1105-09

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UNITED STATES GOVERNMENT

Memorandum

SEP 2 5 1978

Land Operations
Oneida

TO : Field Representative, Oneida

DATE: 09-22-78

Return to Frank

FROM : Great Lakes Agency, Land Operations

SUBJECT: Transmittal of Field Solicitor's letter to Oneida Tribal Chairman

This is in response to our September 21st, telecon regarding the Solicitor's opinion on the Oneida Tribes' sewer and water controversy.

We are sending you a copy of the Solicitor's September 15th, letter to the Oneida Tribal Chairman. This states his opinion on the problems regarding sewer-water service to the Airport property owned by the Tribe.

Charles A. McCuddy

Charles A. McCuddy
Natural Resources Specialist

5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

September 15, 1978

Mr. Purcell Powless
Oneida Tribe of Indians of Wisconsin, Inc.
Route #4
DePere, Wisconsin 54115

Re: Water and Sewer Service for Oneida Tribe's Airport Property

Dear Mr. Powless:

For some time, the Oneida Tribe has been trying to obtain water and sewer service for its airport property from the Village of Ashwaubenon. Such services are necessary so that the Tribe can proceed with plans to develop the property. The Tribe will construct the water mains with grant funds from the Economic Development Administration, and is willing to pay for hookup and the usual service charges. Originally, the Village told the tribe that it could connect its property to the Green Bay sewer system, but recently the Village has attempted to condition the provision of services on the Tribe's grant of a road right-of-way to the Brown County Highway Commission. The Tribe would like our opinion on what its rights are with respect to obtaining water and sewer service from Ashwaubenon.

A recent court decision, Chase v. McMasters, Civ. No. 77-1317 (8th Cir., April 5, 1978), addressed the question of whether a municipality may deny a water and sewer service to land held in trust for Indians. In that case, an individual Indian lived on a parcel of land within the city limits of New Town, South Dakota; title to the land was in the United States in trust for her. Although she had paid special assessments and offered to pay hookup charges and service fees, the town refused to extend water and sewer service to her land while it was in trust status.

The Eighth Circuit found that holding land in trust status is one way in which the United States fulfills its guardianship responsibility to Indians. New Town may not, said the court, do anything which would interfere with the carrying out of the United States' guardianship responsibility. Conditioning the provision of water and sewer services on the termination of trust status is such an impermissible interference with federal policy.

Similarly, the Village of Ashwaubenon may not attach conditions to the provision of water and sewer services to the Oneida Tribe's airport property. It has already been determined by court decision in United States v. Brown

County, Civ. No. 75-C-248, (E.D. Wis., November 3, 1976), that Brown County cannot force the Tribe to grant a road right-of-way across the airport property by condemnation, and the Village may not withhold water and sewer services in an attempt to coerce the Tribe into agreeing to the right-of-way. Since the Tribe is willing to pay hookup and service charges, the Village should provide the services as it previously promised to do.

Sincerely,

(Sgd) Elmer T. Nitzschke

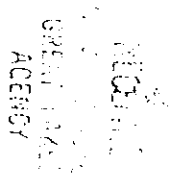
Elmer T. Nitzschke
Field Solicitor

cc: Minneapolis Area Office, BIA
Great Lakes Agency, BIA
Regional Solicitor, Boston

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

November 16, 1976

Mr. Edmund Manydeeds
Acting Superintendent
Great Lakes Agency
Bureau of Indian Affairs
Ashland, Wisconsin 54806



Attention: Housing

Re: Application of State Building Code

Dear Mr. Manydeeds:

We received a telephone inquiry from your staff concerning the applicability of state building codes and the like to projects on trust lands. As you know, this office has taken the position that the State of Wisconsin has no jurisdiction to enforce its regulations in these matters. We have corresponded on this problem in relation to the Oneida Reservation's Post Office building. Numerous letters have been exchanged with the architects, Nichols and Barone, and the Wisconsin Department of Industry, Labor, and Human Relations.

In reviewing that correspondence, you will note that the state Attorney General was asked to render an opinion on the subject. However, to date it has not been completed. We suggest you review the previous correspondence to formulate a response in this situation. Of significance are the federal court decisions in Santa Rosa Band v. Kings County and Bryan v. Itasca County, copies of which we previously supplied.

If after reviewing the materials referred to above, you still have questions regarding a response to the state, please advise.

Sincerely,

Elmer T. Nitzschke

Elmer T. Nitzschke
Field Solicitor

1105-09

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Great Lakes Agency
Ashland, Wisconsin 54806

IN REPLY REFER TO:
Tribal Operations

October 12, 1979

Memorandum

To: Area Director, Minneapolis Area

From: Superintendent

Subject: Request for Solicitor's Opinion

Enclosed is a memorandum from the Oneida Field Representative and a letter from the Oneida Tribal Chairman, Purcell Powless, dated October 10, 1979 for the Field Solicitor's opinion on whether or not the City of Green Bay can discriminate or deny municipal services to the tribe as indicated in the above enclosed correspondence.

As indicated an early reply would be appreciated.

[Sgd.] Edmund Manydeed

Superintendent

Enclosure

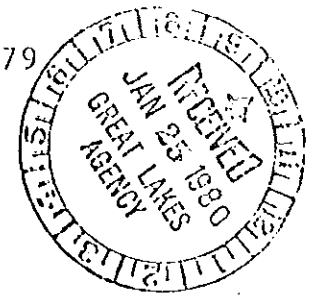
cc: Tribal Chairman, Oneida
Field Representative, Oneida

United States Department of the Interior

IN REPLY REFER TO:

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

January 22, 1979



Mr Edwin L. Demery
Area Director
Minneapolis Area Office
Bureau of Indian Affairs
831 Second Avenue South
Minneapolis, MN 55402

Re: Provision of Municipal Services to Oneida Industrial Park by the City of Green Bay, Wisconsin

Dear Mr. Demery:

By a memorandum dated October 15, 1979, you have asked for our comments and recommendations on the above problem. The Oneida Industrial Park is located within the city limits of Green Bay, Wisconsin. The park is situated on the Oneida Reservation on land held by the United States in trust for the Oneida Tribe. The City and the Tribe are now negotating for provision of necessary municipal services to the Industrial Park. In a letter dated October 10, 1979, from Oneida Tribal Chairman Purcell Powless to Great Lakes Agency Superintendent Edmund Manydeeds, Mr. Powless states that all matters relating to the provision of these services have been resolved except the issue of services which are paid for from property tax revenues. Because the Oneida Industrial Park is located on trust land, it is of course exempt from local property taxation. The services enumerated by Mr. Powless which are financed with property tax revenues are fire and police protection, snow removal, and health, welfare and sanitation services.

Based upon our research, which we will discuss in detail below, we conclude that the City of Green Bay is obligated to provide municipal services to the Oneida Industrial Park on the same basis on which they are provided to other tax-exempt property within the City. However, with respect to those portions of the Oneida Industrial Park which are leased to non-Indian lessees, Wisconsin state law requires that the lessee be assessed an amount equal to the taxes which would be owing if the land were taxable. Furthermore, we suggest that the Tribe consider a contractual agreement with the City whereby the Tribe agrees to make payments in lieu of taxes as reimbursement for municipal services provided to those portions of the Oneida Industrial Park which are leased to Indians.

The tax-exempt status of the Oneida Industrial Park does not alter Green Bay's obligation to provide municipal services to the Park if those services are provided to other tax-exempt property without charge. Cf. Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), cert. denied 439 U.S. 965 (1978) (town could not deny water and sewer service to an Indian couple because of trust status of their property). In Acosta v. San Diego County, 126 Cal.App.2d 455, 272 P.2d 92 (1964), quoted in Monroe Price, Law and the American Indian, 238 (1973), the court held that San Diego County could not deny state welfare benefits to Indians living on reservations, even though the benefits were paid for by tax revenues and the reservation lands were exempt from state and local taxation. Because they are citizens of the state, the court held that Indians have the benefit of the privileges and immunities clause of § 1 of Amendment 14 of the United States Constitution. The court found the tax-exempt status of the reservation lands irrelevant to the issue of whether or not Indians were entitled to welfare benefits. In so holding, the court said: "Many non-Indians in San Diego County live upon tax-exempt property belonging to federal or local government agencies or to religious institutions, but in no such case has this fact been considered a justification for the withholding of any public services . . . In no case has the enjoyment of such special rights or privileges served as a justification for the exclusion of any such favored group from participation in the ordinary rights of citizenship, including the right to equal treatment under state welfare laws." Acosta v. San Diego County, supra, in Price, supra, page 240. On the authority of this case, we believe that the Oneida Industrial Park is entitled to municipal services paid for from tax revenues if such services are routinely provided by the city to other tax-exempt property.

Our research of Wisconsin law leads us to the conclusion that other tax-exempt property within the City of Green Bay, with the exception of state-owned property, is provided tax-supported municipal services free of charge. Wis. Stat. Ann. § 70.119, sets forth procedures by which the state is to reimburse local governments for tax-supported services provided to state-owned tax-exempt property. However, the Wisconsin statutes contain no analogous provisions for reimbursement for municipal services rendered to other types of tax-exempt property, such as religious property. We infer from this that the municipalities provide services to these types of tax-exempt

property without charge, and equal treatment of Indians requires that the services be furnished to Oneida Industrial Park without charge as well.

Where the municipal services are funded in part with money provided to the city by the Federal Government under the revenue sharing program, there may be a federal statutory basis for requiring provision of these services to Indian property within the city limits. The State and Local Fiscal Assistance Act of 1972, as amended, contains a non-discrimination provision at 31 U.S.C. § 1242. That section provides that no one is to be deprived of benefits funded with revenue sharing money because of "race, color, national origin, or sex." Violation of this provision by any state or locality may result in a civil action brought by the Attorney General of the United States. This section has been used at least once to compel a municipality to provide fire and police protection services to reservation land within a city. See United States v. City of Oneida, New York, Civil No. 77 c.v. 399 (D.N.Y. 1977). Although that case never went to trial on the merits, the court-approved settlement required the city to provide fire and police protection to reservation lands. Therefore, if Green Bay uses any of the services in question, the City may be violating Federal law if it refuses to provide them to the Oneida Industrial Park.

Based on the Acosta case and the non-discrimination provisions of the State and Local Fiscal Assistance Act of 1972, we conclude that the City of Green Bay is obligated to provide tax supported municipal services to Oneida Industrial Park regardless of whether the Oneida Tribe reimburses the city for these services. However, it has been a common practice in similar situations for tribes to work out contractual agreements with municipalities under which the tribe makes payments in lieu of taxes to the municipalities as compensation for services. This is in many cases desirable as a matter of fairness. However, it is a question to be decided by the Oneida Tribe and the City.

The situation is complicated in Wisconsin by the existence of Wis. Stat. Ann. §70.11 (8m). The statute deals with the situation in which tax-exempt United States property is "leased to, used by or in the charge or possession of a person and is used for pecuniary profit." In that case, the property itself remains tax-exempt. However, an amount equal to the real and personal property tax assessments which would otherwise be attributable to the property is placed on the roll and charged to the lessee.

This amount is to be collected in the same manner as other local taxes. The state may collect the tax by a direct action against the lessee, but failure to pay the tax does not result in a lien on the federal property.

Insofar as it applies to non-Indian lessees, we believe this statute to be valid. A very similar statute was upheld in Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). In that case, the State of California levied a possessory interest tax on non-Indian lessees of trust property located on the reservation. The tax was levied, not on the land itself, but on the interest of the lessee in possessing the land. As will be the case in the Oneida Industrial Park, the lessees were engaged in profit-making enterprises. The court acknowledged that the burdens of this tax could fall on the tribe by reducing the amount of rental income which it could obtain from its property, but nevertheless sustained the tax. The rationale was that the legal burden, as oppossed to the actual burden, of the tax clearly fell on the non-Indian lessee.

Wis. Stat. Ann. §70.11 (8m), although not denominated as such, is essentially a possessory interest tax as well. Under the reasoning of the Fort Mojave case, the statute is a valid exercise of state power as applied to non-Indian lessees within Oneida Industrial Park, since no lien can be imposed on the property itself.

The court in Fort Mojave assumed, and we agree, that the possessory tax could be applied validly only to non-Indian lessees. Recent cases have clearly established that, unless Congress has specifically authorized it, states and localities do not have the authority to tax Indian income and Indian activities on the reservation. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 372 (1976). Indian lessees of commercial property within Oneida Industrial Park thus will not have to make the payments mandated by Wis. Stat. Ann. § 79.11 (8m).

Our conclusion is that the City must provide municipal services supported by tax money to the Oneida Industrial Park whether or not the Oneidas reimburse the City for those service. However, we suggest that the Tribe consider a contractual agreement with the City providing for payment in lieu of taxes for those service. Because of Wis. Stat. Ann. § 70.11 (8m); any such agreement should provide that

payments in lieu of taxes will be made only as to that property leased to Indians, since non-Indian lessees will already be making payments to the City by virtue of the above cited statute.

We hope this letter has adequately dealt with your questions. Any comments or further questions about this matter should be addressed to Ann M. Spencer.

Sincerely,

Mariana R. Shulstad
For the Field Solicitor

cc: Reg Sol, Boston
Great Lakes Agency

AMS:lj