Exhibit I

United States Department of the Interior

OFFICE OF THE SOLICITOR

DEC 21 2010

Mr. Michael Gross
Associate General Counsel, General Law
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Re: Bay Mills Indian Community Vanderbilt property, Indian lands opinion

Dear Mr. Gross:

This is in response to your letter dated November 9, 2010, in which you state that the Bay Mills Indian Community (the Tribe) recently opened an off-reservation gaming facility on a parcel that it purchased in Vanderbilt, Michigan (the Vanderbilt site). You asked for my opinion whether the Vanderbilt site is held in restricted fee under the Indian Gaming Regulatory Act (IGRA) by virtue of the fact that the Tribe purchased the land using money from its land trust under the Michigan Indian Land Claims Settlement Act of 1997 (the MILCSA). As I understand it, the NIGC is attempting to determine whether it has regulatory jurisdiction over the Tribe's Vanderbilt site. Such regulatory jurisdiction would exist only if the Vanderbilt site qualifies as *Indian lands* under IGRA.

According to the warranty deed for the Vanderbilt site, the Tribe purchased the property in August 2010 from Treetops Acquisition Company, LLC, a Michigan Limited Liability Company. The legal land description on the warranty deed follows:

> Lands in the Township of Corwith, County of Otsego, Michigan described as:
>
> A parcel of land on part of the Northwest ¼ of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly Right-of-Way line of Limited Access I-75; thence continuing South 22°56'39" West, 440.43 feet along said Right-of-Way line; thence continuing South 45°47'56" West, 460.00 feet along said Right-of-Way line; thence continuing South 56°47'56" West, 112.50 feet along said Right-of-Way line; thence North 89°30'40" West, 209.68 feet; thence 537.75 feet along curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along

> the centerline of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the Point of Beginning.

Warranty Deed between Treetops Acquisition Company, LLC and the Bay Mills Indian Community, Otsego County Mich. Liber 1237 at 261 (Aug. 27, 2010).

This deed describes a parcel of land containing about 47 acres in Otsego County, in the northern part of Michigan's Lower Peninsula. It is located about 87 miles away from the Tribe's headquarters and reservation in Chippewa County, in the northern part of Michigan's Upper Peninsula—over 100 miles away by road.

As explained below, it is my opinion that the Vanderbilt site was not acquired in conformance with the MILSCA and it is not a restricted fee site.

Indian Gaming Regulatory Act

In IGRA, the term *Indian lands* is defined to mean:

> (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).

The NIGC's regulations clarify the definition of *Indian lands* for purposes of IGRA. Those regulations provide:

> Indian lands means:
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> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either –
>
> > (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> >
> > (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

The question presented now is whether the Tribe's fee land purchase in Vanderbilt was transformed, by operation of law, into any of the three categories of *Indian lands* under IGRA—

reservation, trust, or restricted fee. As I understand it, your inquiry focused on the restricted fee category because the Tribe previously submitted legal memoranda to the NIGC and the Department arguing that position.[1] In developing my opinion, I have carefully considered the Tribe's legal memoranda. I have also considered a legal analysis submitted by four other tribes in Michigan that argues against the Bay Mills position,[2] as well as correspondence issued by the Michigan Attorney General's Office and other relevant materials.

Importantly, we are not presented here with a fee land purchase by a tribe using general tribal funds. Rather, the Tribe has submitted evidence showing that the land was purchased with earnings from a special fund created by a tribal-specific statute. Therefore, this analysis is focused on, and limited to, an interpretation of the MILCSA. [3]

Michigan Indian Land Claims Settlement Act

In 1997, Congress enacted the MILCSA, 105 Pub. L. 143, 111 Stat. 2652. The purpose of the statute was to provide plans to distribute certain Indian Claims Commission judgment funds that the Department had been holding in trust. Among other things, the MILCSA established a non-expendable land trust for the Tribe.

Congress provided that the principal of the Tribe's land trust was not to be expended for any purpose, but that:

> 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).

The Tribe submits, and for present purposes I will assume, that it purchased the Vanderbilt site with earnings from its MILCSA Land Trust. The United States does not hold the

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[1] 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 (May 26, 2010); The Bay Mills Indian Community, Memorandum and Materials in Support of Resolution No. 10-2-9 Amendment to Gaming Ordinance, Submitted to the National Indian Gaming Commission (Feb. 25, 2010); The Bay Mills Indian Community, Request for an Indian Lands Opinion, Submitted to the Department of the Interior (July 7, 2009). The Tribe withdrew each of these requests before receiving responses from the NIGC or the Department.

[2] Letter from Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Bank of Potawatomi Indians, Match-e-Be-Nash-She-Wish Band of Pottawatomi Indians, and Saginaw Chippewa Indian Tribe of Michigan to Attorney General Eric Holder, U.S. Dept. of Justice, Secretary Kenneth Salazar, U.S. Dept. of the Interior, Chairwoman Tracie Stevens, National Indian Gaming Commission (Dec. 14, 2010).

[3] The Department has previously articulated its position that unless a tribal-specific statute expressly dictates otherwise, off-reservation lands purchased by a tribe in fee simple do not automatically become restricted fee sites by operation of the Trade and Intercourse Act, otherwise known as the Non-Intercourse Act, codified as amended at 25 U.S.C. § 177. M-Opinion 37023 at 6 (Jan. 18, 2009); *see also* Letter from George T. Skibine, Acting Deputy Assistant Secretary – Policy and Economic Development, to Carl Edwards, President of the Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin (Dec. 19, 2008) (the Trade and Intercourse Act's restrictions on alienation do not apply to off-reservation lands purchased by a tribe in fee simple).

deed to the Vanderbilt site in trust, and the Tribe has no current application to place the land into trust. Nor does the Vanderbilt site fall within an existing Indian reservation. Therefore, the issue is whether the language of MILCSA Section 107(a)(3) operated as a matter of law to create a reservation, trust site, or restricted fee site under IGRA when the Tribe purchased the Vanderbilt site in fee simple.

For two reasons, each sufficient by itself, I conclude that the Tribe's purchase of the Vanderbilt site did not transform it into *Indian lands* under IGRA.

I. Consolidation and Enhancement of Tribal Landholdings

First, under the statute's plain language, MILCSA Section 107(a)(3) does not apply to the Tribe's purchase of the Vanderbilt site. The statute mandates that "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." MILCSA § 107(a)(3) (emphasis added). The expenditure in this case was not for an improvement on tribal land, as it was for the purchase of new land rather than for an improvement on existing land. So the only issue is whether the new land purchase in Vanderbilt was made for the "consolidation and enhancement of tribal landholdings . . . ."

In interpreting a statute, one must always start with the language of the statute itself. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). If Congress has provided unambiguous direction within the language of the statute, agencies and courts are obligated to follow it. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The MILCSA does not define the terms *consolidation* and *enhancement*, nor does the statute set forth a tribal land consolidation area within which Land Trust purchases may be made.[4] Because Congress did not provide a special definition of those terms, it is proper in this instance to rely on their ordinary meanings.

Webster's New Twentieth Century Unabridged Dictionary defines the word *consolidate* as meaning "to unite (various units) into one mass or body." Webster's primary definition of the word *enhance* is "to make greater, as in cost, value, attractiveness, etc.; heighten; intensify; augment." Another definition of *enhance* is "to rise; to increase." But that alternative definition is noted as being archaic.

The Tribe's trust landholdings are all located in Chippewa County, on Michigan's Upper Peninsula. The Vanderbilt site is in Otsego County, on Michigan's Lower Peninsula, over 85 miles away from the Tribe's existing trust landholdings. Furthermore, the Tribe has confirmed with my office that it does not own any other fee lands in Vanderbilt. Given that the Vanderbilt land purchase was over 85 miles away from any other tribal trust lands and not near any other tribal fee lands, it cannot have been acquired for the purpose of consolidating—or uniting—other tribal landholdings. In fact, it could be argued that the acquisition actually results in a further fragmentation of the Tribe's landholdings.

[4] In addition, I note that the Bay Mills Indian Community does not have a land consolidation plan or tribal consolidation area approved by the Bureau of Indian Affairs. Nor has the Tribe submitted a proposal for any such consolidation plan or consolidation area.

Moreover, the Tribe's submissions do not demonstrate a fulfillment of this requirement. The submissions merely state that the MILCSA's land acquisition authority is "to improve existing tribal land holdings and to acquire new tribal land holdings." Tribe's May 2010 Memorandum at 3; Tribe's Feb. 2010 Memorandum at 3; Tribe's July 2009 Memorandum at 3. The Tribe gives no explanation of its interpretation that MILCSA allows for unlimited acquisitions of "new tribal land holdings." The Tribe's submissions also do not show that the Tribe's purchase in any way consolidated tribal landholdings. My office sought additional information from the Tribe on this point, but as of the date of this letter, no additional information had been provided by the Tribe.

The analysis could end there, because Congress' use of the conjunctive *and* within the phrase *consolidation and enhancement* strongly implies that any Land Trust purchase has to both consolidate and enhance tribal landholdings. *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588-90 (6th Cir. 2005) (determining through comprehensive analysis that "dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or.'").[5]

The presumption that *and* is conjunctive may be rebutted only where the context in which the term is used or other provisions of the statute dictate a contrary interpretation. *OfficeMax*, 428 F.3d at 589 (citing *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930)). In examining the context and other provisions of the MILCSA, I find nothing that warrants such a conclusion. To the contrary, the context and other provisions of the MILCSA demonstrate that Congress knew how to use the word *or* when it intended to provide a choice between alternatives. First, Congress twice used the disjunctive *or* within the very same sentence at issue here when it meant to provide a choice—"improvements on tribal land *or* the consolidation" and "purchase *or* exchange." Moreover, Congress specifically used the disjunctive *or* in a separate but similar section of the MILCSA setting forth the distribution plan for the Sault Ste. Marie Tribe:

> The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines—
>
> * * *
>
> (C) will consolidate *or* enhance tribal landholdings.

MILCSA § 108(b)(1) (emphasis added). The same phrase is used in the language relating to the Sault Ste. Marie Tribe's expenditure of Self-Sufficiency Fund income:

> The interest and other investment income of the Self-Sufficiency Fund shall be distributed—
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> * * *

[5] *See* Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community (Sept. 10, 2002) at 2, 4 (stating that the "earnings may also be used to consolidate *and* enhance tribal land holdings through either purchase or exchange." (emphasis in original)).

(5) for consolidation *or* enhancement of tribal lands.

MILCSA § 108(c) (emphasis added).

Because Congress chose to use the word *or* in an otherwise similar section of the statute for the Sault Ste. Marie Tribe, but used the word *and* with regard to the Bay Mills Indian Community, I must assume that the distinction was intentional and that it makes a difference. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another . . . ."); *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1067 (9th Cir. 1998) ("Congress's use of two distinct phrases leads us to conclude that two different meanings were intended."); 2A Sutherland, Statutory Construction § 4606 (5th ed. 1992 & Supp. 1997) ("When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). Because Congress made a choice to create different distribution plans for each of the MILCSA tribes, agencies and the courts are obligated to respect those differences. Therefore, under the Bay Mills distribution plan, the Tribe may use Land Trust earnings to purchase new lands only where such purchases both consolidate and enhance tribal landholdings.

Furthermore, even if Congress had meant to authorize the Tribe to make Land Trust purchases that either consolidate or enhance tribal landholdings, I do not believe that the Vanderbilt purchase can be said to enhance tribal landholdings. I believe that the term *enhancement* of tribal landholdings means that any Land Trust purchase must somehow enhance (*i.e.*, make greater the value or attractiveness) some other tribal landholding already in existence. Because the Vanderbilt site is very far from all other tribal landholdings, it cannot be said to enhance any of them. Therefore, even under an interpretation where *enhancement* includes the addition of new land, there must be some connection to benefiting existing tribal landholdings. Such a showing has not been made here.[6]

The statute simply cannot be read to authorize the Tribe to purchase additional landholdings in any geographic location with no connection to the intended purposes of the MILCSA, which was the consolidation and enhancement of tribal landholdings. First, such an interpretation would rely on a strained definition of *enhancement*. And second, it would be very unusual. Especially after IGRA became law in 1988, Congress has typically included some geographic guidance when it authorizes a tribe to obtain new lands that will fall under its legal jurisdiction. *See, e.g.*, Auburn Indian Restoration Act, 103 Pub. L. 434 § 204 (1994) (codified at 25 U.S.C. § 1300l-2); Aroostook Band of Micmacs Settlement Act, 102 Pub. L. 171 § 5(a) (1991) (codified at 25 U.S.C. 1721); Seneca Nation Settlement Act, 101 Pub. L. 503 § 8(c) (1990) (codified at 25 U.S.C. § 1774f(c)); Ponca Restoration Act, 101 Pub. L. 484 § 10(c)(1) (1990) (codified at 25 U.S.C. § 983h(c)(1)).

[6] This discussion highlights the practical necessity and benefit of the Department's position that the MILCSA provides discretionary trust acquisition authority. *See* Section II, *infra*; Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community at 4-5 (Sept. 10, 2002). Under that interpretation, the Tribe would have to demonstrate to the Secretary that its Land Trust acquisitions conform to the limitations in the MILCSA before the Secretary would accept them into trust.

Moreover, if tribal land purchases made in conformity with Section 107 of the MILCSA become restricted fee *Indian lands* under IGRA, as the Tribe has argued, then interpreting the statute as containing no geographic limitations would produce a result inconsistent with the legislative purpose of IGRA. The legislative purpose of IGRA Section 20, codified at 25 U.S.C. § 2719, was to freeze every tribe's gaming eligible Indian lands as they existed on IGRA's enactment date, subject to several delineated exceptions. Consistent with IGRA's plain language, the Department has interpreted IGRA Section 20's general prohibition against gaming on newly acquired lands to apply only to "lands acquired by the Secretary in trust for the benefit of an Indian tribe." *See* M-37023 (Jan. 18, 2009). Therefore, if the Tribe's land purchases under the MILCSA became restricted fee by operation of law, then the general prohibition against gaming on newly acquired lands would not apply. That alone does not lead to an absurd result, as Congress certainly has created specific gaming opportunities for tribes that faced specific circumstances. But if the MILCSA were to be interpreted as containing no geographic limitations on where the Tribe may purchase lands under Section 107(a)(3), and considering that the purchasing power of the Tribe's Land Trust earnings may continue indefinitely, then the Tribe potentially could open any number of gaming facilities anywhere in the nation from now through the indefinite future. Given the legislative purpose of IGRA Section 20, along with the nearly complete lack of discussion regarding gaming within the MILCSA's legislative history (see Section II below), it is hard to believe that Congress intended such a result.

It follows that the MILCSA does not transform the Vanderbilt site into *Indian lands* by operation of law. I acknowledge that the second sentence of Section 107(a)(3) does say literally that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." But the words *any lands acquired* should not be interpreted to include lands that were acquired contrary to the parameters of the statute. The second sentence must be read along with the preceding sentence, which includes the limitations just discussed and the mandate that Land Trust earnings shall be used exclusively for those purposes. In order to give meaning to the first sentence, the second sentence must be interpreted to include those limitations as well and therefore affect only those lands that are acquired in conformance with the statute. Because the Vanderbilt site did not consolidate and enhance tribal landholdings, the last sentence of Section 107(a)(3) does not apply and it cannot – under any interpretation – create Indian lands eligible for gaming under IGRA.

II. Held as Indian Lands are Held

Even if the Tribe had used its Land Trust earnings to purchase land in an area that could be said to consolidate and enhance tribal landholdings, I do not believe that the MILCSA would operate as a matter of law to transform that land purchase into *Indian lands* under IGRA. This part of the analysis requires an interpretation of what Congress meant by: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held."

The term *Indian lands* appears in numerous statutes with different definitions. Therefore, although the term appears in both IGRA and the MILCSA, one cannot assume that Congress intended the term *Indian lands* in the MILCSA to mean *Indian lands* as defined under IGRA. There no indication in the MILCSA or its legislative history that Congress intended to adopt the IGRA definition of *Indian lands*. Moreover, doing so would not have provided any guidance on how lands purchased under MILCSA Section 107 are to be held, because IGRA defines *Indian*

lands to include reservation lands, trust lands held by tribes or individuals, as well as lands held by tribes or individuals in restricted fee. Furthermore, to conclude that the definition of *Indian lands* in a broadly applied statute such as IGRA is synonymous with similar wording in a tribe-specific statute is unpersuasive. MILCSA addresses specific land claims of a particular tribe and provides that any lands acquired per its terms will be treated like other Indian lands but it does not dictate any special land status, whereas IGRA is a broad statutory delegation of authority by Congress to the executive branch that applies to all tribes where the definition of *Indian lands* is used to ascertain the eligibility of tribes to have certain provisions of IGRA apply to them. The former statutory language is for the purpose of stating that lands acquired thereunder will be one of those kinds of Indian lands and the latter statute is to show what kind of land status is necessary to qualify for certain statutory provisions. Given these distinctions, a more in-depth analysis is required.

In its prior submissions to the Department and the NIGC, the Tribe argued that the phrase *held as Indian lands are held* in the MILCSA means that lands purchased by the Tribe with earnings from its Land Trust become automatically subject to a restriction by the United States against alienation (a so-called restricted fee site), therefore qualifying as *Indian lands* under IGRA.

There is no plain meaning of the phrase *held as Indian lands are held.* Neither the full phrase nor the term *Indian lands* are defined in the MILCSA. Nor does the phrase have a precise meaning within the body of Federal Indian law. In practice, Indian lands can be held in a variety of ways—*e.g.,* in fee simple, in restricted fee, in trust for the benefit of a tribe or tribes, in trust for the benefit of individual Indians, and as reservations. Furthermore, these forms of Indian land ownership are not exhaustive and they are not all mutually exclusive. Therefore, the phrase *held as Indian lands are held* does not identify a particular land tenure.

The phrase has appeared in at least two other statutes, but in the other statutes it has been used only in conjunction with a more specific land holding directive, such as: "the land transferred shall be taken in the name of the United States in trust for the tribe or bands to be held as Indian lands are held, and shall be part of their reservation." 25 U.S.C. § 766 (a); *see also* 25 U.S.C. § 1300f(c) ("The Secretary of the Interior is directed . . . to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property . . . and such lands shall be held as Indian lands are held . . . ."). Those statutes do not help to discern the meaning of the phrase when it appears by itself. In fact, these statutes suggest that use of the phrase *held as Indian lands are held* in isolation does not vest the land with a particular status, and rather, the use of that phrase is merely to reflect Congress' intent that the land should be treated like other Indian lands are treated once some action is taken to establish its status.

The phrase *held as Indian lands are held,* or similarly *held as other Indian lands are held,* appeared in a number of 19th century Indian treaties.[7] The phrase does not have a special

[7] Treaty Made at Chicago with the United Nation of Chippewa, Ottowa and Potawatamie Indians, 7 Stat. 431 (1833); Treaty with the Winnebagoes, 7 Stat. 370 (1832); Treaty with the Oneida Indians Residing at Green Bay, 7 Stat. 566 (1838); Treaty with the Sioux, 10 Stat. 954 (1851); Treaty with the Menomonee Indians, 10 Stat. 1064 (1854); Treaty with the Mendawakanton and Wahpakoota Bands of Dakota or Sioux Tribe of Indians, 12 Stat. 1031 (1858).

meaning relating to the Bay Mills Indian Community, because the Tribe has not provided, and our own research has not uncovered, any treaty signed by a political predecessor of the Bay Mills Indian Community that used such language.

In each of the treaties where the phrase was used, it was in the context of creating what today we would call a reservation for the subject tribes. The phrase was used in place of a more definitive directive regarding the nature of the underlying land ownership. But this created a legal uncertainty, because the title derived by an Indian tribe on its reservation depends entirely upon the terms of the treaty. Some treaties called for the United States to grant ownership of the reservation lands to the subject tribes in fee simple. Other treaties granted fee ownership to the tribes, but subject to a restriction against alienation. Many other treaties have language that has been interpreted to mean that the United States retained fee title to the lands, with a right of use and occupancy or beneficial interest held by the tribe.[8] Given such a varied background, it was undoubtedly difficult for 19th century treaty drafters to describe a definitive tribal estate. By using the circular phrase *held as Indian lands are held,* the drafters tried to avoid the problem. In his Handbook of Federal Indian Law, Felix Cohen explained:

> [A] number of treaties dodge the problem of defining the Indian estate by providing that specified lands shall be held "as Indian lands are held," or as an Indian reservation, thus ignoring the fact that considerable differences may exist with respect to the tenures by which various tribes hold their land.

Felix S. Cohen, Handbook of Federal Indian Law, U.S. Dept. of the Interior, Office of the Solicitor at 296 (U.S. Govt. Printing Office 1942) (internal footnotes omitted).

So by its very nature and history, this phrase is ambiguous. Therefore, the Indian canon of construction applies and the statute should be construed liberally in favor of the Tribe. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The question is whether the MILCSA can be liberally construed as a mechanism that automatically transforms unrestricted fee lands purchased by the Tribe into *Indian lands* under IGRA.

In interpreting an ambiguous statutory provision, it is proper to consult legislative history to discern congressional intent. In this case, the MILCSA includes rather extensive legislative history. Interestingly, this history is almost entirely devoid of any discussion of gaming, but for two comments made by the Department of the Interior. In the first version of the bill, the language that would become Section 107(a)(3) was different. It read:

> The earnings generated by the Land Trust shall be used annually and exclusively for the consolidation and enhancement of tribal landholdings through purchase or exchange. Any land so acquired shall be held in trust by the United States for the Bay Mills Indian Community.

HR 1604 § 7(a)(3). After testifying during a hearing before the House Committee on Resources, the Department's Assistant Secretary -- Indian Affairs wrote a letter to the Committee with

[8] Such was the case with the Menominee Reservation created by the 1854 treaty cited above, which used the phrase *held as Indian lands are held. See Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

several proposed technical amendments to this bill. As to the provision at issue here, the letter stated:

> Section 7 is the use and distribution plan for the Bay Mills Indian Community. Section 7(a)(3) provides that earnings generated by its land trust shall be used annually and exclusively for consolidation and "enhancement" of tribal landholdings. It should be clarified whether enhancement includes improvements upon land, or only the acquisition of additional land. This section does not permit the Community to consolidate earnings from the fund for two or more years in order to acquire choicer or more valuable property, or from returning money to the principal of the Land Trust – two options which may give the Community desired flexibility depending on economic conditions.
>
> Section 7(a)(3) provides that "Any land so acquired shall be held in trust by the United States for the Bay Mills Indian Community." It should be 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.

Letter from Ada E. Deer, Assistant Secretary – Indian Affairs, to the Honorable Don Young, Chairman of the Committee on Resources, U.S. House of Representatives (July 15, 1997).

As you know, Section 20 of the Indian Gaming Regulatory Act prohibits gaming on lands acquired by the Secretary in trust for a tribe after October 17, 1988, the date of IGRA's enactment, subject to several potential exceptions. This, plus a nearly identical comment made in a subsequent Department letter discussed below, is the sole reference to gaming within the legislative history of the MILCSA. The intent of the Department's comment was to clarify that if lands were taken into trust for the Tribe under this statute, then those newly acquired lands would be subject to IGRA's general prohibition against gaming, unless eligible for one of the statutory exceptions.

The Tribe has argued that Congress rejected the Department's proposed changes to Section 7(a)(3), which would become Section 107(a)(3). In so arguing, the Tribe correctly points out that after receiving the Department's letter, the House Resources Committee reported a bill to the full House that did not change a single word of Section 7(a)(3). *See* HR 1604 RH (Oct. 28, 1997). But the bill as introduced on the House floor seven days later contained several changes to Section 7(a)(3). *See* Congressional Record – House H9931, H9933 (Nov. 4, 1997); HR 1604 EH (undated). Specifically, Congress added the Department's suggestion that Land Trust funds should be authorized for use on improvements to existing tribal lands; Congress deleted the word "annually" and thus accepted the Department's suggestion that the Tribe should be allowed to save its yearly earnings for the purchase of more valuable land; and Congress replaced its original mandatory trust language with the language that became law—that "[a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held." Therefore, I do not interpret the Committee's reported bill as a signal that the Committee rejected the Department's recommendations. Rather, it seems more likely that the bill was reported out of committee while changes to the land acquisition sections were still being negotiated. The bill as introduced on the House floor reflected Congress' intent to remove the mandatory trust nature of

the acquisition and to default to standard rules applicable to such land acquisitions. The Tribe argues that by removing the mandatory trust acquisition language, Congress intended to remove any need for administrative action and made the land subject to restraint against alienation by operation of law. If that were Congress' intent, I believe Congress would have expressly designated such lands as restricted fee, as it had done so before. *See* discussion of the Seneca Nation Settlement Act of 1990, *infra.*

As further support for this explanation of events, I note that the Sault Ste. Marie Tribe was addressing its land acquisition goals within the bill at the same time. After the Committee reported its bill, but before the bill was introduced on the House floor, the Sault Ste. Marie Tribe was able to have significant changes made to its distribution plan for land acquisition purposes. In the reported bill, the Sault Ste. Marie Tribe's distribution plan contained no explicit language relating to land acquisition. *See* HR 1604 RH § 8 (Oct. 28, 1997). But by the time the bill was introduced onto the House floor, it contained the following new language relating to land acquisition:

> (b) Use of Principal.—
>
> (1) The principal of the Self-Sufficiency Fund shall be used exclusively for investments or expenditures which the board of directors determines—
>
> * * *
>
> (C) will consolidate or enhance tribal landholdings.
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> * * *
>
> (4) Any lands acquired using amounts from the Self-Sufficiency Fund shall be held as Indian lands are held.
>
> (c) Use of Self-Sufficiency Fund Income.— The interest and other investment income of the Self-Sufficiency Fund shall be distributed—
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> * * *
>
> (5) for consolidation or enhancement of tribal lands.
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> * * *
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> (f) Lands Acquired Using Interest or Other Income of the Self-Sufficiency Fund.—Any 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.

HR 1604 EH § 8 (undated).[9] Thus, Congress' amendments here show a similar intention to treat acquired lands as *Indian lands* and that the designation of that land status would come later under default land acquisition rules, with the exception of paragraph (f) which called for a mandatory land acquisition but perhaps was a mistake by Congress. If Congress had meant restricted fee status, then it could have indicated as much but declined to do so.

On November 3, 1997, the Senate Committee on Indian Affairs held a hearing on the bill. Michael Anderson, Deputy Assistant Secretary for Indian Affairs, testified in support of HR 1604, noting specifically that his testimony was directed toward the most recent version of H.R. 1604, which was to be presented on the House floor the next day. *See* Judgment Funds of the Ottawa and Chippewa Indians of Michigan, Hearing before the Committee on Indian Affairs of the United States Senate, S. Hrg. 105-413 at 29 (Nov. 3, 1997). In other words, Mr. Anderson's testimony was directed toward the bill that used the language "held as Indian lands are held" in the land acquisition sections for the Bay Mills and Sault Ste. Marie Tribes. Mr. Anderson stated:

> The Department submitted two draft bills in March to Congress, and also has submitted comments on H.R. 1604, as introduced, to Chairman Don Young last summer, on July 15, 1997. We are pleased to note that while most of the suggestions were incorporated within the latest version, that these basically were agreed to, and we now have basic agreement other than a couple of technical amendments.

Id. at 30.

The technical amendments to which Mr. Anderson referred were subsequently delivered to the Senate Committee on Indian Affairs. *See* Letter from Michael Anderson, Acting Assistant Secretary – Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs (Nov. 12, 1997). But that letter did not reach the Senate before its primary vote on HR 1604, which took place on November 9, 1997, and may not have even reached the Senate before its final action on the bill on November 13, 1997, which was to recede from an amendment not passed by the House. This fact is reflected in a letter written by Solicitor John Leshy to the White House's Office of Management and Budget recommending that the President sign the bill:

> The Department submitted a letter setting forth certain technical and clarifying amendments to the bill which did not reach the Senate prior to the vote which took place in that chamber on November 10 [sic], 1997. However, we are considering various administrative and legislative options to address the issues detailed in that letter. Nevertheless, the Department of the Interior supports this legislation as an effective and equitable means of distributing the judgment funds to the affected tribes and lineal descendants.

Letter from John Leshy, Solicitor, to Franklin D. Raines, Director, Office of Management and Budget (Nov. 19, 1997). The President then signed the bill into law on December 15, 1997.

[9] The final version of the MILCSA includes this language. 105 Pub. L. 143 § 108 (1997).

The technical amendments proposed in the Michael Anderson letter included a suggestion regarding Section 7(a)(3). The letter states: "Section 7(a)(3): Delete the last sentence because it is unnecessary." The last sentence to which the letter refers is the sentence at issue here: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." Similarly, the Michael Anderson letter made the following comment about Section 8(b)(4), the nearly identical counterpart for the Sault Ste. Marie Tribe: "Section 8(b)(4) should be deleted because it is unnecessary and adds nothing to existing law." In addition, the Michael Anderson letter states:

> Section 8(f) should be deleted because it is superfluous and conflicts with Section 8(b)(4), if 8(b)(4) is not deleted.[10] 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.

Letter from Michael Anderson, Acting Assistant Secretary – Indian Affairs, to Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs at 2 (Nov. 12, 1997) (footnote added).

An important conclusion may be drawn from these portions of the Michael Anderson letter, as compared to the previous Ada Deer letter. Under the revised language in the bill, the Department was no longer concerned that the land acquisition provisions for Bay Mills could be interpreted to provide for mandatory trust acquisition or implicitly repeal any limitations in IGRA. That is evident by the fact that the Michael Anderson letter did not carry the concern forward as it related to Bay Mills. At the same time, the Michael Anderson letter did raise the concern as it now related to Sault Ste. Marie, where Congress added the trust acquisition language that had previously applied to Bay Mills. As to the new Bay Mills language, the Department seemed basically satisfied. The suggestion that the *Indian lands* sentence should be deleted as unnecessary is evidence that the Department interpreted it to have no true legal effect. The language was unnecessary because there is no need for federal legislation to acquire fee land and then request that the land be placed into trust under the Secretary's discretionary authority, consistent with the Department's statements in the legislative history. My interpretation is consistent with that position. I believe that the term *held as Indian lands are held* served simply as a congressional affirmation that the statute was not changing any of the standard Indian land acquisition rules.

Had Congress retained its original language, the Tribe would have had a strong argument that any lands purchased with Land Trust earnings would have been subject to mandatory trust

[10] It is perhaps not readily apparent how a statutory provision can be both superfluous and conflicting. But I believe that the *superfluous* comment was in reference to the fact that by its plain language, Section 8(b)(4) could be interpreted to apply to any lands acquired using any amounts from the Self-Sufficiency Fund, including both principal and interest income. Under that interpretation, it would not be necessary to have a second section at 8(f) to cover lands acquired using interest from the Self-Sufficiency Fund. This view is also consistent with the Department's characterization of 8(f) as conflicting with 8(b)(4). If 8(b)(4) covered all Self-Sufficiency Fund land acquisitions and was not a mandatory trust directive, then 8(f) would be in conflict if it were interpreted to provide for mandatory trust acquisition of lands acquired using interest income.

acquisition.[11] When the Department raised this concern, Congress responded by amending the bill. By changing the language "shall be held in trust" to "shall be held as Indian lands are held," Congress borrowed a phrase and a strategy from the 19th century treaties, which basically was to decline to set forth any specific directive. Instead of defining with particularity how the tribal estate would be owned pursuant to MILCSA Land Trust purchases, Congress borrowed the phrase *held as Indian lands are held* as a way of declining to change the standard rules. It follows that the standard Indian land rules apply. The Tribe may use Land Trust earnings to purchase land in fee simple; the Tribe may then request the Secretary to take such lands into trust for the benefit of the Tribe; the Secretary retains discretion under 25 C.F.R. part 151 to take such lands into trust; and with any such trust acquisition for gaming purposes, the Tribe is subject to the standard analysis for newly acquired trust lands under IGRA Section 20. Unless and until the Secretary acts to accept those lands into trust, any off-reservation lands acquired by the Tribe with Land Trust earnings are held by the Tribe in unrestricted fee.

The Tribe has argued that Congress rejected the Michael Anderson letter's proposed changes to Section 7(a)(3). But in making that argument, the Tribe was not aware that the Michael Anderson letter failed to reach the Senate in time for consideration. Considering that timing, the only thing that can be gleaned from the Michael Anderson letter is the Department's own position with regard to the language at issue.

As to the Department's comments in the earlier Ada Deer letter, the Tribe argued that Congress actually went the other direction—that Congress replaced the trust language from the bill with the language that such lands "shall be held as Indian lands are held" not only to reject the Department's comment that the Secretary should retain discretion in the matter, but to remove any need for the Secretary to take any action whatsoever by making tribal land purchases restricted fee by operation of law. There is nothing in the legislative history to support the Tribe's view. Nothing in the record suggests that the Tribe requested Congress to make its MILCSA lands automatically held in restricted fee status. And had Congress decided on its own initiative to depart so drastically from the Department's suggestion, one would expect to see some discussion of that fact in the legislative history.

Furthermore, I note that seven years before Congress enacted the MILCSA, it demonstrated that it knew how to specify with particularity that a tribe's land purchases should be held in restricted fee. In the Seneca Nation Settlement Act of 1990, Congress provided:

> LAND ACQUISITION. -- Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the

[11] The Tribe previously asserted that the final language adopted in Section 107(a)(3) created mandatory trust acquisition authority. In a 2002 letter to the Tribe, the Department expressed its interpretation that the language of Section 107(a)(3) creates discretionary trust acquisition authority. Letter from Larry Morrin, BIA Regional Director, to Mr. L. John Lufkins, President of the Bay Mills Indian Community (Sept. 10, 2002).

> comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes [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. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Springs Reservation in accordance with the procedures established by the Secretary for this purpose.

Seneca Nation Settlement Act of 1990, 101 Pub. L. 503 § 8(c) (codified at 25 U.S.C. § 1774f) (emphasis added).

This provision demonstrates that Congress knows how to express its unambiguous intent to place restraints against alienation on acquired land. In the Seneca Nation Settlement Act, Congress not only expressly stated that the land will be held in restricted fee, but it also provided a process for the Secretary of the Interior to determine whether the land should be given special status. This level of detail is in great contrast to the language in the MILCSA. Moreover, the Tribe's submission does not explain why Congress would use the more general phrase in the MILSCA if it had intended to automatically vest lands acquired under that Act with restricted fee status. Indeed, the Department's regulations define "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*." 25 C.F.R. § 151.2(e) (emphasis added). Here, the MILCSA does not reflect a direct imposition of such limitations. It is presumed that Congress knows of its former legislation and passes new laws in view of the provisions of the legislation already enacted. *Navajo Nation v. Dept. of Health & Human Serv.*, 325 F.3d 1133, 1139 n.8 (9th Cir 2003). Therefore, had Congress intended to create restricted fee lands in the MILCSA, it could have followed its precedent in the Seneca Nation Settlement Act and made that intention clear.[12]

Finally, I have considered and rejected an alternative interpretation that the phrase *held as Indian lands are held* in the MILCSA might operate to automatically create the same land tenure as created by the 19th century treaties using the same phrase. In each of those treaties, the United States defined a particular tract of land that was meant to serve as a tribal homeland or reservation. It has since generally been held that unless such treaties stated otherwise, the United States retained the fee title to such lands and the tribes were granted a right of occupancy, with attendant hunting/fishing rights, often characterized as a beneficial or trust interest.[13] But Congress specifically amended the MILCSA bill to remove what could otherwise have been characterized as mandatory trust acquisition language, so it was obviously not its intent to create automatic trust lands. Nor can I interpret the MILCSA to create automatic reservations for the Tribe wherever and whenever the Tribe uses Land Trust earnings to purchase real estate. In this

[12] Even if the MILCSA did transform the Vanderbilt site into restricted fee, the Tribe would still have to demonstrate that it has legal jurisdiction to exercise governmental power over the site in order for the property to be eligible for gaming under IGRA. *See* 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). But because the MILCSA did not transform the Vanderbilt site into restricted fee, I do not have to reach that question.

[13] *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406-408 (1968).

modern era of federal Indian law, Congress knows quite clearly how to create or expand Indian reservations, and it did not do so here.

For these reasons, I do not believe that even a liberal construction of the MILCSA can support the Tribe's position that its Land Trust purchases in fee simple automatically become restricted fee lands under the definition of *Indian lands* set forth in IGRA. Thank you for requesting my opinion on this matter. If you have any questions, please do not hesitate to contact me or Senior Attorney Jeffrey Nelson.

Sincerely,

Hilary C. Tompkins
Solicitor