



Adoption of Indian Law at the State Level

Study Summary And Reports

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League of Women Voters of New Mexico Adoption of Indian Law at the State Level

The study

At the April 2021 convention, The League of Women Voters of New Mexico (LWVNM) proposed a one-year study of the pros and cons of codifying federal Indian law at the state level, considering what is the best option for preservation of tribal sovereignty as well as benefits to tribal populations. The objective is to educate ourselves about the complexities of enforcing federal Indian law as well as the complexities of protecting tribal sovereignty. Recently, efforts have increased to more rigorously enforce federal Indian law and tribal sovereignty in New Mexico and other states with large Indigenous populations.

This study was adopted with unanimous approval by the convention delegates. It was extended in 2022 and 2023.

The normal League process of developing a consensus position based on the study was not completed because we were unable to conduct some key interviews and we lost key study participants, including our leader. This document contains the papers developed for the study. We were unable to complete the study as originally approved.

We reviewed research and current literature on areas of conflict, lack of enforcement and/or lack of funding of laws and policy pertaining to various institutions serving Native American populations. The focus areas are:

1. Education
2. Health services
3. Economic development
4. Criminal justice with a focus on missing and murdered Indians.

Reports were prepared for each of the focus areas listed above. Full reports are available on the LWVNM website, along with numerous supplemental materials related to this study for League members interested in further study.

In these papers we use the terms “Indian Law,” “Tribal law,” and “Native American” at various times. We have tried to use the correct term within the context of what is being discussed. Below is an explanation of the terms.

Context – Terms

“Federal Indian law” is the body of United States law – treaties, statutes, executive orders, administrative decisions, and court cases – that define and exemplify the unique legal and political status of the over 550 federally recognized American Indian and Alaska Native tribes; and the relationship of the tribes with the federal government.

Federal Indian law has three fundamental legal principles:

a) American Indian and Alaska Native tribes that are recognized by the federal government are independent sovereign governments, separate from the states and from the federal government.

b) Unless Congress provides otherwise, the sovereignty of federally recognized American Indian and Alaska Native tribes generally extends over their federally recognized geographic territory (e.g., reservations, allotments, trust and restricted Indian lands, and other Indian country), including over the activities and conduct of tribal members and non-tribal members within that territory.

c) The sovereignty of federally recognized American Indian and Alaska Native tribes is inherent and exists unless and until Congress takes it away. [1]

“Tribal law” means the body of non-Federal law that governs lands and activities under the jurisdiction of a tribe, including ordinances or other enactments by the tribe, and tribal court rulings. [2]

Background

Tribal sovereignty: Nations within a nation

Native American lands and peoples are considered sovereign (independent and equal) nations before the law in their dealings with one another and with the government created by the Europeans who colonized their lands.

“Sovereignty” is a legal word for an ordinary concept— the authority to self-govern. Hundreds of treaties, along with the Supreme Court, the President, and Congress, have repeatedly affirmed that tribal nations retain their inherent powers of self-government. These treaties, executive orders, and laws have created a fundamental contract between tribal nations and the United States. Tribal nations are located within the geographic borders of the United States, while each tribal nation exercises its own sovereignty.”[3]

The system and history of treaties between the national government and the tribes and nations govern the relationship. Tribally recognized Native Americans have the right of citizenship in their tribe, the state in which they reside, and the United States.

Treaties take precedence over state laws as they are approved under the constitution of the United States. The US government and the states must negotiate with the tribes and nations as equals, nation to nation. These treaties lay out the specific relationships between the U.S. and the tribes in terms of lands, law, education, health, and other areas. Historically, many legal treaties have been broken or not fulfilled by the U.S. and this fact must be acknowledged. Currently, treaties that were not fulfilled or not enforced are being re-recognized in various jurisdictions across the U.S.

Tribes set up their own systems of self-governance; these systems can and do vary among tribes. In some cases, leaders are chosen by election; in others they are chosen by more traditional methods, such as councils of elders. The Bureau of Indian Affairs created a model constitution, which some tribes follow; adoption is not mandatory. The Navajo Nation has no written constitution, but does have a tribal code. Several Pueblos have orally transmitted and tradition-based rules for governance.[3]

The tribes and nations in New Mexico are listed below. [4]

Pueblo of Acoma	Pueblo of Cochiti	Fort Sill Apache Tribe	Pueblo of Isleta
Pueblo of Jemez	Jicarilla Apache Nation	Pueblo of Laguna	Mescalero Apache Tribe
Pueblo of Nambe	Navajo Nation	Ohkay Owingeh	Pueblo of Picuris
Pueblo of Pojoaque	Pueblo of Sandia	Pueblo of San Felipe	Pueblo of San Ildefonso
Pueblo of Santa Ana	Pueblo of Santa Clara	Pueblo of Santo Domingo	Pueblo of Taos
Pueblo of Tesuque	Pueblo of Zia	Pueblo of Zuni	

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Summary of Focus Area Reports

Education

While data on Native education outcomes is scarce, New Mexico's Native students perform below the national and state averages on all measures. The COVID-19 pandemic disproportionately impacted our Native communities and education was especially affected. Many Native students, especially those living on tribal lands, had/have little or no access to remote learning technology due to lack of infrastructure and connectivity. No academic progress data is available for School Year 2020-21 as no assessments were given due to the pandemic, but the learning loss for Native students is likely to be significant.

While New Mexico recognizes that culturally and linguistically relevant programs are critical to addressing the achievement gap among Native American students, research from the Yazzie/Martinez lawsuit demonstrates that Native students do not currently have access to culturally and linguistically relevant programs even though it is already required by the Indian Education Act. The Yazzie/Martinez decision and subsequent court decisions have helped to mobilize Native communities, including efforts to build a robust Indigenous teacher pipeline to provide culturally relevant curriculum and develop supporting materials reflecting Native students' tribes, nations and pueblos.

The New Mexico Public Education Department (PED) has the authority and jurisdiction to provide the necessary leadership to move these programs forward, as well as provide the infrastructure for sharing reports and tools to generate and distribute data necessary for strategic improvement of education outcomes for Native students. More and better communication and consultation between the PED and tribes is needed.

Health Care Services

Health care for Native Americans is primarily a responsibility of the federal government. The Indian Health Service (IHS) in the Department of Health and Human Services is responsible for funding and providing health care for Native Americans, including urban Native health programs.

The IHS has been underfunded for decades and does not provide a complete range of health care services. Most hospitals provide only basic services. Any needed surgery or specialty care requires Native patients to look for care outside of IHS. The ACA does require that Native Americans obtain health insurance; Medicare is also available to Native populations.

Lack of funding, ongoing marginalization of the Native population, lack of employment opportunities and inadequate education continue to result in significant health disparities among Native populations. Differences in certain health conditions and outcomes are worse

for Native populations as a result of systemic economic, social and environmental disadvantages. Alcoholism, diabetes and cancer are conditions that occur in the Native population far more than in the general population.

Tribes can make their own laws about public health emergencies, preparedness and occupational health and safety. This is a right and responsibility belonging to any sovereign nation. A recent amendment to the ACA designates tribal epidemiology centers as public health authorities. New Mexico has two of these centers: the Navajo Epidemiology Center, and ABQ Area Southwest.

Economics

The most common sources of funding for tribal economic development are grants and bonds. Tribal sovereignty allows Nations to make their own decisions about how to best serve their unique populations. Economic development generally includes employment and job training opportunities, housing, technology and infrastructure.

While the CARES Act of 2020 and the American Rescue Plan Act of 2021 appropriated significant funds to tribal government for infrastructure projects, the timelines for project completion were very short. As a result, many of the projects were unable to be completed. Also of great importance for tribal economic development, is the expansion of broadband access. Much attention has been paid to this concern recently at both the state and federal levels; however, the lack of broadband access on tribal lands remains a barrier to economic development for most Native communities in New Mexico.

Tribal gaming has been shown to have had a positive economic impact on the pueblos and tribes in NM. Pueblos and tribes involved in gaming enjoy higher incomes, lower levels of poverty, and improved standards of living. In recent years, however, tribes have been trying to diversify their revenue streams to go beyond gaming, notably leveraging tribal sovereignty in creative ways. Overall, data on Native economic development is scarce. Research and data are key to developing policies to promote economic development for all tribal communities.

Criminal Justice

The U.S. recognizes three types of domestic sovereign governments: federal, tribal, and state. On tribal land, criminal justice for serious crimes is left to federal law enforcement. Criminal cases outside of federal or tribal jurisdiction fall to state law enforcement.

The incidence of missing and murdered Native people on tribal land is at an epidemic level. These cases highlight the budgetary and jurisdictional issues specific to law enforcement on tribal lands. A 2016 report from the National Institute of Justice found that almost 85% of Native women had experienced violence in their lifetimes. In 2017 Albuquerque and Gallup ranked in the top ten U.S. cities for missing and murdered Native women and girls. Cases of

missing and murdered Native people are complicated by overlapping jurisdictional authority, the length of time it takes to identify jurisdiction, systemic and historical devaluation of the lives of Native people, and increased risk for sexual violence and sex trafficking on and around Native communities. These factors create incentives for predators to target Native women and girls and they are much more likely to get away with these crimes.

The Biden administration proposed significant increases in funding for tribal criminal justice and support services in the 2022 budget. Included in this request was funding for Violence Against Women Act training on strategies to protect Native women. The jurisdictional issues, however, must be addressed to allow the appropriate law enforcement agency, with proper training and resources, to strategically address crime – especially crime against Native women and girls – on tribal lands.

Indian Education in New Mexico *By Meredith Machen*

Sovereignty and Education

Over the past two centuries, treaties, compacts, legislation, and court decisions have codified elements of tribal sovereignty. The legal and political recognition of tribal sovereignty is the basis for government-to-government relations that are strengthened through mutual respect, consultation, and collaboration. Tribal sovereignty is complicated when it comes to education policies because most funding comes from federal and state governments, which establish the rules of operation and overall management.

Federal Legislation History

Federal Indian education policy dating from the 1860s required the vast majority of Native American students to be taken from their families and communities to be educated in boarding schools run by Christian organizations and the U.S. government. Assimilation efforts included physical discipline of Native students for speaking their Indigenous languages, wearing Native clothing and long hair, and practicing their religious or cultural traditions. Two of the 25 off-reservation boarding schools established by the US Bureau of Indian Affairs in the 15 states with the largest Indian populations were in New Mexico (Albuquerque and Santa Fe).

Attempts to devalue and eradicate Indian identity and to educate Indigenous students for the white world resulted in intergenerational psychological trauma with long-term impacts exacerbating social and economic disparities. Though the federal government closed most of these boarding schools by 1972, the ill effects of the disastrous assimilation policy have not been forgotten. Vestiges of Manifest Destiny, colonialism, and removal from Native homelands can be seen today. Many Indians living on reservations face poverty, lack of infrastructure (electricity, clean water, sanitation, health care, and broadband), and environmental degradation from extractive industries.

In the 1970s, Indian activism about the lack of respect for tribal sovereignty forced a change in federal and state policies in numerous arenas, especially education. The activism was fueled both by anger at long-standing efforts to acculturate Native students into the mainstream and an urgency to preserve the distinct languages, traditions, and cultures that were threatened by Americanization. Indigenous and other leaders worked with education experts who advocated successfully for the federal Indian Self-Determination and Educational Assistance Act (P.L. 93-638) in 1975. The act acknowledged the inherent right to self-governance of Indigenous peoples.

Soon afterwards New Mexico's All Indian Pueblo Council (AIPC) was formed, becoming the first organization in the nation to use the law to establish tribal sovereignty over education and other matters. Subsequent amendments allowed Santa Fe Indian School to become a tribally

controlled school. The Santa Fe Indian School Act (2000) transferred the land to the AIPC, which today represents the 19 Pueblo Governors of New Mexico and the Governor of Pueblo Ysleta del Sur in Texas.

In 1990, Congress passed the Native American Languages Act (P.L. 101-477), which accorded special status to Native Americans, “a status that recognizes distinct cultural and political rights including the right to continue separate identities.” The law found that, “the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values” (P.L. 101-477 SEC. 102).

In 1992, the act was amended (P.L. 102-524) to provide grants that have supported numerous tribal language acquisition programs across the country. In March 2021, bipartisan legislation, S.989, proposing the establishment of a Native American Language Resource Center for preservation and revitalization of Indigenous languages, was introduced. Representative Teresa Leger Fernández (D-NM-03) is one of the sponsors of H.R. 2271, the House companion bill: <https://www.congress.gov/bill/117th-congress/senate-bill/989?s=1&r=1>.

Formula and special grant funding for K-12 Indian education flows from the federal government through the state’s public education department to local educational agencies or directly to the Bureau of Indian Education for tribal schools. The Every Student Succeeds Act, Pub. L. No. 114-95, Title I, § 1401 (2015) (ESSA), requires all elementary and secondary school students to meet the same academic achievement and content standards.

New Mexico’s Indigenous Students and Policies

Native Americans comprise about 10 percent of New Mexico’s population. Many Native students live on reservations in rural areas far from urban centers. Each of New Mexico’s 23 sovereign governments (19 Pueblos, three Apache tribes, and the Navajo Nation) has a separate relationship with the state. New Mexico’s policies and programs related to its Native population go well beyond what is required by federal legislation.

New Mexico’s extraordinary State Tribal Consultation Act (STCA), passed in 2009, requires the state to provide services to benefit its Native citizens. In terms of education, the STCA calls for regular communication and collaboration to “ensure that parents; tribal departments of education; community-based organizations; the department of education; universities; and tribal, state, and local policymakers work together to find ways to improve educational opportunities for American Indian students.”

With regard to Indian education, each of New Mexico’s sovereign nations works with the state in different ways. Some tribal governments have formal, detailed government-to-government agreements with the state defining their policies and procedures for interactions. Some communicate on a regular basis and submit detailed reports; others provide little to no evidence of collaboration. Every state agency is required to submit annual reports to the NM

Indian Affairs Department in July describing the activities and outcomes related to the collaboration. The NM Public Education Department (PED) had not submitted its STCA report as of mid-August 2021.

For many years, PED has been heavily criticized for not providing public school students - including Native students - a sufficient education as mandated by New Mexico's Constitution. Though it has made some progress, the PED will continue to face major legal and budgetary challenges in order to comply with the STCA, the Bilingual Multicultural Education Act (1973), the Indian Education Act (2003), and the Yazzie/Martinez decision (2018), which are described later in this report.

NM's Bureau of Indian Education Schools

About 6,000 Native students in New Mexico are served by the federally funded Bureau of Indian Education (BIE), a division of the Bureau of Indian Affairs (BIA), run by the Interior Department. The BIE system in New Mexico consists of 44 schools. The BIE directly controls the staffing and budgets of 22 schools, functioning somewhat like a school district. The other 22 BIE schools are operated separately by various sovereign tribal governments.

Federal legislation authorizes the BIE to determine the use of federal Indian education dollars. The academic proficiency rates of students in New Mexico's BIE schools lag behind those of students in New Mexico's traditional public schools and the state's charter schools. Most of New Mexico's Native students living on tribal land attend both Bureau of Indian Education (BIE) and state-supported public schools at different points in their education. Because the BIE schools work under federal regulations and are not required to work with the state system, they are not the focus of this study.

NM Public Education Department (PED) and Tribal Education Departments (TEDs)

Of the many agencies with programs and services that affect Indian education, the primary one is the New Mexico Public Education Department, especially the Indian Education Bureau. Tribal Education Departments (TEDs) are federally and tribally funded executive branch agencies within sovereign nations. The roles and responsibilities of TEDs vary according to each sovereign nation's government, laws, and resources.

New Mexico was the first state in the nation to pass a Bilingual Education Act (1973). This model legislation requires instruction in English and a home or heritage language to "culturally and linguistically different" students.

The law has expanded several times through the years to include more programs and services. Currently, qualified students can earn a State Seal of Bilingualism-Biliteracy on their NM high school diplomas. Criteria for the "Tribal Language Proficiency Certification" are determined by tribes and Pueblos, which communicate with districts or schools when students have met

requirements. Since 2002, New Mexico has permitted “a person proficient in a Native American language and culture of a New Mexico tribe or pueblo who meets criteria” to obtain a Native American Language and Culture certificate and to instruct without a bachelor’s degree and teacher certification. (NALC-520).

The New Mexico Indian Education Act (2003) [22-23A-1 to 22-23A-8 NMSA 1978] requires the state’s public and charter schools to provide Native students with an equitable and culturally and linguistically relevant (CLR) education. The act also requires the system to promote the success of Native students in other ways. The 32 Native American-serving districts and charter schools were budgeted \$35.4 million in FY21 for services aligned with the Indian Education Act. Of these, 23 school districts and nine charter schools are federally designated as “historically defined Indian impacted,” meaning they meet at least one of the following criteria: (1) serve at least 175 American Indian students who live wholly or partially on tribal land; (2) have at least 10 percent American Indians in its overall student population and are located wholly or partially on tribal land; or (3) have American Indians as 45 percent of the overall student population.

In School Year (SY) 2020-21, PED reported serving 37,899 Native students in traditional public schools and 1,133 in state charter schools.

Academic Performance and Student Learning Outcomes

Quality data is scarce. The Indian Education Advisory Council recommends establishing data sharing agreements between tribal governments of tribally controlled and BIE-controlled Indian Education schools and the state’s public-school districts and charter schools.

New Mexico’s students in the public education system, especially Native students, perform below national and state averages in all measures. Some metrics were improving before the pandemic hit in March 2020. In SY 2019-20, the high school graduation rate of Native students rose to 69%, but third grade proficiency was only 19% in reading and 21% in math, and proficiency scores of Native eighth graders were lower than those of third graders. Math proficiency for Native students was 12% while the average for all students was 20%; Native reading proficiency was 25% while that of all students was 34%; and Native science proficiency was 20% while the average for all students was 35%. Data is not available for SY 2020-21, and no assessments were given in SY 2021-22 because of the pandemic, which disproportionately affected Native Americans, especially those living on tribal lands. Many Native students had little to no access to remote learning technologies because of lack of infrastructure and connectivity.

The silver lining of the pandemic was the realization of the need for universal access to broadband and technology to educate students. On April 30, 2021, the First Judicial Court ordered the state to provide digital devices and high-speed internet to students who lack the tools necessary to access remote learning. Significant investments of state and federal funds for broadband infrastructure and educational technology will help to remedy some of the disparities that Native students experience.

Increased funding for instruction and support services, K-3 Plus, extended school year, and quality teachers can all improve the academic performance of Native students and help overcome the achievement gap.

NM's Landmark Litigation

In 2018, District Court Judge Sarah Singleton issued findings and orders in the Yazzie/Martinez case. This case garnered national attention and will forever affect policies and budgets in New Mexico. After studying the data filed in 2014 (the result of years of research, advocacy, and litigation) and hearing testimony from the 23 school districts and other plaintiffs, she determined that approximately 70% of New Mexico's students were not receiving an equal and sufficient education as required by the state constitution. In addition to Native students (represented by lead plaintiff Wilhelmina Yazzie), the consolidated suit demonstrated that PED had failed to adequately educate students who are not English proficient as well as those challenged with disabilities and economic disadvantages.

Part of the research provided in the Yazzie/Martinez lawsuit demonstrated that Native students did not have access to culturally and linguistically relevant programs required by the Indian Education Act. As a result of the court order, the New Mexico legislature in 2019 allocated millions of additional dollars for programs and services to address learning needs. In June 2020, the court denied the state's request to end court oversight of compliance and ordered PED and the Legislature to address the educational needs of the plaintiffs no matter the cost.

Native communities have been spurred into action as a result of the Yazzie/Martinez decision. Leaders and advocates are challenging the state to provide scholarships and professional development training so that Indian students may be taught by qualified Native educators and to support Native-serving districts with substantial increases in allocations. Native educators and experts are also working on a sequential, culturally relevant curriculum and developing materials appropriate for the state's various tribes, nations, and pueblos. Efforts to build a robust Indigenous teacher pipeline are underway.

Conclusion

New Mexico clearly recognizes that culturally and linguistically relevant programs will help address the achievement gap and assist Native American students in becoming adequately prepared for college and careers. With more flexibility, funding, and support from PED, the future is bright for Native students, but much needs to be done in the next few years to ensure implementation.

PED can immediately provide leadership so that school districts and charter schools serving most of the Native students collaborate meaningfully with tribal communities. Evaluation instruments can guide and measure completion of strategic objectives and accomplishments of

goals. Sharing reports that document specific accomplishments and challenges will improve Indian education across the state.

Appendix

Below is a list of some of the recent measures New Mexico has taken to support its Native American students.

Legislative Appropriations

- \$5.25 million each year for past two years to the Indian Education Fund
- \$5.5 million over two years for Indigenous, Multilingual, Multicultural, and Special Education Initiatives
- \$9 million for culturally and linguistically diverse instructional materials and curriculum development

PED

- Awarded grants to 21 nations, tribes, and pueblos and 28 school districts and charter schools serving large numbers of Native American students
- Developed culturally and linguistically diverse instructional materials
- Provided 6,252 Chromebooks to 22 tribes and schools with a significant Native American student population, 101 Cradle Point fixed and mobile hot spots to tribal schools and 22 tribes, and 700 residential hotspots to the Navajo Nation to assist in closing the digital divide
- Trained district, charter, and tribal education departments in culturally and linguistically responsive instructional and family engagement practices

Recruitment and Retention of Quality Educators

In response to the court's findings and conclusions in the consolidated Yazzie/Martinez education sufficiency lawsuit, the state has increased its efforts to recruit, train, and retain educators who reflect the state's ethnically diverse student population. It is using evidence-based strategies to improve the quality of teacher preparation programs by providing state-funded teacher residencies and grow-your-own scholarship programs to help current school employees attain teacher credentials. Financial aid for current and prospective educators is especially important to Native New Mexicans living in tribal communities. A better trained, more representative educator workforce will help close the achievement gap between Native and nonminority students.

Having more Indigenous educators will help Native students keep their cultures alive. Students who become bilingual will help preserve Native languages that are in danger of disappearing. With targeted scholarships and financial aid, more Native students will attend and complete

college and have more career opportunities. Many may choose to become teachers and administrators and future leaders of their communities.

Impact Aid for Native-Serving Districts

In 2021, the federal government ordered New Mexico to stop its long-term practice of deducting federal Impact Aid from the funding school districts receive through the State Equalization Guarantee (SEG). This was a victory hard won after many years and an important result of tribal leaders identifying the illegal/unfair practice in the Yazzie/Martinez litigation. Congress had established the Impact Aid Program through Title VII of the Elementary and Secondary Education Act of 1965 to assist local school districts that have lost tax revenue due to tax-exempt federal property or that have increased expenditures due to the enrollment of federally connected children, including children living on federal Indian reservations.

Education Policy Leadership

The Santa Fe Indian School Leadership Institute, founded in 1997, has brought together Indigenous leaders from across New Mexico and held Community Education Institutes and Convocations on Native lands to address the challenges, goals, and needs related to tribal sovereignty and self-determination in Indian education.

The Leadership Institute continues to be the principal organization working with the state's sovereign nations. The Tribal Education Alliance (TEA), the Native American Budget and Policy Institute at UNM, and the New Mexico Center on Law and Poverty are leading change. TEA includes the All Pueblo Council of Governors, the Jicarilla Apache Tribal Council, the Mescalero Tribal Council, Navajo Nation leaders, educators, social workers, health practitioners, and Native community members. Together they have developed a framework for Indian education that balances Indigenous knowledge with essential skills for success in today's society. For years, New Mexico's Congressional delegation has successfully used the Leadership Institute's work to advance federal Indian education policy.

The Tribal Remedy Framework, produced by the TEA at UNM, reflects years of collaborative work to reform Indian education and sustain core Indigenous cultural values and traditions. This new blueprint for New Mexico's Indian education reform promises to become a national model for Indian education and advancing tribal sovereignty and equality. A graphic of the Framework, which is being used to guide legislative and administrative reform efforts, can be found here: <https://nabpi.unm.edu/tribal-remedy-framework.html>.

Key Sources

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NM Public Education Department (PED), <https://webnew.ped.state.nm.us/bureaus/indianeducation/>. See Indian Education Act (NMSA 1978 Section 22-23A-1 through 22-23A-8) in the Appendix. The Indian Education Bureau makes grants to tribal departments of education, districts, and charter schools serving significant numbers of Native American students. See also PED's "Memorandum Regarding Yazzie and Martinez Consolidated Lawsuit." P.2, <https://webnew.ped.state.nm.us/bureaus/yazzie-martinez-updates/> (October 22, 2019).

NM's State-Tribal Collaboration Act mandates government-to-government consultations to ensure that every NM agency collaborates with the state's Indian Tribes, Pueblos, and Nations. PED's July 2021 report included information about program administrators for Titles I, II, III, IV, VI, and VII and other areas providing training to tribal education directors and officials from 24 districts and 9 charter schools on issues that impact the state's Indian students.

NM's Higher Education Department administers a number of programs for Native students in middle and high schools and provides programmatic support and technical assistance to Tribal colleges, higher education institutions, and adult education programs aimed at serving Native American students. HED's 2020 report and PED's 2021 report are available along with other state agency reports at <https://www.iad.state.nm.us/annual-reports/>.

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Health Services on Tribal Lands and for Native American and Alaska Native (NA/AN) populations *By Judith (Judy) Williams*

Legal Basis

Health care for Native Americans (nations, tribes, pueblos, and urban Indians) is primarily a federal affair. The US Constitution, various treaties, and a body of law have defined federal responsibilities to tribes. Health care has been one of these treaty obligations. The Snyder Act of 1921 authorized federal funds for American Indian health care. This responsibility was reasserted and made permanent in the 2010 Patient Protection and Affordable Care Act (ACA). Other legislation covers health care facilities, alcohol and substance abuse treatment, child protection, and family violence prevention.

How is health care funded and provided?

The Indian Health Service (IHS) in the Department of Health and Human Services (DHHS) has the authority and responsibility to provide health services to federally recognized American Indians and Alaska Natives. This includes services to those living in both tribal and urban areas. Services and facilities include hospitals and clinics. In addition, the population is eligible for all other federal, state and local services provided in the general community.

In reality, the IHS has been underfunded for decades and does not provide a complete range of services. Hospitals on the reservations provide only basic services for the most part; specialty care and most surgical procedures must be obtained from community health care providers, usually off the reservation. The DHHS states that the IHS only meets half the need because of lack of funding [1].

An additional deficiency is that adequate consultation with tribes does not always occur. One recent example was the IHS decision, in the midst of the Coronavirus pandemic, to end emergency, inpatient hospital care, and other services at the Acoma-Cañoncito-Laguna Service Unit hospital. Acoma sued the IHS for violating federal law [2]. In May 2021 the federal government settled with the tribe, committing to keep the facilities open until February 2022. Meanwhile, the Pueblo will create a plan for hospital and regional health care in partnership with the IHS.

The ACA stipulates that the Native American population must obtain health insurance through the health care exchanges or Medicaid (for individuals with low incomes). The Native population is also eligible for coverage under Medicare (for the aged and disabled). There are no charges for Medicaid or IHS services. The ACA has built-in cost-sharing for premiums and copays based on income.

Lack of funding is but one of the factors that has resulted in great health disparities in the native population. Others include the continued marginalization of the population, lack of

employment, and inadequate education. Health disparities are differences in certain health conditions and outcomes that are worse for populations burdened by economic, social and environmental disadvantages. The Native American and Alaska Native population is at greater risk for diabetes, alcoholism, cancer [3] and other conditions.

Budget Issues

Since the IHS does not provide the complete package of health care needed, the AI/AN population is expected to enroll in health insurance programs via private insurance through the exchanges, Medicare, Medicaid and/or the Children's Health Insurance Program (CHIP). Things like specialty care, ambulance services and services away from tribal lands must be paid by other sources.

The Biden administration has proposed an \$8.5 billion budget for fiscal year 2022, an increase of \$2.2 billion, or 36%, over fiscal year 2021. This is discretionary funding for the IHS and would be the largest increase in decades. DHHS says it will begin to address health disparities in indigenous populations. It is expected to expand access to health care services, modernize aging facilities and information technology infrastructure, and address urgent health issues, including HIV and hepatitis C, maternal mortality, and opioid use. It also includes funding to improve health care quality, enhance operational capacity, and recruit and retain health care providers [4].

The ACA also includes expanded services to address health disparities. The ACA includes a large number of items that are often overlooked in the debates and public perceptions about the legislation. Improving capacity of the safety net and overall quality of care are among the important elements of the act.

Services

In addition to basic hospital and clinic care, the IHS provides public health and prevention services, behavioral health services, diabetes care, and drug and alcohol prevention and treatment. However, these services are not readily available in many areas.

The role of the state – New Mexico

There is an Office of Tribal Liaison at the New Mexico Department of Health (NMDOH). It is responsible for communication and collaboration to “promote better health and wellness outcomes” (NMDOH Office of Tribal Liaison); leverage all DOH resources and programs; serve as information exchange; facilitate training; and provide technical assistance. The NM DOH does not provide direct services. Some Native Americans have expressed a desire for a separate Native American health department. There is no entity within the NM Department of Health that has Indian health data or programs as their priority.

The State-Tribal Collaboration Act (NM SB 196, 2009) requires the state to work with tribes, pueblos and nations on a government to government basis. An intergovernmental group developed policies to promote communication and collaboration. Annual reports are required and produced [5].

Tribal law and health care

Tribes can make their own laws about public health emergencies, preparedness, and occupational safety and health [6]. They have the right to determine how they conduct emergency efforts, according to their own needs. This is a sovereign nation right and responsibility. (They can also regulate motor vehicle safety.)

A recent amendment to the ACA designates tribal epidemiology centers as public health authorities. It grants tribes certain rights to make their own laws in this regard. They can enter into cooperative agreements with other governmental entities to collect and analyze data. There are two such centers in New Mexico: the Navajo Epidemiology Center and the Albuquerque Area Southwest.

Counting is difficult

Epidemiological data is considered public health data, and is critical to the identification, tracing, tracking, and measurement of disease and health outcomes. It is used in developing prevention and treatment programs and is critically important in controlling and eradicating communicable diseases. Communicable disease in individuals as well as deaths and cause of death are required to be reported in each state, usually to the health department.

In order for tribes to know what's occurring on their lands, they must obtain this data, but the tribal epidemiology centers have difficulty doing so. Some states are reluctant, or downright refuse, to share data with tribes. The often-heard reason is "HIPAA," the law that governs confidentiality of medical records. It is widely misinterpreted as meaning data cannot be shared with anyone, ever. In fact, data can be shared for coordination of care among medical providers, and also can be presented in aggregate form, thus protecting individual identities. [7].

A recent *Searchlight New Mexico* article published by *High Country News* highlights the challenges faced by tribes in counting COVID-19 related illness and deaths [8]. They report that Arizona, Utah, and New Mexico, the states in which the Navajo Nation is located, refuse to share this data. This is in spite of the collaboration requirement described above.

The IHS often does not have, or does not share, such data either (ibid.). Accurate data is hampered by misidentification of race/ethnicity and cause of death throughout the system. A common problem is the recording on death certificates of a cause of death that may be only a contributing cause, and not the immediate one. This has caused difficulties throughout the US

during the COVID pandemic – instead of recording COVID as the cause of death, officials or a hospital might cite a heart attack, stroke or other accompanying condition.

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Economic Development on Tribal Land and for Native American and Alaska Native (NA/AN) Populations *By Donna Sandoval*

Background

The most common sources of funding for tribal economic development come through grants, federal or state government or by issuing bonds. The goal of this study is to understand the current status of economic development on tribal land in New Mexico. The areas of research include New Mexico legislation, federal legislation, funding opportunities, and other research projects examining tribal economic development.

Why does sovereignty matter?

When sovereign Native nations make their own decisions about what development approaches to take, they consistently out-perform external non-Native decision makers on matters as diverse as form of government, natural resource management, economic development, health care, and social services. [1]

When Native nations are in the “driver’s seat,” strategies for community progress are tuned to local needs, and lines of accountability are clarified. Story after story and study after study prove that benefits follow from such authority – whether it is called practical sovereignty, self-determination, or tribal jurisdiction. Strikingly, tribal decision-making authority often generates benefits both for tribes and tribal citizens and for neighboring non-Indian governments and their members. Intertwined economies grow, collaboration leads to the expansion of critical infrastructure, new models for criminal justice emerge, and air and water become cleaner. [2]

Tribal sovereignty ensures that New Mexico’s 23 federally recognized tribes, nations, and pueblos have independence in their decision making and governance over their own laws and policies. Tribal sovereignty helps preserve unique cultural heritage.

Progress, Current Status and Opportunities for Funding

Economic development can include employment and job training, housing, telecommunications and technology, roads, and energy generation and transmission.

The CARES Act of 2020 provided \$8 billion in financial assistance to tribal governments but allowed very short timelines to complete infrastructure projects. The American Rescue Plan Act of 2021 appropriated \$900 million to the U.S. Department of Indian Affairs. The federal government plays a role in reviewing the infrastructure projects, which often require permits or other authorizations which must be followed to fulfill federal laws and regulations. A recent interview with the President of the Navajo Nation illustrates the complexity and time-sensitivity of this form of economic development:

“The Navajo Nation is now working to fast-track critical projects that would improve public health with the \$1.8 billion received from the American Rescue Plan. The Navajo Nation has identified more than 9,000 projects at a cost of more than \$20 billion, which means those new federal dollars won't go as far as needed. “These have to be construction-ready projects that can be done within the next three years and a lot of those projects that are on the list have been vetted already, because they were part of the CARES Act. But because of that timeline, with the CARES Act, we weren't able to get those constructed,” said Navajo Nation President Jonathan Nez. “We are actually requesting right now the federal government, the congress and the White House to change some of these federal laws. So we call them red tape, so that projects can get done quickly,” he added.” [3]

Broadband

The National Tribal Broadband Strategy (NTBS) addresses the barriers and the strategies for broadband deployment on tribal land. In January 2018, President Trump issued Executive Order (EO) 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America; and a Presidential Memorandum to the Secretary of the Interior entitled “Supporting Broadband Tower Facilities in Rural America on Federal Properties Managed by the Department of the Interior.” These documents establish federal policy to deploy broadband connectivity in rural areas including tribal communities. [4]

During the 2021 New Mexico legislative session, three bills passed that are major steps to expanding broadband capacity. Senate Bill 93, the Broadband Access and Expansion Act, coordinates broadband efforts for state government agencies, local government bodies, tribal governments and internet service providers. House Bill 10 (HB10) establishes the Connect New Mexico Fund and the Connect New Mexico Council (Council) and provides state grant funding for broadband infrastructure. HB10 appropriated \$130 million for the Council to oversee broadband grants. Senate Bill 200 creates the State Rural Universal Fund Establishment, which includes low-income broadband internet access to unserved and underserved populations. [5]

Other Infrastructure Legislation

The Tribal Infrastructure Act, passed by the New Mexico Legislature in 2005 [6] addresses the tribes' lack of basic infrastructure resulting in poor social, health and economic conditions for tribal communities. The Act established the Tribal Infrastructure Fund (TIF), which uses an alternative financing mechanism that is a long-term cost savings benefit to both the state and the tribes. The 2010 HB162 – Severance Bonds for Tribal Infrastructure, allocates 4.5% of the estimated senior severance tax bonding capacity each year for qualified tribal infrastructure projects. [7]

The U.S. Department of Agriculture (USDA) Rural Development offers several programs for federally recognized tribes related to economic development.

Gaming on Tribal Land in New Mexico

A study of the impact of casino gaming on tribal land in New Mexico during the 1990s concluded that gaming has had a positive economic impact on the gaming pueblos and tribes in New Mexico, especially for the more urbanized nations. [8] Pueblos and tribes which engaged in gaming enjoy higher incomes, lower levels of poverty, and improvements in selected social areas compared to those nations opting not to pursue casino gaming in the 1990s. The tribes in New Mexico entered into compacts with the State in 2015 that expire in 2037. [9] The total of net annual wins for all tribes average \$700 million with average revenue-sharing to the state of \$65 million annually, with the exception of 2020, during the pandemic. In more recent years tribes have been trying to diversify their revenue streams beyond gaming, recognizing that younger people as a consumer group are turning away from casinos, and becoming creative in utilizing sovereignty to disrupt stagnant patterns in economic development. A case study in this strategy is Nambé Pueblo, which recently converted a former casino building into New Mexico's first Tesla dealership, thus leveraging its status as a sovereign nation to enable the direct-to-customer Tesla retail sales model and bypassing the cartel-like hold that the other auto dealerships exercised over sales until recently in the state. [10] [11]

Data

Increasing the availability of data can be a strategy to assist economic development on tribal land. Research is a catalyst to gather data for policy development, implementation, evaluation and change. Federal, state and tribal governments would benefit from centralized data on infrastructure needs and barriers to economic development on tribal land.

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Criminal Justice on Tribal Lands and for Native American and Alaska Native (NA/AN) Populations *By Rebecca Álvarez*

Legal Responsibility

The United States recognizes three types of domestic sovereign governments: federal, tribal, and state. State sovereignty includes both county and municipal governments. [1] On tribal land, criminal justice for serious crimes is primarily a federal affair. Cases that fall outside of federal and tribal jurisdiction belong to the state. This is a complex issue and is explored in more detail later in this report in the “Jurisdictional Issues” section.

How is the Criminal Justice System Funded and Provided on Tribal Land?

About 400 separate tribal justice systems exist in the United States. The Bureau of Indian Affairs (BIA) does not manage tribal justice systems; however, tribal courts are partially funded through Public Law 638 Tribal Priority Allocations. Policing is funded by the BIA and by tribes. Often, BIA agents and tribal police work together on tribal land.

Tribal courts and police departments have been underfunded for decades, and do not provide a complete range of services. For example, the Navajo Nation needs 775 police officers to provide adequate policing services on its tribal territory according to a recent assessment report commissioned by the tribe. [2] It currently has fewer than 200 officers to police an area of approximately 25,000 square miles, a territory that is larger than the area of 10 states in the Union. Officers on tribal land are also often required to respond to calls that do not provide addresses, with directions that rely on landmarks such as windmills or colors of homes. [2]

This underfunding is despite the fact that Native Americans living on tribal land are disproportionately in need of criminal justice services. This is especially true in areas where a boom in extractive industries (gas and oil) has brought large numbers of non-Natives to tribal land in concentrated so-called “man camps.” [3] In particular, domestic violence stands out as an area where more resources are desperately needed. [4]

Budget Issues

According to the United States Department of the Interior, the Biden Administration has proposed significant increases in funding for tribal criminal justice and supporting services in its 2022 budget. [5] “The budget also proposes \$507.1 million for Public Safety and Justice activities under the BIA’s Office of Justice Services (OJS), an increase of \$58.4 million from the FY 2021 enacted level, \$462.3 million for 191 law enforcement and 96 corrections programs serving 227 Tribes and \$43.2 million for Tribal courts. Of the amount available for law enforcement, \$259.5 million is for criminal investigations and police services, including \$10 million to implement public safety changes resulting from the *McGirt v. Oklahoma* Supreme Court decision; and \$26.8 million is for Tribal Justice Support programs, including \$5.0 million

for Violence Against Women Act (VAWA) training and strategies to protect women in Indian communities.

The budget request proposes to invest \$16.5 million for Law Enforcement programs and Special Initiatives to support missing and murdered indigenous persons casework. The newly formed Missing and Murdered Unit (MMU) within OJS provides leadership and direction for cross-department and interagency coordination to put the full weight of the federal government into investigating and resolving these cases. In response to an observed increase in drug activity on Indian lands, the request includes \$14.9 million to support reducing drug trafficking and drug related crime in Tribal communities.” [5]

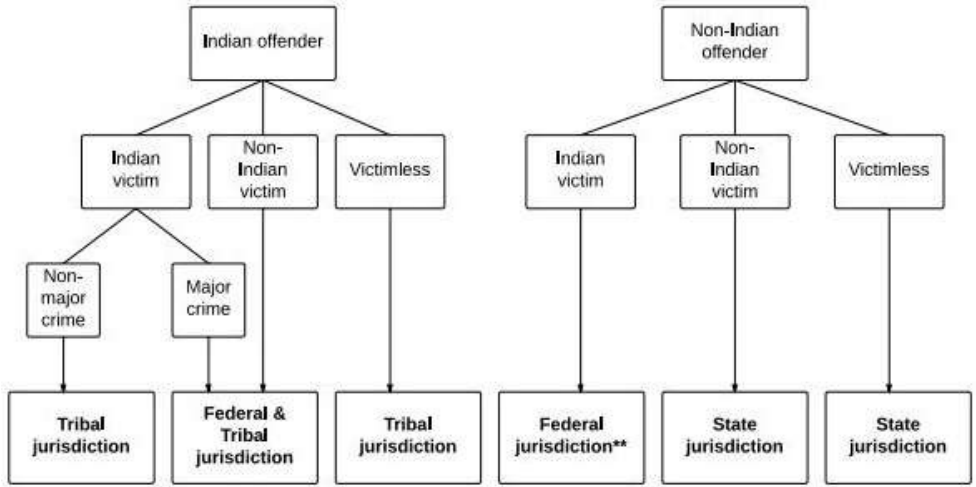
Jurisdictional Issues

In the 2004 legal decision *United States v. Lara*, the Supreme Court held that tribal courts have criminal jurisdiction over all members of federally recognized tribes. It also held that both tribes and the federal government could prosecute a Native individual who committed crimes on tribal land. [6] The 1978 Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, is important because it held that tribal courts do not have jurisdiction over non-Natives who commit crimes on tribal land. [7] This decision was partially abrogated by Congress when it reauthorized the Violence Against Women Act (VAWA) in 2013, which recognizes that tribes have criminal jurisdiction over non-Natives who perpetrate crimes of domestic violence against Native people. However, VAWA has not yet been reauthorized. A more recent development is the *United States v. Cooley* decision of 2021, which holds that a tribal police officer has authority to detain temporarily and to search non-Native persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law. [8] In addition to the *Cooley* decision, the Supreme Court has also made other recent decisions supporting tribal sovereignty and enforcing treaty rights. One example is the 2020 *McGirt v. Oklahoma* opinion authored by Neil Gorsuch. It asserts that the original boundaries of the land assigned to Native American tribes who were forcibly moved to Oklahoma “remains ‘Indian Country’” for the purposes of the Major Crimes Act. [9] The Major Crimes Act denies state governments the jurisdiction to prosecute certain crimes that occur on tribal reservations.

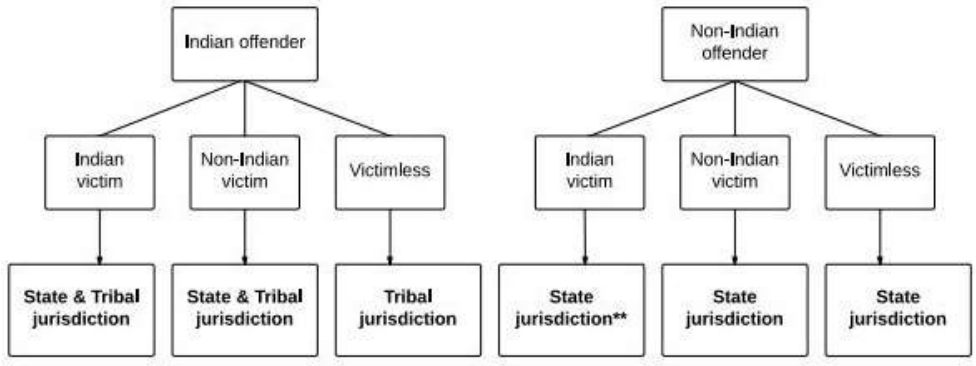
An important distinction when comparing jurisdictional authority between states and tribes is PL-280 status. “In 1953, six states took over the federal government’s duties and were granted criminal and some civil jurisdiction over reservations within their states. The so-called PL-280 states (based on the law’s origins in Public Law 83-280) include Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. According to the U.S. Census, these six states represented about 24% of the American Indian and Alaska Native population in the United States in 2016. The law also expanded criminal jurisdiction in “optional PL-280” states, granting Florida, Idaho, and Washington the option to assume partial or whole jurisdiction of reservations.” [10]

The extreme complexity and overlapping nature of tribal, state, and federal jurisdictions is summarized by the following flowchart [10]:

Non-Public Law 83-280 States



Public Law 83-280 States*



* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of 'Optional 280' status is shown in this chart.
 ** Under the *Violence Against Women Act Reauthorization of 2013* (VAWA Amendments), after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.

Source: The Tribal Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*

Missing and Murdered Native People and Criminal Justice on Tribal Land

An area of particular interest to New Mexico, which highlights the budget and jurisdictional issues in the criminal justice system, is the resolution of cases of missing and murdered Native people on tribal land. This is an issue that has long been present in Native communities but has only reached prominence nationally within the last 5 years. A groundbreaking report from the National Institute of Justice in 2016 found that almost 85% of Native women had experienced violence in their lifetimes. [11] In 2017, the Urban Indian Health Institute found that both Albuquerque and Gallup ranked in the top 10 U.S. cities for missing and murdered Native women and girls. [12] These findings, combined with a grassroots effort by Native communities across the country, and an earlier campaign around the issue in Canada [13], created the

impetus for the present focus and research on missing and murdered Native people in the United States and New Mexico. Cases of missing and murdered Native people are complicated by several factors:

- 1) Victims who are Native are often misclassified as Asian, Hispanic, or Black by law enforcement, making it difficult to obtain a clear picture of the extent of the problem.
- 2) Overlapping jurisdictions, as outlined earlier in this report, mean that federal authorities are not always immediately involved in a case of a missing or murdered Native person.
- 3) The time lapse between federal authorities assuming responsibility for a case and investigation of a case often means that cases are dropped for lack of evidence.
- 4) A centuries-long history of colonization and genocide has meant that criminals and (historically) law enforcement have devalued and deprioritized the lives of Native people.
- 5) An increased risk of sexual assault, domestic violence, and sex trafficking in Native communities, especially for Native women, puts Native people at a greater risk for both intimate partner homicide and homicide by strangers.
- 6) All of the above factors combine to create an incentive for predators to reside in tribal land and/or “border towns” which are next to tribal land, as they know that they are much more likely to get away with crimes of sexual violence, domestic violence, and homicide. [14]
- 7) When missing Native women are found alive, there are almost no available resources for rehabilitation of sex-trafficking victims. [15]

Task forces to examine the issue of missing and murdered Native people currently exist at both the federal and the state levels. In New Mexico, the Missing and Murdered Indigenous Women and Relatives (MMIWR) Task Force was established by HB 278 in 2019 and reestablished by Executive Order 201 in May of 2021. The task force would like to see mandatory MMIWR reporting to the state from all law enforcement agencies. [16] Currently, not all law enforcement agencies report data on MMIWR. In December of 2020, the MMIWR Task Force issued a comprehensive report on the state of the MMIWR issue in New Mexico, which the LWVNM Tribal Law Study group recommends for further reading on the topic. [14]

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