Resolution #97- 151-DSB

RESOLUTION OF THE GOVERNING BODY OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Three Affiliated Tribes is sovereign government for which the United States has a special trust relationship, and which is not generally subject to state laws or regulations except in narrow circumstances specified by Congress or except as otherwise determined by decisions of the United States Supreme Court; and

WHEREAS, The Three Affiliated Tribes has never by resolution or otherwise explicitly conceded that the worker's compensation laws of the State of North Dakota apply to it and that the Tribe is bound to honor such laws; and

WHEREAS, The Worker's Compensation Bureau of the State of North Dakota presently believes that the Three Affiliated Tribes is subject to the worker's compensation laws of the State of North Dakota; and

WHEREAS, There exists sound legal precedent for the proposition that the Three Affiliated Tribes is not subject to the worker's compensation laws of the State of North Dakota; and

WHEREAS, The premiums imposed by the North Dakota Worker's Compensation Bureau on the Three Affiliated Tribes as a tribal government and its various business enterprises are disproportionately higher than the claims paid to employees during the period covered by such premiums; and

WHEREAS, The Tribal Business Council has determined that it is possible to secure worker's compensation insurance coverage for substantially less that is now being paid to the North Dakota Worker's Compensation Bureau either through private insurance or a self-insurance fund;

Reference
R# 97-151-DSB

Three Affiliated Tribes
Mandan, Hidatsa, and Arikara Nation
LEGAL DEPARTMENT

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MEMORANDUM

To: **Tribal Business Council, Dennis Maddux, Phil Frazier, Florence Brady**

From: **Tom Disselhorst, Staff Attorney**

Subject: **Worker's Compensation Insurance coverage for Tribal employees, and Tribally owned enterprises**

Date: **June 16, 1997**

Summary

For various reasons, since approximately late 1993, the Three Affiliated Tribes has not paid to the State of North Dakota Worker's Compensation Bureau premiums billed to the Tribe for worker's compensation coverage. Usually, these premiums are owed quarterly. In the same manner, for different reasons, the Four Bears Casino and Lodge has not paid its premiums for 1996 and 1997, nor has the Gaming Commission paid its worker's compensation premiums since 1994. Total premiums, interest and penalties claimed to be owing are now approximately $500,000.

The initial reasons for not paying the Worker's Compensation premiums were:

1) Lack of funds;

2) A belief that the premiums were too high in relation to actual Worker's Compensation claims. During the past five years, claims by Tribal employees have been less than $35,000, although premiums owed during this period were more than $400,000; and

3) A belief that the single rate applied to Tribal employees was too high in comparison to what the rates would be if all Tribal employees were classified according to the normal rate classifications for the various types of workers employed by the Tribe (i.e., clerical, maintenance, heavy equipment operator, etc.).

Since the non-payment of premiums began, the State Worker's Compensation Bureau has threatened to take legal action to collect the past due premiums, but to date has not done so. In September, 1996, the Tribe had the State Worker's Compensation Bureau due a "classification audit", which reclassified all Tribal employees according to their actual job description, rather than lumping all Tribal employees under one classification. This audit showed that according to the state, the state's worker's compensation single rate for all Tribal employees was comparable to the overall rate obtained when all employees were classified normally. This audit was accepted by the Tribe and was not appealed.

Since that audit, we have been waiting on several proposals for worker's compensation insurance coverage, and possible self-insurance plans. In pursuing these plans, and because the state is again imposing penalties and threatening further legal action, all of the various departments working on this matter would like to get approval from the Tribal Business Council to go forward with looking for either a self-insurance plan or worker's compensation coverage outside of the State Worker's Compensation Bureau.

A proposed resolution is attached.

Legal Analysis

In reviewing this matter in 1996, however, it became clear that there are legal reasons why the Three Affiliated Tribes is not subject to the North Dakota Worker's Compensation laws.

1) In other states where this issue has been litigated, Tribes are not subject to mandatory Worker's Compensation laws unless the Tribe has specifically agreed to abide by such laws. In several states, Tribes have been held to be exempt from state requirements concerning worker's compensation. (e.g., Arizona, Minnesota). In this case, the Three Affiliated Tribes has never consented to the applicability of any North Dakota laws imposing the mandatory participation of all employers in the State in the State worker's compensation insurance coverage. In acquiring worker's compensation coverage from the State, and periodically paying premiums for such coverage, the Tribe has never entered into an agreement with the State, nor has it explicitly waived its sovereign immunity and consented to the State having a right to sue to collect the premiums owed.

2) State statutes of a general nature do not apply to activities taking place on trust land on the Fort Berthold Indian Reservation unless specifically authorized by an Act of Congress, with such exceptions as have been noted by the United States Supreme Court. State worker's compensation laws have not been held to be applicable to Tribes by the U.S. Supreme Court. The North Dakota worker's compensation statute does not specifically apply to Indian tribes within North Dakota.

3) There is no Federal requirement that Tribes participate in a state worker's compensation program. No Federal law exists which requires Tribes to participate in state worker's compensation programs.

Legal and Policy Alternatives

In light of the above analysis, the Tribe is left with several alternatives concerning worker's compensation coverage:

1) Bargain with the State for a) repayment of the past due premium amounts and b) continue to get worker's compensation coverage for all of its employees and the employees of its various enterprises from the State Worker's Compensation Bureau;

2) Provide no worker's compensation coverage, and either a) bargain with the State to pay off past due amounts, or b) let the State sue the Tribe for the amounts owing, pleading as a defense sovereign immunity; or

3) Provide worker's compensation coverage through a different insurance company, either by a) paying a premium directly for such coverage, or b) seeking to establish a self-insurance fund for worker's compensation coverage administered by a third party, with appropriate stop-loss insurance coverage.

Policy Issues

This matter has been under review for some time by the Finance, Legal and Personnel Departments, and now more recently by the administration of the Four Bears Casino and Lodge as they seek ways to both protect their employees with worker's compensation insurance and save money.

Basically, worker's compensation insurance protects the employer from liability caused by employees suing their employer for injuries which occur during the course of employment. It avoids a determination, including litigation, as to who is at fault in a given situation in which an injury occurred: the employer or the employee. This in turn fosters better employer-employee relations and saves enormous amounts of time and money pursuing litigation between the employee and the employer.

A government, such as a tribal government, could, of course, claim sovereign immunity from such suits, requiring its employees to use their medical insurance, if any, for payment of medical expenses related to job-related injuries. But such a policy is so contrary to existing employment practices throughout the United States that it could create low employee morale

those departments which have looked at the worker's compensation issue believe that worker's compensation insurance should be provided, and, at a minimum, should provide similar coverage to what is provided by the State of North Dakota. The plan most likely would be a partial self-insurance plan, partial only in the sense that a stop-loss coverage would be provided in the event of an extremely large claim or a series of expensive smaller claims within a defined period that could exhaust the self-insurance fund.

We also believe, based on preliminary quotes offered by several companies, that such insurance coverage can be obtained more cheaply than currently offered by the State of North Dakota. The attached resolution allows us to go forward and obtain the best possible proposal for worker's compensation insurance coverage and bring it back to the Tribal Business Council for your review and final action.

The risks of seeking coverage outside of the state Worker's Compensation Bureau is that North Dakota may sue the Tribe to try to force it to be covered by the Worker's Compensation Bureau and pay the premiums imposed. It is my hope to prevent such a lawsuit by seeking an Attorney General's opinion about whether the any federally recognized Indian tribe in North Dakota, including the Three Affiliates Tribes, is required to be covered by the state Worker's Compensation Bureau. Because the case law is overwhelmingly on the side of Indian tribes on this issue, I believe that an attorney general's opinion will be in favor of the Indian tribes on this issue. If the Attorney General of the State does not believe a lawsuit by the State against the Tribe will be successful, then there is much less likelihood of a lawsuit.

Citation
397 N.W.2d 883
(Cite as: 397 N.W.2d 883)

FOUND DOCUMENT

Database
MN-CS

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Michael C. TIBBETTS, Respondent,
v.
LEECH LAKE RESERVATION BUSINESS COMMITTEE, (uninsured), Relator,
Minnesota Department of Human Services, intervenor, State Treasurer, Custodian of the Special Compensation Fund, Respondents.
No. C0-85-1863.
Supreme Court of Minnesota.
Dec. 26, 1986.

Member of Indian band allegedly injured on Indian reservation in course of employment by Indian band brought action against Indian band and against custodian of Special Compensation Fund. The Workers' Compensation Court of Appeals determined that governing body of Indian band waived sovereign immunity otherwise available to it, and appeal was taken. The Supreme Court, Kelley, J., held that: (1) governing body of Indian band was shielded from workers' compensation liability by virtue of doctrine of sovereign immunity; (2) immunity was not waived by public law or by tribal ordinances; (3) potential liability of Special Compensation Fund, being derivative, was extinguished when governing body of Indian band as employer was immune from liability; and (4) extinguishment of liability did not deprive injured member of Indian band of equal protection.

Reversed.

[1] INDIANS k27(1)
209k27(1)
Governing body of an Indian tribe is generally immune from suit unless immunity has been waived.

[2] INDIANS k27(1)
209k27(1)
Congress may waive immunity from suit enjoyed by an Indian tribe provided Congress, by unequivocal expression, clearly indicates its intent to do so.

[3] INDIANS k27(1)
209k27(1)
Public law granting jurisdiction over Indian tort and contract claims to certain states including Minnesota does not amount to a waiver by Congress of an Indian tribe's right to defensively assert sovereign immunity. 18 U.S.C.A. s 1162.

[4] INDIANS k32(2)
209k32(2)
Minnesota Workers' Compensation Act is a civil regulatory law as to which Indian tribes may not be subordinated. M.S.A. s 176.001.

[5] INDIANS k27(1)
209k27(1)
Public law providing that state workers' compensation laws apply to work injuries that otherwise would not be covered by a state's workers' compensation law if injuries occur on federal lands does not confer upon states jurisdiction

over otherwise immune or exempt parties and, hence, does not operate as a waiver of sovereign immunity otherwise available to an Indian tribe. 40 U.S.C.A. s 290.

[6] INDIANS k27(1)
209k27(1)
Enactment of ordinances waiving tribe or band sovereign immunity in workers' compensation actions when tribe or band carries workers' compensation insurance coverage is ineffective to constitute a waiver of tribe or band sovereign immunity if, at time employee's claim arose, neither tribe nor band carried workers' compensation insurance. M.S.A. s 176.001.

[7] WORKERS' COMPENSATION k1048
413k1048
Since the liability of the Special Compensation Fund for payment of workers' compensation benefits is derivative from that of employer, if the employer is immune from workers' compensation liability, no benefits are due the injured employee from the Special Compensation Fund, but if the employer is subject to liability and doesn't pay, the Special Compensation Fund has the obligation to stand in the shoes of the defaulting employer. M.S.A. s 176.001.

[8] CONSTITUTIONAL LAW k245(4)
92k245(4)
Denial of payments from the Special Compensation Fund when an Indian band successfully asserts sovereign immunity with respect to a claim for workers' compensation benefits by an Indian tribal member injured on Indian reservation in course of employment is not violative of equal protection. M.S.A. ss 176.041, 176.183; M.S.A. Const. Art. 1, s 2; U.S.C.A. Const.Amend. 14.

[9] WORKERS' COMPENSATION k1057
413k1057
Statute allowing the Special Compensation Fund to recoup payments it makes to injured employees from the noncomplying employer as well as possible punitive damages was not designed to afford employees scheduled benefits when injured in noncovered employment. M.S.A. s 176.183.

[10] INDIANS k27(1)
209k27(1)
Defense of sovereign immunity, when not otherwise waived by Congress or by the tribe or the reservation business committee, operated to shield Indian band from workers' compensation liability in action by Indian tribal member allegedly injured on Indian reservation in course of employment by Indian band. M.S.A. ss 176.041, 176.183; 18 U.S.C.A. s 1162; 28 U.S.C.A. s 1360; 40 U.S.C.A. s 290.

[10] WORKERS' COMPENSATION k252
413k252
Defense of sovereign immunity, when not otherwise waived by Congress or by the tribe or the reservation business committee, operated to shield Indian band from workers' compensation liability in action by Indian tribal member

allegedly injured on Indian reservation in course of employment by Indian band. M.S.A. ss 176.041, 176.183; 18 U.S.C.A. s 1162; 28 U.S.C.A. s 1360; 40 U.S.C.A. s 290.

*884 Syllabus by the Court

1. The governing body of the Leech Lake Band of the Chippewa Indian Tribe may assert the defense of sovereign immunity in a workers' compensation action commenced by a member of the Band claimed to have been injured on reservation lands while in the employment of the Band.

2. The sovereign immunity of the Chippewa Indian Tribe and its constituent Band was not waived by Congress by enactment of Public Law 280 (codified as 18 U.S.C. s 1162, 28 U.S.C. s 1360) or 40 U.S.C. s 290.

3. Enactment of ordinances waiving tribal and band sovereign immunity in workers' compensation actions when the Tribe or Band "carries workers' compensation insurance coverage," is ineffective to constitute a waiver of the tribe or the band sovereign immunity if, at the time the employee's claim arose, neither the Tribe nor Band carried workers' compensation insurance.

4. Because Special Compensation Fund's liability for payment of workers' compensation benefits is derivative, if the employer is immune from liability, the Special Fund likewise is not liable.

5. Denial of workers' compensation benefit payments from the Special Compensation Fund to an Indian tribal member injured on Indian Reservation lands in the course of employment by an Indian Band, who successfully asserted sovereign immunity, does not violate the equal protection clauses of the Federal and State Constitutions.

Harold R. Finn, Jr., Walker, for Leech Lake RBC.

Jacob E. Forsman, Dept. of Labor & Industry, St. Paul, for Michael C. Tibbetts.

*885 Hubert H. Humphrey, III, Atty. Gen., James Alexander, Sp. Asst., St. Paul, for Dept. of Human Services.

Hubert H. Humphrey, III, Atty. Gen., Stephen B. Masten, Thomas G. Lockhart, Sp. Assts., St. Paul, for Special Fund.

Heard, considered and decided by the court en banc.

KELLEY, Justice

Respondent Michael C. Tibbetts, a member of the Leech Lake Band of the Chippewa Indian Tribe, commenced this action against his employer, the Leech Lake Reservation Business Committee (the governing body for the Leech Lake Band) and the custodian of the Special Compensation Fund to recover Minnesota workers' compensation benefits for injuries allegedly sustained during the course of his employment by the Band. Although recognizing that the Leech Lake Reservation Business Committee (hereinafter RBC) enjoyed sovereign immunity, the Workers' Compensation Court of Appeals held the immunity had been waived, and that, therefore, the Leech Lake RBC was subject to the Minnesota Workers' Compensation Act. We reverse. [FN1]

FN1. The alleged accident giving rise to respondent's claim occurred in 1978. At the initial hearing on the workers' compensation claim, RBC moved for dismissal of the petition claiming sovereign immunity and lack of subject matter jurisdiction. Further hearings were continued pending the

outcome of a declaratory judgment action in district court seeking a declaration that the Minnesota Chippewa Tribe is not involuntarily subject to the Minnesota Workers' Compensation law, and that the Bands of the Tribe have sovereign immunity against claims brought under the workers' compensation statute. The district court dismissed the declaratory judgment action. This court reversed and remanded for trial. Minnesota Chippewa Tribe v. State of Minnesota, 339 N.W.2d 55 (1983). After remand, in 1984 the parties stipulated to dismissal of the declaratory judgment action and agreed to an expedited hearing on legal issues before a judge of the Office of Administrative Hearings (OAH), Workers' Compensation Division. The compensation judge denied the Band's dismissal motion. After affirmance by the Workers' Compensation Court of Appeals, we granted a writ of certiorari to the employer. Meanwhile, respondent Minnesota Department of Human Services intervened to recover medical payments made on behalf of Tibbetts following his injury.

The parties have stipulated to the basic facts necessary for consideration of RBC's claim of sovereign immunity and the claim of Respondent Tibbetts that the immunity has been waived. Tibbetts claims that on November 30, 1978, while employed by the Leech Lake Band on reservation lands, he sustained back injuries. He alleges temporary total disability and an undetermined amount of permanent partial disability arising out of his claimed work-related injuries. [FN2] The Leech Lake RBC is a duly constituted and federally recognized tribal governing body for the Leech Lake Reservation. Tibbetts' principal place of employment by the Leech Lake RBC was within the boundaries of the Leech Lake Reservation. Prior to October 24, 1978, the Leech Lake RBC had carried workers' compensation insurance. On that date the policy was cancelled by the insurer for nonpayment of premiums. On November 30, 1978, the date of Tibbetts' alleged accident, the Leech Lake RBC had no workers' compensation insurance in force. Later, in December 1978, the Leech Lake RBC did acquire assigned risk workers' compensation coverage, but that insurance did not provide coverage for work-related accidents happening prior to the inception of the policy. Eight and one-half months after Tibbetts' alleged work accident, the Leech Lake RBC adopted Ordinance No. 80-1 entitled "Re: Insurance and Sovereign Immunity." The part of that ordinance relative to this controversy reads:

FN2. The intervenor Minnesota Department of Human Services has paid medical and subsistence expenses in excess of $22,000.

(3) The Leech Lake Band of Chippewa Indians herein waives its sovereign immunity as to all workmen's compensation claims for those employees whom the Leech Lake Band of Chippewa Indians has employed and for which it carries workmen's compensation insurance coverage. It does not waive its sovereign *886 immunity as to independent contractors and it alone, shall have the authority to determine, through its Reservation Business Committee, as to which persons are its employees.

Because of the procedural moves set forth in abbreviated terms in footnote 1 herein, the motion to dismiss made by the Leech Lake RBC in late 1979 was not heard until mid-1984. The administrative compensation judge denied the

dismissal motion and ordered a hearing on the merits of Tibbetts' claim. The compensation judge ruled that Minnesota had subject matter jurisdiction based on (1) Public Law 280, codified at 18 U.S.C. s 1162 and 28 U.S.C. 1360 (that certain states including Minnesota have been granted jurisdiction over Indian tort and contract claims); (2) 40 U.S.C. 290 (state workers' compensation acts to apply to federal lands); and (3) Minn.Stat. ss 176.001-.85 (1984 & Supp.1986) (the Minnesota Workers' Compensation Act). The compensation judge further ruled the Workers' Compensation Division had personal jurisdiction based upon the Leech Lake RBC waiver of sovereign immunity contained in Ordinance 80-1 as well as the Chippewa Tribe Ordinance 6. Finally, the compensation judge found the Band to be an employer within the definition of Minn.Stat. s 176.011, subd. 10 because Indian tribes or bands were not specifically excluded from the statute. In affirming, the Workers' Compensation Court of Appeals adopted the administrative judge's memorandum as its own.

If the Band is immune from suits of this kind, the dismissal motion of the Leech Lake RBC in this case should have been granted unless the immunity was properly waived. Therefore, we proceed first to consider the ruling of the courts below that the defense of sovereign immunity was unavailable to the Leech Lake RBC in this workers' compensation action.

[1] Since the earliest times of our nation's court history, Indian tribes have been recognized as being independent political communities possessing natural rights in conducting self governance. Worcester v. Georgia, 6 Pet. 515, 559, 8 L.Ed. 483, 500 (1832). Absent waiver by the Tribe or the enactment of statutes by the Congress clearly and effectively indicating an intention to abolish the immunity, the federal courts have recognized that the independent tribal political units possess the common law immunity from suit historically enjoyed by sovereign states. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); Puyallup Tribe v. Washington Department of Game, 433 U.S. 165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977); United States v. Oregon, 657 F.2d 1009, 1013 (9th Cir.1982). Likewise, this court has acknowledged that traditionally Indian tribes are generally immune from suit. Duluth Lumber & Plywood Co. v. Delta Development, Inc., 281 N.W.2d 377, 383 (Minn.1979). No one disputes that the Leech Lake RBC, as the governing body of the Leech Lake Band of Chippewa Indians, also is generally immune from a suit of this nature unless immunity has been waived.

[2] However, the immunity enjoyed by Indian tribes is not absolute. Clearly Congress may waive tribal immunity provided that Congress, by unequivocal expression, clearly indicates its intent to do so. Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. at 1677; United States v. Oregon, 657 F.2d at 1013; Chemehuevi Indian Tribe v. California State Board of Education, 492 F.Supp. 55, 58-59 (N.D.Cal.1979). In addition, an Indian tribe may take actions that amount to a waiver of its general right to defensively assert sovereign immunity. United States v. Oregon, 657 F.2d at 1013-14.

[3] The compensation judge and the Workers' Compensation Court of Appeals agreed with Respondent Tibbetts' contention that by enactment of Public Law 280 (codified at 18 U.S.C. s 1162 and 28 U.S.C. s 1360), Congress waived the Leech Lake Band's right to defensively assert sovereign immunity. The Leech Lake RBC responds here to those holdings below by arguing that Public Law

280 is merely a limited conferral upon the courts of Minnesota *887 of forum jurisdiction over private parties, one or both of which may be tribal members, but confers upon the state no general civil regulatory powers over the Chippewa Tribe or the Leech Lake Band RBC. It relies upon Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) where the Supreme Court of the United States, in reversing this court's holding in Bryan v. Itasca Co., 303 Minn. 395, 228 N.W.2d 249 (1975), reviewed the "legislative history of Public Law 280 and the application of canons of construction applicable to congressional statutes claimed to terminate Indian immunities." Id. 426 U.S. at 379-80, 96 S.Ct. at 2106-07. In so doing, the Court noted:

> Piecing together as best we can the sparse legislative history of s 4, [28 U.S.C. s 1360(2)] seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens * * * [Further, there is] in the legislative history * * * the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.

Id. at 383-84, 96 S.Ct. at 383-84, 2108-09. In concluding that Public Law 280 did not subordinate tribal governments to the "full panoply of civil regulatory power" of state governments, the U.S. Supreme Court likewise stated "[t]he Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves * * *. [I]f Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers * * * it would have expressly said so." Id. at 388-89, 390, 96 S.Ct. at 2111-12.

[4] It cannot reasonably be argued that Minnesota Workmen's Compensation Act (Minn.Stat. ch. 176 (1984 & Supp.1986) is not a civil regulatory law. Obligations and liabilities are imposed upon employers and employees regulating not only the forum and its procedures, but issues of substantive law as well. Minn.Stat. ch. 176 provides for "a mutual renunciation of common law rights and defenses." Minn.Stat. s 176.001 (1984). In return for scheduled benefits for compensating employees who sustain injuries in the course of the employment relationship, the employer's liability is made substantially absolute. Chapter 176, indeed, is a civil regulatory law. Heeding the United States Supreme Court's language in Bryan, we hold that enactment of Public Law 280 constituted no waiver of the Leech Lake Band RBC's right to assert sovereign immunity as a defense to Tibbetts' claim. [FN3]

> FN3. In resolving questions concerning the state's exercise of civil regulatory laws, a suggestion has been made that the Supreme Court of the United States has recently given less weight to the "back drop of tribal sovereignty" in applying a two-stage balancing test. Rice v. Rehner, 463 U.S. 713, 720, 103 S.Ct. 3291, 3296, 77 L.Ed.2d 961 (1983). Application of such test requires a showing of strong state interest. When the tribe has a traditional bequest of regulatory power, any repeal would require a direct and explicit order from Congress. Id. 103 S.Ct. at 3296. See generally, Native American Indian Law & the Burger Court: A Shift in Judicial Methods, 8 Hamline L.Rev. 671 (1985). Certainly, Minnesota has an interest in the regulation of the work place, and compensation of its citizen-employees for injuries sustained during the

scope of employment. In our opinion, however, that interest is insufficient to overcome the strong language used by the United States Supreme Court in Bryan holding that Public Law 280 confers upon the state therein denominated no general regulatory powers.

[5] Tibbetts also contends that Congress has effectively waived the tribal sovereign immunity by enactment of 40 U.S.C. s 290. [FN4] That Act generally provides that state workers' compensation laws apply to work injuries that otherwise would not be covered by a *888 state's workers' compensation law if the injuries occur on federal lands. No immunity, exclusion or exemption otherwise available to either an employer or an employee is terminated by the statute. That act simply cannot be read to confer upon states jurisdiction over otherwise immune or exempt parties. Not only does that result from a plain reading of the statute, but also from the act's interpretive history as made, for example, by the Solicitor of the Department of Interior who concluded that the statute was never intended to apply to Indian tribes themselves. 1 Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-1974, 692, 1044 (1974). The sole objective of the statute was to close a gap that prevented states from exercising workers' compensation jurisdiction over work-related injury causing accidents occurring on federal lands. For example, following enactment of the statute, an Indian injured on an Indian reservation in the course of his employment by a non-Indian employer could maintain a workers' compensation action against that employer under the state's workers' compensation law, and the employer could not raise the fact the accident occurred on federal land as a defense. Additionally, courts who have addressed the issue have recognized that 40 U.S.C. s 290 was not intended to apply to Indian tribes. More than 30 years ago in Swatzell v. Industrial Commission, 78 Ariz. 149, 277 P.2d 244 (1954), the Supreme Court of Arizona observed that the wording of the statute failed to clearly manifest any intention to include Indian activities within its scope. Moreover, that court noted that an examination of the Senate Committee Report corroborated its conclusion:

FN4. 40 U.S.C. s 290 states:
Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are

affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: Provided further, That nothing in this section shall be construed to modify or amend subchapter I of chapter 81 of Title 5.

An examination of Senate Committee Report accompanying this Act, S.R. No. 2294, 74th Congress, 2d Session, reveals that such was not the intention of the Congress. Rather, it there appears that:

The purpose of the amended bill is to fill a conspicuous gap in the workermen's compensation field by furnishing protection against death or disability to laborers and mechanics employed by contractors or other persons on Federal property. The United States Employees' Compensation Act covers only persons directly employed by the Federal Government.

Id. at 154, 277 P.2d at 248. More recently, the Arizona Court of Appeals in addressing the specific question here involved wrote " * * * that whatever 40 U.S.C. s 290 attempted to accomplish by making state workers' compensation laws applicable to federal enclaves, it did not have the effect of abrogating the doctrine of sovereign immunity * * *." White Mountain Apache Tribe v. Industrial Commission of Arizona, 144 Ariz. 129, 134, 696 P.2d 223, 228 (App.1985). We agree.

[6] Respondent next asserts that the Leech Lake Band RBC by its own conduct waived the Band's sovereign immunity. In holding that the right to assert the defense of sovereign immunity has been waived, the administrative judge first examined Ordinance 6 enacted by the Minnesota Chippewa Tribe as well as Ordinance 80-1 enacted by the Leech Lake RBC. From the examination of the two ordinances, the judge concluded their enactments constituted a waiver of immunity. We do not address *889 the judge's analysis because it seems patently clear to us that the wording of the ordinances themselves unequivocally indicate that under the facts here existing, there has been no waiver as to this workers' compensation claim brought by Respondent Tibbetts. Ordinance 6 of the Minnesota Chippewa Tribe specifically involves traditional Indian tribal sovereign immunity. It states, "The Minnesota Chippewa Tribe has sovereign immunity and may not be sued without its consent on contract claims or tort claims * * *." However, the ordinance further addresses waiver of that immunity in workers' compensation matters:

The Minnesota Chippewa Tribe does herein waive its sovereign immunity as to all workmens' compensation claims for those employees whom The Minnesota Chippewa Tribe has employed and for which it carries workmen's compensation insurance coverage. It does not waive its sovereign immunity as to independent contractors and it alone shall have the authority to determine through its Tribal Executive Committee as to which persons are its employees.

Without dispute at the time of respondent's alleged injury, the Tribe did not "carry" workers' compensation insurance coverage. Therefore, the asserted tribal immunity had not been waived by the Tribe. Eight months after Respondent Tibbetts' alleged work-related injury, the Leech Lake RBC enacted Ordinance 80-1, which, as previously indicated, is drafted using substantially

the same language. Absolutely no evidence exists that this ordinance was intended to be retroactively applied. But even if construed to be so applied, the ordinance's specific language limits any waiver to claims "for which it carrie[d]" insurance. No insurance was "carried" on November 30, 1978. The conclusion follows that neither the Tribe nor the Band waived the RBC's sovereign immunity by the enactment of these ordinances. [FN5]

FN5. We do not address an issue raised by the Leech Lake RBC that it was not subject to Minn.Stat. ch. 176 because not identified as an employer subject to the Act. Our finding of sovereign immunity and non-waiver makes resolution of that issue here unnecessary.

[7] Respondent Tibbetts further argues that even if the Leech Lake RBC may assert as a defense its sovereign immunity, the defense of sovereign immunity is unavailable to the Special Compensation Fund. Conversely, the Special Fund posits that it is liable only if the Leech Lake RBC is liable because any liability on the fund is strictly derivative. [FN6] In St. Martin v. KLA Enterprises, Inc., 269 N.W.2d 59 (Minn.1978) we held the Fund "stands in the shoes of an uninsured employer and is obligated to pay all compensation benefits due the injured employees * * * in the event the employer fails to make such payments." Id. at 60. Thus, it is clear the Fund's liability is derivative from that of the employer. If the employer is immune from workers' compensation liability, no benefits are due the injured employee from the Fund. On the other hand, if the employer is subject to liability but doesn't pay, the Fund has the obligation "to stand in the shoes" of the defaulting employer. In Zak v. Gypsy, 279 N.W.2d 60 (Minn.1979), even though at the time of the filing of the employee's workers' compensation claim, the musical combo employer(s) was out of business and unavailable to suit, we held the Fund "stood in the [combo's] shoes" because the combo during its existence was liable as an employer. Id. at 63-64. Contrasted to that setting, here the Leech Lake RBC was at no relevant time liable as an employer because of its sovereign immunity. Since it was never liable, therefore the Fund cannot be liable.

FN6. The administrative judge noted the fund's liability to be derivative. She did so, however, in the context of finding the Band liable under the Minnesota Workers' Compensation law.

[8] Finally, we reject Respondent Tibbett's contention that to deny him Special Fund coverage violates Section 1 of the 14th Amendment to the Constitution of the United States and Art. 1, s 2 of the Minnesota State Constitution--the equal protection clauses.
*890 Tibbett's treatment is not disparate from that afforded to similarly situated persons--employees whose employers are not subject to the Workers' Compensation Act. See, e.g., Minn.Stat. s 176.041. All employees of employers exempted from the Act are denied coverage from the Special Fund. Additionally we note, as conceded by Respondent Tibbetts, that neither the distinctions made by the Act nor the de facto distinction arising as the result of sovereign immunity are drawn upon suspect classifications. They likewise fail to create suspect classifications. Consequently, the State need only demonstrate a

rational basis for its legislation.

The United States Supreme Court, in interpreting the equal protection clause in the social welfare field noted:

> This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Dandridge v. Williams, 397 U.S. 471, 485 [90 S.Ct. 1153, 1161, 25 L.Ed.2d 491] (1970), quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 [31 S.Ct 337, 340, 55 L.Ed. 369] (1911). See also Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 [96 S.Ct. 2562, 49 L.Ed.2d 520] (1976); Mathews v. DeCastro, 429 U.S. 181 [97 S.Ct. 431, 50 L.Ed.2d 389] (1976); Jefferson v. Hackney, 406 U.S. 535 [92 S.Ct. 1724, 32 L.Ed.2d 285] (1972).

Idaho Department of Employment v. Smith, 434 U.S. 100, 101, 98 S.Ct. 327, 328, 54 L.Ed.2d 324 (1977).

The Idaho case arose after the state had enacted legislation providing unemployment benefits to night school students. Such benefits were denied to day school students. In holding the Idaho scheme passed constitutional muster, the court recognized that it was rational for Idaho to conclude that daytime employment is far more plentiful than nighttime work, and, consequently, that attending school in the daytime imposes a greater restriction upon obtaining full-time employment than does attending night school.

[9] Likewise, it was rational for the Minnesota legislature to provide for the Special Fund to fill a potential gap for protection of injured employees whose employments are "covered" by the Workers' Compensation Act, but whose employers illegally refuse or fail to comply with the Act's requirements. The statute, itself, demonstrates this intent by a provision allowing the Fund to recoup payments it makes to injured employees from the noncomplying employer as well as possible punitive damages. Minn.Stat. s 176.183 (1984). The Act was not designed to afford employees scheduled benefits where injured in noncovered employment. Since the distinction between noncomplying but covered employers and noncovered employers did have a rational basis, we find no deprivation of equal protection of the laws.

[10] Accordingly, we hold that the Leech Lake RBC was shielded from workers' compensation liability to Respondent Tibbetts by virtue of the doctrine of sovereign immunity; that the immunity was not waived either by Congress, the Chippewa Tribe or the Leech Lake Reservation Business Committee; that the Special Fund's potential liability, being derivative, is extinguished when the employer is immune from liability; and that such extinguishment does not deprive respondent of equal protection of the laws.

Reversed.

END OF DOCUMENT

NOW, THEREFORE, BE IT RESOLVED, that the Tribal Business Council hereby authorizes the Finance, Legal and Personnel departments, along with the management of the Four Bears Casino and Lodge, to seek out proposals from various reputable worker's compensation insurance providers for worker's compensation coverage for all employees of the Tribal government and its various enterprises, and present the best proposal, along with a recommendation, to the Tribal Business Council for final action; and

NOW, THEREFORE BE IT FURTHER RESOLVED, that the Tribal Business Council hereby authorizes the Tribal Legal Department to request that an appropriate state official seek a formal opinion from the North Dakota Attorney General's office concerning whether a Federally recognized Indian tribe within the State of North Dakota is required to be part of the North Dakota worker's compensation system and to pay such premiums as may be due.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, hereby certify that the Tribal Business Council is composed of 7 members of whom 5 constitute a quorum, 6 were present at a Special Meeting thereof duly called, noticed, convened, and held on the 23rd day of June, 1997; that the foregoing Resolution was duly adopted at such Meeting by the affirmative vote of 6 members, 0 members opposed, 0 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Dated this 23rd day of June, 1997.

Daylon Spotted Bear
Secretary, Tribal Business Council

ATTEST:

Chairman, Tribal Business Council