

Melanie Benjamin

Office of the Chief Executive

**STATEMENT OF
MELANIE BENJAMIN, CHIEF EXECUTIVE
MILLE LACS BAND OF OJIBWE**

September 20, 2006
Before the Senate Committee on Indian Affairs
Oversight Hearing on Tribal Self-Governance

Good morning, Mr. Chairman, Mr. Vice Chairman, and members of the Committee. My name is Melanie Benjamin. I am the elected Chief Executive of the Mille Lacs Band of Ojibwe.

I have two points to make in my testimony today. First, I will identify what hinders the widespread tribal desire to expand self-governance authority and participation levels among tribes. And second, I will suggest a practical step that the Congress can take to remove obstacles to greater tribal self-governance. But first, I will give a brief background.

BACKGROUND

A. Mille Lacs Band History and Structure

A century ago, after our lands were stripped away from us by both law and lawlessness, the U.S. Congress referred to us as the "homeless nonremoval Mille Lacs Indians" and restored to us a small fraction of our original lands. That land today comprises the center of the Mille Lacs Indian Reservation in central Minnesota about two hours' drive from Minneapolis. Most of our approximately 3,800 tribal members live on or near our checker-boarded Reservation and its three separate Reservation Districts.

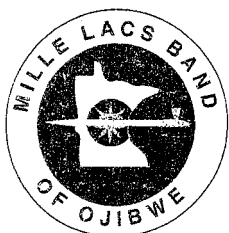
In the 1980s we organized our constitutional government into three branches of government, with an Executive, a unicameral Legislature, and an independent judiciary. Over the past two decades, through a combination of self-governance authority and the exercise of lawful governmental gaming, our Band has been transformed from the darkest of nights into a bright new day.

**Mille Lacs
Band of
Ojibwe**

43408 Oodena Dr.

Onamia, MN

56359



B. Leadership in Self-Governance

I am proud to say that the Mille Lacs Band has been a leader among other Tribes in seeking greater tribal self-governance authority and in putting it into practice. The Band was among the first ten Indian Tribes to participate in self-governance with the Bureau of Indian Affairs (BIA) in the late 1980s and the first Tribe to negotiate an agreement with the Indian Health Service (IHS) in the early 1990s.

We will always be grateful to you, Chairman McCain, and to a handful of your colleagues, for having been responsive, time and time again, to tribal calls for writing into federal statute greater tribal self-governance authority that curbs the federal bureaucracy's insatiable appetite to dominate tribal operations. Congress, at your behest, has repeatedly had to step in with statutory changes to correct the tendency of federal agencies to place a strait-jacket on tribal authority, priorities, administration, and programs. Today, we urge you to step in again and change the law to remove more obstacles to tribal self-governance.

OBSTACLES TO TRIBAL SELF-GOVERNANCE

As you know, Mr. Chairman, it was the scandal of a corrupt and wasteful BIA, uncovered by the *Arizona Republic* newspaper in 1987, that led the Congress to impose by law upon the BIA a "demonstration" project for tribal self-governance in 1988. Congress expanded that authority in 1991 to IHS, made it permanent for Interior in 1994 and, in 2000, made it permanent for IHS. In each of these enactments, Congress made specific changes to the law to remove obstacles to greater self-governance. In each case, Congress had to amend the statute to correct what the federal agencies either had distorted by regulation and practice or had balked at implementing.

A. Over-Reach by Federal Agencies

Each of the previous four congressional reform efforts was embraced in rhetoric but opposed in practice by the Administration, regardless of political party or leadership. The message of the federal agencies has always been – 'we cannot trust the tribes to do better for themselves than we are able to do for them.' This is not a position rooted in partisan ideology. It is instead pure paternalism, fed by an institutional desire to preserve itself, its power, its prerogatives, and its personnel at all costs. These interests of the federal bureaucracy are at direct odds with the interests of tribal self-governance, and must be constrained by statute.

Of course there will be mistakes made by tribes in the exercise of self-governance authority. But there are built-in correctives. First, the people closest to the action – the tribal member constituents and beneficiaries – hold the power to correct tribal leaders through the ballot box and other political restraints available in tightly-knit Reservation communities. Second, stringent audits and corrective actions are required. Third, federal criminal sanctions against misappropriation of funds apply. And fourth, the tribal self-governance movement is very protective of its reputation and encourages inter-tribal cooperation and assistance.

B. Involuntary Transfer of Power

Federal agencies do not give up power easily or willingly. Whether a transfer of power is required by a President or a Secretary or by an Act of Congress, those involved in implementation have many opportunities to blunt, curb, avoid or undermine directives to transfer authority to tribes. The resistance to change is great in an entrenched bureaucracy whose primary reason for existence is to exercise authority over others. The more precise the statute, the less latitude is left to the bureaucrats to resist the change intended by Congress.

Congress has had to amend the self-governance statute four times. Each time, it has done so to correct distortions that have been made to the statute by the federal agencies. We are again at such a point with Title IV and its application to the BIA.

C. Stifling Policies and Procedures

Federal agencies want to impose uniformity that is inflexible and unresponsive to local needs and priorities. One size does not fit all. There are many ways to a common objective. The specifics of what works in Window Rock may not work as well in Onamia.

The rationale for detailed policies and procedures, for program manuals, negotiation guidelines, and regulations, is that a tribe won't get it right without using the bureaucracy's cookie cutter. It is at its root a fundamental lack of trust in tribes to seek their own best interests and an unwillingness to let go of control so that leaders closer to the people served may govern their own people.

D. Conflicting BIA and IHS Requirements

Like Mille Lacs, most tribes have self-governance agreements with both IHS and BIA. But because Congress enacted Title V governing IHS in 2000, and Title IV governing BIA in 1994 -- Title V and Title IV now

contain provisions that differ from each other and thus require self-governance tribes to operate separate administrative structures and systems for programs funded by IHS and BIA. Congress expanded tribal authority and flexibility when it enacted Title V governing IHS-funded programs. But the same tribes still labor under the more restrictive authority of Title IV governing BIA-funded programs. These dual requirements are an administrative and cost burden that weighs against more tribes assuming more federal program administration under self-governance authority.

THE BOOTSTRAP AMENDMENT – A PRACTICAL WAY TO EXPAND SELF-GOVERNANCE PARTICIPATION

A. The Last Six Years: Stalemate at Interior

In 1994, Congress enacted Title IV, which at the time was landmark permanent authority for tribal self-governance related to BIA. It was enacted over the objections of the Administration. The negotiated rulemaking that followed was contentious, concluding in late 2000 when Interior over-rode tribal interpretations of Title IV and published a rule that construed the statute to limit tribal authority in many key areas. Meanwhile, on a dual track in the late 1990s and informed by their difficult experience with Interior-BIA, the tribes worked with Hill allies and this Committee to reform IHS-related tribal self-governance authority. The result in 2000 was enactment of a detailed new Title V that expanded specific tribal authorities over IHS programs. The ensuing negotiated rulemaking process with IHS on this new Title V concluded quickly with the support of the tribes.

In 2001, the tribes began an effort to develop legislation to completely overhaul Title IV (BIA-Interior) modeled after the expanded tribal authority enacted in Title V (IHS) in 2000. The draft bill mandated strict timeframes, clarified appeal rights, and expanded tribal flexibility in administration. Many other ambiguities in Title IV were clarified so that, like with Title V, there would be little left to argue about in the regulations. Negotiations between tribal leaders and a succession of Interior Department officials on the tribal draft bill over the last five years have been protracted and unsuccessful.

B. A Simple Solution – “Bootstrap” Title V Authority Into Title IV

Given the complications arising from a detailed bill, the tribes crafted an alternative “bootstrap” amendment that simply would allow any Indian tribe to elect to apply existing Title V authority to its BIA-Interior self-governance activity. Several Senate (e.g., May 12, 2004, S. 1715) and House hearings were held on the larger and bootstrap alternatives, and the

larger bill was reported at the end of 2004 but was not acted upon by the Senate.

The attempt to gain Interior support for the detailed tribal bill to conform Title IV to Title V is basically at a stalemate today, and has been for years. Bureaucratic opposition has stalled all progress. So the tribes now ask that the Committee support enactment this year of a simple alternative statutory amendment that borrows from something the Congress did a decade ago – authorize any self-governance tribe to apply the same flexible authorities to its Interior-funded programs that Title V permits a tribe to apply to its IHS-funded programs. We ask that the Committee secure enactment of this technical amendment before adjournment.

In 1996, Congress adopted a similar “bootstrap” amendment you sponsored, Sen. McCain, that applied the latest reforms of Title I (self-determination) to Title III and IV (self-governance) administration. The bootstrap amendment we ask you to consider would, in substance, simply add the phrase “Title V” to the bootstrap provision in existing law, at 25 U.S.C. 458cc(1) so that Title V reforms, like Title I reforms, may be applied by any tribe to its Title IV program authorities.

The rationale for this is plain and simple -- if the IHS has survived the application of Title V provisions over the past five years, so too can Interior. Having the same rules apply to all tribal self-governance operations of a tribe like Mille Lacs will enable us to run a more efficient tribal administration with less duplication of effort and greater cost sharing. Timeframes, reporting requirements, control structures, systems architecture, fiscal management and investment, and other activities can be made more congruent. Such bootstrap authority would offer the Mille Lacs Band and other tribes a greater potential to better coordinate all our federal programs at the tribal level and thereby increase the program benefits to our people.

C. The Specific Benefits of “Bootstrap” Authority

The “bootstrap” would allow an Indian tribe, at its discretion, to apply any provision of enacted Title V authority to its negotiation and administration of BIA-Interior funds. This would capture the improvements made by Congress in 2000 regarding IHS and extend them to BIA-Interior. Some examples of the added authority include: (a) greater eligibility to participate; (b) simplification of the application process; (c) strict timeframes for application, negotiation, decision-making, and dispute resolution; (d) more flexible tribal administrative authority; (e) expanded tribal investment authority over advanced funds; and (f) cost savings and efficiencies realized from allowing a tribe to conform its administrative

practice regarding BIA-funded programs to that of its IHS-funded programs.

The bootstrap amendment is the kind of simple, house-keeping legislative reform that can have lasting positive impact. It would adopt the extensive work done by Congress in 2000 on Title V and apply it to Title IV at tribal option. Its enactment would remove many of the known federal obstacles to full tribal participation in self-governance at BIA-Interior. Presumably BIA-Interior would take no position on or oppose the bootstrap amendment, but their grounds for any opposition would likely not be very compelling.

Attached is a copy of the bootstrap bill language previously prepared by the Senate Office of Legislative Counsel and considered by the Committee in 2002. The only substantive change to existing law it would make is to add the words "Title V" to 25 U.S.C. 458cc(1).

CONCLUSION

For six years we have tried to negotiate with Interior to gain its agreement to add to Title IV (BIA) the reforms made by Congress to Title V (IHS). We have not succeeded. A simpler approach is for Congress to enact legislative "bootstrap" authority this year, patterned after what it did in 1996, which would allow a self-governance tribe to apply Title V authority to its Title IV agreements with Interior.

The broader Title V self-governance authority has worked well at IHS where there is widespread participation by tribes in self-governance. We believe tribal participation would expand if Title V was applied, at tribal option, to Interior-BIA agreements. More efficient and responsive tribal program administration is not the only product of expanded tribal self-governance authority. Broad-based and sustained economic development and growth also follows where a tribal government exercises self-governance, according to research conducted by Harvard University's Kennedy School of Government.

From our first days in tribal self-governance, the vision of the Mille Lacs Band has been to move closer to a large, comprehensive block-grant program that includes all of the federal dollars we are eligible to receive. We do not want to have to go through the State of Minnesota for any federal flow-through dollars, and we want the flexibility to determine our own priorities and to reprogram federal funds at all levels of the federal government. We would propose a new demonstration project, similar to the "New Federalism" proposed years ago, that is rooted in the federal trust responsibility and includes a Department of Indian Affairs that administers

all Indian programs. And we would be pleased to work with you and this Committee to that end. However, as a very interim step, we need quick enactment of this "bootstrap" Title V authority for Title IV. And so we ask the Committee to marshal its energies and persuade Congress to enact this "bootstrap" amendment in the closing days of this Congress.

Thank you for this opportunity to express the views of the Mille Lacs Band of Ojibwe, and for your work, Mr. Chairman, and the work of this Committee over the years in supporting tribal self-governance at the request of tribal governments and in the face of resistance from the federal agencies.

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Attachment: "Bootstrap" amendment language

10-14

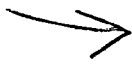
1 “(B) DESCRIPTION OF CLAIM.—A claim
2 described in this subparagraph is—

3 “(i) a claim by a person for a fee for
4 services relating to an appeal described in
5 paragraph (1) that are performed on or
6 after March 29, 1996; or

7 “(ii) a claim by a person for a fee for
8 services that—

9 “(I) is asserted on or after
10 March 29, 1996; but

11 “(II) is for a fee for services re-
12 lating to an appeal described in para-
13 graph (1) performed before that
14 date.”.



15 (b) INCORPORATION OF SELF-DETERMINATION PRO-
16 VISIONS.—Section 403 of the Indian Self-Determination
17 and Education Assistance Act (25 U.S.C. 458cc) is
18 amended by striking subsection (I) and inserting the fol-
19 lowing:

20 “(1) INCORPORATION OF SELF-DETERMINATION
21 PROVISIONS.—

22 “(1) IN GENERAL.—At the option of any par-
23 ticipating Indian tribe, any or all of the provisions
24 of title I or V shall be incorporated in a compact or
25 funding agreement entered into under this title.

10-15

1 “(2) FORCE AND EFFECT.—A provision incor-
2 porated under paragraph (1) shall—

3 “(A) have the same force and effect as if
4 included in this title; and

5 “(B) be deemed to—

6 “(i) supplement or supplant any re-
7 lated provision in this title, as appropriate;
8 and

9 “(ii) apply to any agency subject to
10 this title.

11 “(3) TIMING.—In any case in which an Indian
12 tribe requests incorporation of a provision under
13 paragraph (1) during the negotiation stage of a com-
14 pact or funding agreement described in that para-
15 graph, the incorporation shall—

16 “(A) be considered to be effective imme-
17 diately; and

18 “(B) control the negotiation and any re-
19 sulting compact or funding agreement.”.

20 **Subtitle D—Indian Arts and Crafts**

21 **SEC. 10401. INDIAN ARTS AND CRAFTS ACT AMENDMENTS.**

22 Section 2(g) of the Act of August 27, 1935 (25
23 U.S.C. 305a(g)), is amended—

24 (1) in paragraph (1), by inserting “trademarks
25 for” after “products and”;