



THE MILLE LACS BAND OF
OJIBWE INDIANS

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Office of the Solicitor General

OPINION OF THE SOLICITOR GENERAL
No. 40-18

On February 28, 2018, the Speaker of the Band Assembly inquired about the propriety of Title 26 not being codified, annotated, or publicly available.¹ The Speaker subsequently emphasized the need for a formal solicitor's opinion,² addressing the aforementioned concerns and explaining the absence of Solicitor General involvement in the legislative process.³ Finally, the Speaker criticized this office for its seeming failure "to ensure laws that are passed are codified and posted with the rest of Mille Lacs Band Statutes."⁴ This opinion will analyze the three principal noted concerns, which conflate with the remainder.

Codification:

The Solicitor General has a responsibility "[t]o aid in drafting public bills . . . or amendments thereto *on the request* of the . . . Speaker of the Assembly."⁵ The Solicitor General additionally maintains an obligation "[t]o certify to [sic] the ordinances of Band government and codify said ordinances into Band Statutes."⁶ Regarding Title 26, former Solicitor General James M. Genia (1993-99) certified a predecessor version of the ordinance on July 7, 1998,⁷ and Solicitor General James F. Pence (1992-93) certified an earlier enactment on April 30, 1992, which is not the original version of the law.⁸

The current version of the law recites in the Preamble as follows: "It is enacted by the Band Assembly of the Mille Lacs Band of Ojibwe for the purpose of amending Title 26 (previously amended by Bill 15-02-73-12) referred to as the Compensation of Elected Officials numbered in the Mille Lacs Band Statutes as Title 26."⁹ Inarguably, the codification of Title 26 has occurred.¹⁰ One must assume such codification;¹¹ otherwise, the questions posed above and this analysis that has followed makes no intuitive sense.

Apparently, the Band Assembly has amended Title 26 on two occasions within the past seven years,¹² but on neither occasion did the former Speaker of the Assembly seek assistance in drafting the amendments.¹³ No one from the Office of the Solicitor General ("OSG") attended any corresponding Band Assembly meetings due to a complete lack of knowledge and notice.¹⁴ Furthermore, none of the elected officials, past or present, had provided a copy of Title 26 to the OSG from at least May 2, 2011, until February 20, 2018.¹⁵

Annotation:

The Band's statutes appear in annotated form on the Band Assembly website.¹⁶ The process of annotation, however, does not convert a legislatively adopted bill into a law,¹⁷ or enable such statutory law to appear in a code as a title.¹⁸ More significantly, the OSG is nowhere charged in Band statute with annotating statutes.¹⁹

Public Dissemination:

As a pre-condition to enactment, the Band Assembly must formally seek Band member input on bills seeking to amend Titles 1 and 3-5 and portions of Titles 2 (Chapter 1 – General Provisions) and 24 (Chapter 3 – Procedure, subchapters I-III, entitled “General Provisions,” “Appeals,” and “Certification of Questions of Law,” respectively).²⁰ “The Band Assembly may conduct public hearings on any or all other bills at their discretion.”²¹ Title 26 falls in this latter category, and, therefore, the Band Assembly could permissibly avoid public discussion upon the statute prior to its passage, which appears to have repeatedly occurred.

Once enacted, the Band Assembly has publicly disseminated its statutory titles, with the notable exception of Title 26. Whether the Band Assembly can maintain an entire, or even partial, statutory title as confidential first demands an examination of Title 26, to determine legislative intention, and, secondly, an examination of other constitutional and statutory provisions to determine the legality of a discovered intention of confidentiality.

The starting place for any statutory interpretation “is the language itself.”²² However, in those cases where a literal application would produce an absurd result, “the intention of the drafters or the meaning of the statute, rather than its strict language, controls.” Interpretation of 15[-]92 at 6.²³ “If the language of a Band statute is plain, unambiguous and uncontrolled by other parts of the Band statute or other Band statutes upon the same subject,” then it should be given its customary meaning.²⁴

When attempting to ascertain the “intention of the drafters,” resort to legislative history is a commonly accepted practice.²⁵ But, to reiterate, one typically does not need to examine ancillary sources if statutory provisions lack ambiguity.

Nothing on the face of Title 26 suggests that the Band Assembly intended the statute to remain confidential. As stated above, the law confers administrative authority over the programs created pursuant to the Title unto the Commissioner of Finance.²⁶ The law additionally entrusts the Band’s Court of Central Jurisdiction with addressing certain consequences that might arise from the Title’s operation.²⁷ And, the copy of Title 26 recently provided to this office denotes that the enactment bore the Band’s Official Seal, which “shall be affixed to all official documents.”²⁸

A plain meaning interpretation of Title 26 does not leave one with the impression that the Band Assembly intended to restrict Band member access to the Title.²⁹ Consequently, any such intent must appear within the legislative history, if at all,³⁰ but, presuming its existence, remarks in the official minutes would not ordinarily override the facial neutrality of the statute on this point.³¹ Ultimately, “[i]n the absence of a ‘clearly expressed legislative intention to the contrary,’ the language of the statute itself ‘must ordinarily be regarded as conclusive.’”³²

No Band statute explicitly requires that legislative enactments be disseminated to the general public, either by posting on a non-restricted website or published in another freely available form.³³ In addition, the Band Assembly has not enacted – for general purposes – any legislation analogous to the federal Freedom of Information Act of 1966,³⁴ or the Minnesota Government Data Practices Act.³⁵ However, Band law does require temporary posting of legislative enactments immediately following passage: “Newly enacted bills and laws *shall be posted* in each district within 5 days of enactment *and shall remain posted* until 20 days have passed after enactment.”³⁶ The Band Assembly apparently did not adhere to this mandatory requirement.³⁷

Following the initial posting period, the Band Assembly would need to provide statutory law upon request of a Band member. Otherwise, a Band member would be conceivably incapable of fully exercising his or her civil rights.³⁸ A Band member cannot challenge a tribal law if he or she is not knowledgeable of such law.³⁹ In this regard, the Band Assembly could, and should, have satisfied any Band member requests to obtain Band legislation.⁴⁰ To reiterate, no known constitutional or statutory impediment exists that would render Band Assembly incapable of disseminating its own laws.⁴¹ This official has never offered contradictory advice, although not offering any advice on the subject since previously unaware of the 2012 and 2013 enactments and, more significantly, never being asked.


Todd R. Matha
Solicitor General

3/20/18
Date of Issuance



¹ Text message from Carolyn M. Beaulieu, Speaker of the Band Assembly, to Att’y Todd R. Matha, Solicitor Gen. (Feb. 28, 2018, 12:26 p.m.) (on file with recipient). Speaker Beaulieu also asked whether the latest version of Title 26, pertaining to compensation, violated another Band statute. *Compare* MLB Ordinance 40-13 § 4(b) (establishing base salary levels of the elected officials, including set annual increases), *and id.* § 10 (“In regard to compensation, the elected officials reserve the right to review and amend the compensation plan in even numbered years after July 10 of that year.”), *with* 3 MLBSA § 15 (“No increase in compensation shall take effect during the period for which the existing membership of the Band Assembly has been elected . . .”), *and* MCT Election Ordinance (ed. Dec. 14, 2017) §§ 1.2(A)(2), 1.10(B)(1) (holding tribal regular primary elections on “the second Tuesday in June of even numbered years” and presumptively conducting swearing-in ceremonies on “the second Tuesday in July following elections”). Title 26 does not operate in a manner that requires an amendment to Title 3 given the logical and reasonable interplay between the above provisions. Following a texted response on February 28, 2018, this inquiry had not resurfaced within the below-cited correspondence, and will not receive further consideration here. If necessary, an addendum to this opinion may be issued.

² E-mail from Speaker Beaulieu to Solicitor Gen. Matha (Mar. 1, 2018, 07:29 a.m.) [hereinafter Formal Request] (on file with recipient); *see also* 4 MLBSA § 18(d)(1) (authorizing the Solicitor General “[t]o interpret all laws” and issue “[a]ll said interpretations in the form of Opinion of the Solicitor General”). Title 26 certainly represents a Band law susceptible to such manner of interpretation, which occurs throughout this opinion. *See* 3 MLBSA § 16(a)-(c) (describing the Band’s legislative process, entitled “Passage of laws,” which details how a proposed bill may become a law).

³ Even further, Speaker Beaulieu directly questioned how current Chief Executive Melanie A. Benjamin and former Secretary-Treasurer Curtis L. Kalk “were able to sign off on . . . significant salary increases . . . without Solicitors [sic] involvement or without being public.” Formal Req. Speaker Beaulieu also expressed dismay that “Band Assembly . . . [was] being accused of covering up this statute . . . ; a Band law that was hidden for many years . . .” *Id.* In this regard, the Band Assembly posts Band statutes on its legislative webpage. *See* <http://millelacsbandlegislativebranch.com/statutes> (excepting Title 26) (last visited on Mar. 19, 2018). The Band Assembly possesses “[a]ll legislative political authority,” 3 MLBSA § 1, which obviously encompasses the “power to enact laws.” *Id.* § 2(a); *see also id.* § 8(a)(1) (conferring authority upon District Representatives “to introduce into the Band Assembly appropriate bills . . . for enactment into the laws of the Band”). No known constitutional or statutory impediment exists that would render Band Assembly incapable of disseminating its own laws.

⁴ E-mail from Speaker Beaulieu to Solicitor Gen. Matha (Mar. 2, 2018, 05:54 p.m.) (on file with recipient).

⁵ 4 MLBSA § 18(e) (emphasis added).

⁶ *Id.*

⁷ MLB Ordinance 38-98 at 3.

⁸ Band Assembly Bill 05-01-08-92 (indicating that a prior statute “is hereby repealed and replaced by this enactment”). On February 28, 2018, Commissioner of Finance Adam M. Valdez delivered the available versions of the statute to this office. E-mail from Comm’r of Fin. Valdez to Solicitor Gen. Matha (Feb. 28, 2018, 03:40 p.m.) (on file with recipient). The Commissioner of Finance is responsible for administering Title 26. MLB Ordinance 40-13 § 3.

⁹ *Id.*, pmb1. This statement comports with the statutory requirement that Band laws reflect enactment by the Band Assembly. 3 MLBSA § 28.

¹⁰ By comparison, when the U.S. Congress enacts an entire title of the U.S. Code, e.g., Title 10 – Armed Forces, that enactment represents the “positive law” of the United States. The given title does not differ in any respect from the enacted legislation. “When Congress enacts a title of the Code into ‘positive law,’ it puts its authoritative imprimatur on the language appearing in that particular title of the Code.” *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 378 n.2 (4th Cir. 2001). In contrast, other titles of the U.S. Code, e.g., Title 25 – Indians, represent an accumulation of laws on a particular subject, i.e., “non-positive law,” that has subsequently been arranged and edited by the Office of the Law Revision Counsel, an office of the U.S. House of Representatives. 2 U.S.C. § 285b (2012). Each of the Band Assembly’s enactments, including Title 26, were adopted as complete titles, either as originally passed or later amended, and, therefore, represent examples of “positive law.” No further action is necessary to designate these titles as part of a Band code, and, to reiterate, each obtained version of Title 26 has referred to itself and its predecessor as Title 26.

¹¹ Title 25, entitled “Official Recognition,” appears on the Band Assembly webpage, <http://millelacsbandlegislativebranch.com/statutes> (last visited Mar. 19, 2018), and the Band Assembly recently forwarded a bill intended to serve as Title 27, tentatively entitled “Limited Liability Companies,” to the Chief Executive for formal approval on or around December 20, 2017. *See* 3 MLBSA § 16(c)-(d); 4 MLBSA § 6(l). Chief Executive Benjamin instead vetoed the proposed law. Correspondence from Chief Executive Benjamin to Speaker Beaulieu (Dec. 22, 2017) (on file with author); *see also* 3 MLBSA § 16(g) (signifying “a total veto of the entire bill”).

¹² The author began his first appointment as Solicitor General on May 2, 2011. <https://www.millelacsband.com/government/office-of-solicitors-general> (last visited on Mar. 19, 2018).

¹³ MLB Ordinance 40-13; MLB Ordinance 62-12.

¹⁴ On March 2, 2018, I requested the Band Assembly’s “official minutes,” along with any available audio record or transcription thereof, pertaining to consideration and passage of Title 26, i.e., legislative history, from Parliamentarian Darcie K. Big Bear, but have not yet received a response. E-mail from Solicitor Gen. Matha to Parliamentarian Big Bear (Mar. 2, 2018, 03:18 p.m.) (on file with author); *see also* 3 MLBSA § 10 (“It shall be the duty of the Clerk of the Band Assembly to record all official minutes of the proceedings of the Band Assembly,” which “shall be prima facie evidence of the facts stated therein in the Court of Central Jurisdiction and any other court of competent jurisdiction.”). At a minimum, the official minutes should reflect attendance at the pertinent Band Assembly meetings.

¹⁵ I subsequently contacted former Legislative Counsel Elaine H. Smith (2001-14) on February 28, 2018, at or around 1:20 p.m. CST, and she imparted that the Band Assembly, as formerly constituted, sought to maintain confidentiality of Title 26 due to its inclusion of salary figures. Despite Band statute declaring that the Solicitor General (and by

logical extension – the OSG) is “Interior Legal Counsel of the Band,” 4 MLBSA § 16(a), who must maintain an attorney-client relationship with Band Assembly members, *id.* § 19(a); 24 MLBSA § 1054(b), the Band Assembly perpetuates a system whereby a parallel officer simultaneously serves as interior legal counsel. Band statute, however, does not countenance such a system, but, while this contradiction is apparent, it nonetheless persists. *See* Interoffice Mem. re Status of Legislative Counsel (July 11, 2014) (citing, in part, MLB SOLICITOR GEN. OP. 36-12 at 1 (“The Office of the Solicitor General (“OSG”) serves as the Interior Legal Counsel of the Non-Removable Mille Lacs Band of Chippewa Indians, and not solely the Executive Branch of government.”)). In this instance, if the position of Legislative Counsel were situated within the OSG, the Solicitor General – at some earlier point – would have been privy to the exact nature and contents of Title 26. The OSG has not located any electronic or paper version of the law within its offices. Moreover, Legislative Counsel, if functioning as a Senior Deputy Solicitor General, could have previously offered this very interpretation on behalf of the OSG, after likely consultation with the Solicitor General.

¹⁶ According to the available Preface, “[t]he Mille Lacs Band Statutes Annotated was first published in 1996. . . .” however, while “Historical and Statutory Notes . . . have been updated . . . , the Cross References have not been updated, and are simply retained from the 1996 version” <http://millelacsbandlegislativebranch.com/statutes> (last visited on Mar. 19, 2018).

¹⁷ This occurs by virtue of Chief Executive approval. *Supra* note 11.

¹⁸ The term “statute” can be defined as follows: “A law passed by a legislative body The term *act* or *legislation* is interchangeable as a synonym.” BLACK’S LAW DICTIONARY (10th ed. 2014); *see also supra* note 10.

¹⁹ Returning to an earlier comparison, the Office of the Law Revision Counsel does not annotate the U.S. Code; rather, private companies perform this helpful, but not indispensable, service. For example, Thompson Reuters annually publishes the United States Code Annotated.

²⁰ 3 MLBSA § 16(a).

²¹ *Id.*

²² *See In re Interpretation of Solicitor Gen. Op. 15-92* (MLB App. Ct., Mar. 24, 1993) [hereinafter *Interpretation of 15-02*] at 6 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)) (annulling Solicitor General opinion concerning authority to interrupt the performance of a construction contract and adopting well-known federal canons of statutory construction).

²³ For this proposition, the MLB Court of Appeals cited persuasive federal case law. *Id.* (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

²⁴ MLB SOLICITOR GEN. OP. 18-97 at 1 (quoting *id.* at 7) (endnotes added).

²⁵ *Interpretation of 15-92* at 8-10 (citing, in part, *United States v. Monia*, 317 U.S. 424 (1943)).

²⁶ *Supra* note 8.

²⁷ MLB Ordinance 40-13 §§ 5(c), 6(g).

²⁸ 2 MLBSA § 6.

²⁹ *See Interpretation of 15-92* at 8 (adopting “plain meaning rule” of statutory construction).

³⁰ Regardless, this office has not received the official minutes from the Band’s Parliamentarian. *Supra* note 8.

³¹ Furthermore, any attempt to divine legislative intention from considering an individual lawmaker’s recollection proves a worthless exercise. The U.S. Supreme Court has often reached the same conclusion:

Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition “could have had no effect on the congressional vote.”

Brausewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008)) (citations omitted); *see also Graham County Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 298 (2010) (“A letter by the primary sponsors of legislation ‘does not qualify as legislative “history,” given that it was written 13 years after the amendments were enacted. It is consequently of scant or no value for our purposes.”).

³² *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

³³ The degree to which tribal statutory law is publicly available differs from tribe to tribe. Some tribes wholly decline to post internal law, including constitutional text. *See, e.g.*, <https://shakopeedakota.org/> (containing no searchable database).

³⁴ Pub. L. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2012)).

³⁵ MINN. STAT. §§ 13.001-13.90 (2016).

³⁶ 3 MLBSA § 3(b) (emphasis added); *cf.* REVISED CONST. & BYLAWS OF THE MCT art. XIV, § 2 (“The Reservation Business Committee, upon receipt of a petition . . . , shall submit any enacted or proposed resolution or ordinance of

the Reservation Business Committee to a referendum of the eligible voters of the Reservation.”); *see also* 3 MLBSA § 1 (“The Band Assembly is and shall be the body referred to in the Constitution as the Reservation Business Committee.”). The use of the adverb “newly” in subsection 3(b) does not render the provision applicable only to an initial version of an enactment given the broader terminology used in the preceding subsection and equivalent constitutional provision.

³⁷ *See, e.g., In re Trusteeship Created by Alaska Indus. Dev. & Expert Auth.*, Civil No. 10-2996 (DSD/JJG), 2010 WL 4811899, at *1 (D. Minn. Nov. 19, 2010) (citing, in part, *McDonnell Douglas Corp. v. Iran*, 758 F.2d 341, 346-47 (8th Cir. 1985)) (“The words ‘may’ and ‘should’ generally signify permissive clauses, while the words ‘shall,’ ‘will’ or ‘must’ generally signify mandatory clauses.”).

³⁸ *E.g.*, 1 MLBSA § 8 (setting forth the Band’s equal protection and due process clauses). The MLB Court of Appeals has determined that a Band member must avail him- or herself of the rights and guarantees assured under the Band’s Civil Rights Code when attempting to bring a cause of action against the Band. *Id.* §§ 1-15. “Article XIII of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe guarantees that the *Minnesota Chippewa Tribe* will not infringe the fundamental rights of its members . . . ; Article XIII does not supercede the Mille Lacs Band Civil Right [*sic*] Code as it applies to actions of the Mille Lacs Band Tribal government.” *Costello v. Mille Lacs Band of Ojibwe Indians*, 2011-APP-07 (MLB App. Ct., May 31, 2012) at 7.

³⁹ Certain tribal law is “unwritten,” namely tradition and custom, and Band statute references this fact within various titles. 1 MLBSA § 13; 2 MLBSA § 2; 5 MLBSA § 111(c); 24 MLBSA §§ 1001(c)(3), 2007(a). One, however, may become knowledgeable of tradition and custom by appropriately seeking out and inquiring of a traditional member possessing such knowledge.

⁴⁰ This may have occurred; the OSG has no definitive information to the contrary.

⁴¹ By analogy, successive Solicitors General have issued binding legal interpretations since 1983, and these formal opinions possess the force of law unless legislatively or judicially annulled. 4 MLBSA § 18(d)(2); *see also* <https://www.millelacsband.com/government/office-of-solicitors-general.com> (last visited Mar. 19, 2018) (including every available Solicitor General Opinion). A failure to comply with a Solicitor General Opinion can constitute an offense against the government, potentially leading to a fine and loss of employment. 24 MLBSA § 1212(a). As a result, this office endeavored to publicly post its opinions during this official’s first appointment term. The obvious responsibility to provide such opinions remains upon whoever occupies the position of Solicitor General, and the authorship of any given opinion proves immaterial to this ongoing duty. The existing catalogue of Solicitor General Opinions is attributable to the OSG, as an enduring statutory governmental entity, and not to any one Solicitor General.

INTEROFFICE MEMORANDUM

TO: MELANIE BENJAMIN, CHIEF EXECUTIVE
TODD MATHA, SOLICITOR GENERAL

FROM: SHELLY DAY, ACTING BAND ASSEMBLY CLERK

SUBJECT: NOTICE OF INTENT TO ANNUL SOLICITOR'S OPINION 40-18

DATE: MARCH 23, 2018

CC: BAND ASSEMBLY, STACEY THUNDER



On Thursday, March 22, 2018 the Band Assembly discussed Solicitor's Opinion 40-18. It is the decision of the Band Assembly to give notice of its intent to annul Solicitor's Opinion 40-18, according to the provisions of 3 MLBSA § 17.

The Band Assembly would like to hold a hearing on Tuesday, March 27, 2018 at 1:00 p.m. at the Intercontinental Hotel in St. Paul, MN.

INTEROFFICE MEMORANDUM

TO: MELANIE BENJAMIN, CHIEF EXECUTIVE
TODD MATHA, SOLICITOR GENERAL

FROM: DARCIE BIG BEAR, BAND ASSEMBLY CLERK. *DBB*

SUBJECT: NOTICE OF ANNULMENT OF SOLICITOR'S OPINION 40-18

DATE: APRIL 3, 2018

CC: BAND ASSEMBLY, STACEY THUNDER



On Tuesday, March 27, 2018, the Band Assembly held a hearing pursuant to 3 MLSBA § 17 to discuss the intent to annul the Opinion of the Solicitor General 40-18 ("Opinion"). Solicitor General Todd Matha participated in the hearing and answered questions.

On Thursday, March 29, 2018, Band Assembly discussed the Opinion and voted to annul pursuant to 3 MLBSA § 17 based on the reason the Opinion did not answer nor address all the questions or concerns stated in Secretary-Treasurer Beaulieu's request for an Opinion. Band Assembly requires further discussion and legal analysis on the evolution of Title 26 since 1992.