

# CMS Waiver Thinking Ignores Tribal Sovereignty

Result: Health care costs shift to Tribes

By Ron Karten

Like everybody, Oregon's Tribes are paying more for health care these days, but for the Tribes, the reason is not only the economics of health care, but also cheap politics. It is another case of sovereignty denied and the federal Department of Health and Human Services acknowledges as much.

When the state's 2002 Legislative Emergency Board ordered cuts to Oregon's Medicaid program, thousands of Oregon Indians were among those slated to lose state health benefits.

Confederated Tribes of Grand Ronde Chairwoman Cheryle Kennedy took the lead among Tribes in asking a legislative panel to exempt the Tribes from the cuts because Tribal funding is all federal. In short, she said, the state would save no money by cutting Natives from the Health Plan.

Nevertheless, when Oregon Medicaid developed a second, lower level of care, a so-called "standard" plan, affecting as many as 100,000 of the state's poor, it included about 2,400 Natives.

About 5,000 Native Americans continued to be covered by the state's "plus" plan for Oregon's neediest.

The standard plan requires higher co-payments and does not provide non-emergency transportation, routine vision services, services related to hearing aids, dental services, medical equipment, supplies, outpatient mental health or chemical dependency services.

Medicaid services have continued decreasing since then. Most recently, on July 1st, the Medicaid office began implementing a legislative directive to cut the standard benefit package by more than half. Sources at Oregon Medical Assistance Programs (OMAP) expect the Native population to be cut proportionately. While the cuts will be met as much as possible through attrition, the process has swept Oregon's Native population into a circling-the-drain policy that abrogates longstanding treaty obligations, Supreme Court decisions and federal regulations already on the books.

Since the E-board's 2002 reductions, Oregon Tribes, the Oregon Legislature and the state's Medicaid office have worked together to exempt the Tribes from the cuts.

The effort came in the form of Senate Bill 878 in the 2003 Oregon Legislature followed by a waiver request from the state Medicaid office to the federal Center for Medicare and Medicaid Services (CMS).

The waiver has since landed in the federal Office of Civil Rights. It is being evaluated under the so-called "strict scrutiny" provision of

the 1964 Civil Rights Act. Title VI requires the state to show that the waiver is consistent with directives forbidding discrimination based on race, etc.

Although no official decision has

been handed down, the word came back from Washington, according to Joan Kapowich, Program and Policy Section manager for OMAP, that "the overall leaning was to tell us, 'No, absolutely no'" to the exemption.

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~ Deborah Cateora  
**American Indian Alaska Native  
 Program manager for OMAP**

In short, the Civil Rights office considers the AI/AN population a minority group and the request discriminatory because it singles some out for benefits that others don't get.

The state/Tribal view holds that Tribes are sovereign nations and not a minority group among Americans.

Another knowledgeable source who declined to comment for attribution agreed that the CMS statement was an unexplainable turnaround in policy.

"It speaks to the mindset of an institution that doesn't understand the issues of Indians," Roberts said.

CMS also blamed Congress for not specifically requiring consideration

of sovereignty and other treaty trust obligations in CMS statutes.

This is "something the senator will definitely be looking into," said Carolyn Espinoza, spokeswoman for Oregon Senator Gordon Smith.

The actual cost to Tribes paying for those Indians booted from Oregon's standard plan varies by Tribe and changes with on-going cuts in the state's program.

For the Confederated Tribes of Grand Ronde, which funds a health clinic for its members and also offers a Tribe-funded insurance policy, the Medicaid cutbacks have driven many urban and other off-reserve Tribal members back to the Tribe for their health care needs translating into a cost-shift from Medicaid and the Indian Health Service to the Tribe.

In addition to paying for increased numbers, the Tribe also now pays for expensive dental and behavioral health services cut off by Medicaid. All this means less

money is available to the Tribes for economic development, social services and the housing needs of members.

"As the Oregon Health plan gets skinnier and skinnier," said Michael Watkins, the Grand Ronde's Executive Health director, "it costs the Tribe more and more."

For the smaller Burns-Paiute Tribe that does not have a health insurance plan for its members, funding expensive health services requires hard decisions, Watkins said.

"One hospital stay has already cost the Coquille Tribe \$40,000," said Edward Fox, Director of the Northwest Portland Area Indian Health Board.

The costs also are likely to grow into other areas of Tribal government, said Jim Roberts. When individuals do not receive drug and alcohol related services, for example, courts and social service agencies are also likely to see increased costs.

"One could (also) argue that it could have a detrimental effect on the (Tribal) Trust relationship," said Roberts.

With the stars lined up against Oregon's waiver request, the state withdrew its waiver request and is hoping to piggy-back on a CMS decision about a similar waiver being sought in the state of Washington.

Washington seeks a waiver from co-pays and premiums for many children of the AI/AN population. Washington also argued that "the exemption is based not on race or ethnicity but on a government-to-government relationship based on

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CMS spokeswoman Mary Kahn defended the civil rights argument with a statement from the department's Office of the General Counsel: "Neither CMS nor states are authorized to accord special treatment for individuals in the

Native Treaty Trust Rights, and that has been recognized by the Supreme Court," said Roger Gantz, Director of Policy and Analysis for the Washington State Department of Social and Health Services.

In *Morton v Mancari*, the Supreme Court ruled, "Federal legislation that singles out Indians for preferential treatment is not subject to strict scrutiny and will pass constitutional muster if it is rationally related to the government's unique trust responsibility to Indians."

In its letter to CMS seeking a waiver for AI/AN children, the state of Washington wrote: "Its objective is fully consistent with the hundreds of other federal programs which permissibly single out American Indians and Alaska Natives for special or preferential treatment in furtherance of the Federal government's trust responsibility to Indians as defined by the Supreme Court in *Mancari*."