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Testimony
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Oversight Hearing on Tribal Self-Governance

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Good morning Mr. Chairman and Members of the Committee. My name is Melanie Benjamin and I am Chief Executive of the Mille Lacs Band of Ojibwe. We are a federally-recognized tribe of 3,593 members located in East Central Minnesota. As one of the first six tribes to enter into a Self-Governance compact with the United States government, it is an honor to be here today to talk about Tribal Self-Governance. Today I will address the history and benefits of Self-Governance, and some of our policy concerns with the direction of current federal Indian policy in relation to Self-Governance and the federal trust responsibility.

The History of Self-Governance

Under the leadership of my mentor and predecessor, Arthur Gahbow, the Mille Lacs Band was one of the first tribes to envision the concept of Self-Governance: the ability of tribes to plan, implement and administer programs that best meet the needs of a tribal membership. Self-Governance was Art Gahbow's dream and as a result of his hard work the Mille Lacs Band was one of the pioneer tribes. From day one we have been involved in Self-Governance policy. Today, I am a delegate on the Tribal Self-Governance Advisory Committee that provides policy recommendations to the Director of Indian Health Services.

In the 1970s, tribes were allowed to contract for federal programs and services that would benefit their memberships under Public Law 93-638, the Indian Self-Determination Act. By the 1980s, however, a growing federal bureaucracy was not adequately addressing the uniqueness of the different tribes and made it difficult for us to administer our programs. As someone who used to administer Self-Determination contracts, I can tell you that the rules and regulations were very constraining. We had to report to low level bureaucrats in order to run simple programs.

The inflexibility of the Indian Self-Determination Act left little room for creativity and experimentation. More troublesome was the fact that Self-Determination was not cost-effective for tribes who already had scarce resources to administer programs. I recall someone quoting a study that only about ten cents of every dollar appropriated ever actually made it to the reservations.

In 1987, tribal leaders formed the Alliance of American Indian Leaders. It was the 200th anniversary of the United States Constitution and tribal leaders such as Roger Jourdain of the Red Lake Band of Chippewa, Wendell Chino from Mescalero Apache, Joe De La Cruz of the Quinault Nation, and our own Arthur Gahbow came together in Philadelphia, Pennsylvania, to seek a change in federal Indian policy. Within a year, the Alliance drafted a new title to the Indian Self-Determination Act, the Title III Self Governance Demonstration Project.

In its consideration of the Demonstration Project, there is a story of a Congressional staffer asking a tribal leader a question something like this: "If you are allowed to spend federal funds on your own tribal priorities, what would stop you from buying a fleet of Cadillac cars?" The tribal leader replied, "I wouldn't do that for two reasons. First, I would be skinned alive by my own people. Second, if I survived, I would not be re-elected. This is what Self-Governance is about. It is not just creating new authority for tribes, but also letting them be accountable for the consequences of their mistakes. More than fifteen years later, I am not aware of a single Cadillac purchased with federal funds.

In 1988, Title III of Self-Governance became law. Around 1990, the Mille Lacs Band and five other tribes formed the Six Tribe Consortium and entered into the first Self-Governance Compacts under the Demonstration Project. In 1994, Self-Governance became a permanent program in the Bureau of Indian Affairs and in 2000 became permanent law in the Indian Health Service and the Department of Health and Human Services. What started as a movement by a very small number of tribes more than a decade ago now sees more than 200 Self-Governance tribes. There are 35 federally-recognized tribes in our region, 9 of which are Self-Governance.

The Benefits of Self-Governance

The Mille Lacs Band of Ojibwe Self-Governance Compact is with the Department of Interior and we receive Self-Governance funds through our Annual Funding Agreements with the Bureau of Indian Affairs and the Indian Health Service. Once received, we make the determination of how our Self-Governance funds will be allocated. This is the essence of Self-Governance: the empowerment of tribes to make allocations based upon tribally-identified priorities that reflect membership needs. For the Mille Lacs Band, those priorities have typically been health, education, housing, and natural resources. More recently, economic development has also been identified because it is a means to provide more opportunities for Band members and their families.

Based upon these priorities, Self-Governance has allowed us to contemplate new initiatives that may not have been possible without Self-Governance status. The Mille Lacs Band has been able to develop an infrastructure that supports our expanding economy. For example, we have a new Housing Initiative to provide new homes for our Band members, new sewer lines for those homes, and new roads that allow the safe transportation of our children to their schools. We are also developing and expanding our environmental programs to include water quality testing and other monitoring measures that will better manage and protect our natural resources.

What Self-Governance means for the Mille Lacs Band specific to program operations are five-fold. First, we can now redesign programs as we see fit. If we have a better way to provide chemical dependency treatment by using a sweat lodge, we can do it. Second, we can also reprogram funds as we see fit based on changing needs. For example, if we have an exceptionally dry season as we recently had, we can allocate more funds to fire protection. Third, the Mille Lacs Band can participate in rulemaking. Title IV was the first Indian law that required negotiated rulemaking and for the first time brought federal and tribal officials together to develop the rules. Fourth, we are using our funds more efficiently. Our local needs determined by us dictate the use of our funds, not a federal official located in Minneapolis or Washington, D.C. Finally, our compacts with the federal government reflect a true government-to-government relationship that indicates we are not viewed as just another federal contractor.

For example, years ago the Mille Lacs Band needed business and governmental expansion to accommodate our economic growth. We signed Memorandums of Agreement with a number of federal and state agencies for this development to occur. The Mille Lacs Band became the lead agency and started a business that now employs 1200 people, and established new schools, clinics, a government center and elderly assisting living units. These developments would not have happened without the authorization provided under Self-Governance.

Self-Governance has also played a role in promoting new partnerships between the Mille Lacs Band and other entities. We are a rural community located on the southern shores of Lake Mille Lacs, one of the largest lakes in the state of Minnesota. We have recently joined forces with local municipalities to build a state-of-the-art waste water treatment plant utilizing the latest technology that benefits both Band members and our surrounding neighbors. Many of our Band members engage in traditional fishing and wild ricing activities and for their health we want to ensure the integrity and water quality of Lake Mille Lacs. The new treatment plant will help ensure the continued protection of our greatest natural resource. Though the plant does not utilize Self-Governance funds, we believe it is an example of what our Self-Governance status can lead to.

The direct and derivative benefits of Self-Governance cannot be emphasized enough. But for Self-Governance, we might not have the relative success that we enjoy. There was a time not long ago when the Mille Lacs Band struggled with great poverty and was unable to meet the basic needs of our membership. We have come a long way since then and strongly believe Self-Governance played a significant role in our progress.

This is not to say that Self-Governance is the panacea to a tribe's problems, but rather Self-Governance is a means for tribes to realize their potential. Self-Governance is the tool that allows tribes like the Mille Lacs Band to build capacity that ultimately benefits a tribal membership. While Self-Governance has done much to benefit tribes more than any other federal Indian policy, I want to bring to your attention some concerns the Mille Lacs Band has with current federal policy towards the tribes.

A Disproportionate Self-Governance Budget

The Mille Lacs Band first compacted for 30 programs from the Bureau of Indian Affairs in 1990 with funds that amounted to approximately \$603,698.00. Programs varied from natural resources to substance abuse. Thirteen years later, our Self-Governance budget is approximately \$817,426.00 for the same 30 programs. This growth is less than 3% per year, or less than 35% for the entire thirteen years. In effect, we are doing more with less funds because our Self-Governance budget does not reflect the increasing costs of administering those 30 programs. Consequently there may be a day when administrative costs of a program will far outweigh the function and program activity. In contrast, the Bureau of Indian Affairs budget has more than doubled in the same 13 years.

When we entered into Self-Governance, we believed that our Self-Governance budget would grow at the same percentage rate as the Bureau of Indian Affairs. This has not been the case. Though Congress had appropriated funds to establish Tribal Self-Governance, it has not allowed Self-Governance to grow proportionately with the BIA or United States as a whole since its inception. Despite this fact, many tribes continue to seek Self-Governance status each year, which is a clear indication of the success of Self-Governance.

For Self-Governance to continue to work and be successful, changes must be made and implemented for tribes to remain in Self-Governance. Otherwise, Self-Governance may fail and tribes will be reabsorbed into the Bureau of Indian Affairs. The Mille Lacs Band is willing to offer assistance and participate in the redress of this budget problem.

Self-Governance and the Federal Trust Responsibility

The Mille Lacs Band of Ojibwe and all federally-recognized tribes have a unique relationship with the United States. Our treaties with the United States established a government-to-government relationship that exists to this day. The United States' federal trust responsibility arises out of the treaties, federal statutes, Executive Orders, and Supreme Court decisions. From this federal trust responsibility flows a trust obligation of the United States to the tribes.

It is the Mille Lacs Band's position that the federal trust responsibility is very broad in scope and not limited to fine distinctions in legal definitions. However, the Department of Interior's BIA reorganization and the Department of Health and Human Services "One" Department Initiative indicate that the federal trust responsibility is being re-defined in a manner that tribes strongly disagree with. This development in new federal Indian policy is heading in the wrong direction and will be detrimental to many tribes.

In Public Law 106-260, the Tribal Self-Governance Amendments of 2000, the following language addressing tribal sovereignty, the government-to-government relationship, and the federal trust responsibility reads in relevant part:

The Congress finds that—

- (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;
- (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

...

- (5) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominated tribal affairs;

...

(6) Congress ... finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof)—

(A) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with the Indian tribes; and

(B) strengthens the Federal policy of Indian self-determination.

and

It is the policy of the Congress—

...

(A) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(B) to permit each Indian tribe to choose the extent of its participation in self-governance in accordance with the provisions of the Indian Self-Determination and Education Assistance Act relating to the provision of Federal services to Indian tribes;

(C) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;

(D) to affirm and enable the United States to fulfill its obligations to the Indian tribes under treaties and other laws;

(E) to strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with all tribes;

(F) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of individual tribal communities; [and]

(G) to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portions thereof) are assumed by Indian tribes

25 U.S.C. § 458aaa.

The Trust Responsibility provision of the Self-Governance Act specifically addresses the duty of the Secretary: "The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions." 25 U.S.C. § 458aaa-6.

The above statutory language illustrates that Congress clearly intended to continue its federal trust responsibility to the tribes and maintain the government-to-government relationship between the United States and tribes by expressly stating such. Despite the Mille Lacs Band and other Self-Governance tribes assuming more authority and control over compacted programs, Self-Governance law and policy never intended to diminish or waive the federal trust responsibility but rather preserve it.

That was our understanding of Self-Governance as it relates to the federal trust responsibility at the time we entered into our compacts, and this is our understanding today. This very understanding by the Mille Lacs Band leadership in 1990 was the primary reason we assumed Self-Governance, because we believed that all of our trust resources and assets would always be protected. In the event the Mille Lacs Band would be unable to adequately protect a trust resource or asset, the law provides trust resource and asset protection for us.

Under the Self-Governance Reassumption provision, the law provides that if our trust resources face imminent jeopardy or endangerment, meaning immediate threat and the likelihood of significant devaluation, degradation, damage, or loss of a trust asset, the Secretary may reassume program operations upon a finding of imminent jeopardy. 25 U.S.C. § 450m and § 458aaa-6; 25 C.F.R. pt. 1000 at 78727 (2000).

Operation of this provision ensures that our trust resources are always protected under the federal trust responsibility.

Today, the ongoing Bureau of Indian Affairs reorganization and the establishment of the Office of the Special Trustee appear to be re-defining the federal trust responsibility through administrative action. Tribes, including the Mille Lacs Band, have been opposed to the BIA reorganization since before its implementation, yet the reorganization continues despite our objections in the name of "trust reform."

One of the many aspects of the reorganization is the removal of all trust functions from the BIA to the Office of the Special Trustee. More troublesome is that the Special Trustee's office is moving in the direction of limiting its trust responsibility to more limited duties. If such a concept becomes actual policy, we will have resources that may not meet the proposed limited standards, thereby leaving these resources unprotected and vulnerable to non-federal interests. Therefore, the Mille Lacs Band seriously questions what measure of trust responsibility we can expect from the Office of the Special Trustee in regard to our trust resources and assets under our Self-Governance compacts.

Another "reorganization" the Mille Lacs Band is concerned with is the ongoing One Department Initiative of the Department of Health and Human Services that seeks to streamline the delivery of services. We interpret this to mean a reduction in staff and resources, although in the 1990s the Indian Health Service had already downsized significantly in order to increase the delivery of direct medical services to tribes. Part of that downsizing was the transfer of resources and operations to tribal management, which many other agencies had not undertaken to do. Consequently, there has been a 60% reduction in administrative staff in the Central Office Headquarters and the Area Offices in the past six years.

It must also be pointed out that as a direct result of more tribes entering into Self-Governance each year, more IHS administrative reductions will occur. To have more downsizing occur now is unreasonable and will impact the IHS's ability to help tribes address the significant health disparities that exist in our communities. Indian Health Service has a unique place within the DHHS and is a direct extension of the federal trust responsibility that addresses Indian health care. We fear that the Indian Health Service will become lost in the HHS One Department Initiative, which has direct bearing on the trust responsibility to tribes and the provision of critical health care delivery.

Specific to HHS, a recommendation to address tribes' concern is to elevate the position of the Indian Health Service Director to that of Assistant Secretary of Indian Health. Such an elevation would assure tribes that Indian health issues would be addressed and improve the coordination efforts between the various health and human services agencies that serve tribes and their communities.

Generally, the Mille Lacs Band maintains the position that the federal trust responsibility is very broad in scope and should not be limited in any manner. If the trust responsibility is limited to certain duties, the Mille Lacs Band further maintains that such a proposed policy overlooks our treaties with the United States and is in direct contravention of existing policy that defines the trust responsibility and relationship between the United States and tribes.

The Promise of Self-Governance

If the existence of Self-Governance as we know it today ceases to be, there would be the elimination of many crucial programs that function to improve our Band members' lives. The worst-case scenario is a return to the terrible poverty conditions we once knew not very long ago. It would mean being the poorest of the poor, the lowest in educational achievement, and poorest in health conditions. We cannot go back to such a harsh life.

It is a sad fact that my grandparents and many other Band member families suffered tremendously for a lack of resources prior to Self-Governance. It has only been under Self-Governance that the Mille Lacs Band has been able to rise above extreme poverty and improve lives on the reservation. The elimination of manipulative systems and reduction of federal bureaucracy has allowed us to prosper and provide for our members.

Our relative success under Self-Governance is a good thing, but it does not mean our fundamental relationship with the United States should change. The government-to-government relationship should remain in place and should continue to recognize our sovereignty and right to self-determination. Altering current policy poses the risk of relegating us back to a ward status, much like a child, that knew no success

by any measure.

Today we are able to chart our own destiny as determined by our Band membership, not a federal official or agency. The Mille Lacs Band can create a promising path for our children to follow who in time will also chart the Band's destiny. Self-Governance permits us the means to create a better world for many generations to come.

Conclusion

The vision of those tribal leaders in 1987 was bold. They wanted tribes and the United States to have a relationship that was more like the original one, back in the treaty-making era. The tribal leaders wanted a real government-to-government relationship with the United States, seeking the closest thing to a treaty they could find and settled on a "compact." Fifteen years later, those Self-Governance compacts have become a hallmark of progress for tribes and tribes are living that vision. Tribal leaders today look ahead to 21st Century Federal Indian policy and ask, will we stay on track? What is left to accomplish in the evolution of Self-Governance policy?

The Mille Lacs Band of Ojibwe has always wanted to have all of our federal dollars, not just those from Interior and HHS, but all of our dollars rolled into one annual funding agreement with the United States. This includes funds from all other federal Departments: Labor, Justice, Education, and all funds that currently flow through state programs.

I am told that the jurisdiction of the House committees make such a bill difficult to pass. Also, dealing with all affected agencies and the state would be an enormous challenge. But if any member of the House has the courage to take on this task, the Mille Lacs Band would like to work with you. It would be our honor to be included in a demonstration project that moves this policy to the next level.

I appreciate your time and would be pleased to take any questions you might have.

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