TESTIMONY OF
John Shagonaby
treasurer, Match-E-Be-Nash-ShE-Wish
BAND OF Pottawatomi INDIANS
GUN LAKE TRIBE

BEFORE THE
House Committee on resources

April 5, 2006

Chairman Pombo, Ranking Member Rahall and respected Members of the Committee, thank you for the opportunity to testify today regarding H.R. 4893. My name is John Shagonaby and I am a tribal council member and Treasurer of the Match-E-Be-Nash-She-Wish Band of the Pottawatomi Indians, also known as the Gun Lake Tribe. Our Tribal homeland has always been in Western Michigan. We are a landless tribe, but have received a final determination from the United States Department of the Interior to place 146 acres of land in to trust in Allegan County, Michigan for the benefit of the Tribe. A private organization has challenged Secretary's decision in federal court and the United States Department of Justice is defending the Department's decision to acquire the lands.

First, let me express my appreciation to the Members of the Committee, and specifically the Chairman, for the straight-forward, cooperative and open process in which this Committee has proceeded over the past year regarding potential amendments to 25 U.S.C. §2719 of the Indian Gaming Regulatory Act. Indian Country has had significant opportunity to work with the Committee on the review of this legislation through two draft bills, many consultations at various Indian association meetings across the country and several oversight hearings. Our Tribe, in particular, has enjoyed a solid working relationship with many of the Committee Members and staff, including Representative Dale Kildee (D-MI), who has always maintained an open door to our Tribe. We recognize the Committee's hard work on addressing concerns with the so-called reservation shopping and off-reservation issues and understand the goals of H.R. 4893. In the spirit of cooperation, we would like to offer two recommendations for amendments and share our general concerns about certain provisions of the bill.

HR 4893 Imposes New Requirements on Landless Tribes

H.R. 4893 expressly prohibits newly recognized landless tribes from acquiring any trust land on which those tribes may conduct gaming unless the tribe can meet the following new requirements: First, the Secretary of the Interior must determine that the proposed gaming is not detrimental to the surrounding community and nearby Indian tribes. Next, this determination must be approved by the Governor, the State Legislature and any other Indian tribes within a 75 mile radius. Finally, the petitioning Tribe must pay for a local "advisory" referendum and enter into a memorandum of understanding with the county or parish where the land is located. These additional requirements pose new and we believe unintended challenges to those landless tribes seeking to reclaim their homelands as an initial reservation. While our overall preference would be to exclude landless tribes altogether from these requirements, we offer the following comments for the Committee's consideration.

PROPOSED AMENDMENT:

include a Grandfather Clause

If the proposed legislation moves forward, our primary recommendation is the inclusion of a so-called "grandfather clause" to exempt tribes like ours that have completed or nearly completed the federal regulatory process. As the Committee is aware, many Indian tribes across the country have made tremendous investments into their gaming projects—both financially and in terms of the time and effort of tribal members. This should not be overlooked by Congress.

In fact, one need only review the five year history of our land-to-trust application to appreciate the need for such a grandfather clause:

At every step of the process we have followed the rules. After finally gaining federal acknowledgment in 1999, our Tribal Council identified suitable land for economic development that is only three miles from our ancient tribal burial grounds. The land has an existing industrial warehouse on it and is zoned light industrial. It was always our intent to use this land and the building to develop a casino. The Tribe submitted its fee-to-trust application pursuant to 25 C.F.R. §151 et seq., to the Minneapolis Area Office of the Bureau of Indian Affairs on August 12, 2001. As part of the fee-to-trust application to acquire land into trust for gaming purposes, the Tribe and the Bureau of Indian Affairs (BIA) conducted an Environmental Assessment (EA) in satisfaction of the requirements of the National Environmental Policy Act (NEPA). Our Tribe is highly sensitive to our natural environment. This is why the Tribe made every effort to be extraordinarily cooperative

and responsive to the Bureau of Indian Affairs during the agency's determination of whether our casino project might pose any significant impact on the environment of West Michigan.

As the Committee is aware, federal regulations require that our Tribe comply with NEPA in order to have land acquired in trust for our benefit. Compliance with NEPA is achieved if an EA of the proposed project results in a Finding of No Significant Impact, to the environment by the BIA —often referred to as a "FONSI". NEPA requires, however, that if the BIA finds that a project has a *significant* impact on the environment, an Environmental Impact Statement must written by the agency. Over a three year period, beginning in mid-2002, the Tribe worked closely with the BIA Regional Office's environmental resources experts to produce an EA. The Tribe and its consultants prepared several revisions of the EA following comments from both the BIA and the public.

During an extensive and atypically long 75-day public comment period (November 2002 – February 2003), Michigan citizens and local government officials submitted over 300 letters to the BIA containing project comments and concerns. Each public comment, as reflected in the administrative record, was painstakingly reviewed by the BIA. In the end the EA examined everything from the project's effects on the water supply, traffic and air quality to the effects on animals in the surrounding area. In addition, since such great scrutiny is placed on casino projects, the EA examined the effects of secondary development resulting from the casino and its operations and examined potential alternatives to this project.

After an exhaustive review of the evidence and the extensive public comment, the BIA concluded that a FONSI was appropriate, and with this finding of *no* significant impact, an EIS was not required. The BIA issued the FONSI on February 27, 2004. More than a year later, on May 13, 2005, the BIA published in the Federal Register its final determination to acquire the land in trust for the benefit of the Tribe.

Mr. Chairman, our land would be in trust today but for a lawsuit filed June 13, 2005 against the Department of the Interior seeking, among other things, to enjoin the Secretary from moving forward with her decision to acquire land in trust for our Tribe. As I mentioned above, the Department of Justice is defending that litigation. The Plaintiff in this action is a private anti-gaming group from West Michigan. In fact, the attorneys representing the plaintiffs challenging the Secretary's determination are the same attorneys that lost a challenge to the previously landless Pokagon Tribe in Michigan on nearly identical causes of action. Today, the Pokagon lands are now in trust. Our case is nearing completion and we are confident that we will also prevail.

If H.R. 4893 is enacted prior to a final order in our litigation, it is our understanding that without clarification the Gun Lake Tribe could be pulled back into the regulatory process and required to meet many of these new criteria. This scenario would lead to substantial additional delays and incredible expense for the Tribe. Most importantly, such further delay would seriously impede our Tribe's hopes for the future and our ability to start to provide some of the services so badly needed by our tribal members. Therefore, we respectfully request that a provision exempting tribes like ours from this new legislation be included in H.R. 4893.

PROPOSED AMENDMENT:

Allow for alternative compacting

As you know before a Tribe can conduct Class III gaming, it needs a gaming compact with the State—for which the state is required to negotiate in good faith. Eleven federally recognized Tribes in Michigan have gaming compacts, some of which were negotiated by former Governor John Engler and subsequently approved by the Michigan Legislature.

The United States Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ended a tribe's right to bring a cause of action in federal court against a state that refused to bargain in good faith for a tribal state gaming compact—unless that state waives its sovereign immunity. There is currently no remedy for an Indian tribe to sign a compact with a state refusing to negotiate in good faith. Our recommendation would be the authorization of the Department of the Interior to issue alternative compacts when a state Governor or state legislature refuses to negotiate in good faith a compact with an Indian tribe. This amendment would promote intergovernmental cooperation between states and tribes and result in the furtherance of a cooperative relationship between the states and tribes. Specifically, such an amendment would codify by statute the authority of the Secretary to issue the Class III gaming procedures of 25 C.F.R. Part 291 et seq.

general CONCERN with h.r. 4893:

The Advisory Referendum Imposes a Difficult Challenge

We are concerned that the "advisory referendum" requirement creates a significant impediment to Indian tribes. First, H.R.

4893 does not impose deadlines requirements on the county officials to act and there are no federal or state regulations in place for such an event. Also there needs to be clarification of whether the election could be called as a special election or held in regular course during the Primary or General elections.

Next, the Committee may want to consider exempting the tribe from state laws addressing the qualification of a referendum for the ballot. Most states require the collection of hundreds of signatures and payment of a filing fee. Another related concern is that not all states allow local referendum and, as such, those local officials may be ill-equipped to hold and manage a ballot initiative. Third, a tribe would need to reach a financial arrangement with the county on the cost of the election for its particular referendum. Perhaps the Committee can offer guidance as to what costs would or could be included or limited by this arrangement.

Fourth, the element of campaign costs associated with a referendum should be carefully weighed by the Committee. A tribe would need to hire public and political relations experts to campaign for its side of the referendum. This creates a new significant financial investment for the tribe. Fifth, there is a general concern that Congress does not possess the constitutional authority to compel a local government to act. Finally, the results of this election, as stated in H.R. 4893, are only advisory and have no impact on the mitigation of public concerns about proposed gaming projects. In other words, is it the intent of the Committee to require that tribes and local governments conduct what is essentially a very expensive public opinion poll?

general CONCERN with h.r. 4893:

Proposed two-part determination is

Unfair to Initial Reservation Tribes

This new two part determination in the initial reservation exception appears contrary to basic elements of fundamental fairness. Such a determination would create an uneven playing field and further disadvantage the most disadvantaged tribes in America. Landless restored and newly acknowledged tribes have been without land and the benefits of federal recognition for significant periods of time. These tribes are forced to carve out small pieces of their original homeland from local jurisdictions that typically are not eager to lose land from their tax rolls and regulatory authority. Indeed, the very reason IGRA contains exceptions for the initial reservations of a tribe is because Congress did not want to penalize those tribes that were not yet recognized by October 17, 1988.

general CONCERN with h.r. 4893:

Interference between Tribal Sovereigns

H.R 4893 requires the concurrence of other Indian tribes within seventy-five (75) miles of the applicant project site to concur with the proposed acquisition for gaming purposes. Such a provision, for the first time under Congress' plenary authority, enables neighboring Indian tribes to interfere with another tribal sovereign's internal decision-making and self-determination. Allowing and requiring concurrence by neighboring tribal governments is tantamount to economic warfare between neighboring tribal governments.

In fact, the application and effect of this provision will be uneven in various regions in the nation and undermine economic development. For example, California tribal projects under this provision may be required to seek upwards of twenty-five (25) concurrences from neighboring tribes while Tribe in the mid-west might have merely one (1) or no tribes required to concur because shear geographic distance gives these tribes a free pass. In practical terms such a concurrence is a death-blow to a gaming project. Why would those other tribes agree to allow a competing casino? Their market shares will inevitably be cut. Landless tribes, like ours, are recognized by the federal government with the same privileges and immunities as other tribes with land prior to October 17, 1988. This provision in its present form makes landless tribes a different class of tribes because is denies us the ability to have an opportunity to use IGRA under the same rules as everyone else.

In short such a provision undermines the spirit of IGRA: economic development through self-determination.

Gun Lake Meets the Primary Geographic,

Social, Historical, and Temporal Nexus Test

The legislation also creates a new test for tribes seeking their initial reservation. Under H.R. 4893, the Secretary is required to determine that the tribe has its primary geographic, social, historical and temporal nexus to land. Although we are uncertain how these terms may ultimately be defined in light of case law and Departmental practices, we firmly believe that Gun Lake Tribe has such a nexus to the land.

In fact, we have long and established ties to an area that is now Western Michigan. The Gun Lake Tribe descends primarily from the Pottawatomi Band, led by Chief Match-E-Be-Nash-E-Wish. Prior to European contact, the Gun Lake Tribe used and occupied lands in the Great Lakes, in what is now known as present-day Michigan Lower Peninsula. This is where we are today. In the late 1700s, the Gun Lake Tribe lived under the direction of Chief Match-e-be-nash-she-wish at a village at Kalamazoo, which we called “Kekamazoo,” and which is located near where Michigan Highway 43 crosses the Kalamazoo River.

In 1821, the Michigan Indian Tribes and the United States entered into the 1821 Chicago Treaty, under which the tribes ceded all Michigan land south of the Grand River to the United States. Match-e-be-nash-she-wish signed this treaty on behalf of the Gun Lake Tribe, and as a realization from stipulations from the 1795 Treaty, he and his band were provided a 3-mile square of land at Kalamazoo. The northeast corner of the reservation was a short distance northeast of present day Michigan Avenue Bridge which crosses the Kalamazoo River as part of Michigan Highway 43. Today, Western Michigan University’s main campus is located approximately in the center of the 3 square mile area which was known as the Match-e-be-nash-she-wish Reservation.

Despite previous treaties between the United States and the Michigan tribes, and despite the huge amounts of land ceded, pressure continued on the tribe to cede more land. In 1827, Match-e-be-nash-she-wish agreed to cede his small reservation at Kalamazoofor an equal size land base adjacent to the Nottawaseppi Reservation near Mendon. However, the Tribe was never paid for the land cession and they did not move to this location. Before the land could be surveyed and provided to Match-e-be-nash-she-wish and his Tribe, all the major chiefs in southwest Michigan except Match-e-be-nash-she-wish signed the 1833 Chicago Treaty, ceding their land rights to the United States. To avoid a forced removal to Kansas as a “hostile” Band, Match-e-be-nash-she-wish moved the Tribe north, first to Cooper, then Plainwell, then Martin, and finally to Bradley in 1839. Tribal members maintained a connection with the Kalamazoo area into the 20th century, as residents of the Bradley settlement would collectively move south to the Kalamazoo River during the summer months to camp, fish, and socialize. The United States never fulfilled its treaty obligation to make payment for the Gun Lake Tribe’s Kalamazoo land cession.

In 1839 in Bradley, Allegan County, the Tribe placed itself under the protection of an Episcopalian Mission while the Tribe occupied what was known as the Griswold Colony, or Bradley settlement. Indian colonies like the Griswold Colony were established pursuant to the 1819 Civilization Act, which allowed five participating denominations to establish trust agreements, in which the missionary societies would hold land in trust for the Indians, build churches and schools, clear and fence fields, teach farming techniques, and make blacksmiths and mills available to the tribes.

Funding for the Griswold Colony had been set by treaty for 20 years. In 1855, the assistance provided by the treaty came to an end and a new treaty was made with the Tribe whereby they were granted outright ownership of lands in Oceana County near Pentwater, Michigan. The majority of the Griswold Indians took advantage of the provisions of the new treaty and moved northward, while a few families stayed behind. Within 10 years, however, most of the Griswold Indians had lost their lands in Oceana County, and many returned to the mission grounds, which had not been disposed of, despite the fact that the work there had come to an end. The Indians lost their lands in Oceana County not to taxes, but because the patents to the lands were never delivered to those that held land certificates, and thus the land selection process in Oceana County was never legally completed by the United States government.

When the land patents were not delivered, the Gun Lake tribal members returned to Allegan County, to the 360 acre reservation which was still in trust with Bishop McCoskry. However, during the period when some members lived in Oceana, the reservation members that remained behind refused to pay Allegan county taxes on the reservation lands, based on treaty rights. Tribal members returning from Oceana County met with court action by Allegan County and the reservation land was put up for sale for back taxes. Within a few years, practically all of the Tribal members had lost their land to non-Indians for failure to pay their taxes.

In 1890, pursuant to federal law allowing the “Pottawatomi Indians of Michigan and Indiana” to receive a payment from the United States for past annuities, the Pokagon Band and Nottawaseppi Pottawatomi filed cases in federal court. However, only the Pokagon Band was paid, and not the Allegan County Pottawatomies, our Tribe. In 1899, the Supreme Court ruled that the Allegan County Indians were also eligible to share in the judgment. The Taggart Roll was developed to establish the additional parties to be paid, and it contains 268 Pottawatomi Indian names, many of whom are descendants of Match-E-Be-Nash-She-Wish’s Band. The Bradley Indian community used the funds to expand and acquire land in the area.

The Tribe had unambiguous previous Federal acknowledgment, which is demonstrated by treaties extending at least through the 1855 Treaty of Detroit with the Ottawa and Chippewa Indians of Michigan, to which the Tribe's chief was a signatory, through the 1870 date at which annuity payments under prior treaties were commuted. There was never an express congressional legislation terminating the Tribe; the Tribe was simply passed over for a Treaty before treaty making ended in 1871

Over one hundred years later, in 1992, the Gun Lake Tribe petitioned the Bureau of Indian Affairs for acknowledgment. In August of 1999, the Tribe was acknowledged as a federally recognized Indian Tribe, re-establishing their government-to-government relationship with the United States. Since restoration as a federally recognized tribe, the Tribe has identified a site in Allegan County within the Wayland Township as a proposed site to place in trust for the benefit of its members. In fact, most of the Tribal members currently reside in the Allegan area. The Tribe chose to remain in Allegan County because it is part of the Tribe's aboriginal lands and the land on which the Tribe has lived since 1839.

It is also important to highlight that on June 25, 2003, the Tribe received a Department of the Interior Solicitor Opinion that acknowledged Gun Lake Tribe's historical nexus to proposed land acquisition site and determined that land acquired in trust for the land would be proclaimed the Tribe's initial reservation. The opinion concluded that the Tribe could conduct gaming activities on the land under the "initial reservation" exception in Section 20 of the Indian Gaming Regulatory Act.

The Gun Lake Project is Widely Supported

As Senate Committee on Indian Affairs Chairman, Senator John McCain (R-AZ) observed during the May 18, 2005 committee hearing on trust lands, the Gun Lake Tribal project has received "a pretty impressive display of local support." This is quite true, as part of the public comment period for the Environmental Assessment, the Bureau of Indian Affairs received letters supporting the Tribe's proposed land acquisition and development from the following groups/individuals:

- Wayland Township
- International Brotherhood of Electrical Workers
- Michigan House of Representatives
- City of Wayland
- Allegan Public Schools
- Barry County Economic Development Center
- Gun Lake Area Chamber of Commerce
- Allegan County Health Department
- Wayland Area Chamber of Commerce
- Plumbers/Pipe Fitters Union
- Wayland Union Schools
- Dorr Township
- Barry County Area Chamber of Commerce
- Allegan County Board of Commissioners
- Wayland City Police
- Deputy Sheriff's Association of Michigan
- Michigan House Democratic Leader Buzz Thomas
- Michigan State Majority Floor Leader Randy Richardville

Unfortunately, there are a small handful of detractors such as MichGo and *23 is Enough!* – a witness testifying in the second panel today. We understand that these two organizations are led and funded by a small collection of businessmen who operate their companies regionally. We also believe that *23 is Enough!* has not opposed any other gaming projects in Michigan aside from the Gun Lake project – not even the commercial gaming operations recently opened in Detroit. This group seems solely focused on *our* Tribal project.

Furthermore, none of this group's leaders submitted comments during the lengthy environmental review conducted by the Bureau of Indian Affairs. This raises a legitimate question of whether this group has gathered to oppose Indian gaming in the State or to oppose what promises to be a significant local competitor for the job base in Western Michigan. After all, the Gun Lake Casino is expected to bring 4,300 new jobs to the area, as well as local supplier purchases, local and state revenue sharing, a proven recreational attraction, and other economic development to the depressed area.

As a final thought, we know that Congress, when it enacted IGRA, carefully considered the unique history of tribal-federal relationship and we hope it will do so when it considers the special circumstances of landless tribes affected by this legislation. It is an honor and privilege to present testimony to Committee today and I am happy to answer any questions you have of me.