



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

May 4, 1987

Mr. Ted Williams, Director
Arizona Department of Health Services
State Health Building
1740 West Adams Street
Phoenix, Arizona 85007

Re: I87-060 (R86-166)

Dear Mr. Williams:

Your predecessor has asked for an opinion as to the extent of the authority of the Department of Health Services ("Department") to regulate ambulance services serving tribal members or operated by Indian tribes, whether operating on or off an Indian reservation.

A.R.S. §§ 36-2201 to -2244, gives the Department broad authority to regulate ambulance services operating within Arizona. The Department has the power to register ambulances, A.R.S. § 36-2231, license ambulance services, A.R.S. § 36-2212, and regulate rates, response times and service areas to meet the needs of the public and assure adequate ambulance service, A.R.S. § 36-2232. The power of the Department to regulate depends on the power of the court to enforce such regulation. Three obstacles to state regulation of tribal ambulance services exist. They are tribal immunity, tribal self-governance and federal preemption.

It is well established that Indian tribes are immune from suit. Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214, 104 S.Ct. 2655, 81 L.Ed.2d 362 (1984); accord Val/Del, Inc., v. Superior Court, 145 Ariz. 558, 560, 703 P.2d 502, 504 (App.), cert. denied, ___ U.S. ___, 106 S.Ct. 250, 88 L.Ed.2d 257 (1985); S. Unique, Ltd., v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 380, 674 P.2d 1376, 1378 (App. 1983). This immunity extends to tribal officials acting in their representative capacity. Snow,

Mr. Ted Williams
May 4, 1987
I87-060
Page 2

709 F.2d at 1321. However, tribal officials may be sued, individually, for actions which are in excess of their official duties. White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 8, 480 P.2d 654, 658 (1971). Tribal immunity also extends to tribal enterprises. White Mountain Apache, 107 Ariz. at 7, 480 P.2d at 657. Nonetheless, a tribe may create a corporate entity which is subject to federal and state jurisdiction. Inecon Agrincorporation v. Tribal Farms, Inc., 656 F.2d 498, 499, 501 (9th Cir. 1981). If a suit brought for the purpose of enforcing state regulation upon a tribal ambulance service is barred by tribal immunity, such bar is dispositive. See California v. Quechan Tribe, 595 F.2d 1153, 1154-1155 (9th Cir. 1979).

Tribal sovereign immunity is not absolute. It exists only at the sufferance of Congress and can be waived by congressional act. United States v. Oregon, 657 F.2d 1009, 1013 (9th Cir. 1981). No congressional act has waived Indian immunity to suit in the context of state ambulance service regulation. A tribe may also waive its immunity to suit.^{1/} Id. Waiver must be unequivocal; it cannot be implied. Snow, 709 F.2d at 1321. Without an express congressional or tribal waiver, the Department could not enforce its statutes and regulations because it could not overcome the tribe's personal immunity from suit.

^{1/}A sue and be sued clause has been recognized as constituting an explicit waiver of sovereign immunity. Nonetheless, such waiver does not determine what forum has jurisdiction. Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 671-672 (8th Cir. 1986). Great care must be taken when dealing with a tribal enterprise to determine (1) whether the entity is organized so that it has waived or may waive sovereign immunity, (2) whether the waiver is limited, and (3) what court has subject matter jurisdiction. Once it has been determined that the enterprise will be subject to suit, then care must be taken to deal exclusively with the sue and be sued entity and not with the tribe or another tribal entity which has not waived sovereign immunity. E.g., Ramey Construction Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982).

Mr. Ted Williams
May 4, 1987
I87-060
Page 3

The second obstacle to Department regulation of an Indian tribal ambulance service concerns subject matter jurisdiction. The inquiry is: Does the Department have the power to regulate tribal ambulance service?

Two independent but related barriers drawn from the supremacy of federal policy have developed: (1) the right of tribes to govern themselves and (2) the federal preemption doctrine. Either barrier, standing alone, is a sufficient basis for holding state law inapplicable to activity undertaken on a reservation or by tribal members. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665, 672 (1980).

In the leading case on state exercise of jurisdiction over Indians and Indian reservations, the Court formulated the test that state action must not infringe upon the right of reservation Indians to govern themselves. Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed. 251, 254 (1959); accord White Mountain Apache Tribe, 448 U.S. at 142, 100 S.Ct. at 2583, 65 L.Ed.2d at 672 (1980). Essential to the analysis of whether state action infringes on Indian self-governance is an examination of whether the area sought to be regulated by the state is one in which the Indian tribe has retained inherent sovereign power.

An Indian tribe retains inherent sovereign power in regulating matters which affect the health and welfare of the tribe. Cardin v. De La Cruz, 671 F.2d 363, 366 (9th Cir.), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). This sovereign power has even been held to empower regulation by Indians over the activities of non-Indians on the reservation. In Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) the court stated:

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566, 101 S.Ct. at 1258, 67 L.Ed.2d at 511.

Mr. Ted Williams
May 4, 1987
I87-060
Page 4

The Arizona statutes and regulations which govern ambulance services are pervasive in their application to such services. See A.R.S. §§ 36-2212 to -2244, A.A.C. R9-13-1001 to R-13-1201, A.A.C. R-13-1401 to R9-13-1415. The area sought to be regulated, health care, falls within retained inherent Indian sovereignty. Cardin v. De La Cruz. Arizona cannot extend its power into Indian country if it will thereby infringe upon the right of the Indian people to govern themselves. See White v. Califano, 437 F.Supp. 543, 548 (D.S.D. 1977). State regulation of a tribal ambulance service, based on an Indian reservation and serving members of the tribe is an impermissible infringement on tribal sovereignty.

Closer questions are presented where (1) the tribe contracts for a non-member to provide ambulance service solely on the reservation or (2) a tribal ambulance service based on a reservation transports non-members on the reservation or from the reservation to an off-reservation facility. A tribe may regulate activities of non-members on the reservation. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-331, 103 S.Ct. 2378, 2384, 76 L.Ed.2d 611, 617-618 (1983). If the tribe chooses to provide health care services for its members through contracting with non-members, it is still exercising its inherent sovereignty and state regulation of the contractor providing ambulance service to the tribe on the reservation would be barred.

With regard to a tribal ambulance service primarily serving tribal members, the occasional transport of non-members on the reservation or to off-reservation facilities does not overcome the self-governance bar to state regulation. See Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 162-164, 100 S.Ct. 2069, 2086, 65 L.Ed.2d 10, 35-36 (1980). In that case the Court held the state was not permitted to tax vehicles owned by tribe or its members even though they were used both on and off the reservation. In cases of tribal service to non-members and tribal contracts with non-members, the tribe is seeking to govern activity occurring on the reservation. Its ambulance service exists for the purpose of providing health care to members, a matter which falls within inherent tribal sovereignty.

The third barrier to state regulation of Indian ambulance services is the federal preemption doctrine. That doctrine holds that state jurisdiction is preempted by the

Mr. Ted Williams
May 4, 1987
I87-060
Page 5

operation of federal law if it interferes with 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 authority. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 103 S.Ct. 2378, 2386, 76 L.Ed.2d 611, 620 (1983); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 845, 102 S.Ct. 3394, 3402, 73 L.Ed.2d 1174, 1184-1185 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. at 145, 100 S.Ct. at 2584, 65 L.Ed.2d at 673. When a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose. The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the state in connection with the on-reservation activity. New Mexico v. Mescalero Apache Tribe, 462 U.S. at 336, 103 S.Ct. at 2387, 76 L.Ed.2d at 622.

The preemption analysis requires a particularized inquiry into the nature of the state, federal and tribal interests at stake. 462 U.S. at 333, 103 S.Ct. at 2386, 76 L.Ed.2d at 620.^{2/} In Ramah the Court examined the federal interest by looking to federal statutes demonstrating the federal government's concern with the education of Indian children^{3/} and to the comprehensive regulations governing school construction for schools now controlled and operated by tribes or tribally approved Indian organizations. 458 U.S. at 840-841, 102 S.Ct. at 3400, 73 L.Ed.2d at 1181. It found the federal government's detailed regulatory scheme governing the construction of autonomous Indian education facilities to be

^{2/}There is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. White Mountain, 448 U.S. at 142, 100 S.Ct. at 2583, 65 L.Ed.2d at 671-672.

^{3/}The Court looked to the Snyder Act, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13); the Johnson-O'Malley Act, 48 Stat. 596 (1934) (codified at 25 U.S.C. §§ 452 to 457); and the Indian Self-Determination Act, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450 to 450n, 455 to 458e, 42 U.S.C. § 2004b, 5 U.S.C. § 3371, 42 U.S.C. § 4762).

Mr. Ted Williams
May 4, 1987
I87-060
Page 6

comprehensive. Id. at 841, 102 S.Ct. at 3400, 73 L.Ed.2d at 1182; see White Mountain, 448 U.S. at 145-148, 100 S.Ct. at 2584-2586, 65 L.Ed.2d at 674-676.

Examining the federal interest in ambulance service regulation requires looking to four congressional acts. First, the Snyder Act specifically authorized the Bureau of Indian Affairs to spend money on the Indians "[f]or the relief of distress and conservation of health." 25 U.S.C. § 13. Second, the Johnson-O'Malley Act authorized the Secretary of the Interior to contract for and expend moneys appropriated by Congress for medical attention of Indians. 25 U.S.C. § 452. Third, the Indian Self-Determination Act provided for an orderly transition from federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services. 25 U.S.C. § 450a(b). Finally, in the Indian Health Care Improvement Act, 90 Stat. 1400 (1976), as amended 94 Stat. 3137 (1980), Congress found that Indian health was imperiled by lack of access to health services because of remote residences and undeveloped or underdeveloped communication and transportation systems, and declared a policy to provide the highest possible health status to Indians. 25 U.S.C. §§ 1601(f)(5), 1602.

This federal legislation regarding Indian health care is amplified by comprehensive regulation. Indian Health, 42 C.F.R. §§ 36.1-.374 (1986).^{4/} The Arizona regulatory

^{4/}Subpart H of these regulations provides for federal grants to be awarded for "projects for development including . . . operation, provision, or maintenance of services . . . provided to Indians." 42 C.F.R. § 36.101 (1986). A project supported under subpart H must have sufficient, adequately trained staff in relation to the scope of the project, maintain a mechanism for dealing with complaints regarding the delivery of health services, hold medical information confidential, keep adequate liability insurance and provide services at a level and range which is not less than that provided by the Indian Health Service or that identified by the Service as an appropriate level, range and standard of care. Id. § 36.105. A subpart H grant to a tribal enterprise emergency health care system which included an ambulance service would be subject to these federal regulations.

Mr. Ted Williams
May 4, 1987
187-060
Page 7

scheme differs from and would interfere with the detailed federal regulatory scheme governing Indian health care services,^{5/} which is at least as comprehensive as the federal scheme found to be preemptive in Ramah and White Mountain. See Ramah, 458 U.S. at 840-41, 102 S.Ct. at 3400, 73 L.Ed.2d at 1182; White Mountain, 448 U.S. at 145-148, 100 S.Ct. at 2584-2586, 65 L.Ed.2d at 671-672.

To demonstrate a state interest Arizona must either point to significant off-reservation effects which warrant state intervention to protect Arizona citizens, or identify a regulatory function it provides in connection with the maintenance of Indian ambulance services. New Mexico v. Mescalero Apache Tribe, 462 U.S. at 341, 103 S.Ct. at 2390, 76 L.Ed.2d at 625. To override the Indian and federal interests the state interest must be substantial enough to justify interference with tribal self-government and with the federal regulatory scheme. See Id. at 338-341, 103 S.Ct. at 2388-2390, 76 L.Ed.2d at 623-625.

Through its registration of ambulances, A.R.S. § 36-2231, licensure, A.R.S. § 36-2212, and certification, A.R.S. § 36-2232, of ambulance services, Arizona provides a regulatory function in return for its fees. It inspects ambulances, A.A.C. R9-13-1001(B)(4), and establishes staffing criteria for safety purposes, A.A.C. R9-13-1002(B). It establishes rates, response times and service areas. A.R.S. § 36-2232(A). All of these functions benefit the patients and the ambulance service. The tribe may, and the federal government does regulate in these areas. Where concurrent jurisdiction of both state and tribe exist, Arizona's

^{5/}Arizona statutes and rules govern the same areas governed by subpart H. See, e.g., A.R.S. § 36-2201(3), (5), (11), (12), (14) (defining staff and services); A.R.S. § 36-2204 (authorizing the medical director of emergency medical services and the emergency medical services council to recommend medical standards and criteria which apply to ambulance attendants); A.R.S. § 36-2205 (requiring the director to establish rules governing services, treatments, procedures and medications which may be administered by emergency medical technicians (ambulance attendants)); and A.R.S. § 36-2237 (requiring ambulance service to show proof of liability insurance).

Mr. Ted Williams
May 4, 1987
I87-060
Page 8

comprehensive regulation of ambulance services would effectively supplant the tribal control which Congress sought to return to the Indian tribes through the Indian Self-Determination Act. The Arizona regulatory interest, when weighed against the strong federal and Indian interest in the Indian health care area, will most likely be found insufficient. We are aware of no significant off-reservation effects that would warrant state intervention.

Therefore, both Indian self-governance principles and the federal preemption doctrine would bar state jurisdiction to license and certificate an Indian tribal ambulance service, primarily serving Indian patients, based upon or operated from an Indian reservation.

In certain circumstances, however, an argument can be made in support of Department enforcement of its regulatory authority over a tribal ambulance service operating off reservation. A general principle of Indian law is that absent federal law to the contrary, Indians going beyond reservation boundaries are subject to nondiscriminatory state law otherwise applicable to all citizens of the state. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114, 119 (1973); see also Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S.Ct. 562, 571, 7 L.Ed.2d 573, 583-584 (1962) (non-reservation Indian communities operating fish traps in state waters in contravention to state law were subject to state regulation). State jurisdiction turns on whether the transaction sought to be regulated involves significant contacts with the state outside reservation boundaries, *i.e.*, whether the Indian has voluntarily subjected himself to state jurisdiction over that transaction. Crawford v. Roy, 577 P.2d 392, 393-394 (Mont. 1978); accord R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 985 (9th Cir. 1983). But see People v. McCovey, 685 P.2d 687 (Cal. 1984) (reservation Indian caught salmon on reservation as permitted by federal and tribal law; sold it off reservation in contravention of state law prohibiting sale of gill-netted salmon; preemption analysis held no California jurisdiction over sale).

Thus, were a tribal ambulance service to regularly come off its reservation to serve non-members of the tribe in the normal course of its business, these activities would be subject to Department regulation. A tribe's interest in self-governance does not extend beyond its interest in the health and safety of

Mr. Ted Williams
May 4, 1987
I87-060
Page 9

members of the tribe. Cf. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154-157, 100 S.Ct. 2069, 2082-2083, 65 L.Ed.2d 10, 29-31 (1980) (using preemption analysis, the Court found that marketing a state generated tax exemption had no substantial connection to the reservation or retained inherent sovereignty). As in Crawford v. Roy, subject matter jurisdiction in state court could be achieved by proof of significant voluntary contacts outside reservation boundaries. Personal jurisdiction over tribal officers is appropriate if it can be shown they are acting outside the scope of the tribe's sovereign power. See Tenneco Oil Co. v. Sac & Fox Tribe, 725 F.2d 572, 574 (10th Cir. 1984).

In conclusion, federal policy favoring Indian self-governance and federal preemption of the area of Indian health care effectively bar Department enforcement of its regulatory authority with regard to an ambulance service serving tribal members or operated by an Indian tribe on its reservation. The fact that a tribal ambulance service comes off the reservation to transport its Indian patients does not provide a sufficient state nexus to overcome the jurisdictional barriers to regulation of a basically Indian enterprise.

Sincerely,



BOB CORBIN
Attorney General

BC:SSS:pcd