



THE MILLE LACS BAND OF OJIBWE INDIANS

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Office of the Solicitor General

OPINION OF THE SOLICITOR GENERAL NO. 36-12

The Mille Lacs Band Gaming Regulatory Authority (“GRA”) has formally inquired whether it “falls under the Executive Branch and the Solicitor General’s Office for purposes of selecting GRA legal representatives.”¹ Consequently, the Secretary-Treasurer requested a Solicitor General’s opinion on the question posed by the GRA.² Before proceeding, I must recast the question in terms that accurately correspond with MLB statutory law.

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.³ In contrast, the Band has reserved the right to obtain Exterior Legal Counsel, provided that such counsel “shall be employed pursuant to the provisions of a contract approved by the Secretary of Interior pursuant to the provisions of 25 U.S.C. § 81.”⁴ The Band has never acquired Exterior Legal Counsel under this provision,⁵ but instead contracts with external law firms and attorneys through the OSG when necessary.⁶ In these instances, outside legal counsel acts under the auspices of the OSG.

Therefore, one need not resolve whether the GRA is an Executive Branch sub-entity, but rather whether the GRA is a governmental agency of the Band. In this regard, the enabling statute conclusively responds: “There is hereby established as an agency of the Mille Lacs Band of Ojibwe the Gaming Regulatory Authority”⁷ The GRA, in turn, “shall be governed by the laws of the Band” when “carrying out any function.”⁸ As a result, the OSG presumptively, and presently, provides legal counsel to the GRA as it conducts its statutory duties.⁹ The OSG does not encounter any disqualifying factors that would prevent it from assuming this role.¹⁰

The logical interplay of certain provisions within the Gaming Regulatory Act additionally supports the above conclusion. “The Authority *may* retain such consultants and enter into such contracts as it *may* deem necessary to carry-out its duties” while continuing, “as an agency of Band government . . . , [to] comply with all Band laws.”¹¹ The GRA, in its discretion, may then certainly decline to contract with consultants, but must nonetheless engage the services of legal counsel when performing its monitoring and investigatory functions. “All such investigations and related activities may be undertaken *only* after review by legal counsel that the scope and subject of any such activities complies with Section I of this Title and other applicable law.”¹²

The Gaming Regulatory Act, therefore, requires legal review in connection with essential functions of the GRA, but the Act does not similarly require the retention of consultants. One must conclude that the Gaming Regulatory Act does not contemplate the hiring of legal counsel pursuant to the “consultants” provision. The Act presumes that legal counsel already exists.

The drafters could have easily employed the term, "legal counsel," in each section, which are separated by only a single section. Ultimately, the OSG must "independently uphold the laws . . . of the Band,"¹³ and cannot preemptively surrender its statutory responsibility to do so. The OSG must fulfill its clearly designated role, and continue to serve as legal counsel for the GRA, "an agency of the Mille Lacs Band of Ojibwe."¹⁴



Todd R. Matha
Solicitor General

12/10/12
Date of Issuance

¹ Letter from GRA Chairperson Johnathan L. Benjamin, to MLB Joint Assembly (Oct. 10, 2012) (on file with recipients).

² Letter from Secretary-Treasurer Curt Kalk, to Attorney Todd R. Matha, Solicitor General (Nov. 1, 2012) (on file with recipient).

³ 4 MLBSA § 16, available at http://www.millelacsband.com/Page_BandStatutes.aspx. The authority of the Solicitor General finds its expression in several statutory titles, but principally in Titles 4 and 24, respectively entitled "Executive Branch" and "Judicial Proceedings." In regards to the former, "[t]he Solicitor General . . . shall liberally construe the provisions of th[e] title so as to provide for achievement of the purposes thereof." *Id.*, § 26.

⁴ "[T]he Chief Executive upon the advice and consent of the Band Assembly" can select External Legal Counsel, which may be a single attorney or law firm. *Id.*, § 16(b). However, such counsel(ors) must have a contract approved by the Secretary of the Interior. *Id.* (citing 25 U.S.C. § 81). This provision was likely intended to correspond with an earlier version of the cited federal statute when it required secretarial approval of tribal choice of counsel. Indian Reorganization Act, ch. 576, § 16(e), 48 Stat. 987 (1934). In 2000, this requirement was removed, but the modification did not "alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe." 25 U.S.C. § 81(f)(3) (2012).

⁵ The GRA does not seek to obtain legal assistance via the Exterior Legal Counsel provision. *Infra* note 11.

⁶ The OSG will seek the assistance of outside counsel when confronted with non-waivable concurrent conflicts of interest. 52 M.S.A., R. of Prof'l Conduct ("MRPC"), Rule 1.7 (2012). A state Supreme Court maintains authority to discipline members of the bar pursuant to state rules of professional conduct regardless of whether the alleged improper conduct occurs entirely on tribal land. *Gillette v. Edison*, 593 F. Supp. 2d 1063, 1068 (D. N.D. 2009), *aff'd*, 610 F.3d 1045 (8th Cir. 2010). The OSG may also require specialized support for matters that exceed the accumulated legal expertise of the office, which cannot be reasonably acquired through diligent research and other preparation. MRPC 1.1, 1.16(a)(1).

⁷ 15 MLBSA § 301. Moreover, the GRA was not set up as a semi-autonomous Corporate Body Politic by the Band Assembly. 16 MLBSA § 1101(b). The GRA, however, does retain a significant degree of independence as articulated throughout the Gaming Regulatory Act. *See, e.g.*, 15 MLBSA §§ 302(d)(6) (prohibiting members of the Joint Assembly from becoming GRA appointees), 303(a)(2) (imparting discretionary scheduling authority), 305 (conferring authority to promulgate binding regulations).

⁸ *Id.*, § 302(d)(3)(B).

⁹ The OSG provides wide-ranging assistance to the Band and its numerous sub-entities. *See* MRPC, Scope(18) (acknowledging that an in-house legal department attorney "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients"). "The Solicitor General . . . represent[s] the interests of the Non-Removable Mille Lacs Bands of Chippewa Indians in all legal proceedings . . .," 4 MLBSA § 18(a); "interpret[s] all laws and executive, legislative, secretarial and commissioner's orders and policies on behalf of the Non-Removable Mille Lacs Bands of

Chippewa Indians," *id.*, § 18(d); and "ha[s] the responsibility [to] ensur[e] the enforcement of all the laws of the Mille Lacs Band of Ojibwe." 24 MLBSA § 1054(c).

¹⁰ *Supra* note 6.

¹¹ 15 MLBSA § 304 (emphasis added).

¹² *Id.*, § 306(b) (emphasis added).

¹³ 4 MLBSA § 18(b); *see also id.*, § 18(d) (concerning the obligation of the OSG to interpret Band law).

¹⁴ 15 MLBSA § 301.



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OJIBWE INDIANS

Legislative Branch of Tribal Government

December 17, 2012

Todd Matha, Solicitor General
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

Re: Solicitor's Opinion No. 36-12

Dear Todd:

The Band Assembly is in receipt of Solicitor's Opinion No. 36-12 dated December 10, 2012. At this time, the Band Assembly does not intend to issue notice of its intent to annul this opinion.

If you have any questions in regard to this request, please contact me at x7428.

Sincerely,

Curt Kalk
Speaker of the Assembly/
Secretary-Treasurer

Encl.

cc: Chief Executive Melanie Benjamin
District Representatives

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