LETTER OPINION
2000-L-118

July 5, 2000

Mr. Bill Schoen
President
State Board of Architecture
419 East Brandon Drive
Bismarck, ND 58501-0410

Dear Mr. Schoen:

Thank you for your letter in which you ask whether the State Board of Architecture can exercise, on Indian reservations, the jurisdiction given it in N.D.C.C. ch. 43-03 and as implemented in N.D.A.C. title 8.

The scope of state regulatory jurisdiction within Indian reservations is a difficult and recurring issue. Conf. W. Attorneys Gen., American Indian Law Deskbook 106 (2d ed. 1998). The issue is one our Supreme Court has described as "convoluted." Application of Otter Tail Power Co., 451 N.W.2d 95, 99 (N.D. 1990). Even so, I hope to provide you with some general guidance.

An important beginning principle is that a reservation boundary is not an absolute bar to state regulatory jurisdiction. "Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. . . ." White Mt. Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-25 (1987) ("Our cases . . . have not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent."); Oglala Sioux Tribe of Pine Ridge v. South Dakota, 770 F.2d 730, 734 (8th Cir. 1985) ("The Supreme Court has made it clear that state government is no longer entirely barred from the reservations."). Indeed, "'Congress has to a substantial degree opened the doors of reservations to state laws . . . .'" Rice v. Rehner, 463 U.S. 713, 718 (1983) (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962)). Thus, it is possible that an architect engaged in an on-reservation project is subject to the Board of Architecture's jurisdiction.

There are some situations in which the extent of state jurisdiction is clear. When an on-reservation activity involves only non-Indians, the state may usually regulate it. See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 257-58 (1992); Montana v. United States, 450 U.S. 544, 565 (1981) <PAGE NAME="p.L-119"> ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

Thus, if an architect is not a tribal member and is engaged in an on-reservation project on non-Indian land for a non-Indian client, then the Board of Architecture should assert its jurisdiction just as it would off the reservation.

But when an activity involves only tribal members, "state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mt., 448 U.S. at 144. See also American Indian Law Deskbook at 125-26 (states have jurisdiction over an entirely Indian, on-reservation activity only in exceptional circumstances). Thus, the board probably cannot exercise authority over an architect who is a tribal member and is involved in an on-reservation project for the tribe or a tribal member.

The application of state law is thus fairly clear when the on-reservation activity involves only non-tribal members and when it involves only tribal members. But many non-Indians reside on North Dakota's reservations and many non-Indian entities have a reservation presence. It is, therefore, likely that the Board of Architecture will be presented with situations in which the parties and circumstances are not "all Indian" or "all non-Indian." It is when there is a mix of Indian and non-Indian elements that jurisdictional questions can become complicated.

The Supreme Court's "recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.'" Rice v. Rehner, 463 U.S. at 718 (quoting McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973)). This means that there are no rigid rules to resolve these questions. Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73 (1994). Under the preemption analysis, "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). Thus, the existence of state jurisdiction often comes down to balancing the state, federal, and tribal interests at stake to determine which is paramount.

The state has a significant interest in ensuring that buildings are safely constructed. This requires regulation of architects. The state interest, however, is only one factor in the balancing test.

<PAGE NAME="p.L-120">Another consideration is whether the tribe regulates architects. If there is no tradition of tribal regulation, state jurisdiction is more likely present. Rice v. Rehner, 463 U.S.

at 722, 725; Oglala Sioux Tribe, 770 F.2d at 734; Burlington N. RR v. Montana, 720 P.2d 267, 269 (Mont. 1986); County of Vilas v. Chapman, 361 N.W.2d 699, 702 (Wis. 1985). I do not know whether tribes regulate architects. The tribal codes would have to be examined each time a jurisdictional question arises. If indeed a tribe does not regulate the profession, there is a regulatory vacuum into which the Board of Architecture might be able to step to protect public safety.

Another consideration is the presence of any federal involvement in the activity by, for example, regulating it or as a participant. If the federal government is involved, the tribe's interest is heightened and the state's regulatory interest is diluted. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 839 (1982); White Mt., 448 U.S. at 145-48.

Also, Congress can give states jurisdiction over on-reservation activities. It has the power "to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Thus, if Congress has enacted a statute that directly, or possibly even indirectly, authorizes state authority over Indian activities on reservations, then the state has regulatory jurisdiction. E.g., Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115-16 (9th Cir. 1985). I am unaware of any federal action authorizing or in any way addressing state regulatory jurisdiction over architects in Indian country.

After considering the factors mentioned above and the governing law, I reach the following conclusions about the Board of Architecture's authority over architects engaged in an on-reservation project.

1. If the architect is a non-tribal member engaged in a non-Indian project, the Board of Architecture's working assumption should be that it has jurisdiction over the architect.

2. If the architect is a non-tribal member engaged in an Indian project or a mix of Indian and non-Indian projects, the Board of Architecture might have jurisdiction depending upon a balancing of all the state, tribal, and federal interests at stake.

3. If the architect is a tribal member engaged in an Indian project, the Board of Architecture's working assumption <PAGE NAME="p.L-121">should be that it does not have jurisdiction over the architect.

4. If the architect is a tribal member engaged in a mix of Indian and non-Indian projects, the Board of Architecture might have jurisdiction depending upon a balancing of all the state, tribal, and federal interests at stake.

It is unfortunate that there is not a single, simple rule governing the extent of state regulatory jurisdiction on reservations. Nonetheless, I hope that this provides you with some guidance.

Should the Board of Architecture find it necessary to take disciplinary action against a state-registered architect who resides or works on a reservation, it should proceed as it would in any other disciplinary action. The "reservation character" of the situation should not cause it to act any differently. Architects who seek and obtain board registration, whether on-reservation or off-reservation architects, are subject to all the rules and obligations of the Board of Architecture.

State law requires that anyone practicing architecture as a profession must hold a certificate of registration from the Board of Architecture. N.D.C.C. § 43-03-09. Violation of this requirement is a class B misdemeanor. N.D.C.C. § 43-03-21. If someone without a certificate of registration is offering architectural services on a reservation and is, under the discussion above, subject to the Board of Architecture's jurisdiction, the board should refer the matter to the local state's attorney. It is possible that N.D.C.C. § 43-03-21 may not apply because there are limits to the application of state criminal law to on-reservation activities. That, however, will be a question for the local state's attorney to address, not the board.

Sincerely,

Heidi Heitkamp
Attorney General

cmc/pg