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Josh Clause, Esq.  
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829 11th Street, N.E.  
Washington, D.C. 20002

Re: Keweenaw Bay Indian Community Canal Lands and Swamp Lands Claims

Dear Josh:

You advised me recently that a question has been raised by the staff of the House Subcommittee on Natural Resources regarding why the Keweenaw Bay Indian Community ("KBIC") did not pursue its claims relating to the Canal Lands and Swamp Lands in the Indian Claims Commission ("ICC"). As you know, KBIC's Canal Lands and Swamp Lands Claim forms the basis for legislation that has passed the Senate by unanimous consent and is pending in the House of Representatives that would compensate KBIC for the unlawful taking of these lands located within the L'Anse Reservation established by the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the "1854 Treaty"). You asked me to address the Subcommittee's question as an ethnohistorian. As explained below, several factors explain why KBIC did not pursue these claims before the ICC.

First, at the time of the land transfers, KBIC believed that the State of Michigan was primarily culpable for unlawfully taking the Canal and Swamp Lands. This is understandable because the federal legislation allowed Michigan to select the parcels, notwithstanding the federal government's oversight responsibility, and once transferred, the lands were in Michigan's possession. KBIC also knew that the ICC only allowed claims against the United States, not individual states. This is important because the Tribe watched as the State received title to the land and then passed it to third parties. Act of Aug. 13, 1946, Pub. L. 97-726, 60 Stat. 1049.

Second, the ICC allowed only claims for damages, not equitable remedies such as the return or replacement of land. *Id.* §§ 19, 22. KBIC's needs concerning the unlawful taking of the Canal Lands and Swamp Lands would have been unlikely to be met at that time with a damages remedy. This is particularly so because the State of Michigan took the position during that period that parcels like the Canal and Swamp Lands were not part of the L'Anse Reservation. If KBIC had won a case for damages against the United States relating to the Canal and Swamp Lands, it might have had a harder time defending its belief that the Canal and Swamp Lands were part of its reservation established by the 1854 Treaty. It was not until after the ICC was disbanded that the federal courts handed down two favorable decisions that addressed KBIC's concerns about the best way to handle its Canal and Swamp Land claims.

The most important of the federal court decisions was Keweenaw Bay Indian Community v. Michigan, 784 F. Supp. 413 (W.D. Mich. 1991). In that case, KBIC sued the State of Michigan, asking for a declaratory judgment that the L'Anse Reservation followed the exterior boundaries of the townships and fractional townships mentioned in the 1854 Treaty and an injunction that would prevent the State

of Michigan from exercising civil and criminal jurisdiction within the reservation's boundaries. Interpreting the 1854 Treaty, the court held for KBIC on both issues. It ruled that the 1854 Treaty created a continuous rather than a "checkerboard" reservation for KBIC at L'Anse and that the phrase "unsold lands" in the 1854 Treaty referred solely to land title and not reservation status. *Id.* at 426. The decision referred to the Canal and Swamp Lands in passing but held that title to these lands was "not legally significant" to the question before the court because even if these lands were sold before the 1854 Treaty (the historical record conclusively establishes they were not sold before the treaty), such lands were part of the reservation created by the 1854 Treaty. *Id.* at 425-26. The court concluded that all the land within the exterior boundaries of the townships and fractional townships mentioned in the 1854 Treaty constituted "Indian country" within the meaning of 18 U.S.C. § 1151, including all Canal and Swamp Lands and was subject to tribal and federal jurisdiction. *Id.* at 428. Thus, this decision subdued concerns about limiting remedies to damages.

The second major federal court decision was *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514 (6th Cir. 2005), cert. denied, 127 S. Ct. 680 (2006). KBIC brought this action to prevent State of Michigan officials from imposing the Michigan real property tax on fee land owned by KBIC and its members within the L'Anse Reservation. In addition to reinforcing the holding of the 1991 decision about the exterior boundaries of the reservation, the 2005 decision found that the predecessor bands of KBIC from at least the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591, remained within the area reserved for them as a reservation by the subsequent 1854 Treaty. Accordingly, the 2005 decision provided a basis for KBIC's contentions that the right of KBIC to the Canal and Swamp Lands is based both on aboriginal and treaty-protected title.

Third, the ICC almost exclusively dealt with claims that the United States had paid unconscionably low consideration for lands ceded by Indian tribes, and both the ICC *and* lawyers representing tribal claimants took a narrow view of the scope of the ICC's jurisdiction. Of the more than 600 claims the ICC eventually heard, one scholar reported that over 90% were unconscionable consideration claims. Nearly all the remaining claims sought accountings for the mismanagement of tribal assets. Nancy Oestreich Lurie, *The Indian Claims Commission*, 436 Annals Am. Acad. Pol. & Soc. Sci. 97, 99 (1978) (copy of article enclosed). Most attorneys representing tribes before the ICC were doing so on contingency fees, and the cases could stretch for years, which posed a real financial risk for attorneys. In the words of anthropologist Nancy Lurie, "the hazards of contingency contracts and 10 percent fees designed to benefit the Indians also tended to discourage lawyers from striking out in innovative directions." *Id.* Also, attorneys generally combined several tribes' claims from a region into one case, so they would only pursue common claims across their clients, like unconscionably low consideration. KBIC's claims were unique to KBIC and, therefore, not a candidate to be consolidated with the other Chippewas of Lake Superior. 41 Ind. Cl. Comm. 249 (1978).

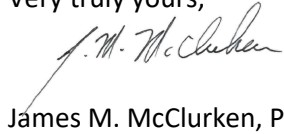
It bears noting, too, that KBIC's request for remedial legislation is not unusual. Numerous tribes have received legislative relief for claims that might have been asserted in the ICC or other judicial processes, including claims for unlawful takings of land and other claims similar to those asserted by KBIC. Pertinent examples of such legislative relief include:

1. The Puyallup Tribe of Indians Settlement Act of 1989, P.L. 101-41, 103 Stat. 83 (Jun. 21, 1989), compensating the Puyallup Tribe and its members for land and related claims arising as far back as the negotiation of the Treaty of Medicine Creek in December 1854;
2. The Seneca Nation Settlement Act of 1990, P.L. 101-503, 104 Stat. 1292 (Nov. 3, 1990), compensating the Seneca Nation for improper leases of and rights of way through Alleghany reservation lands dating back to the mid-nineteenth century and also redressing related harms resulting from an inadequate award of damages by the ICC and

3. The Crow Boundary Settlement Act of 1994, P.L. 103-444, 108 Stat. 4632 (Nov. 2, 1994), settling a Crow Reservation boundary dispute arising from an erroneous survey by the federal government in 1891.

Please let me know if you have any questions or want to discuss the abovementioned matters.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. M. McClurken", written over a horizontal line.

James M. McClurken, Ph.D.