

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-01

Date issued: January 7, 1992  
Requested by: Jim Kusler  
Secretary of State

- QUESTION PRESENTED -

Whether a business incorporated under the laws of the Three Affiliated Tribes is a foreign corporation for the purposes of N.D.C.C. ch. 10-22.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a business incorporated under the laws of the Three Affiliated Tribes may be a foreign corporation for the purposes of N.D.C.C. ch. 10-22.

- ANALYSIS -

Businesses have incorporated under law enacted by the Three Affiliated Tribes, the governing tribal authority on the Fort Berthold Indian Reservation. Such corporations may desire to transact business beyond the boundaries of the reservation. If such a corporation is a foreign corporation, it may obtain a certificate of authority from the Secretary of State authorizing it to do business throughout North Dakota. N.D.C.C. ' 10-22-01. If a business incorporated by the Three Affiliated Tribes is not considered a foreign corporation, then such entity is not entitled to a certificate of authority, but must incorporate under the laws of North Dakota and receive a certificate of incorporation from the Secretary of State if it wishes to do business beyond the reservation boundaries but within North Dakota. N.D.C.C. ch. 10-19.1. A foreign corporation may obtain a certificate of authority more easily than the North Dakota incorporation process.

Chapter 10-22 of the North Dakota Business Corporation Act governs foreign corporations. Section 10-22-01 requires foreign corporations to obtain a certificate of authority from the Secretary of State prior to transacting business in the state. Neither this statute nor any other statute in ch. 10-22 defines "foreign corporation." However, N.D.C.C. ' 10-22-01, as well as other statutes in ch. 10-22, refer to the "state or country" where the foreign corporation is registered. N.D.C.C. " 10-22-05(1)(4), 10-22-06, 10-22-14(1). Therefore, if the Three Affiliated Tribes is a state or country, then the entities it incorporates are foreign corporations able to obtain a certificate of authority.

"Country" is "[t]he territory occupied by an independent nation or people. . . . In the primary meaning 'country' denotes the population, the nation, the state, or the government, having possession and dominion over a territory."

BLACK'S LAW DICTIONARY 351 (6th ed. 1990) (emphasis added). The Three Affiliated Tribes and its members do not constitute an independent nation or people. They are subject to the plenary authority of Congress. United States v. Wheeler, 435 U.S. 313, 323 (1978) (the "unique and limited" sovereignty of Indian tribes "exists only at the sufferance of Congress and is subject to complete defeasance"). In addition, tribal authority over the land and people within the reservation has limits. See, e.g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (a tribe has only limited authority to regulate land use in those areas of a reservation where the character is predominantly non-Indian); Montana v. United States, 450 U.S. 544 (1981) (a tribe does not have authority to enforce its hunting and fishing regulations against a non-Indian on fee-owned land); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (a tribe does not have criminal jurisdiction over a non-Indian). Therefore, the Three Affiliated Tribes is not a country within the meaning of ch. 10-22.

Also, in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831), the Court ruled that tribes are "clearly" distinguished from foreign nations. See also United States v. Kagama, 118 U.S. 375, 381 (1886) (holding that tribes are not foreign nations); Pub. Serv. Comm. v. Edward Motor Transit Co., 39 N.Y.S.2d 119, 121 (N.Y. S.Ct. 1943) (holding that tribes are not foreign nations).

It is, however, less clear whether the Three Affiliated Tribes

is a state, for the term "state" is subject to two interpretations, one restrictive and one broad. In its restrictive interpretation "state" means a component state of the United States of America. The Three Affiliated Tribes has never been admitted by Congress into the Union as a state, as is required by U.S. Const. art. IV, ' 3. This provision also provides that "no new State shall be formed or erected within the Jurisdiction of any other State." Courts have often addressed the issue of whether Indian tribes are states of the Union and generally conclude that they are not. E.g. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-93 (1989) (tribes are not states for purposes of the commerce clause); White Mountain Apache Tribe v. Bracher, 448 U.S. 136, 143 (1986) (making the general conclusion that "Tribal reservations are not States"); United States v. Kagama, 118 U.S. 375, 381 (1886) (tribes are not states); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) (same); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 n.5 (9th Cir. 1990) (tribes are not states under a provision of the RICO law); Barta v. Oglalla Sioux Tribe, 259 F.2d 553, 556-57 (8th Cir. 1958) cert. denied 358 U.S. 932 (1959) (tribes are not states for purposes of the Fourteenth Amendment). Contra Larch v. E. Band of Cherokee Indians, 872 F.2d 66, 68 (4th Cir. 1989) (finding that a provision of the Parental Kidnapping Prevention Act referring to "State" included tribes, but in doing so relied in part upon general principles of comity).

The broad meaning of the term "state" is simply a "body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength." Ex. Parte Corliss, 114 N.W. 962, 980 (N.D. 1907) (Spalding, J., dissenting). See also Beagle v. Motor Vehicle Accident Indemnification Corp., 254 N.Y.S.2d 763, 765 (N.Y. S.Ct. 1964), rev'd on other grounds 274 N.Y.S.2d 60 (N.Y. App. Div. 1966); Delaney v. Moraitis, 136 F.2d 129, 130 (4th Cir. 1943). The Three Affiliated Tribes is a body politic, for it is a defined group of people organized not only politically but also culturally and racially.

Unfortunately, there is nothing in the legislative history of N.D.C.C. ch. 10-22 that indicates whether the legislature intended "state" to have a broad or a limited meaning. Without question, the legislature should be asked to clarify whether corporations incorporated by North Dakota's tribal governments, as well as tribal governments in other states, are foreign corporations and by that status are entitled to

the certificate of authority provided for in N.D.C.C. ' 10-22-01. Until the legislature resolves the question, the Secretary of State has the discretion to treat tribally incorporated entities as foreign corporations entitled to a certificate of authority or as entities that must incorporate under North Dakota law to do business beyond the boundaries of a reservation.

ATTORNEY GENERAL'S OPINION 92-01

January 7, 1992

Page 4

- EFFECT -

This opinion is issued pursuant to N.D.C.C. '54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Nicholas J. Spaeth  
Attorney General

Assisted by: Charles Carvell  
Assistant Attorney General

ah