OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan
ATTORNEY GENERAL

FILE NO. 00-011

COUNTIES:
Contribution to Legal Defense Fund

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The Honorable C. Steve Ferguson
State's Attorney, Coles County
651 Jackson, Room 330
Charleston, Illinois 61920

Dear Mr. Ferguson:

I have your letter wherein you inquire whether it would be permissible for a non-home-rule county to contribute county moneys to a legal defense fund established to aid the 25 named defendants in Miami Tribe of Oklahoma v. Walden, Docket No. 4:00 CV 4142 (United States District Court, Southern District of Illinois). For the reasons hereinafter stated, it is my opinion that a county would not be prohibited from contributing public moneys to a private legal defense fund if it is determined that the interests of the county and its residents will be benefitted thereby.

In responding to your inquiry, it is helpful to review the historical background underlying the Miami Tribe of Oklahoma v. Walden lawsuit. On June 2, 2000, the Miami Tribe of Oklahoma

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filed suit against 25 named defendants seeking "* * * recognition of [the Miami Tribe of Oklahoma's] ownership interest in trust, and recovery of physical possession of those portions of land wrongfully held by the respective Defendants, of an approximate 2,648,420 acre tract of land within Champaign, Clark, Coles, Crawford, Cumberland, Douglas, Edgar, Effingham, Ford, Iroquois, Jasper, Moultrie, Livingston, Shelby and Vermilion Counties, Illinois (the 'Miami Wabash Watershed Tribal Lands within Illinois') to which it is entitled under federal law and U.S. Treaty commitments. * * *" The Miami Wabash Watershed Tribal Lands within Illinois include, inter alia, some 249,185 acres situated in Coles County.

On September 1, 2000, the Miami Tribe of Oklahoma filed an amended complaint in this case. Under the amended complaint, the Miami Tribe "* * * seeks[, inter alia,] a declaration that * * * [the Miami Tribe of Oklahoma] holds recognized treaty title to the lands held by the [named] Defendants within the Miami Wabash Watershed Tribal Lands within Illinois * * * [and] possession of those portions of land, within the Miami Wabash Watershed Tribal Lands within Illinois, that are held by the respective Defendants * * *".

According to the Miami Tribe's amended complaint, the Miami's tribal lands originally extended over much of modern-day

Ohio, Michigan, Indiana, Wisconsin and Illinois, and included that area referred to as the Miami Wabash Watershed Tribal Lands within Illinois. As early as 1795, the United States government began to negotiate treaties with various Indian tribes regarding title to land and the relinquishment of claims related thereto. Under the Treaty of Greenville (7 Stat. 49), the Federal government and the participating Indian tribes, including the Miami Tribe, established a boundary line between United States lands located east of the Mississippi River for which Indian title had been relinquished and Indian lands which had not been relinquished for which title had been recognized by the Federal government.

In 1805, the United States government entered into the Treaty of Grouseland (7 Stat. 91) with several Indian tribes, including the Miami Tribe, which dealt with title to certain lands located east of the Mississippi River. According to the Miami Tribe's amended complaint, under the provisions of that treaty, the Federal government "* * * recognized the Miami, Eel River and Wea Tribes as having exclusive title, ownership and right to possession of treaty-guaranteed lands located in the Wabash Watershed in parts of what are now Ohio, Indiana and Illinois * * *" and "* * * that no part of the lands guaranteed to the Miami Tribe by treaty could be transferred without the

express consent of the Miami Tribe". Although the Miami Tribe has ceded lands within the Wabash Watershed to the United States government through a series of treaty cessions since 1805 (see, e.g., Miami Treaty of 1818 (7 Stat. 189), Miami Treaty of 1826 (7 Stat. 300), Miami Treaty of 1828 (7 Stat. 309), Miami Treaty of 1834 (7 Stat. 458-463), Miami Treaty of 1838 (7 Stat. 569), and Miami Treaty of 1840 (7 Stat. 582)), the amended complaint alleges that the Miami Tribe "* * * did not, at any time, cede the Miami Wabash [Watershed] Tribal Lands within Illinois".

The Miami Tribe maintains that, subsequent to entering into the foregoing treaties, the United States government, through its General Land Office, sold property located in the Miami Wabash Watershed Tribal Lands within Illinois to white settlers. The Miami Tribe further alleges that the United States government sold that property without adopting a treaty or convention as Federal law required, without the adoption of a statute expressly and specifically extinguishing the Miami Tribe's title to the Wabash Watershed Tribal Lands within Illinois and without the consent of the Miami Tribe.

Based upon its allegations that the United States government failed to obtain the requisite consent from the Miami Tribe or to extinguish the Miami Tribe's interest in the tribal lands, the Miami Tribe has filed suit against 25 private landown-

ers or trustees of private land trusts who are representative defendants for claims affecting thousands of landowners in 15 Illinois counties. Among those named as defendants in the suit are Coles County landowners Timothy R. Yow and Patricia L. Yow.

You have noted that although some of the named defendants have title insurance policies covering their property, others do not. Consequently, a legal defense fund for the benefit of the named landowners has been established, and a number of the defendants have requested that the affected counties contribute to the defense fund. You have inquired whether Coles County may lawfully contribute public moneys to the legal defense fund in these circumstances.

It is well established that non-home-rule counties may exercise only those powers that have been expressly granted to them by the constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers which have been expressly granted. (Redmond v. Novak (1981), 86 Ill. 2d 374, 382; Heidenreich v. Ronske (1962), 26 Ill. 2d 360, 362.) Section 5-1016 of the Counties Code (55 ILCS 5/5-1016 (West 1998)) authorizes a county board to "* * * manage the county funds and county business, except as otherwise specifically provided. * * *" The county board's power to manage the county's funds, however, is limited by section 1 of article VIII

of the Illinois Constitution of 1970 which provides, in pertinent part:

> "(a) Public funds, property or credit shall be used only for public purposes.
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Under the language of article VIII, section 1(a) of the Illinois Constitution, it is clear that an expenditure of public funds must serve a public purpose. (Wright v. City of Danville (1996), 174 Ill. 2d 391, 400.) In In re Marriage of Lappe (1997), 176 Ill. 2d 414, the Illinois Supreme Court was asked, inter alia, to determine the constitutionality of sections 10-1 and 10-10 of the Public Aid Code (305 ILCS 5/10-1, 10-10 (West 1994)), which allowed the Illinois Department of Public Aid to file a petition to intervene on behalf of a custodial parent for judicial enforcement of a noncustodial parent's support liability regardless of the financial circumstances of the custodial parent. In concluding that these provisions of the Public Aid Code were not unconstitutional and that a public purpose, within the meaning of article VIII, section 1 of the Illinois Constitution, was served by providing child support enforcement services for all children, the supreme court stated:

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> * * * This court has long recognized that what is for the public good and what are

public purposes are questions which the legislature must in the first instance decide. [Citations.] In making this determination, the legislature is vested with a broad discretion, and the judgment of the legislature is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private. [Citations.] In the words of Justice Holmes, 'a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect.' Block v. Hirsh, 256 U.S. 135, 154, 65 L. Ed. 865, 870, 41 S. Ct. 458, 459 (1921).

This court has previously set forth guidelines for this inquiry:

> 'In deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper use of the government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a public purpose and proper for the maintenance of good government.' Hagler, 307 Ill. at 474.

What is a 'public purpose' is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society. [Citations.] Moreover, '"[t]he power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general wellbeing of society and the

> happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they ofttimes call for the expenditure of public money."' [Citation.] The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose. [Citations.]
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(Emphasis added.) In re Marriage of Lappe (1997), 176 Ill. 2d at 429-31.

Recognizing these limitations, the Illinois courts have long held that "[d]efraying the costs of purely private litigation has always been outside the bounds of a proper public purpose". (Wright v. City of Danville (1996), 174 Ill. 2d at 400; see also City of Chicago v. Williams (1899), 182 Ill. 135.) It must be determined, therefore, whether the defense of the real property rights at issue in the lawsuit initiated by the Miami Tribe of Oklahoma is a "purely private" matter, or would serve "a proper public purpose".

As previously noted, the Miami Tribe has filed suit against 25 private landowners or trustees of private land trusts and has claimed title to 15 private tracts of land located within 15 east central or southern Illinois counties. If the resolution of the competing claims of ownership in these private tracts of land was the extent of the lawsuit, it is questionable whether the defense of the action would serve a public interest suffi-

cient to justify a contribution of public funds to the defense fund. The Miami Tribe's original complaint, however, sought a declaratory judgment that the Tribe holds title to approximately 2.6 million additional acres of real property in east central and southern Illinois, and also sought physical possession of those lands allegedly wrongfully held. Although the Miami Tribe's amended complaint seeks a declaration of ownership and possession only with respect to the property of the 25 named defendants, nothing in the amended complaint or in the Miami Tribe's other pleadings (see generally MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTION OF THE STATE OF ILLINOIS TO INTERVENE FOR THE LIMITED PURPOSE OF MOVING TO DISMISS, filed September 15, 2000) suggests that its claims concerning the other 2.6 million acres of property have been waived by the Miami Tribe. Moreover, nothing in the amended complaint or the other pleadings in this case indicates any intent on the part of the Miami Tribe to forego proceedings against the other landowners allegedly wrongfully holding tribal lands located in the Miami Wabash Watershed Tribal Lands within Illinois in the future.

In addition to the specter of future litigation regarding the remaining 2.6 million acres of property, there is an immediate concern that the other affected property owners may also be bound by determinations made in Miami Tribe of Oklahoma

v. Walden. In this regard, I note that the Federal courts have consistently held that the interpretation of an Indian treaty is a question of law, not a matter of fact. (United States ex rel. Chunie v. Ringrose (9th Cir. 1986), 788 F.2d 638, 643 n.2, cert. denied, 479 U.S. 1009, 107 S. Ct. 650 (1986); Strong v. United States (Ct. Cl. 1975), 518 F.2d 556, 563, cert. denied, 423 U.S. 1015, 96 S. Ct. 448 (1975); Sioux Tribe v. United States (Ct. Cl. 1974), 500 F.2d 458, 462; Cayuga Indian Nation of New York v. Cuomo (N.D.N.Y. 1991), 758 F. Supp. 107, 111.) Under the doctrine of stare decisis, "* * * a deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in the case, and necessary to its determination is an authority or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases where 'the very point' is again in controversy; * * *". (Beals v. Fontenot (5th Cir. 1940), 111 F.2d 956, 959 n.6; United States v. Furey (E.D. Pa. 1980), 491 F. Supp. 1048, 1069.) Thus, any decision with respect to the effect of the pertinent treaties on the 25 named defendants may well be binding precedent upon any similarly situated parties in a subsequent suit involving some or all of the other 2.6 million acres of property located in the Miami Wabash Watershed Tribal Lands in Illinois.

As previously noted, some 249,185 acres, or approximately 389 square miles, of property located in Coles County is included in the area subject to potential claim. Coles County is 508.3 square miles in size. (Illinois Blue Book 413 (1993-94.) Therefore, this or a subsequent lawsuit may affect approximately 77% of the real property located in Coles County. Since a majority of the landowners in Coles County could potentially be affected by the outcome of the Miami Tribe's lawsuit, a determination by the Coles County Board that a contribution of money to the legal defense fund would serve a public purpose would certainly be defensible. Indeed, such a determination would be entitled to great weight by the courts. Because of the direct impact that a successful suit would have on the county itself, however, I believe that the Board could justify a contribution on that basis alone.

Attached to the Miami Tribe's amended complaint as "Exhibit 1" is a map which purports to identify the location of the Miami Wabash Watershed Tribal Lands within Illinois, including the boundaries of the 2.6 million acres which the Miami Tribe seeks to recover. Exhibit 1 illustrates that the 249,185 acres in Coles County claimed by the Miami Tribe includes the entire city of Charleston, the county seat of Coles County. Thus, the Miami Tribe's lawsuit could ultimately deprive the county of the

very property upon which the Coles County Courthouse and other county buildings is situated and upon which various county agencies are housed. Moreover, since 77% of the real property located in the county has been and may eventually be included in this or a derivative lawsuit, it can safely be assumed that roads and highways included in the county highway system would likewise be affected by the Miami Tribe's suit. Therefore, the lawsuit has the potential of depriving Coles County of property which it purports to own for the use and benefit of the public and for the construction and maintenance of which public funds have no doubt been expended. Surely, it could not seriously be contended that a county would be without authority to expend public funds to defend its ownership of land in a quiet title action. (See generally City of West Chicago v. County of DuPage (1979), 67 Ill. App. 3d 924, 926 ("* * * a municipality * * * has the implied authority to * * * sue and be sued in order to effectuate the purposes for which it was created").) No significant distinction can be drawn between defending an action and contributing to a defense fund where a court's decision may have a binding, precedential effect on the county.

In addition to having a direct interest in the ownership of the real property which may be affected by the lawsuit, the county also has an interest in the preservation of its taxing

and regulatory powers. The loss of as much as 77% of the real property currently on the county's tax rolls (see, e.g., McClanahan v. State Tax Commission of Arizona (1973), 411 U.S. 614, 93 S. Ct. 1257, and Mescalero Apache Tribe v. Jones (1973), 411 U.S. 147, 93 S. Ct. 1267, with respect to the amenability of Indian-owned land to ad valorem taxation and local regulation) would result in a significant loss of tax revenue and no doubt would impair the county's ability to perform its mandated functions. Moreover, the removal of the property at issue from county jurisdiction may result in the remaining property in Coles County being affected by the county's inability to enforce its land-use, health and other regulations.

Based upon these factors, it is my opinion that the defense of the real property rights at issue in Miami Tribe of Oklahoma v. Walden cannot be characterized as purely private litigation. To the contrary, it is apparent that the lawsuit may ultimately have an adverse effect upon the interests of the people of Coles County generally and of the county itself. Although Coles County has not been named as a defendant in the Miami Tribe lawsuit, it would not offend the Constitution to permit the county to protect these interests in this litigation by assisting the named defendants in their defense of the action, if it is determined that this would benefit the interests of the

public. Consequently, it is my opinion that Coles County would not be prohibited from contributing to the private landowners' defense fund in these circumstances.

Nothing stated herein, however, should be interpreted as suggesting any diminution in the traditional role of the State's Attorney as the legal representative of the county. It has long been held that the State's Attorney is, by law, the sole legal representative of the county and its officers, and that a county board ordinarily cannot expend county funds to employ any other attorney to perform the duties imposed upon the State's Attorney. (See Ashton v. County of Cook (1943), 384 Ill. 287, 300.) If the county had been named a defendant in this case, or had sought to intervene in the litigation, then only the State's Attorney or his designee could represent the county's interests. In this litigation, however, the interests of the county and its people are only indirectly at issue. It cannot be said that the State's Attorney would be under an affirmative duty to provide representation or to take any action on behalf of the county in these proceedings. Therefore, the contribution of funds to assist in the representation of the named defendants would not intrude upon the relationship existing between the State's Attorney and the county board, where no duty to represent the county has arisen. Because of the possibility that this case

will ultimately lead to litigation in which the interests of the county are directly in issue, I cannot emphasize too greatly the need for the county board to consult with and obtain the advice of the State's Attorney before making any decision in this regard.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL