Legal Opinion of Former
Attorney General Rob McKenna

Memo

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To Ed Budge

From Rob McKenna
Melanie D. Phillips

Date October 3, 2016

Re Legality of Nisqually Jail Service Agreement

I. QUESTION PRESENTED

Is the Nisqually Jail Service Agreement, entered into between the Nisqually Indian Reservation, a Federally Recognized Indian Tribe, and the City of Yelm, on or about December 10, 2013, legal under Washington law?

II. SHORT ANSWER

No. The contract is not authorized by Washington law. First, the City and County Jail Act, RCW 70.48 *et seq.*, provides only for contracts between and among cities and counties for the provision of jail services. The City and County Jails Act does not authorize cities or counties to enter into contracts with Indian tribes or Indian reservations for the provision of jail services. Second, the Interlocal Cooperation Act, RCW 39.34 *et seq.*, does not independently authorize cities or counties to enter into contracts with Indian tribes or Indian reservations for the provision of jail services. Nevertheless, it appears that multiple cities and counties have entered into contracts with the Nisqually Indian Tribe for the provision of jail services on the Nisqually Reservation, citing the City and County Jails Act and Interlocal Cooperation Act as providing authority for such contracts.

III. LEGAL BACKGROUND

A. Legislative History

1. City and County Jails Act – Chapter 70.48 RCW

The City and County Jails Act was largely rewritten in 1977 by the Washington legislature, in part as a response to the developing body of case law nationwide requiring prisons to maintain humane conditions. Prior to this time, Washington, like many other states, had afforded local government discretion over the operation of local jails and had not imposed enforcement

provisions at the state level. *See* "Jail Standards and Construction," William J. Hagens, Office of Program Research, House of Representatives, State of Washington, Jan. 25, 1979. This 1977 legislation set forth the state's policy regarding the "humane and safe environment" to be required of all city and county jails. Washington Laws, 1977 Ex. Session, Ch. 316, Section 1. One of its three main purposes was "to provide for a determination of the role of state and local units of government with regard to the custody of persons who are arrested for and/or convicted of violating statutes or ordinances which define crime." *Id.* The definitions included in the legislative scheme included: "(3) 'Correctional facility' means a facility operated by a governing unit primary designed, staffed, and used for the housing of adult persons serving terms not exceeding one year for . . . conviction of a criminal offense . . . and (10) 'Governing unit' means the city and/or county or any combination of cities and/or counties responsible for the operation, supervision, and maintenance of a jail." *Id.* at Section 2.

Companion legislation, further amending the City and County Jails Act, was adopted in 1979 and provided funding via a state bond issuance to build and remodel local jail facilities. The 1979 legislation specifically added the opening language of RCW 70.48.090 which is at issue here: "Contracts for jail services may be made between a county and a city located within the boundaries of a county, and among counties." Washington Laws, 1979 1st Ex. Session, Ch. 232, Section 15 (enacted as RCW 70.49.090(1)). This legislation further specified that, "A person convicted of an offense punishable by imprisonment in a city or county jail may be confined in the jail of any city or county contracting with the city or county for jail services." *Id.* at Section 19 (enacted as RCW 70.48.220). Finally, the 1979 legislation provided for a commission to review requests for bond funds for construction or remodeling of jail facilities, and one rule to be adopted by that committee was to "encourage the voluntary consolidation of jail facilities and programs of contiguous governing units where feasible . . . ." Washington Laws, 1979 1st Ex. Session, Ch. 232, Section 9(3)(iii) (enacted as RCW 70.48.060).

RCW 70.48.090(1) was amended in 2002 to its current form: "Contracts for jail services may be made between a county and a city, and among counties and cities." This amendment removed the requirement that a county contract with a city "within the boundaries of a county" and added authorization for inter-city and inter-county contracts. Washington Laws, 2002, Ch. 125, Section 1. This 2002 legislation also amended RCW 70.48.220 to substitute the term "confined for" in place of "convicted of," allowing for pre-conviction transfer of persons among city and county jails. *Id.* at Section 2.

In 2007, RCW 70.48.090 was further amended to provide cities and counties the authority to contract with cities and counties in neighboring states for the housing of persons convicted of crimes under state law. Washington Laws, 2007, Ch. 13, Section 1 (enacted as RCW 70.48.090(2)). Analysis of the proposal by the State House of Representatives indicates that the legislation was necessary because the existing statute was unclear as to whether a county or city was authorized to contract with a city or county outside of the State of Washington. Testimony in support of the bill came from Clark County, which indicated that this would assist with its overcrowding issues. Opposition to the bill was based on: (1) issues encountered by cities, including Seattle, when previously contracting with Yakima County for the housing of prisoners; (2) varying standards between the jails run by cities and by counties and the inability to ensure that those standards would be met by jails in other states; and (3) difficulties based on the high turnover rates for jail inmates housed outside their home counties, revealing an increased need for contact with families and counsel.

2. Interlocal Cooperation Act – Chapter 39.34 RCW

The Interlocal Cooperation Act was first passed in 1967 "to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities." RCW 39.34.010.

The definition of "public agency" under the Act was expanded in 1971 to include any "Indian tribe recognized as such by the federal government." Washington Laws, 1971, Ch. 33 (amending RCW 39.34.020). The Summary of the Senate Bills sent to Governor Evans at the time of this amendment indicated that the legislation was recommended by the Urban Affairs Council because it would allow "tribes to take an active part in governmental cooperation plans throughout the state," such as enabling the Colville tribe to take part in the Tri-Counties Cooperation Program.

In 1984, the Legislature enacted the Court Improvement Act in response to the increasing costs of operating the court systems and municipalities repealing their municipal codes and forcing counties to bear the burden of prosecuting, adjudication, and sentencing in misdemeanor and

gross-misdemeanor criminal cases then filed in district court as a result. AGO 2000 No. 8 (Nov. 15, 2000). The Court Improvement Act provided that if a municipality had already repealed its municipal criminal code, but maintained traffic infractions, it was required to reach agreement with the county under the Interlocal Cooperation Act regarding reimbursement for the costs resulting from its repeal. RCW 3.50.800. Disagreements between cities and counties regarding apportionment of criminal justice costs ensued, including litigation. AGO 2000 No. 8 (Nov. 15, 2000).

In response to the ongoing disputes, a specific provision relating to misdemeanor offenses was added to the Interlocal Agreement Act in 1996. This new section provided that "each county, city, and town is responsible for the prosecution, adjudication, sentencing, and incarceration of misdemeanor and gross misdemeanor offenses committed by adults in their respective jurisdictions . . . whether filed under state law or city ordinance, and must carry out these responsibilities through the use of their own courts, staff, and facilities, or by entering into contracts or interlocal agreements under this chapter to provide these services." Washington Laws, 1996, Ch. 308 (enacted as RCW 39.34.180).

The Senate Bill Report indicated that the legislation specified that each county, city, or town was responsible for the costs incident to misdemeanors and gross misdemeanor offenses in their respective jurisdictions, except if modified by contract or interlocal agreement. Testimony in support of the legislation indicated that the legislation would reduce suits between different government entities, enhance district courts, and provide a process for negotiation of agreements.

The House Bill Report explained that a district court (run by a county) has concurrent criminal jurisdiction with a superior court (run by a city or town) with respect to misdemeanors and gross misdemeanors. Superior courts charged a filing fee to a city or town that filed a criminal action in a district court for violation of a city or town ordinance. The legislation amended the existing framework such that the responsibility for the filing fee would be based on the jurisdiction referring the misdemeanor or gross misdemeanor violation for prosecution, regardless of whether the person was charged under state or municipal code. The House Report also outlined that local government and state agencies could enter into interlocal contracts (one government provides a service or facility for another government) or interlocal agreements (joint provision of a service or facility) under the Interlocal Cooperation Act. It further specified that "[t]he City and County Jails Act permits counties and cities to enter into contracts with each other for the provision of

jail services." Testimony against the bill in the House indicated that the bill would be costly and time was needed to prepare for it.

B. Attorney General Opinions

The Attorney General issued an opinion in 2000 dealing with the scope of authority provided to a city under the City and County Jails Act. AGO 2000 No. 8 (Nov. 15. 2000). Among the questions addressed in the Opinion was whether a code city has the authority to lease a jail from a non-governmental entity. The Attorney General recognized the broad authority that code cities have to acquire property for municipal purposes, but explained that "the Legislature has significantly limited the power of cities and counties with respect to jails." The Opinion cited the City and County Jails Act which was enacted in 1977, "apparently after years of study," and explained that "the Act appears to have narrowed cities' preexisting authority with respect to jails." The Attorney General found that a result of the Act was "the express imposition on cities and counties, as governing units, the responsibility for the 'operation, supervision, and maintenance' of jails."

The Attorney General had previously issued a 1975 opinion regarding the Interlocal Cooperation Act. AGO 1975 No. 2 (Jan. 31 1975). The specific question addressed in the Opinion was whether a consolidated city-county government could make contracts under the Act. The Opinion explained that the authority for city-county governments was established in Amendment 58 passed by the voters in 1972. Amendment 58 provided that city-county governments would have the "rights, powers and privileges as may be granted to it, or to any city or county or class or classes of cities and counties . . . ." However, the Interlocal Cooperation Act, which was amended in 1973, the year after Amendment 58 passed, did not include "city-county" in its definition of "public agencies" permitted to enter into contracts in RCW 39.24.020. The Attorney General reasoned that the legislature could have easily amended the Interlocal Cooperation Act, if it intended to include city-counties, but did not. "Accordingly, their absence from the extensive list of other governmental bodies set forth in that statute gives rise to a strong inference of intentional omission by the legislature . . . ." Moreover, the Attorney General reasoned, even if the authority for the city-county to enter into such inter-local agreements existed, based on the broad language of Amendment 58, the correlative authority does not exist for other public agencies to enter into such agreements with a city-county. Accordingly, no such

authority exists "until and unless the legislature again amends RCW 39.24.020 [] so as expressly to include city-counties."

C. Case Law

In *Queets Bank of Indians v. State*, the Supreme Court of Washington responded to a certified question from the Ninth Circuit seeking to determine whether the definition of "jurisdiction" in a Washington act pertained to reciprocal registration of vehicles by Indian tribes. 102 Wn.2d 1, 2-3 (1984). The Tribes involved in the case argued that they bore sufficient similarities to entities included in the definition of "jurisdiction" of the act at issue, specifically "a state, territory, or possession of the United States." *Id.* at 4. The Washington Supreme Court acknowledged that "Indian Tribes do possess some powers and characteristics akin to those of states, territories, and possessions"; it emphasized, however, that "they are truly sui generis" and "do not fit into neat pigeonholes of the law." *Id.* (internal citations and quotations omitted). The court went on to explain that where the legislature intended to include Indian tribes in statutes, it has done so expressly, citing to the Interlocal Cooperation Act (RCW 39.34.020) as well as three other examples, RCW 43.99.020(2), RCW 43.99D.030, and RCW 47.68.090. *Id.* at 4-5. Based on the fact that there was no uniformity in treatment of Indian tribes as territories or possessions "and the Legislature's general practice of expressly mentioning Indian tribes," the court was "convinced" that the Legislature did not intend to include them in the act at issue. *Id.* at 5.

In *Exendine v. City of Sammamish*, the Washington Court of Appeals highlighted that the Interlocal Cooperation Act does not provide independent authority for a public agency to engage in any underlying governmental activity. 127 Wn. App. 574, 584 (2005). The plaintiff in the case argued, citing to the Interlocal Cooperation Act, that the district court that issued a search warrant applying to it did not have jurisdiction over it. *Id.* In response, the court emphasized that the Interlocal Cooperation Act allowed cities and counties to enter into agreements for government services and facilities, but does not independently provide a court with jurisdiction to issue a search warrant. *Id.* Rather, such jurisdiction is provided for in a separate legislative provision and a court authorized to exercise such jurisdiction could contract with another city or county which had the same jurisdiction. *Id.*

The interplay between the Interlocal Cooperation Act and municipal court jurisdiction was at issue before the Washington Supreme Court in *City of Medina v. Primm*, 160 Wn.2d 268 (2007).

There, the plaintiffs challenged the jurisdiction of the municipal court in which they were charged and sentenced, because they were charged under the municipal code of a different city than the municipal court where they were charged and prosecuted, due to agreements under the Interlocal Cooperation Act. *Id.* at 273. The court had no trouble concluding that read together, the jurisdictional statute and the Interlocal Cooperation Act allowed cities to enter into intercity court sharing contracts, especially since the jurisdictional statute cited the Interlocal Cooperation Act. *Id.* At 276. The court emphasized the broad language of the Interlocal Cooperation Act, specifically that it is "in addition to and *supplemental to* powers or authority conferred by any other law," highlighting that this meant the Interlocal Cooperation Act provided supplemental authority to the municipal court in which these plaintiffs were charged and prosecuted. *Id.* at 276-77 (citing RCW 39.34.100). The court rejected the plaintiff's argument that the municipal court hearing the cases was not authorized to enforce municipal codes other than its own: "The question under RCW 39.34.080 is whether the city is authorized to perform *the type of governmental activity that is the subject of the agreement*[.]" *Id.* (emphasis added). Importantly, the court went on and acknowledged that, based on plain language and legislative history, RCW 39.34.180 (the provision at the heart of the issue here) "governs city/county interlocal agreements . . . . [and] was not intended to govern intercity court-sharing agreements." *Id.* at 278-79. The court went on to explain that "RCW 39.34.180 clarifies the allocation of criminal justice costs as between cities and counties . . . ." and that the authority for intercity agreements arose from RCW 39.34.080. *Id.* at 279.

The Washington Supreme Court reiterated its limited reading of RCW 39.34.180 in *City of Auburn v. Gauntt*, 174 Wn.2d 321 (2012). The City of Auburn charged an individual with a misdemeanor under state law, but the city had not adopted a corresponding municipal statute. *Id.* at 323. The city contended that it had adopted an ordinance acknowledging its responsibilities under RCW 39.34.180 and thus, had the authority to prosecute state-law-based misdemeanors. *Id.* at 329-30. "Read as a whole, RCW 39.34.180 addresses the responsibility for and apportionment of the costs and expenses of the administration of justice at the local level." *Id.* at 330. "It does not confer authority on municipalities to prosecute violations of state law." *Id.* at 331. The court found, however, that "nothing in the Interlocal Cooperation Act, chapter 39.34 RCW, [] explicitly grants cities the authority to prosecute for violations of state statutes." *Id.* Instead, it looked to statutes specifically dealing with a city's power to prosecute misdemeanors

to determine whether the city had authority to prosecute misdemeanors based on state law. *Id.* at 331-332.

IV. ANALYSIS

The Nisqually Jail Service Agreement cites both the City and County Jails Act and the Interlocal Cooperation Act as the authority for the contractual agreement. Thus, the question is whether either statute actually provides authority for the contract between the City of Yelm and the Nisqually Indian Reservation.

The ultimate goal of statutory interpretation is to determine the legislature's intent. *Dep't of Ecology v. Campbell*, 146 Wn.2d 1, 9 (2002). The first step is to determine if there is a plain meaning to the statutory language. *Id.* at 9-10. Plain meaning is derived from the ordinary meaning of the language, the context of the statute, related provisions, as well as the statutory scheme as a whole. *Id.* at 9-12. If there is ambiguity in the statutory language, then courts will look beyond its plain meaning to other "aids to construction, including legislative history." *Id.* at 10.

A. City and County Jails Act

The meaning of the City and County Jails Act is apparent from its plain language. At its core, the Act provides that "[c]ontracts for jail services may be made between a county and a city, and among counties and cities." RCW 70.48.090. At issue here is whether an Indian tribe or Indian reservation can reasonably be included in this provision as either a "county" or "city." "City" and "county" are not separately defined in the Act, but are included in the definition of "governing unit." RCW 70.48.020 (defining "governing unit" as "the city and/or county or any combination of cities and/or counties responsible for the operation, supervision, and maintenance of a jail.").

The ordinary meaning of "city" and "county" is plain. Black's Law Dictionary (10th ed.) provides definitions for both:

- County: "The largest territorial division for local government within a state, generally considered to be a political subdivision and a quasi-corporation."

- City: "A municipal corporation, usually headed by a major and governed by a city council; a municipality of the highest grade."

The ordinary usage and definition of each of these terms does not include Indian tribe or reservation. Accordingly, the plain language of the statute does not authorize a contract for jail services between the City of Yelm and the Nisqually Indian Reservation.

This is consistent with the Attorney General's reading of the Act. *See* AGO 2000 No. 8 (Nov. 15, 2000). The Attorney General explained that the City and County Jails Act "appears to have narrowed cities' preexisting authority with respect to jails." *Id.* Moreover, the Act expressly imposed the responsibility specifically on cities and counties for the "'operation, supervision, and maintenance' of jails." *Id.*

Looking at the statute more broadly further supports this conclusion. The statute has been amended twice with respect to the parties permitted to contract under it and both amendments broadened its scope. In 2002, an amendment allowed contracts between cities and counties generally (not just between counties and the cities located within them) and for contracts between cites and contracts between counties. The 2007 amendment provided for contracts with cities and counties in neighboring states. Nothing in the plain language of these amendments or the legislative history suggests an intent to include Indian tribes or Indian reservations. Importantly, the 2002 amendment was adopted in part because cities were already entering into these inter-city contracts. As is discussed below, the fact that a fair number of cities and counties have entered into contracts with Indian tribes or Indian reservations (particularly Nisqually) for the provision of jail services is publicly known. If the legislature wanted to explicitly provide authority for these contracts, it could have done so in a number of its amendments to the City and County Jails Act since 1979, but it has not done so. This omission suggests that the legislature does not intend the Act to include Indian tribes or Indian reservations. *See* AGO 1975 No. 2 (Jan. 31, 1975) (finding failure to include city-counties in Interlocal Cooperation Act or any subsequent amendment "gives rise to a strong inference of intentional omission by the legislature").

This determination is supported by *Queets Bank of Indians v. State*, 102 Wn.2d 1 (1984), where the Washington Supreme Court rejected the argument that Indian tribes were included in a statute by its reference to "a state, territory, or possession of the United States." *Id.* at 4. As in

that case, Indian tribes or Indian reservations may have some powers or characteristics similar to a city or county, but they do not fit squarely into these definitions. *Id.* The Legislature's failure to expressly include Indian tribes or Indian reservations in the City and County Jails Act, even in subsequent amendments, suggests that the legislature did not intend to include them here. *Id.* at 4-5.

Finally, even if the statute were ambiguous, nothing in the legislative history of the City and County Jails Act or relevant amendments reflects an intent to include Indian tribes or Indian reservations as parties with whom a city or county can contract with to provide jail services. The Act originated from concerns regarding the conditions of Washington jails in general and the belief that one way to address the issue of limited funding was to allow for cooperation between the cities and the counties within which they reside, given the overlapping responsibilities for the provision of jail services. The 2002 Amendment to allow cities to contract with other cities was based, in part, on the fact that this was an existing practice although not explicitly authorized by the Act. The 2007 amendment, providing the authority to contract with cities and counties in neighboring states, was based on a perceived ambiguity of "city" and "county." Importantly, the legislative history for the 2007 amendment is silent on the potential for Indian tribes or Indian reservations as included in the potential ambiguity. Instead, the ambiguity was simply whether the definition of "city" or "county" is limited to those in the State of Washington.

Based on the above, we find no authority or support for Indian tribes or Indian reservations as being parties authorized to enter into contracts with cities or counties for the provision of jail services under the City and County Jails Act.

B. Interlocal Cooperation Act

The Interlocal Cooperation Act does not provide the authority for a city or county to contract with an Indian tribes or Indian reservations. The plain language of the statute makes clear that it does not create the power for any public agency to perform specific services. "Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking *which each public agency entering into the contract is authorized by law to perform.*" RCW 39.34.080 (emphasis added). "The powers and authority conferred by this chapter shall be construed as *in addition and supplemental to* powers or authority conferred by any other law." RCW 39.34.100 (emphasis added). These provisions

provide that the Act requires that the public agency that is required to perform services under an interlocal contract or agreement must have independent authorization to perform such services. The Act allows the public agency to perform such services on behalf of another public agency as a supplement to that original authority. The Act does not provide original and independent authority for a public entity to provide a services that it not otherwise authorized to perform under Washington law.

This was expressly recognized by the Washington Supreme Court in *City of Medina v. Primm*, 160 Wn.2d 268 (2007). There, the court explained that the Interlocal Cooperation Act provides supplemental authority for an agency to act, but does not independently demonstrate that the public agency at issue "is authorized to perform the type of governmental activity that is the subject of the agreement[.]" *Id.* at 277. Instead, to determine whether the public agency at issue has the authority to perform the act contracted for, the court must look to where there is a separate statute authorizing the public agency to perform that function. *Id.*; *Exendine v. City of Sammamish* 127 Wn. App. 574, 584 (2005) (finding the Interlocal Cooperation Act did not provide a court with jurisdiction, but rather that authority had to be found in a separate statute dealing specifically with jurisdiction).

This is critical here. As explained above, Indian tribes or Indian Reservations are not independently authorized under Washington law to provide jail services. The City and County Jails Act only provides the authority for cities and counties to contract with other cities and counties, either in Washington or in a neighboring state, for the provision of jail services. The City and County Jails Act does not provide for contract with sovereign nations, such as an Indian tribe or Canada, for the provision of jail services.

Moreover, the Washington Supreme Court has, in two separate cases, emphasized that the specific provision of the Interlocal Cooperation Act that deals with contracting between cities and counties relating to criminal misdemeanors (RCW 39.34.080) is expressly limited to interlocal agreements between a city and a county. *City of Auburn v. Gauntt*, 174 Wn.2d 321 (2012); *Medina*, 160 Wn.2d at 278-79. Based on plain language and legislative history, RCW 39.34.180 (the provision at the heart of this issue) "governs city/county interlocal agreements . . . . [and] was not intended to govern intercity court-sharing agreements." *Medina*, 160 Wn.2d at 278-79. "RCW 39.34.180 clarifies the allocation of criminal justice costs as between cities and counties . . . ." Accordingly, the mere inclusion RCW 39.34.080 in the

Interlocal Cooperation Act is not sufficient to support an argument that the legislature intended to provide the authority for all "public agencies" as defined in the Act, which includes Indian tribes, to enter into agreements for the provision of jail services for criminal misdemeanors.

Finally, under Washington law, where there are conflicting statutes relating to the same topic, the more specific statute controls. *See Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 870 (2012) ("When statutes conflict, specific statutes control over general ones.") (citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146-47 (2001)). Here, the City and County Jails Act is the more specific statute, specifically enacted to provide authorization for contracting with other governmental entities for the provision of jail services. In contrast, the Interlocal Cooperation Act is the more general statute, enacted to provide for inter-governmental agreements generally.

Based on the above, we find no authority or support for Indian tribes or Indian reservations as being parties authorized to enter into contracts with cities or counties for the provision of jail services under the Interlocal Cooperation Act.

C. Existing Practice of Contracting with Indian Tribes or Indian Reservations

Despite the above findings, the City of Yelm's contract with the Nisqually Reservation is not unique. According to the Nisqually Department of Corrections website "partnerships have been developed with several other agencies to provide housing and various correctional services . . . including: Port Gamble, Squaxin, Suquamish, Puyallup, Lacey, Tumwater, Yelm, Rainier, Tenino, Thurston County, ICE, Swinomish, Skokomish, Ft. Lewis, Nooksack, and Washington State DOC.[1] Additionally, the City of Tacoma approved an agreement with the Nisqually tribe in 2005.[2]

V. CONCLUSION

The City of Yelm's contract with the Nisqually Indian Reservation is not authorized under Washington law, specifically the City and County Jails Act (Ch. 70.48 RCW) or the Interlocal Cooperation Act (Ch. 39.34 RCW).

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[1] http://www.nisqually-nsn.gov/index.php/administration/tribal-services/public-safety/department-corrections/

[2] http://www.tacomaweekly.com/news/article/tacoma-inmates-set-to-face-short-term-shuffle/