LETTER OPINION
2000-L-68

May 5, 2000

Ms. Linda Hickman
Williams County State's Attorney
PO Box 2047
Williston, ND 58802-2047

Dear Ms. Hickman:

Thank you for your letter asking questions about the Trenton Indian Housing Authority. I apologize for the delay in responding.

You ask if the Trenton Indian Housing Authority has any limits to its "area of operations." There are, in general, three places to look for an answer to this question: state law, tribal law, and federal law.

North Dakota statutes address the "area of operation" for city and county housing authorities. N.D.C.C. §§ 23-11-01(1), 23-11-11. Leaving aside the question of whether the state even has the power to define a tribal housing authority's area of operation, nothing in state law addresses the issue. So, state law does not confine the Trenton Indian Housing Authority's operations to any particular area.

It is possible that tribal law or the Trenton Indian Housing Authority's own governing by-laws or policies define its area of operation. I don't have ready access to and am unaware of any such tribal documents. You might conduct your own investigation into these sources to determine if there is anything relevant.

In 1996 Congress enacted the Native American Housing Assistance and Self-Determination Act. 25 U.S.C. §§ 4101-4212. The Department of Housing and Urban Development is to implement the Act through its Office of Native American Programs. 25 U.S.C. § 4102. Officials from HUD's Denver Office of Native American Programs as well as HUD's legal department informed my office that Indian housing programs are governed by the 1996 Housing Act.

Under that Act, HUD makes block grants to tribes for affordable housing activities. 25 U.S.C. § 4111(a). These activities are to be implemented on reservations and "other Indian areas." 25 U.S.C. § 4131(a). There is not an Indian reservation in the area around Trenton or in Williams County. State v. Gohl, 477 N.W.2d 205, 208 (N.D. 1991). The Act, however, broadly defines "Indian area." It is "the area within which an Indian tribe or a tribally designated housing entity . . . provides assistance under this Act for affordable housing." 25 U.S.C. § 4103(10). There has not been any litigation

over the meaning of "Indian area" and the Act's legislative history, which is sparse, doesn't shed any light on Congress' understanding of it.

The implementing regulations also define "Indian area" and equally broadly. "Indian Area means the area within which an Indian tribe operates affordable housing programs or the area in which a [tribally designated housing entity] is authorized by one or more Indian tribes to operate affordable housing programs." 24 C.F.R. § 1000.10(b) (1999). Thus, federal law doesn't appear to put much of a limit on where a tribal housing authority may operate.[1]

The 1996 Act's apparent failure to limit the area of operations of Indian housing authorities has led a commentator to state that "[t]his may be the basis of future problems." Elizabeth Brown, "The Future of Native American Housing Programs: State vs. Tribal," reprinted in Oklahoma Sup. Ct., Sovereignty Symposium XII 8-2, 8-6 (1999). The article states that the Act "does not require the tribes to obtain consent . . . before operating within the area of another housing authority, it only requires [the] tribe to authorize the action." Id.

Your second question asks if there are any limits on the Trenton Indian Housing Authority's ability to purchase property and remove it from the county's tax rolls. This is a broad question. I would prefer to have a more defined set of circumstances before discussing what limits, if any, there may be on a housing authority's ability to acquire property and thereby exempt it from tax. As a general comment, however, so long as the housing authority's purchase and use of property furthers the public purpose of providing affordable housing, the tax exemption of N.D.C.C. § 23-11-29 applies. See N.D.C.C. § 23-11-01(9)(b); Ferch v. Housing Auth. of Cass County, 59 N.W.2d 849, 865 (N.D. 1953).

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[1] The Act's preliminary "findings" state that there is a need for affordable housing "on Indian reservations, in Indian communities, and in Native Alaskan villages." 25 U.S.C. § 4101(6). I don't believe, however, that this statement would be construed to limit the breadth of "Indian area" which appears later in the Act. An implementing regulation of the Act, 24 C.F.R. § 1000.302, wherein it defines "formula area" could be read to limit a tribal housing authority's area of operations, but I doubt a court would adopt such an interpretation. Congress seems to have intended the Act to have broad application. E.g., 142 Cong. Rec. H11613-14 (daily ed. Sept. 28, 1996) (statement of Rep. Lazio); S12405-06 (daily ed. Oct. 3, 1996) (statement of Sen. McCain).

Your third question concerns my 1996 letter to Parshall's city attorney. The letter states that even if the state Legislature removes Indian housing authorities from the property tax exemption, "principles of federal Indian law" may nonetheless still exempt the property of such entities from taxation. 1996 N.D. Op. Att'y Gen. L-183 (Oct. 23 to William Woods). You ask me to expand upon this.

Until the state removes the exemption your question is academic and one I'm not inclined to address outside of a specific factual situation. Nonetheless, a simple example would be if the housing authority were to transfer its property to the United States, which would then hold it in trust for the authority. Land owned in trust by the federal government for the benefit of a tribe or tribal member is exempt from state and local taxation. 25 U.S.C. § 465; McCurdy v. United States, 264 U.S. 484, 486 (1924); United States v. Rickert, 188 U.S. 432, 437-39 (1903); Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978).

Furthermore, in 1996 the tax-exempt status of Indian-owned land was being hotly litigated. In 1992 the Supreme Court ruled that states could tax at least some Indian-owned land even if it was on a reservation where the reservation land was originally made alienable when patented in fee simple under the General Allotment Act of 1887. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). Lower courts struggled with interpreting this decision; some limited it to its facts and others read it broadly to allow state taxation of any land owned in fee by tribes and tribal members. E.g., Leech Lake Band of Chippewa Indians v. Cass County, 108 F.3d 820 (8th Cir. 1997); United States v. Michigan, 106 F.3d 130 (6th Cir. 1997); Southern Ute Indian Tribe v. Board of County Commr's, 855 F. Supp. 1194 (D. Colo. 1994), vacated on other grounds, 61 F.3d 916 (10th Cir. 1995); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993).

In 1998 the Supreme Court again addressed the issue. Its decision in Cass County v. Leech Lake Band of Chippewa Indians, 118 S.Ct. 1904 (1998), brought more order to the field and confirmed a fairly broad right of states to tax reservation land owned in fee by tribes and tribal members when Congress has expressly made the reservation lands taxable or when Congress has made the reservation lands freely alienable. Although more is known now about the tax-exempt status of Indian land than in 1996, all taxation issues have not been resolved and I do not, as mentioned, want to give a blanket answer to a taxation question without the benefit of specific facts and circumstances.

In your last question you describe a scenario in which a tribal member takes title to property from the Trenton Indian Housing Authority but then transfers it back to the authority. While the tribal member owned the land in fee, it probably would have been taxable. You ask whether the property reacquires tax-exempt status by its reconveyance back to the housing authority.

The state statute exempting the property of housing authorities from taxation is broad. "The property of an authority, including an authority created under Indian laws recognized by the federal government . . . is exempt from all taxes and special assessments . . . ." N.D.C.C. § 23-11-29. "It is clear that the legislative intent [of this statute] is that any property held by a housing authority . . . for public purposes shall be exempt from taxation." Ferch v. Housing Auth. of Cass County, 59 N.W.2d at 865. Nothing in the statute requires that housing authorities, to enjoy the exemption, acquire their property in any particular way. If the property is held to further the purposes for which Indian housing authorities are established, it is entitled to the exemption.

The city of Williston also recently asked questions about the Trenton Indian Housing Authority. Enclosed is a copy of my response to the city.

Sincerely,

Heidi Heitkamp
Attorney General

cmc/pg
Enclosure
cc: E. Ward Koeser, President, Williston Board of Commissioners
Everette Enno, Chairman, Trenton Indian Service Area
John Skowronek, Special City Attorney