared by**

**Virginia W. Boylan**
**Partner, Gardner, Carton & Douglas**
**Counsel to the Bay Mills Indian Community**

Opponents of the Bay Mills Indian Community ("Tribe") land claim settlement are putting forward several issues to undermine the Tribe's efforts to achieve congressional enactment of the settlement reached by the Tribe and the State of Michigan ("State") embodied in S. 2986 and H.R. 5459. These issues include: (1) the merits of the land claim itself; (2) the use of the land claim settlement exception to IGRA's general ban on gaming on land acquired in trust after 1988; (3) the location of the settlement land; (4) the role of agencies of the United States in negotiating the settlement; (5) the precedent that might be set by S. 2986; and (6) the position of other Michigan tribes. This response addresses each of these issues.

### (1) The Land Claim

The written testimony prepared by President Lufkins for the October 10, 2002 hearing before the Senate Committee on Indian Affairs describes the history and merits of the land claim in exquisite detail. The following paragraphs summarize the claim.

The Bay Mills Indian Community land claim is in the area known as "Charlotte Beach," an area that encompasses the tribal lands that were purchased in 1857 and placed into trust with the Governor of the State of Michigan for two of the six bands of the Sault Ste. Marie Chippewa who are identified in the treaty of August 1, 1855 (11 Stat. 631—a treaty with only the Sault Ste. Marie bands). The lands are located in Chippewa County, Michigan and are now owned by the State and private landowners. The Tribe cannot get a hearing in federal court on the merits of its case because of failure to be able to join an "indispensable party." The party in question, the Sault Ste. Marie Tribe, has refused to join the claim as plaintiff. Nevertheless, there is a cloud on the titles of the landowners and they are very supportive of the effort by the Tribe and the State to settle the claim. Of course, because of 25 U.S.C. §177, tribal lands, whether or not held in trust, cannot be alienated without the approval of the Congress (25 C.F.R. 152.22(b)). This is why it is imperative the Congress approve the settlement between the Tribe and State that was reached at virtually no cost to the United States.

The lands were sold for unpaid for taxes in the 1880s without notice to the bands. Efforts to resolve this matter were unsuccessful. For many years, the Tribe lacked the resources to access the courts. The United States declined to bring the case under 28 U.S.C. 2415 because the United States did not hold the lands in trust in the 1980s. It was not until 1996 that the Bay Mills Indian Community had sufficient funds to bring the case on its own behalf. In October 1996, the Tribe filed suit in the U.S. District Court for the Western District of Michigan against

147 named defendants. The case, titled *Bay Mills Indian Community v. Western United Life Assurance Co.*, Case No. 2:96 CV 275, challenges the titles, mortgages, rights of way and easements relating to 230 acres of land along the St. Mary's River in Chippewa County, Michigan.

Because of Eleventh Amendment issues, the Tribe brought a separate suit against the State of Michigan titled *Bay Mills Indian Community v. State of Michigan, et al.*, Case No. 96-16482-CM. That case was decided against the Tribe on statute of limitation grounds. Thus, this claim has never been dismissed on its merits, leading the Governor to enter into negotiations to finally resolve the claim.

**(2) The Use of IGRA's Land Claim Settlement Exception**

The objectors question the use of lands obtained as part of a settlement of a land claim for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §2719, also referred to as "Section 20." ***A copy of 25 U.S.C. §2719 is attached.***

The Indian Gaming Regulatory Act generally prohibits gaming on lands taken into trust after date of enactment of the Act (October 17, 1988). This general ban on gaming on after-acquired lands has several exceptions. First, gaming is permitted on lands taken into trust that are within or contiguous to a tribe's reservation as it existed in 1988. For "off-reservation" lands, there is a major exception that is political in nature and three additional exceptions that are within the authority of the Secretary of the Interior.

The major political exception is when a tribe acquires land off its reservation and requests that the Secretary take it into trust because the tribe seeks to conduct gaming operations on that land (2719(b)(I)(A)). A secretarial 2-part determination is necessary and requires the concurrence of the Governor of the State. This exception was not used by Bay Mills and the State because the underlying land claim of Bay Mills would not be resolved.

Under Section 20, part (b)(1)(B), the three other exceptions to the ban on gaming on after-acquired lands are *"lands are taken into trust as part of—*

*(i) settlement of a land claim,*

*(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or*

*(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."*

(25 U.S.C.§2719)

The Bay Mills Indian Community Settlement Act falls within exception (i). This exception was made part of IGRA because tribes seldom re-acquire the lands that are subject to a land claim. Generally, claims lands are located in populated areas or are owned by non-Indians who acquired title in good faith and were unaware of the underlying tribal claim. Rather than

dislocate these owners, very often settlements include parcels of land that are either owned by the State or the Federal government or land that is vacant and there is a willing seller. However, settlement lands are rarely on or near the tribe's current reservation. *The Act thus contemplates that the replacement or settlement lands should be able to be used in exactly the same way as if the lands had not been illegally alienated. Since tribes can conduct gaming on reservation lands even if not taken into trust until after October 1988, so should tribes be able to use settlement lands acquired after October 1988 without having to go through the 2-part test and risk non-concurrence by the Governor.*

Had the Charlotte Beach lands not gone out of tribal ownership in a questionable manner, there would be no settlement bill before the Congress. *If the Tribe's Settlement Act passes this will be the first use of this exception since Congress passed the IGRA in 1988. Because it is a case of first impression, there is no court holding that addresses use of this exception.*

There are tribes in New York and Wisconsin who are negotiating land claim settlements and these also may involve off-reservation settlement lands that may be used for gaming. There are no other pending land claims that have been widely discussed. This settlement will not open a Pandora's box. For a claim to even reach settlement stage, it must have a strong basis in law and fact. The Bay Mills' claim does have such a basis in law and fact.

In short, the Tribe only asks that Congress extinguish the Tribe's land claim at *no cost* to the federal government.

**(3) The Location of the Settlement Land**

The opponents question whether the settlement land needs to be either within the claim area or near (or contiguous to) the Tribe's existing Reservation or, if not, whether the distance from the Tribe's Reservation of this particular settlement land will set an unwarranted precedent.

*The IGRA provision that allows gaming on after-acquired lands taken into trust as part of a land claim settlement contains no restriction on where those settlement lands may be located.* There is no legislative history, departmental regulation or case law on this exception. In the absence of any explicit restriction, the location of the lands is a matter for negotiation between the parties. Any lands obtained through the settlement of its land claim may be used for Indian gaming (subject to the substantive provisions of IGRA, of course) so long as the Secretary of the Interior takes the land into trust. This is so regardless of the proximity of the land to the claim area or to the Tribe's current reservation. In fact, that is just what IGRA contemplates. The settlement of land claims is a worthy goal to be undertaken by tribes to clear clouded non-Indian title. Once successful (with hopefully little or no displacement of current landowners), *the Act contemplates that the replacement or settlement lands may be used in exactly the same way as if the lands had not been illegally alienated, regardless of where they are located.* In this case, the land is 250 miles from the current Reservation, is within the same State as the Tribe is located, the Tribe is welcomed by the local community, and the land is in an area that was once inhabited by Chippewa Indians.

There is no indication that the distance from Bay Mills to the Port Huron site would create any problems for policy makers. Both the Grand Traverse Band of Chippewa and Ottawa Indians and the Sault Ste. Marie Tribe sought locations for gaming in Detroit in the mid-1990s. In fact, a site selected in Detroit by the Sault Ste. Marie Tribe was subject to a secretarial 2-part best interest determination and the Secretary found it was in the Tribe's best interest. The location approved by the Secretary was farther from the Sault Ste. Marie Reservation than the Port Huron site is from the Bay Mills Reservation. In that case, the Governor was not inclined to concur in the positive best interest determination and so the project did not go forward. The "distance" issue is simply a red herring and has no policy underpinning.

**(4) The Role of Federal Agencies**

The opponents of the bill claim that the Department of Justice and/or the Department of the Interior should have negotiated the Settlement. There is no requirement that a land claim settlement between a Tribe and a State must be negotiated by the Department of Justice when the United States is not a party to the suit. When the Tribe first approached the Department of the Interior to intervene with Justice to have the claim brought, Interior concurred. However, in 1984, the Department of Justice declined to bring this case on the Tribe's behalf.

In 1995 and again in 1997, the Tribe asked Interior how to proceed with the settlement of its claim and the extinguishment of the Tribe's land title. The response from Interior officials was that once the issues involving the State and the Tribe have been settled by the parties (the State, the Tribe and the landowners), then the Congress must pass a law to extinguish the underlying tribal land claim. Only the Congress has the power extinguish tribal title to land and, without a bill, the cloud on the title of the State and non-Indian owners will remain.

**(5) The Precedent of S. 2986**

Opponents argue that S. 1986 will pave the way for "scam" land claims by tribes seeking to find more lucrative casino locations. This argument completely ignores the fact that any land claim must have some basis in fact and law. Tribes cannot just make them up. When the Bay Mills Tribe officials discussed this matter with officials of the Department of the Interior in 1995, they were told that there are only a few serious Indian land claims throughout the Nation that have yet to be resolved. This is a question for the Department of the Interior to answer.

There has never been any use of the "lands taken into trust to settle a land claim" exception in IGRA. In fact, there have been only three instances since 1988 where the United States Government has allowed tribes to conduct gaming on newly acquired lands that are located off tribal reservations. Those are the Kalispel Tribe in Washington, the Forest County Pottawatomi Tribe in Wisconsin and (arguably) the Keweenaw Bay Indian Community in Michigan. (The latter tribe conducts gaming on land that was put in trust after 1988 but no one questioned this until after the compacting process was long finished and gaming was in operation. The land was subsequently the subject of the two-part best interest determination and the Governor concurred in that determination.) There is simply no "Pandora's box" waiting to be opened.

**(6) The Position of Other Michigan Tribes and the Tribal/State Compact Issue**

Opponents have advanced the argument that the bill, by incorporating the terms of the Settlement Agreement, means that future changes or amendments to the Settlement Agreement will also somehow require congressional approval. This is not the case. While the Settlement incorporates an agreement between the Tribe and the State and includes some references to the Tribal/State Gaming Compact, this in no way sets a precedent that would require Congress to ratify any and all other Tribal/State Compacts or amendments thereto as alleged by the opponents. The Settlement speaks for itself; it is a stand-alone document that is separate and apart from the Bay Mills' gaming compact and all other tribal/state compacts in Michigan. The agreement is between the Bay Mills Indian Community and the State of Michigan. It does not amend (or seek to amend) any provision of the existing Tribal/State Gaming Compacts in Michigan.

The Agreement settles a land claim and provides value to the Tribe for lands illegally alienated from the Tribe many years ago. The State played a role in the alienation and consequently is a necessary party to the settlement of the claim. The Governor is authorized by state law to enter into agreements of this kind with tribes. The approval of the State Legislature is not required for these agreements and there is a state Attorney General opinion on this point.

**Summary**

The exceptions contained in IGRA are there for a reason. There is nothing in the law or the legislative history to support the notion that settlement lands must be either the original lands of the claims or lands on or near the Tribe's reservation. That simply would make the provision unnecessary. The opposition is not driven by principles of Indian law or policy. In fact, seven of the 11 recognized Tribes in Michigan either support or do not oppose the Bay Mills Settlement Act.

Attachment:

25 U.S.C. §2719 reads:

(a) Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless –

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and –

(A) such lands are located in Oklahoma and –

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b)

(1) **Subsection (a) will not apply when** –

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) **lands are taken into trust as part of** –

(i) **a settlement of a land claim,**

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(c) Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

The applicable language is highlighted in bold.

Additional Commentary:

The various parts of subsection (a) deal with requirements that gaming take place within reservations. For example, (a)(1) clearly allows tribes to acquire lands within (or contiguous to) their existing reservations for gaming facilities. In this context, the exceptions in subsection (b) **by definition** refer to lands **away from** a tribe's reservation.

A thorough review of the legislative history reveals nothing that would support a different conclusion. For example, the Senate Report states: "Gaming on newly acquired tribal lands *outside of reservations is not generally permitted* unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination." S.Rep. No. 446, 100th Cong., 2d Sess. 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3078. The key word is "generally," which was clearly included to preserve the exceptions included by Congress in the statute, including the one for settlement lands. The legislative history does not expand on this point, nor is there any language in the legislative history to suggest that the statute does not mean what it says: lands acquired through claim settlements may be used for gaming so long as they are taken into trust.

This conclusion may be initially alarming to some observers, but reflection on several factors should assuage any fears. First, to utilize this exception, a tribe cannot simply acquire land off-reservation for gaming purposes; the land must be obtained through a settlement of a land claim. This not only limits the universe of possible claimants to those tribes with valid land claims, but it also limits the number of possible current land owners having titles that may be clouded by potential tribal land claims. Experience shows that most land claims are settled with some combination of monetary damages, funding for land acquisition, and/or donation of some federal or state lands. Where federal or state land is involved, there is an opportunity for states to be involved in the process of deciding whether a particular parcel should be offered as part of a settlement. Very often, such parcels are not within the original land claim area but are nevertheless considered lands acquired in settlement of a land claim.

Finally, IGRA makes it very clear that the lands must be taken into trust by the United States (or be subject to a restriction on alienation by the United States) in order for gaming to take place. 25 U.S.C. §2703(4)(B). As subsection (c) of §2719 makes clear, "Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." Under 25 U.S.C. §465, the Secretary of the Interior has discretion to take lands into trust on behalf of Indian tribes.

> **The Secretary of the Interior is hereby authorized, in his discretion, to acquire,** through purchase, relinquishment, gift, exchange, or assignment, **any interest in lands,** water rights, or

> surface rights to lands, **within or without existing reservations**, including trust or otherwise restricted allotments, whether the allottee be living or deceased, **for the purpose of providing land for Indians.**

Thus, even the basic law governing secretarial trust acquisitions unequivocally includes the authority to take lands "within or without (outside) existing reservations."

**TESTIMONY OF AURENE M. MARTIN**
**DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS**
**BEFORE THE**
**COMMITTEE ON INDIAN AFFAIRS**
**U.S. SENATE**
**ON**
**S. 2986**
**"THE BAY MILLS INDIAN COMMUNITY LAND CLAIM SETTLEMENT ACT"**

**OCTOBER 10, 2002**

Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here today, to testify on the bill for the settlement of certain land claims of the Bay Mills Indian Community in Michigan.

**Land Claim Settlement**

S. 2986 would ratify and execute an agreement between the Governor of the State of Michigan and the Bay Mills Indian Community settling the Tribe's land claim in the State of Michigan. According to the provisions of S. 2986, in exchange for extinguishing their claim to Charlotte Beach Land in Chippewa County, Michigan, the Indian Community is to receive alternative land at Port Huron, which is 257 miles from the Community's reservation. The land would be taken into trust by the Department and a Class III gaming compact would be approved to allow gaming on the land. We are encouraged by the efforts of the State and the Tribe to reach an agreement on this important issue, however the Department does not support this legislation at this time. S. 2986 would force a number of administrative actions without giving the Administration sufficient time to review the terms and there is no provision for obtaining the views of other interested parties, including other

Tribes, prior to executing these significant actions.

**Settlement of Land Claim**

Section 1(5) defines the term "Settlement of Land Claim" to mean "the agreement between the Community and the Governor of the State executed on August 23, 2002, and filed with the Office of the Secretary of State of the State." The Department has not fully reviewed the terms and implications of the Settlement Agreement. On its face, it appears the Tribe would agree to make revenue-sharing payments to the Michigan Economic Development Corporation in an amount equal to 8 percent of the net win derived from all Class III electronic games of chance (as defined in Section 3(A)(5) of the Class III gaming compact between the Bay Mills Community and the State of Michigan) that are operated by the Tribe. In exchange, the Tribe would receive limited geographical exclusivity for electronic games of chance. The Tribe would also agree, under the Settlement Agreement, to limit its Class III gaming operations in Michigan.

**Gaming Provisions**

The Settlement Agreement also contains other gaming-related provisions. It has been the policy of the Department to require that provisions such as these be part of the Class III gaming compact between a tribe and the State. In our view, the Indian Gaming Regulatory Act (IGRA) requires that ***all*** substantive provisions relating to the operation of gaming activities be included in the tribal/state compact. This bill arguably carves an exception to this requirement of IGRA, and may set a precedent for other parties to try to do the same.

**Land into Trust**

Section 3 of the bill would establish a 30 day requirement for the Secretary to take land into trust for the Tribe once the Secretary receives a title insurance policy for the alternative land that indicates it is not subject to any mortgage, lien, deed of trust, option to purchase, or other security interest. Under statutory and regulatory provisions, the BIA is normally required to consult with local units of state government and other Tribes prior to taking land into trust. The mandatory nature of this trust acquisition, as well as the short time frame provided in the bill, precludes us from consulting with interested parties in this regard. The legislation also precludes the Department from evaluating the subject property to determine whether hazardous materials (such as lead paint, mercury, spilled fuel, other dangerous or toxic material), or other potential liabilities exist, and to work with the owner on a remediation plan if necessary.

**Conclusion**

The Department respects the sovereign-to-sovereign relationship between the United States and Federally recognized Indian Tribes. On this issue, we commend the efforts of the Tribe and the State to work toward reaching agreement, but we do not support S. 2986 at this time.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 8 2003

Honorable Daniel K. Inouye
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

I am pleased to provide the responses to the questions submitted following the October 10, 2002, Committee on Indian Affairs hearing on S. 2986, the Bay Mills Indian Community Land Claim Settlement Act.

Should you have any questions, please contact my office at (202) 208-5706.

Sincerely,

Aurene M Martin

Aurene Martin
Acting Assistant Secretary - Indian Affairs

Enclosure

**QUESTION 1: Please discuss the merits of the Bay Mills Community land claim to the Charlotte Beach area.**

**ANSWER:** The land claim is currently under litigation.

**QUESTION 2: What are the standards that the Department applies to a request by a tribe for the Secretary of the Interior to take land into trust that is not contiguous to the tribe's reservation or is a part of the tribe's ancestral homelands?**

**ANSWER:** Title 25 of the Code of Federal Regulations, Part 151 provides the standards for taking land into trust for both gaming and non-gaming purposes. Section 151.11 provides the criteria for off-reservation acquisitions (where the land is located outside of and noncontiguous to the tribe's reservation and the acquisition is not mandated), and requires that the criteria listed in 25 CFR § 151.10(a) through (c) and (e) through (h) must be evaluated. These criteria include: the existence of statutory authority for the acquisition, the need of the tribe for the land, the purposes for which the land will be used, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, potential jurisdictional problems and conflicts in land use, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition, and the extent to which information has been provided that will allow the Department to comply with NEPA and its own hazardous substance requirements for acquisitions. In addition, Section 151.11 provides that the Department must consider the location of the land relative to state boundaries and its distance from the boundaries of the tribe's reservation, such that as the distance between the tribe's reservation and the land to be increased, the Department gives greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. In addition, greater weight is given to concerns raised by state and local governments as to the acquisition's impact on regulatory jurisdiction, real property taxes and special assessments. Finally, when the land is being acquired for business purposes, the tribe must provide a plan that specifies the anticipated economic benefits associated with the proposed use.

**QUESTION 3: What is the Department's position on Indian land settlement legislation that contains express provisions relating to a tribe's plan to conduct gambling on the land that is acquired by the tribe as a result of the land settlement?**

**ANSWER:** The Department does not generally support Indian land settlement legislation that contains express provisions denying a tribe the opportunity to engage in gaming activities under the provisions of the Indian Gaming Regulatory Act. With respect to Indian land settlement legislation that contains express provisions permitting a tribe to conduct gaming on land acquired by the tribe as a result of a land settlement, the Department would have to examine the specific provisions of such an act before expressing its views on the merits of the proposed legislation.

**QUESTION 4: Has any tribe ever made use of the settlement of a land claim exception of the Indian Gaming Regulatory Act to conduct gambling on its reservation?**

**ANSWER:** No tribe has submitted an application under the land settlement exception of the Indian Gaming Regulatory Act. Gaming by the Seneca Nation of New York, however, raises a similar issue. Pursuant to the Seneca Nation Land Claims Settlement, 25 U.S.C. 1774f(c) the Seneca Nation of New York recently acquired land in restricted fee for gaming in Niagara Falls, New York. This land falls within the "settlement of land claim" exception contained in 25 U.S.C. § 2719(b)(1)(B)(i).

**QUESTION 5: How many tribes currently conduct gambling on trust land that is not contiguous to the tribe's reservation? In each situation, please provide a comprehensive explanation as to the circumstances that has led to the tribes' ability to conduct gambling on trust land not contiguous to the tribe's reservation including, but not limited to, the role of the Department in each situation, the role of a State and local government, information on historical or ancestral ties to the land, or any adjudication by a Court relating to the land on which the tribe is conducting gambling.**

**ANSWER:** There are three tribes that currently conduct gambling activities on non contiguous trust land, acquired after enactment of IGRA, to their respective reservations. All three tribes complied with the requirements of 25 U.S.C. § 2719(b)(1)(A) of IGRA. The three tribes are: the Forest County Potawatomi, the Kalispel Tribe of Washington State, and the Keweenaw Bay Indian Community of Michigan. An explanation of each circumstance follows.

**Forest County Potawatomi:** On June 10, 1987, the Tribe requested that certain land located in the City of Milwaukee, Wisconsin be placed in trust for the benefit of the Tribe.

The lands consisted of two parcels, the Concordia College site and the Menominee Valley site. The Menominee Valley site was to be used for high stakes bingo and the Concordia College site would be for an Indian Community School offering social programs to the local Indian community. The Tribe stated that the trust acquisition of the lands was needed to further Indian self-determination and to enhance tribal self-government. The Tribe complied with Land Acquisition Regulations in 25 CFR, Part 151. The City of Milwaukee indicated its support by its willingness to endorse the Tribe's request.

On June 14, 1990, the Bureau of Indian Affairs' Midwest Regional Office forwarded the Tribe's request to the Assistant Secretary - Indian Affairs with a recommendation for a favorable response. Pursuant to Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), on July 10, 1990, the Assistant Secretary - Indian Affairs made a positive determination that the acquisition of the Menominee Valley site would be in the best interest of the Tribe and would not be detrimental to the surrounding community.

On July 24, 1990, pursuant to Section 20(b)(1)(A) of the IGRA, the Governor of the State of Wisconsin concurred in the Secretary's determination that a gaming establishment on the Menominee Valley site would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community.

**Kalispel Tribe of Washington:** On August 19, 1996, the Kalispel Tribe of Indians of Washington requested that the Department of the Interior review their application to conduct class III gaming on an undeveloped 40.06 acre parcel of land located in Airway Heights, Washington, that was acquired and placed in trust status after October 17, 1988.

Gaming on the Airway Heights parcel was subject to the two-part Secretarial determination in Section 20(b)(1)(A) of the IGRA, 25 U.S.C. § 2719(b)(1)(A), because the parcel was acquired in trust after October 17, 1988, was an off-reservation acquisition at the time of its acquisition, and did not meet any of the specific exemptions to the prohibition against post October 17, 1988, gaming on trust lands in 25 U.S.C. § 2719.

Based on the application and its supporting documentation, including the comments received from State, local government officials, and officials of nearby Indian tribes, findings of fact supporting the two-part determination required under Section 20(b)(1)(A) of the IGRA were developed.

On August 19, 1997 the Secretary determined that a gaming establishment on the 40.06 acre parcel located in Airway Heights, Washington, would be in the best interest of the Kalispel Tribe and would not be detrimental to the surrounding community and forwarded the findings of fact to the Governor of Washington seeking his concurrence. On June 26, 1998, the Governor of the State of Washington concurred with the Secretary's decision.

**Keweenaw Bay Indian Community of Michigan:** On August 19, 1994, the Keweenaw Bay Indian Community of Michigan (Tribe) requested that the Department of the Interior review its application to conduct class III gaming activities on a 22.28 acre parcel of land located in Chocolay Township, Marquette County, Michigan, that was placed in trust status after October 17, 1988.

Gaming on the Tribe's Marquette trust property is subject to the two-part Secretarial determination in Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(A), because the land was acquired in trust after October 17, 1988, is located outside of the Tribe's Indian reservation, and does not come within any of the specific exemptions to the prohibition against post October 17, 1988,

gaming on trust lands in 25 U.S.C. § 2719. *See Keweenaw Bay Indian Community v. United States,* 136 F.3d 469 (6th Cir. 1998).

On May 9, 2000, the Department completed its review of the Tribe's application. Based on the application and its supporting documentation, including the comments received from State and local government officials, and officials of nearby tribes, the Department provided findings of fact supporting the two-part determination required under Section 20(b)(1)(A) of IGRA.

Based on the findings, the Assistant Secretary - Indian Affairs determined that the gaming establishment on the 22.28 acre parcel of land located in Chocolay Township, Michigan, would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. On May 9, 2000, the findings of fact were forwarded, with the supporting documentation, to the Governor of Michigan seeking his concurrence. On November 7, 2000, the Governor of the State of Michigan in settlement of *Keweenaw Bay Indian Community v. United States* concurred with the Secretary's decision.

There are several other tribes that are engaged in gaming activities on lands that were taken into trust for them as part of the restoration of lands for an Indian tribe that is restored to Federal recognition, pursuant to the exception contained in 25 U.S.C. § 2719(b)(1)B)(iii). We do not consider these tribes to be engaged in off-reservation gaming activities since they did not have established reservations at the time the lands were acquired in trust, with the exception of the Turtle Creek Casino operated by the Grand Traverse Band of Ottawa and Chippewa Indians in Whitewater Township, Michigan. The Turtle Creek site was acquired in trust in 1989, and is not located within the initial reservation of the Tribe. The National Indian Gaming Commission issued an opinion on August 31, 2001, determining that gaming on the land was authorized because it was on restored land for an Indian tribe that has been restored to federal recognition, and thus fell within the exception contained in 25 U.S.C. § 2719(b)(1)(B)(iii) of IGRA.

*Michigan Machinists Council*
*1723 Military*
*Port Huron, Michigan 48060*
*Richard W. Cummings*

October 8, 2002

**Subject; Bay Mills Land Settlement**

Honorable Daniel Inouye, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Bldg.
Washington, D. C. 20510

Honorable Ben Knighthorse Cambell, Vice Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Bldg.
Washington, D. C. 20510

Dear Senators;

Currently in St. Clair County there is approximately 14% unemployment. This is about twice the state of Michigan average. There are more evictions and bankruptcies than ever and the soup kitchens and homeless shelters in our community are full. The city of Port Huron is mandated by the Federal Government to sewer separation (which it should), and the price tag is approximately $185,000,000.

About 3 years ago the Thomas Edison Casino Committee put together a plan that would create employment, increase the tax base and give money to the local United Way to take care of the charity needs in the community.

After watching over a million Americans cross over into Canada to frequent the two Casinos within 5 minutes of the International border at Port Huron, the Casino Committee decided to take it to the voters for their approval. The voters in Port Huron approved the Casino concept to be located at the Thomas Edison Inn with 5% of the net revenue to go to the City of Pt. Huron and 3% of the net revenue to go to the local charities to be administered by the United Way, by a vote of 54% to 46%.

Approximately 77% of the patrons at the Pt. Edward Casino and Hiawatha Horse Park Casino are from the United States. Port Huron, Michigan is the only border crossing in Michigan that does not have a Casino on the Michigan side and all of the others do. When Windsor, Canada opened their Casino Detroiters didn't like the jobs and money going across the border either and as a result now Detroit has 3 Casino's each doing about 1million a day. The voters of St. Clair County supported having Casinos in Detroit by a 56% to 44% margin to help Detroit.

The jobs created would give the building trades needed work, create employment for the residents of St. Clair County and help with the needed sewer separation costs while also diversifying the economy. For all of the above reasons and many more we hope that the Senate and Congress approve this Bay Mills land settlement agreement and approve the City of Port Huron Casino project so that both St. Clair County and the Bay Mills community can be more self sufficient.

We believe that the challenges to this settlement are ridiculous as the competition is not with other Native American Tribes or the people of Detroit and surrounding communities but, with our Canadian counterparts one quarter of a mile across the river who are laughing all the way to the bank. This project is supported by all of organized labor in St. Clair County and by the majority of the voters. We urge you to expedite this process so that we can help our community. Thank you in advance for your support on this important issue.

Sincerely, Richard W. Cummings

Richard W. Cummings, President
Michigan Machinists Council


September 16, 2002

Senator Debbie Stabenow
U.S. Senate
702 Hart Senate Office Building
Washington, DC 20510-2203

Dear Senator Stabenow:

I am the owner of the Thomas Edison Inn and I am writing in support of the efforts of the Bay Mills Tribe to establish a casino on the property currently occupied by the Thomas Edison Inn, in Port Huron. In 2001 I made a proposal to the Port Huron City Council to have a ballot referendum to determine if the City electorate supported a casino on our property. As I am sure you are aware, the City's voters overwhelmingly approved the ballot proposal. Subsequently, we entered into a contract to pave the way for the Bay Mills Tribe to establish a casino on our property.

The Edison Inn property is ideally suited for a casino. It is almost directly across from the highly successful Pointe Edward, Ontario casino. The Edison Inn property has many good transportation routes, has plenty of property and a beautiful view of Lake Huron. I fully and unconditionally support the efforts of the Bay Mills Tribe to establish a casino on our property. Port Huron needs the investment, temporary construction jobs and many permanent jobs that would be brought to our community. We certainly could stand to share in the success that our neighbors in Pointe Edward have enjoyed and the investment it has brought to their community.

Accordingly, I urge your support for the Bay Mills Tribe in their efforts.

Sincerely,

Don Reynolds

Don Reynolds

500 Thomas Edison Parkway, Port Huron, Michigan 48060
Phone: (810) 984-8000 Toll Free: 1-800-451-7991 Fax: (810) 984-3230
Email: tei@advnet.net

**Kingsbury, Pat**

**From:** Kingsbury, Pat
**Sent:** Thursday, October 03, 2002 9:57 AM
**To:** 'testimony@indian.senate.gov'
**Cc:** Kingsbury, Pat
**Subject:** October 8 Hearing

The Honorable Daniel Inouye
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510-6450

Dear Chairman Inouye:

As Mayor of Port Huron, I am writing to ask you for your support in upcoming legislation that would allow for the construction of a casino in our community. I request that the clerk include this correspondence in the hearing record for S2986.

In June of 2001, a referendum was placed before the voters of Port Huron asking them if they would approve the locating of a casino on the property adjoining the Thomas Edison Inn along the St. Clair River. Voters gave their approval by a 55/45 percent margin.

Historically, Port Huron's unemployment rate runs much higher than the State of Michigan's average. We foresee that the proposed casino would add approximately a thousand permanent jobs to our workforce. This, along with the hundreds of construction jobs, would go a long way in helping our community with employment opportunities that would provide good paying jobs for our citizens.

Obviously, the millions of dollars of investment in our community would generate much needed revenue that would be shared with the City of Port Huron and the State of Michigan. It would greatly enhance our area as a tourist destination because, since the opening of a casino across the river in Point Edward, Ontario, we have seen our tourist dollars cross the border instead of staying in our community.

The people of Port Huron support this development. It is with that support I am asking that you support the request for a casino to be located in Port Huron. Thank you for your time and consideration in this matter.

Sincerely,

B. Mark Neal
Mayor

**City of Port Huron** 100 McMorran Boulevard Port Huron, Michigan 48060

October 8, 2002

The Honorable Daniel Inouye
Chairman
Committee on Indian Affairs

The Honorable Ben Nighthorse Campbell
Vice Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510-6450

Dear Chairman Inouye and Vice Chairman Campbell:

After much public input and discussion the citizens of Port Huron on June 26th, 2001 voted, by a substantial margin, to support the development of a Casino on the property adjacent to the International Blue Water Bridge in Port Huron.

This proposal was strongly supported by a variety of professional, business and social groups. The local newspaper, The Times Herald, took a very public position in support of the casino vote.

St. Clair County, in which the City of Port Huron is located, is struggling with an unemployment rate that is double the rest of the State of Michigan. Losses in the Industrial Park, a high percentage of low income population, and not to mention a $ 200,000,000 state mandated sewer separation and infrastructure project, have all contributed to the financial hardships facing Port Huron today.

You can understand how important the casino project is to the stability of our community.

The citizens and leadership, both governmental and business, are anxious to move forward with this development. The City of Port Huron, every member of the City Council and City Administration are available to you at anytime to help, advise and to be an active part of this opportunity for the citizens of Port Huron.

Thank you for your time and efforts in this matter. We look forward to the Casino being a very important part of Port Huron's future.

Thank you,

Clifford E. Schrader
Port Huron City Council Member
810-985-4425 / 966-9866

**City of Port Huron** 100 McMorran Boulevard Port Huron, Michigan 48060

**Office of the City Manager**
Phone: (810) 984-9740 • Fax: (810) 982-0282

October 8, 2002

The Honorable Daniel Inouye
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, DC 20510-6450

Dear Chairman Inouye:

As City Manager of the City of Port Huron, Michigan, I am writing to ask for your support on an issue of great importance to the citizens of the greater Port Huron area, specifically, legislation allowing the construction of a casino in our community. I request that the Clerk include this correspondence in the hearing record for S2986.

The development of a casino in our City's commercial district is vital for our future economic development as a tourist and recreation destination for visitors from surrounding areas, including the State of Michigan and Canada. Given the area's historic high unemployment rate, we count on venues such as the proposed casino as necessary to the economic welfare of our region and of our citizens.

A public advisory vote was placed on the ballot in June, 2001 asking citizens of Port Huron for their position on this proposal. The 55% approval rate is indicative of our community's widespread support for this endeavor. This financial investment in our community would produce better paying jobs and much needed revenue to be shared with local governments and local non-profit agencies. In addition, it would provide the necessary catalyst to spur commercial development in a downtown commercial district with a 40% vacancy rate.

I trust we can get support from our elected representatives in Washington that coincides with public support we see in our City. Thank you very much for your consideration and efforts on this important issue.

Sincerely,

Thomas J. Hutka
City Manager

*Maritime Capital of the Great Lakes*


# United Way of St. Clair County

1723 Military St.
Port Huron, MI 48060
(810) 985-8169
Fax (810) 982-7202

October 8, 2002

Honorable Daniel Inouye, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Bldg.
Washington, D.C. 20510

Honorable Ben Knighthorse Cambell, Vice Chairman
Committee on Indian Affairs
United States Senate
838 Hart Office Bldg.
Washington, D.C. 20510

Dear Senators:

I am writing to ask your support for the Bay Mills Land Settlement Agreement. This legislation would allow the building of a casino in Port Huron, Michigan. The partnering of the Bay Mills Native Americans and the people of Port Huron would benefit two populations in need of economic opportunities.

The people of Port Huron approved this proposal for our community because our economy must become diversified. St. Clair County is always among the highest counties in the state in unemployment. This is due to the level of dependence on the auto industry while only being a community of third tier parts suppliers. Third tier is the first to suffer loss and the last to recover gain. We must find other sources of major employment to meet the needs of the community. The proposed casino is one such source.

In the development of the casino concept we studied the problems associated with gambling from a human services perspective. We found that in most U.S. communities the issue of providing increases in the human services necessary to combat problems had not been addressed prior to the casino development. We established from the beginning that if a casino were to be in St. Clair County it would have to generate enough charitable funds to cover these increased needs. The citizens of our community agreed and in fact voted that three percent of the casino proceeds would be provided to meet these and other human service needs annually. We believe this is precedent setting in this type of casino development in the U. S. Our United Way has a plan for the distribution of these funds that will assure the community that increased needs are met with the highest levels of accountability.

Our County needs employment it also needs a means of meeting increased human service needs. With escalating unemployment we have opened an additional shelter. We have higher numbers than ever at the soup kitchens and on government programs. We must diversify the economic base of this community.

Sincerely yours,

Lonnie J. Stevens
Executive Director