

**N.D.A.G. Letter to Vogel (Sep. 16, 1991)**

September 16, 1991

The Honorable Sarah Vogel  
Commissioner  
Department of Agriculture  
State Capitol  
Bismarck, ND 58505-0020

Dear Commissioner Vogel:

Thank you for your August 28, 1991, letter requesting my opinion on questions raised by the North Dakota State Potato Council.

You ask whether the North Dakota State Potato Council is a state agency and if so, whether the doctrine of sovereign immunity protects the council and the council's members. These questions were addressed in a previous memorandum from Assistant Attorney General Allen C. Hoberg. Memo to Kevin Pifer from Allen C. Hoberg (August 26, 1987). I am enclosing a copy of that memo for your information.

In the Hoberg memo it was concluded that the North Dakota State Potato Council was a state agency. This conclusion was based in part on the fact the Potato Council is established by state law, members are elected by North Dakota potato growers and it has taxing authority. The law in this area has not changed since 1987, consequently the conclusions reached in that memo are still valid.

The memo also concluded the Potato Council had sovereign immunity. As a state agency, unless the Legislature waives the Council's immunity by statute, the council has sovereign immunity.

Your third question is whether the purchase of liability insurance from a private company on behalf of the council and individual members waives the doctrine of sovereign immunity.

N.D.C.C. § 32-12.1-15(1) provides: "No purchase of insurance pursuant to this section or participation in a government self-insurance pool may be construed as a waiver of any existing immunity to suit." This language was added to the statute during the 1987 and 1989 legislative sessions. 1989 N.D. Sess. Laws ch. 412 § 4; 1987 N.D. Sess. Laws ch. 351, § 3.

The North Dakota Supreme Court considered the question you ask in Senger v. Hulstrand Construction, Inc., 320 N.W.2d 507 (N.D. 1982). In that case the court determined that the purchase of insurance was a waiver of sovereign immunity to the extent of the coverage purchased. Since that time, however, the Legislature has amended the statute

as noted previously.

Only the Legislature may waive the state's sovereign immunity. Id. at 509; N.D. Const. Art. I, § 9. Because the Legislature has specifically provided that existing immunity is not waived by the purchase of liability insurance, it is my opinion that the purchase of liability insurance by the North Dakota Potato Council and its individual members will not waive their sovereign immunity.

I trust this answers your questions.

Sincerely,

Nicholas J. Spaeth

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