MILLE LACS BAND OF OJIBWE
Executive Branch of Tribal Government

TESTIMONY OF THE HONORABLE MELANIE BENJAMIN CHIEF EXECUTIVE MILLE LACS BAND OF OJIBWE

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON

THE 30TH ANNIVERSARY OF TRIBAL SELF-GOVERNANCE: SUCCESSES IN SELF-GOVERNANCE AND AN OUTLOOK FOR THE NEXT 30 YEARS

APRIL 18, 2018

Good afternoon! My name is Melanie Benjamin. I have had the honor of serving my people as the elected Chief Executive of the Mille Lacs Band of Ojibwe for over 16 years. Before I was elected, and during our initial self-governance negotiations, I served as the chief of staff to the Chief Executive, and as Commissioner of Administration for our Band. Our Reservation is located about one and one-half hours north of Minneapolis in east-central Minnesota, with approximately 4,500 tribal members..

Thank you for the invitation to testify today on Tribal Self-Governance, what we've done with it for the past 30 years and what more I and my colleagues and successors in tribal leadership hope to accomplish in the next 30 years.

I would be remiss at the outset of my testimony if I failed to thank this Committee for moving quickly last week to favorably report S. 2515, the "Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2018" (the "PROGRESS for Indian Tribes Act").

Mille Lacs and many other tribes have worked for the past 18 years to draft, shape, and negotiate its language, and to persuade Administration after Administration, House after House, and Senate after Senate to support its provisions. Now that this Committee has once again applied its jockey-whip to these Title IV amendments, we're down to the wire at the end of the final lap. We hope S. 2515 does not stumble on its way to the finish line in the coming weeks.

DISTRICT I
43408 Oodena Drive • Onamia, MN 56359
(320) 532-4181 • Fax (320) 532-4209

DISTRICT II
36666 State Highway 65 • McGregor, MN 55760
(218) 768-3311 • Fax (218) 768-3903

DISTRICT IIA
2605 Chiminising Drive • Isle, MN 56342
(320) 676-1102 • Fax (320) 676-3432

DISTRICT III
45749 Grace Lake Road • Sandstone, MN 55072
(320) 384-6240 • Fax (320) 384-6190

URBAN OFFICE
1433 E. Franklin Avenue, Ste. 7c • Minneapolis, MN 55404
(612) 872-1424 • Fax (612) 872-1257

S. 2515 has been preceded by a long string of tribal self-governance accomplishments. I hope to point to some of those today in my testimony, as I briefly summarize the origins of Tribal Self-Governance policy and take a quick tour of how Tribal Self-Governance came to be, what stood in its way, what difference it makes, why it matters, and what keeps it from being more widespread.

Scandalous Origins – How Tribal Self-Governance Came to Be. The federal policy of Tribal Self-Governance was not conceived overnight. It was carefully crafted by some of the tribal leaders who had formed what they called the "Alliance of American Indian Leaders" and had met together in 1980s to, among other things, draw national attention during the 200th anniversary of the U.S. Constitution to the key role Indian tribes played in the formation of the United States of America. These tribal leaders included one of my predecessors, Art Gahbow, Chief Executive, Mille Lacs Band of Ojibwe. He was joined by Joe American Horse, Chairman, Oglala Sioux Nation; Wendell Chino, President, Mescalero Apache Nation; Joe DeLaCruz, President, Quinault Nation; Ernest House, Chairman, Ute Mountain Tribe; Roger Jourdain, Chairman, Red Lake Band of Chippewa Indians; Larry Kinley, Chairman, Lummi Tribe; Earl Old Person, Chairman, Blackfeet Nation; Richard Real Bird, Chairman, Crow Tribe; and Jack Thorpe, Principal Chief, Sac and Fox Tribe of Oklahoma. These leaders forcefully sought to restore a more robust government-to-government relationship between each Indian tribe and the United States. They insisted that Indian tribes should have the right to control their own programs and workforces, to prioritize where their federal funding should be applied, and to follow their own ways of governance. And they said it was imperative that the United States keep its promises it made to tribes in exchange for land and resources, and that the United States honor its trust responsibility to uphold, regulate and enforce its treaty obligations. Looking back at the 1980s today, these are indeed timeless messages and tribal leaders will accept no excuse from those who still, today, refuse to listen.

In early October, 1987, as the 200th anniversary celebrations were winding down, the *Arizona Republic* newspaper published an eight-day investigative series entitled "Fraud in Indian Country: A Billion Dollar Betrayal" that exposed the rampant and systemic diversion of Bureau of Indian Affairs (BIA) funding to everywhere but Indian reservations. The *Arizona Republic* series claimed that just eleven cents of every federal dollar appropriated for the benefit of Indians was reaching Indian communities.

The foul smell of that scandal led Senator Daniel Inouye, then Chairman of the predecessor to this Committee, to form a Special Committee on Investigations, to which he appointed Senator Dennis DeConcini (D-AZ) (Chair), Senator John McCain (R-AZ) (Co-Chair), and Senator Tom Daschle (D-SD) (Member).

At about the same time, the voices of the Alliance of American Indian Leaders during the Constitution commemorations caught the ear of the House Interior Subcommittee on Appropriations, chaired by Rep. Sid Yates (D-IL), who asked leaders of the Alliance to testify in oversight hearings after the BIA funding scandals hit the

headlines. The Alliance leaders were joined at those hearings by several younger tribal leaders like Edward K. Thomas, President of the Central Council of Tlingit and Haida Indian Tribes of Alaska, and Ron Allen, Chairman of the Jamestown S'Klallam Tribe. At one point, Chairman Yates asked the tribal leader witnesses – if Congress required the BIA to simply give you the funding directly, how would you propose to handle it? What would be an effective, tribally-driven solution, he asked?

The tribal leaders worked around the clock to come up with appropriations bill and report language that sketched the outlines of the initial tribal self-governance demonstration project. They proposed a self-governance model by which tribes would have broad negotiation and operational authority to assume administrative responsibility for virtually all programs, functions, services and activities previously carried out for tribes by federal officials. The ten tribes told the Appropriations Committee they wanted to participate in this as a pilot project. They were named in the appropriations measure and each allocated $100,000 to begin conducting planning activities.

The ten tribal leaders also worked with the Senate Committee on Indian Affairs and the House Interior Committee to add a new Title III to Public Law 93-638, that in 1991 provided a more detailed outline for the demonstration project, further describing how tribes would negotiate amounts and operate programs under the terms of a "compact" and funding agreement that replaced multiple federal program rules and reporting requirements with structures that were primarily accountable to the Indian tribe itself.

The goal at the time was to transform a historically dependency-ridden federal Indian services delivery system into a government-to-government relationship that returns power, authority, responsibility, accountability and funding to tribal governments at the local level. The result were a congressionally-imposed, tribally-driven set of self-governance authorities that stepped away from the rampant corruption, waste, inefficiency, and pointless regulatory burdens that dominated the Bureau of Indian Affairs bureaucracy. That work is not yet finished.

Obstacles and Hurdles – What Initially Stood in the Way of Tribal Self-Governance? Many federal officials and program staff openly and strenuously opposed tribal self-governance in its early days when it was being shaped by tribal leaders and their allies on Capitol Hill. The federal bureaucracy seemed to see self-governance as a threat to its exercise of power. Within some of the ten tribes there was internal opposition as well, fueled by a similar fear that self-governance would mean that tribal program directors would have a new "boss" – the tribal government – rather than the federal program administrators. At its core, tribal self-governance was about shifting power to a tribe's governing structure as the most legitimate, appropriate, and effective authority.

It should come as no surprise that tensions arise when a tribe seeks to assume a program, function, service or activity previously carried out by a federal agency office.

Federal officials are understandably reluctant to sit down at the table to negotiate away their own authority, sphere of influence, and at times, even their own jobs. This is the dynamic that permeated many negotiations for self-governance agreements. Tribes typically have been faced with federal negotiating partners who act like their own jobs are at stake if the tribe succeeds in negotiating a self-governance agreement. It is true, sometimes their jobs are at issue. This raises some very delicate challenges for both the tribes and the federal officials. The human dimensions of career paths, home mortgages, children's schools, and community ties overwhelm all thought of what is the most efficient and sound approach, which is tribal control of tribal service delivery systems. While federal workers' personal situations can and do engender great sympathy, change like this is a normal and expected part of life. The priority must be to get the job done in the best possible fashion. The priority is not federal job protection. And there are ample provisions in federal statute to protect federal workers who are right-sized out of their present positions because of tribal self-governance assumptions.

One of the earliest battles in this struggle for power surfaced in the struggle to get accurate and complete budgetary information from the BIA. To maximize their power, federal bureaucrats would hide funding, reallocate it, and reward their favorite tribes and consultants with special year-end funding. The Self-Governance Demonstration tribes sent an army of lawyers and accountants with their tribal leaders to demand transparency, pouring over haystacks of information to find the needles necessary to determine fair tribal share allocations of funding appropriated by the Congress.

Another early battle dealt with what Congress meant when it said "all programs, activities, services, or activities, or portions thereof" were available for self-governance negotiations. Federal officials actively sought to hold back from negotiations and distribution virtually all federal funding because they argued it all supported what the Interior Secretary believed were unique, inherent federal functions that only a federal employee could fulfill. Protracted, line-by-line and function-by-function negotiations with tribal leaders helped to whittle away at the functions and money the BIA wanted to keep out of reach. Unfortunately, the BIA under President Bill Clinton Administration was able to persuade Senator Slade Gorton (R-WA) to include a rider in the annual Interior appropriations bill that kept <u>all</u> Central Office funding off limits to tribal self-governance negotiations. To this day, two decades later, that same restrictive rider reappears in each annual appropriations bill because tribal leaders have been unable to persuade the appropriators to stop including it. It should be removed today as the last vestige of an unenlightened and ill-advised distant past.

There were many other battle lines that remain. And similar battles have ensued with the Indian Health Service ever since Congress exposed its programs, functions, services and activities to tribal self-governance negotiations after 1990. For most of these battles, we cannot yet declare victory.

<u>Why Tribal Self-Governance Works</u>. The self-governance provisions authorize tribes to "compact" with the federal government, specifically the Departments of the

Interior and the Department of Health and Human Services, to administer virtually all aspects of federal programs that are operated by those departments for the benefit of that tribe. The statute permits self-governance tribes to redesign the federal programs and, where necessary, redistribute funds among the different programs they operate. This flexibility, with authority transferred to the service-delivery level under the control of the tribal government beneficiaries themselves, is the hallmark of tribal self-governance.

The concept is similar to that of a block grant. Rather than the federal government micro-managing Indian tribes, it contracts with tribes to perform those functions. Like state governments, tribal governments tend to know best how federal programs and dollars can best serve their local communities and meet locally-determined priority needs.

Tribes are authorized in statute to plan, conduct, consolidate, and administer federally-funded programs, services, functions, and activities according to priorities established by tribal governments. Tribes have greater control and flexibility in the use of these funds, streamlined reporting requirements, and authority to redesign or consolidate programs, services, functions, and activities. In addition, tribes receive lump sum funding and may reallocate funds during the year and carryover unspent funds to the next fiscal year. As a result, tribes are able to more efficiently and effectively use the funds to address unique tribal conditions and circumstances as they arise. Self-governance tribes are subject to annual trust evaluations to monitor the performance of trust functions they perform. They are also subject to annual audits pursuant to the Single Audit Act and OMB Circular A-133.

The rationale for tribal self-determination and self-governance has always been that the best government is the government closest to the governed, and the best service delivery is done by the government closest to those served. Both rationales fit the situation of tribal governments.

When a tribal government serves its own members – there are no cross-cultural or language barriers; there is more practical responsiveness to changing needs; there is far more direct accountability to those who are supposed to be served; and there is greater potential for maximum flexibility and efficiency.

Why Tribal Self-Governance Has Yet to Fully Work. It remains a bitter irony that, to this day, far too much of the federal funding appropriated each year does not reach the stark, socio-economic needs of many Native American Indian communities. Instead, those funds are spent far away from Indian communities. One thing is for sure, once a tribal government receives federal dollars under a self-governance agreement, those funds are spent and churned right there in the targeted Indian community rather than in some distant city bureaucracy or research park.

One of the biggest fictions that has dogged the expansion of tribal self-governance is that an expensive and time-consuming federal monitoring, reporting, and oversight bureaucracy is needed to ensure that a tribe does not squander the scarce federal dollars it

administers. What this fails to acknowledge is the tribal logic that persuaded the Congress to birth tribal self-governance policy in the late 1980s – there is no greater accountability pressure than that of the tribal voters themselves. If tribal members are not satisfied with the services they receive, they are able to organize and vote out the tribal leaders who have failed them. Tribal elections are an ultimate and effective accountability tool. No such accountability exists when a federal government staffer fails to provide satisfactory service or controls the delivery of services. Failing federal bureaucrats have the shelf-life of a nuclear fuel rod. They seemingly cannot be removed or disciplined. When the chain of command is far from the reach of the Indian community served, the quality and quantity of the federal service often deteriorates to that of an afterthought. Self-governance tribes must annually report on their performance objectives and submit to a comprehensive Single Audit Act audit. This bare minimum reporting and audit oversight structure verifies that funds are applied appropriately. Anything more is a waste of federal dollars and diverts funds necessary for direct services.

Another factor that has bedeviled the expansion of tribal self-governance is the fiction that good ideas only come from the top down. This ivory tower approach to federal Indian service delivery has trapped Indian Country in a status quo that should be rejected by Capitol Hill as unacceptable. This fiction has created federal careers. It has fueled a growth industry in consultants and study-makers. But, most critically, it has failed Indian Country. The answers that will work will come only from tribal leaders who are elected to answer to their own voters.

Still other crippling myths abound – most notably that a tribe's assumption of self-governance responsibilities must of necessity reduce the federal government's trust responsibilities. In the early days of self-governance, this notion was put forward by federal adversaries of tribal self-governance as a poison pill or as a shameless way to shirk a legal duty owed to tribes. Congress responded with a clear affirmation that nothing in the self-governance title "shall be construed to diminish the Federal trust responsibility to Indian tribes… ." This principle has been held inviolate in statute and in practice.

<u>What Difference Does Tribal Self-Governance Make</u>? Tribal Self-Governance for the Mille Lacs Band and many other Indian tribes has been like the difference between walking through the federal maze at midnight and walking through it at high noon. There is so much more opportunity available when you can see options and exercise your own decision making authority.

Tribal Self-Governance means we can now design 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. It means we can reprogram federal funds the way we want based on our changing needs. For example, if unexpectedly we have exceptionally dry weather, we can allocate more funds to fire protection.

Tribal Self-Governance has meant we, as an Indian tribal government, sit as a decision-maker at the table when federal regulations are negotiated. The 1994 Amendment that made Tribal Self-Governance permanent for the BIA was the first federal Indian law that required negotiated rulemaking and for the first time brought federal and tribal officials together to negotiate the development of the rules. As a result, they tie the hands of the federal administrators and untie the hands of tribal administrators.

Finally, with Tribal Self-Governance authorities, we use our funds more efficiently. Our local needs are determined by us and dictate the use of our funds, not a federal official located in Minneapolis or Washington, D.C. Our compacts and funding agreements with the federal government reflect a true government-to-government relationship that ensures we are not treated as just another federal contractor.

Why Does Self-Governance Matter? Years ago the Mille Lacs Band needed to expand our tribal business and governmental operations in order to accommodate economic growth on or near to our Reservation. We signed memoranda 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 businesses that now employ thousands of people and established new schools, health clinics, a government center and elderly assisted-living units. Very little of this growth could have happened without tribal self-governance authority.

The Mille Lacs Band was one of the first Indian tribes to reach a compact and funding agreement with the Indian Health Service (IHS). We were able to leverage our self-governance funding to enable an expansion of our clinical services on a more efficient model. Most of the challenges we encountered in our negotiations with IHS mirrored our experience with the BIA; except that our federal counterparts on the IHS negotiating team kept showing up in military dress. At one point, we overheard them talking about how their Commissioned Corps officer uniforms presented a more imposing presence at the table. Given our history with the federal cavalry, we could not help being rather underwhelmed by that negotiation maneuver.

What Keeps Self-Governance From Expanding? By FY 2019, the Department of the Interior anticipates it will have entered into compacts serving over 270 tribes through about 125 separate funding agreements each year covering an estimated $500 million. About $160 million of that is comprised of funds appropriated directly to the BIA and the balance are funds transferred through BIA to Indian tribes from the Departments of Transportation, Labor, and Health and Human Services. By all accounts, self-governance has been successful in improving both the quality and quantity of services provided at the tribal level and in assisting tribal governments in developing administrative and managerial skills and acumen that are transferable to other tribal efforts to create sustainable tribal economies.

So, after 30 years, why aren't more of the 573 federally-recognized Indian tribes participating? And why is only $160 million of the BIA's annual $2.4 billion appropriation being transferred to Indian tribes under self-governance authority? And why, after 30 years is the mandatory reach of tribal self-governance authority still limited only to BIA and not to the U.S. Fish & Wildlife Service, the National Park Service, the Bureau of Land Management, and the rest of the Department of the Interior? Has Tribal Self-Governance stalled-out?

One answer may lie in the 18 year, energy-depleting battle we've been fighting to enact the Title IV amendments, which this Committee last week once again favorably reported in the form of S. 2515. The marathon battle to enact these changes, which for the most part simply mirror the excellent, tribally-driven changes the U.S. Congress applied to IHS Tribal Self-Governance 18-years ago, has diverted tribal energies away from the battle to expand the application of tribal self-governance authority.

Another reason may be that the focus given by tribal leaders to the task of creating the tribal self-governance movement in its first decade or two has become diluted by the many other areas of growth in Indian Country since the 1990s. In contrast to this competition of interests, self-governance in its early days was the constant theme of its boosters on Capitol Hill, when nearly everything our congressional allies did on federal Indian policy was infused with self-governance themes. Today, the federal Indian policy small diner of the 1980s and 1990s has turned into a mega-buffet with self-governance now one of hundreds of items vying for a place on the congressional plate.

We are not, however, without hope for renewed growth and support for tribal self-governance. If reclaimed, the original meaning and intention of self-governance would be directly relevant to every item on today's buffet line of federal Indian policy. In every aspect of the federal-tribal relationship, only the Congress with its plenary power can write federal statutes across every federal program and every federal agency that curb the power and ability of federal agencies and officials to interfere with tribal program authority, shifting power and authority from federal to tribal government hands. There is much more that can be done.

Thirty Years of Conclusions. Almost exactly ten years ago, I offered testimony to this very same Committee at a hearing entitled "The Success and Shortfall of Self-Governance Under the Indian Self-Determination and Education Assistance Act After Twenty Years." Much has changed since then. Much has not.

While this Committee has once again reported out the Title IV tribal amendments, in the form of S. 2515, the aptly-named PROGRESS For Indian Tribes Act of 2018, these amendments have yet to pass both the Senate and House in the same Congress and be signed into law. Will that finally change this year?

And while there are decades of experience and strengthened tribal capability and interest in self-governance, Congress has not expanded mandatory self-governance

authority to other agencies within the Interior Department, to agencies in other federal departments other than IHS, or even to the BIA's Central Office. Congress has so much more to do, and all kinds of reasons to do it. But first, Congress should immediately enact S. 2515 and once again put PROGRESS back into the self-governance word cloud of federal Indian law and policy.

Mr. Chairman, and Members of this Committee, I am very proud of my Tribe's role over the past 30 years as a partner with you and your predecessors in the U.S. Congress as together we have shaped federal policy in support of tribal self-governance. This has led to unparalleled success for Mille Lacs Band and many other Indian tribes and no tribal mismanagement scandals anywhere near the scale of waste, inefficiency, and ineffectiveness that plagued the BIA and induced your predecessors to give tribal leaders a chance to show we could do better. We have. And, with your participation, we seek to do far more in the next 30 years.