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Beyond the Pandemic: Historical Infrastructure, Funding, and Data Access Challenges in Indian Country

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SUMMARY. The COVID-19 pandemic has disproportionately impacted Tribal communities, in part, due to the historical inequities that Tribes have faced for centuries. As sovereign nations, Tribes have the authority to self-govern their people and land. However, the federal government has a special trust responsibility and treaty obligations to Tribes that it often has failed to fulfill. As a result, many Tribal communities live in inferior living conditions as compared to their non-Native counterparts. This Chapter builds on the prior report to explore the historical inequities Tribes experience and how they have been compounded by the pandemic. More specifically, it identifies persistent challenges with infrastructure in Indian Country. It also provides a legislative update on laws directly related to the pandemic as well as laws that have the potential to address some of the issues underlying the pandemic. It concludes by identifying additional recommendations to right these historic wrongs and build on the resiliency shown by Tribes during the pandemic.

Introduction

In *Volume I* of this report, we identified the foundational principles governing Tribal public health systems; discussed their relationship to state and federal governments; and made initial recommendations on improving Tribal health outcomes. This second Chapter focuses on the inequities exacerbated by COVID-19 in Tribal communities and provides additional recommendations to remedy the disparities experienced as a result. While this Chapter highlights some areas of historical inequalities, it is not exhaustive of all issues, such as barriers to economic development and employment. Additionally, at the time of this publication, the country is in the first stages of vaccine distribution. While this implicates Tribal sovereignty and raises issues related to medical research ethics, these issues are outside the scope of this Chapter and were not discussed.

Historical Inequities in Indian Country

In *Volume I*, we identified the persistent failures of the federal government to honor its treaty obligations to Tribes. One of the main failures has been the chronic underfunding of Indian Health Service (IHS) — the federal agency responsible for providing health care to Native Americans and federal Indian health programming. However, other factors, such as the built environment, play an equally important role in health. The lack of infrastructure, pervasive across Indian Country, has made it difficult to follow the Centers for Disease Control and Prevention

(CDC) recommendations regarding COVID-19 prevention, and contributed to the elevated incidence rate of COVID-19 among Native Americans.

To minimize the spread of COVID-19, the CDC recommends avoiding close contact with others. Many Tribes experience chronic housing shortages, making it difficult to take this precaution. Native Americans are one of the fastest growing populations. However, the existing housing in many Tribal communities is insufficient to meet the growing needs. “Forty percent of on-reservation housing is considered substandard (compared to six percent outside of Indian Country)” (National Congress of Indians, 2020). Additionally, the limited housing available is often a significant monthly expense. Almost one-fourth of Native households pay 30% or more of their household income for housing. Lack of safe, affordable housing on reservations further contributes to overcrowding and other conditions incompatible with social distancing and, when necessary, quarantine. These homes often lack basic amenities that the rest of America views as a staple of life in the 21st century, e.g., water, phone service, and broadband.

Access to clean water is also a contributing factor to the high spread of COVID-19 in Tribal communities. To minimize the risk of contracting COVID-19, the CDC recommends washing hands frequently and cleaning surfaces with soap and water. Lack of indoor plumbing has been strongly associated with the incidence of COVID-19 cases on reservations (Rodriguez-Lonebear et al., 2020).

Water is an essential requirement for good health; it is essential to basic personal hygiene, domestic cooking and cleaning, and other aspects of household and community life. And yet, race is the strongest predictor of water and sanitation issues. Native Americans are 19 times more likely than white households to lack indoor plumbing with running water (Roller et al., 2019).

Water access is particularly challenging for the Navajo Nation, which has the largest and most populous reservation in the country. Navajo residents are 67 times more likely than other population groups to live without access to running water. These residents must haul water, often from long distances, to meet their basic household needs. Aside from the time involved, hauling water is also more costly. Navajo families that haul water spend an estimated \$43,000 per acre-foot of water compared to the average American family with piped water delivery that spends \$600 per acre-foot of water. “This water is among the most expensive in the U.S. for a sector of the population that is among the poorest” (Bureau of Reclamation, 2018). In order to conserve available options, Navajo residents are forced to make decisions that may negatively impact their health. For example, soda and other sugary beverages are more readily available than potable water. Therefore, many residents may choose to drink soda to save money and conserve their limited water, even though drinking these beverages can contribute to obesity and diabetes. The Coronavirus Aid, Relief, and Economic Security (CARES) Act allocated \$5 million to IHS to support installation of transitional water points, payment of water fees, purchase of water storage containers, and water disinfection tablets (The Navajo Nation, 2020). While this initial

funding will help provide water access to some homes, it does not address the extensive lack of infrastructure on the Navajo Nation. More than \$700 million is needed to fund existing, high priority projects identified by the Navajo Nation. And to truly address the widespread lack of water access on the Nation, \$3 billion to \$4 billion would be required.

Finally, in the technological age that we live in, broadband has been recognized as a human and civil right as well. But, a digital divide exists in America between rural and urban areas that is particularly felt in Indian Country. In a 2018 report, the Government Accountability Office (GAO) found that only 65% of residents on Tribal lands had access to fixed broadband services, and only 69% of households on Tribal lands had telephone services. Limited broadband and phone services have been significant challenges to working remotely during the pandemic. It has also impacted education. During the pandemic, Bureau of Indian Education (BIE) estimates that up to 95% of students at BIE facilities lack residential internet services. For additional information on broadband services, see Chapter 32.

Promising Legislation to Build Infrastructure

When the federal government removed Tribes to reservations, it promised that those lands would be a permanent homeland for the Tribes. As part of its trust responsibility, the federal government has a duty “to protect tribal treaty rights, lands, assets, and resources” (Bureau of Indian Affairs). The persistence of the inequities discussed above reflect the federal government’s failure to uphold its trust responsibility to protect tribal lands and

Table 12.1. Actions by 116th Congress to Support Tribal Infrastructure

DRINKING WATER PROGRAMS AND RELATED INFRASTRUCTURE PROJECTS	
S. 4168 (A bill to require the Secretary of HHS to award additional funding through the Sanitation Facilities Construction Program of the IHS, and for other purposes)	Recognizes the association between lack of infrastructure and sanitation and the high incidence of COVID-19 in Tribal communities; and calls on the U.S. Secretary of the Department of Health and Human Services (HHS) to award funding for water infrastructure projects, including \$1.45 billion for IHS.
S. 4188 (Water for Tomorrow Act)	Provides \$100 million to U.S. Department of the Interior in grant funding to help disadvantaged communities meet drinking water standards and address declining drinking water quality and access.
H.R. 2 (Moving Forward Act)	Provides \$2.67 billion to HHS for each fiscal year 2020 through 2024 to effectuate the design, construction, and improvement of water sanitation facilities that are funded at least in part by IHS.
H.R. 8271 (Environmental Justice Legacy Pollution Cleanup Act of 2020)	Provides \$3 billion to IHS to provide safe drinking water and adequate sewer systems in Native American homes.
S. 3044 (Western Tribal Water Infrastructure Act)	Amends the America’s Water Infrastructure Act of 2018, would make funding for drinking water infrastructure projects on reservations mandatory and increase appropriations to the Indian Reservation Drinking Water Program from \$20 million to \$30 million.
BROADBAND	
H.R. 1144 (Broadband for All Resolution of 2020)	Recognizes access to affordable and reliable broadband service is a civil and human right and calls on the president to 1) preserve and build the technological leadership of the federal government and funding opportunities to provide affordable broadband access; 2) ensure tribal sovereignty over access to electromagnetic spectrum on Tribal lands; and 3) address the civil and human rights threats posed by lack of affordable access to broadband.

ensure Indian Country is a permanent, habitable homeland. Over the course of 2020, the 116th Congress introduced legislation and resolutions that have the potential to address some of these underlying inequities and uphold the federal trust responsibility. Some of those actions are identified in Table 12.1.

Congressional action that addresses infrastructure in Indian Country is an important step in remedying the historical inequities plaguing Tribes. In addition, there have also been some legislative efforts to more broadly strengthen Tribal sovereignty as well. The Progress for American Indians Act (Pub Law No. 116-180) was enacted on October 21, 2020. The law amends the Indian Self-Determination and Education Assistance Act to further support self-governance by Tribes. The Act allows Tribes to receive grants to plan for participation in self-governance and to negotiate the terms of participation; it also revises the Department of Interior's process for approving self-governance compacts and funding agreements with Tribes. Congress also passed a resolution declaring racism a public health crisis (S. Res. 655/H. Res. 1069). The resolution recognizes,

“the United States ratified over 350 treaties with sovereign indigenous communities, has broken the promises made in such treaties, and has historically failed to carry out its trust responsibilities to Native Americans ... as made evident by the chronic and pervasive underfunding of the Indian Health Service and Tribal, Urban Indian, and Native Hawaiian health care, the vast health and socioeconomic disparities faced by Native American people, and the inaccessibility of many Federal public health and social programs in Native American communities” (S. Res. 655/H. Res. 1069).

Update on Congressional Funding to Tribes

As outlined in Volume I, Congress's major COVID-19 legislative package, the CARES Act, authorized \$8 billion in financial assistance to Tribes and Tribal business entities, federal agency Tribal set-asides, and additional funding for certain existing Tribal programs. Tribes have used CARES Act funding for health care facility construction, per capita distributions to citizens, and community gardens, among many other response efforts. However, reports suggest some inconsistencies of funding across Tribes with similar populations (Harsha, 2020).

Federal administration of CARES Act funding through the U.S. Department of Treasury has been inconsistent, with frequent policy changes directing how the funding could be used. In a September 2020 statement, President Shelley Buck of the Prairie Island Indian Community stated, “Until we actually get guidelines from the Treasury that are set in stone, that don't keep changing, we're almost afraid to use the money because we don't want to have to pay it back.” Initially, the funding could only be used for expenses incurred through December 30, 2020, leaving a short window to spend the money given the inconsistent administration of the funding (U.S. Department of Treasury, 2021). The COVID-19 stimulus package, discussed below, extended this deadline to December 31, 2021.

The CARES Act also authorized funding to Alaska Native Corporations (non-governmental entities), which has resulted in litigation. Several Tribes have sued the Department of Treasury

arguing that Alaska Native Corporations do not meet the definition of Tribal governments under the law and the money should only be distributed to Tribal governments. The D.C. Circuit court ruled that these corporations are not eligible for CARES Act funding. The U.S. Supreme Court recently granted certiorari to review petitions from the Treasury Secretary and several Alaska Native Corporations challenging the D.C. Circuit decision. The Department of Treasury has not distributed money earmarked for Alaska Native Corporations pending this litigation.

The latest COVID-19 stimulus package, passed by Congress on December 21, 2020, included a variety of provisions related to American Indian and Alaska Native health. As reported by the National Indian Health Board, Congress has authorized funding to IHS, Tribal health facilities, and urban Indian health facilities for vaccine distribution, testing, and mental health services. It also includes funding for Tribal broadband, housing, and nutrition programs. In the package, Congress has also reauthorized funding for the Special Diabetes Program for Indians for three more years, through 2024. Unfortunately, this reauthorization remained at existing 2004 funding levels without the additional \$50 million minimum requested by Tribes.

Public Health Data Access

Volume I outlined the importance of public health surveillance to COVID-19 response efforts and persistent data quality issues regarding American Indians and Alaska Natives due to racial misclassifications and omission from data collection, among other reasons (Tribal Epidemiology Centers, 2013). Reports have indicated that both Tribes and Tribal Epidemiology Centers (TECs) have been denied timely access to COVID-19 data implicating their communities. Several states have denied Tribal access to data citing that Tribes are not public health authorities (Hoss, 2021). Such statements are incorrect. Tribes are not only governmental public health authorities, but are also public health authorities under the Health Insurance Portability and Accountability Act (HIPAA), entitling Tribes to access otherwise protected health information. Similarly, the CDC failed to respond to numerous requests by TECs for COVID-19 data for months. Under HIPAA, TECs are authorized to have access to protected health information and federal law also requires HHS to facilitate TEC data access.

The Tribal Health Data Improvement Act of 2020 was introduced by Rep. Greg Gianforte, a Republican from Montana, on August 7, 2020. It reaffirms Tribal and TEC access to public health data and requires HHS to make public health data available within 30 days. The act also would require the CDC to develop guidelines to facilitate and encourage state and local health departments to enter into data sharing agreements with Tribes and TECs and to improve the quality of American Indian and Alaska Native-related data collection. The Act passed the House and was sent to the Senate and referred to the Committee on Indian Affairs on September 30, 2020. As of February 15, 2021, no further action on the legislation has been taken. While there have been some discussions regarding Tribal versus TEC access to data, it is critical that Congress take legislative action to ensure Tribal exercise of self-governance in the form of data access. 🌟

Recommendations for Action

In addition to the recommendations in Volume I of this chapter, we offer the following recommendations:

Federal government:

- The federal government must recognize that treaty and trust responsibilities include the provision of basic amenities necessary to life, including clean water access, safe and adequate housing, and broadband.
- Congress should pass legislation to reaffirm Tribal authority to public health data and to facilitate access from federal and state governments.
- Congress should pass legislation, such as those identified in this Chapter, for infrastructure projects in Indian Country; and direct federal agencies to work together to maximize and pool funding for such projects.
- The federal government must ensure Tribal sovereignty over access to electromagnetic spectrum on Tribal lands.
- Congress should pass legislation to reaffirm Tribal and Tribal Epidemiology Center (TEC) data access.
- The federal government should create incentives for state and local governments to share data with Tribes and TECs and enter into data sharing agreements.

State and Local governments:

- State governments must recognize the basic human right to water that is separate from water settlements or other negotiations between states and Tribes.
- State and local governments must improve data quality regarding American Indian and Alaska Native health records and provide data access to Tribes.

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