

[367] June 3, 1998

David McNaught

Executive Director

Clean Water Management Trust Fund

2313-B Executive Park Circle

Greenville, N.C. 27834

Re: Advisory Opinion: Eligibility of the Eastern Band of Cherokee Indians for a grant from the Clean Water Management Trust Fund pursuant to N.C.G.S. § 113-145.4

Dear Mr. McNaught:

By letter of April 7, 1998 you ask whether the Eastern Band of Cherokee Indians is eligible to receive grants from the Clean Water Management Trust Fund. After reviewing prior court decisions concerning the status of the Eastern Band of Cherokee Indians in North Carolina, we have concluded that the Tribe is not an eligible grant recipient under existing statutes. The basis for this conclusion is set out below.

The statutes governing administration of the Clean Water Management Trust Fund (CWMTF) provide that grants may be awarded to:

- (1) A State agency;
- (2) A local government or other political subdivision of the State or a combination of such entities;
- (3) A nonprofit corporation whose primary purpose is the conservation, preservation, and restoration of our State's environmental and natural resources.

N.C.G.S. § 113-145.4(a). The Eastern Band of Cherokee Indians clearly does not constitute a nonprofit corporation with the primary purpose of conserving, preserving or restoring the State's environmental and natural resources. Thus, the remaining question is whether the Tribe has, by virtue of its history, become either a state agency or a local government.

Generally, federally recognized tribes retain powers inherent to a sovereign state, except as qualified and limited by Congress. The Eastern Band of Cherokee Indians has a more complex historical relationship to the State of North Carolina than is usual, however, and that history must be considered in order to answer your question. Until 1835, the Cherokee living in North Carolina and what is now South Carolina, Tennessee, Georgia and Alabama, were members of a separate, sovereign nation with inherent powers of self government. By the Treaty of Echota in 1835, the Cherokee ceded all lands east of the Mississippi River to the United States and agreed to relocate to the west. Some 1,200 Cherokee remained in North Carolina, however, and for several years their status was uncertain.

The federal government, exercising its plenary power over Indians, finally provided that those Cherokee remaining in North Carolina would thereafter be subject to state law and by 1868 members of the Eastern Band of Cherokee had become state citizens. Meanwhile, the Cherokees' relationship with the federal government continued to develop. By 1868, Congress had instructed the Secretary of the Interior to exercise the same supervisory role over the Eastern Band of Cherokee Indians as over other Indian tribes. Later acts of Congress also recognized the Eastern

Band of Cherokee Indians as having full tribal status even though tribe members were also citizens of North Carolina. In 1889, the North Carolina legislature issued a corporate charter under the name of the Eastern Band of Cherokee Indians with power to sue and be sued and to exercise other powers belonging to corporations under the laws of the State.

The CWMTF statutes do not define "local government" or "unit of local government", but a number of other state laws define the term to include counties, municipal corporations, special purpose districts and public authorities. For example, N.C.G.S. §§ 120-30.42 defines "unit of local government" as follows:

..."unit of local government" means counties, cities, towns, and incorporated villages, sanitary districts, mosquito control districts, hospital districts, metropolitan sewerage districts, metropolitan water districts, county water and sewer districts, special airport districts, water and sewer authorities, county boards of education and city boards of education.

Definitions in other sections of the General Statutes similarly define "local government" in terms of political subdivisions and special purpose districts created by and deriving their authority from the State by action of the legislature. See, e.g. N.C.G.S. §§ 158-32(5) and 159I-3.

Based on the history of federal/state relations with the Eastern Band of Cherokee Indians, our courts have concluded that "the Eastern Band [of Cherokee Indians], like all recognized Indian tribes, possesses the status of a "domestic, dependent nation", with certain retained inherent sovereign powers. *Wildcatt v. Smith*, 69 N.C.App. 1, 5-6, 316 S.E.2d 870 (1984). The federal appellate courts have also concluded that neither North Carolina citizenship nor the issuance of a state charter to the Eastern Band of Cherokee Indians converted the Tribe into a state agency or political subdivision of the State:

The granting of a charter of incorporation to the Tribe by the State of North Carolina does not make the Tribe an arm or agency of the State...If the charter could be construed as that of a municipal corporation the prior decisions of the Court of Appeals for the Fourth Circuit and the Acts of Congress would nullify such construction because it is now a tribe.

In *Wright and Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957); *United States v. Boyd*, 83 F. 547, 555 (4th Cir. 1897); *United States v. Colvard*, 89 F.2d 312 (4th Cir. 1937); *United States v. 7,405.3 acres of land*, 97 F.2d 417 (4th Cir. 1938); *Blair v. McAlhaney*, 123 F.2d 142 (4th Cir. 1941), and *United States v. Parton*, 132 F.2d 886 (4th Cir. 1943), the Court has held that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States. These decisions and the Acts of Congress clearly dictate the conclusion that the Eastern Band of Cherokee Indians is not a municipal corporation or any other agency of the State of North Carolina... *Toineeta v. Andrus*, 503 F.Supp. 605, 608 (1980). The decision in *Toineeta* compels the conclusion that the Eastern Band of Cherokee Indians is neither a "state agency" nor a "local government" within the meaning of N.C.G.S. § 113-145.4(a) as currently written. The statute would have to be amended (either to define "local government" to expressly include the Cherokee or by designating the tribe as a fourth category of grant recipients) in order to make the tribe eligible to receive grants from the Clean Water Management Trust Fund.

You also asked about the State's ability to regulate Tribal activities. Because of the complex

nature of the relationship between the Tribe and both the State and federal governments, there is no simple answer to that question. The answer will be different depending on the specific nature of the State regulation; the degree to which the federal government has regulated within the same subject area; and the scope of tribal self-governance. I would suggest that those issues be addressed as they arise.

Thank you for your inquiry. Please advise if we can be of further assistance.

signed by:

Daniel C. Oakley

Senior Deputy Attorney General

Robin W. Smith

Assistant Attorney General