

TRIBES ARE PUBLIC HEALTH AUTHORITIES:

Protecting Tribal Sovereignty
in Times of Public Health Crisis

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SUMMARY

- No law, federal or Tribal, is needed to grant Tribes the authority to engage in public health activities.
- Engaging in public health activities is an inherent power of Tribes as sovereign nations.
- Federal law recognizes Tribal sovereignty and states that Tribes retain all powers of its inherent sovereignty unless clearly divested by Congress.
- No federal law exists that clearly divests Tribes of their authority to engage in public health activities.
- Although not the source of Tribal public health authority, the federal government recognizes this power under federal law and programming.
- Tribal public health codes designating public health officers, agencies, and duties can be used as a tool to protect Tribal public health jurisdiction from infringement by state and local governments or implied divestment by federal courts.
- State, local, and federal agencies should recognize each Tribe's unique and sovereign authority to engage in public health activities.

INTRODUCTION

The COVID-19 pandemic has highlighted existing gaps in public health systems across the country¹ including federal Indian health systems.² Despite treaty obligations to provide health care to American Indians and Alaska Natives, the federal government has consistently underfunded Indian health facilities.³ Federal Indian health programming remains piecemeal, often falling victim to Congressional politics for continued funding,⁴ requiring inter-Tribal competition for grant and cooperative agreement funding,⁵ or requiring Tribal cost sharing.⁶

Tragically, but, unsurprisingly given failures in federal Indian health policy,⁷ many American Indian and Alaska Native communities have experienced health inequities throughout the pandemic.⁸ In several states, American Indians have higher rates of COVID-19 infections as well as worse health outcomes, including higher mortality, than their non-Indian counterparts.⁹

By exercising their inherent sovereignty as Tribal Nations, many Tribes have been able to mitigate failings in federal Indian health policy in their COVID-19 response.¹⁰ Unfortunately, reports across Indian country have found instances of state and local governments failing to adequately engage Tribal governments in public health activities, even those implicating Tribal members on Tribal lands, citing lack of Tribal public health authority. Not only is this legally inaccurate, but it also limits Tribal public health response efforts, and infringes on Tribal sovereignty.

This issue brief discusses the legal authority for Tribes to serve as public health authorities. First, it describes the inherent authority of Tribes to engage in public health activities. Second, it discusses the recognition of Tribal public health authority across federal law and programs. This issue brief ends by discussing strategies to reinforce Tribal authority in times of public health crisis.

For the purposes of this issue brief, public health authority refers to the authority of a government to engage in public health activities as part of its official duties. Although the federal government defines this term as part of statutory and regulatory schemes,¹¹ being recognized as a public health authority under a federal law is distinct from being the official public health authority for a sovereign government.¹²

I. TRIBAL INHERENT PUBLIC HEALTH AUTHORITY

No law, federal or Tribal, is needed to grant Tribes the authority to engage in public health activities. Protecting the public's health, safety, and welfare is among the core powers and duties of sovereign governments.¹³ Engaging in isolation, quarantine, case investigations, contract tracing, and disease surveillance are essential public health services.¹⁴ These powers are inherent to all sovereign nations, including Tribes. This authority to protect and promote health and welfare has been explicitly referenced as a power of the government in some Tribal constitutions.¹⁵



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Federal Indian law, the body of law that defines the rights, relationships, and responsibilities between Tribes, states, and the federal government,¹⁶ holds that Tribal sovereignty is not a grant of authority by the United

States.¹⁷ Instead, federal law recognizes this sovereignty, which Tribes have exercised since time immemorial.¹⁸ Tribal sovereignty is a Tribe's "right ... to make their own laws and be ruled by them."¹⁹ It is a "plenary and exclusive power over their members and their territory" and includes governmental power to tax, regulate, among other authorities.²⁰

Under federal law, Congress maintains authority, referred to as the plenary power doctrine, to legislate on all matters concerning Tribes and Indians.²¹ This plenary power can be used to divest Tribes of their jurisdiction, including their ability to exercise sovereignty in certain matters; however, divestment of Tribal government power requires a clear statement by Congress.²² No federal law exists that clearly divests Tribes of their authority to engage in public health activities. And, while the federal government has concurrent authority "to intervene in infectious disease threats in Indian country, through isolation and quarantine as an example, the day-to-day management of public health rests with the Tribes."²³

II. RECOGNITION OF TRIBAL PUBLIC HEALTH AUTHORITY UNDER FEDERAL LAW

No federal law is needed to grant Tribes the authority to engage in public health activities. As discussed above, this authority is inherent to Tribal sovereignty. However, federal law does recognize Tribal public health authority as it relates to federal law and programming.

For example, Health Insurance Portability and Accountability Act (HIPAA) authorizes “public health authorities” to access identifiable health information otherwise protected under federal law in order to prevent or control disease or injury.²⁴ For the purposes of HIPAA, “public health authorities” are defined to include state, local, and Tribal agencies.²⁵ Federal law also refers to state and Tribal “public health authorities” in the context of grants for tuberculosis programs in correctional facilities²⁶ and consultation with National Biodefense Science Board.²⁷

Federal programming also provides examples of federal recognition of Tribal public health authority. The Centers for Disease Control and Prevention’s (CDC) Center for State, Tribal, Local, and Territorial Support provides support through programming and technical assistance to health agencies across state, Tribal, local, and territorial governments.²⁸ It recognizes each of the 574 federally recognized Tribes as the agencies it serves.²⁹ Federal funding, like the Preventative Health and Health Services Block Grant and the Stafford Act, includes distribution mechanisms to states and Tribes.³⁰

III. STRATEGIES TO REINFORCE TRIBAL PUBLIC HEALTH AUTHORITY

No Tribal law is required for Tribes to exercise their public health authority. However, Tribal law can be used as a tool to protect this authority from infringement, particularly from state and local governments.

The structure of governments varies from Tribe to Tribe.³¹ Some Tribes have health agencies primarily responsible for providing health services and programming³² while others may decentralize them across multiple agencies.³³ Tribal codes regularly designate individuals and agencies as health officers and health departments.³⁴ For example, the Little Traverse Bay Bands of Odawa Indians Code of Law establishes the Tribe's health department³⁵ and assigns it with certain duties.³⁶ Tribal codes also outline provisions related to contact tracing, disease surveillance, quarantine, and isolation.³⁷ Tribal public health codes can support the internal stability of public health activities:

Thus, a Tribe that centralizes public health activities in one or two departments or one that decentralizes them across multiple government entities, may maintain public health jurisdiction. While explicit Tribal authorization may not be necessary, specific authorization in Tribal codes can still be useful to operationalize and fund public health programming.³⁸

Public health codes can also enhance the external legitimacy of Tribal governments. Codified public health roles and agencies can demonstrate stability of Tribal institutions to local, state, and federal government counterparts³⁹ and facilitate more effective public health partnerships. While it is unconscionable that Tribal authority is not respected on its face, facilitating partnerships through codification of public health responsibilities can be a tool to avoid state infringement of sovereignty and, in turn, promote community health. When the Navajo Nation amended its existing laws in 2014 to reorganize its health programming under a single department of health, President Ben Shelley stated that the reorganization achieves a “state-like health department.”⁴⁰ Then Vice President Jim stated that “We firmly believe we are a sovereign nation and as a sovereign nation, there are certain essential governmental functions that we cannot, should not, ever give away to other sovereigns, entities and organizations. These are basic governmental functions.”⁴¹

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Additionally, in the event of legal conflicts between Tribes and states regarding jurisdiction, federal courts have considered the existence of Tribal codes as relevant evidence in their inquiry.⁴² And while Tribes do not generally maintain civil jurisdiction over nonmembers on nonmember fee lands, federal law provides an exception to this rule in the event that the conduct the Tribe is attempting to regulate “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁴³ Although federal courts have been reluctant to find such direct effects,⁴⁴ codification and robust agency policies may be useful evidence to support Tribal jurisdiction, particularly during a public health crisis.

CONCLUSION

Tribes are public health authorities and engaging in public health activities is an inherent power of Tribes as sovereign nations. No law—federal or Tribal—is needed to grant Tribes the authority to engage in public health activities. Tribal public health codes designating public health officers, agencies, and duties can be used as a tool to protect Tribal public health jurisdiction from infringement by state and local governments or impliedly divested by federal courts. State, local, and federal agencies should recognize each Tribe’s unique and sovereign authority to engage in public health activities. Particularly in times of public health crisis, like the COVID-19 pandemic, failure to recognize Tribal authority leads to unnecessary suffering and death.

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