



ALAN WILSON
ATTORNEY GENERAL

February 21, 2019

Commissioner Raymond Buxton, II
R. Alexander Pate, II, Esq.
South Carolina Human Affairs Commission
PO Box 4490
Columbia, SC 29240-4490

Dear Commissioner Buxton and Mr. Pate:

You have requested an opinion from this Office regarding the applicability of South Carolina's Fair Housing Law to the Catawba Indian Nation. In your letter, you state the following:

The South Carolina Human Affairs Commission's mission, as affirmed by the General Assembly, is to eliminate and prevent discrimination in employment, housing, and public accommodations. The Human Affairs Commission works to eliminate housing discrimination and to ensure equal opportunity for all people through leadership, education and outreach, public policy initiatives, investigation of fair housing violations, and enforcement.

The Commission has recently received questions regarding its jurisdiction over property and housing providers located on Catawba Indian Nation lands.

The jurisdictional limits placed upon the Commission's investigations into alleged discrimination by a housing provider are found in the South Carolina Fair Housing Law ("FHL"), S.C. Code Ann. § 31-21-70. Unlike the jurisdictional limits of the South Carolina Human Affairs Law¹ at S.C. Code Ann. §1-13-30(e), the FHL does not, on its face, limit application to Native American Tribes located in South Carolina.²

¹The Human Affairs Law governs employment discrimination complaints and other non-housing human rights issues.

² S.C. Code Ann. § 31-21-70(D) contains provisions for religious organizations to use preferences for members of the same religion in the provision of housing, but is not implicated in the questions presented below.

The Catawba Indian Tribe of South Carolina (“Catawba Indian Nation” or “CIN”) is the only federally recognized tribe in the state of South Carolina. While there is an extensive body of case law addressing the relationship between sovereign tribes, the federal government, and the states, the CIN’s relationship with the state of South Carolina is, perhaps uniquely among recognized tribes and other states, largely governed by statute. The Catawba Indian Claims Settlement Act (“Settlement Act”), S.C. Code Ann. § 27-16-10, *et seq*, delineates the terms of the relationship between the state and the CIN.

The Settlement Act states:

The Catawba Tribe, its members, lands, natural resources, or other property owned by the Tribe or its members, including land, natural resources, or other property held in trust by the United States or by any other person or entity for the Tribe, is subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State, except as otherwise expressly provided in this chapter or in the federal implementing legislation.

S.C. Code Ann. § 27-16-40.

The federal implementing legislation, in relevant part, states:

(e) General applicability of State law

Consistent with the provisions of section 941b(a)(2) of this title, the provisions of South Carolina Code Annotated, section 27-16-40, and section 19.1 of the Settlement Agreement are approved, ratified, and confirmed by the United States, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

25 U.S.C. 941(m);

(e) Extent of Jurisdiction

This subchapter shall not be construed to empower the Tribe with special jurisdiction or to deprive the State of jurisdiction other

than as expressly provided by this subchapter or by the State Act. The jurisdiction and governmental powers of the Tribe shall be solely those set forth in this subchapter and the State Act.

25 U.S.C. 941(b);

In the administration of this subchapter:

- (1) All matters involving tribal powers, immunities, and jurisdiction, whether criminal, civil, or regulatory, shall be governed by the terms and provisions of the Settlement Agreement and the State Act, unless otherwise provided in this subchapter.

25 U.S.C. 941(h).

Section 27-16-80 of the Settlement Act outlines the jurisdiction of the CIN courts:

Tribal courts - original and appellate civil; full faith and credit; waiver of jurisdiction; appeal to nonTribal courts; claims and suits against Tribe; limited sovereign immunity; liability insurance; partial applicability of Tort Claims Act; satisfaction of judgments.

(A) The Tribe may provide in its constitution for a Tribal Court having civil jurisdiction which may extend up to, but not exceed, the extent provided in this chapter and the federal implementing legislation. The Tribe may have a court of original jurisdiction, as well as an appellate court.

(1) With respect to actions on contracts, the Tribal Court may be vested with jurisdiction over an action on a contract:

(a) to which the Tribe or a member of the Tribe is a party, which expressly provides in writing that the Tribal Court has concurrent or exclusive jurisdiction.

(b) between the Tribe or a member of the Tribe and other parties or their agents who are physically present on the Reservation when the contract is made, and which is to be performed in part on the Reservation so long as the contract does not expressly exclude jurisdiction of the Tribal Court. For purposes of this section, the delivery of goods or the solicitation of business on the Reservation

does not constitute part performance sufficient to confer jurisdiction.

(c) to which the Tribe or a member of the Tribe is a party where more than fifty percent of the services to be rendered are performed on the Reservation, so long as the contract does not expressly exclude jurisdiction of the Tribal Court.

(2) With respect to actions in tort, the Tribal Court may be vested with jurisdiction over an action arising out of:

(a) an intentional tort, as defined by South Carolina law, committed on the Reservation, in which recovery is sought for bodily injuries or damages to tangible property located on the Reservation.

(b) negligent tortious conduct occurring on the Reservation or conduct occurring on the Reservation for which strict liability may be imposed, excluding, however, accidents occurring within the right-of-way limits of a highway, road, or other public easement owned or maintained by the State or its subdivisions or by the United States, which abuts or crosses the Reservation. However, the action in tort involving a nonmember of the Tribe as defendant may be removed to a state or federal court of appropriate jurisdiction if the amount in controversy exceeds the jurisdictional limits then applicable to magistrate's court in South Carolina.

(3) The Tribal Court may be vested with exclusive jurisdiction over internal matters of the Tribe. . .

(B) The original jurisdiction of the Tribal Court over the matters set forth in subsections (A)(1)(b), (A)(1)(c), (A)(2), and (A)(4) must be concurrent with the jurisdiction of the Court of Common Pleas of South Carolina, the Family Court, and the United States District Court for South Carolina. The original jurisdiction of the Tribal Court over the matters set forth in subsection (A)(1)(a) must be concurrent or exclusive depending upon the agreement of the parties. The original jurisdiction of the Tribal Court over matters set forth in subsection (A)(3) must be exclusive. The original

jurisdiction of the Tribal Court over matters set forth in subsection (A)(5) must be exclusive unless the Tribe has waived exclusive jurisdiction as to any person or entity. As to all sections referred to in this subsection, jurisdiction over appeals, if any, must be governed by subsection (D). . . .

S.C. Code Ann. § 27-16-80. . . .

You have presented our Office with several questions regarding “the interaction of the Commission with the CIN in the Fair Housing context,” and we address each question in turn.

LAW/ANALYSIS:

Three of your questions address whether the Settlement Agreement and implementing federal and state law impact the jurisdiction of the South Carolina Human Affairs Commission (“Commission” or “State Commission”) to investigate allegations of housing discrimination under the South Carolina Fair Housing Law³ (“FHL” or “State FHL” or “State Fair Housing Law”) in various circumstances:

Question 1:

May the South Carolina Human Affairs Commission investigate alleged violations of the Fair Housing Act that occur on CIN tribal lands?

Question 2:

May the South Carolina Human Affairs Commission investigate alleged violations of the Fair Housing Act that occur on CIN tribal lands when the housing provider (owner/landlord) is the CIN?

Question 4:

Is the CIN “subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State” under S.C. Code Ann. § 27-16-40 as to an allegation of discrimination in the provision of housing when the party alleging a violation is both a citizen of the state of South Carolina and a member of the CIN?

³ S.C. Code Ann. § 31-21-10 *et seq.*

To summarize, we understand that you are asking if there is any provision of the Settlement Agreement which would preclude the Commission from investigating allegations of housing discrimination where the allegations involve the Catawba Indian Nation, its members, and its housing provider on the Reservation.⁴ Accordingly, we begin our analysis with a brief discussion of the Settlement Agreement.

As referenced in your letter, your questions involve the Settlement Agreement between the Catawba Indian Nation (“CIN” or “Tribe”), the United States, and the State of South Carolina (“State”). The Settlement Agreement was a multi-faceted resolution of a complex and long-running dispute. The Agreement and accompanying state legislation were ratified and approved by the United States Congress and given the force of federal law. See 25 U.S.C. § 941b(a)(2). While a detailed discussion of the entire Agreement is beyond the scope of this opinion, we note that a few of the key components were the restoration of the Tribe to the status of a federally recognized Indian tribe (resulting in federal benefits for the CIN and its members); the establishment of the jurisdiction and powers of the Tribe; an award of monetary damages to the Tribe; and quieting title to lands subject to litigation. See 25 U.S.C. § 941 & Wade v. Blue, 369 F.3d 407 (4th. Cir. 2004).

In the federal implementing legislation, Congress expressly provided the legislation “shall not be construed to empower the Tribe with special jurisdiction or to deprive the State of jurisdiction other than as expressly provided by this Act or by the State Act.” 25 U.S.C. § 941b(e) (emphasis added). Congress further required “[a]ll matters involving tribal powers, immunities, and jurisdiction, whether criminal, civil, or regulatory, to be governed by the terms and provisions of the Settlement Agreement and State Act, unless otherwise provided in [the federal implementing legislation].” 25 U.S.C. § 941h(1) (emphasis added).

Regulatory jurisdiction also was addressed in the State Act and codified at Section 27-16-40, which reads in full:

The Catawba Tribe, its members, lands, natural resources, or other property owned by the Tribe or its members, including land, natural resources, or other property held in trust by the United States or by any other person or entity for the Tribe, is subject to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other

⁴ You confirmed during our telephone conversation that you are asking about the State Fair Housing Law rather than the Federal Fair Housing Act and that you mean the CIN Reservation when you refer to “tribal lands.”

person, citizen, or land in the State, except as otherwise expressly provided in this chapter or in the federal implementing legislation.

S.C. Code Ann. § 27-16-40 (2007) (emphasis added). Congress further emphasized the significance of Section 27-16-40 of the State Act by specifically granting it individually the power of federal law. 25 U.S.C. § 941m(e). In Section 941m(e), Congress provided:

Consistent with the provisions of section 941b(a)(2)⁵ of this title, the provisions of South Carolina Code Annotated, section 27-16-40, and section 19.1 of the Settlement Agreement are approved, ratified, and confirmed by the United States, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

Id. (emphasis added). In summary, the language of Section 27-16-40 and of 25 U.S.C. § 941m(e) unambiguously place the Tribe under the regulatory jurisdiction of the State of South Carolina, “except as otherwise expressly provided” in the same state and federal legislation. § 27-16-40; cf. Op. S.C. Att’y Gen., 2005 WL 1983358 (July 14, 2005) (discussing the rules of statutory construction and highlighting the preeminence of the language itself).

Our Office has carefully reviewed Chapter 16, Title 27 of the South Carolina Code of Laws and the federal legislation implementing the settlement agreement. Our thorough review has not revealed any language that may fairly be read so as to exempt allegations of housing discrimination from the general regulatory jurisdiction of the State set out in Section 27-16-40, with one caveat discussed below. Because the implementing legislation does not expressly address housing discrimination regulation in any way, the text of Section 27-16-40 remains the clearest evidence of the intent of all of the parties, including the CIN.

However, we note that general law and the express terms of the Settlement Agreement also provide for the right of the Tribe to limit access to its reservation by non-members, and in the housing context this empowers the Tribe to give preference to tribal members and other Native Americans. The federal implementing legislation provides that the United States holds the reservation land in trust for the Tribe. See 25 U.S.C. § 941j. The United States Supreme Court has observed that “a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.” Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894 (1982). This

⁵ 25 U.S.C. § 941b(a)(2) provides:

The Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

power was expressly contemplated in the Settlement Agreement which defined an “internal matter” to include “the Tribe's exercise of the power to exclude individuals from its Reservation.” S.C. Code Ann. § 27-16-30(8) (2007).

Additionally, the Settlement Agreement and the State statutes contemplated that the CIN might own multi-family dwellings, including reservation housing financed by the U.S. Department of Housing and Urban Development, which might be occupied by both members of the Tribe and nonmembers. See § 27-16-130(D)(2). The Agreement further provided for preferential tax treatment of that housing based on the tribal membership of its inhabitants. Id. Section 27-16-130 is entitled “Taxation of Tribe and tribal persons, entities, and property. . . .” S.C. Code Ann. § 27-16-130. Under this tax section, single and multi-family residences located on the Reservation are exempt from all property taxes if they meet a certain criteria. Both types of residences must be owned by the Tribe, tribal members, or tribal trust funds and be “rental property constructed by the Tribe on the reservation through an Indian Housing Authority which is financed by HUD” in order to be tax exempt. § 27-16-130(D)(2)(a)(iv), (i). Furthermore, single family residences must be occupied by a tribal member or the surviving spouse of a deceased tribal member. § 27-16-130(D)(2)(a)(ii).

For these reasons, we believe that a court would conclude that the Tribe has the power general law and under the Settlement Agreement to prefer housing applicants who are members of the Tribe or other Native Americans, even where such membership arises from ancestry. Cf. S.C. Code Ann. § 31-21-40 (2007) (prohibiting housing discrimination “because of race, color, religion, sex, familial status, or national origin”); S.C. Code Ann. § 1-13-30(b) (2005) (establishing that “[n]ational origin includes ancestry” for purposes of the South Carolina Human Affairs Law).

Accordingly, it is the opinion of this Office that the Commission has jurisdiction to investigate allegations of housing discrimination where the allegations involve the Catawba Indian Nation, its members, and its housing provider on the Reservation. S.C. Code Ann. § 27-16-40 (2007). However, we offer this conclusion with the caveat that we believe a court would conclude that housing discrimination laws may not be enforced such that the CIN could not prefer tribal members or other Native Americans as tenants on the CIN Reservation. See S.C. Code Ann. § 27-16-30(8) (2007); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894 (1982).

Question 3:

Is an allegation of discrimination in the provision of housing an “internal matter of the tribe” such that the Tribal Court is vested with exclusive jurisdiction under S.C. Code Ann. § 27-16-

80(A)(3) when the party alleging discrimination is a member of the tribe and the housing is provided as part of a housing program administered through the tribe?

Although the Settlement Agreement authorizes the formation of tribal courts in a new tribal constitution, to date it appears that no such constitution has been ratified and no tribal courts have been established. Therefore Subsection 27-16-80(A)(3) currently has no impact on any jurisdiction of the State. For this reason, we reserve any opinion on questions related to the interplay of tribal courts and South Carolina administrative law until such tribal courts are established. This is consistent with the longstanding policy of this Office not to opine on hypothetical questions.

In order to be as responsive as possible to your question, we will briefly discuss the provision for a tribal court in the implementing legislation. The federal implementing legislation requires the CIN to adopt a new constitution. 25 U.S.C. § 941f(a). It also provides that “the existing tribal constitution shall remain in effect” and the Tribe’s executive officers shall serve as “the provisional and transitional” government until the CIN adopts a new constitution. 25 U.S.C. § 941f(b). The existing 1975 CIN Constitution does not provide for a tribal court.⁶

The State Act expressly authorizes the creation of a tribal court with civil and criminal jurisdiction in a future constitution. S.C. Code Ann. §§ 27-16-80(A); 27-16-70(B). It further provides that a tribal court with civil jurisdiction must be vested with exclusive jurisdiction over internal matters of the Tribe. S.C. Code Ann. §§ 27-16-80(A)(3); (B). Under S.C. Code Ann. § 27-16-30(8), “internal matters” or “internal tribal matters” are:

matters which include, but are not limited to, the relationship between the Tribe and one or more of its members, the conduct of Tribal government over members of the Tribe, or the Tribe's exercise of the power to exclude individuals from its Reservation.

The State Act also contemplates that tribal courts might not be established:

If no Tribal Court is established by the Tribe, the State shall exercise jurisdiction over all civil and criminal causes arising out of acts and transactions occurring on the Reservation or involving members of the Tribe.

S.C. Code Ann. § 27-16-80(H) (emphasis added).

⁶ See Constitution and By-Laws of the Catawba Indian Nation, located at <https://catawbaindian.net/assets/docs/1975-CIN-Constitution.pdf>.

It appears that the CIN has not yet adopted a new constitution as contemplated at the time of the Settlement Agreement.⁷ In Wade v. Blue, 369 F.3d 407, 412 (4th Cir. 2004), the Fourth Circuit held that in the absence of tribal courts established pursuant to a new constitution, South Carolina state courts have exclusive jurisdiction over all criminal and civil matters of the CIN. In particular, the court in Wade v. Blue determined that South Carolina courts possess exclusive jurisdiction even over internal tribal matters until the formation of such courts. Id. at 411, 412. The Court found that the CIN's choice of a state forum to handle intra-tribal disputes was "an exercise of the Tribe's sovereign power" which had been ratified by Congress. Id. at 412.

We reserve any opinion on questions related to the interplay of tribal courts and South Carolina administrative law until such a time as tribal courts are established, consistent with the longstanding policy of this Office not to opine on hypothetical questions. We offer these observations here in order to be as responsive as possible to your question without offering any opinion on it.

Question 5:

Does the South Carolina Human Affairs Commission have jurisdiction over housing discrimination claims related to NAHASDA-funded housing?

You also have requested that we address whether The Native American Housing Assistance and Self Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et seq.*, would preclude the Commission from having jurisdiction over the CIN if NAHASDA-funded housing is involved.

A. NAHASDA Generally

NAHASDA was adopted by Congress in 1996 to consolidate the prior low income housing programs. Under NAHASDA, "the U.S. Department of Housing and Urban Development ("HUD") allocates federal money to Indian tribes to fund the construction and maintenance of affordable housing on Indian reservations." United States v. Aubrey, 800 F.3d 1115, 1119 (9th Cir. 2015). "HUD evaluates a tribe's specific needs and then allocates money to the tribe, such funds are then termed a block grant." Id. The housing assistance is made directly available to the tribes or to their designated housing entities, which then are responsible for operating the housing program and maintaining the housing. Id.; Marceau v. Blackfeet Hous. Auth., 540 F.3d 916, 926–27 (9th Cir. 2008).

⁷ We observe that the CIN website currently states that "[t]he Catawba Constitution needs to be updated. Our current constitution was adopted in 1975." <https://catawbaindian.net/about-us/constitution-initiative.php>.

Under NAHASDA, tribes and their designated housing entities are permitted to give preference to tribal members and other Native American families with respect to tenant selection in NAHASDA housing. See 25 USC § 4131(b)(6).⁸ HUD has further established that tribes and their housing entities “shall ensure that housing activities funded under NAHASDA are subject to the preference.” 24 C.F.R. §1000.120. Consistent with this right and duty to give preference to Native Americans in tenant selection, Congress expressly excluded NAHASDA from application of certain portion of the Civil Rights Act. Specifically, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs receiving federal funds. See 42 U.S.C. § 2000d *et seq.* Meanwhile, Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act,⁹ prohibits housing discrimination on the basis of race, color, religion, sex, familial status, handicap, and national origin. 42 U.S.C. § 3604. However, 25 U.S.C. § 4131(b)(6) provides that Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 do not apply to federally recognized tribes and their tribally designated housing entities.¹⁰

B. CIN Settlement

It appears that as a federally recognized Indian tribe, the CIN is entitled to and receives NAHASDA low income housing assistance. It also appears that the Tribe has established the ISWA Development Corporation ("ISWA") as its tribally-designated housing entity.¹¹ Pursuant to NAHASDA, the CIN and ISWA have the right to give preference to Native Americans as tenants on its Reservation. This is consistent with the South Carolina implementing legislation discussed earlier in this opinion. See S.C. Code Ann. § 27-16-30(8) (2007); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982). Additionally, Section 27-16-130 demonstrates that HUD financing for rental property on the Reservation was considered and factored into the CIN settlement. S.C. Code Ann. § 27-16-130 (2007). As discussed earlier in

⁸ As explained in the footnote of the statute, there were two subparagraphs numbered as (b)(6) in the codified statute. *Id.*, footnote 1. This the first paragraph (b)(6).

⁹ 42 USC § 3601 *et seq.*

¹⁰ Although federally recognized tribes and their tribally designated housing entities are exempt from Title VI and the Fair Housing Act under NAHASDA, persons who allege that they have been discriminated against by a tribe or its designated housing entity for reasons other than identity as a Native American are not left without a remedy. Pursuant to 24 CFR § 1000.12, a tribe and its designated housing entity cannot discriminate on the basis of age, rehabilitation (disability), religion, sexual orientation, gender identity, or marital status.

¹¹ See Catawba Indian Nation website, located at <https://catawbaindian.net/services/housing-services.php> (ISWA spends IHBG [Indian Housing Block Grant] funds; ISWA Development Corporation is TDHE [Tribally Designated Housing Entity] for the Catawba Indian Nation); <https://catawbaindian.net/about-us/iswa-board-of-directors.php>.

this opinion, NAHASDA simply consolidated prior low-income housing programs into a block grant system. See discussion, supra.

We believe that a court would conclude that the requirements placed on NAHASDA block grants are consistent with the preexisting scheme whereby the Commission had regulatory jurisdiction over alleged housing violations which occur on the Reservation with the caveat that the Tribe has the right to give preference to Indians as tenants on its Reservation. S.C. Code Ann. §§ 27-16-30(8) & 27-16-40 (2007). For that reason, we believe that a court would conclude that the Commission has jurisdiction to investigate allegations of housing discrimination where the allegations involve NAHASDA-funded housing on the CIN Reservation, with the same caveat. Id.

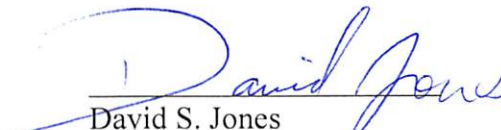
CONCLUSION:

In summary, it is the opinion of this Office that the Commission is not deprived of jurisdiction to investigate allegations of housing discrimination simply because the allegations involve the Catawba Indian Nation, its members, and its housing provider on the Reservation. S.C. Code Ann. § 27-16-40 (2007). This includes allegations involving NAHASDA-funded housing. See discussion, supra. However, we offer this conclusion with the caveat that we believe a court would conclude that housing discrimination laws may not be enforced such that the CIN could not prefer tribal members or Native Americans as tenants on the CIN Reservation. See S.C. Code Ann. § 27-16-30(8) (2007); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894 (1982). We also reserve any questions regarding tribal courts until such courts are established.

Sincerely,



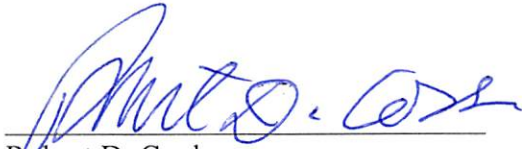
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REVIEWED AND APPROVED BY:

A handwritten signature in blue ink, appearing to read "R. D. Cook", is written over a horizontal line.

Robert D. Cook
Solicitor General