

**TESTIMONY OF KAREN R. DIVER
CHAIRWOMAN FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA
ON S. 920
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**

July 31, 2013

I am Karen R. Diver, Chairwoman of the Fond du Lac Band of Lake Superior Chippewa. On behalf of the Fond du Lac Band, I would like to thank the Committee for scheduling this hearing to consider S. 920, and for inviting me to testify regarding this bill. I would also like to thank Senator Franken and Senator Klobuchar for their work in considering the Band's request for this measure and for introducing this bill.

The Fond du Lac Band and Carlton County, Minnesota have been working jointly on a number of matters. One of these, which brings us to Congress, is our effort to find ways in which the Band and the County can address problems arising from checkerboard land ownership within the Fond du Lac Reservation, and enhance the ability of both the Band and the County to make the best use of the lands that each of us holds.

S. 920 would enable us to do this. S. 920 would provide the Band with authority under federal law to convey title to land that the Band holds in fee simple. This would address the last remaining step that is needed in order for the Fond du Lac Band and Carlton County to implement an agreement that we have for a land exchange that will greatly benefit us both and which has been processed through and satisfied all other requirements of Minnesota law. Carlton County's support for this measure is set out in a letter dated July 3, 2013 from Robert Olean, Chair, Carlton County Board of Commissioners, to Maria Cantwell, Chairwoman of the Senate Committee on Indian Affairs. A copy of the County Commissioner's letter is attached to this testimony and we ask that it be included as part of the record.

We also note that a companion bill to S. 920, H.R. 2650, was introduced in the House on July 10, 2013 and referred to the House Natural Resources Committee, Subcommittee on Indian Alaska Native Affairs which held a hearing on that bill on July 23, 2013.

Background

The Fond du Lac Band occupies a Reservation in northeastern Minnesota that was carved out of our aboriginal territory pursuant to our 1854 Treaty with the United States. Treaty of September 30, 1854, 10 Stat. 1109. Our Reservation is but a fraction of the Band's aboriginal territory and is the home of more than 6,700 Tribal members and other Indians who live on and near the Reservation. The 1854 Treaty established a Reservation that encompassed more than 101,000 acres. While the Treaty provided that this was to be a permanent homeland for the exclusive use and benefit of the Fond du Lac Band, as a result of the federal allotment policies in the early Twentieth century, a considerable part of our Reservation lands were opened to private entry by homesteaders and others. Over the years, many of those lands were forfeited for nonpayment of taxes, and have since been administered by the County with title held by the State of Minnesota. Land-ownership within the Reservation is checkerboarded, with tax-forfeited

lands held by the County intermixed with trust land held by the Fond du Lac Band and our Band members.

The checkerboard landownership significantly limits both the Band's and the County's ability to make effective use of our lands. Several years ago, the Band and the County began to look for ways in which to work together to improve this. We determined that we could do this through a land exchange, and the Band and the County subsequently entered into an agreement to implement a land exchange.

The Band and the County have worked jointly on this land exchange and it will greatly benefit both the Band and the County. The land exchange involves 1,451 acres of land located outside the Fond du Lac Reservation which are owned in fee simple by the Band. These lands would be exchanged for tax-forfeited lands of equivalent value (approximately 3,200 acres) that are administered by Carlton County which are located within the Fond du Lac Reservation.

By this land exchange, both the Band and the County can consolidate scattered tracts of land into areas that can be more effectively managed and productively used. The land that would be transferred by the County to the Band lies within the Fond du Lac Reservation. Because these lands are intermixed with Indian trust lands, and tend to be of poorer quality, there are limits to the County's ability to effectively use them. A transfer of this land to the Band, however, will greatly benefit the Band by providing land on which the Band can construct much-needed housing for Band members as well as areas that can be preserved in their natural state to enhance Band member hunting and gathering opportunities.

The land that would be transferred from the Band to the County is held by the Band in fee simple, lies outside the Reservation, and is very good timber land. The transfer of these lands to the County will greatly enhance the County's forestry resources. Independent third party appraisals have been done and the property to be exchanged is of equivalent value.

Why legislation is needed.

The proposed land exchange has been processed through and met all of the requirements of Minnesota law for such an exchange. Minn. Stat. Ch. 94.344. This includes the appraisals, public hearings, environmental review, and title review. However, because the federal Non-Intercourse Act, 25 U.S.C. §177, prohibits any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" unless authorized by Congress, Minnesota advised the Band and the County that the State cannot give final approval to the land exchange without an Act of Congress authorizing the Band to convey its title to this land.

The Non-Intercourse Act has been in effect since the earliest days of the Republic. Under that statute, a sale or other conveyance of tribally-owned land is of no effect unless the sale or conveyance is made pursuant to either a treaty with the United States or federal statute. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677-678 (1974). *See also Cohen's Handbook of Federal Indian Law*, §15.06 at pp. 1027-1039 (2012 ed.) ("*Cohen's Handbook*"). The statute is broadly written.

In recent years, however, questions have been raised about whether the restrictions contained in 25 U.S.C. §177 would apply to land purchased by a tribe without federal involvement and held by the tribe in fee simple. See *Cohen's Handbook*, §150.06[4] at pp. 1034-36. To date, the United States Supreme Court has not resolved that question. In its most recent decision where the issue was raised, the Court stated that “[t]his Court has never determined whether the Indian Nonintercourse Act, which was enacted in 1834, applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe.” *Cass Cnty., Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n. 5 (1998). The Court there declined to decide that question because the issue had not been presented to or considered by the lower federal courts in that case. *Id.* The Supreme Court has not since resolved the issue left open by the *Cass County* case.

To address this Congress has, in other circumstances, provided the necessary federal authorization for Indian tribes to convey interests in tribally-owned fee lands. Two such examples involve other tribes in Minnesota. In particular, Act of June 20, 2000, Pub. L. 106-217, 114 Stat. 344, provides that the Lower Sioux Indian Community in Minnesota “may lease, sell, convey, warrant, or otherwise transfer all or any part of the Community’s interest in any real property that is not held in trust by the United States for the benefit of the Community” “without further approval, ratification, or authorization by the United States.” Similarly, in the Native American Technical Corrections Act of March 2, 2004, Public Law 108-204, section 126, 118 Stat. 542, Congress did the same for the Shakopee Mdewakanton Sioux Community in Minnesota, authorizing the Tribe to convey land it holds in fee simple to others without further federal approval.

S. 920 would do the same for the Fond du Lac Band. S. 920 is modeled on the 2000 and 2004 statutes that were enacted for the other Minnesota tribes. S. 920 would provide the necessary congressional authorization for the Fond du Lac Band to convey its title to the lands that the Band holds in fee simple, and thereby enable the Band and the County to complete their proposed land exchange.

While the immediate need for this legislation is the current proposed land exchange, the Band and the County have identified other lands which are appropriate candidates for similar exchanges in the future. Accordingly federal legislation that would generally permit the Band to convey land that the Band holds in fee simple – as done in S. 920 – will facilitate similar transactions in the future.

Conclusion

The Fond du Lac Band and Carlton County have worked together to find ways to meet our shared interest in improving our ability to effectively use and manage our lands so that we can better meet the needs of the people we serve. S. 920 would provide the Band with the federal authorization needed to complete the land exchange that would serve those objectives.

I would be pleased to answer any questions that the Committee may have and to provide any additional information that the Committee may need to review this. We very much

appreciate the Committee's consideration of this important matter, and ask that the Committee favorably report on this bill.

Miigwech. Thank you.