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HEARING OF THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
REGARDING
H.R. 3994 -- THE TRIBAL SELF-GOVERNANCE ACT AMENDMENTS OF 2007

Good morning, Mr. Chairman and members of the Committee. I am pleased to appear today in support of H.R. 3994, a bill to amend Title IV of the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian tribes.

On behalf of the Mille Lacs Band of Ojibwe, thank you for convening this hearing, and for collaborating with Representatives Boren and Pallone and others in introducing this bill.

H.R. 3994 has the strong support of the Mille Lacs Band. It contains many provisions we and other Indian Tribes have long sought to be written into federal law. We ask that you make every effort to secure early passage of H.R. 3994 by the House and Senate.

My testimony will survey some relevant history, describe why key provisions of H.R. 3994 are needed, and provide some examples of tribal self-governance successes that can and should be replicated. I will urge immediate expansion of Tribal Self-Governance express authority to the Department of Transportation, and eventually, in the form of a consolidated federal grant, to all federal agencies. And finally, I will ask that at some point in the near future you consider utilizing the Self-Governance Program as a vehicle for the federal government, through the Department of the Interior, to enter into a direct relationship with tribal governments in P.L.83-280 states in the area of criminal law enforcement.

## HISTORY

Less than two months ago we celebrated an important, 20-year anniversary in federal Indian policy. It was on September 17th, 1987, that the late Chairman of the Mille Lacs

Band, Art Gahbow, attended a meeting in Philadelphia with several other Tribal Chairman, including Wendell Chino of the Mescalero Apache Tribe, and Roger Jourdain of the Red Lake Band of Chippewa.

They met to discuss plans for the 200th Anniversary of the U.S. Constitution, and what this observation might mean for Indian tribes. It was at this meeting that the concept of what we today call, Tribal Self-Governance, was born. These visionary Tribal Leaders prepared a Tribal Self-Governance path for the rest of us to follow. It was built on six foundations insisted upon by Indian Tribes:

- First, that each federal agency deal with each Indian Tribe on a respectful, government-to-government basis.
- Second, that all federal agency decisions honor the fact that Indian Tribes, as the governments closest to those served, provide the best quality and most efficient services to Tribal members.
- Third, that federal law should allow Tribal government priorities, not federal priorities, to shape what is funded and done in Indian communities.
- Fourth, that federal agencies can and should rely on the fact that the elected leadership of Indian Tribes are, by definition, accountable to Tribal members.
- Fifth, that federal bureaucracies should be down-sized, reformed, and restructured into technical assistance resource centers that aid Tribal governments in meeting the needs of Tribal communities, with the resulting financial savings transferred to Tribal communities for program services.
- And sixth, no function, program, service or activity that is supposed to benefit an Indian Tribe should be kept out of the reach of any Indian Tribe seeking to take the money and do it for themselves.

These six pillars of Tribal Self-Governance – government-to-government relations, delegation of authority to Tribes, deference to Tribal priorities and program design, Tribal accountability, right-sizing the federal bureaucracy, and no program or function off-limits – have served well for the past 20 years. But as with all good ideas that have weathered the storms of time, there is room for improvement. And in some instances, there has been a creeping retreat, rather than steady progress, in implementing these principles. Which brings me to the need for H.R. 3994, the bill before the Committee today.

But first, some Tribal Self-Governance history that is specific to the Mille Lacs Band of Ojibwe. My Tribe was one of the first ten tribes to be involved in the Self-Governance Demonstration Project in the late 1980's, and in 1990 ours was the first Tribe to negotiate a Self-Governance Compact with the Department of the Interior. We soon thereafter negotiated an agreement with the Indian Health Service (IHS). Since then, the project has grown to include more than 300 tribes in BIA and/or IHS Tribal Self-Governance.

I recall our first negotiation with two personal representatives of Interior Secretary Manuel Lujan sitting across the table from us in the double-wide trailer that then served as our tribal headquarters. We opened with prayer in our language and a tobacco pipe made its way around the table. The Mille Lacs Band set the negotiation agenda. We explained what the Band had to have in the way of an agreement. When we reached an impasse, we called our friends on Capitol Hill. Secretary Lujan's aides called him and came back to the table with agreement. Many terms were set in that initial negotiation year, all were founded on the six principles I just described.

The Mille Lacs Band insisted upon, and got, respect from their federal counterparts in these negotiations. And the basic framework of that early agreement endures through to this day. But not without room for improvement. In fact, our nearly 17 years of experience with Tribal Self-Governance and the Department of the Interior tells us that we very much need H.R. 3994 enacted as soon as possible. Here's why.

## WHY KEY PROVISIONS OF H.R. 3994 ARE NEEDED

H.R. 3994 is the product of more than six years of discussion, drafting and negotiation between Tribal and Interior representatives. The bill before you reflects many compromises. In large part, that's attributable to the flexibility of Interior officials. But perhaps even more, it is due to the stamina of Tribal representatives. And our sense that we really need this bill.

The overarching reason we need H.R. 3994 enacted is because, for six years now, the Mille Lacs Band, and many other Self-Governance Tribes, have had to operate under two sets of often conflicting rules. Ever since 2000, when the Congress enacted Title V to govern our Tribal Self-Governance operation of health programs funded by the IHS, the Mille Lacs Band has had to follow two different sets of procedures, meet two different sets of standards, and split its Self-Governance administration into two separate operations.

Congress last reformed Title IV, governing our Interior-funded operations, in 1994. Informed by our experience, Congress improved upon Title IV when it wrote Title V to govern our IHS-funded operations in 2000. But at that time Congress made no changes to Title IV. And so Self-Governance Tribes like the Mille Lacs Band have since then had to maintain different requirements and two sets of investments. Tribal Self-Governance is supposed to streamline Tribal operations and permit consolidation of Tribal effort. Instead, having two different laws, Title IV and Title V, has served to make Tribal administration more complex and difficult. H.R. 3994 would bring Title IV into conformity with Title V. This is long over due.

What follows are some of the key provisions of H.R. 3994 that would bring Title IV into line with Title V, and thereby greatly facilitate more efficient Tribal administration at the Mille Lacs Band and allow our leadership to provide more services within the present constraints of limited federal funding.

Clarify Inherent Federal Function. H.R. 3994 would for the first time narrowly and uniformly define by statute what is an inherent federal function that cannot be transferred to an Indian Tribe. Section 401(8). Such a narrow and uniform definition will greatly streamline negotiations and result in a greater transfer of federal Indian funding to the local Tribal community level and assist federal officials in efficiently restructuring the federal administrative structure.

Clearly Identify Tribal Share Funds. H.R. 3994 would add greater clarity to the definition of what is and is not a tribal share, and in combination with the narrow definition of an inherent federal function, greatly streamline negotiations and result in a greater transfer of federal funding to the local level. Section 401(11).

Ban Unilateral Federal Changes to Agreements. H.R. 3994 would stop a practice that has reappeared in recent years of attempts by certain federal officials to make unilateral changes to Tribal Self-Governance agreements after they have been negotiated. Section 405(c). It would require the specific consent of a Self-Governance Tribe before any changes are made.

Resume the Transfer of Central Office Functions to Tribes. A tribal share of all funds related to all functions, including those organized within the BIA Central Office, are to be made available to a requesting Self-Governance Tribe. Sections 405(b)(1) and 409(c). Tribal shares of Central Office functions were provided to some Self-Governance Tribes in the early to mid-1990's until the Administration collaborated with the Appropriations Committees and then-Senator Slade Gorton to stop this through an appropriations rider.

Resume the Transfer of Office of Special Trustee Functions to Tribes. A tribal share of all funds related to all functions, including those organized within the Office of Special Trustee (OST), are to be made available to a requesting Self-Governance Tribe. Sections 405(b)(1) and 409(c). Tribal shares of the OST were provided to some Self-Governance Tribes in the early to mid-1990's until the Administration moved some trust-management functions from BIA to OST and tried to claim they were beyond the negotiation authority of Self-Governance Tribes.

Transfer Non-BIA Functions to Tribes. Likewise to be made available to a requesting Self-Governance Tribe is a tribal share of funds related to all functions provided by non-BIA/OST offices of the Interior Department for the benefit of Indians because of their status as Indians or with respect to which Indian Tribes or individuals are the primary or significant beneficiaries. Section 405(b)(2). The Department has been reluctant to transfer significant authority or funding to Indian Tribes under the existing authority of Title IV, so further precision in this authority is included to encourage greater cooperation by the Department in response to Tribal negotiations.

Streamline Negotiations With Final Offer Authority. One of the most important changes to Title IV in H.R. 3994 is in the "final offer" provisions that have worked so well to facilitate negotiations with IHS under Title V. Section 407(c). When negotiations reach

an impasse, Section 407(c) would specific timeframes and standards by which the Department must respond to a Tribe's "final offer". Similar provisions in Title V have streamlined negotiations with IHS since 2000.

Make Uniform Burden of Proof Standards in Appeals. As in Title V, when negotiations break down, or other grounds arise for legal appeal by an Indian Tribe of a federal decision, H.R. 3994 would assign to the Department the burden of proof to demonstrate by clear and convincing evidence that its decision is validly made. Section 407(d). This approach has worked well with IHS since 2000. Having the same legal standard and procedure for Interior as IHS would facilitate Tribal administration.

Expand Tribal Construction Authority. Where an Indian Tribe has hired or contracted with licensed professionals regarding health and safety considerations in the design and construction of a facility, H.R. 3994 would clarify that, as in Title V with the construction of clinics and hospitals with IHS funds, the responsibility and accountability for adherence with standards rests with the Indian Tribe and its professional certifications. Section 408(c). This approach will reduce the duplicative costs of federal engineering oversight while guaranteeing compliance with industry standards.

Make Investment Standard Uniform for Titles IV and V. One advantage of current authority for advance lump sum funding is that an Indian Tribe can invest those funds until they must be spent during the program year. However, while hundreds of millions of IHS funds are annually invested by Indian Tribes under the "prudent investment standard" pursuant to Title V, the BIA has declined to allow Indian Tribes to similarly invest funds transferred to Indian Tribes under Title IV. As a result, Indian Tribes have had to maintain two separate investment portfolios, losing the advantages of a single and coordinated investment structure. H.R. 3994 would conform Title IV authority to Title V authority and permit an Indian Tribe to invest its Title IV advance funds using the prudent investment standard. Section 409(j)(3).

Expedite Regulation Waiver Requests. Tribal requests to waive certain regulatory requirements have often gone ignored in the past two decades. H.R. 3994 would resolve this in a manner similar to the one used in Title V, by applying specific timeframes and standards by which the Department must respond to a Tribe's request for waiver of a regulation. Section 410(b).

Bring Unfettered Self-Governance Authority to Federal Indian Roads Programs. Ever since Congress amended SAFETEA-LU, the roads program, to authorize direct self-governance agreements between the Department of Transportation (DoT) and Self-Governance Tribes, the lack of precision in the statute has slowed its implementation. Accordingly, I and other Self-Governance Tribal leaders are asking that you add a provision to H.R. 3994, a new Section 419, which would state simply and effectively that the Secretary of Transportation shall enter into funding agreements under Title IV with any Tribe that elects to utilize the authority of Title IV to govern any funds made available to Indian tribes under SAFETEA-LU, and that the negotiation and

implementation of each such funding agreement shall be governed by Title IV, as amended by H.R. 3994.

Proposed new Section 419

"SEC. 419 APPLICABILITY OF THE ACT TO THE DEPARTMENT OF TRANSPORTATION

(a) The Secretary of the Department of Transportation shall carry out a program within the Department of Transportation to be known as the Tribal Transportation Self-Governance Program.

(b) Notwithstanding any other provision of law, the Secretary of Transportation shall enter into funding agreements under this title with any Tribe who elects to utilize the authority of this title to govern any funds made available to Indian tribes under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59) or successor authorities.

(c) Notwithstanding any other provision of law, the negotiation and implementation of each funding agreement entered into under this section shall be governed by the provisions of this title. "

Explanation of proposed new Section 419 to H.R. 3994

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) authorized tribal governments to receive funding from and participate in a number of Department of Transportation (DOT) programs as direct beneficiaries without having the Bureau of Indian Affairs or state governments acting as intermediaries. For example, section 1119(g)(4) of SAFETEA-LU [23 U.S.C. § 202(d)(5)] provides for tribal governments to enter into contracts and agreements directly with the Secretary of Transportation to undertake transportation functions "in accordance with the Self-Determination and Education Assistance Act ..." (ISDEAA). Some DOT Federal Highway Administration (FHWA) officials have interpreted this "in accordance with" language to somehow mean that FHWA-Tribe agreements under SAFETEA-LU *are not* ISDEAA agreements, and they have refused to include standard Title IV provisions in their agreements. This erroneous interpretation has sharply limited the number of FHWA-Tribe agreements that have been executed, and has generated a great deal of confusion and disagreement over the scope and extent of the applicability of Title IV to those agreements. The proposed new Section 419 to H.R. 3994 will fix these problems by establishing a Tribal Transportation Self-Governance Program within the DOT. It directs DOT, upon the request of an Indian tribe, to enter into funding agreements under Title IV for any programs and funding made available to tribes by SAFETEA-LU. This section makes clear that the negotiation and implementation of those funding agreements will be governed by Title IV. Section 419 would echo existing authority in SAFETEA-LU and clarify in Title IV itself that Title IV applies to these DOT funds and programs.

## TRIBAL SELF-GOVERNANCE SUCCESSES

My predecessors who led my Tribe imagined a future in which Mille Lacs Band members were politically empowered, self-determining, self-governing, and self-sufficient. They

imagined a world in which the Mille Lacs Band not only was able to take care of its members, but also to take care of future generations of Band members.

My generation of leaders must still look to our imagination for such a world. Our world today remains beset by hurdles thrown on our path, some by petty federal bureaucracies, some by county officials who attack our rights, and some by a neglectful and distracted Congress (which of course would be obviated by prompt enactment of H.R. 3994, a move that would go a long way towards making our imagined world a reality).

Nevertheless, our imagination has begun to pay off:

- Over 300 Indian Tribes now participate in some form of Tribal Self-Governance. With enactment of H.R. 3994, and the greater administrative efficiencies that it will bring, I am certain that number will increase.
- For the Mille Lacs Band, and for many other Indian Tribes, the last decade or so has seen our Tribal members choosing to return home to their Indian communities and Reservations. There are more and more jobs available in Indian Country. There is more and more meaningful work here than was available 20 years ago. In utilizing our resources, we are always striving to protect our way of life, our culture, our ceremonies, and our language. Tribal Self-Governance has been the main cause of this, as we govern ourselves according to our own Tribal priorities.
- One benefit of Self-Governance is that many Indian people who previously served as federal employees have now come back to offer their training and expertise to their own tribal communities. As our Band government and enterprise workforce grows, I imagine a time when the Band reciprocates by sending Band-trained experts to serve in federal agency positions, under a reverse-Intergovernmental Personnel Act or reverse-IPA program.
- Self-Governance has enhanced our ability to govern. Our sovereignty is inherent, but our ability to govern ourselves properly was difficult when permission was required of the federal government for our every fiscal move. The enactment of Title IV changed that. We enact budgets. We determine program priorities. We administer services. We manage programs. We recruit, hire and fire a Tribal workforce. We raise Tribal revenue from a variety enterprises and activities. We are responsible and accountable to our Band membership. Much of this can be traced to our assumption of federally-funded programs, functions, services and activities under Tribal Self-Governance.

## IMMEDIATE ISSUE ON LAW ENFORCEMENT

There is an additional issue that has come up only in the last few days, and that is the need for a federal law that would authorize, perhaps on a demonstration or pilot basis, a Self-Governance Tribe like the Mille Lacs Band to utilize an "escape valve" to resolve conflicts in the provision of law enforcement services in certain emergency situations where public safety requires it.

The Mille Lacs Band provides significant law enforcement services on our Reservation. We spend approximately $2 million a year on law enforcement activities and employ 19 full-time tribal police officers who are certified under both State and Tribal law. These officers have exercised primary responsibility for policing the portions of the Reservation in which most Band members live, and routinely provide assistance to the County Sheriff's Office as well the police offices in local towns.

The State of Minnesota also has law enforcement jurisdiction on our Reservation, under a federal statute known as Public Law 83-280. In 1991 and again in 1998, we entered into cooperative agreements with Mille Lacs County to coordinate the provision of law enforcement services on the Reservation.

Less than a week ago, we ended the agreement with Mille Lacs County. While we have continuing law enforcement and other agreements with neighboring counties, we were unable to continue the agreement with Mille Lacs County because of the rise in hostile actions by County leadership directed toward Band members, Band law enforcement officials and Band Government.

Under our agreements with the County, our officers had referred many criminal cases to the County Attorney for prosecution. Typically, we referred cases involving non-Indian defendants, over whom we have no prosecutorial jurisdiction, or Indian defendants when the seriousness of the charge warranted greater penalties that could be imposed under State law.

Recently, the relationship between the County and the Band deteriorated. The County Attorney insisted that we refer *every* case handled by our law enforcement officers to the County for prosecution, even when those cases involved only Band member defendants suspected of violating Band laws. The County Attorney also insisted that our officers not confer with our attorneys before deciding which cases to refer, and demanded that our attorneys not communicate with Band officers about such matters.

These extraordinary demands apparently stemmed from the County Attorney's challenge to the existence of the Mille Lacs Reservation. In a memo to County employees last year, the County Attorney ordered all employees to stop referring to Indian land as "reservation" land and to purge County files of all references to the Reservation. She has since prosecuted cases against Band members for "civil/regulatory" violations on the Reservation, over which the State has no jurisdiction under Public Law 83-280, on the theory that there is no Mille Lacs Reservation.

In addition, her office caused an arrest warrant to be issued for a Band child who had been the *victim* of a crime, on a failure to appear charge. This led to the child's arrest, incarceration overnight, and appearance in court in handcuffs, leg shackles and an orange jail jumpsuit. The County Attorney has defended and refused to apologize for this treatment of a child crime victim.

We will continue to provide law enforcement services on our Reservation, notwithstanding the end of our Agreement with the County. However, the County Attorney is now threatening to sue to challenge our officers' law enforcement credentials, and may take other actions that hinder cooperation among law enforcement agencies on the Reservation.

Public Law 83-280 has a provision for "retrocession" of state jurisdiction to the federal government, but it requires the consent of the state. University of Minnesota Law Professor Kevin Washburn testified several months ago about the need for an escape valve in situations like ours. When retrocession of P.L. 83-280 jurisdiction is not an option, the federal government should find a way to enter into a direct relationship with an Indian Tribe for purposes of law enforcement. We would like to work with the Committee to develop such authority and make it part of Title IV. I will be providing your staff with a copy of Professor Washburn's statement.

A Tribal option for retrocession, that is, a choice, would further Tribal self-government by putting key law enforcement questions in the hands of the Tribe and force the state to be responsive to the Tribe if it wishes to keep the Tribe as a partner. It would also further public safety because it would make the government accountable to the community it is supposed to be serving. If a Reservation community believes that the state is doing a good job, then the state can continue. But if the state is doing a poor job, then it can install a federal/Tribal system in which Tribal officials will be forced to exercise greater accountability for public safety.

## WHERE WE MUST GO AFTER H.R. 3994 IS ENACTED

About twelve years ago, the Mille Lacs Band sat down with the Clinton Administration and looked at whether we could move Tribal Self-Governance to the next level. We sought to consolidate into one single agreement **all** federal dollars the Band was eligible to receive. This would bring us closer to restoring the full, government-to-government relationship that our treaties once provided. To the Mille Lacs Band, this is a logical progression of Self-Governance and we are very interesting in pursuing this idea.

There is no sound policy reason why Tribal Self-Governance must be limited to the BIA and IHS and Tribal roads programs. Tribes receive funds aimed at Tribal communities from many different federal agencies: housing and community development grant funds from HUD, rural development grants from USDA, environmental program funds from EPA, child and family grant funds from HHS's Administration for Children and Families, addiction and mental health funds from HHS's Substance Abuse and Mental Health Services Administration, education grants from DoEd, energy development funds from DoE, border security funds from DHS, and on and on.

Just imagine the creativity and efficiencies that would be unleashed if Tribal governments would be able to consolidate all these sources of funding into one Tribal Self-Governance

agreement and administer the funds under one set of rules that respected Tribal priorities, Tribal accountability, and Tribal Self-Governance.

## CONCLUSION

Title IV is in dire need of a major overhaul to bring it into conformity with Title V. Without prompt enactment of H.R. 3994, Tribes like the Mille Lacs Band will be forced to waste time, effort and money maintaining duplicative and separate Tribal Self-Governance structures and programs. Reforming Title IV, as proposed in H.R. 3994, will bring great efficiencies to our Tribal administrative efforts.

I also urge you to join with me in imagining into reality one single Tribal Self-Governance agreement for all federal funding.

But first, enact H.R. 3994 and get Title IV caught up to Title V.

If you have any questions, please contact me at (320) 532-7486. You may also contact Tadd Johnson, the Mille Lacs Band's Special Counsel on Government Affairs, at (320) 630-2692.