*MILLE LACS BAND OF CHIPPEWA INDIANS*
*Judicial Branch of Tribal Government*

Opinion of the Solicitor General

12-OSG-84

TO: Henry Davis, Commissioner of Administration

FROM: Jay Kanassatega, Solicitor General

SUBJECT: Legality Review of Contracting with the State of Minnesota

You have requested an opinion whether the Band may enter into contracts with the State of Minnesota when specific provisions of said contract violate the statutes of the Mille Lacs Band. The following is submitted as a binding opinion pursuant to Band Statute 1024-MLC-3, Section 19.01.

In 1932, Chief Justice John Marshall set forth one of the most basic and enduring principles which established the political independence and self-governing status of Indian tribes in the case Worcester v. Georgia, 31 U.S. (6 Pet.) 515. Of equal importance, this decision held that the political existence of the tribes was closely linked to the federal government and restrained by terms of treaties, federal statutes and restraints implicit in the protectorate relationship. As such, the tribes remain independent and self-governing political bodies. In another case the Court found that Indian tribal governments were recognized by the federal government, but not created by it Talton v. Mayes, 163 U.S. 376.

The federal government has "plenary and exclusive power" to deal with Indian tribes. Bryan v. Itasca County, 426 U.S. 373, 376 N. 2 (1976), including in particular the power to "regulate and protect the Indians and their property from interference by a state." Id. (quoting Board of Commissioners v. Seber, 318 U.S. 705, 715 (1943)). Perhaps because, at times, "the people of the States where they are found (have been the tribes) deadliest enemies," United States v. Kagama, 118 U.S. 375, 384.(1886). "(t)he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." McClanaham v. Arizona State Tax Commission, 411 U.S. 164, 168 (1973).

Absent federal law to the contrary, state courts do not have jurisdiction over actions involving Indians arising on reservation lands. Williams v. Lee, 358 U.S. 217 (1959). "Congress has . . . acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation . . . . Significantly, when Congress has wished the states to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied." Id. at 220-21.

Star Route, Box 194, Vineland, Minnesota 56359 (612) 532-4181

It is true that Congress has granted jurisdiction to the State of Minnesota over actions involving individual Indians who reside on territory under the jurisdiction of the Mille Lacs Band of Chippewa Indians. That grant of jurisdiction does not extend, however, to the tribal government structure/body of the Band. As the Supreme Court said: "there is notably absent (from Public Law 280) any conferral of state jurisdiction over the tribes themselves." Bryan v. Itasca County, 426 U.S. at 389. Thus, any assertion of state jurisdiction to compel the Band, a federally recognized and historical tribe with aboriginal title to enter into contracts which violate specific statute or policy of the Band would be held as inconsistent with Federal and Band law and invalid.

The Band's immunity from state jurisdiction, as a federal Indian tribe with inherent soverign powers, does not justify any denial of public assistance to Band members when such denial is based upon the Band's illegal consent via contract to provide such services. Band members are citizens of the Band first, of the United States second and of the State of Minnesota third and such a denial founded in contractual stipulations which violate Band law would constitute a violation of the constitutional guarentee of equal protection of the laws. In addition, I suspect that there is no statutory basis upon which the state could deny public assistance to which eligibility standards are met by Band members, and, therefore, such denial would violate Minnesota State laws as well.

In any event, the courts have held repeatedly that a selective denial of public benefits or rights to Indians is unconstitutional. One line of cases hold that the denial to Indians of services provided to other persons is a denial of equal protection. Thus, in Piper v. Big Pine School District, 193 cal. 664, 226 P. 936 (1924), the court held that "the denial to children whose parents, as well as themselves, are citizens of the United States and of this state, admitance to the common school solely because of color or racial differences without having made provisions for their eduction equal in all other respects to that afforded other persons of any other race or color, is a violation of the provisions of the Fourteenth Amendment . . . ." 226 P. at 928-9.

Other state benefits which cannot be denied to Indians include welfare payments, Acosta v. San Diego County, 126 Cal, App. 2d 455, 272 P. 2d 92 (1954), and mental health care, Bad Bear v. Fall River County Subcommission for the Mentally Retarded, 1 Ind. L. Rep. No. 2 at 35. (1973).

The Mille Lacs Band is a federally recognized Indian tribe. As such, it has inherent soverign powers and sovereign immunities from state jurisdiction. See United States v. Wheeler, 435 U.S. 313, 322-23 (1978). The state therefore can not assert contractual authority over the Band and to do so would therefore be of no force and effect.

Although the cases cited in the previous paragraphs do not deal specifically with the provision of energy assistance, food and nutritional services, employment training and assistance and any other like type service which is available to other qualified persons in Minnesota, their relevance for any selective denial to Band members would arguably be unconstitutional as well. Therefore, contracts for the provision of services to Band members by the Band can not be imposed upon the government for the Mille Lacs Band as a take it or leave it proposition nor, if the Band refuses to enter into any contractual arrangement for services can the State selectively deny eligible Band members these services.

A second concern which arises from the previous discussion is the Band's statutory authority to contract for services with the State of Minnesota. The Band does possess constitutional authority without specific Congressional intent or authorization to "consult, negotiate and contract and conclude agreements on behalf of its respective Reservation with Federal, State and local governments" . . . Article VI, Section 1(c) of the Constitution of the Minnesota Chippewa Tribe. However, restraint was placed upon this consent in the enactment of Band Statute 1024-MLC-3, Section 38.04, "Full faith and credit will be given to public acts, records and judicial proceedings of all other Reservations and all Federal and State jurisdictions that have enacted a full faith and credit provision in their constitution or statutes." The second restraint is the Band government can not consent to mandates which diminish or limit the soverign power of the Band if the Band is possessed of exclusive right of regulation. Since the State of Minnesota has no authority to impose its civil laws upon the Band government, it would be illegal for the Band to consent to such imposition of state civil or administrative law, Band Statute 1011-MLC-5, Section 12. Neither, can such consent be accepted through terms and conditions of contracts.

Another principle which arises from federal Indian law prevents adjudication of civil disputes involving the Band is that both federal and state courts lack jurisdiction to determine intratribal disputes as tribal governments are immune from suit in both federal and state courts. It does therefore appear as though the Band has been granting civil regulatory authority to the State of Minnesota over the Band through a contractual mechanism through the Band's provision of services to its citizens. To continue this process violates Federal and Band Statutes.

There exists no federal statute to readily answer this question related to conferral of jurisdiction through a contracting mechanism. Additionally there is no established procedure to accomplish this task if so desired. What is clear, however, is that no official of Band has the authority to confer state jurisdiction by virtue of contract. Neither, can the Band unilaterally confer additional jurisdictional authority to the State of Minnesota without clear expressed intention of Congress to mandate and extend their civil regulatory authority over tribal government.

It may be argued, however, that the presence of the Band Assembly's ratification of the contract constitutes sufficient power grant to extend the state's civil regulatory authority. This is contrary to other applicable and controlling federal statutes. However, should the Band seek to grant such authority, specific legislative enactment would be required as the first step of the process. Since this type of legislation would grant additional jurisdiction not conferred in the Act of August 15, 1953 (67 Stat. 588, P.L. 83-280), the Band Assembly would be mandated to seek referendum vote of its constituency (with no less than two-thirds of the people granting consent for passage), Act of April 11, 1968 (82 Stat. 78; P.L. 90-284). Additionally, the legislative enactment would require Secretary of Interior approval because of the direct federal interest involved.

For the reasons indicated above, it is my opinion that it is illegal for any officer of the Band to enter into a contractual relationship with the State of Minnesota under contractual documents presently utilized. Further, it is my opinion that present contract stipulations illegally confer upon the State, civil regulatory authority when no such authority exists in law. The foregoing opinion shall be legally binding unless annulled by the Court of Central Jurisdiction or amended by the Band Assembly. Should you require further information, feel free to contact me.

THE SOLICITOR GENERAL

DATED at Vineland this 9th day of December, 1983.

OFFICIAL SEAL OF THE BAND