



Understanding Tribal Sovereignty and Public Health Jurisdiction

The American Indian Health Commission

www.aihc-wa.com





About Us

American Indian Health Commission

Pulling Together for Wellness

We are a Tribally-driven, non-profit organization providing a forum for the twenty-nine Tribal governments and two urban Indian health programs in Washington State to work together to improve health outcomes for American Indians and Alaska Natives.





Overview



Introduction

Part One

Part Two

Part Three

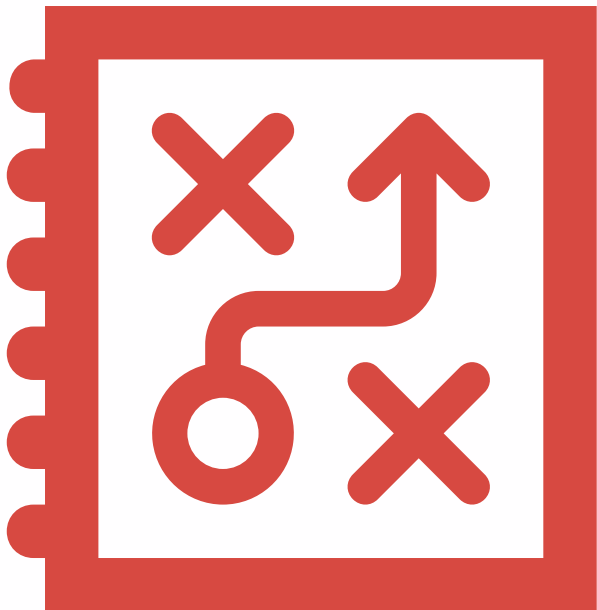
Conclusion

Scenario

Tribal Governments in Relation to State, Federal, and Local Governments

Exchanging Public Health Data with Tribal Jurisdictions

Medical Countermeasures (e.g. vaccines)



Scenario Tribe X



Tribe X

Background Info

Population. A Tribal reservation located in Washington State (Tribe X) has a population of 9,000 people residing on their Tribal lands. 3600 are Tribal members and 5400 residents are non-Tribal members residing on Tribal land

Public Health Board. The Tribal Council acts as the Tribe's public health board

Public Health Officer. The Tribal Public Health Officer is appointed by the Tribal Council and is a renowned infectious disease doctor



Tribe X

Background Info Cont.

Mass Testing and Vaccination Capability. During the COVID-19 pandemic the Tribe conducted mass testing and large-scale vaccinations. The Tribe vaccinated over 31,000 people including members of the surrounding community

Public Health Powers Capability. The Tribal Council, in consultation with their Tribal Public Health Officer and utilizing their Tribal law enforcement and Tribal courts, issued isolation and quarantine orders, mask mandates, and business closures.



Scenario

Friday, September 16: The state department of health receives reports of 6 pneumonic plague cases from the regional hospital and private healthcare providers' labs near Tribe X's reservation.

Wednesday, September 21: After analyzing the data, the state department of health determines that 3 of the cases reside on Tribal lands.

Thursday, September 22: The state department of health provides the local health jurisdiction with information about the 6 cases.

Friday, September 23: Six or more Tribal community members have been sick with the pneumonic plague for over one week. Each of these individuals are employed in the neighboring county. The Tribe has received no state or local data about any of the cases.



Questions



1. How should public health data (case info) be shared among the jurisdictions?
2. How should vaccine be distributed to Tribes?
3. Who has authority to order isolation and quarantine orders on Tribal land?



To be able to answer these questions, you need to understand Tribal sovereignty and jurisdiction.

If state government actors do not understand Tribal sovereignty, there are public health impacts including, but not limited to, failed or delayed public health response.



Part One

Tribal Governments in Relation to State, Federal, and Local Governments

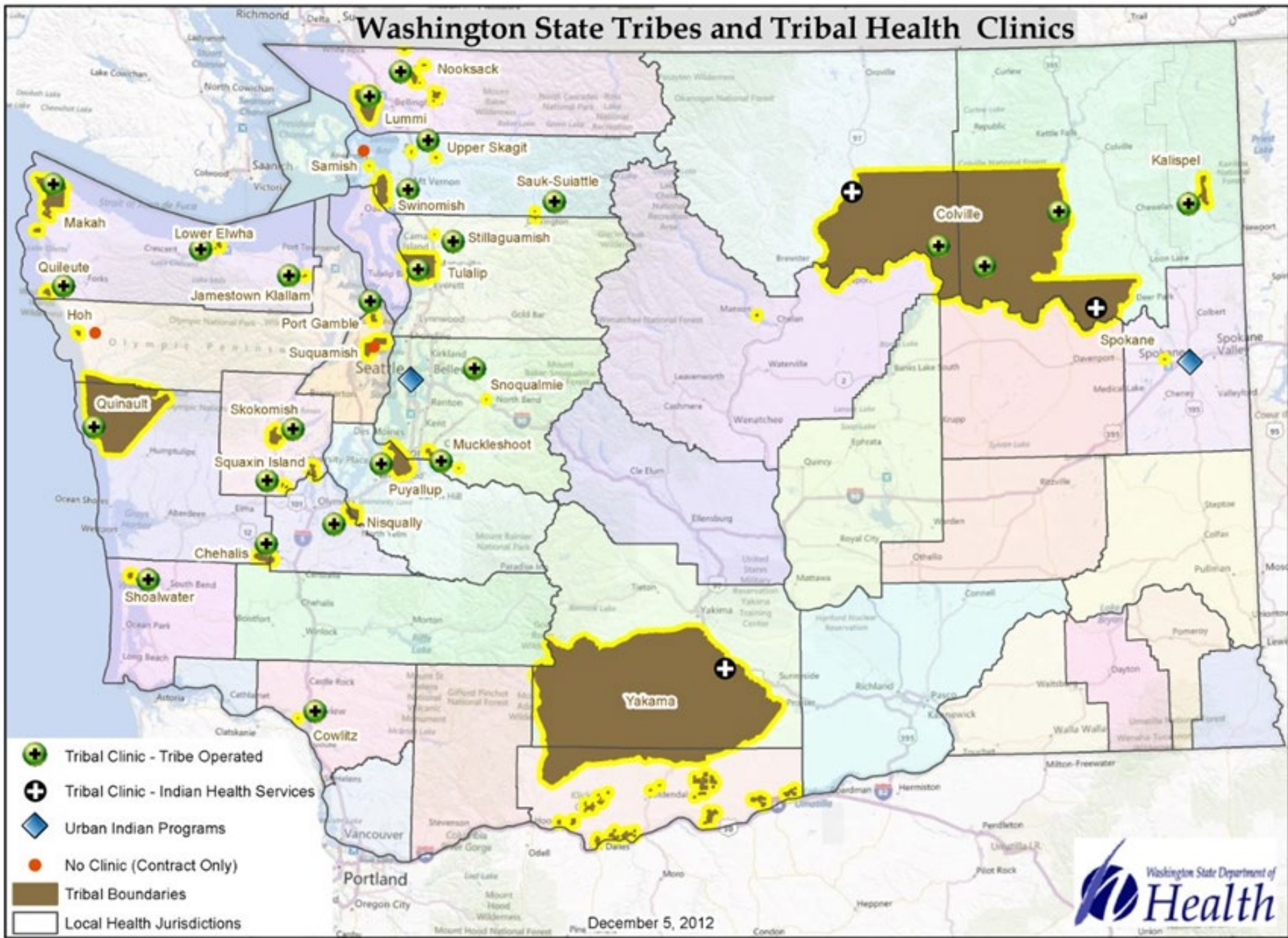


Source: NBC News, [Dakota Pipeline Protests: President Obama Tells Tribes 'You're Making Your Voices Heard'](#)



Photo by: Heather Erb







Two Important Themes For Indian Law



Theme 1 → Sovereignty

TRIBES = Independent entities with
inherent power of self-government

See American Indian Law in a Nutshell, William Canby, Jr., 7th Edition



Tribal Sovereignty

Tribal Sovereignty predates the formation of the United States government.

Prior to contact, Tribal governments had complete sovereignty.



Source: IndianZ.com, Colville Tribes Weigh Possible Casino on Ancestral Territory



U.S. Recognition of Tribal Sovereignty

Indian nations within the United States possess the inherent power to govern.

“The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial...”

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



Sovereignty is an Inherent Power

In contrast to a city, who derives certain powers to enact regulations from the State, a Tribe's power is inherent, and the Tribe needs no authority from the federal government.

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).



Tribal Sovereignty in Practice

AUTHORITY TO GOVERN

Sovereignty ensures control over the future of the Tribes and encourages preservation of Tribal culture, religions, and traditional practices.

Tribes have the authority to, among other things, govern their people and their land; define their own Tribal membership criteria; create Tribal legislation, law enforcement and court systems; and to impose taxes in certain situations.*

*Building Bridges for the New Millennium: Government to Government Implementation Guidelines, May 18, 2000



Source: Native News Online, 'Tribal courts are essential' | New Legislations Aims to Strengthen Tribal Court System



Theme 2 → Trust Responsibility

Trust responsibility is a legally enforceable obligation of the United States to protect tribal self-determination, Tribal lands, assets, resources, and treaty rights, as well as carry out the directions of federal statutes and court cases.*

* Building Bridges for the New Millennium: Government-to-Government Implementation Guidelines, State-Tribal Workgroup, May 18, 2000.





Federal Trust Treaty Responsibility to Provide Health Care to AI/AN

“And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of ...medical attendance to be defrayed by the United States, and not deducted from the annuities.”

Treaty of Point Elliot, 1855, Article 14



Federal Trust Statutory Responsibility to Provide Health Care to AI/AN

Under the Indian Health Care Improvement Act (IHCIA), “[f]ederal health services to maintain and improve the health of the Indians are ... required by the Federal Government’s historical and unique relationship with, and resulting responsibility to, the American Indian people.”

25 U.S.C. § 1601(a)



Public Health Governmental Powers: Jurisdiction, Jurisdiction, Jurisdiction

Federal Public Health Powers

Under the “Doctrine of Implied Powers,” the federal government can exercise authority to act in the interest of public health and safety³

Federal Trust Responsibility

To protect Tribal Sovereignty and Health of AI/AN and Tribes¹

Government-to-Government

Tribal Public Health Powers

Inherent.^{*} Not derived from the federal government²

The Three Sovereigns⁴

State Public Health Powers

Derived largely from sovereign powers via the 10th Amendment³

Local Public Health Powers

Derived largely from state police powers via state constitutional, legislative, or executive means.³

¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); Indian Health Care Improvement Act, Pub. L. 94-437 (25 U.S.C. 1601 et seq.)

² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); Aila Hoss, *Toward Tribal Health Sovereignty*, 2022 WIS. L. REV. ONLINE 413, 420 (2022)

³ James G. Hodge Jr., *PUBLIC HEALTH IN A NUTSHELL*, 54-60 (3d ed. 2018).

⁴ RESTATEMENT OF THE LAW OF AMERICAN INDIANS, Ch. 1, intro. note (Am. L. Inst. 2022) (citing to Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 U L.J. 1, 1 (1997)).



Washington State Laws Recognizing Tribal Public Health Jurisdictions

“Protecting the public's health across the state is a fundamental responsibility of the state and is accomplished through the governmental public health system. **This system** is comprised of the state department of health, state board of health, local health jurisdictions, **sovereign tribal nations**, and **Indian health programs**.”

Revised Code of Washington (RCW) 43.70.512(1)



“The legislature, therefore, intends to: Recognize the **sovereign authority of tribal governments to act as public health authorities** in providing for the health and safety of their community members”

Revised Code of Washington (RCW) 43.70.512(1)

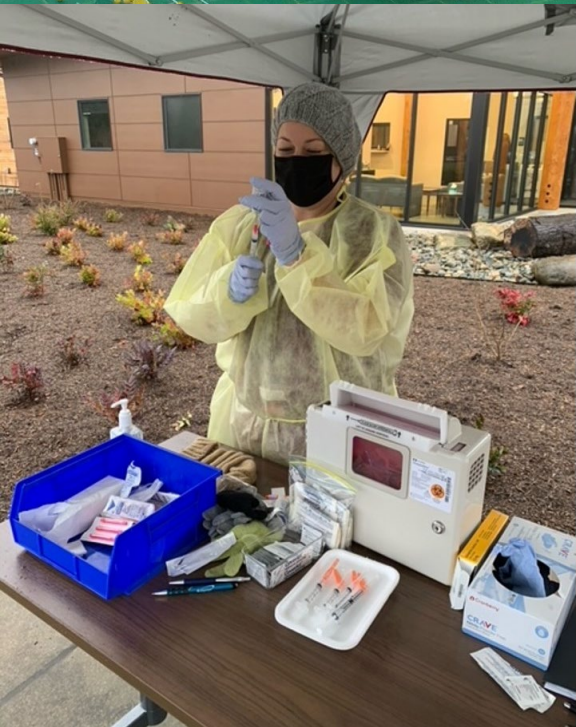


Tribal Public Health Jurisdiction

CAPACITY + CAPABILITY

Tribal governments are public health jurisdictions with inherent legal authorities and powers equal to or greater than state and local governments.*

**Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); See also, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 at 16 (1831).*





Tribal Public Health Powers

Tribal jurisdictions exercise a wide range of governmental public health powers including, but not limited to, the following functions:

Declare	Order	Close	Establish	Investigate	Surveil
Declaring public health emergencies	Ordering mandatory isolation and quarantine	Closing businesses and off-reservation borders	Establishing priority groups and service populations for dispensing vaccines	Performing case and contact investigations	Conducting data surveillance



“The clinic vaccinated about **500** people in four hours....”

Health | Local News | Northwest | Puget Sound

Huge response to a mass COVID-19 vaccination site in Sequim is likely preview of what's to come

Jan. 14, 2021 at 6:54 pm | Updated Jan. 19, 2021 at 10:32 am



Hundreds of Sequim residents waited for a drive-through clinic operated by the Jamestown S'Klallam Tribe. Clallum County is starting to vaccinate residents who are 70 and older ahead of the state's vaccination schedule. (Courtesy of James Castell)

PHOTO SOURCE: <https://www.seattletimes.com/seattle-news/health/huge-response-to-a-mass-covid-19-vaccination-site-in-sequim-is-likely-preview-of-whats-to-come/>





Northwest Laboratory in Bellingham now able to test for coronavirus, should speed tests

BY DAVID RASBACH

MARCH 30, 2020 01:12 PM, UPDATED MARCH 30, 2020 01:12 PM



Bellingham Herald, March 30, 2020, “Northwest Laboratory in Bellingham now able to test for coronavirus, should speed tests.”

27

“While Bull said the lab will be working in conjunction with the Public Health Lab and the Washington State Department of Health, Northwest Laboratory will be working closely with the Whatcom County Health Department, the Skagit County Public Health Department, Lummi Public Health Department and PeaceHealth for the testing needs of this region.”

SOURCE: <https://www.bellinghamherald.com/news/coronavirus/article241627986.html>



Native American tribe takes trailblazing steps to fight Covid-19 outbreak

Lummi nation will open a pioneering field hospital to treat patients in wave of strong public health measures

THE
GUARDIAN

““The Lummi want to help. Dr Lane said: ‘The Lummi believe in controlling our own destiny. We don’t count on help reaching us, but the hospital is something we can do to help the community.’”

Dr. Dakota Lane, Lummi Nation Health Director

SOURCE: <https://www.theguardian.com/us-news/2020/mar/18/covidcoronavirus-native-american-lummi-nation-trailblazing-steps>



Part Two

Exchanging Public Health Data with Tribal Jurisdictions



Source: [Cornerstone GCI](#), Lummi Nation Wellness Center





“Tribes having direct access to their own data is critical for Tribal governments to make decisions for the protection of our citizens within our jurisdictions.”

-Marilyn Scott, Chairman
Upper Skagit Tribe

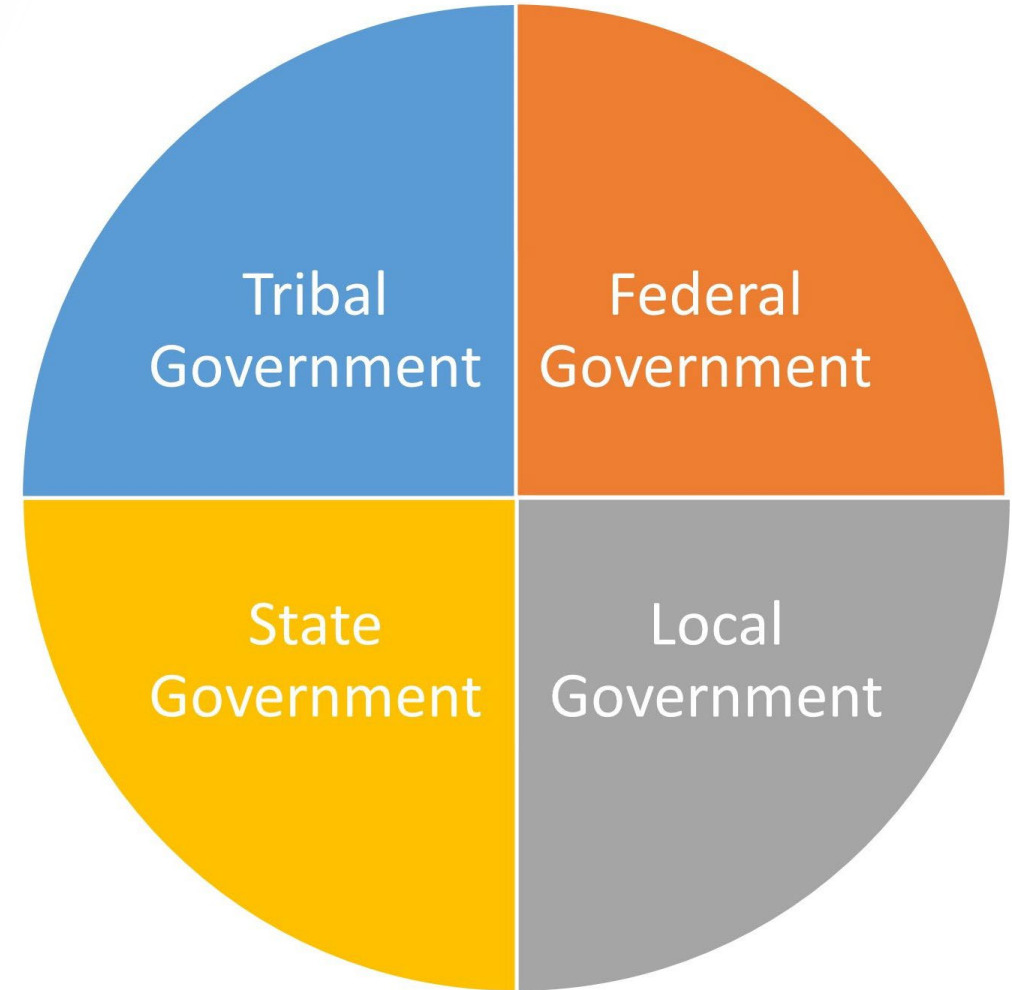


Photo courtesy of Marilyn Scott



Exchanging Public Health Data with Tribal Jurisdictions

Federal, state, and local jurisdictions can exchange public health data with Tribal jurisdictions. Under 45 C.F.R. § 164.512(b)(1)(i), covered entities can “disclose protected health information, without authorization, to public health authorities who are legally authorized to receive such reports for the purpose of preventing or controlling disease, injury, or disability.” (emphasis added). The federal definition of public health authorities includes Tribal governments.





Federal Definition of Public Health Authority

45 C.F.R. § 164.501

an agency or authority
of the United States

a State

a territory

a political subdivision of
a State or territory

an Indian Tribe

a person or entity acting
under a grant of
authority from or
contract with such
public agency



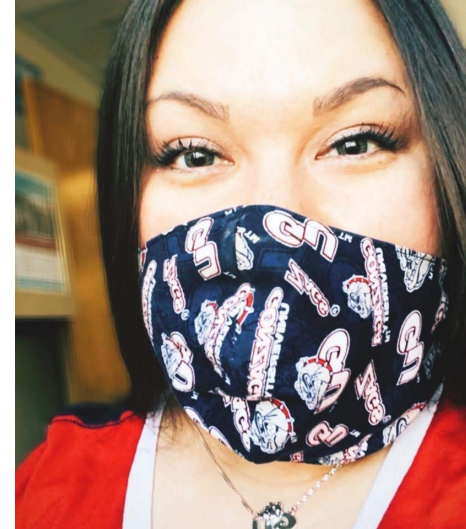
First in Line

Tribal, federal, state, and local health jurisdictions should be first in line for data about their citizens.



Impacts of Withholding Public Health Data from Tribal Jurisdictions

If a serious disease outbreak occurs on Tribal land, and the Tribal government does not receive public health data in a timely manner, that outbreak could spread more broadly within the Tribe's community and into neighboring jurisdictions.



CAPACITY + CAPABILITY



Impacts of Withholding Public Health Data from Tribal Jurisdictions

Failure to share data can result in increased administrative burden to both Tribal and local jurisdictions. During the COVID-19 pandemic, Tribal jurisdictions reported they could not get read/write access to their state's disease reporting surveillance system. As a result, the Tribal medical staff were forced to write on paper and fax the information to their county health department who would then enter the information into the state system. This increased administrative burden to Tribal staff results in reduction of critical health services.

CAPACITY + CAPABILITY





Resources

AIHC has also posted a [legal overview for public health data exchange between Tribal, federal, state, and local jurisdictions](#). This overview is intended to address frequently asked questions regarding public health data exchange with Tribal jurisdictions and provide resources including recommended practices for drafting Tribal data sharing agreements. The overview is available on the AIHC website [here](#).



Part Three

Medical Countermeasures
(e.g. vaccines)





Distribution of Medical Countermeasures to Tribes

Each time an incident occurs, a Tribe has the sovereign authority to choose how medical countermeasures are distributed to their community by federal, state, and or local governments





State and Local Health Jurisdiction Role in Distribution of Medical Countermeasures to Tribes

- States are responsible for ensuring that MCMs are distributed to Tribes*
- In Washington, the State committed to distributing MCMs directly to each of the Tribes or coordinating with federal and/or local health jurisdictions to distribute MCMs to Tribes.



*"Receiving, Distributing, and Dispensing Strategic National Stockpile Assets: A Guide to Preparedness, Version 11, p. 5-6 (electronic version), p. 1-2 (print copy)"



“ For each incident, the Tribe, not the local health jurisdiction or Washington State, shall determine the Tribe's service population. Each Tribe will coordinate with the State on the specific allocation of MCM to be distributed to the Tribe.”



STATE OF WASHINGTON
DEPARTMENT OF HEALTH
PO Box 47890 • Olympia, Washington 98504-7890
Tel: 360-236-4030 • 711 Washington State Relay

September 3, 2020

Steve Kutz, Chairman
American Indian Health Commission
808 North 5th Avenue
Sequim, Washington 98382

Dear Chairman Kutz:

SUBJECT: Medical Countermeasures Tribal-State-LHJ Coordination Plan

On August 12, 2020, the Department of Health (DOH) hosted a consultation with the AIHC, tribal nations, and other Indian health organizations to be prepared for the eventual distribution of medical countermeasures related to the COVID-19 pandemic. The recommendations were shared with consultation partners and a comment period was held open on them through August 31, 2020. During that period, there was a single comment submitted to DOH from AIHC. It was incorporated into the final actions I have now approved, which are as follows:

1. Starting September 1, 2020, DOH staff from both the Emergency Preparedness and Response Division and the Prevention and Community Health Division/Office of Immunization and Child Profile will work together with tribal and local health jurisdiction (LHJ) leaders and representatives to support successful tribal-state-local health partnerships for the distribution of medical countermeasures, including vaccines.
2. By October 1, 2020, the Tribal-State-LHJ Medical Countermeasures Guide will be finalized to include this language on page 1, paragraph 2, under the Tribal Sovereign Authority Regarding Medical Countermeasures: **For each incident, the Tribe, not the local health jurisdiction or Washington State, shall determine the Tribe's service population. Each Tribe will coordinate with the State on the specific allocation of MCM to be distributed to the Tribe.**
3. By October 1, 2020, DOH will incorporate the following language into Annex 9, page 6, first item under the Tribal Sovereign Authority Regarding Medical Countermeasures: **For each incident, the Tribe, not the local health jurisdiction nor Washington State, shall determine the population the Tribe will serve to provide MCM, and each Tribe will coordinate with the State on the specific allocation of MCM to be distributed to the tribe.**





“[E]ach tribal nation has the sovereign authority to provide for the welfare of its people and, therefore, has the authority to:

- Choose among the jurisdiction or Indian Health Service (IHS) options for accessing vaccine.
- Determine the population(s) it chooses to serve.
- Choose how vaccines are distributed to its community.
- Establish priority groups when there is a limited supply of COVID-19 vaccine or other accompanying resources.”

COVID-19 Vaccination Program Jurisdiction Operations Interim Operational Guidance, Centers for Disease Control and Prevention (CDC) October 29, 2020 Version 2.0.



CDC Guidance Cont.

“Jurisdictions should reach out to tribal nations within their respective areas for involvement in planning efforts.”

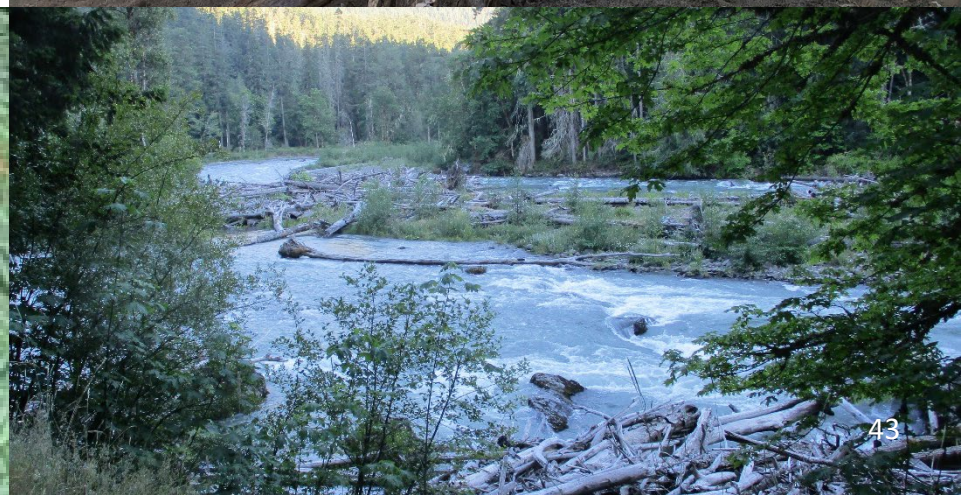
“Jurisdictions must include each tribe’s preference for COVID-19 vaccine distribution to ensure vaccine is effectively delivered to tribal nations and their communities. State and local jurisdictions should also engage with Urban Indian Health Centers (UIHCs).”

“Details of engagement with tribal nations and other tribal entities should be included in jurisdiction COVID-19 vaccination plans.”

“The jurisdictional planning process should include state-recognized tribes, unrecognized tribes, and American Indian/Alaska Native individuals who are included in state-recognized tribes because the option to access COVID-19 vaccine through IHS may not be possible for these communities.”



Conclusion





Questions

1. How should public health data (case info) be shared among the jurisdictions?
2. How should vaccine be distributed to Tribes?
3. Who has authority to order isolation and quarantine orders on Tribal land?
4. Why is it important to institutionalize federal law into state law and policy when it comes to Tribes?



Lack of understanding of federal Indian law and respect for Tribal sovereignty can have detrimental impacts to Tribal governments and to American Indians and Alaska Natives.



Public health issues and emergencies know
no boundaries



Coordination and collaboration
between Tribes,
local governments,
and states vital are community
health and safety



**Vicki Lowe,
Executive
Director**

**Heather Erb,
Lead Policy
Advisor**

Thank you