LETTER OPINION
2004-L-18

March 2, 2004

Ms. Mary K. O'Donnell
Rolette County State's Attorney
PO Box 1079
Rolla, ND 58367-1079

Dear Ms. O'Donnell:

Thank you for your letter asking whether the Rolette County Board of Commissioners may assess a $1.00 monthly fee to implement a 911 telephone system in Rolette County, including those lines located within the jurisdiction of the Turtle Mountain Tribe. You also ask what liability issues may arise if a cooperative agreement between the county and tribe is required to implement the 911 system within tribal jurisdiction, and the tribe elects not to participate.

A prior opinion from this office on this subject is helpful in answering your first question. See N.D.A.G. 94-L-227 (copy enclosed). The 1994 opinion concluded that the county could not impose an excise tax on the use of telephone access lines to support an emergency communications system on tribal members within the Turtle Mountain Indian Reservation. It noted the general rule that tribal members within their reservations are generally exempt from the taxing authority of state and local governments.

Central to the 1994 opinion was the distinction between a "tax" and a "fee." See also United States ex rel. Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552, 1557-58 (8th Cir. 1997), cert. denied, 522 U.S. 981 (1997) (enforceability of the assessment turned on whether it was a sales tax or a property tax). As discussed in the prior opinion, a "tax" is an enforced contribution for maintaining governmental functions, while a "fee" is a charge for a requested service. The law defining "tax" and "fee" has not changed since that opinion. See N.D.A.G. 2002-L-48.

Because the assessments on telephone lines are imposed on all residents for maintaining governmental functions, and are not dependent on their consent, they are taxes, not fees.[1] And since Congress has not allowed these kinds of taxes to be

[1] I note that Congress has subjected Indian-owned property, even that within a reservation, to local property taxes. Cass County v. Leech Lake Band of Chippewa

imposed on members of the Turtle Mountain Band of Chippewa within their reservation, Rolette County may not impose these taxes on tribal members, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985),[2] absent an agreement between the county and the Turtle Mountain Tribe authorizing the tax. See Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, 518 F.Supp. 712, 715 (D.C. Wis. 1981) (in the absence of tribal consent or express congressional authorization, state law generally does not govern conduct involving only tribal members); Meyers By and Through Meyers v. Bd. of Educ. of San Juan School Dist., 905 F.Supp. 1544, 1567 (D. Utah 1995) (providing education opportunities to the tribal members is unlikely to interfere with tribal sovereignty, particularly where the tribe has solicited the state's help).

Section 57-40.6-02, N.D.C.C., provides that "[t]he governing body of a county or city may impose a fee," but must "submit[ ] the proposed fee to the electors of the county or city before the imposition of the fee is effective." While the electors must approve the fee, because of ballot secrecy and the fact that not all voters residing on reservations are necessarily enrolled tribal members it would not be known whether a majority of enrolled members voted for or against the resolution. Consent of enrolled members may not be presumed by the vote of the county. Therefore, it is my opinion that Rolette County must obtain the consent of the tribe to levy this tax against enrolled members of the Turtle Mountain Band of Chippewa.

Your second question concerns potential county liability should the tribe elect not to participate and Rolette County implements the 911 telephone service only for the remainder of the county. It is not practicable to envision every type of potential liability and defense that may arise from the hypothetical situation you pose in your letter. However, I will briefly discuss, in general, the more foreseeable type of potential liability that may occur and defenses that might be utilized.

One obvious liability issue arises if an injury worsens or death results because an individual did not have access to 911 emergency telephone services, i.e., can the county be held liable for the increased injury or death because it did not install countywide 911 emergency telephone services. Potential theories of liability for the county or county officials could, for example, range from a simple negligence or

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Indians, 524 U.S. 103 (1998). But, as described above, the tax on telephone lines in question is not part of a property tax and cannot be validated under this limited exception to the general rule prohibiting on-reservation taxation of tribal members. See N.D.A.G. 2002-L-48.

[2] In Montana, the Court held that "Indian tribes and individuals generally are exempt from state taxation within their own territory." See also Conf. W. Attorneys General, American Indian Law Deskbook 125, 314 (2d ed. 1993).

wrongful act claim under N.D.C.C. § 32-12.1-03 to a claim for liability under 42 U.S.C. § 1983 for a constitutional violation or deprivation of civil rights.

Generally, a plaintiff bringing a claim based on negligence must prove four elements: duty, breach, causation, and injury. That is, a person suing for negligence must allege that the defendant owed her a duty of reasonable care and injured her by breaching that duty. Iglehart v. Iglehart, 670 N.W.2d 343, 347-348 (N.D. 2003) (citing Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996)). A political subdivision or employee of it is liable for injury to the same extent a private person would be. N.D.C.C. § 32-12.1-03(1).[3] The general rule is, however, that absent a special relationship, there is no duty to rescue, nor a duty to prevent harm by a third person.[4] Should a claim be based on negligence under N.D.C.C. § 32-12.1-03(1), the county could assert the defense that it had no duty to prevent the injury or death.

In addition, there is no statute or rule in North Dakota creating a duty upon the government to provide emergency telephone services. A number of courts have ruled that there is no affirmative obligation to provide this type of service. See, e.g., Walker v. Meadows, 521 S.E.2d 801, 803 (W. Va. 1999); Hollis v. City of Brighton, 2004 WL 42906 (Ala. 2004); City of Rome v. Jordan, 426 S.E.2d 861, 863 (Ga. 1993). Consequently, the county would breach no duty if it did not provide 911 services. But, as you note, your concern is if the service is made available to county residents outside of the tribe's jurisdiction and a cooperative agreement to provide the service to lines within the tribe's jurisdiction is rejected. Some courts have held that while the

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[3] N.D.C.C. § 32-12.1-03(1) provides that "[e]ach political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant."

[4] The Restatement (Second) of Torts, § 314 (1965), provides that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." See South v. National R. R. Passenger Corp. (AMTRAK), 290 N.W.2d 819, 836 (N.D. 1980) (quoting Prosser, Law of Torts, Section 56 (4th ed. 1971)). "Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. . . ." Id. at 836. Similarly, "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another" absent a "special relation" between the actor and the third person. Restatement (Second) of Torts, § 315.

government has no absolute duty to provide certain services, once it does so, it has the duty of giving each person such reasonable protection as others within a similar area within the municipality under like circumstances. Veach v. City of Phoenix, 427 P.2d 335, 337 (Ariz. 1967); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448, 481 (Tx. Ct. App. 1968). Thus, a claim could possibly be brought under this theory.

A claim could also be brought under 42 U.S.C. § 1983. That section provides a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding . . . ." Id.

Possible defenses to any claims of liability may include lack of a duty (discussed above), statutory immunity, the public duty doctrine, and the practical defense that may be asserted if the county offers the 911 emergency service to the appropriate tribal authorities and they reject it.

Statutory Immunity Defense. States may immunize political subdivisions from liability for a failure to provide emergency services. For example, N.D.C.C. § 32-12.1-03(3) provides, in relevant part:

> Specifically, a political subdivision or a political subdivision employee is not liable for any claim that results from:
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> . . . .
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> d. The failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities; or doing any fire extinguishment or fire prevention work, rescue, resuscitation, or first aid; or any other official acts within the scope of official duties; provided, however, this subdivision does not provide immunity for damages resulting from acts of gross negligence.

(Emphasis added.) Thus, statutory immunity may provide a defense for claims related to the county's 911 services.

Public Duty Doctrine Defense. The public duty defense has been explained by one noted author as follows:

> The public duty rule provides that where a municipality has a duty to the general public, as opposed to a particular individual, breach of that

> duty does not result in tort liability. The rule protects municipalities from liability for failure to adequately enforce general laws and regulations, which were intended to benefit the community as a whole. The public duty rule is not technically grounded in government immunity, though it achieves much the same results. Unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place. . . .
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> The public duty rule does not protect a municipality where there was a "special relationship" between a public official and a particular individual that gave rise to a duty to that individual separate from the official's duty to the general public. The special relationship rule is not only an exception to the public duty doctrine, but also to the tort principle that a person is not liable for the harm caused by others.

18 Eugene McQuillin, The Law of Municipal Corporations § 53.04.25 (3rd ed. 2003) (citations omitted).

Civil Rights Claims Defense. Defenses may also exist to civil rights claims under 42 U.S.C. § 1983. "Since there is no constitutional right to basic public services, the failure to provide police protection may not be a recognized claim under 42 USC §1983 [absent a special relationship]." 18 Eugene McQuillin, The Law of Municipal Corporations § 53.04.50 (3rd ed. 2003). Similarly, in DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195-97 (1989), the Supreme Court held that government lacks a constitutional duty to provide competent emergency services to the general public:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. (Citations omitted.) [S]ee also Youngberg v. Romeo, supra, 457 U.S., at 317 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border"). As we said in Harris v. McRae: "Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . ., it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

(Citations omitted.)

Rolette County's decision whether or not to offer emergency telephone services is an issue of the proper allocation of public safety resources. Thus, the county does not have a duty to provide 911 emergency services to county residents. However, if the county implements a 911 service at all, it must offer those services to all county residents through the election process provided for by N.D.C.C. §57-40.6-02. This requirement would be met for tribal members if Rolette County offers the appropriate tribal officials an agreement whereby enrolled members of the tribe will have access to 911 services. A tribal refusal to enter into an agreement would likely be a defense to a claim of liability for discrimination or denial of equal protection or other claim. Again, however, a liability claim could be asserted under a myriad of factual and legal circumstances that may not be anticipated or foreseen at this time and, as a result, cannot be definitively addressed in this letter.

Sincerely,

Wayne Stenehjem
Attorney General

djh/pg
Enclosure