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THE BAY MILLS INDIAN COMMUNITY

MEMORANDUM AND MATERIALS IN SUPPORT OF RESOLUTION NO. 10-5-20 AMENDMENT TO GAMING ORDINANCE

SUBMITTED TO

THE NATIONAL INDIAN GAMING COMMISSION

Presented to
The Hon. George T. Skibine
The Hon. Penny J. Coleman

May 26, 2010

KATHRYN L. TIERNEY
CHAD P. DEPETRO
TRIBAL ATTORNEYS
BAY MILLS INDIAN COMMUNITY
12140 WEST LAKESHORE DRIVE
BRIMLEY, MI 49715

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INTRODUCTION

Land acquired by the Bay Mills Indian Community (Tribe) under the authority of 107(a) of the Michigan Indian Land Claims Settlement Act (MILCSA), using Land Trust funds set aside pursuant to that same section, attains restricted fee status by operation of law as soon as the Tribe acquires unencumbered fee title to the land. This analysis of section 107(a) of MILCSA is consistent with the relevant standards set forth in analogous situations by the National Indian Gaming Commission (NIGC), the Department of the Interior (Department), and the federal courts. *See* **Part I** below. Further, after attaining restricted fee status, such land will meet the Indian Gaming Regulatory Act's (IGRA's) definition of "Indian lands," will not be subject to IGRA's Section 20 after-acquired lands prohibition, and therefore will be eligible to be used for gaming-related economic development. *See* **Part II** below.

PART I
THE MICHIGAN INDIAN LAND CLAIMS SETTLEMENT ACT: TRANSFER OF TITLE TO RESTRICTED STATUS BY OPERATION OF LAW

A. Brief Overview of the Michigan Indian Land Claims Settlement Act

1. The Bay Mills Indian Community's Claim Against the United States

The Bay Mills Indian Community is comprised of the "six [Ojibwe] bands residing at and near Sault Ste. Marie," as described in Article 1, First [Paragraph] of the Treaty of July 31, 1855, 11 Stat. 621. The Bay Mills bands engaged in numerous treaties with the United States, several of which resulted in legal claims against the federal government which were adjudicated by the Indian Claims Commission.

In 1820 the Bay Mills bands ceded to the United States an area along the St. Mary's River rapids near present-day Sault Ste. Marie, Michigan for construction of a fort. Reserved from the cession was "a perpetual right of fishing at the falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground." Art. 3, Treaty of June 16, 1820, 7 Stat. 206. In early 1855, the U.S. Army burned to the ground all Indian structures on the encampment and drove out the Ojibwe occupants so that the Corps of Engineers could build a lock. The encampment ground was excavated and the rapids were brought under control by the lock. On August 2, 1855, the Bay Mills Bands signed another cession treaty relinquishing the encampment grounds and the right of fishing at the falls (*see* 11 Stat. 631). A United States commissioner unilaterally set the value of the Bay Mills bands' 1855 cession, indicated that it would be paid "as annuities are paid." Art. 2, Treaty of August 2, 1855. The amount in fact paid to the Bay Mills bands was ludicrously small, and it formed the basis of the complaint filed by the Tribe before the Indian Claims Commission (ICC) in *Bay Mills Indian Community, et al. v. United States*, Docket No. 18-R. In 1975, the ICC found the amount paid to the Tribe for this cession to be unconscionably low, and accordingly Congress appropriated the settlement funds for the Tribe in that same year. MILCSA provides for the distribution of the judgment for all of these claims.

The major land cession involving the six Bay Mills bands occurred in the Treaty of March 28, 1836 (7 Stat. 491), covering lands identified in Royce Area 205. Approximately 14 million acres, encompassing the east half of Michigan's Upper Peninsula and almost the entire western half of Michigan's Lower Peninsula, were ceded to the United States by the Ojibwe and Ottawa bands living there, including the six Bay Mills bands. The United States compensated the bands for the cession with annuities for 20 years, trade goods, access to technical assistance from mechanics and farmers, etc. The total amount paid to the ceding bands was so far below its actual value that the Bay Mills Indian Community filed suit against the United States before the Indian Claims Commission in Docket 18-E. Another Bay Mills claim, arising under the cession of the St. Martins Islands in the Treaty of July 6, 1820, 7 Stat. 207, was consolidated for adjudication as Docket 364. Ruling in 1971, the Commission found that the United States obtained $12,142,225 in value from the property, but had paid less than one tenth that amount to the bands. The Commissioner declared this amount unconscionable, and the final judgment of the Commission was reported to Congress as $10,300,250. Although Congress appropriated the judgment funds the following year, since there was no distribution plan, the funds were not distributed. Unfortunately, it would take another 25 years for the Congress to enact a distribution plan by which the Tribe finally would receive compensation for its losses. That distribution plan, enacted on December 15, 1997, was the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, which finally completed the Bay Mills Indian Community's 50-year effort to obtain compensation and settle its treaty cession-related claims against the United States.

2. Structure of the Michigan Indian Land Claims Settlement

When the claims of the Bay Mills Indian Community were filed with the Indian Claims Commission in Dockets 18-E, 18-R and 364, the Bay Mills Indian Community was the only federally recognized tribe that was a signatory to the Treaty of July 6, 1820 (7 Stat. 207), Treaty of March 28, 1836 (7 Stat. 491), the Treaty of July 31, 1855 (11 Stat. 621), and the Treaty of August 2, 1855 (11 Stat. 631).

When judgment of the Indian Claims Commission in Dockets 18-E and 364 was entered in 1971, the Bay Mills Indian Community was still the only signatory tribe that was federally recognized. But by 1975 when judgment was entered in Docket 18-R, the Sault Ste. Marie Tribe of Chippewa Indians had been administratively recognized and now participated along with the Bay Mills Indian Community in hearings conducted that year by the Bureau of Indian Affairs on developing a plan for distribution of the funds (as was required by the Indian Tribal Judgment Funds Act, 25 U.S.C. § 1401, *et seq.*).

By the time the Bureau of Indian Affairs conducted a second round of distribution plan hearings in 1984, the Grand Traverse Band of Ottawa and Chippewa Indians too had been administratively recognized. Again, no plan for fund distribution was finalized, so then-Congressman Bob Davis introduced legislation in 1987 to effect distribution. Another consultation hearing was conducted by the Bureau in 1988, but no plan was finalized and submitted to Congress as a result.

The Bay Mills Indian Community finally sought judicial enforcement of the provisions of the Indian Tribal Judgment Funds Act by filing suit in 1996 against the Secretary of Interior, the Assistant Secretary for Indian Affairs, the Bureau of Indian Affairs and the Department in the

United States District Court for the District of Columbia. The Tribe and the federal defendants agreed to resolve the litigation through the submission of proposed legislation by the Department of Interior to the Office of Management and Budget on or before December 15, 1996, after consultation with Bay Mills, other affected Tribes and any descendency groups. An order implementing the stipulation was entered by Judge Stanley Sporkin on September 16, 1996.

The Department transmitted a draft bill to the House and Senate by letter dated March 14, 1997. Section 4 provided that each Tribe submit a plan for its respective share. When legislation was introduced as H.R. 1604, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians participated with Congress in developing their respective tribal plans for inclusion in the legislation. The result is sections 107 (Bay Mills), 108 (Sault Ste. Marie) and 109 (Grand Traverse) of the Michigan Indian Land Claims Settlement Act. *See* Attachment A.

B. MILCSA Land Acquisition Authority

Section 107(a) of MILCSA established a trust fund -- the "Land Trust" – which was created from a portion of the funds received by the Tribe in settlement of the Tribe's Indian Claims Commission cases (*see* discussion in subpart A above). Section 107(a)(3) requires that the Tribe use the proceeds of the Land Trust (*i.e.,* interest generated by the Land Trust) to improve existing tribal land holdings and to acquire new tribal land holdings. Further, it dictates that any new land holdings be held as "Indian lands":

> (3) The earnings generated by the Land Trust *shall be used exclusively* for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange. *Any land acquired with funds from the Land Trust shall be held as Indian lands are held.*

MILCSA § 107(a)(3), Pub.L. 105-143, 11 Stat. 2661 (Dec. 15, 1997) (emphasis added). Congress has dictated that the Tribe *must* use these particular settlement funds to improve existing, or obtain new, tribal lands (the funds "*shall be used exclusively*"). Congress also has dictated that land obtained with these particular settlement funds will *not* be land held in fee simple, but rather will be land upon which Congress has bestowed the special legal status of "Indian lands" ("Any land acquired with funds from the Land Trust *shall be held as Indian lands are held*"). More specifically, for the reasons discussed at length below, it is clear that the special legal status conferred on land acquired under MILCSA § 107(a)(3) is that of restricted fee title.

C. By Operation of Law, MILCSA Imposes a Restriction Against Alienation on Lands Acquired Pursuant to Section 107(a)(3)

Obviously, the phrase "as Indian lands are held" must have some meaning other than that the lands simply will be held in fee by the Tribe. Under well-established principles of statutory construction, statutory language is to be interpreted in such a way as to give it meaning -- Congress is presumed not to include meaningless verbiage in a statute. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Sutherland Statutory Construction, § 46.6 at 230; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001)

("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotations and citations omitted). Accordingly, we must assume that Congress would not have included this language in the statute unless Congress intended that the language would have real meaning.

If Congress had intended that the Tribe simply would hold land purchased with the Land Trust settlement funds in fee simple, there would have been no need to say anything at all about how the land would be held. Land purchased by a tribe outside specific congressional authorization or direction is held in fee simple anyway. *See* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands, at 3, 6 (Jan. 18, 2009). (Federal restrictions against alienation do not automatically attach to off-reservation parcels acquired by a tribe in fee simple. Rather, a restriction on alienation attaches only by operation of treaty language or a tribe-specific statute [which is what MILCSA provides], or through some other type of federal involvement or "extenuating circumstances".) *See* Attachment B. *See also* December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by Tribe in fee simple, without more, is not subject to the restriction against alienation of Indian lands embodied in the Indian Trade and Intercourse Act, 25 U.S.C. § 177).

Accepting the principle that "as Indian lands are held" cannot mean land held in fee simple and therefore must mean something else, we set out below the applicable rules of statutory construction, the legislative history of MILCSA, and a comparison to other statutes, all of which confirm that lands validly acquired by the Tribe with funds from the Land Trust are held in restricted fee status by operation of law.

1. The Phrase "Indian Lands"

The phrase "Indian lands" has been used by Congress in a large number of statutes, and while the definitions vary depending on the context, in virtually every case the definition of "Indian lands" includes lands held in restricted fee status. *See* the following federal statutes, all of which expressly include restricted fee lands within the definition of "Indian lands": The Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470b(b)(4); the Federal Cave Resources Protection Act of 1988, 16 § 4302(3); the McKinney-Vento Homeless Assistance Act, 20 U.S.C. § 7713(7); the Indian Tribal Economic Development and Contract Encouragement Act of 2000, 25 U.S.C. § 81(a)(1); the Indian Health Amendments of 1992, 25 U.S.C. § 1680(n)(b); the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4); the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1702(3); the National Community Service Act of 1990, 42 U.S.C. § 12511(10); and the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2102(c).[1] Of particular importance for the Tribe's

[1] In only three cases did Congress fail to expressly include restricted fee lands within the meaning of "Indian lands." In each of those statutes, restricted fee land would appear to be included by implication. The Public Land Corps Healthy Forests Restoration Act of 2005, 16 U.S.C. § 1722, defines Indians lands to include any Indian reservation, public domain allotments, former reservations in Oklahoma, ANCSA lands, and land held by dependent Indian communities (the definition here is broad enough to encompass restricted fee lands); the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4302(4), which uses the "Indian Country" definition of 18 U.S.C. 1151(and therefore encompasses restricted fee land); and the Surface Mining Control and Reclamation Act of

purposes of course is the "Indian lands" definition in IGRA, which also encompasses restricted fee lands. There, Indian lands are defined as including:

> (A) all lands within the limits of any Indian reservation, and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual *subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.*

25 U.S.C. § 2703(4) (emphasis added).

From these definitions it is clear that the term "Indian lands" refers to a special status assigned to land held by Indian tribes which status includes trust land, reservation land, and land held in restricted fee status. It follows, then, that the phrase "held as Indian lands are held" has a particular meaning relating to that special status, whether it be trust, reservation or restricted fee – it is something other than the holding of land in fee simple status. For the reasons discussed below, in the case of section 107(a)(3) of MILCSA, that phrase must mean held in restricted status.

2. In MILCSA § 107(a)(3) "As Indian Lands Are Held" Means Restricted Fee

a. "As Indian Lands are Held" in Section 107(a)(3) *Does Not* Mean Held in Trust

What is obvious about the language of section 107(a)(3) is that it does not use any of the phraseology normally associated with the acceptance of trust title. It does not direct or otherwise authorize the Secretary to accept trust title, nor does it indicate that the United States will acquire trust title by operation of law – indeed it does not use the word "trust" in any fashion whatsoever. In obvious contrast are other provisions in MILCSA pertaining to other tribes where trust language specifically is used. *See* MILCSA § 108(f) (providing that lands acquired using amounts from interest or other income from the Sault St. Marie Self-Sufficiency Fund "shall be held in trust by the Secretary for the benefit of the tribe").[2] In light of the fact that other parts of the statute specifically provide that lands acquired with settlement funds shall be held in trust, Congress' decision not to use the same trust language for the Bay Mills Indian Community's land acquisition must be understood as intentional and meaningful, and the term "held as Indian lands are held" means something other than lands held in trust.[3] "'[I]t is generally presumed that Congress acts

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1977, 30 U.S.C. § 1291, which defines Indian lands to include lands within Indian reservations, and all lands "held in trust for or *supervised by an Indian tribe.*"

[2] *Cf.* MILCSA § 108(b)(4) (lands purchased with Self-Sufficiency Fund monies to be held as Indian lands are held).

[3] In a discussion of tribal property interests, Cohen points out that a number of treaties avoided the problem of defining the nature of Indian land interests by "providing that specified lands should be held 'as Indian lands are held,'" and that this kind of phrasing should be read to mean that the United States will hold title in trust for the tribe. Felix S. Cohen,

intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (*quoting Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994)). In other words, the plain language of MILCSA makes a clear distinction as to how lands acquired for different tribes under the Act are to be treated differently. Congress' direction that some lands shall be "held in trust" and that other lands shall be "held as Indian lands are held" signals a clear difference in how the land shall be held, and establishes that lands acquired by Bay Mills are not held as trust lands.

The Department of the Interior has indicated its agreement that lands acquired pursuant to MILCSA Section 107(a)(3) are not to be held in trust. In a letter dated September 10, 2002, the Midwest Regional Director wrote to the Tribe that "[b]ecause Congress used both the phrase 'as Indian lands are held' and the phrase 'in trust for the benefit of the tribe,' it is reasonable to assume that Congress intended different meanings for the two different phrases in the same statute." *See* Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") at 3, provided at Attachment C.

b. "As Indian Lands are Held" in Section 107(a)(3) *Does* Mean Held Subject to Restrictions Against Alienation

If the phrase "held as Indian lands are held" does not mean held in fee simple, and does not mean held in trust, the only other thing it can mean is that the land is held as a reservation, or that it is land held subject to restriction against alienation. While MILCSA includes no specific language stating that the land shall be part of the Tribe's reservation, lands validly set aside for tribal use or occupancy, even without specific use of the words "reserved" or "reservation", may be considered reservations. *See* Felix S. Cohen, Handbook of Federal Indian Law, ch. 15 § 6 at 296-297 (1942 ed.). But absent any of the specific language typically used in statutory reservations, *see id.* (describing typical statutory reservations language such as "reserved for the sole use and occupancy"), the better reading of the MILCSA phrase "held as Indian lands are held" is that lands acquired pursuant to Section 107(a)(3) are to be held subject to restriction against alienation. Both the courts and the Department have found that a restriction on alienation attaches to land held in fee by a tribe where there is federal involvement with the acquisition or supervision over the land. *See generally* Cohen, § 15.06[4], citing *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) (tribal land purchase in fee is subject to restriction on alienation where there is sufficient "federal involvement" to establish the restriction, in *Alonzo*, that federal involvement took the form of certain Congressional enactments ... relating to the Tribe's purchase of the land). *See also* Office of the Solicitor, Opinion M-37023, Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009) (restrictions against alienation attach to certain Indian fee lands by operation of law, including "tribe-specific statutes"). Cohen reaches the same conclusion, stating that the phrase "held as Indian lands are held" vests

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Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). While this construction may apply generally to the executive's establishment of reservations by treaty, in the case of a statute enacted by Congress where certain sections specifically designate that land shall be held in trust, and other sections use the phrase "held as Indian lands are held", this general rule of construction for treaty provisions would not apply.

recognized and enforceable property rights in the Tribe. Cohen, Handbook of Federal Indian Law, Ch. 9, § A.1.a (1982 ed.). In this case, Congress clearly has enacted a "tribe-specific statute" that not only provides for the acquisition of the property but in fact actually requires the Tribe to use its Land Trust settlement for tribal land-related purposes.

Indeed the Department of the Interior's own fee-to-trust regulations define restricted fee lands in order to set them apart from the Department's administrative fee-to-trust process, and it is clear from that definition that land acquired under MILCSA more properly fits within that definition. *See* 25 C.F.R. § 151.2(e) (defining "restricted land" or "land in restricted status" as "land the title to which is held by … a tribe and which can only be alienated or encumbered by the owner with the approval of the secretary because of limitations contained in the conveyance instrument pursuant to Federal law or *because of a Federal law directly imposing such limitations.*") (emphasis added); *see also* 25 C.F.R.§ 151.1 ("[A]cquisition of land . . . by Tribes in fee simple status is not covered by these [fee-to-trust] regulations even though such land may, by operation of law, be held in restricted status following acquisition.").

For all of the forgoing reasons, it is clear that land acquired by the Bay Mills Indian Community pursuant to section 107(a)(3) of MILCSA will be restricted fee lands.

3. The Transfer of Title to Restricted Fee Status Occurs By Operation of Law

Congress provided no role at all for the Secretary in the acquisition of title to land purchased with Land Trust funds. This Congressionally-mandated lack of administrative involvement in the Tribe's acquisition of the land leads to the conclusion that MILCSA's directive that "[a]*ny land acquired with funds from the Land Trust shall be held as Indian lands are held*" effects a legislative transfer of title (once the land is purchased by the Tribe) into restricted fee status by operation of law without need for any administrative action.

A comparison between MILCSA and the Seneca Nation Land Claims Settlement Act, 25 U.S.C. § 1774, *et seq.*(Seneca Settlement Act) illustrates this point. Like MILCSA, the Seneca Settlement Act authorizes the Seneca Nation to acquire lands with funds appropriated by the statute, and it provides for the transfer into restricted fee of such lands by operation of law:

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of … (25 U.S.C. 177), such lands shall be subject to the provisions of that Act, and shall be held in restricted fee status by the Seneca Nation.

25 U.S.C. § 1774f(c). While the Seneca Settlement Act includes an administrative step (the Secretary must receive and consider comments) not required by MILCSA, the mechanism by which title is transferred to restricted fee status is in principle the same: once the Tribe meets the requirements of the statute the restriction automatically attaches to the Tribe's fee title. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance*, January 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 7 (Attachment M) ("Here, DOI certified that according to the provisions of the SNSA, the Buffalo Parcel *became restricted fee land by operation of law* on December 2, 2005.")(emphasis added).

The very same principles are illustrated by other act of Congress which effected a legislative transfer of trust title. In the Valles Caldera Preservation Act, Pub. L. 106-248, 114 Stat. 598 (2000), Congress authorized the federal acquisition of the Baca Ranch in New Mexico for preservation purposes, and provided the Santa Clara Pueblo the right to acquire certain portions of the Baca Ranch for fair market value. With respect to lands acquired by the Pueblo under that authority, Congress provided:

> As of the date of acquisition, the fee title lands, and any mineral estate underlying such lands, acquired under this subsection by the Pueblo of Santa Clara are deemed transferred into trust in the name of the United States for the benefit of the Pueblo of Santa Clara and such lands and mineral estates are declared to be part of the existing Santa Clara Indian Reservation.

§ 104(g)(2), Pub.L. 106-248, 114 Stat. 598. Although the Valles Caldera legislation requires that the Secretary and the Pueblo first agree on which lands the Tribe will be assigned the right to acquire, once the lands are identifed, as in MILCSA, the Secretary has no involvement in the actual purchase of the lands by the tribe, and once purchased, the lands by operation of law are held in a specified status on behalf of the tribe (in the Pueblo's case, in trust status). There is no further action required by the Secretary once the Pueblo acquires title to the property – the terms of the statute dictate how the lands will be held and effectively transfer the land's title into that status.

In a similar statute, Congress transferred land held by the United States for the Flandreau, South Dakota Boarding School into trust for the Flandreau Santee Sioux Tribe:

> That all of the right, title, and interest of the United States in 80 acres of land ... acquired by the United States for the Flandreau Boarding School at Flandreau, South Dakota, and no longer used for such purposes; together with improvements thereon, are hereby declared to be held by the United States in trust for the Flandreau Santee Sioux Tribe, subject to all valid existing rights-of-way.

Pub.L. 88-483, 78 Stat. 595 (1964). Again, like MILCSA and the Valles Caldera legislation, no further Departmental action is required; the lands are transferred into trust on behalf of the Tribe by operation of law. Also similar to MILCSA, this legislative transfer was made in connection with claims made by the Santee Sioux under the Indian Claims Commission Act, and Congress directed that the Indian Claims Commission (ICC) should consider whether the value of the title conveyed by the statute should be set off against any claim against the United States determined by the ICC. *Id.* Other legislative transfer statutes use similar language that transfers land into trust by operation of law. *See, e.g.,* Pub.L. 106-228, 114 Stat. 462 (2000) (certain land held in fee by Mississippi Choctaw "is declared to be held by the United States in trust for the benefit of the Mississippi Band of Choctaw Indians"); Utah Schools and Exchange Act, Pub.L. 105-335 (1998) (automatically transfers state-owned lands into trust for the tribes). As with these other statutes, land acquired pursuant to MILCSA section 107(a)(3) is by operation of law transferred into an inalienable status (in MILCA's case into restricted fee rather than trust) without the need for any administrative action to give effect to the restriction.

Finally, the conclusion that land acquired pursuant to section 107(a)(3) attains restricted status by operation of law (and accordingly requires no administrative action) is further supported by the fact that the Department of the Interior has no role in the expenditure of funds from the Land Trust to purchase lands pursuant to section 107(a)(3). Section 107(a)(6) provides:

> Notwithstanding any other provision of law, the approval of the Secretary of any payment from the Land Trust shall not be required and the Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of funds from the Land Trust.

The plain language of section 107(a)(3) and section 107(a)(6) makes clear that the Secretary has no role in the acquisition of land pursuant to MILCSA.

For all these reasons, by operation of law MILCSA automatically imposes a restriction on alienation on land validly acquired by the Tribe pursuant to section 107(3)(a) without further administrative action.

4. MILCSA's Legislative History Supports The Restricted Fee and Legislative Transfer Analyses

MILCSA's legislative history underscores the analyses provided above that the land is to be held in restricted fee and that it acquires that status by operation of law rather than by administrative action.

Congress initially intended that lands acquired by Bay Mills would be held in trust, but the House Committee purposely changed that approach before enacting the bill into law. NIGC cannot ignore Congress' deliberate action. "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Sutherland Statutory Construction, § 46.6 at 247-48. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *see also Chickasaw Nation v. United States*, 434 U.S. 84, 93 (2001). As shown below, Congress clearly discarded language providing that lands acquired by Bay Mills would be held in trust, and instead replaced that language with a phrase that allows the land rather to be held in restricted fee.

As originally introduced by Congressman Kildee, H.R. 1604 mandated that lands acquired with earnings generated by the Land Trust "*shall be held in trust* by the United States for the Bay Mills Indian Community." *See* H.R. 1604 IH at § 7(a)(3) (emphasis added). *See* Attachment D. On June 24, 1997, the House Resources Committee held a hearing on the bill. H.R. Rep. No. 105-352, at 9 (Oct. 28, 1997). *See* Attachment E. Shortly after that hearing, the Department of the Interior submitted proposed "technical amendments" to the Committee for its consideration. Among other things, the Department expressly requested that the Committee modify the sentence "Any lands so acquired shall be held in trust by the United States for the Bay Mills Indian Community" so as to make clear that the Secretary was not required to take such land into trust but rather "that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act." July 15, 1997 Letter

from Assistant Secretary Ada E. Deer to Chairman Don Young, Committee on Resources at 3. *See* Attachment F. After receiving the Department's proposed "technical amendments," the Committee met to consider the bill and adopted by voice vote an amendment in the nature of a substitute "to make certain technical corrections proposed by the Administration[.]" H.R. Rep. No. 105-352, at 9. *See* Attachment E. The substitute bill reported out of Committee did not change a single word of § 7(a)(3). *See* Attachment G. In other words, the House Resources Committee rejected the Department's request that language be adopted to make the Bay Mills acquisition a discretionary trust acquisition.[4]

Then, Congress went even further, and it stripped out the language that would have required Bay Mills land acquisitions to be held in trust. More specifically, as described in the relevant Committee Report, issues had arisen among the tribes regarding the legislation, and the House Resources Committee had worked with the tribes such that "[t]hese issues have been resolved *to the satisfaction of the Tribes* and descendancy groups involved and the Committee plans to address them with a floor amendment to H.R. 1604[.]" H.R. Rep. No. 105-352, at 9 (emphasis added). *See* Attachment E. On November 4, 1997, the full House considered the Committee's most recent version of H.R. 1604 that addressed tribal concerns. The only substantive amendments to section 7(a)(3) (what would become section 107(a)(3) in the final statute) were made in this version, which was passed by the House by voice vote. The amendments made were as follows:

> *The earnings generated by the Land Trust shall be used ~~annually and~~ exclusively for* ***improvements on tribal land or*** *the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land ~~so~~ acquired* ***with funds from the Land Trust*** *shall be held* ***as Indian lands are held*** *~~in trust by the United States for the Bay Mills Indian Community~~.*

H.R. 1604 EH at § 7(a)(3). *See* Attachment H. Accordingly, not only did the House reject the Department's proposed amendments on this section to turn this language into discretionary trust acquisition language, Congress went even further by removing any need for administrative action whatsoever, and making the land subject to a restriction on alienation by operation of law once the land is acquired. Amendments made to other sections of the Act demonstrate that the House rejected Interior's comments on how lands would be held under the Act. Most notably, the House added section 8(f) to the Sault Ste. Marie Tribe plan which provides that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe." Contrary to the Department's request, Congress did not provide language in section 8(f) that would have allowed the Secretary to retain discretion under the Act as to whether to acquire lands, nor did it provide that this legislative mandate did not repeal the limitations in section 20 of IGRA.

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[4] "Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute." Sutherland Statutory Construction, § 48.6, at 571-72.

The Senate Committee on Indian Affairs also held a hearing on H.R. 1604 -- the day *before* the House vote on that legislation. *See* S. Hrg. 105-413.[5] *See* Attachment I. The Department's testimony explained that its comments were "directed *toward the most recent version* of H.R. 1604, *which is to be presented on the House Floor tomorrow*. . . [and that the Department] support[s] the enactment of H.R. 1604 with certain technical and clarifying amendments, which are truly in the nature of technical amendments, which will be provided both to the House and Senate staff for, hopefully, incorporation into the bill." *Id.* at 29 (emphasis added).

The legislative record is clear that both bodies of Congress rejected the Department's comments on the land acquisition provisions contained in the legislation as passed by the House. Regarding § 7(a)(3) [section 107(a)(3)], the Department appears to have requested that the sentence "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held" be deleted "because it is unnecessary." *See* Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2.[6] *See* Attachment J. Apparently, the Department believed that lands acquired pursuant to the Act either were automatically subject to restriction against alienation under the Indian Trade and Intercourse Act (25 U.S.C. § 177) and therefore such language was unnecessary, or that such lands would not be protected in any manner, and therefore such language was unnecessary.

Congress' decision to retain the phrase "shall be held as Indian lands are held" despite Interior's request, combined with the rule that every word in a statute must be given effect, compels the conclusion that such lands are restricted given that tribes do not need federal legislation to acquire fee and freely alienable land. *Cf.* Opinion of the Solicitor, No. M-37023 at 6 (Jan. 18, 2009) ("While the Department has not previously opined on this precise question, Federal restrictions under the Non-Intercourse Act do not automatically attach to off-reservation parcels acquired by a tribe in fee simple absolute."); December 19, 2008 Letter from Acting Deputy Assistant Secretary George Skibine to Lac Du Flambeau Band of Lake Superior Chippewa Indians President Edwards (land in Illinois purchased by Tribe in fee simple, without more, is not subject to 25 U.S.C. § 177). Further, any argument that the phrase had no effect and the land is unrestricted and held in fee simple runs afoul of the overall history surrounding the legislation. After finally providing a modicum of justice to the tribes after extracting 12 million acres of their land for approximately 15 cents an acre, Congress surely did not maintain, over Interior's objection, the particular phrase authorizing the acquisition of land by Bay Mills and yet intend that those lands acquired pursuant to the Act would have no protection whatsoever.

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[5] Senator Inouye noted the uniqueness of the situation, explaining that "[w]e are considering a measure that has yet to be passed by the House of Representatives, but we consider that justice has been delayed too long, and therefore we intend to report this measure out as soon as you report yours, sir." S. Hrg. 105-413 at 28.

[6] The Tribe's files contain only the "Draft" letter from the Assistant Secretary. We presume that the Department's final letter did not substantively differ from the Draft. In any event, as discussed below, the Senate did not incorporate any of the Interior's comments on the land acquisition sections contained in MILCSA.

The subsequent history of the legislation further confirms Congress' rejection of Interior's requests to amend the language governing the status of lands acquired pursuant to the Act. As discussed above, Interior's letter requested that the last sentence of § 7(a)(3) [section 107(a)(3)] be deleted.[7] Interior requested that the same sentence be deleted from section 8(b)(4) relating to acquisitions by the Sault Ste. Marie Tribe. Notably, Interior also requested that the Senate delete section 8(f) which provides that any lands acquired by Sault Ste. Marie with interest or other income from the designated fund "shall be held in trust by the Secretary for the benefit of the tribe." Interior's draft requested as follows:

> Section 8(f) should be deleted because it *is superfluous and conflicts with section 8(b)(4), if 8(b)(4) is not deleted.* If Section 8(f) is retained, we would like it clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act.

Draft Letter from Assistant Secretary-Indian Affairs to Senate Indian Affairs Committee Chairman Ben Nighthorse Campbell, at 2 (emphasis added). *See* Attachment J. Interior's comment that the requirement in 8(f) placing the lands in trust was superfluous and conflicted with the requirement in 8(b)(4) to hold the lands "as Indian lands are held" demonstrates that Interior understood the phrase "as Indian lands are held" to constitute restricted lands. If Interior understood the phrase "as Indian lands are held" to mean simply alienable, fee simple land without any restrictions, a direction by Congress to hold the lands in trust would not be superfluous. However, Interior clearly understood that lands acquired by 8(b)(4) would be held in restricted fee by operation of law because placing the same land in trust would be *superfluous* (because they are already protected against alienation) and in *conflict* with 8(b)(4) because recognized Indian title is either restricted fee or trust land, but not both.

Finally, the legislative record shows that the Senate did not make any amendments to H.R. 1604 that were suggested by the Department. *See* 143 Cong. Rec. S12425-26 (Nov. 9, 1997) (amendments offered in Senate to H.R. 1604). *See* Attachment K. After passing the amendments offered by Senators Murkowski and Inouye, H.R. 1604 passed the Senate by unanimous consent. On November 13, 1997, the House considered the amendments offered by the Senate and again did not incorporate any of Interior's proposed amendments to the sections relating to land acquisitions pursuant to the Act. The House ultimately accepted all of the Senate's amendments but one and sent the bill back to the Senate. *See* Attachment L. The Senate receded from the one amendment rejected by the House and the President signed the legislation into law on December 15, 1997. *See* Attachment L.

In sum, the extensive legislative history of MILCSA confirms that lands acquired pursuant to section 107(a)(3) are restricted fee lands by *operation of law* because Congress rejected Interior's request to modify the legislation to provide for discretionary trust acquisitions. *Further, such lands are*

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[7] That sentence provides: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

restricted fee lands rather than trust lands or alienable, fee simple lands, because Congress purposefully discarded "held in trust," replaced that language with "held as Indian lands are held," and rejected the Department's request that the phrase be deleted.

5. 2002 BIA Memorandum Did Not Squarely Address The Legislative Transfer Question

In 2002, the BIA Midwest Regional Director issued a letter to the Bay Mills Indian Community's then-President regarding the land acquisition provisions contained in MILCSA as applicable to the Tribe. Letter from The Hon. Larry Morrin, BIA Midwest Regional Director, to L. John Lufkins, President of the Bay Mills Indian Community (September 10, 2002) ("Morrin Letter") *See* Attachment C. The Morrin Letter was issued in response to the Tribe's request that the Secretary accept *trust title* to 235 acres of land purchased with money from the Tribe's Land Trust pursuant MILCSA. *Id.* at 1. The Tribe believes that this land already has attained restricted fee status.[8]

The Regional Director analyzed MILCSA's land acquisition section in responding to the Tribe's request. He framed the issue as follows: "[T]he real question is … does the MILSCA (sic) provide mandatory acquisition authority for the Bay Mills Indian Community." *Id.* He concluded that, "land acquisition authority in MILCSA is not mandatory," and, "the Bureau should process trust applications … as discretionary trust acquisitions." *Id.* at 7. In other words, the Morrin Letter addresses only the question whether MILCSA provides mandatory trust acquisition authority to the Secretary, and he finds that it does not. The Morrin Letter does not address at all whether MILCSA effectuates a legislative transfer of title by operation of law as discussed in Part I.C.3 above.

While Regional Director Morrin rejected the idea that MILCSA vests the Secretary with mandatory trust acquisition authority on behalf of the Tribe, he also acknowledged the possibility that MILCSA could provide for lands acquired by the Tribe to be held in restricted fee, explaining:

> The use of the language, "Any land acquired with funds from the Land Trust shall be held as Indian lands are held" is not a clear statement that the acquired lands are to be held in trust, or more particularly that the acquisition authority is mandatory. *Indian lands may be held in a variety of ways, including,* in trust by the United States, *subject to restrictions on alienation,* or owned in fee by the Indian Tribe. Certainly the language does not provide clear mandatory acquisition authority.

Id. at 2-3 (emphasis added).

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[8] The Tribe did request that the Department acquire trust title to 40 of those acres in trust for the use of its community college, and the Tribe believed that trust status was necessary to ensure that certain kinds of federal funding would be available to the community college.

At no time did the Midwest Regional Director squarely address whether Congress directed that lands purchased by the Tribe pursuant to section 107(a)(3) be held in restricted fee. Rather, the Regional Director's discussion focused on the Secretary's role in trust land acquisition, where he indicated that the intent of the Department's proposed changes to MILCSA was "to retain the Secretary's discretion to acquire land in trust, not to change how the land acquired with the funds from the Land Trust would be held." *Id.* at 3. As discussed further in Part I.C.4 above, the Regional Director's assertion[9] that MILCSA's legislative history supported his conclusion was based upon a mistaken view of MILCSA's legislative history. Although the proposed changes may have reflected *Interior's* intent, Congress in fact rejected the Department's proposed amendments to the relevant sections of the MILCSA.

In sum, MILCSA was enacted to compensate the Tribe by distributing funds awarded to it by the Indian Claims Commission, and by allowing the Tribe to enhance its land base through purchase and exchange of new, restricted lands to replace the lands it lost. The Morrin Letter did not squarely address the Tribe's authority to acquire title to land with MILCSA funds; instead, it merely addressed whether MILCSA provided for a mandatory acquisition of trust title by the Secretary. By its terms, MILCSA allows the Tribe to use settlement funds to acquire title to new lands, and it provides that such lands, by operation of law, will be restricted from alienation upon acquisition by the Tribe.

PART II
IGRA ALLOWS LANDS ACQUIRED PURSUANT TO MILCSA § 107(a)(3) TO BE USED FOR GAMING

A. IGRA Allows Gaming on "Indian Lands"

The Indian Gaming Regulatory Act allows tribes to conduct gaming operations on "Indian lands." *See* 25 U.S.C. § 2710(b) and (d). IGRA defines the term:

> (4) The term "Indian lands" means –
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or *held by any Indian tribe . . . subject to restriction by*

[9] The Regional Director asserted that Congress changed the proposed language of MILCSA "to retain the Secretary's discretion to acquire the land in trust, not to change how the land acquired with the funds from the Land Trust would be held." Morrin Letter at 3. He added, "the change in language, following a request from the Department to clarify the statute to retain the Secretary's discretionary authority, is an indication that the authority was not meant to be mandatory." *Id.*

> *the United States against alienation* and *over which an Indian tribe exercises governmental power.*

25 U.S.C. § 2703(4) (emphasis added). For the reasons set forth below, lands validly acquired by the Tribe pursuant to Section 107(a)(3) of MILCSA fall within IGRA's definition of "Indian lands." Further, as also discussed below, because such lands will be held in restricted fee, they will not be subject to IGRA Section 20's prohibition on gaming on after-acquired lands. Finally, it also is clear that the Tribe will exercise governmental power over the land. Accordingly, lands validly acquired pursuant to section 107(a)(3) are eligible for gaming.

1. MILCSA Lands are "Subject to Restriction by the United States Against Alienation"

As discussed in detail in Part I above, once the Tribe validly acquires fee title to land using MILCSA Section 107(a) Land Trust funds, by operation of law the land will become restricted against alienation. Accordingly, the land will meet the requirement in 25 U.S.C. § 2703(4)(B) that off-reservation land must either be held in trust or be held "subject to restriction by the United States against alienation."

2. The Tribe will Exercise Jurisdiction Over those Lands

IGRA permits a tribe to conduct gaming on "Indian lands" over which the tribe, as a legal matter, possesses governmental jurisdiction. *See* 25 U.S.C. § 2710(b) and (d). Where Indian lands are located off-reservation, IGRA further requires that the tribe exercise "governmental power" over the Indian lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). A tribe must have legal jurisdiction over the land before the tribe can, as a factual matter, exercise "governmental power" over the land. *See NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance*, January 20, 2009 NIGC letter to Seneca President Barry E. Snyder at 8 (Attachment M); *Mechoopda Indian Tribe of the Chico Reservation*, NIGC Memorandum at 3 (2003) ("[t]ribal jurisdiction is a threshold requirement to the exercise of governmental power"); *Bear River Band of the Rohnerville Rancheria*, NIGC Memorandum at 4 (2002).

a. The Bay Mills Indian Community Will Have Legal Jurisdiction

As a matter of law tribes are presumed to possess governmental jurisdiction within "Indian country." As recently articulated by NIGC,

> The presumption of jurisdiction exists for any federally recognized tribe acting within the limits of Indian country. This jurisdiction, an inherent sovereign power, can only be modified by a clear and explicit expression of Congress.

NIGC *Seneca* Letter at 8 (internal citations omitted); *see also* NIGC *Mechoopda* Opinion at 3; NIGC *Rohnerville* Opinion at 5.

"Indian country" is defined in 18 U.S.C. § 1151 and applies both to criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987); NIGC *Seneca* Letter at 8-9. "Indian country" includes the following geographic areas:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, Congress's definition of "Indian country" includes reservations, dependent Indian communities and Indian allotments. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998).

In *Venetie*, the Court considered whether land acquired pursuant to the Alaska Native Claims Settlement Act (ANCSA) and held in fee simple by the Native Village of Venetie constituted "Indian country" and was therefore subject to tribal jurisdiction. The Court noted that because ANCSA "revoked the Venetie Reservation" and Indian allotments were not at issue, the question was whether the Tribe's land constituted a dependent Indian community. *Venetie*, 522 U.S. at 953. Based on earlier precedent which Congress essentially codified in section 1151, the Court held that "dependent Indian communities" under section 1151(b) are those lands that satisfy two criteria: (1) the land "must have been set aside by the Federal Government for the use of the Indians as Indian land;" and (2) the land "must be under federal superintendence." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); NIGC *Seneca* Letter at 9.

In its approval of the Seneca Nation's gaming ordinance, NIGC explained that "[a]lthough for many the term 'Indian country' may be perceived as synonymous with the reservation system, this perception is erroneous because the term is not so limited. Reservation status is not necessary for a finding of Indian country. NIGC *Seneca* Letter at 9. Citing to numerous Supreme Court and Circuit decisions, NIGC appropriately concluded that restricted fee land that satisfies both criteria, regardless of whether it has been declared a reservation, constitutes "Indian country." NIGC *Seneca* Letter at 9; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *United States v. Sandoval*, 231 U.S. 28 (1913) (restricted fee land constitutes Indian country); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999).

Here, once the Bay Mills Indian Community purchases the title to land with earnings generated from the Land Trust, the land passes into restricted fee status by operation of law pursuant to MILCSA Section 107(a)(3) and constitutes a "dependent Indian community" under 18 U.S.C. § 1151. The MILCSA restricted fee land is "validly set apart for the use of the Indians *as Indian land*" by Congress. *Venetie*, 522 U.S. at 529 (*quoting United States v. McGowan*, 302 U.S. 535, 539 (1938)). Indeed, MILCSA closely tracks the Court's enunciation of the test in *Venetie* and *McGowan*

by mandating that lands acquired pursuant to section 107 "shall be held *as Indian lands are held*." Lands "held as Indian lands are held" constitutes recognized title that is subject to the Indian Trade and Intercourse Act, 25 U.S.C. § 177. *See* Treaty with the Menominee, Art. 2, 10 Stat. 1064 (1854);[10] *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968)[11]; *Cayuga Indian Nation v. Cuomo*, 758 F.Supp. 107, 110 (N.D.N.Y. 1991), *rev'd on other grounds, Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).[12] Because land validly acquired pursuant to Section 107(a)(3) is subject to the restriction on alienation embodied in the Indian Trade and Intercourse Act, it also meets the government supervision requirement. As the Supreme Court acknowledged in *Venetie*, "federal restrictions on the lands' alienation" constitute an "'exercise of the government's guardianship over the tribes and their affairs.'" 522 U.S. at 528 (*quoting United States v. Sandoval*, 231 U.S. 28, 48 (1913). *See also* NIGC *Seneca* Letter at 9. Further, as restricted fee land the property will be regulated by a multitude of statutes, (including IGRA) passed by Congress that place such lands under federal superintendence. Thus, once validly purchased with Land Trust funds, land obtains restricted fee status and the Bay Mills Indian Community will, as a legal matter, possess jurisdiction over it.

b. The Bay Mills Indian Community Will Exercise Governmental Power

Having established jurisdiction over the Parcel, the Tribe will then be able to demonstrate that it will exercise present-day governmental power over the property as required by IGRA Section 4(4)(B), 25 U.S.C. § 2703(4)(B). NIGC recently explained that it "has not formulated a uniform definition of "exercise of governmental power" but rather decides that question in each case based upon all the circumstances." NIGC *Seneca* Letter at 10. Of course present-day governmental power over the land cannot be established before the land is acquired in restricted fee. NIGC *Mechoopda* Opinion at 5. However, in multiple analogous situations both NIGC and Interior have found that an applicant tribe will exercise governmental powers over lands once the lands are acquired in trust or restricted fee. *See* NIGC *Mechoopda* Opinion at 5[13]; Interior *Pomo of Upper Lake* Indian Lands

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[10] "Article 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country . . . [legal description of reservation lands]."

[11] "The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064. By this treaty . . . the United States confirmed to them the Wolf River Reservation 'for a home, *to be held as Indian lands are held*.' . . . [T]he language 'to be held as Indian lands are held' includes the right to fish and to hunt. . . . The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968).

[12] "[I]f an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe of its title to such land." *Cayuga Indian Nation v. Cuomo*, 758 F.Supp. at 110..

[13] "The Tribe has submitted information indicating that, once the land is in trust, it will exercise governmental authority over the parcel through various environmental, zoning, trespass, law enforcement and other ordinances and programs. We can reasonably rely on the Tribe's representations and assume for the purpose of this opinion that the Tribe will exercise those authorities when the land is acquired in trust." NIGC *Mechoopda Opinion* at 5.

Determination at 7.[14] In the case of the Bay Mills Indian Community, it is clear that the Tribe will exercise governmental authority over its MILCSA section 107(a)(3) land once it is acquired because the Tribe will build a gaming facility on the property and regulate its operations pursuant to its federally approved tribal gaming ordinance.[15]

B. IGRA's Ban on Gaming on "After Acquired Lands" Does Not Apply to Restricted Fee Lands

Section 20 of IGRA provides that gaming "shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988" unless specific exceptions apply. 25 U.S.C. 2719(a) (emphasis added). As discussed in detail below, the Department of the Interior and NIGC have concluded that IGRA's prohibition against gaming on lands acquired after October 17, 1988 does not apply to restricted fee lands that constitute Indian country. The Department of the Interior articulated its conclusion through rulemaking that implements IGRA's Section 20 and in Solicitor M-Opinion M-037023, dated January 18, 2009. (M-Opinions are "binding on all Departmental offices . . . and may only be modified or overruled by the Solicitor, Under Secretary or Secretary." *See* M-Opinion M-37003, dated January 18, 2001 and attachments thereto.) NIGC concurred in the Department's analysis and conclusion that Section 20 does not apply to restricted fee lands when it approved the Seneca Nation of Indians' Class III Gaming Ordinance.

Set forth below is a brief summary of the United States' articulation of this position in approvals involving the Seneca Nation; following that is by a summary of the Department's Section 20 (25 C.F.R. Part 292) regulations and M-Opinion finding that restricted lands are not subject to IGRA's Section 20 prohibition against gaming on after acquired lands. Based on analyses adopted by both the Department and NIGC, it is clear that lands acquired by the Bay Mills Indian Community pursuant to MILCSA will not be subject to the prohibition set forth in Section 20 of IGRA.

1. The United States' Position in the Seneca Litigation Supports this Analysis

The United States has relied on this same analysis in its ongoing defense of NIGC's approval of the Seneca Nation of Indians' (Seneca's) Gaming Ordinance. In 2002, NIGC approved a Seneca gaming ordinance that included a non-site specific general definition of tribal lands eligible for gaming that was consistent with IGRA's definition of "Indian lands." In 2005, Seneca purchased

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[14] "Governmental authority will be exercised once the fee-to-trust process is complete. The Tribe has entered into a Memorandum of Understanding (MOU) with the Lake County government addressing civil jurisdiction and development of the property. . . . Moreover, the prospective development of a gaming ordinance and the regulation of the proposed gaming operation are indicators of the exercise of governmental power. If the Secretary accepts the land into trust, it will qualify as Indian lands under IGRA." Interior *Pomo of Upper Lake* Indian Lands Determination at 7

[15] Once acquired in restricted fee status, several of the Tribe's laws will become applicable to the parcel, including the Tribe's NIGC-approved gaming ordinance and the Tribal Code (which includes provisions governing the Tribe's court and criminal justice systems).

land in Buffalo, New York and, pursuant to the requirements of the Seneca Nation Settlement Act (25 U.S.C. § 1774 *et seq.*),[16] requested that the Department confirm the status of that land as being held in restricted fee. Once the Department completed the administrative work required by the Seneca Nation Settlement Act, title to the land transferred to restricted fee by operation of law (this occurred in December 2005).

In January 2006, opponents to Seneca's proposed Buffalo casino filed suit challenging, among other things, NIGC's 2002 approval of the Nation's gaming ordinance. The District Court found that NIGC's approval of the Nation's gaming ordinance was arbitrary and capricious because NIGC did not issue an Indian lands determination for the general locations set forth in the Nation's gaming compact with the State. The court vacated NIGC's approval of the ordinance and remanded the matter back to the agency to determine whether the Buffalo site constituted "Indian lands" under IGRA. *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295 (W.D.N.Y. 2007).

Shortly thereafter, Seneca submitted an amended gaming ordinance to NIGC for approval. The amended ordinance modified the definition of tribal lands to include the legal description of the Buffalo site. NIGC approved the amended ordinance on July 2, 2007 after finding that: 1) the Buffalo site constituted Indian lands; 2) that "restricted lands" were subject to Section 20 of IGRA; and 3) that Seneca's restricted lands were acquired pursuant to a settlement of a land claim and therefore were excepted from IGRA Section 20's general prohibition on gaming on newly acquired lands.

Opponents to the Nation's Buffalo casino again filed litigation challenging NIGC's approval of Seneca's new gaming ordinance. The district court again set aside NIGC's approval of the amended 2007 ordinance as arbitrary and capricious, this time finding that the Seneca Nation Settlement Act did not settle a land claim and therefore that the lands acquired in Buffalo pursuant to the Act did not satisfy the requirements of IGRA Section 20's settlement of a land claim exception (25 U.S.C. § 2719(b)(1)(B)(i)). The court agreed with NIGC that IGRA Section 20's general prohibition on gaming on lands acquired after the enactment of IGRA applied to all lands, including restricted fee lands. *See Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-0451S (W.D.N.Y. July 8, 2008).

A few months after the Department of the Interior's regulations governing section 20 of IGRA (discussed in detail in Part (b) below) became effective, the Seneca Nation submitted an amended gaming ordinance to NIGC for approval. The amended ordinance again included a legal description of its Buffalo site in its definition of Nation lands. Based on its application of the

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[16] The Chairman's analysis began with the Seneca Nation Settlement Act (SNSA), 25 U.S.C. § 1774. The SNSA settled disputes over leases between the Seneca Nation, the village of Salamanca, New York and the United States. In the settlement the Seneca Nation was awarded $60,000,000 for their claims against the government and also for agreeing to offer new leases in Salamanca. 25 U.S.C. § 1774(d). The Seneca Nation was authorized to use these funds to acquire "land within the aboriginal area in New York or situated within or near proximity to former reservation lands." 25 U.S.C. § 1774f(c). Unless the Secretary objects within thirty days of the comment period the land becomes subject to the provisions of 25 U.S.C. § 177 (Non-Intercourse Act)[16] and is "held in restricted fee." Id.

Department's recently promulgated regulations, NIGC approved the Seneca Nation's ordinance.[17] Chairman Hogen explained that the Department's recent "change of course" in its regulations led NIGC "to review this new ordinance and the agency's Indian lands analysis afresh." *Id.* at 2.

Turning to whether the Seneca Nation's restricted fee lands in Buffalo were eligible for gaming under IGRA, NIGC concurred in Interior's recently promulgated regulations which interpreted the restrictions contained in section 20(a) to apply only to lands acquired *in trust* after the effective date of IGRA. *Id.* at 7. NIGC stated that this conclusion "adheres to the explicit language of the statute" because section 20 "only references trust land acquired after October 17, 1988. It says nothing of land held by a tribe subject to restriction by the United States against alienation." *Id.* at 11. Pointing to the Department's differing definitions of trust and restricted land in 25 C.F.R. Part 151 and federal statutes distinguishing between trust and restricted lands, NIGC concluded that "'in trust' is a term of art that has a specific meaning with the realm of federal Indian law." *Id.* at 17. NIGC concluded that based on "Congress' history of enacting legislation pertaining to trust and restricted land, it is evident that Congress in this context understood that the two types of Indian lands are not the same and intended to use the term 'in trust' accordingly. . . . [Conversely the] use of the term *restricted* in some provisions of IGRA and not in [section 20] evinces Congressional intent to exclude it from the general prohibition." *Id.* at 17-18.

NIGC further explained that even if the statutory language of section 20 was ambiguous, the Department's and NIGC's interpretation of that ambiguous language is reasonable. NIGC explained that the conclusion that Indian country restricted lands were not subject to IGRA's prohibitions "comports with the plain language of IGRA, resolves any ambiguity in favor the tribes, as required by the Indian canon of construction, and promotes IGRA's underlying policies and objectives [of encouraging tribal economic development, self sufficiency and strong tribal government]." *Id* at 20. Accordingly, based on this recent plain reading of IGRA, NIGC approved the Seneca Nation's gaming ordinance.

2. The Department's Part 292 Regulations Also Support This Analysis

In 2008 the Department of the Interior promulgated regulations implementing the exceptions to IGRA Section 20's general prohibition against gaming on after-acquired lands, published now at 25 C.F.R. Part 292, which make clear that Section 20 applies only to trust land, and not to restricted fee lands. In the preamble to the regulations, the Department explained that "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including section 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. 29354, 29355 (May 20, 2008).

Following issuance of the regulations, on January 18, 2009, then-Solicitor David Bernhardt issued a memorandum opinion further explaining the Department's interpretation of Section 20 in

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[17] *NIGC Approval of Seneca Nation of Indians' Class III Gaming Ordinance*, January 20, 2009 NIGC letter to Seneca President Barry E. Snyder (Attachment M).

the Part 292 regulations, and justifying the Department's departure from its pre-Part 292 position that Section 20 barred gaming on both after-acquired trust and restricted fee lands. Memorandum Opinion M-37023 re: Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands (Jan. 18, 2009). The Solicitor concluded that upon further investigation the Department "has since determined that the better view of the law is that when a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, the land is not, without more, automatically subject to restrictions against alienation." *Id.* at 6.

In reaching this conclusion, the Solicitor first examined the basic attributes of trust land and restricted fee land, explaining that the Secretary of the Interior "lacks any general authority to place restrictions on lands tribes acquire in fee." *Id.* at 3. The only authority that the Secretary has to acquire and place restrictions on lands for Indians is through Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. §465. But land acquired under the IRA is held by the United States in trust, it is not held by the tribe as restricted fee land. Restricted fee lands are created by operation of law, either pursuant to the terms of a specific treaty or statute (such as the Seneca Nation Settlement Act or MILCSA), or more generally the Non-Intercourse Act. Land purchased in fee by a tribe outside the reservation boundaries is not, however, without more (*e.g.*, a specific statute or treaty), subject to the Non-Intercourse Act and is not considered "Indian country". The Solicitor relied on the United States' position in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), to support his conclusion that "the Non-Intercourse Act's Federal protections against alienation do not extend to off-reservation lands owned by a tribe in fee unless some extenuating circumstances exist." *Id.* at 7. The memorandum also relied on the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), to support the Department's view that a tribe's purchase of land in fee outside of the reservation does not establish a tribe's sovereignty over that land because the IRA provides the "proper avenue for [a tribe] to reestablish sovereignty over territory." *Id.* at 6.

Against this background, the Solicitor explained that the Department had concluded that the language in Section 20 was plain and that Congress clearly meant for the prohibition against gaming on after-acquired lands to apply only to trust land for three reasons. First, the term "in trust" has "a common and generally well-accepted meaning in Indian law." Congress is familiar with this meaning and chose specifically to apply Section 20 to this form of land. Second, the statute expressly applies to "lands acquired in trust by the Secretary," and as previously discussed, the Secretary does not acquire restricted fee lands – they are acquired and owned by tribes. Third, lands held in trust by the Secretary may be different from restricted fee lands in certain respects, depending on the terms of the specific statutes and implementing regulations. *Id.* at 5-6. For these reasons, and because the Department's prior interpretation was based on the "misapprehension of the law" that off-reservation lands purchased by tribes automatically would be subject to restrictions against alienation, the Solicitor concluded that the plain language in Section 20 could not be ignored, and was properly implemented in the new Part 292 regulations.

In sum, the Department's Part 292 regulations are based on the presumption that lands purchased by a tribe in fee that are located outside the boundaries of the reservation are not subject to the restrictions against alienation imposed by the Indian Trade and Intercourse Act unless Congress has dictated otherwise. Conversely, in cases where a specific statute creates the restrictions against alienation for land purchased by a tribe, or effects a legislative transfer of such lands in restricted fee status, such as in MILCSA, such lands would be eligible for gaming under IGRA and the Department's Part 292 regulations, because as the Part 292 regulations make clear, the

prohibition against gaming on after-acquired lands in Section 20 does not apply to restricted fee lands. Accordingly, land acquired pursuant to MILCSA section 107(a)(3) is not subject to IGRA section 20's general ban on gaming on after-acquired off-reservation lands.

CONCLUSION

For all of the foregoing reasons, once the Tribe acquires fee title to lands purchased with the proceeds of the Land Trust, the Tribe's fee title will become restricted from alienation by operation of law pursuant to the Michigan Indian Land Claims Settlement Act Section 107(a)(3).[18] Further, once the restriction on alienation attaches to the property, the property will become eligible for gaming because it is not subject to the restrictions set forth in Section 20 of IGRA on lands acquired in trust after October 17, 1988.

If you have any questions, please contact President Jeff Parker, tribal attorneys Ms. Kathryn Tierney and Mr. Chad DePetro (all of whom can be reached at (906) 248-3241) or Ms. Heather Sibbison at (202) 457-6148.

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[18] In the unlikely event that NIGC, the Department of the Interior or a court were to subsequently determine that restricted fee lands are subject to IGRA's general prohibition against gaming on lands acquired after 1988, the Tribe maintains that lands acquired pursuant to section 207(a)(3) of the Michigan Indian Land Claims Settlement Act satisfy IGRA's "settlement of a land claim exception," 25 U.S.C. 2719(b)(1)(B)(i), and respectfully requests the opportunity to provide additional information and analysis on this issue should NIGC, the Department or a court find that the prohibitions contained in section 20 apply to restricted fee lands.