American Indian Health Commission

Tribal Exclusion Authority and Pandemics

Inherent Tribal Right to Exclude Individuals from Tribal Land

Several Tribes within Washington State reported nonmembers' presence within their communities during the worldwide outbreak of COVID-19. In order to protect the health and welfare of their people, many Tribes took steps to prohibit nonmembers from entering Tribal land including posting signage at the boundaries of their reservations. Such legal actions are well within their authority.

Tribal governments have possessed since time immemorial an inherent power to exclude individuals from their lands, including, but not limited to, placing conditions on entry, on continued presence, or on reservation conduct.[1] This power is explicit within each of the Pacific Northwest Treaties: "no white man shall be permitted to reside thereon without permission of the tribe."[2] The power is also recognized in federal case law: "A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power" to exclude them from the tribe's land.[3] Several Washington Tribes have legislated this power of exclusion within their codes including the right to remove nonmembers on the basis of contagious disease.[4]

When actions of others threaten or has some direct effect on the health or welfare of the Tribe, "Tribal governments are in the best positions to assess these ills and craft appropriate solutions. Courts should not second-guess the intent behind these solutions."[5]

Federal and State Assistance in Removal of Individuals Who Violate Exclusion Laws

The United States, in honoring its treaty obligations, should assist a Tribe which requests assistance in removing individuals who violate exclusion orders. The Department of Justice has in past practice enforced federal trespass laws.[6] In addition, Tribes and local law enforcement agencies with cross-deputization agreements may want to coordinate in the enforcement of exclusion and trespass violations on Tribal land.

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[1] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145 (1982).

[2] *See* Treaty of Point No Point 1855; Treaty of Point Elliot, 1855; Treaty of Olympia, 1856; Treaty of Neah Bay, 1855; and Medicine Creek Treaty, 1854.

[3] *Merrion*, 455 U.S. at 145.

[4] *See* Kalispel Tribal Law and Order Code, Chapter 5, Section 5-1.01; Makah Tribe, Title 9, Chapter 2, § 9.2.02; Port Gamble S'Klallam Code, Title 22, Chapter 22.02.01.

[5] Jeremy Wood, "Tribal Exclusion Authority: Its Sovereign Basis with Recommendations for Federal Support," *American Indian Law Journal*, Vol. 6: Iss. 2, Article 5, p. 244.
https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1186&context=ailj

[6] Id.

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