STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-07

Date issued: May 22, 1990

Requested by: Dr. Robert M. Wentz
State Health Officer

- QUESTIONS PRESENTED -

I.

Whether the Tribal Council of the Turtle Mountain Band of Chippewas must receive a certificate of need from the State of North Dakota to establish a nursing home lawfully on the Turtle Mountain Reservation.

II.

Whether the Tribal Council of the Turtle Mountain Band of Chippewas must comply with North Dakota law, if it intends to seek rate payments through the medicaid program to operate a nursing home on the Turtle Mountain Reservation.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Tribal Council of the Turtle Mountain Band of Chippewas need not receive a certificate of need from the State of North Dakota to establish a nursing home lawfully on the Turtle Mountain Reservation.

II.

It is my further opinion that the Tribal Council of the Turtle Mountain Band of Chippewas must comply with North Dakota law if it intends to seek rate payments through the medicaid program.

- ANALYSES -

I.

The Tribal Council of the Turtle Mountain Band of Chippewas plans to construct a 60-bed nursing home on the Turtle Mountain Reservation. The facility will not be an Indian health services facility but will be owned and operated by the tribe. Anyone planning to establish a nursing home is required to obtain acertificate of need from the North Dakota State Department of Health and Consolidated Laboratories under N.D.C.C. ch. 23-17.2. Whether the Turtle Mountain Band of Chippewas must comply with this statute is part of the larger

issue of the boundary between state regulatory authority and tribal sovereignty and self-government. The United States Supreme Court has often considered this issue of state-tribal jurisdiction.

"[C]onsiderations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read." Three Affiliated Tribes of Ft. Berthold v. Wold Engineering, 476 U.S. 877, 884 (1986). Where the state interest is "unduly burdensome on federal and tribal interests," the federal interest will override the state interest. Three Affiliated Tribes of Ft. Berthold v. Wold, 476 U.S. 877, 888 (1986).

The Supreme Court has given voice to a rule that when a state's interest is substantial, a state regulation applied to a tribe directly may be upheld. However, the Court has rarely decided this issue in the state's favor. The state's interest in regulating the tribe itself must, therefore, be compelling or its regulation will be stricken. In summary, "[s]tate jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state's authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983).

Federal law and policy encourages tribal sovereignty and self-sufficiency. See, e.g., 25 U.S.C. ' 450 et seq. (1988). Congress has assured that Indians have direct access to adequate health care. 25 U.S.C. ' 13 et seq. (1988); 25 U.S.C. ' 2 & 1601 et seq. (1988).

If the state certificate of need law applies to the Band and the certificate is denied, such action may adversely affect federal and tribal interests in enhancing Indian employment and economic development as well as the tribe's ability to provide direct health services to its members. "Self-determination and economic development are not within reach if the tribes cannot raise revenues and provide employment for their members." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987).

The state has a heightened interest in regulating a tribal activity that has off-reservation effects. Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977). Nonetheless, the Supreme Court's cases do not favor state regulatory authority over tribal members or the tribe itself when, as in this case, the regulation will adversely affect tribal sovereignty. Thus, it is my opinion that the state certificate of need law does not apply to the Turtle Mountain Band of Chippewas' plan to construct a 60-bed nursing home.

II.

N.D.C.C. ' 23-16-01 requires that nursing homes be licensed by the state. N.D. Admin. Code art. 33-07 contains comprehensive regulations governing nursing homes. If the Band seeks rate payments through the medicaid program, these state requirements will apply.

It is possible that the nursing home would apply for the status of a medicaid provider to be eligible to serve tribal members (or others) who are eligible for medicaid benefits under N.D.C.C. ch. 50-24.1. A nursing home which seeks payment for services furnished to medicaid eligibles must accept rates established by the state pursuant to N.D.C.C. ch. 50-24.4 and rules adopted to implement it. N.D.C.C. ' 50-24.4-04. No payments can be made except upon compliance with all state laws. N.D.C.C. ' 50-24.4-04. Federal law also provides for states to establish and maintain health standards for institutions in which recipients of medical assistance may receive care and services, and also to establish and maintain standards, other than those relating to health, for such institutions. 42 U.S.C. ' 1396(a)(9) (Supp. V 1987). Federal law also requires compliance with applicable state laws if medical assistance is provided to persons in long-term care facilities. 42 C.F.R. ' 405.1120(c) (1989), 42 C.F.R. ' 442.315 (1989), 42 C.F.R. ' 442.201 (1989), and 42 C.F.R. ' 442.251 (1989) (until October 1, 1990), and 42 C.F.R. ' 438.75(a) and (c) (1989) (after October 1, 1990).

In a number of decisions the Supreme Court has referred to the relevance of the provision of state services in the preemption analysis. See Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989) (upholding severance tax because substantial services provided); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (state hunting and fishing laws inapplicable to non-Indians on a reservation when no service provided); Ramah Navajo School Bd. v. Bur. of Revenue of New Mexico, 458 U.S. 832 (1982) (gross receipts tax inapplicable to a non-Indian company's construction of a school for an Indian tribe because no service provided); and White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (holding state fuels tax preempted because state provided no services). Thus, a state's regulation of a tribal activity may be permitted when the regulation is coupled with services to the tribe.

Assuming the state provided medicaid rate payments to the tribal facility, the state's interest in applying state laws is heightened by the fact that it may face loss of federal financial participation if the "state plan" for medical assistance is not approved and followed. 42 U.S.C. ' 1396 (Supp. V. 1987) and 42 U.S.C. ' 1396b (Supp. V 1987). The "state plan" must require facility certification, execution of effective provider agreements which meet the requirements of state and federal statutes and rules, and the adoption of state standards, whether or not relating to health, in order to receive approval by federal authorities. 42 U.S.C. ' 1396a(a)(9) (Supp. V 1987), 42 U.S.C. ' 1396a(a)(27) (1982), and 42 U.S.C. ' 1396a(a)(28) (Supp. V 1987). The standards adopted by North Dakota include the certificate of need provision discussed in section I. Therefore, it is my opinion that the nursing home will be subject to North Dakota, including licensing requirements and certification of need requirements, if the tribe seeks payments through the medicaid program.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the

actions of public officials until such time as the questions presented are decided by the courts.

Nicholas J. Spaeth
Attorney General

pg