

Prepared Statement of the Honorable Derek J. Bailey
Chairman, Grand Traverse Band of Ottawa and Chippewa Indians
Before the
United States Senate Committee on Indian Affairs
December 9, 2009

I very much appreciate the invitation to appear before the Committee today.

My Tribe, the Grand Traverse Band of Ottawa and Chippewa Indians, is located on the shores of Grand Traverse Bay in the northwest Lower Peninsula of Michigan. It consists of approximately 4000 members, who descend primarily from the Odawa (Ottawa) and Ojibwa (Chippewa) peoples or Anishinaabek. As the Department of the Interior found in 1980, we have maintained “a documented continuous existence in the Grand Traverse Bay area of Michigan since at least as early as 1675.” Department of the Interior, Determination for Federal Acknowledgement of [GTB] as an Indian Tribe, 45 Fed. Reg. 19321 (March 25, 1980).

The United States first recognized and established a government-to-government relationship with us through the Treaty of Greenville in 1795. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of United States Attorney for the Western District of Michigan*, 369 F.3d 960, 967 (6th Cir. 2004) (“*Grand Traverse Band*”). The Grand Traverse Band entered into subsequent treaties with the United States in 1815, 1836 and 1855 and “maintained a government-to-government relationship with the United States from 1795 until 1872[.]” *Id.* at 961. In 1872, however, the Secretary of the Interior misread the 1855 Treaty of Detroit as calling for an end to the federal relationship with the Band and our sister tribes in that year. As the United States Court of Appeals for the Sixth Circuit recently held, based on this misreading of the treaty “the executive branch of the government *illegally* acted as if the Band’s recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years.” *Id.* at 968 (emphasis in original). This period lasted until 1980, when the Department restored the Grand Traverse Band to federal recognition, making us the first tribe recognized by the Department pursuant to the formal Federal Acknowledgment Process, 25 C.F.R. Part 54 (now Part 83). *See* 45 Fed. Reg. 19321-22.

The termination of our federal recognition in 1872 had dire consequences for us. “Because the Department of Interior refused to recognize the Band as a political entity, the Band experienced increasing poverty, *loss of land base* and depletion of the resources of its community.” *Grand Traverse Band*, 369 F.3d at 969 (internal quotation marks and citation omitted) (emphasis added). Indeed, while the United States had solemnly promised to set aside 100,000 acres of land for the Band as our permanent homeland in the 1855 Treaty of Detroit, and similar blocks of land for our sister Tribes (out of the millions of acres that had been ceded by the Tribes to the United States), by 1878 Special Agent Edward Brooks documented in a report to the Commissioner of Indian Affairs that “the major part of the lands in these reservations have

been disposed of to whites, who are in the majority in the reservations at large. . . . The local laws, in the towns within the former limits of the reservations are shaped entirely by whites, and the administration of public affairs is in their hands.” Agent Brooks detailed the combination of federal malfeasance, corruption and acquiescence that had allowed the Band’s lands to pass out of its possession.

In 1889 the Interior Department shut the doors of the Michigan Agency in the Lower Peninsula, and the United States washed its hands of us. By that point our land base had utterly vanished, and we remained essentially landless when we were restored to federal recognition in 1980. (We were the beneficiary of a state-created land trust where 147.5 acres of our original treaty trust allotments were held by the local county government in the form of a state reservation – this was all that remained of our original land base).

The placement of land into trust for the Band has accordingly played a critical role in the revitalization of our governmental, social and economic institutions, and indeed in our very ability to function as a Tribe. Since 1980, the Secretary has taken 43 parcels of land into trust for us totaling approximately 1000 acres. All of these trust acquisitions have fallen within our historic territory (and the corresponding Department of the Interior service area) surrounding Grand Traverse Bay.

We have utilized these trust acquisitions for four critical governmental purposes: (1) the provision of core governmental services (including tribal government offices, a health clinic, courts, law enforcement, social services, and natural resources management); (2) housing (including elders housing constructed with HUD grants and lot assignments to enrolled members for residences); (3) economic development and diversification (two casinos, hotels and retail businesses); and (4) treaty rights-related activities (preservation of lands utilized for the exercise of inland gathering, hunting, and fishing rights as well as marinas for access to Great Lakes fishing rights reserved by the 1836 Treaty of Washington).

While the restoration of a small portion of our territory through the land-into-trust process has been essential to the revitalization of our Tribe, we cannot function in a fully effective manner as a government or provide our citizens with adequate services without additional lands. Unfortunately, the land-into-trust process has become tortuously slow and complicated. As is the case with so many other Tribes, we have been stymied by the failure of the Department to act on trust applications for years, even when those applications are not objected to by the State or local units of government, and even when they pertain to lands that would allow us to provide critical services to our community.

By way of example, in November of 2007 the Department returned to us as being too old four trust applications that we filed between 1992 and 1994. *See* Table A: Grand Traverse Band Returned Trust Acquisition Requests. All four of those applications involve land parcels that fall within the heart of our historic territory and that are contiguous to existing trust properties. One of the parcels would be used for critically-needed housing for our members. The second already contains tribal member housing, but because the land is not in trust, complicated jurisdictional problems thwart our ability to effectively govern the area. The third would be used to provide safe access to Lake Michigan, where many of our members exercise their treaty fishing rights.

And the fourth would be maintained in its current forest condition in order to allow our members to exercise their treaty gathering and hunting rights. All told, the parcels total about fifty acres of land, and none of the applications is gaming-related.

Even though none of the applications was objected to by the State or local units of government, they languished at the Department for well over a decade. No amount of effort on our part was able to move the applications along. In 2004 there was brief burst of activity – consultation letters were sent to the State and local governments, and some work was performed on the environmental assessments. But then all went quiet again at the Department, and in 2007 the applications were returned to us as stale, even though it was the Department that was responsible for their long pendency.

The Department's treatment of these trust applications is mind-boggling to me. In these circumstances it is difficult to say that the Department is acting in the best interests of Tribes or of their surrounding communities. Instead, it is inexplicably acting in a way that thwarts our best efforts to improve the lives of our citizens and to function as responsible, effective governments.

In addition to the four returned applications, we presently have eight trust acquisition requests (totaling approximately 260 acres) pending with the Department, several of which have likewise been pending for over 15 years. *See* Table B: Grand Traverse Band Pending Trust Acquisition Requests (FY 2009). Once again, all of these proposed trust acquisitions fall within the Band's historic territory, almost all are contiguous to existing trust lands, none are gaming-related, and none are objected to by the State of Michigan or any local unit of government. The Band intends to use the parcels for housing, the provision of governmental services, the exercise of treaty hunting and fishing rights, and economic development and diversification.

As one example, Parcel 45 in Antrim County is a 78-acre parcel that is zoned for residential development by the local township and county. In order to obtain this zoning, we spent 1.5 million dollars of tribal money for roads and for sewer, water, and electrical infrastructure to render the parcels ready for individual housing. The parcel contains two homes owned by tribal members, two Grand Traverse Band rental homes, and 22 empty lots available for Tribal members to construct housing. However, until the land is placed into trust, tribal members cannot obtain the Bureau leases necessary to secure housing financing.

We filed our trust application for this parcel in 2001, and we have applications pending that are considerably older than that. While the Department is now apparently deferring action on any of these parcels until it sorts through the implications of the *Carcieri* decision (or until corrective legislation is passed by Congress), the Department should have taken action on these parcels years ago, and certainly long prior to the time that the *Carcieri* decision introduced additional complexities into the process.

In 2008 we did succeed in having 280 acres of land, divided over a number of small parcels, placed into trust, but even there our success illustrates the problems with the current land-into-trust process. The applications in question had been pending anywhere from eight to fourteen years – indeed, we had to resubmit the majority of them several times because of constant changes in Department policies and because the environmental review requirements

expired for lack of action (by contrast, our early trust applications were typically processed within a year or two). Even after that length of time, the Minneapolis regional office, which we deal with as a self-governance tribe, showed no signs of acting on the applications. Our former Chairman made repeated visits to that office, and to the central office in Washington, urging that action be taken on the pending applications, all to no avail. Ultimately we succeeded only because the Superintendent and Realty Officer at the Michigan Agency expressed a willingness to assist us (even though they receive no funding to act on behalf of self-governance tribes) and because the Regional Director authorized them to do so. All of this required a tremendous expenditure of resources and time on our part, and our one-time success did nothing to fix the long-term problems with a regional office that has failed to satisfactorily discharge its land-into-trust responsibilities.

I hope that my testimony underscores the need for significant reforms to the present land-into-trust process. The Grand Traverse Band tribal government is working as hard as possible to improve the lives of our citizens and to further the revitalization of our governmental, social and economic institutions that commenced with our restoration to federal recognition. The terrible delays that presently plague the land-into-trust process are a major impediment to our efforts and to similar efforts by Tribal governments around the country.

We would recommend the following:

1. The Department should be required to act within a specific timeframe on trust acquisitions; if it fails to do so, the land should acquire trust status by operation of law (much as a gaming compact goes into effect under IGRA by operation of law if the Secretary does not disapprove the compact within 45 days).
2. The BIA has issued a number of guidance memoranda which canvass a panoply of federal compliance requirements including NEPA and historic preservation. These guidance documents have been inconsistent and subject to arbitrary implementation and withdrawal by the central and regional offices, thereby creating confusion and hardship for the Tribes. We believe that if Interior wishes to establish additional prerequisites for the placement of land into trust, it should have to follow the rulemaking process, and hope that in this way some of the arbitrariness and confusion that characterize the present system are mitigated.
3. Given the problems described above, the tribes need statutory or administrative authority to work with their local agency office on trust applications even where they enjoy self-governance status. The relationship between the agency office and the tribes can be one of mutual respect and proven administrative results, like the relationship between Grand Traverse Band and the Michigan Agency.
4. Non-gaming applications should not get bogged down in the delays that presently attend the processing of gaming applications.
5. Applications that are not objected to by the state or local units of government should be processed on an expedited basis.
6. The regional offices need more realty officers.

Thank you again for the opportunity to testify before you today.

TABLE A**GRAND TRAVERSE BAND RETURNED TRUST ACQUISITION REQUESTS**

PARCEL	APPLICATION DATE	COUNTY	ACRES	CONTIGUOUS TO TRUST LAND	ON - OFF RESERVATION	PURPOSE	PHASE I ESA	CONSULTATION LETTERS SENT	PTO RENDERED
16	6/11/92 (Region)	Leelanau	36.00	Yes	On	Forest land Hunter & Gathering	11/8/04	2/20/04	10/15/93
17	3/1/93 (Region)	Leelanau	0.64	Yes	On	Lake access	8/6/04	2/20/04	No
18	1/9/93 (Region)	Leelanau	10.50	Yes	On	Member Housing	8/26/04	2/20/04	No
22	8/9/94 (Region)	Leelanau	1.00	Yes	On	Member Housing	7/28/94	No	No

TABLE B

GRAND TRAVERSE BAND PENDING TRUST ACQUISITION REQUESTS (FY 2009)

PARCEL	APP. RECEIVED	COUNTY	ACRES	CONTIG. TO TRUST LANDS	ON-OFF RESERVATION	PURPOSE	DECISION LETTER (30 days)	NOTICE OF INTENT	PHASE I	ENVRNMTL REVIEW COMPLETED	CONSULT. LTRS SENT	PTO ISSUED
21	6/7/1994 (Region) & 6/20/07	Leelanau	22.50	Yes	On	Tribal utilities (water and sewer)	01/31/08	03/20/08	09/18/07	09/10/07	11/01/07	12/06/07
45	2/28/01 (Region)	Antrim	78.00	No	Off	Member Housing	04/01/08	07/02/08	11/02/07	01/06/06	05/18/01	05/14/02
69	07/03/06	Grand Traverse	0.20	Yes	On	Access for Turtle Creek Development	05/21/08	07/01/08	04/05/08	05/05/08	02/13/07	04/28/07
25	9/27/94 (Region) & 9/17/08	Leelanau	13.00	Yes	On	Member Housing						
77 & 78	12/29/08	Grand Traverse	31.26	Yes	On	Buffer for Turtle Creek Development						
79	12/29/08	Leelanau	104.00	Yes	On	Nature Preserve; Treaty-based hunting and gathering			04/25/08			
80	12/29/08	Grand Traverse	12.07	Yes	On	Access for Turtle Creek Development			04/15/08			

TOTAL ACRES PENDING: 261.03