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Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions

Justin B. Barnard
Office of the Maine Attorney General

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Abstract:

Response to public health emergencies on tribal lands poses a unique challenge for state and tribal public health officials. The complexity and intensely situation-specific nature of federal Indian jurisprudence leaves considerable question as to which government entity, state or tribal, has jurisdiction on tribal lands to undertake basic emergency measures such as closure of public spaces, quarantine, compulsory medical examination, and investigation. That jurisdictional uncertainty, coupled with cultural differences and an often troubled history of tribal-state relations, threatens to significantly impede response to infectious disease outbreaks or other public health emergencies on tribal lands. Given that tribal communities may be disproportionately impacted by public health emergencies, it is critical that tribal, state, and local governments engage with each other in coordinated planning for public health threats.

This Article is offered as a catalyst for such planning efforts. The Article identifies some of the most pressing jurisdictional issues that may confront governments responding to a public health emergency on tribal lands, with the aim of highlighting the nature of the problem and the need for action. The Article goes on to examine the most promising means of addressing jurisdictional uncertainty: intergovernmental agreements. Already utilized in many areas of

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This Article is the work of the author only, and does not represent the views of the Office of the Maine Attorney General. The legal status of the federally recognized Indian tribes in Maine is largely shaped by the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-35 (2012), and the Maine Implementing Act, ME. REV. STAT. tit. 30, §§ 6201-14 (2014). In light of those enactments, it is the position of the Office of the Maine Attorney General that the legal principles discussed in this Article do not apply to Maine's tribes.

shared interest between tribe and state, intergovernmental agreements offer neighboring state, local, and tribal governments a vehicle for delineating roles and authorities in an emergency, and may lay the groundwork for sharing resources. The Article surveys various representative tribal public health intergovernmental agreements, and concludes with suggestions for tribes and state or local governments looking to craft their own agreements.

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INTRODUCTION

The problem of trans-border coordination poses one of the more vexing and persistent problems in the field of public health. Threats to the public health are rarely confined to one political jurisdiction. Rather, in an extensively interconnected modern world, public health threats tend to follow the rapid flow of people and goods between localities.[1] Proper planning and agreements for reporting information, coordinating investigation and countermeasures, and sharing resources across borders are vital for an effective response to public health emergencies.

Meeting this imperative for trans-border coordination is difficult enough between two sovereigns with clear jurisdictional boundaries and lines of authority. The borders that delineate American Indian lands within the United States, however, present a special and challenging case. A shifting and complex body of law controls jurisdiction on Indian lands. This leaves many open questions regarding the scope of tribal and state authority to regulate and respond to threats to public health. Jurisdictional uncertainty is compounded in some states by a rocky history of state-tribal relations,[2] as well as by simple geography: tribal lands may be fragmented and "checkerboarded" with non-Indian lands within a state,[3] or they may straddle the border between two or more states.[4]

Challenges notwithstanding, observers have identified a strong need for states and tribes to coordinate responses to public health emergencies on Indian lands.[5] There are 566 federally recognized Indian tribes and Alaska Native

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1. *See* Lawrence O. Gostin, *Global Health Law Governance*, 22 EMORY INT'L L. REV. 35, 35 (2008) ("The determinants of health do not originate solely with the national borders, pathogens, air, food, water, and even lifestyle choices. Health threats, rather, spread inexorably to neighboring countries, regions, and even continents").

2. *See* Rick Hogan et al., *Assessing Cross-Sectoral and Cross-Jurisdictional Coordination for Public Health Emergency Legal Preparedness*, 36 J. L. MED. & ETHICS 36, 39 (2008).

3. A marked example of such "checkerboarding" can be found in Oklahoma, where police reportedly have to carry GPS units to track jurisdictional boundaries. *See* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1731 (2012).

4. The Navajo Nation, for example, extends across parts of Arizona, New Mexico, and Utah. *See* Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503, 504 (2012).

5. *See, e.g.*, Amy Groom et al., *Pandemic Influenza Preparedness and Vulnerable Populations in Tribal Communities*, 99 AM. J. PUB. HEALTH S271, S271 (2009) ("Tribal and state leadership should . . . cooperate closely to clarify responsibilities that may cross jurisdictional lines, legal authorities should be defined for specific public health activities needed to assist vulnerable populations in tribal communities, and legal tools, such as mutual aid agreements, should be used to help accomplish these tasks"); Cheryl H. Bullard et al., *Improving Cross-Sectoral and Cross-Jurisdictional Coordination for Public Health Emergency Preparedness*, 36 J. L. MED. & ETHICS 57, 59 (2008) (identifying gap and suggesting steps to improve tribal coordination with local, state

villages distributed across a majority (thirty-five) of the fifty states.[6] These tribes, with populations ranging from hundreds to hundreds of thousands,[7] live on land bases that may be a few acres or tens of thousands of acres.[8] The public health infrastructures among tribes vary greatly; some have their own health departments and health codes while others have no public health infrastructure at all.[9] Public health emergencies may also pose a greater threat to tribes than to the general American population due to a variety of factors, including prevalence of chronic disease, poverty, and difficulties accessing medical care.[10] In both the 1918-1919 influenza pandemic and the 2009 H1N1 influenza event, the mortality rate among Indians in the United States was roughly four times that of other groups.[11] Recent amendments to the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act[12] allow tribes to directly petition for a federal emergency declaration and receive federal assistance in the same manner as state governments. These changes have improved tribal emergency response capacity,[13] as have federal, state, and tribal initiatives to encourage tribal public health emergency planning. However, these enhancements to tribal preparedness do not eliminate the need for coordination with tribal neighbors.

This Article examines the vital issue of response to public health emergencies on tribal lands from the state perspective. It explores both the legal challenges of responding to public health emergencies that cross tribal borders as well as the practical means of addressing those challenges through cooperation with tribes. Part I provides a brief overview of the types of emergency measures that might be used to address public health emergencies on tribal lands. Part II surveys the legal landscape for state public health officials contemplating a response to a public health emergency on tribal lands, cataloging some of the jurisdictional issues that might arise in the course of an emergency. Part III

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and federal governments on public health emergency preparedness).

6. *See* Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012).

7. *See* Groom et al., *supra* note 5, at S271.

8. *See* Ralph T. Bryan et al., *Public Health Legal Preparedness in Indian Country*, 99 AM. J. PUB. HEALTH 607, 608 (2009).

9. *Id.* at 609.

10. *See* Ctrs. for Disease Control & Prevention, *Deaths Related to 2009 Pandemic Influenza A (H1N1) Among American Indian/Alaska Natives—12 States, 2009,* 58 MORTALITY & MORBIDITY WKLY. REP. 1341, 1341 (Dec. 11, 2009).

11. *Id.*; Groom et al., *supra* note 5, at S271.

12. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended at 42 U.S.C. §§ 5121-5206 and various sections of titles 12, 16, 20, 26, and 38 of the United States Code).

13. Disaster Relief Appropriations Act of Jan. 29, 2013, Pub. L. No. 113-2, § 1110, 127 Stat. 4, 47-49 (codified at 42 U.S.C. §§ 5122, 5123, 5170, 5191 (2012)).

discusses the negotiation of intergovernmental agreements, one practical avenue for resolving legal impediments to emergency response. Part IV describes current intergovernmental agreements in the arena of tribal public health emergency response and planning. The conclusion suggests specific issues that should be addressed in an agreement between tribe and state to clarify roles, responsibilities, and authorities in a public health emergency.

I. LEGAL MEASURES AVAILABLE FOR RESPONSE TO A PUBLIC HEALTH EMERGENCY ON TRIBAL LANDS

To appreciate the challenges of responding to a public health emergency across tribal borders, one must be familiar with the legal tools at a state's disposal for addressing public health threats. The full measure of legal mechanisms and authorities that can be used in response to a public health emergency arises from a "tangled architecture" of federal, state, and local laws.[14] The brief discussion below introduces some of the more commonly invoked authorities under state law to respond to a public health emergency.

The exercise of public health authority has historically been the province of the states, as it is one of the police powers explicitly reserved to them by the Tenth Amendment.[15] Pursuant to that reserved authority, each state in the Union has enacted laws to control infectious disease and respond to public health emergencies. These laws created a diverse array of state-specific authorities and procedures.[16] In many cases, states also delegated response authorities to local units of government.[17] The scope of this state and local authority to respond to

14. Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 396 (2012).

15. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (listing among the police powers reserved to the States "[i]nspection laws, quarantine laws, [and] health laws of every description").

16. Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 63 (1999). In the last decade or so, there has been a significant effort to modernize state public health laws to address current challenges. Following the September 11, 2001 terrorist attacks and the anthrax attacks later that year, the Centers for Disease Control asked Lawrence Gostin, professor and attorney with the Center for Law and the Public's Health, to draft model legislation to strengthen state public health emergency response capacity. *See* Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 383 (2003). That undertaking eventually produced the Model State Emergency Health Powers Act (MSEHPA). *Id.* Legislation based on the MSEHPA has been introduced in a majority of states, and a good number of those measures have been passed into law. *Id.* at 384-85.

17. The Supreme Court has expressly upheld the delegation of state police powers to local government entities. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("[T]he state may

public health threats has been held to be quite broad and, where necessary, to justify significant restrictions on individual liberties.[18] Depending on the state, the availability of specific public health authorities may depend upon a state or local declaration of emergency.[19]

Social distancing measures, even if rarely implemented, are among the most familiar and foundational tools at a state's disposal for responding to a public health threat.[20] Quarantine laws typically allow a state to separate from the general population and confine people who have been (or may have been) exposed to a contagious disease. Isolation laws, similar in effect, allow the separation and confinement of individuals who have been (or are reasonably believed to have been) actually infected.[21] State laws generally provide for enforcement of quarantine and isolation by means of a civil fine, criminal penalty, or both.[22] Many states explicitly authorize or call for police assistance in enforcement.[23] Some states may require a court order to initiate quarantine or isolation, absent exigent circumstances,[24] while others may require recourse to the courts for enforcement of a quarantine or isolation order.[25]

Social distancing may also include measures with broader, less targeted effect. Quarantine orders may, for example, be issued for entire towns, cities, or counties.[26] State or local health officials may also have authority to issue orders

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invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state").

18. *See, e.g., id.* at 26 (upholding compulsory vaccination law and noting that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint").

19. *See, e.g.*, N.M. STAT. ANN. §§ 12-10A-1 (2014) (setting forth authorities and procedures for declared public health emergency).

20. Edward P. Richards, *Dangerous People, Unsafe Conditions*, 30 J. LEGAL MED. 27, 34 (2009) (noting that isolation and quarantine are "relatively rare in modern public health practice").

21. *See, e.g.*, MONT. CODE ANN. § 50-1-204 (2014); N.M. STAT. ANN. § 12-10A-8 (2014); R.I. GEN. LAWS §§ 23-8-4 (2014); *see also* Reich, *supra* note 16, at 406-09 (explaining distinction between quarantine and isolation).

22. *See, e.g.*, MO. REV. STAT. § 192.320 (2015) (violation of quarantine or isolation a misdemeanor); MONT. CODE ANN. § 50-1-204 (2015) (violation of quarantine punishable by fine of between $10 and $100); N.H. REV. STAT. § 141-C:21 (2015) (same); S.C. CODE ANN. § 44-4-530(C) (2015) (violation of quarantine a felony).

23. *See, e.g.*, KAN. STAT. ANN. § 65-129b(a)(2) (2014); MISS. CODE ANN. § 41-23-5 (2015); S.C. CODE ANN. § 44-1-100 (2015).

24. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-789(B) (2015); HAW. REV. STAT. § 325-8(e), (f) (2015).

25. *See, e.g.*, N.H. REV. STAT. § 141-C:13 (2015).

26. KAN. STAT. ANN. § 65-126 (2014); LA. REV. STAT. ANN. § 40:7 (2014).

prohibiting public gatherings,[27] closing schools,[28] or closing and prohibiting entrance to other buildings accessible to the public.[29]

Other emergency powers focus more directly on identifying and treating infected individuals. Most jurisdictions have laws that permit public health officials to conduct and compel individuals to submit to medical examinations,[30] treatment for contagious disease,[31] and vaccinations.[32] While such provisions are often subject to exemptions for religious and other reasons, they typically require quarantine or isolation of those who refuse to comply.[33] Other treatment-related emergency authorities may include the power to secure healthcare facilities for public use,[34] ration medical supplies,[35] and access medical records.[36]

A public health emergency may also justify action to secure personal or real property. Livestock and domestic animals are of particular concern, and many jurisdictions explicitly authorize the inspection, quarantine, seizure, or destruction of animals that may transmit diseases to humans.[37] Other provisions more generally authorize the seizure and destruction of property that poses a risk to public health.[38]

State and local public health officials also have broad investigative powers with respect to public health threats. Mississippi grants sweeping authority to its health department "to investigate and control the causes of epidemic, infectious and other disease affecting the public health, . . . and in pursuance thereof, to exercise such physical control over property and individuals as the department

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27. *See, e.g.*, KAN. STAT. ANN. § 65-119 (2014); MICH. COMP. LAWS § 333.2453(1) (2015); N.H. REV. STAT. § 141-C:16-b (2015); OHIO REV. CODE ANN. § 3707.26 (2015).

28. *See, e.g.*, N.J. STAT. ANN. § 26:4-5 (2015); OHIO REV. CODE ANN. § 3707.26 (2015).

29. *See, e.g.*, HAW. REV. STAT. § 128-8(2) (2015); ILL. REV. STAT. ch. 20, § 2305/2(b) (2015); N.H. REV. STAT. § 141-C:16-a (2015).

30. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-787(B)(1) (2015); ILL. REV. STAT. ch. 20, § 2305/2(d) (2015); KAN. STAT. ANN. § 65-129b(a)(1)(A) (2014); NEV. REV. STAT. § 441A.160(2)(b) (2014).

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-787(C)(1) (2015); ILL. REV. STAT. ch. 20, § 2305/2(e) (2015); KAN. STAT. ANN. § 65-129b(a)(1)(A) (2014); N.H. REV. STAT. §§ 141-C:11(III), 141-C:15(I) (2015).

32. *See, e.g.*, HAW. REV. STAT. § 325-32 (2015); MISS. CODE ANN. § 41-23-37 (2015).

33. *See, e.g.*, KAN. STAT. ANN. § 65-129b(a)(1)(C) (2014); N.M. STAT. ANN. §§ 12-10A-12(B), 12-10A-13(B) (2014).

34. *See, e.g.*, N.M. STAT. ANN. § 12-10A-6(A)(1) (2014); S.C. CODE ANN. § 44-4-310 (2015).

35. *See, e.g.*, N.M. STAT. ANN. § 12-10A-6(A)(2), (B) (2014); S.C. CODE ANN. § 44-4-330(B) (2015).

36. *See, e.g.*, ILL. REV. STAT. ch. 20, § 2305/2(h) (2015); S.C. CODE ANN. § 44-1-80(B)(3) (2015).

37. *See, e.g.*, ILL. REV. STAT. ch. 20, § 2305/2(g) (2015); N.C. GEN. STAT. § 130A-145 (2015).

38. *See, e.g.*, HAW. REV. STAT. § 128-8(2) (2015); OHIO REV. CODE ANN. § 3707.12 (2015).

may find necessary for the protection of the public health."[39] Investigative authorities often expressly include the power to enter and inspect private property,[40] and may include other administrative investigation powers such as the ability to subpoena individuals and documents.[41]

What can be gleaned from the discussion above is that public health emergency authorities typically permit significant governmental intrusion into and curtailment of personal and community rights to property, bodily integrity, association with others, and freedom of movement.[42] The coercive nature of these measures, coupled with the jurisdictional uncertainty discussed in Part III, underscores the need for tribal and state governments to work together. It is important to ensure that the government entity implementing a particular response to a public health threat does so with a mantle of legitimacy and the support of its neighboring sovereign.

II. THE LEGAL LANDSCAPE FOR RESPONSE TO PUBLIC HEALTH EMERGENCIES IN INDIAN COUNTRY

Federal Indian law has a well-deserved reputation for its complexity. As one leading scholar has characterized it, the body of Indian law "is rooted in conflicting principles that leave the field in a morass of doctrinal and normative incoherence."[43] This doctrinal incoherence is not the only element that makes Indian law challenging; its pattern of development also plays a fundamental role. Decisions in individual federal court cases involving tribes often rest on a variegated foundation of federal law, treaties, historical circumstance, and consideration of the conflicting federal, state, and tribal interests in the case at hand. As a consequence, few broad principles can reliably be applied from one

39. MISS. CODE ANN. § 41-23-5 (2015); *see also* N.H. REV. STAT. § 141-C:9 (2015) (authorizing investigation of communicable diseases, including "interviews with reporting officials, their patients, and other persons affected by or having information pertaining to the communicable disease, surveys of such individuals, inspections of buildings and conveyances and their contents, and laboratory analysis of samples collected during the course of such inspections"); S.C. CODE ANN. § 44-1-80(A) (2015) (requiring state health board to "investigate the reported causes of communicable or epidemic disease and must enforce or prescribe these preventive measures as may be needed to suppress or prevent the spread of these diseases by proper quarantine or other measures of prevention").

40. *See, e.g.*, MINN. STAT. § 144.0535 (2015); N.D. CENT. CODE § 23-35-12(2) (2013); NEV. REV. STAT. § 441A.160(2)(a) (2014).

41. *See, e.g.*, MINN. Stat. § 144.054 (2015).

42. The foregoing is neither a comprehensive list of authorities nor representative of every jurisdiction.

43. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).

decided case to the next.[44]

State governments planning for a response to a public health emergency that crosses tribal borders thus confront an uncertain legal landscape. They do so with precious little guidance: no published federal court decisions address state and tribal authorities responding to a natural disaster or public health emergency. Rather, state public health officials must take what cues they can from existing precedents that address the division of state and tribal authority generally.[45]

This Part attempts to identify some of the legal complications that might arise from a public health emergency response that crosses tribal borders and describes the relevant principles of Indian law. The variability of Indian law between different tribes and circumstances permits few firm predictions as to how the law might be applied in a specific situation.[46] This discussion is intended as a starting point for the consideration of the types of legal barriers a state might encounter—absent a formal cooperative agreement—in trying to coordinate an emergency response involving tribal populations and land.

A. Threshold Issues: Sources of Law and Geographic Area of Application

Before turning to particular legal issues that may arise during a public health emergency response involving a tribe, it is worth briefly canvassing two

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44. As David Getches described it, not only are the few clearly announced "rules" in Indian law periodically replaced with new rules or exceptions, "[e]ven the 'rules' tend to require case-by-case analysis of each situation, and this requires a look at highly variable demographic facts produced by a mix of past policies and historical accidents." David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations' Self-Government*, 1 REV. CONST. STUD. 120, 143 (1993).

45. While this discussion is largely framed from the state perspective, many states have delegated public health emergency response authorities to local units of government. Courts tend to apply the same analysis and standards to local governments in their dealings with tribes as they do to the states; the most that can be said as a general matter is that the authority of a local government to take action on tribal land will be no greater than that of a state, and may in some circumstances be more circumscribed. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 212 n.11 (1987) (noting doubt as to whether Congress, in measure transferring jurisdiction over tribal land to state, had authorized the application of local laws to reservations); Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390 (9th Cir. 1987) (tribal lands subject only to state laws, not local regulation).

46. Taking this caution a step further, some commentators have suggested that the variability in tribal history and circumstance defeats—or at least should defeat—any effort to develop a coherent, uniformly applicable body of "Indian law." *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004); *see also* Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2005) (critiquing the "one-size-fits-all" approach to Indian law and arguing for analysis of legal issues on a tribe-by-tribe basis).

threshold matters: the basic sources of "Indian law"[47] and the geographic area to which it pertains.

Federal Indian law derives from the Indian Commerce Clause of the Constitution, which grants Congress the authority to "regulate Commerce with foreign Nations and among the several states and with the Indian tribes."[48] This grant of authority to Congress to regulate Indian relations, coupled with the Supremacy Clause,[49] means that federal law controls issues of sovereignty and jurisdiction.[50] Federal control, however, does not necessarily mean uniformity. In some areas, Congress has enacted broad laws that affect the status of all Indian tribes within the United States; however, it has also exercised Indian Commerce Clause authority to enact laws that affect only tribes in particular states[51] or that authorize states and tribes to redefine their legal relationship.[52] This uneven body of statutory law stands alongside other types of federal law that may supply the controlling authority for a given tribe or issue of Indian law. This includes treaties (ratified by Congress under its Indian Commerce Clause authority),[53] regulations promulgated by a number of executive branch agencies,[54] and executive orders.[55]

Often, there is no specific federal law or treaty provision controlling the issues that arise from state-tribal relations, and federal courts have been left to fill the gaps. The United States Supreme Court in particular has played a central role

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47. "Indian law" here refers to the law governing the relation of tribes to other governments, not the laws enacted by tribes to govern their own lands and peoples.

48. U.S. CONST. art. I, § 8, cl. 3.

49. U.S. CONST. art. VI, cl. 2.

50. *See* Winton v. Amos, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); *see also* Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

51. For example, in 1953, Congress enacted a measure transferring civil and criminal adjudicatory jurisdiction over tribal lands to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin). *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2012), 28 U.S.C. § 1360 (2012)).

52. *See, e.g.*, Indian Civil Rights Act, Pub. L. No. 90-284, §401, 82 Stat. 73, 78 (1968) (codified at 25 U.S.C. § 1321 (2012)) (authorizing states to assume criminal jurisdiction over Indian country with the consent of the tribe).

53. *See, e.g.*, Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) (holding that terms of 1855 Treaty with the Yakamas exempted tribal members from various state fees related to licensing and operating trucks on state highways).

54. *See* 25 C.F.R. § 1.1 (1960).

55. Executive orders played a particularly pivotal role in the establishment of reservations in the latter half of the nineteenth century and continuing until 1919, when Congress discontinued the practice. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03(9) (Nell Jessup Newton ed., 2012).

in defining the nature and extent of tribal sovereignty. One of the seminal early cases in this area involved Georgia's conviction of a minister who took up residence in the Cherokee nation without first procuring state license or taking an oath to defend the state's laws and constitution. In this case, Chief Justice Marshall described the Indian nations "as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[56] In light of this independence and the federal government's exclusive right to regulate relations with the tribes, Marshall held the Cherokee Nation to be "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[57] The Court's current view on tribal sovereignty and its relationship to state jurisdiction is starkly different from the vision articulated by Justice Marshall.[58] Though the federal courts are the major engines driving the development of Indian law, the courts' resolution any particular issue of law is provisional; Congress has plenary authority over tribal relations and may at any time override the courts.[59]

The second threshold issue is how Congress and federal courts define the geographic area where tribes may exercise their sovereignty. The importance of this determination to the state public health official is plain: it identifies areas where a state may have limited authority to unilaterally carry out emergency response measures. Though the extent and exclusivity of tribal jurisdiction over a particular piece of land may depend on who it is owned by (in the case of fee land) or how it is used, at the most basic level it is the concept of "Indian country" that demarcates the geographic boundary at which state jurisdiction ceases to be absolute. Congress has statutorily defined Indian country to mean any one of three things: (1) any land within the limit of an Indian reservation; (2) "dependent Indian communities within the borders of the United States whether

56. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

57. *Id.* at 561.

58. Justice Scalia's dismissive take on tribal sovereignty in a 2001 opinion, though perhaps not shared by all of his colleagues, captures the extent of the shift: "Though tribes are often referred to as 'sovereign' entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of a State can have no force within reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." Nevada v. Hicks, 533 U.S. 353, 361-62 (2001).

59. For example, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that a tribe's criminal jurisdiction did not extend to members of other Indian tribes who committed crimes on the tribe's land—i.e., that a tribe only had criminal jurisdiction over its own members. Congress promptly responded with an enactment providing that tribal criminal jurisdiction extended to both member and nonmember Indians. *See* Pub. L. 101-511, § 8077(b)-(c), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2012)).

within the original or subsequently acquired territory thereof"; or (3) "all Indian allotments, the Indian titles to which have not been extinguished."[60]

These three categories require further explanation. The first category, Indian reservations, applies to land that has been explicitly reserved by statute or treaty for tribal use. The second category is the most nebulous and potentially broad of the three, but it has been significantly cabined by the Supreme Court. In *Alaska v. Native Village of Venetie Tribal Government*,[61] the Court held that "dependent Indian communities" "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[62] Thus, the second category refers to lands that are similar to reservations because they were set aside for tribal use and are subject to federal oversight. The third describes a category of land created under a federal policy in the late nineteenth and early twentieth centuries that divided tribal land and allotted it to individual tribal members.[63] Though a significant portion of this allotted land was ultimately sold to non-Indians, federal courts consider that which remains in Indian control to be Indian country.

B. Civil Regulatory Authority in Indian Country

The legal question of broadest significance for the state public health official is which entity, state or tribal government, has civil regulatory jurisdiction in Indian country.[64] Who has authority to institute social distancing measures, such as quarantine or closure of public spaces? Who may require the seizure or destruction of private property where necessary to abate a hazard? Who may institute mandatory medical screenings and treatment? Civil regulatory jurisdiction, one of the thorniest issues in an already complex body of law, lies at

60. 18 U.S.C. § 1151 (2012). Although this statute formally defines the Indian country for purposes of criminal jurisdiction, it has been utilized as well for questions of civil jurisdiction. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

61. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 520.

62. *Id.* at 527.

63. *See* Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331 (2012)); *see also* Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 254-56 (1992) (discussing history of allotment policy). Congress eventually ceased the practice of allotting tribal lands in 1934. *See* Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

64. Outside of Indian country, it is settled that, absent an express statement of federal law to the contrary, tribal members are subject to state law, provided that such law is nondiscriminatory. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 n.11 (1980) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1978)).

the heart of these and many other questions.[65] Two distinct and not entirely complementary legal frameworks govern the scope of tribal and state regulatory jurisdiction in Indian country. While there are a few relatively firm precepts in this area—one may, for example, generally presume a tribe's authority to regulate its own membership within Indian country—many questions are not susceptible to a uniform answer and must be assessed individually.

The leading modern authority on the extent of tribal civil regulatory jurisdiction is the Supreme Court's 1981 decision in *Montana v. United States*.[66] There, the Court held that Montana's Crow Tribe lacked the power to regulate hunting and fishing by non-Indians on lands within its reservation that were owned in fee simple by non-Indians. The Court set forth a number of principles that have endured to the present day, affirming that the "attributes of sovereignty" possessed by tribes necessarily include the powers of self-government over their own members. Among these powers was the authority "'to prescribe and enforce criminal laws,' . . . 'to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'"[67] Those powers came close, however, to marking the furthest reach of tribal sovereignty. The Court went on to hold that, without express Congressional delegation, tribes ordinarily may not exercise any authority "beyond what is necessary to protect tribal self-government or to control internal relations."[68] Thus, the Court established what amounts to a default rule dictating that tribes lack jurisdiction to regulate the activities of nonmembers.

The Court added an important caveat to this default rule, suggesting in dicta that there are two situations in which tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[69] The first permits a certain degree of tribal regulation of nonmembers who "enter consensual relationships with the tribe or its members."[70] The second reserves a tribe's "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,

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65. *See* CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 106 (Joseph P. Mazurek ed., 2d ed. 1998) ("Among the most difficult and recurring issues in Indian law is the scope of tribal and state civil-regulatory authority in Indian country").

66. 450 U.S. 544 (1981).

67. *Id.* at 564 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).

68. Montana v. United States, 450 U.S. 544, 569 (1981).

69. *Id.* at 565.

70. *Id.* ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

the economic security, or the health or welfare of the tribe."[71] Notwithstanding the potential breadth of these two *Montana* exceptions, the Court has given them a decidedly cramped reading to date.[72] They have enjoyed greater currency in the lower courts; for example, in a case decided shortly after *Montana*, the Ninth Circuit applied both exceptions to uphold application of tribal building, health, and safety regulations to a business owned and operated by a non-Indian on fee land within a reservation.[73]

The question of the reach of *state* authority in Indian country is more complicated. As the Supreme Court candidly acknowledged, "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."[74] Rather, the Court has adopted a case-by-case approach that weighs the state's interest in application of its law within tribal borders against federal and tribal interests.[75] According to the Court, a state law that conflicts or interferes with federal and tribal interests is preempted in Indian country unless the gravity of the state's regulatory interest justifies the intrusion.[76] Application in the individual case is less simple.

Where the conduct of tribal members in Indian country is concerned, the analysis will typically (though not always) result in the preemption of state law, for, as the Court has suggested, "the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[77] Far less predictable are those cases involving the conduct of non-Indians within Indian country. Such cases, per the Supreme Court, require a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," with close attention to the language of and policies underlying the federal statutes and treaties relevant to the specific case.[78] The Court has offered little guidance on how to balance these competing interests, aside from a suggestion that federal authorities should be read against the background "notions of sovereignty that have developed from historical traditions of tribal

71. *Id.* at 566.

72. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329-41 (2008) (rejecting application of both *Montana* exceptions, and emphasizing their limited nature).

73. Cardin v. De La Cruz, 671 F.2d 363, 365-67 (9th Cir. 1982).

74. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

75. As a matter of formal doctrine, the Court has suggested that there are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members": the preemptive force of federal law and the tribe's right to make its own laws and be ruled by them. *Id.* at 142-43. The Court largely condensed these two concerns into a single analytical framework to be applied in cases involving the application of state civil regulatory laws to Indian country.

76. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

77. *White Mountain Apache Tribe*, 448 U.S. at 144.

78. *Id.* at 144-45.

independence."[79] The Court's analysis in individual cases has, consistent with its articulated framework, been heavily rooted in the particular federal, tribal, and state policies and interests at stake, and thus has generated little in the way of generalizable principles.[80] The Court has shown a willingness to hold state law preempted even where it may apply to conduct by non-members, such as a motor-carrier and fuel use tax that Arizona sought to levy on two non-Indian corporations contracting with a tribe for on-reservation work.[81] However, the Court has also permitted narrow applications of state law to tribally operated businesses that serve non-members, as in the case of tobacco taxes[82] and liquor licensure.[83]

This contrast in precedent illustrates the legal uncertainty facing the state public health official: in a typical case, neither state nor tribal government would have plenary authority to carry out public health emergency response measures in Indian country. Pursuant to its retained right of self-government, [84] a tribal government would likely have authority to pursue emergency measures affecting its own members—e.g., requiring mandatory medical screenings for tribal members, or ordering the closure of tribal schools and daycares—provided that its laws explicitly authorize such measures.[85] By the same token, it is unlikely that state emergency laws would reach tribal members living in Indian country absent specific provisions in a treaty or federal law.[86] Beyond this, however, little can be predicted with certitude. In light of *Montana*, a federal court would likely not countenance a tribe's application of coercive or rights-limiting emergency measures to non-members and their property.[87] But state law may not apply in

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79. *Id.* at 145; *see also* Rice v. Rehner, 463 U.S. 713, 719-20 (1983) (describing the role of historical notions of tribal sovereignty as the backdrop for the preemption balancing analysis).

80. *See, e.g.*, *White Mountain Apache Tribe*, 448 U.S. at 145-53; *Cabazon Band of Mission Indians*, 480 U.S. at 214-22.

81. *White Mountain Apache Tribe*, 448 U.S. 136.

82. Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 481-83 (1976) (holding that tribal smokeshop could be required to collect and remit state tobacco taxes for sales to non-Indians).

83. *See Rice*, 463 U.S. 713 (upholding application of state licensure requirements for sale of liquor by federally licensed Indian trader).

84. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981).

85. For examples of tribal code provisions outlining quarantine procedures and other emergency public health authorities, see E. BAND CHEROKEE CODE §§ 130-5 (2011); NAVAJO NATION CODE § 2101 (2002).

86. *See White Mountain Apache Tribe*, 448 U.S. at 144.

87. A court could, of course, find that the need for an effective response to public health threats brings tribal emergency provisions with the second *Montana* exception, implicating a tribe's "inherent power to exercise civil authority over the conduct of non-Indians . . . when that conduct threatens or has some direct effect on the . . . the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

these situations either, leaving such individuals in a jurisdictional limbo: the mere fact that tribes may not have jurisdiction over non-members living in Indian country does not automatically establish the application of state law.[88]

Jurisdiction over businesses that serve both tribal members and non-members—such as hotels, restaurants, private schools, and daycares—present particularly difficult questions. Consider the situation of an on-reservation, tribally operated casino that serves predominantly non-tribal visitors. In the early stages of a public health emergency, it is possible that state and tribal governments might disagree as to the necessity of closure given the conflicting interests at stake. Casinos represent a vital source of income for some tribes, but they are also a congregating place for travelers that could facilitate the rapid spread of a contagious disease. However great a risk a casino might pose, a state may lack the authority to order its closure over tribal objection given the particular legal framework for regulation of casinos in Indian country.

Conflict over regulation of Indian casinos first came to a head in the late 1980s when the Supreme Court reviewed a case involving the application of state gaming laws to bingo operations by several tribes in California. The Court held that, in light of the important federal and tribal interests in the revenue and employment opportunities created by on-reservation gaming, state laws regulating bingo could not reach the tribe's operations.[89] Congress responded by enacting the Indian Gaming Regulatory Act (IGRA).[90] The IGRA created a regulatory regime that offered states some measure of control by largely limiting tribal gaming to those types already permitted in a state and by requiring tribes to negotiate a State-Tribal gaming compact prior to operating most casino-type gaming.[91] The IGRA suggests, but does not require, that a State-Tribal compact include provisions clarifying the allocation of civil and criminal jurisdiction over gaming activities.[92] Absent such agreement, the IGRA makes clear that tribal law, not state law, governs on-reservation gaming.[93]

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88. One can imagine that particular exercises of state authority, even when applied to non-members, might make for close cases under the Supreme Court's interest-balancing framework—for example, measures involving the seizure, closure, or condemnation of real property within Indian country.

89. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

90. 25 U.S.C. §§ 2701-5 (2012).

91. *Id.* §§ 2703(7)-(8), 2710(b)(1), (d)(1) (2012).

92. *Id.* § 2710(d)(3)(C) (2012).

93. *See id.* § 2071(5) (2012) (finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity"); §§ 2710(a), (d)(4)-(5), 2713(d) (2012); *see also* S. REP. NO. 100-446, at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 (describing the IGRA as a "a framework for the regulation of gaming activities on Indian lands which provides that in the

In a given situation, a state and tribe might address public health regulatory authority for tribal casino operations in a State-Tribal compact. Such agreements, however, might also be limited to the narrow regulation of the actual gambling operations and not the associated accommodations. Absent any clear agreement, jurisdiction would depend on a balancing of the interests at stake, which the Senate's Indian Affairs Committee concisely outlined in its report recommending passage of the IGRA:

> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to . . . gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.[94]

At least one court has weighed these interests and determined that a county government's public health and safety concerns cannot justify enforcement of the county's health and safety regulations in an on-reservation casino.[95] Others have addressed the somewhat distinct question of jurisdiction over tort claims arising from casino incidents; in doing so, these courts reached conflicting conclusions on the extent of state jurisdiction.[96] These few decided cases fail to shed light on how courts may determine jurisdiction in the context of a public health emergency, where the state's governmental interests in public safety would be significantly sharpened.[97]

Any discussion of civil regulatory jurisdiction in Indian country must

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exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities").

94. S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

95. *See In re* Sonoma Cnty. Fire Chief's Application, No. C 02-04873 JSW, 2005 WL 1005079 (N.D. Cal. Apr. 29, 2005).

96. *Compare* Muhammad v. Comanche Nation Casino, No. CIV–09–968–D, 2010 WL 4365568 (W.D. Okla. Oct. 27, 2010) (holding that tribal courts have exclusive jurisdiction over casino tort claims), *with* Cossey v. Cherokee Nation Enters., 212 P.3d 447 (Okla. 2009) (holding that tort claims arising from accidents in on-reservation casino may be brought in state courts).

97. Additionally, it is worth noting that federal law grants the Chairman of the National Indian Gaming Commission certain authority to order temporary closure of gaming facilities. *See* 25 U.S.C. § 2705(a)(1) (2012). While the grounds for that authority are limited, they include violations of tribal ordinances, *id.* § 2713(b) (2012), which could provide a basis for federal closure of a casino to the extent that tribal public health provisions were implicated.

acknowledge the existence of 25 U.S.C. § 231, a long dormant federal statute. Enacted in 1929, the statute authorizes the Secretary of the Interior[98] to prescribe regulations permitting the agents or employees of a state to enter Indian country for the purpose of, among other things, "making inspection of health . . . conditions and enforcing sanitation and quarantine regulations."[99] No regulation has ever been promulgated under 25 U.S.C. § 231.[100] However, even absent implementing regulations, at least one court interpreted § 231 to be an expression of Congressional intent to transfer plenary public health regulatory jurisdiction over Indian country to the states.[101] The impact of the statute on the balance of Indian and state public health regulatory jurisdiction has never been directly presented in a court case. A broad view of § 231 seems unlikely to prevail today, given that state authority under § 231 is contingent on an act of federal delegation that has not occurred in over eighty years.

C. Authority of State Officials to Enter Indian Country

Closely related to civil regulatory jurisdiction is the question of the authority of state officials to enter Indian country, whether to investigate public health threats, enforce state emergency measures, or deliver aid (such as antivirals or food). Federal courts have long recognized that tribes possess a landowner's "traditional and undisputed power to exclude persons whom they deem to be

98. The responsibilities of the Secretary with respect to Indian public health have since been transferred to the Department of Health and Human Services. *See* 42 U.S.C. § 2001 (2012).

99. 25 U.S.C. § 231 (2012).

100. *See* Confederated Bands & Tribes of Yakima Indian Nation v. Washington, 550 F.2d 443, 446 n.8 (9th Cir. 1977) (en banc). The Centers for Disease Control and Prevention (CDC) has proposed regulations under § 231 that would allow the Director of the CDC, with the concurrence of the Indian Health Service Director and after consulting with the affected tribes, to authorize state officials to enter Indian country, but only for the sole purpose of enforcing *federal* quarantine regulations. *See* Control of Communicable Diseases, 70 Fed. Reg. 71892 (proposed No. 30, 2005) (to be codified at 42 C.F.R. pts. 70 & 71). The regulations have not been adopted.

101. *See* Anderson v. Gladden, 188 F. Supp. 666, 677 (D. Or. 1960) (suggesting in dicta that § 261 "surrendered to the states all jurisdiction over Indians and Indian Reservations in the field of health and education and gave the states, through the Secretary of the Interior, complete jurisdiction in connection with enforcing sanitation and quarantine regulations and compulsory school attendance in such field"). While this may be the broadest extant reading of § 261, it is not alone in overlooking the federal authorization necessary for states to exercise public health authority in Indian country. *See, e.g.*, Snohomish Cnty. v. Seattle Disposal Co., 425 P.2d 22 (Wash. 1967) (suggesting in dicta that § 231 granted the states "jurisdiction to inspect and regulate health, sanitation, and related matters on Indian tribal lands"); Acosta v. San Diego Cnty., 272 P.2d 92, 97 (Cal. Ct. App. 1954) (suggesting in dicta that § 231 authorizes the states "to enter upon Indian lands for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations").

undesirable from tribal lands."[102] This right of exclusion was generally understood to extend to state officials[103] until the Supreme Court's 2001 decision in *Hicks v. Nevada*.[104] In *Hicks*, the Court introduced considerable uncertainty into the question of whether state officials have authority to enter and carry out their responsibilities in Indian country.

Hicks came before the Court on a question of tribal court jurisdiction; the operative issue was whether a tribal court could exercise jurisdiction over claims by a member of the Fallon Paiute-Soshone Tribes, Floyd Hicks, against various Nevada state game wardens.[105] Acting on information suggesting that Hicks illegally killed a California bighorn sheep off-reservation, the game wardens executed search warrants on Hicks' property on two separate occasions.[106] Because Hicks resided on the Tribes' reservation, the wardens took the precaution in both instances of procuring a tribal-court warrant in addition to a state-issued warrant.[107] They did not find incriminating evidence on either occasion. The searches resulted in damage to Hicks's property, leading Hicks to bring suit in tribal court against the tribal court judge, various tribal officers, and Nevada's game wardens, alleging various violations of his rights.[108] The wardens and the State of Nevada filed a declaratory judgment action in the Federal District Court seeking a declaration that the tribal courts lacked jurisdiction.[109] Both the District Court and the Ninth Circuit ruled against the state, finding the tribal court's exercise of jurisdiction proper.[110] The Supreme Court disagreed.

The determinative issue for the Court was whether the Tribes' regulatory

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102. *Reina*, 495 U.S. at 698; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) ("A tribe's authority to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established.").

103. *See, e.g.*, State v. Hicks, 196 F.3d 1020, 1028 (9th Cir. 1999) ("The tribal court was free to exclude state officials engaged in law enforcement activities on the reservation."), *rev'd*, 533 U.S. 353 (2001); Cnty. of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998) (noting that, in entering into law enforcement agreement with State, tribe "gave up its landowner's right to exclude state officials engaged in law enforcement activities on the reservation."); Miccosukee Tribe of Indians of Fla. v. United States, No. 00–3453CIV, 2000 WL 35623105 (S.D. Fla. Dec. 15, 2000) (holding that State Attorney could not effectuate service of process on tribal land); *see also* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that "the citizens of Georgia have no right to enter" the territory of the Cherokee nation "but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress").

104. *Hicks*, 533 U.S. at 353.

105. *Id.* at 355.

106. *Id.* at 356.

107. *Id.*

108. *Id.*

109. *Id.* at 357. This followed rulings by the tribal court and a tribal appeals court that the courts could properly exercise jurisdiction over claims against state officials. *Id.*

110. *Id.*

jurisdiction extended to the on-reservation conduct of the state game wardens.[111] Applying *Montana*,[112] the Court asked whether regulation of state officials executing search warrants for off-reservation crimes was essential to tribal self-government or internal relations.[113] The Court held that it was not.[114] In the course of reaching that conclusion, the Court offered some strong indications (arguably dicta[115]) of how it would resolve the converse question[116]: the scope of a state official's authority to enter tribal land in execution of his duties. While acknowledging that state regulatory authority will not generally reach the activities of tribal members on tribal land, the Court noted that it had, upon occasion, found state regulation appropriate where the state's off-reservation interests are implicated—as, for example, in permitting states to require tribal businesses to collect state cigarette taxes from nonmembers, or allowing state jurisdiction over crimes committed by members off-reservation.[117] Past cases had left unanswered the question of whether the State's regulatory authority in such circumstances "entails the corollary right to enter a reservation (including Indian fee lands) for enforcement purposes."[118] At least in the case at bar—execution of a search warrant for an alleged off-reservation crime—the Court suggested that it did. Relying on a pair of cases from the nineteenth century, the *Hicks* Court found indications that the "process" of state courts had historically been understood to extend to Indian country, and reasoned that such "process" likely included the authority to issue search warrants for off-reservation conduct.[119]

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111. *Id.* at 358. The Court had previously held that a tribe's adjudicative jurisdiction cannot extend beyond its legislative jurisdiction, and thus, the Court reasoned, the absence of the latter would necessarily mean the absence of the former. *Id.* at 357-58 (citing Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).

112. *See supra* Part II.B.

113. The Court categorically rejected the application of the other *Montana* exception (relating to regulation of nonmembers who enter consensual relationships with the tribe), *Hicks*, 533 U.S. at 359 n.3, noting that the exception "obviously" was not intended to apply to "[s]tates or state officers acting in their governmental capacity," *id.* at 371-72.

114. It would risk understatement to note that the *Hicks* decision was, and continues to be, controversial. In a reaction that typifies the decision's scholarly reception, one academic characterized *Hicks* as "a stunning example of how [the Court] pursues the Justices' larger agendas in Indian cases while ignoring and misapplying Indian law principles." David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 329-30 (2001).

115. *See, e.g.*, State v. Cummings, 679 N.W.2d 484, 488-89 (S.D. 2004) (characterizing as dicta the Court's discussion in *Hicks* of state authority to enter Indian country).

116. *See* Jones *ex rel.* Murray v. Norton, No. 2:09–cv–00730-TC-SA, 2010 WL 2990829, at *3 (D. Utah July 26, 2010) (observing that "*Hicks* concerned tribal authority rather than the authority of the state").

117. *Hicks*, 533 U.S. at 362.

118. *Id.* at 363.

119. *Id.* at 363-64.

For the state official whose duties may take him into Indian country, *Hicks* leaves many open questions.[120] There is considerable uncertainty even when, as in *Hicks*, investigation of off-reservation crimes is at issue. In a 2004 case, for example, the South Dakota Supreme Court affirmed the suppression of evidence obtained from a tribal member during a traffic stop after a state officer pursued him onto a reservation for an off-reservation traffic offense.[121] In so doing, the court distinguished *Hicks* on the grounds that "in *Hicks*, tribal sovereignty was being used as a sword against state officers" whereas here "tribal sovereignty [was] being used as a shield to protect the Tribe's sovereignty from incursions by the State."[122]

Beyond the narrow criminal investigation context of *Hicks*, it is difficult to say what authority, if any, state officials may exercise in Indian country.[123] The Court in *Hicks* acknowledged this open question and suggested that any action by state officials unrelated to law enforcement "is potentially subject to tribal control depending on the outcome of [the] *Montana* analysis."[124] Nonetheless, one may extrapolate at least two general principles from *Hicks*. First, a tribe's authority to regulate or exclude state officers from Indian country will be related to the scope of the state's regulatory jurisdiction over the matter at issue.[125] Thus, where the state's claim of regulatory authority is strongest—e.g., over nonmembers on fee land—state officials are most likely to have authority to enter Indian country to carry out their duties. Where it is weakest—over tribal members on reserved or tribally owned land—a state official's authority is most in question.

Second, the mere fact of state regulatory jurisdiction does not necessarily grant authority for state officials to enter Indian country. In *Hicks*, the Supreme Court did not locate the state wardens' authority to execute warrants in Indian country in the states' general criminal jurisdiction over off-reservation crimes.

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120. Indeed, the Court took pains to confine its decision in *Hicks* to the precise circumstances before it. *See id.* at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

121. State v. Cummings, 679 N.W.2d 484, 484 (S.D. 2004).

122. *Id.* at 487. *But see* State v. Harrison, 238 P.3d 869 (N.M. 2010) (holding on similar facts that state officer had authority to pursue tribal member onto reservation and obtain evidence of DWI violation).

123. The Ninth Circuit, for example, has taken a very narrow view of *Hicks*, characterizing it as a single, limited exception to a tribe's general power to exclude nonmembers from tribal land. *See* Water Wheel Camp Recreational Area v. Larance, 642 F.3d 802, 813 (9th Cir. 2011).

124. Nevada v. Hicks, 533 U.S. 353, 373 (2001).

125. The questions of state and tribal regulatory jurisdiction are, to be sure, distinct and not entirely complementary. However, *Hicks* suggests that a determination of the importance to tribal self-government of regulating state officials will depend on the extent of the state's authority in the substantive area at issue. *See id.* at 360-65.

Rather, the Court relied on case precedent regarding the extension of state court "process" to tribal lands.[126] Consider state taxation of on-reservation cigarette sales to nonmembers, an area in which states have unambiguous authority to regulate Indian country conduct. Rather than acting within Indian country, state officials typically seize cigarettes outside of tribal borders.[127] To the extent that this evinces a possible gap between regulatory authority and enforcement authority in Indian country, a distinction between the two would not be surprising. Ratifying the extension of state laws to Indian country is a lesser offense to Indian sovereignty, at least symbolically, than is authorizing state officials to actually enter and enforce those laws over tribal objection.

The uncertainties here can be addressed through express agreements with the tribes as to the authority of state officials in Indian country.[128] Absent such an agreement, however, significant questions concerning the ability of state officials to enter Indian country will persist. This lack of clarity may impede coordination of an effective response to a public health emergency.

D. Adjudicatory Authority in Indian Country

Issues of adjudicatory authority may arise from public health emergencies in Indian country in two situations: (1) where judicial orders (such as temporary restraining orders) are needed to implement emergency authorities; and (2) in subsequent litigation related to an emergency response (e.g., tort claims for injuries suffered by responders or property damaged in a response). At the broadest level, the scope of adjudicatory authority should mirror the scope of civil regulatory authority, but this becomes considerably less clear when considered in light of the details of litigating a case. The following is a brief overview of the law on adjudicatory jurisdiction.

The leading Supreme Court case on the adjudicatory jurisdiction of tribal

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126. *Id.* at 363-64.

127. *See, e.g.*, Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1180-83 (10th Cir. 2012) (affirming legality of state's practice of seizing cigarettes lacking state tax stamp en route to a reservation); *see also* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (noting that "States may . . . collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." (internal citation omitted)). Indeed, in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980), the Supreme Court expressly reserved (and has not subsequently answered) the question of whether state officials could enter a reservation to seize cigarettes.

128. *See, e.g.*, Cnty. of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998) (describing an Agreement under which "county law enforcement officers (as agents of the state) have an express right to come onto the reservation and exercise jurisdiction over Indians. They have authority to patrol the reservation, investigate minor crimes and make arrests.").

courts, *Strate v. A-1 Contractors*,[129] arose from an accident between two non-Indians on a state highway running through the Fort Berthold Reservation in North Dakota. The accident produced a tort suit in tribal court, a declaratory judgment action in federal court, and, ultimately, an opportunity for the Supreme Court to assess the scope of the tribal adjudicatory jurisdiction. The Court rejected a reading of its precedents that would grant a tribe adjudicatory authority over nonmembers in situations where it lacked regulatory authority. Rather, the Court held that a tribe's adjudicatory jurisdiction over nonmembers does not exceed its regulatory jurisdiction.[130] The Court thus applied its *Montana* analysis (governing the scope of tribal regulatory jurisdiction) to determine whether adjudicatory jurisdiction over the subject tort suit was proper.[131] The *Strate* Court held that the minimal tribal interests at stake could not justify jurisdiction over a suit between nonmembers.[132]

While establishing that a tribe may not adjudicate where it lacks the power to regulate, *Strate* leaves unresolved the question of whether a tribe's adjudicatory authority may in fact be narrower than its regulatory authority.[133] Following *Strate*, courts have generally treated the two as coextensive, applying *Montana* to determine whether adjudicatory jurisdiction properly lies with a tribal court. This approach is particularly likely to prevail where adjudication is directly incident to a proper exercise of tribal regulatory authority—as would be the case, for instance, if a temporary restraining order were sought to enforce an emergency order issued by tribal authorities and directed at tribal members. There is greater room for question when the object of the tribe's regulatory authority diverges from the subject matter of the adjudication. For example, a court could find that a tribe has the regulatory authority to exclude state public health officials from tribal land, but lacks adjudicatory jurisdiction over tort suits arising from acts by such officials on tribal land.[134]

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129. 520 U.S. 438 (1997).

130. *Id.* at 453.

131. *Id.* at 456-59.

132. *Id.*

133. *See* Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001).

134. The question of adjudicatory jurisdiction over state officials is, to be clear, an open question; it is certainly possible that state officials who caused injury to individuals or property in carrying out emergency response measures in Indian country would be subject to suit in tribal court. In *Hicks*, the Supreme Court barred jurisdiction over suits against state officials in one narrow area—execution of search warrants for off-reservation crimes—but preserved the possibility that suit against state officials in tribal court might be proper in other circumstances. *Id.* at 373. Tribal court jurisdiction over such a suit would perhaps more likely be found proper where a state official acted beyond the scope of his or her proper jurisdiction. *Cf. id.* at 386 (Ginsburg, J. concurring) (noting possibility of tribal court jurisdiction over "state officials engaged on tribal land in a venture or frolic of their own").

Similarly, state court jurisdiction over matters pertaining to Indian country, such as torts occurring in the conduct of public health emergency operations, mirrors state regulatory authority. Thus, absent a specific enactment by Congress, determination of state adjudicatory jurisdiction rests on the same nebulous interest-balancing test[135] used to assess the reach of state regulatory jurisdiction.[136]

A significant complicating factor with respect to state court jurisdiction is a 1953 Congressional enactment commonly referred to as P.L. 280, which transferred civil and criminal jurisdiction over Indian country to five states, and also permitted other states to electively assume jurisdiction.[137] While the basic jurisdictional transfer effected by Public Law 280 is relatively clear,[138] giving state courts jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country,"[139] the enactment left in its wake some difficult questions regarding the law to be applied in such cases.[140] Moreover, Public Law 280 allowed states that voluntarily assumed jurisdiction over Indian country to exercise partial rather than full jurisdiction.[141] This means that, in some states, determining which sovereign has adjudicatory jurisdiction in Indian country may depend not only on the identity of the parties, but also on the

135. *See supra* Part II.B.

136. *See* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 147-50 (1984) (applying balancing analysis articulated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 136 (1980) to question of state court jurisdiction); AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 154-58 (concluding that same substantive analysis is used for questions of state adjudicatory and regulatory jurisdiction).

137. *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2012), 28 U.S.C. § 1360 (2012)). The five states to which P.L. 280 transferred jurisdiction are California, Minnesota, Nebraska, Oregon, and Wisconsin; subsequent legislation added Alaska to the list.

138. It must be noted that individual questions of jurisdiction under P.L. 280 can be quite involved, as there are specific exceptions in law even for the so-called "mandatory" states named in the statute. *See, e.g.*, 18 U.S.C. § 1162(a) (2012) (carving out specific communities, such as the Warm Springs Reservation in Oregon, from the general transfer of jurisdiction).

139. 28 U.S.C. § 1360(a) (2012).

140. Two basic choice-of-law issues may be encountered in civil cases arising from Indian country in P.L. 280 jurisdictions. First, P.L. 280 specifically provided for the continued application of tribal law "if not inconsistent with any applicable civil law of the State," necessitating close analysis of whether tribal law is, in fact, consistent with state law. 28 U.S.C.§ 1360(c) (2012). Second, the Supreme Court has held that P.L. 280 did not "confer general state civil regulatory control over Indian reservations," and thus certain regulatory measures (such as taxes) cannot be imposed on Indians solely on P.L. 280's authority. *See* Bryan v. Itasca Cnty., 426 U.S. 373, 384 (1976). The line between regulatory laws and laws that may be properly applied in Indian country cases is, unsurprisingly, not always clear. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 160.

141. *See* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) (rejecting challenge to Washington's partial assumption of jurisdiction over Indian country pursuant to P.L. 280).

type of action or claim being filed.

E. Criminal Jurisdiction in Indian Country

State public health officials will be less concerned with the boundaries of federal, tribal, and state criminal jurisdiction in Indian country than with matters of civil jurisdiction. Nonetheless, issues of criminal jurisdiction may arise where state or tribal codes prescribe criminal penalties for violation of emergency response measures, such as quarantine.

As a general matter, criminal jurisdiction in Indian country "is governed by a complex patchwork of federal, state, and tribal law,"[142] application of which depends upon, among other things, the identities of perpetrators and (if any) victims. The starting place for most jurisdictional analyses is 18 U.S.C. § 1152. That statute extends to Indian country the "general laws of the United States" that apply to crimes committed in federal enclaves, giving the federal government general jurisdiction, with some significant exceptions. The statute does not apply to "offenses committed by one Indian against the person or property of another Indian," over which the tribes have exclusive jurisdiction (as to minor crimes),[143] "nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[144] While this federal statute might be read to leave no place for state criminal jurisdiction, a long line of Supreme Court precedent assigns states exclusive jurisdiction over crimes involving only non-Indians but committed in Indian country.[145] Moreover, with respect to civil adjudicatory jurisdiction, Public Law 280 transferred criminal jurisdiction over Indian country crimes to five states, and permitted other states to assume jurisdiction in whole or part.[146]

This Article does not purport to fully map the overlapping lines of criminal jurisdiction, as the type of criminal offense that may arise from a public health emergency presents a special and narrow case—albeit one with some complications of its own. Public health offenses of this ilk (e.g., violation of quarantine) are victimless crimes. Although a violation of a public health

142. Duro v. Reina, 495 U.S. 676, 680 n.1 (1990), *superseded by statute,* Pub. L. 101-511, 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301(2) (2012)).

143. 18 U.S.C. § 1152 (2012). A separate statute gives the federal government exclusive jurisdiction over major crimes such as murder and kidnapping between Indians. *See* 18 U.S.C. § 1153 (2012).

144. 18 U.S.C. § 1152 (2012).

145. *See Reina*, 495 U.S. at 680 n.1.

146. *See* 18 U.S.C. § 1162 (2012); *see also supra* note 137.

emergency measure might pose a threat of serious societal harm, a distinctive characteristic of such an offense is that the violation itself has no immediate victim. For violations committed by non-Indians, it is relatively clear as a matter of law that victimless crimes come within state jurisdiction.[147] When the offender is a tribal member, the matter is not so clear. Whereas section 1152 leaves jurisdiction over lower-level crimes *between* Indians to tribes, the statute is silent as to victimless crimes by Indians. Case law is split as to whether or not such crimes fall exclusively within tribal jurisdiction.[148] Even assuming section 1152 applies to at least some victimless crimes by Indians, tribes would still retain concurrent jurisdiction under their own laws to punish violations of public health emergency measures by Indians[149]—and, pursuant to section 1152, punishment under tribal law would deprive the federal government of jurisdiction. However, this does not foreclose the possibility of the federal government prosecuting an Indian offender under the "general laws of the United States." This phrase refers not to the generally applicable laws that apply anywhere in the United States, but rather the laws applied in federal enclaves. The applicable law is primarily state law, as the federal Assimilative Crimes Act[150] largely incorporates the substantive criminal law of the state or territory in which a federal enclave is located. So, at least in theory, under section 1152, the federal government could prosecute an Indian for violation of a state quarantine law.[151]

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147. *See, e.g.*, United States v. Langford, 641 F.3d 1195, 1197-99 (10th Cir. 2011) (holding that state had exclusive jurisdiction over prosecution of non-Indian for being spectator at a cockfight in Indian country); People v. Collins, 826 N.W.2d 175, (Mich. Ct. App. 2012) (holding that state had jurisdiction over prosecution of non-Indians for possession of controlled substance in Indian country).

148. *Compare* United States v. Quiver, 241 U.S. 602 (1916) (Indian-against-Indian exception includes the arguably victimless offense of adultery committed between Indians), *and* United States v. Blue, 722 F.2d 383, 386 n.4 (8th Cir. 1983) (citing *Quiver* and noting that § 1152's "Indian against Indian exception has been read very broadly to include 'victimless crimes' affecting only Indians"), *with* United States v. Thunder Hawk, 127 F.3d 705, 708-09 (8th Cir. 1997) (holding that offense of driving under the influence fell outside of the Indian-against-Indian exception and distinguishing *Quiver* on the grounds that it involved "domestic relations, an area traditionally left to tribal self-government"), *and* United States v. Sosseur, 181 F.2d 873, 876 (7th Cir. 1950) (United States had jurisdiction to prosecute Indian defendant for illegally operating slot machines). *See also* AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 91 (noting that it "appears doubtful" that the Indian-against-Indian exception applies to all victimless crimes by Indians).

149. *See, e.g.*, CHEROKEE CODE § 130-6(f) (2011) (prescribing criminal penalties for violation of quarantine or isolation orders), *id.* at § 130-13 (2011) (authorizing arrest to enforce quarantine ordinance).

150. Codified as amended at 18 U.S.C. § 13 (2012).

151. This is exceedingly unlikely for any number of reasons, not least among them that the federal government has its own quarantine authority in Indian country and is thus unlikely to rely upon state enactments. *See* 25 U.S.C. § 198 (2012) (granting broad authority to isolate or quarantine "any Indian afflicted with tuberculosis, trachoma, or other contagious or infectious

This example raises a second distinguishing characteristic of this type of public health offense: it is merely an enforcement mechanism for a set of civil regulatory authorities. Given the low likelihood that a court would find state public health emergency laws applicable to tribal members in Indian country at all, it seems perverse to suggest that the federal government could use section 1152 to bootstrap those laws into Indian country. Indeed, case law interpreting the Assimilative Crimes Act has found that the statute only imports a state's *prohibitory* laws, not its *regulatory* laws.[152] Courts have made the same distinction in interpreting the reach of Public Law 280's transfer of criminal jurisdiction to the states.[153] According to the Ninth Circuit Court of Appeals, the essence of this distinction is whether the state statute at issue is "intended to prohibit particular conduct in order to promote the general welfare," or rather is "primarily a licensing law aimed at regulating particular conduct."[154] A state law penalizing noncompliance with a public health emergency measure does not fit easily into one category or the other. However, it is very likely that, where the penal provision is merely an aid to a civil regulatory system—and where a violation cannot exist without the state first exercising its regulatory authority by issuing a quarantine order or other emergency measure—a court would find the law itself regulatory and thus not applicable to tribal members in Indian country.[155]

Though no formal regulatory/prohibitory distinction controls the reach of state criminal jurisdiction over non-Indians in Indian country, enforcement of a state law penalizing a violation of an emergency measure such as a quarantine order presupposes state authority to apply the measure in the first place. Thus, whether a state has the criminal enforcement authority as against a non-Indian necessarily depends upon whether the state's civil regulatory jurisdiction extends to Indian country in the individual circumstances at hand. This determination

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diseases").

152. *See* United States v. Dotson, 615 F.3d 1162, 1165-66 (9th Cir. 2010).

153. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207-14 (1987). Accordingly, the ability of a state that has assumed jurisdiction under P.L. 280 to criminally enforce its public health emergency laws in Indian country will turn on whether such laws are deemed prohibitory or regulatory.

154. *Dotson,* 615 F.3d at 1168 (quoting United States v. Clark, 195 F.3d 446, 450 (9th Cir. 1999)).

155. As the Ninth Circuit has noted, the rationale for the argument that regulatory offenses should be carved out from the Assimilative Crimes Act is that Congress did not intend to allow "a state [to] enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations (i.e., licenses, permits, etc.)." *Clark,* 195 F.3d at 450 (quoting United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977)). That said, in *Clark,* the court found a state law criminalizing the unlicensed practice of law prohibitory in nature, even though the law was, arguably, closely tied to the state's professional licensing regulation. *Id.* at 449-50.

would rely on the interest-balancing analysis described in Part II.B above.

Generally, tribes have criminal jurisdiction over violations by Indians of their own public health laws (possibly concurrent with the federal government).[156] A state's plenary jurisdiction over crimes involving only non-Indians may furnish the state with some authority to enforce criminal violations of state public health laws in Indian country. However, as with most other questions of federal Indian law, those general principles may give way in the specific circumstances of an individual case.

III. NAVIGATING JURISDICTIONAL UNCERTAINTY IN PRACTICE: THE INTERGOVERNMENTAL AGREEMENT

Most state or tribal officials who have occasion to interact with their governmental counterparts should be familiar with the challenges thus far discussed, as well as with the negotiation of intergovernmental agreements (IGAs). This Part briefly introduces the concept of the intergovernmental agreement and makes the case for its application to the context of public health emergency authorities.

The Indian law scholar David Getches has referred to intergovernmental agreements as a "device of necessity" for tribes and neighboring governments.[157] An IGA is an agreement or memorandum of understanding (MOU) negotiated between a tribe and a neighboring government to clarify some aspect of their legal relationship. In some cases, these agreements permit cooperation and sharing of resources. The use of IGAs with tribes in the United States is widespread. They address such diverse subjects as law enforcement authorities, water rights, regulation of hunting and fishing, taxation, waste disposal, economic development, and social service delivery.[158] IGAs help "close the gap between concepts of sovereignty and the necessities of governance," and, at their best, function to "give practical meaning to broad legal principles, to effectuate court decisions and legislative delegations of authority, and to clarify ambiguous laws."[159]

The exigencies of a public health emergency make IGAs, and the clarity

156. Note that, even where jurisdiction over an offender lies with the state, tribal officers "may exercise their power to detain the offender and transport him to the proper authorities." Duro v. Reina, 495 U.S. 676, 697 (1990). Thus, tribal officers could likely assist in enforcement of a state public health order against non-Indians.

157. Getches, *supra* note 44, at 121.

158. *See id.* at 122; AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 404-30; Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 258-67 (1991).

159. Getches, *supra* note 44, at 121.

they can provide, particularly attractive.[160] However, there may be limitations to what can be accomplished through direct negotiation between a tribe and a neighboring state or local government. Jurisdictional uncertainty is perhaps the most obvious, though not the only,[161] impetus for a state to negotiate an IGA with a tribe addressing responses to public health emergencies in Indian country. Federal and state laws generate, rather than answer, questions as to who has jurisdiction to pursue emergency response measures in areas that are likely to be of concern to state public health officials. This "uncertainty leaves tribes, state governments, and local governments to act at their peril, not knowing whether assertions of jurisdiction will be upheld or not."[162]

Even in instances where the law is be more settled, differences in the *perception* of the extent of tribal sovereignty may necessitate a cooperative agreement between tribe and state to clarify responsibilities and authorities. It has been said that "[t]he success of any legal system depends upon its acceptance by the people to whom it applies."[163] Given the coercive nature of many public health emergency measures—which may require holding individuals against their will, entering or destroying property, or closing down public spaces and businesses—the perceived legitimacy and acceptance of the implementing government's authority seems especially critical to the success of the response. Indeed, disputes over tribal sovereignty have ended in armed stand-offs between tribal members and the local, state, and federal government officials.[164]

Public health emergencies afford little opportunity to resolve legal uncertainty or to reconcile conflicting understandings of the scope of tribal

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160. Even outside of the tribal context, the importance of intergovernmental agreements to public health emergency response has widely been noted. *See, e.g.*, Daniel D. Stier & Richard A. Goodman, *Mutual Aid Agreements: Essential Legal Tools for Public Health Preparedness and Response*, 97 AM. J. PUB. HEALTH S62 (2007); Hogan et al., *supra* note 2, at 39.

161. In states where transfer of allotments has created extensive "checkerboarding" of Indian and non-Indian lands, the practical challenges of regulating and policing these fragmented jurisdictions may also serve as a strong motivation to form intergovernmental agreements. *See* Riley, *supra* note 3, at 1731.

162. Getches, *supra* note 44, at 143.

163. KARL LLEWELLYN & EDWARD ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 239 (1941).

164. For example, in 1976, amidst a jurisdictional dispute, members of the Oneida Nation in New York barricaded the road leading onto the Oneida's land and refused to let local police officers pass. Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 559-60 (1994). Another high-profile incident took place in 1973, when there was a seventy-one-day stand-off between members of the American Indian Movement and local, state, and federal authorities over issues relating to the federal government's treaty obligations with the Sioux Nation. *See* Scott R. Tkacz, Note, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301, 310 (2006).

sovereignty. While a state or tribal government might petition a court for emergency authority, that court may be unable or unwilling to expeditiously clarify complicated and politically sensitive jurisdictional issues. Moreover, state and tribal officials may lack the time and resources to brief complex questions of law amidst a crisis. Even if a court were to quickly resolve a jurisdictional dispute, the prevailing government would likely find implementation of its emergency authority difficult or impossible without the cooperation of the other sovereign.

The potential challenges of working through jurisdictional issues during an active emergency only serve to highlight the value of an IGA. Such an agreement, instituted *before* an active emergency, would establish and specify roles, responsibilities, and authorities to which the involved governments could agree. Negotiating an agreement in advance allows a tribe and state or local government to clarify the application of broad and uncertain jurisdictional principles in very specific contexts likely to arise in a public health emergency. Additionally, the process of negotiation may foster a cooperative relationship between tribal and state or local governments that the involved governments can codify in an IGA or pledge of mutual assistance.[165]

While the practical dividends of negotiating such an agreement are plain, there is some question as to the legal status and enforceability of an intergovernmental agreement between tribal and state or local governments. In certain areas—such as the disposition of tribal lands or trust property[166]—federal law explicitly prohibits the formation of agreements with tribes absent federal approval. Federal law also expressly authorizes states and tribal governments to negotiate compacts on certain subjects, such as tribal gaming[167] and child custody proceedings.[168] In areas not reached by federal statute, it is not clear whether an agreement directly negotiated between a tribe and a state or local government (without federal involvement) has any legal force.[169] For the most part,

165. *See* Pommersheim, *supra* note 158, at 268 (noting that the goal of negotiating intergovernmental agreements is not just "to narrow the band of likely areas of litigation," but also, "as part of that process, to increase mutual respect and the ability to solve common problems").

166. *See* 25 U.S.C. § 177 (2012).

167. *See id.* § 2710(d)(3) (2012).

168. *See id.* § 1919 (2012).

169. *Compare* AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 406 ("Generally, cooperative agreements that do not involve tribal lands or trust property do not require federal approval . . ."), *and* Getches, *supra* note 44, at 145 ("Neither federal permission or federal approval is generally required for interjurisdictional agreements"), *with* Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1305, 1313 (1993) (noting that it is unclear both whether federal approval is required for state-tribal cooperative agreements and whether such agreements are enforceable), *and* Note, *Intergovernmental Compacts in Native American Law:*

enforceability is beside the point; the primary value of an agreement is its clarification of expectations, procedures, and roles. Whether or not such agreements have the force of law on their own, it is often impracticable to obtain judicial enforcement of agreement obligations during an emergency. However, where a provision lasts longer than the emergency itself—disclaimers of liability for actions taken during a response, or provisions for reimbursement—the question of enforceability is more likely to come before a court.

Finally, there is the question of an agreement's validity under the laws of the governmental parties entering into it. Many states have statutes that specifically authorize their administrative agencies and/or local governments to form agreements with tribes.[170] Tribal constitutions may also contain provisions specifying the authority, procedures, or circumstances for entering into agreements with other governmental entities.[171] While compliance with state and tribal procedures will not resolve the question of an agreement's validity under federal law, it will at the very least increase the likelihood that the agreement would survive judicial scrutiny.

IV. INCIDENCE OF PUBLIC HEALTH EMERGENCY PREPAREDNESS AGREEMENTS BETWEEN TRIBES AND STATE OR LOCAL GOVERNMENTS

In recent years, many states have increased their focus on trans-border coordination with tribes on public health and other issues. This is manifest in strengthened tribal consultation policies, funding agreements, and engagement with tribes on regional and state emergency planning. Though these efforts have no doubt improved cooperation between the tribes and their neighboring governments, they have not necessarily generated comprehensive agreement on the difficult jurisdictional issues addressed in the preceding sections.

The following are the results of a preliminary investigation of the incidence of IGAs on public health emergency measures between tribes and states or local governments. Part V draws on publicly available agreements and the author's

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Models for Expanded Usage, 112 HARV. L. REV. 922, 924 (1999) ("Federal statutes and caselaw restrict the lawful authority of tribes and states to make binding agreements between themselves, and prohibit almost all tribal-state compacts absent approval by the Secretary of Interior"). Even if an intergovernmental agreement were not directly enforceable, it might have some weight in the balancing of state, federal, and tribal interests utilized to determine the scope of state civil authority in Indian country. *See supra* Part II.B.

170. *See, e.g.*, MONT. CODE ANN. § 18-11-103 (2014); WASH. REV. CODE ANN. §§ 39.34.020(1), 39.34.030 (2015). At least one state has a provision specifically authorizing state agencies to form agreements with tribes to implement public health emergency response measures. *See* N.M. STAT. ANN. § 12-10A-18 (2014).

171. *See, e.g.*, CONST. OF THE COLO. RIVER INDIAN TRIBES art. VI, § 1; CONST. OF THE TOHONO O'ODHAM NATION art. VI, § 1(f).

own discussions with public health officials and nonprofit public health organizations in Arizona, Maine, New Mexico, Oklahoma, and Washington regarding planning efforts with tribes in those states.[172] The investigation uncovered a number of IGAs, which can be coarsely assigned into two categories: those that comprehensively address aid to be given or roles and responsibilities during a public health emergency, and those that address more discrete matters or facilitate preparedness activities more generally.

Given the relatively small sample of officials contacted and states surveyed, this Article cannot—and does not purport to—offer a comprehensive picture of planning efforts nationwide. There may be many more jurisdictions that have addressed, or are in the process of addressing, emergency response authorities and responsibilities. Insofar as the states included have within their borders some of the largest tribes in the country, the paucity of agreements between these states and neighboring tribes addressing substantive jurisdictional issues suggests that there is more work to be done in this arena.

A. Comprehensive Mutual Aid Agreements

Of the IGAs analyzed for this Article, only those from the State of Washington comprehensively address the exchange of aid and/or delineation of responsibilities and authorities between tribal and neighboring governments during a public health emergency. In the interest of coherence, the agreements are ordered according to degree of devolution of public health response authority by the tribal party: substantial devolution, contingent devolution, and no devolution.

At one end of the continuum is an MOU between the Snoqualmie Indian Tribe and the Public Health Department for Seattle and King County.[173] The agreement states upfront that "*this MOU is not a legally binding document*, but rather signifies the belief and commitment of the signator[ies] . . . that in the event of a region-wide disaster, the needs of the community may be best met if they cooperate and coordinate their response efforts."[174] The agreement contemplates three areas of cooperation: (i) communication and coordination of response efforts during an emergency between the parties' respective health officers; (ii) an annual meeting and ongoing communication to address emergency response issues outside the context of an actual emergency; and (iii)

172. Most of these states were chosen for their significant tribal populations.

173. Intergovernmental Memorandum of Understanding, Pub. Health-Seattle & King Cnty., Snoqualmie Indian Tribe, Oct. 12, 2007, *available at* http://nwtemc.org/Documents/IMOU-PHSKC-Tribe.pdf (last visited Apr. 29, 2015).

174. *Id.* at 1 (emphasis in original).

sharing of surplus staff, pharmaceuticals, and supplies during an emergency to the extent available.[175] Consistent with the nonbinding nature of the agreement, cooperative efforts are framed not as obligatory, but as endeavors that the parties "may" undertake at their discretion.[176]

At the other end of the spectrum is an agreement between the Puyallup Tribe of Indians and the Tacoma-Pierce County Health Department.[177] The agreement grants the Department broad jurisdiction over "Tribal Lands, People on Tribal Lands and Tribe members off Tribal Lands . . . for purposes of epidemiological research, investigation, prevention, containment and treatment related to a Disease or Contamination Event affecting human health."[178] Crucially, the agreement also spells out many of the corollary details necessary to give effect to its jurisdictional grant. These include (i) access to tribal lands for county officials to carry out their investigative and response duties; (ii) a guarantee that the tribe will give full faith and credit to detention, isolation, and quarantine orders issued by state courts; (iii) a guarantee of assistance from tribal police in enforcing such orders; and (iv) use of tribal personnel, facilities, and materials where necessary to support isolation or quarantine.[179] Other provisions safeguard the rights of tribal members, calling for the county to adhere to state law safeguards in employing social distancing measures and providing for challenges to those measures in either tribal or county courts.[180]

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175. *Id.* at 1-2.

176. The only item slightly at odds with the otherwise carefully noncommittal nature of the agreement is a provision requiring that the costs associated with the sharing of staff or materials be carefully tracked "for reimbursement after the event is over." *Id.* at 2. Given the disclaimer at the front of the agreement, it is unlikely that this would be construed to create a binding obligation of reimbursement.

177. Mutual Aid Agreement, Puyallup Tribe of Indians, Tacoma-Pierce Cnty. Health Dept., (Sept. 7, 2005), http://www.michigan.gov/documents/mdch/ISOLATION_QUARANTINE_-_Puyallup_-_TPCHD_Public_Health_Mutual_Aid_201022_7.pdf [hereinafter Puyallup Mutual Aid Agreement]. A substantially identical agreement appears to have been proposed between the Lummi Nation and Whatcom County in Washington, but, according to officials from the Whatcom County Health Department, was never put in place. *See* Memorandum of Understanding, Lummi Nation, Whatcom Cnty. Health Dept., 2006, *available at* http://nwtemc.org/Documents/Lummi%20Nation%20revised.doc (last visited Apr. 29, 2015); Email from Marcus Deyerin, Emergency Response Program Specialist, Whatcom County Health Department to Author (May 14, 2013) (on file with author).

178. Puyallup Mutual Aid Agreement, *supra* note 177, at 2.

179. *Id.* at 2-3.

180. *Id.* at 3. The agreements also contain provisions that, among other things, state that the aid provided for therein is gratuitous; clarify that the parties are legally responsible for their own actions and omissions; require the maintenance of certain types of insurance policies; require that medical records be maintained in compliance with state and federal confidentiality laws; and call for the sharing of disease or contaminant information where necessary to avert harm to personnel performing services under the agreements. *Id.* at 3-4.

The most interesting of the Washington agreements is the one that stakes out the middle ground, arising from collaborations among a number of tribes and counties in Washington's Olympic Peninsula. The agreement addresses issues of public health emergency coordination in the absence of consistent public health infrastructure among the various governments with jurisdiction in the Peninsula.[181] With the help of a facilitator from the Washington Department of Health, three county health departments[182] and seven tribes[183] came together to draft an agreement that would not only improve public health emergency preparedness within the region, but also honor the sovereignty of the parties by providing enough flexibility to fit their varying circumstances. The resulting agreement, eventually signed by all participating governments, reflects a balance of those priorities and objectives.

Like the Snoqualmie agreement, the Olympic Regional Mutual Aid Agreement is premised explicitly on the fact that, while the parties acknowledge the necessity for collaboration, the agreement does not create a binding legal duty to provide mutual aid.[184] However, the Olympic Agreement offers a much more comprehensive set of expectations and procedures for coordination and for invoking assistance during an emergency. At bottom, the Agreement is a mechanism through which tribes can temporarily fill gaps in their public health infrastructure and expertise in order to respond to a public health emergency. Noting that some of the tribal signatories represent tribes without health officers or complete health codes, the Agreement lays out two options for tribes to exercise their public health authority in an emergency.[185] First, the tribe may choose to grant the closest county health department permission to exercise public health response authority over tribal lands and all inhabitants therein under the procedures and authority of local, state, federal, and—if there is a tribal

181. *See* Susan Ferguston et al., *The Olympic Regional Tribal-Public Health Collaboration and Mutual Aid Agreement and Operation Plan: Challenges and Solutions*, *available at* http://www.npaihb.org/epicenter/emergency_preparedness_conference_2010_presentations (last visited Apr. 29, 2015) (follow third link from the bottom to Dr. Ferguston's presentation); Telephone Interview with John Erikson, Special Assistant, Pub. Health Emergency Preparedness & Response, Wash. Dep't of Health (Apr. 4, 2013).

182. These are the Kitsap County Health District, the Clallam County Health Department, and the Jefferson County Health Department. *See* Ferguston et al., *supra* note 181.

183. These include the Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe, Makah Tribe, Port Gamble S'Klallam Tribe, Quileute Tribe, and Suquamish Tribe. *Id.*

184. *See* Olympic Regional Tribal-Pub. Health Collaboration & Mutual Aid Agreement 1, 4 (2009), http://www.doh.wa.gov/Portals/1/Documents/5100/Olympic-Regional-Tribal-Public-Health-Mutual-Aid-Agreement.pdf (last visited April 21, 2015) [hereinafter Olympic Regional Mutual Aid Agreement].

185. *Id.* at 5-7.

health code provision on point—tribal law.[186] Second, the tribe may elect to retain its public health response authority but rely on the county health departments for technical assistance.[187] In either case, the tribe and county governments have the right to decline or rescind a request or offer of assistance at any time.[188]

The Olympic Regional Mutual Aid Agreement thus lays the foundation for the sort of devolution of public health authority the Puyallup agreement contemplates. At the same time, the Olympic Regional Mutual Aid Agreement allows tribes to choose whether to actually transfer authority to the county health department—and allows the county to choose whether to accept that authority—on a case-by-case basis. The Agreement goes on to cover various matters ancillary to the provision of assistance: (i) specifying the chain of command for staff and resources shared under the agreement;[189] (ii) providing for reimbursement for the costs of personnel and resources utilized during an emergency;[190] (iii) requiring proper registration of personnel under the State's emergency laws (entitling them to certain benefits and protections);[191] and (iv) disclaiming liability for the acts and omissions of the other party's personnel.[192] To aid coordination and implementation, the Agreement also calls for the parties to participate in an initial regional exercise and exchange their individual emergency preparedness plans.[193] Lastly, the Agreement sets forth a detailed dispute resolution process that ranges from informal discussions to mediation and, if necessary, binding arbitration. Moreover, the dispute resolution process includes a provision for enforcement of arbitration awards in tribal or federal court, depending on the party seeking equitable relief.[194]

The multiplicity of approaches within the State of Washington alone speaks to the variety of ways in which tribes and state or local public health officials can address questions surrounding public health emergency response authorities. Some tribes may be willing to turn over responsibility for public health emergencies to another governmental entity. Others may prefer an approach that

186. *Id.* at 6.

187. *Id.*

188. *Id.*

189. *Id.* at 7. The agreement provides that non-medical personnel and resources are placed under the command of the requesting party's leadership, while medical personnel remain under the supervision of the responding party's health officer.

190. *Id.* at 8.

191. *Id.*; *see also*, WASH. ADMIN. CODE § 118-04-080 (2015).

192. Olympic Regional Mutual Aid Agreement, *supra* note 184, at 9.

193. *Id.* at 5.

194. *Id.* at 10-12. The agreement calls for awards to be enforced against tribes in tribal court, and against county health departments in federal court (or, if federal jurisdiction is lacking, in county court). *Id.* at 11.

maintains tribal control over emergency response. To be sure, there is no single model appropriate to every situation.

B. Funding and Single Subject Agreements

Although few of the states researched for this Article had direct public health emergency IGAs like Washington's, the other four states each had some form of relevant or analogous agreement in place. Most prevalent among such agreements were provisions related to funding for tribal public health preparedness activities. The majority of the states had entered into such IGAs with at least some of the tribes within state lines. These agreements typically passed through to the tribes a portion of the state's Centers for Disease Control (CDC) grant funding in exchange for a specific set of public health preparedness deliverables. Some of the more common IGA provisions focused narrowly on tribal readiness deliverables, such as the completion of a public health preparedness self-assessment tool.[195] Other IGAs encouraged intergovernmental coordination by requiring tribal participation in regional or state-wide planning discussions, preparedness exercises, and trainings.[196]

Arizona's funding agreements warrant special mention. Arizona forged agreements with twelve of the twenty-one tribes having a presence in the state, whereby the state would provide funding (through the CDC Public Health Emergency Preparedness Cooperative grants) for public health preparedness work.[197] Unique to Arizona's agreements are their comprehensive scope. The agreements, which cover a five-year term, require the tribes to hire or appoint a public health preparedness coordinator who becomes responsible for a substantial roster of deliverables and activities.[198] Each contracting tribe must: (i) develop its

195. *See, e.g.*, Intergovernmental Grant Agreement, N.M. Dept. of Health-Pueblo of Zia, 2013 (deliverables include "[c]onduct a tribal self assessment of Public Health Emergency Preparedness using the Public Health and Healthcare Capabilities Planning Guide (CPG) prepared by the CDC").

196. *See, e.g., id.* (requiring tribal emergency coordinator or representative to attend state emergency preparedness stakeholder meetings); Intergovernmental Grant Agreement, N.M. Dep't of Health-Pueblo, 2013 (requiring "essential tribal personnel" to participate in Cities Readiness Initiative trainings and drills); Intergovernmental Agreement, Ariz. Dep't of Health Servs.—Hopi Tribe, 2010 (requiring tribal participation in quarterly meetings of regional public health preparedness committee); Sample Statement of Work for Healthcare Coalition Agreements between the Wash. Dep't of Health and tribes (provided by the Washington Dept. of Health by email to the author on Apr. 19, 2013) (requiring tribal participation in regional coalition meetings and public health emergency preparedness training and exercises).

197. Telephone Interview with Teresa Ehnert, Bureau Chief, Pub. Health Emergency Preparedness, Ariz. Dep't of Health Servs. (Apr. 22, 2013); Telephone Interview with Michael Allison, Native American Liaison, Ariz. Dep't of Health Servs. (Apr. 12, 2013).

198. *See, e.g.*, Intergovernmental Agreement, Ariz. Dept. of Health Servs.-Navajo Nation, 2010, at 12 (on file with author).

own public health emergency preparedness and response plan and update it on an annual basis; and (ii) participate in the development of regional preparedness plans maintained by the county, state, and/or Indian Health Services.[199] The agreements direct tribes to draft plans for dispensing mass prophylaxis and medical countermeasures to tribal members, develop a tribal volunteer coordination plan for emergencies, and—to the extent consistent with its emergency preparedness plan—enter into mutual aid agreements with local jurisdictions.[200] Other deliverables include, but are not limited to: attendance at regional preparedness meetings; participation in public health emergency and Strategic National Stockpile (SNS) exercises; and participation in various activities related to disease surveillance and outbreak investigation.[201] The Arizona Department of Health Services has contracted with an elder in the Fort Mojave Tribe to act as liaison on public health emergency preparedness with other tribal governments. The elder facilitates coordination with the tribes on these grant activities and related work.[202]

Several state and local governments have also formed agreements with tribes to facilitate transfer of SNS[203] medical assets to the tribe for distribution to tribal members.[204] The agreements generally provide for SNS assets to be delivered in an emergency to a location specified in the agreement[205] or chosen by tribal leaders at the time of delivery,[206] for dispensation (at no charge)[207] solely to tribal members and employees.[208] The tribe provides the location, personnel, and

199. *Id.* at 12-13.

200. *Id.*

201. *Id.* at 13.

202. Telephone Interview with Teresa Ehnert, *supra* note 197; Telephone Interview with Michael Allison, *supra* note 197.

203. The Strategic National Stockpile is a federally administered and maintained stockpile of pharmaceuticals and medical supplies available for distribution in the event of a public health emergency. *See* Office of Pub. Health Preparedness & Response, *Strategic National Stockpile (SNS)*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/phpr/stockpile/stockpile.htm (last visited Apr. 29, 2015). The federal government will deliver SNS assets to the states in the event of an emergency, and states are responsible for planning for distribution to local communities. *Id.*

204. *See, e.g.*, Memorandum of Understanding, Me. Dep't of Health & Hum. Servs., Ctr. for Disease Control & Prevention-Passamaquoddy Tribe at Indian Township, 2012 (on file with author) [hereinafter Passamaquoddy SNS Agreement]; Agreement to Provide Strategic National Stockpile Assets, Maricopa Cnty. Dep't of Health, Office of Preparedness & Response-Gila River Indian Cmty., 2012 (on file with author) [hereinafter Maricopa Cnty. SNS Agreement].

205. *See* Maricopa Cnty. SNS Agreement, *supra* note 204, at 1.

206. *See* Passamaquoddy SNS Agreement, *supra* note 204, at 1-2.

207. *See* Maricopa Cnty. SNS Agreement, *supra* note 204, at 2; Passamaquoddy SNS Agreement, *supra* note 204, at 2.

208. *See* Maricopa Cnty. SNS Agreement, *supra* note 204, at 1-2; Passamaquoddy SNS Agreement, *supra* note 204, at 2-3.

equipment (e.g., tables, chairs, computers, and copiers) for the distribution. The tribe also assumes responsibility for distributing product information to recipients and keeping records of the dispensation.[209] The delivering state or county government must ensure that the tribe can access medical protocols associated with the pharmaceuticals to be dispensed. The delivering government may also provide training or technical assistance on dispensation.[210] An agreement from Maricopa County, Arizona addressed security for SNS assets. It specified that armed personnel may accompany assets to the delivery point, but only if the weapons are carried by "certified [state] peace officers" under the direction of the county's Department of Health.[211]

Finally, some agreements address the sharing of public health data, which can be crucial both during a public health emergency and for normal disease surveillance purposes. In its simplest form, such an agreement between a local health department and a tribe requires each party to provide notice to the other of any disease outbreak that may lead to widespread illness.[212] However, the data-sharing obligations need not be perfectly symmetrical. For instance, an agreement between the Gila River Indian Community and the Arizona Department of Health Services requires the tribe to provide ongoing communicable disease reports for individuals within the community. In return, the agreement obligates the Department to disclose on an annual basis a much broader set of data relating to individuals residing in the Gila River Indian Community, including birth and death records, hospital discharge database files, communicable disease surveillance and tracking data, and birth defect and cancer registry information.[213]

CONCLUSION: KEY ELEMENTS OF A STATE-TRIBAL AGREEMENT ON PUBLIC HEALTH EMERGENCY RESPONSE

It would behoove policymakers and practitioners to understand the basic

209. *See* Maricopa Cnty. SNS Agreement, *supra* note 204, at 2; Passamaquoddy SNS Agreement, *supra* note 204, at 2, 4.

210. *See* Maricopa Cnty. SNS Agreement, *supra* note 204, at 1-2; Passamaquoddy SNS Agreement, *supra* note 204, at 3.

211. *See* Maricopa Cnty. S.N.S. Agreement, *supra* note 204, at 2.

212. *See, e.g.*, Mutual Assistance Agreement, Chippewa Cnty. Health Dep't-Sault Tribe Health Ctr. (date unknown) (on file with author) (providing that "[i]n the event there is an occurrence of disease that may cause widespread illness . . . , the part that first is made aware of the case will report the case to the other entity within 24 hours of becoming aware of the potential illness and keep the other entity apprised of the ensuing investigation to ensure coordination of investigation if necessary").

213. Agreement, Gila River Indian Cmty.-Ariz. Dept. Health Servs., Jun. 1, 2000, at 1 (on file with author).

provisions that make for an effective, comprehensive public health mutual aid agreement.[214] However, certain issues are of particular concern in the context of tribal public health. Perhaps most important to any agreement between a tribe and a neighboring government on issues of public health emergency response is clarity of scope. That is, an IGA should resolve, not exacerbate, the jurisdictional uncertainty created by federal Indian law precedents. Achieving clarity can be a simple matter where the scope of the agreement is broad. For example, one such agreement provides for the transfer of jurisdiction over "Tribal Lands, People on Tribal Lands and Tribe members off Tribal Lands."[215] Where an agreement is more targeted in effect, however, drafters should take care to consider the factors that create jurisdictional uncertainty and to address them precisely as possible.

Questions of scope do not have clear-cut answers. First, scope raises the issue of geography: which lands are covered? The boundaries of a reservation provide an easy reference point. Nevertheless, tribal lands come in many different forms and configurations and are often mixed in with non-Indian lands. When defining the geographic scope of a particular provision, it is imperative that drafters be as specific as possible in addressing issues such as whether non-Indian fee land will be covered by the document.[216] A related question pertains to applicability: to whom does a particular provision of an agreement apply? Tribal members only? Non-member Indians on tribal lands? Non-Indians on tribal lands? Clarity is particularly important with respect to applicability given the uncertain status of both state and tribal jurisdiction over non-Indians residing within tribal boundaries.[217]

Drafters should also plainly define the authorities of each involved party, regardless of whether the agreement contemplates complete transfer of such authorities, sharing of authorities, or, as in the Olympic Regional Mutual Aid Agreement discussed above, merely an option to grant the subject authorities at the party's discretion.[218] Even in an agreement providing for a plenary grant of

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214. For a good overview of standard mutual aid agreement provisions, *see* Daniel D. Stier & Melisa L. Thombley, *Public Health Mutual Aid Agreements—A Menu of Suggested Provisions*, CTRS. FOR DISEASE CONTROL & PREVENTION (2007), http://www.cdc.gov/phlp/docs/Mutual_Aid_Provisions.pdf.

215. Puyallup Mutual Aid Agreement, *supra* note 177, at 2.

216. For example, the Puyallup Mutual Aid Agreement defines the geographic scope to include "land within the Puyallup Reservation boundary, Puyallup Tribal Trust Lands, Puyallup Tribal Member Trust Lands, and lands governed by the Puyallup Tribe of Indians Settlement Agreement of 1989, 25 U.S.C. § 1773 (2012) and, collectively, as those lands may be added to or subtracted from, from time to time." Puyallup Mutual Aid Agreement, *supra* note 177, at 1.

217. Again, the Puyallup Mutual Aid Agreement provides a good example, defining its scope to include "members of the Tribe and Indian and Non-Indian employees, residents, visitors, guests and other people on Tribal Lands." *Id.*

218. Olympic Regional Mutual Aid Agreement, *supra* note 184, at 5-7.

public health investigative and response authorities, the parties should consider the specific types of actions a public health emergency might require. To that end, such actions should be individually enumerated to avoid uncertainty or disputes later on. In an agreement that provides for exercise of less than total authority, it is critical that drafters specifically define and limit the powers that each party may exercise. These may include: closure of daycares, schools, and businesses open to the public, both tribally owned and otherwise; prohibition of public gatherings; isolation and quarantine; seizure and destruction of property; medical examination and compulsory vaccination or treatment; and access to private lands for investigative activities.

It is just as important that drafters consider the types of subsidiary measures that may become necessary in the exercise of each party's respective authorities. For example, even if an agreement grants a tribe and state concurrent authority to order quarantine of tribal members on reservation land, a state official may encounter practical barriers to exercising the authority if there is no provision for assistance from tribal police and recourse to tribal courts for enforcement. The parties negotiating the agreement should make explicit decisions regarding access to lands by responding officials, the role of the receiving party's law enforcement officials, and the use of the receiving party's facilities, personnel, and materials to aid in the response (e.g., using governmental facilities for distribution of pharmaceuticals).[219]

Drafting parties should also address the legal mechanisms for exercise of the authority arising from the agreement. Foremost among these is the source of the law that will be applied; if the tribe lacks a comprehensive public health code, this may mean the importation of state law standards to provide authority for a response. Likewise, an agreement should identify the court or courts that will have jurisdiction to enforce and hear appeals from emergency orders. Finally, the drafters should consider how best to ensure that emergency orders are honored and enforced by both governmental parties. One approach to this is through a provision simply stating that the parties will give full faith and credit to orders issued by the other.[220] However, a full faith and credit provision would not necessarily preclude arguments by an individual subject that the issuing government lacks jurisdiction. For example, a non-Indian residing on reservation lands might object to a tribal government's order requiring seizure of his property, even if there is a full-faith-and-credit agreement between tribal and state governments. Concurrent orders by state and tribal authorities may therefore be advised in areas of jurisdictional uncertainty. Such an arrangement should be

219. *See, e.g.*, Puyallup Mutual Aid Agreement, *supra* note 177, at 2-3.
220. *See, e.g.*, *id.* at 2.

memorialized in an advance agreement. Moreover, parties may wish to prepare and exchange form orders ahead of time to ensure smooth coordination during an emergency.[221]

There are numerous other items that drafters should address that are not specific to the tribal-state context. These include reimbursement for aid, liability (and liability protections) for actions taken by personnel in offering aid or carrying out a response, licensing of emergency responders, maintenance of insurance policies, sharing of information, coordination of public messaging, and dispute resolution.[222]

Forming an agreement between tribal and state governments is not a simple matter of sitting down at a table and picking appropriate provisions from a menu of choices. Internal politics, history, cultural differences, and relational barriers must be taken into account.[223] However, the need is plain for cross-border cooperation between tribes and neighboring governments to respond to public health threats. The use of table-top exercises and drills may help the parties assess the sufficiency of a proposed agreement—and test assumptions[224]—ahead of an emergency.[225] The process of exploring and memorializing tribal and state public health authorities, responsibilities, and roles will offer both sides some amount of clarity and predictability. It may even form the foundation for a cooperative relationship. This type of good working relationship is vital to coordinating an effective and practicable emergency response between tribal and state governments. Given the omnipresent threat of a widespread public health emergency, tribes and states must look past the challenges and work together to form IGAs that will safeguard their mutual interest in the public health during an emergency.

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221. *Cf.* Clifford M. Rees et al., *Assessing Information and Best Practices for Public Health Emergency Legal Preparedness*, 36 J.L. MED. & ETHICS 42, 44 (2008) (discussing importance of ready-to-use legal instruments in an emergency).

222. *See generally* Stier & Thombley, *supra* note 214, Olympic Regional Mutual Aid Agreement, *supra* note 184; Puyallup Mutual Aid Agreement, *supra* note 177.

223. Several commentators have addressed the factors that may aid—or impede—negotiation of agreements between tribes and neighboring governments. *See, e.g.*, AMERICAN INDIAN LAW DESKBOOK, *supra* note 65, at 414-16; Getches, *supra* note 44, at 163 n.113.

224. The 2009 H1N1 pandemic highlighted some of the ways in which basic assumptions can differ between tribe and state/federal public health officials. The CDC's protocols for distribution of antivirals at the time prioritized dispensation to pregnant women, whereas many tribes insisted that tribal elders take priority, in light of their central and cherished role in tribal communities. Several state officials recounted that the mismatch of priorities did not become clear until arrangements were being made for distribution of SNS materials during the pandemic. Telephone Interview with John Erikson, *supra* note 181; Telephone Interview with Mary Schmuacher, Chief of the Bureau of Health Emergency Mgmt., N.M. Dep't of Health (Mar. 8, 2013).

225. *See* Stier & Goodman, *supra* note 160, at S63.