

N.D.A.G. Letter to Sinner (May 22, 1990)

May 22, 1990

Honorable George A. Sinner
Governor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Governor Sinner:

Thank you for your May 8, 1990, letter requesting my reconsideration of N.D. Op. Att'y Gen. 90-07.

I have had my staff review the opinion and further research the issues. Their research essentially confirmed the original opinion. As you stated in your May 8, 1990, letter to Ms. Martin-Kekahbah, my opinion recognized that the Tribe is, in most cases, viewed as an independent sovereign able to regulate its own activities. However, I also recognize the United States Supreme Court's determinations that when a tribe's actions have impacts off the reservation, the state's interests are also relevant to determine the balance of regulatory power between the two sovereigns. As the off-reservation impacts increase, the state's interests increase in kind. At some point, the state's interest becomes so great the state may regulate the tribe's activities as the state would regulate the activities of others.

In this case, I determined the off-reservation impacts were sufficient to require the Tribe to submit to state regulation and obtain a certificate of need. Although additional research has been conducted, my opinion with regard to that conclusion has not changed. However, I have determined that the statements concerning the perimeters of the "state plan" were overbroad and, thus, were technically incorrect. I have, therefore, modified the opinion to correct those errors. I am enclosing a copy of the modified and reissued opinion for you.

The corrections required do not change the balance of regulatory power between the state and the Tribe. The corrections stem from the federal government's authority to control the Medicaid Program, not from the Tribe's inherent sovereignty. It is my understanding the Tribe has been attempting to tap the federal government to exercise this authority in its recent negotiations in

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Washington. Their goal is to effect a change in federal law which will allow the Tribe to obtain direct federal financial assistance although the proposed facility is not an Indian Health Service facility.

The Tribe's position before the Health Council and apparently in discussions with you, has been that the state must evaluate the Tribe's application for a certificate of need in light of the Tribe's inherent sovereignty. My position is that tribal sovereignty is a protection for the tribal government from obtrusive actions by other sovereigns. Once a determination is made that state law applies, tribal sovereignty does not prohibit the state from requiring the tribe to obtain a certificate of need or require it to apply state law differently to the Tribe than it does to others. Furthermore, the scope of the Health Council's consideration is limited by state law to whether the facility is needed in the area. The Health Council cannot determine that a facility is needed based only upon the tribe's needs. It must also consider the needs of others and the impact on all who are affected.

I trust that this discussion will be of assistance to you. If you have other questions or wish to discuss this matter further please call me.

Sincerely,

Nicholas J. Spaeth

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