The Grand Traverse Band of Ottawa and Chippewa Indians

2605 N. West Bay Shore Drive • Peshawbestown, MI 49682 • (231) 534-7750

FEBRUARY 6, 2008
HEARING OF THE
U.S. HOUSE COMMITTEE ON NATURAL RESOURCES
REGARDING H.R. 2176 AND H.R. 4115

STATEMENT OF ROBERT KEWAYGOSHKUM
COUNCILOR AND CHAIRMAN
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

I. Summary.

My name is Robert Kewaygoshkum and I am the Tribal Chairman and elected member of the Grand Traverse Band Tribal Council. I have served as Chairman since 2000. I would like to express my sincere appreciation for the opportunity to testify again on this matter on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians and the Grand Traverse Band Tribal Council.[1]

Mr. Chairman and members of this Committee, the Grand Traverse Band of Ottawa and Chippewa Indians opposes the enactment of both bills -- H.R. 2176, to provide for and approve the settlement of certain land claims of the Bay Mills Indian Community, and H.R. 4115, to provide for and approve the settlement of certain land claims of the Sault Ste. Marie Tribe of Chippewa Indians.

Although the Grand Traverse Band and the Bay Mills Indian Community[2] and the Sault Ste. Marie Tribe of Chippewa Indians[3] have worked together for decades, striving for a sound and reasonable Federal Indian policy, we cannot stand beside our friends in this matter. If enacted, H.R. 2176 and H.R. 4115 would set an unhealthy precedent for Federal Indian fee-to-trust acquisition policy. They would unnaturally expand exceptions to the general prohibition against Indian gaming on lands acquired after October 17, 1988. They would promote inconsistent Congressional policy. And, they would violate an important agreement of the Indian Tribes in Michigan.

The Grand Traverse Band does not generally oppose the attempts by Bay Mills or Sault Ste. Marie to improve the economic situation of their people. Nor do we oppose any attempt to establish a legally valid land claim to the Charlotte Beach properties.

What the Grand Traverse Band opposes is the effect H.R. 2176 and H.R. 4115 would have upon Congressional policy and Federal Indian policy in the context of the Indian Reorganization Act and the Indian Gaming Regulatory Act; and we vehemently oppose any Port

---

[1] Hereinafter "Grand Traverse Band" or "GTB."
[2] Hereinafter "Bay Mills" or "BMIC."
[3] Hereinafter "Sault Ste. Marie" or SSMTCI."

Huron and Romulus tribal casino projects that attempt to circumvent Section 9 of the 1993 Compact between the State of Michigan and the seven Michigan Indian Tribes requiring revenue sharing in the event a Michigan Tribe commences gaming in accordance with 25 U.S.C. § 2719(b)(1)(A).

II. Interest of the Grand Traverse Band

Bay Mills, Sault Ste. Marie and the Grand Traverse Band are among the legal successor signatories to the 1836 Treaty of Washington[4] and the 1855 Treaty of Detroit.[5] In the 1836 treaty, the Grand Traverse Band, Bay Mills, and several 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 and the other bands.

Bay Mills, Sault Ste. Marie, and my Tribe, the Grand Traverse Band, each operates gaming facilities in our respective Reservation communities. One of GTB's two facilities is located on land determined to have been restored to our Tribe as part of our restoration process. That 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.[6]

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 economic security, and stable Tribal governments.

The two bills that are the subject of today's hearing attempt to circumvent a very important promise made by seven Michigan Tribes, including Bay Mills, Sault Ste. Marie and the Grand Traverse Band, when they entered into their IGRA Gaming Compacts with the State of Michigan in 1993. At that time, each of our seven Tribes pledged, not only to the State, but to each other, that we would not engage in economic warfare over gaming. Each Tribe agreed that it would pursue proposals to establish casinos far removed from its traditional territory only if it had first reached a revenue-sharing agreement with the other six Tribes.

This inter-tribal agreement was critical to each Tribe's survival, because proposals to game far off-reservation in the more populous parts of the State posed then and pose today the real potential to choke off the revenues of casinos closer to home that the Tribes rely upon to

[4] 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.

[5] 11 Stat. 621 (Jul. 31, 1855).

[6] 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002).

fund essential governmental programs and for employment. H.R. 2176, as proposed by Bay Mills, and H.R. 4115, as proposed by Sault Ste. Marie, brazenly violate that promise. Rather than honoring their Compact pledge, Bay Mills and Sault Ste. Marie have asked the federal Congress to impose federal legislation - based on a land claim that has never been proven - that would excuse them from complying with their inter-Tribal promises and would instead favor them to the great detriment of others, all in violation of the Federal trust responsibility to act with the interests of all Tribes in mind.

These two bills would bypass the courts and force upon the local communities, Indian and non-Indian alike, remedies with all kinds of ramifications, both intended and perhaps, unintended. Chief among these would be Congress's validation of the effort by Bay Mills and Sault Ste. Marie to evade the promise made in their IGRA gaming compacts that they would not pursue casino proposals far off-reservation without first taking into account the interests of other Michigan Tribes.

III. H.R. 2176 and H.R. 4115 Attempt to Circumvent the Promise Made By Bay Mills and Sault Ste. Marie to Other Michigan Tribes Under Section 9 of the Tribal-State IGRA Compacts.

The tribal-state IGRA gaming compacts negotiated in 1993 between seven Michigan Tribes, including Bay Mills, Sault Ste. Marie, Grand Traverse and the State, contain an identical provision, Section 9, which declares as follows:

> 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.*

See, e.g., A Compact Between the Bay Mills Indian Community and the State of Michigan, § 9 (emphasis added).

The meaning of, and intent behind Section 9, are clear. At the time that the 1993 Compacts were negotiated, each of the seven signatory Tribes was operating casinos within its traditional territory. Under IGRA and the Compacts, each Tribe could continue to operate those casinos in separate, independent efforts to foster tribal self governance and economic development. Furthermore, pursuant to the three section 2719(b)(1)(B) exceptions described above, each of the Tribes could develop additional IGRA-governed gaming facilities within its traditional territory. However, if any Tribe sought to take land into trust for gaming purposes outside of its traditional territories, each Tribe agreed that it first had to work out revenue sharing agreements with the other Tribes. In this way, the Michigan Tribes pledged not to engage in a form of economic warfare that would ultimately injure all of them. They promised not to engage in an endless game of attempting to leapfrog over one another in moving closer to major

population centers while cutting off revenues to their less aggressive brethren. Only when they had worked out cooperative arrangements among themselves would the Michigan Tribes then attempt to secure the approval of the Secretary of the Interior, and the concurrence of the Governor, for far-reaching off-reservation gaming proposals under Section 20 of IGRA.

Shortly after the 1993 Compacts were finalized, the Michigan Tribes demonstrated their understanding of how Section 9 of the Compacts was intended to work. The Tribes worked cooperatively on a proposal to take land into trust for gaming under IGRA in the City of Detroit. They crafted an appropriate revenue-sharing agreement, and only because then Governor Engler, at the last minute, withdrew his support for the proposal, did the collaborative effort not come to fruition.[7]

By contrast, the legislation being advanced by Bay Mills and Sault Ste. Marie would establish IGRA-authorized gaming operations far from the traditional territories of those two Tribes without involving the other Michigan Tribes and without any regard for their well-being. H.R. 2176 and H.R. 4115 are nothing more than an obvious attempt to circumvent Section 9 of the 1993 IGRA Compacts and the protection Section 9 offers other Tribal signatories.

Bay Mills and Sault Ste. Marie seek to establish casinos in a part of the State far removed from their traditional territories in violation of their pledge to first work out a revenue sharing arrangement with other Tribes. Under normal circumstances, these proposals would fall squarely within Section 2719(b)(1)(A) of IGRA - the Tribes would have to convince both the Secretary of the Interior and the Governor that gaming proposals should move forward. However, because an application under Section 2719(b)(1)(A) would trigger the revenue-sharing requirements of Section 9, and because they seek to get a free pass from the Congress to avoid the revenue sharing and governmental cooperation underpinning that Compact provision, Bay Mills and Sault Ste. Marie have brazenly sought to characterize their land-grab efforts in southern Michigan as involving the settlement of a land claim in the Upper Peninsula. As detailed above, however, the validity of their land claims in Chippewa County has never been established. Moreover, no court of law has ever construed the "settlement of a land claim" provision in IGRA to authorize Tribes to establish casinos far removed from the traditional territory subject to the land claim being settled as is here proposed by Bay Mills and Sault Ste. Marie, even assuming the existence of a valid claim.

IV. Overview of H.R. 2176 and H.R. 4115

H.R. 2176 contains a legislative remedy provision for a single Michigan Indian Tribe—the Bay Mills Indian Community. Likewise, H.R. 4115 contains a legislative remedy provision for another Michigan Indian Tribe—the Sault Ste. Marie Tribe. Each involves what amounts to

---

[7] After the tribal IGRA deal was blocked, the State issued licenses for three commercial (non-IGRA) casinos in Detroit. All operate under authority of state law and not the federal Indian Gaming Regulatory Act although one of the owner-operators is the Sault Ste. Marie Tribe.

a significant amendment to both the Indian Gaming Regulatory Act[8] and the Indian Reorganization Act,[9] 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.

H.R. 2176 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.[10] Likewise, H.R. 4115 would similarly ratify an agreement between Sault Ste. Marie and the State of Michigan. These two Tribes are asking Congress to ratify settlement agreements that provide an unprecedented remedy to purported Indian land claim—instead of paying monetary damages for trespass or providing land on or near Charlotte Beach, the State would give up land far from the Bay Mills and Sault Ste. Marie reservations 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.[11] Unlike previous land claim settlement acts, Congress is not a party to the negotiations to the Settlement Agreement underlying H.R. 2176 and H.R. 4115. Congress did not and cannot negotiate the terms of H.R. 2176 and H.R. 4115—Congress may only ratify the Settlement Agreement hashed out between Bay Mills and the State of Michigan and between Sault Ste. Marie and the State of Michigan.

The Grand Traverse Band believes the land claim settlement exception in § 2719(b)(1)(B)(i) should be applied only where federal or state liability or potential liability is well 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.

V. Enactment of H.R. 2176 and H.R. 4115 Would Violate Federal Indian Policy.

A. H.R. 2176 and H.R. 4115 Would Allow Gaming on Lands Acquired After October 17, 1988 Approximately 350 Miles from the Bay Mills Reservation and approximately 355 miles from the Sault Ste. Marie Reservation.

H.R. 2176 and H.R. 4115 would ratify agreements between the State of Michigan and the Bay Mills Indian Community and the Sault Ste. Marie Tribe. The Bay Mills agreement would allow the Bay Mills to acquire from the State of Michigan land in the City of Port Huron,

---

[8] Pub. L. 100-497 (Oct. 17, 1988), 102 Stat. 2467, codified at 25 U.S.C. § 2710, et seq. (hereinafter "IGRA").
[9] Act of June 18, 1934, c. 576, 48 Stat. 984, codified at 25 U.S.C. § 461, et seq. (hereinafter "IRA").
[10] Hereinafter the "Settlement Agreement."
[11] See S. 2986 § 3(b)(2); Settlement Agreement, at 2.

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.[12] 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 350 miles from the Bay Mills Reservation in the Upper Peninsula of Michigan. Similarly, the Sault Ste. Marie agreement would allow the Sault Ste. Marie Tribe to acquire from the State of Michigan land in the City of Romulus, 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.[13] Romulus is approximately 125 miles from the nearest boundary of the lands ceded in the Treaty of 1836 that both the Grand Traverse Band and Sault Ste. Marie signed. Furthermore, the Romulus parcel is approximately 350 miles from Sault Ste. Marie lands 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. Norton,[14] 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.[15] Additionally, in Sac and Fox Nation v. Norton,[16] the Tenth Circuit adopted a limited definition of the term "reservation" to mean "'any land reserved from an Indian *cession* to the federal government....'"[17]

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.[18]

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

[12] See Bay Mills Settlement Agreement, at 3.
[13] See Sault Ste. Marie Settlement Agreement, at 3.
[14] 193 F. Supp. 2d 182 (D. D.C. 2002).
[15] Id. at 186 & 192 (citing South Dakota, 69 F. 3d at 882-83 & n.3).
[16] 240 F. 3d 1250 (10th Cir. 2001), cert. denied, Wyandotte Nation v. Sac and Fox Nation of Missouri, 122 S. Ct. 807 (2002).
[17] 240 F. 3d at 1266 (quoting FELIX F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 34 (2nd ed. 1982)) (emphasis added).
[18] See generally S. REP. 100-446 (Aug. 3, 1988).

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."[19] Moreover, Judge Hillman found that Grand Traverse Band members "occupied the region continuously from at least 100 years before treaty times to the present."[20] Finally, Judge Hillman found that the Turtle Creek site "was located within the contemplated reservation, which was not designated for four years after the treaty was signed."[21] Therefore, Turtle Creek was subject to the § 2719(b)(1)(B) exceptions.

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, neither Bay Mills nor Sault Ste. Marie Tribe has shown any traditional or historical connection in any land near Port Huron or Romulus. Port Huron and Romulus are 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.[22]

B. H.R. 2176 and H.R. 4115 Create a Remedy for the Bay Mills Indian Community and for Sault Ste. Marie Tribe By Purporting to Settle a Land Claim that Has Never Established Federal Government Liability in Any Court of Law

H.R. 2176 and H.R. 4115 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 Bay Mills Indian Community and the Sault Ste. Marie Tribe have attempted to establish a valid land claim to the

---

[19] Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney, 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002) (citations omitted).
[20] Id. (citation omitted).
[21] Id. (citations omitted).
[22] 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.

Charlotte Beach property.[23] The essence of 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.[24] Bay Mills and, by extension, Sault Ste. Marie, claim 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.[25]

To this point, however, each of the attempts to establish a land claim have 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 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.[26] 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.[27] 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.[28] As such, the liability of the State of Michigan or the federal government has never been established.

The State of Michigan has embraced a foolish position in its decision to settle the Charlotte Beach land claims on the unfounded basis that they negatively impact land values and the collection of real property taxes by local units of government. So far, these land claims to Charlotte Beach have all been rejected for the purposes of establishing federal liability. Put another way, the State and these two Indian Tribes are asking the Congress to ratify a land claim settlement agreement in which no court has validated the underlying claim.

C. H.R. 2176 and H.R. 4115 Constitute 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

---

[23] 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).
[24] See 626 N.W.2d at 172.
[25] See id.
[26] See id. at 173-174.
[27] See id. at 172-73 (citing Cass Co., Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)).
[28] See 26 Indian L. Rep. at 3041-42 (finding the Sault Tribe indispensable to further proceedings in the Charlotte Beach land claims litigation).

having some rational, factual link to where tribal members lived and worked. Examples from the past several years include the Auburn Indian Restoration Act,[29] the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act,[30] the Paskenta Band of Nomlaki Indians of California Act,[31] and the Graton Rancheria Restoration Act.[32] H.R. 2176 and H.R. 4115 would reverse the disciplined policy Congress has followed for a decade of limiting mandatory fee-to-trust acquisitions to lands acquired within a Tribe's service area, which in those instances closely corresponds with the Tribe's historic area. Neither Sault Ste. Marie nor Bay Mills' traditional territory and service area extends to St. Clair County—nor does it extend to any other county within approximately 200 miles of St. Clair County.

Bay Mills has no governmental authority in the area near Port Huron. Likewise, the Sault Ste. Marie Tribe has no governmental authority near Romulus. Under H.R. 2176 and H.R. 4115, Bay Mills and Sault Ste. Marie would begin exerting jurisdiction over lands far from their own homeland and on lands directly within the jurisdiction of the State of Michigan, the City of Port Huron, and St. Clair County and the City of Romulus.

D. H.R. 2176 and H.R. 4115 Set 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, Sault Ste. Marie and the State of Michigan to invoke a federal remedy for an Indian land claim in which there is no federal or state 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. These two bills could trigger a flood of similar Indian "land claims". Exactly how do the

[29] 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].").
[30] 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].").
[31] 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].").
[32] 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.").

Members of Congress who are proposing H.R. 2176 and H.R. 4115 intend to say no to them after pushing through these bills?

E. H.R. 2176 and H.R. 4115 are Inconsistent With Past Congressional Treatment of the Bay Mills Indian Community and Sault Ste. Marie Tribe Reservations.

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.[33] 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. H.R. 2176 contemplates the reversal of a 142-year old Congressional policy decision to locate BMIC within its traditional territory.

Grand Traverse Band was recognized as an Indian Tribe on May 27, 1980 through the procedures now found at 25 CFR Part 83 and established a Tribal Constitution under the provisions of the Indian Reorganization Act of 1934. The territory of the Grand Traverse Band includes a five county service area in Northwest Michigan. The core of the Tribe is a 20,000 acre reservation on the "North Shore of Grand Traverse Bay" established by the 1836 Treaty and the several townships by the Treaty of 1855. The Tribe has trust land in each of the areas established by the Tribal Constitution, the 1836 Treaty and the 1855 Treaty.

The Sault Ste. Marie Tribe of Chippewa Indians was administratively recognized in 1972.[34] The core area, program service area, and traditional territory of the Tribe is located in the Upper Peninsula of Michigan.

VI. H.R. 2176 and H.R. 4115 Contravene Federal Indian Law and Create a Significant Expansion to the Exceptions to the General Prohibition on Indian Gaming on After-Acquired Lands

The policy enunciated by Congress in 1988 by the passage of IGRA would be undermined by the enactment of H.R. 2176 and H.R. 4115. IGRA provides a general prohibition of gaming on lands acquired after the passage of IGRA on October 17, 1988.[35] 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.[36]

---

[33] See Charles E. Cleland, RITES OF CONQUEST 289 (1992) (citing 12 Stat. 44, 58 (1860)).
[34] *See* City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (1980).
[35] See 25 U.S.C. § 2719.
[36] See 25 U.S.C. § 2719(a)(1).

The Congressional policy behind the enactment of the IRA would also be undermined by the passage of H.R. 2176 and H.R. 4115. A major provision 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."[37] 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.[38] 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 facilitate tribal self-determination, economic development, or Indian housing.[39]

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."[40]

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. 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:

- In our own case, Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney,[41] the district court for the Western District of Michigan held that our gaming

[37] 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).
[38] See 25 C.F.R. Part 151.
[39] 25 C.F.R. § 151.3.
[40] 25 C.F.R. § 151.11(b).
[41] 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002).

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,[42] 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,[43] 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,[44] the D.C. district court held that a parcel held in trust for gaming purposes that was contiguous to the Confederated Tribes' reservation enjoyed the benefits of the restored lands exception.
- In City of Roseville v. Norton,[45] 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,[46] 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,[47] 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).

---

[42] 193 F. Supp. 2d 182, 186 & 192 (D. D.C. 2002) (citing South Dakota, 69 F. 3d at 882-83 & n.3).
[43] 288 F. 3d 910, 912-13 (6th Cir. 2002).
[44] 116 F. Supp. 2d 155, 157 (D. D.C. 2000).
[45] __ F. Supp. 2d __, 2002 WL 31027695, at *2 (D. D.C., Sept. 11, 2002).
[46] 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).
[47] 110 F. 3d 688 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).

- In Sac and Fox Nation v. Norton,[48] 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 H.R. 2176 and H.R. 4115. The three exceptions contained in § 2719(b)(1)(B) should be read in the same context. The Grand Traverse Band opposes the dramatic expansion of the exceptions to the general prohibition against gaming on after-acquired lands.

VII. Conclusion and Suggestions for Future Action.

The Grand Traverse Band does not come before the House Natural Resources Committee with a bone to pick with the Bay Mills Indian Community or the Sault Ste. Marie Tribe of Chippewa. On numerous occasions, the Grand Traverse Band has stood side-by-side with Bay Mills and Sault Ste. Marie on issues of Federal Indian policy, including the U.S. v. Michigan litigation and when we stood together to preserve our fledgling gaming interests. We know better than any other Michigan Indian Tribe that Bay Mills and Sault Ste. Marie have been our fellow leaders in pursuing self-determination, self-governance and self-reliance for Indian Tribes nationwide. We also recognize that Bay Mills in particular 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 and Sault Ste. Marie 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 cannot support H.R. 2176 and H.R. 4115 and urge defeat of these bills. Thank you for reviewing our testimony. If there are questions you believe we can answer, please do not hesitate to ask.

---

[48] 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).