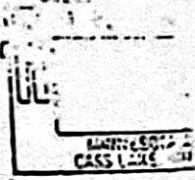




United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240



M 31 1986

BIA-IA-0708

ATTACHMENT 7

To: Assistant Secretary--Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: Authority of the Tribal Executive Committee and the Reservation Business Committees of the Minnesota Chippewa Tribe to authorize tribal courts to adjudicate child custody cases

This responds to a letter that you received and referred to me dated March 25, 1986, from the Fond du Lac Reservation Business Committee urging the reversal of the Field Solicitor's opinion dated June 10, 1985. This opinion concluded that the Constitution of the Minnesota Chippewa Tribe does not delegate to tribal officials the power to authorize tribal courts to adjudicate child custody cases.

The Field Solicitor's opinion was in the form of a memorandum to this office asserting that a petition for reassumption of jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., from the White Earth Band of Chippewa Indians was deficient because the constitution of the Minnesota Chippewa Tribe does not authorize tribal officials to regulate child custody. Both the White Earth Band and the Fond du Lac Band are constituent bands of the Minnesota Chippewa Tribe.

Although Article I, § 3, of the constitution states that one of the purposes of the tribe is "to preserve and maintain justice for its members", the Field Solicitor concluded that such language did not delegate any authority to adjudicate child custody disputes to tribal officials in the absence of any language providing such authority either in Article V, which delegates specific powers to the Tribal Executive Committee, or in Article VI, which enumerates the powers of the reservation business committees. The Field Solicitor took the position that the Tribe would need to amend its constitution in order to authorize tribal courts to adjudicate child custody matters.

This office reviewed the Field Solicitor's advice in 1980 and informed the BIA that we agreed with it. On that basis, the BIA informed the chairman of the White Earth Reservation Business Committee that the Band's petition would not be approved. At the request of the Deputy Assistant Secretary--Indian Affairs, this office again reviewed the issue and concluded, in the attached memorandum dated September 30, 1980, that our previous advice was correct. We concluded that the intent of the constitution was to grant powers through Articles V and VI rather than through Article I or the Preamble. We also concluded that, although the Department should give great weight to a tribe's interpretation of its own constitution, the Department must exercise its own judgment in deciding whether to approve a reassumption petition under 25 U.S.C. § 1918.

We have reviewed the arguments of the Fond du Lac Band contained in both its March 25, 1986 letter and its March 14, 1986 briefing memo and again conclude that the Constitution of the Minnesota Chippewa Tribe must be amended before the Tribal Executive Committee or any of the Tribe's reservation business committees may authorize a tribal court to adjudicate child custody matters. Each of the Band's arguments discussed below.

The Band cites language in Article VI, § 1(b), which authorizes reservation business committees to "make expenditures from Reservation funds for...Reservation purposes" and language in Article I, § 3 stating that one of the purposes of the Minnesota Chippewa Tribe is "...to preserve and maintain justice for its members....". The Band argues that the cited language authorizes the Fond du Lac Reservation Business Committee to expend money for the operation of a court that it has authorized to adjudicate child custody matters because the operation of such a court would "preserve and maintain justice".

The issue, however, is not whether the court can be funded, but whether it can exercise the power, for example, to remove a child permanently from the custody of his or her parents. Article I also provides that the purpose of the tribe is "...to promote the general welfare of the members of the Tribe....". To conclude, as the Band does, that the cited language in Article VI authorizes it to do anything that would further any of the purposes stated in Article I would make unnecessary the detailed listing of specific authorities contained in the remainder of Article VI. It is simply unreasonable to conclude that the drafters of the constitution intended to give virtually unlimited authority to reservation business committees by authorizing them to make expenditures for reservation purposes, but then proceeded to provide several paragraphs detailing explicit authorities that would clearly be subsumed under the categories "promoting the general welfare" or "maintaining justice". Such a conclusion is especially untenable since the U.S. Supreme Court rejected such

an approach with respect to the United States Constitution long before the Constitution of the Minnesota Chippewa Tribe was adopted. Jacobsen v. Massachusetts, 197 U.S. 11, 22 (1905).

The Band points out that the Tribal Executive Committee responded to the 1980 Field Solicitor's opinion by issuing "Constitutional Interpretation No. 1" holding that it, as the "supreme executive, legislative and judicial body" of the tribe, had exclusive authority to interpret its constitution and then issued "Constitutional Interpretation No. 2" holding that both it and the reservation business committees have authority to establish courts. The Band cites Committee to Save our Constitution v. United States, No. 83-3011 (D. S.D. Feb. 24, 1984) (11 ILR 3035) (CSOC), for the proposition that the Interior Department is required to accept without question these interpretations of the tribal constitution.

The court in CSOC overstated the law when it concluded that a tribal court decision on a question of tribal law must "be accepted at face value". Id. at 3035. It is true that the Supreme Court concluded in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that Congress intended to rely on tribal forums for the resolution of many Indian civil rights disputes. It is also true that the Eighth Circuit in Sandwich v. Grassrope, 708 F.2d 335 (8th Cir. 1983), concluded that the BIA should recognize as Lower Brule tribal officials those persons who are recognized as entitled to govern the Tribe pursuant to a judgment entered by a tribal court. It does not follow from those decisions, however, that the BIA must always accept without question the decision of tribal forums on such issues.

Just as considerations of tribal sovereignty dictate that great deference be given to decisions of tribal forums on tribal government matters, considerations of federalism require federal courts to give great weight to the views of state courts on questions of state law. See e.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938). The Supreme Court has noted, however, that Courts are not absolutely bound by state court decisions on matters of state law. For example, a state court may not preclude the U.S. Supreme Court from determining whether the state has unconstitutionally impaired the right of contract simply by ruling as a matter of state law that a contract never existed in the first place. Ibid. Neither is the Supreme Court bound by a state court decision that a litigant abandoned a constitutional claim in state court. Wright v. Georgia, 373 U.S. 284, 289 (1963).

In CSOC the BIA had made an independent decision to recognize the elected tribal council despite allegations it had been illegally elected. The court in CSOC upheld that decision because it happened to coincide with the most recent tribal court decision on the issue. Since the Interior Department prevailed, there was no opportunity for Interior to appeal. The Department, however, continued to assert that it is not required to accept decisions

of tribal forums without question in a subsequent related dispute involving the same tribe. In that case the United States Court of Appeals for the Eighth Circuit required those persons challenging tribal government action to exhaust administrative remedies within the Interior Department before taking their case to federal court. Runs After v. United States, 766 F.2d 347 (8th Cir. 1985). It is unlikely that court would have required exhaustion of remedies within the Interior Department if the Department were required to accept the decision of tribal government officials "at face value".

It is true that 25 U.S.C. § 1911 of the Indian Child Welfare Act confers certain jurisdiction on tribes over Indian child custody proceedings. That provision, however, does not, as the tribe suggests, authorize tribal officials to adjudicate such matters if those officials have not been delegated such authority by the tribal membership in the tribal constitution. Nothing in that section could be construed as preempting the prerogative of the tribal membership to decide whether or not to authorize its officials to exercise the jurisdiction that the tribe has.

The Band also argues that the Department was not authorized to express a view on the powers or authorities of the Minnesota Chippewa Tribe because the tribal constitution does not confer such authority on the Department. Interior's authority in this matter, however, is derived not from the tribal constitution but from 25 U.S.C. § 1913, which permits a tribe to reassume jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., if the Secretary approves a petition submitted by the tribe. The regulation implementing that statute provides that the Assistant Secretary "is to approve the tribal petition only if the tribal constitution authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters." 25 C.F.R. § 13.12(a)(2).

Additionally, the Band takes the position that the Department should have returned the petition without action on the ground that it was unnecessary because the Minnesota Chippewa Tribe has never lost its jurisdiction over Indian child custody matters. The Solicitor has concluded that tribes that are, like the Minnesota Chippewa Tribe, subject to Public Law 83-250 share concurrent jurisdiction with the state on their reservations. 85 F.R. 433 (1978). Despite that ruling, however, tribes may wish to reassume jurisdiction formally in order to establish exclusive jurisdiction and jurisdiction that will not be questioned by state officials who may not accept the Solicitor's view of the law. See 25 C.F.R. § 13.1(b).

We disagree with the Band's assertion that the Department is obligated to construe the tribal constitution as broadly as possible because such a construction will benefit the tribe. If, as we have concluded, the tribal members have not decided to empower the tribal government to decide who should have custody of their children, it is not in the interest of those members for

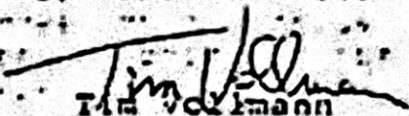
the Department to acquiesce in the decision of tribal officials to assert such power. The usual rule requiring laws passed for the benefit of Indians to be construed liberally and all doubts to be resolved in favor of the Indians has no application where there are Indian interests on both sides of the issue. Northern Cheyenne Tribe v. Hallowbreast, 425 U.S. 649, 655 n.7 (1976). The Department's decision preserves for the tribal membership the right to decide whether it wishes to accord to its government broad power over their family relations.

The Band complains that neither the Minnesota Chippewa Tribe nor any of its other bands were given notice of the White Earth petition before the Department acted on it. In fact, notice of receipt of the petition was published in the Federal Register on April 21, 1980, at 45 Fed. Reg. 26927. That notice states that the petition was under review and could be examined at the Minnesota Agency Office. In any case, the Department's action on the petition had no effect on any other reservation. While the reasoning of that decision may have some effect as precedent on other bands and, indeed, on tribes throughout the nation, the principles of due process do not require a forum to seek out and involve everyone in the nation who might be affected if the rule announced in a specific case is applied to other situations. Were it otherwise, the United States Supreme Court would be compelled to send personal notices to virtually everyone in the nation before considering many of the cases it decides that involve broad constitutional issues.

Finally, the Band points out that the BIA is funding a complete criminal justice system on the Bois Forte Reservation, which is also part of the Minnesota Chippewa Tribe and has funded certain special purpose courts on other reservations of the Tribe. The court at Bois Forte is a CFR court operated by the BIA to administer justice for a band that lacks its own courts. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 n.17 (1978). That court is functioning, not pursuant to the Constitution of the Minnesota Chippewa Tribe but pursuant to Interior Department regulations adopted pursuant to 25 U.S.C. §§ 2 and 9, see United States v. Eberhardt, 789 F.2d 1354, 1359 (1986), and pursuant to the Department's annual appropriations act, see Oliphant v. Suckumish Indian Tribe, 435 U.S. 191, 196 n.7 (1978).

The Department encourages the establishment of tribal courts to provide due process with respect to any matter over which the tribe has jurisdiction. For that reason courts with jurisdiction over the exercise of tribal hunting and fishing rights, for example, have been funded because Article V, § 1(f) and Article VI, § 1(c) authorize the Tribal Executive Committee and the reservation business committees respectively to administer tribal assets. Similarly, regulation of business on the reservation is authorized by Article V, § 1(g) and Article VI, § 1(d). Funding for tribal courts to exercise jurisdiction over such matters is consistent with the conclusion in the Field Solicitor's opinion that such courts may not adjudicate child custody matters.

For these reason, we reaffirm our earlier conclusion that the constitution must be amended before the tribal government may exercise jurisdiction over child custody disputes.


Tim Vollmann