

New Mexico's Tribal Collaboration Act: What are the Impacts of a Legislative Imperative for State And Tribal Relations?¹

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Abstract: *The 23 Tribes of New Mexico have a long history of intergovernmental relations beginning with inter-tribal relationships among diverse Tribes and extending to the periods of Spanish colonial rule, Mexican rule, and finally establishing the federal relationship with the United States. The 23 recognized Tribes constitute over 10% of the State's population. Tribes are represented in both legislative and executive branches of New Mexico today in a continuously evolving relationship. Although the relationship continues to be strengthened through the self-determination and self-governance initiatives carried out by Tribes, it has also become politicized. This case explores the history of the development of tribal relationships with the State of New Mexico, the resulting impacts, and lessons about intergovernmental relationships.*

A Brief History

This case explores the question of how state government-to-government relationships affect both tribal and state sovereignty and the conditions that impact the effectiveness of state-tribal institutional development in New Mexico. Many different models for state-tribal relations exist and more continue to emerge (Kaufmann, et. al., Smith, 2018). In New Mexico formal state-tribal relations began in 1953 when the Commission on Indian Affairs and the Office of Indian Affairs were created by legislative statute. A major change occurred when Governor Richardson elevated the Director of the Office of Indian Affairs to the level of his Cabinet in 2003. This was the culmination of years of changing federal policy and the increasing importance of state-tribal relations. The relationship is complicated by the facts that there are 23 different Tribes in New Mexico, and the Navajo Nation, the largest in the US, extends over four states. The Fort Sill Apache Tribe of Oklahoma is the one tribe with an out-of-state reservation that is included in the list of New Mexico Tribes. State-tribal relations go much further back than these recent developments.

State-tribal relations in New Mexico are deeply embedded in the historic context. Intergovernmental relationships between Tribal and foreign sovereigns date back centuries in New Mexico. Coronado's arrival as a Spanish conquistador claiming New Mexico as Spanish Territory signaled the beginning of colonial rule in 1540. Even then, Coronado was met by tribal officials whose roles could only be described as "diplomats" (Kessel, 1995). Many of the Indian Pueblos created the Office of Governor to work with the regional Spanish colonial governors of "New Spain," but some Pueblos continued to operate internally with traditional indigenous mechanisms of governance by creating parallel systems of

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governance. Tensions with Spanish colonial rule grew until the Pueblo Revolt of 1680 when Tribes united to run the Spanish out for more than 12 years. They continued to resist for many years even after the Reconquista, forging new and more independent relationships with the Spanish. During this period, Apaches and Navajos continued to be treated mainly as foreign sovereign nations by the Spanish, sometimes in conflict with the Spanish and other Tribes, and sometimes participating in alliances. Following the Mexican Revolution, Mexico continued the policies of the Spanish in New Mexico for the most part, but their own internal issues and limited financial resources decreased their ability to govern the vast northern estates.

After the 1848 “War with Mexico” in which the United States claimed almost half the land base of Mexico, the US took over New Mexico as a US Territory. In the Treaty of Guadalupe Hidalgo with Mexico, the United States agreed to honor the Spanish land grants and legal arrangements and grants to Indian lands. The transition was far from smooth, with U.S. authorities failing to comprehend agreements, grants, land tenure and water rights that were set up by the Spanish. Further conflict and unsettled conditions persisted, especially with the Apaches and Navajos, who had previously been treated as foreign sovereigns. As a result, these Tribes largely lacked the history of land tenure arrangements with the Spanish that the Spanish established with the Pueblos. Many of these issues continued to produce conflict and misunderstandings when New Mexico finally became a state in 1913.

For many years after 1913, tribal leaders placed major emphasis on developing the federal relationship. As time passed, tribal leaders in New Mexico organized, even before the Civil Rights movement of the 1960’s. Pueblo leaders banded together since 1923 to fight the Bursum Bill that would have allowed white settlers to retain any lands they had squatted on before 1902 with any disputes to be settled in the State courts. Tribal leaders organized to defeat the proposed bill. In the interim, tribal-state relations were not institutionalized and conflicts over land, water, education, and other areas continued.

In 1953 the Commission on Indian Affairs and the Office of Indian Affairs were created by legislative statute to serve state-tribal relations for the 19 Pueblos, the Navajo Nation and the three Apache Tribes. Since the Navajo Nation is by far the largest Indian Nation, it could tend to dominate state-tribal relationships. Because of its large size, it had long-term representation in the Legislature and could hire lobbyists to work for its benefit. The 19 different Indian Pueblos whose individual populations and land bases were so much smaller needed to find a way of collaborating. Multi-Pueblo organizations helped leverage the tribal relationship. Since its establishment in 1970, the All Pueblo Governor’s Council has spoken with a unified voice on Pueblo Issues with the full force of all 19 Pueblos in both federal and state arenas. Since 1962, the Eight Northern Pueblos Council coordinates economic development, service delivery, and other issues. Tribal leadership was strong and leaders like Wendell Chino of the Mescalero Tribe could move the Nixon administration to act and even support New Mexico Tribes against the state government.

The New Mexico Legislature began to find listening ears in the few lawmakers like Senator Pinto (Navajo) who came from tribal origins or who had long relationships with Tribes in their districts that added a significant percentage to the voting population. The three Apache Tribes continued to coordinate with others, but acted independently at times. Mescalero and Jicarilla Apache Tribes had greater natural resource bases. The Fort Sill Tribe kept a reservation in Oklahoma. Fort Sill maintains long term ties with New Mexico, since they had been forcibly removed in the 1880s by the federal government and held as prisoners of war. Some Fort Sill people were allowed to return to New Mexico in 1914.

The New Mexico Tribes differed in their cultures, languages, and even in their governmental structures. Some Pueblos maintained their unique systems of community-based theocratic governance, while others chose forms of governance tied to the Indian Reorganization Act of 1934 and updated their operations through contracting to administer services under the Indian Self-Determination and Education Act of 1975. The Mescalero Apache Tribe worked with other tribal leaders like Quinault tribal leader Joe DeLa Cruz in the Self-Governance Project of 1988 and became a self-governance Tribe that compacted for direct tribally designed programs of service delivery. The switch from self-determination contracting to self-governance had some drawbacks for large Tribes or Tribes with uneven income opportunities like the Navajo. Under Self-Determination contracting, BIA salaries and retirement pensions could be preserved and one government salary might serve a large extended family. Self-governance compacting, offered flexibility and local program design but could lack benefits and higher salaries.

In addition, the Department of the Interior and the Indian Health Service continued to resist self-governance as it meant a loss of control for the agencies. (Stromer and Osborne, 2015). The different structures could change state-tribal relationships. A Pueblo governor might not be able to work on a boundary issue without long and deep discussion with Kiva and clan leaders. A self-governance Tribe could change program design with relative ease through the annual compacting process, where a self-determination Tribe would need to adhere to the Bureau of Indian Affairs contract for services and programs within the narrow limits of existing Department of the Interior programs. This was further complicated when Obama opened up self-governance compacting to the Department of Transportation, and the Indian Health Service (HIS). Now a Tribe might be using the self-determination structure for all other services but health or transportation. State officials would need to be familiar with the degree of flexibility of each Tribal group and each of their service functions in order to create collaborative agreements.

The Nixon administration had ushered in the policy of Self-Determination. After Congress passed the Self Determination Act of 1975, Tribes began taking over service provision from the BIA. In the 1980s, tribal nations began to place increasing emphasis on tribal-state relationships. The Reagan administration pushed devolution of responsibility to the states, changing the pathway of federal funds in key areas like health and social services from direct delivery to Tribes to delivery to the states with the assumption that they would deliver to the Tribes. In addition to the changes in the flow of federal funds, many Native Americans were forced to switch their healthcare providers from Indian Health Services to different managed care organizations in the state. "The whole state's rights agenda really forced a relationship where there was no Indian policy, there was no delineation of any shared responsibilities between the State and the Tribes," noted Regis Pecos-co-director of the Santa Fe Indian School Leadership Institute "(Pecos, 2018). The changes required significant legislative development in order to create new programs and solutions. Tribal leaders used the opportunity to increase their leverage since they were represented by at least some elected officials in the legislature. As tribes mounted new economic development initiatives like high-dollar casinos and entertainment and tourism initiatives, they further increased their influence and expanded their capacity for planning and developing strategic action (Zaferatos, 2015).

In summary, Congressional actions and court decisions continued to strengthen tribal positions, but the decisions have sometimes led to contentious relationships with the State. Tribes have sometimes acted independently, bypassing the State. The Mescalero Tribe led the way in opening a Casino without State approval, and San Ildefonso Pueblo blocked the state road to the nuclear labs in Los Alamos. Most recently the *Yazzie v. New Mexico* decision led to controversies on equal education opportunities for Native students that created impacts no less powerful than those that the Boldt Decision created for

natural resource issues between the State of Washington and the Tribes in Washington. The Aamodt Water Settlements that are now occurring will also affect state and tribal relations. Significant water rights accompanied by major water allocations were awarded to Tribes in water-starved New Mexico.

State-Tribal Relations: Institutional Development Fuels New Policies and Collaboration

Initially, it fell to the New Mexico Legislature to strengthen institutional development of tribal-state relations. Native Americans have served in the state legislature for many years. The Senate maintains a Committee on Indian and Cultural Affairs. Senator John Pinto (D-Gallup), now 93, is one of the longest serving lawmakers in New Mexico. When legislature statute created the Commission on Indian Affairs, it established the Office of Indian Affairs (OIA) as a State agency. The OIA was to act as a connector between the governor, the legislature and the State's sovereign Indian nations. Meanwhile, tribal-state conflict and litigation in New Mexico continued to span many issues including tribal land claims, land use, minerals and natural resource management. Civil jurisdictional disputes posed problems on reservation borders and old Spanish land grants and documents popped up in court cases. With federal health reform changes, tribal leaders feared that their concerns might become invisible in the bureaucratic appendages of the states that now received the greatest share of new health systems.

After the Indian Gaming Act of 1988, gaming was expanding in New Mexico by the 1990's to multi-million dollar entertainment and gambling enterprises. A greater share in the economy gave Tribes in New Mexico greater leverage. Tourism is the second largest sector of the economy and Indian culture is a tourist magnet for New Mexico. The Native population continued to grow to about 10% and formed an organized portion of the electorate that could wield extra power in close elections.

Former Governor Bill Richardson elevated the OIA with a new title of Indian Affairs Department (IAD) by Executive Order 2003-2022 to a cabinet-level organization. In April 2004, House Bill 39 was signed that formally established the Indian Affairs Department through legislation and confirmed the Governor's action. The New Mexico Senate passed broad and far-reaching legislation in the Tribal-State Collaboration Act signed by Governor Richardson in 2009. (2)

The Tribal Collaboration Act directed that each State agency shall:

1. Develop a government-to-government policy that would promote effective communication and collaboration, promote positive government-to-government relations, promote cultural competency in service provision, and establish a method of notifying employees of each state agency about the provision of the State-Tribal Collaboration Act.
2. Consult with designated tribal representatives
3. Make a reasonable effort to collaborate on the development and implementation of policies agreements and programs that directly affect American Indians or Alaska Natives.
4. Maintain updated lists of names and contact information for the chief executives of Indian Nations and for the state agency tribal liaison
5. Every state agency shall designate a tribal liaison who reported directly to the head of the agency to assist with the implementation of policy and serve as a contact to maintain ongoing communication and ensure that training is provided to the staff of the state agency
6. The Governor shall meet with tribal leaders in a state-tribal summit to address issues of mutual concern in the third quarter of each fiscal year.
7. All state managers and employees who have ongoing communication with Tribes will complete a training provided by the state personnel office with assistance from the IAD.
8. Each state agency will submit a report to the IAD on the activities of that agency pursuant to the State-Tribal Collaboration Act. This includes accountability components like a list of all

employees with contact or responsibilities to Tribes and a list from the personnel office certifying the number who have completed required training and the method(s) used by the agency to notify employees of the provisions of the State-Tribal Collaboration Act.

These provisions were part of a legislative act, not of an agreement signed by Tribes, though Tribes had a strong political influence on the provisions of the law. The reorganized Indian Affairs Department not only elevated government-to-government relations in New Mexico to the cabinet level, it also greatly expanded the functions of state and tribal relations through a number of new organizational mechanisms. After executive order 2005-004 implemented the provisions of the extensive Tribal Collaboration Act of 2009, agency consultation plans were soon in place for every state agency. The IAD policy unit became the core of the effort to create effective collaboration. The Policy Unit provides analysis and research services, training and information to the State of New Mexico and to New Mexico's twenty-two federally recognized tribal governments on matters of mutual concern (NM IAD Policy Unit, n.d.). The scope of the policy unit includes tribal consultation, education, health, community and economic development, legislative training and analysis, and the implementation of the governor's and other policy initiatives.² The Policy Unit has been key to the establishment of agency consultation policies and to the passage of three major bills affecting Indian Nations in New Mexico: The Reburial Grounds Act, the Indian Education Act, and the Tribal Infrastructure Act.

The second major tool added to the IAD was developed through the Tribal Infrastructure Act of 2010. This Act established the Tribal Infrastructure Fund to assist with tribal infrastructure needs like water and waste water systems, roads and power lines. The Severance Bonds for Tribal Infrastructure allocates 5% of the tax bonding capacity each year for tribal infrastructure projects. They hold an annual Tribal Infrastructure Fund and Capital Outlay orientation for project grantees including administrative requirements, monitoring systems, and compliance. The complexities and size of the Navajo Nation calls for a separate Navajo Reconciliation Meeting covering Navajo Nation capital projects and tribal infrastructure fund projects covering obligations, requests, and various accounting reconciliations with the New Mexico IAD and various state agencies like the Department of Transportation and Departments of Aging and Long-term Services, and the Natural Resources Department.

The New Mexico Legislative Council created an Indian Affairs Committee (IAC) on April 26, 2018 including fifteen legislators as members, and fifteen advisory members including several Native legislators. The IAC meets six times a year in various locations that are accessible to the state's tribal members and their leaders. They receive updates from the liaisons and receive a report on priorities and updates from the IAD, agency reports on economic development, education annual reports from the state's executive agencies and a report from the Indian Health Care Task Force regarding access to medical cannabis on tribal lands pursuant to 2018 Senate Memorial 105. This is in addition to the Tribal Legislative Day when tribal representatives come to meet with legislators.

Looking Back-How Did They Do? How effective was the Tribal Collaboration Act?

The Tribal Collaboration Act became the nexus point of state-tribal relations. Its many provisions and reporting requirements appeared to stabilize the relationship and leave room for continuing expansions. Progress was made on many fronts.

²The Tribal Collaboration Act is included in this case in Appendix A.

Health

Indian health remains a federal trust responsibility, but it has left Indian people as the most under-served population in the United States (Fox, et al 2012). Further changes made in the Reagan administration led to forcing Indian patients from the underfunded and dwindling Indian Health Service (IHS) facilities to managed care in states like New Mexico. The Tribal Collaboration Act of 2009 represented a turning point in tribal-state health-care relationships by requiring the State Department of Health to perform all the consultation, advisory and other requirements of the Act.

Although the federal capacity and funding faded, the federal government established a framework for state-tribal relationships in health and added some significant accountability measures. In 2015 President Obama expanded self-governance compacting to the Indian Health Service and Transportation. This enabled some Tribes to participate in federal compacting giving them greater flexibility to work with State programs. Several regions of the Navajo Reservations Jemez, Sandia and Taos Indian Pueblos took the opportunity to compact with IHS on health services giving them the opportunity to create their own programs in collaboration with the State. The situation was far from rosy even under self-governance. Ramah Navajo Area sued the IHS for not delivering the money as agreed. They won their case in federal court, but the government never really delivered and continued to argue over wording in the judgment against them (Stromer and Osborne, 2015). New Mexico did enter into the Affordable Care ACT (ACA) and expanded Medicaid programs that included American Indian applicants and health exchange systems. As a result Indian applicants could apply for State Medicaid, but could not be required to pay fees and the State must get advice from the Indian Health Program and urban Indian health centers for implementing Medicaid and Childrens' Health Insurance Program (CHIP). The State must describe the process of consultation and have a consultation plan in place and specifically give notice on any changes that have direct impacts on Tribes (Begay, Melanie 2018, 01/02/2018).

With the combined requirements of the ACA and Medicaid expansion and the State's Tribal Collaboration Act, the state-tribal healthcare relationship seems to be working within the limitations of funding and capacity that exist despite significant political changes in government administration. Although the American Indian population remains under-served, the Health Department has policies in place and appears to be consulting and following policy. Key tribal liaison positions are filled and the liaison coordinated the entire 2018 Report (New Mexico Department of Health, 2018). The identification of four priority areas for tribal health based on consultation with tribes is an intelligent response to those limitations. In addition, the State added two enhancement areas. State lawmakers currently have legislation in progress with a bill that outlines projects for formal health assessment needs for Tribes. It is likely that this legislation will not be presented until the new governor is in office.

By 2012 after the Medicaid expansion, tribal participation went up 117%. (Center for Medicare and Medicaid, n.d.). The University of New Mexico (UNM) has continued to contribute and work with partners on research, outreach, and special Indian Health Programs.

Education

New Mexico State's Indian Education Act of 2003 and the communication and collaboration plan required by the Tribal Collaboration Act recognized the role of the Indian Education Advisory Council in advising the Secretary of the New Mexico Department of Education. The Council includes sixteen members representing Navajo, Apache and Pueblo nations, and representatives from urban areas and from the Federal Bureau of Indian Education, a Head-Start organization, and one non-tribal member with knowledge of Indian education. Collaboration in education is essential, since 90% of Native students in New Mexico attend public schools. In 2005, the State adopted the Every Student Succeeds Act (ESSA) as the primary law governing K-12 education. This includes the usual baggage of identifying lowest-performing school, testing, and teacher evaluation. On the positive side, the State also supported some cultural and language initiatives and provided additional support for Native American student achievement through direct student services.

The tradition of federal Indian Schools was strong in New Mexico. As the BIA moves away from the policy of providing federal Indian schools and Indian families move to urban areas, more Native students find themselves in state schools. The Navajo Nation, with its large size and geography, still has on-reservation schools. The Tribe has a strong Education Department and many of the BIA leadership positions in BIA schools are held by Navajos today. The Navajo Nation also has special agreements with some of the local districts adjacent to the Navajo Reservation. The Pueblos manage the Pueblo Indian School in Santa Fe. The famed Institute of American Indian Arts (IAIA) in Santa Fe offers 2 and 4-year degrees in the arts and one graduate program in creative writing. UNM built a strong Native Studies Program under Gregory Cajete and built relationships with Southwest Indian Polytechnic, a tribal college, in Albuquerque.

In recent years, New Mexico has struggled with notoriously low ratings in educational achievement. It waivers around the bottom with state ratings falling in the three lowest scores in the United States. In 2018, the State lost a major case in *Yazzie v New Mexico*. The State has struggled to provide equal opportunities in education for American Indian students. The *Yazzie* case brought forth the testimony of a slate of education experts that demonstrated the State's weakest points. In response, the Pueblos held a major education conference in 2018 to establish new standards and develop models for more effective educational programs for Native students.

Although there was support for Native languages and cultural programs, New Mexico produced only grinding failure for its Native students and other groups with high at-risk populations including Latino students. The Bilingual Multicultural Education Act of 1978 sets goals for students to become bilingual and bi-literate in English and a second language including a Native American language with tribal approval. However, legislative findings showed that districts do not understand how to assess, place and monitor students in the program; inaccurate reporting on student participation in these programs impacts state and federal funding, so more accountability is needed (Tribal Collaboration Annual Report, July 2018, p.23). The New Mexico Indian Affairs Department Strategic Plan for 2018 and 2019 only addresses goals for tribal language support and culturally centered program and activities. During this period key state employees in tribal relations left or were terminated from their positions.

Governor Susanna Martinez turned down funding and legislation for Native education projects as the whole State plummeted to the 50th place in the ranking for child well being. (Anne Casey Foundation, 2018) Key positions in tribal affairs were filled by interim appointments. At the same time, Regis Pecos,

former Cochiti Pueblo Governor, chronicled the significant and long-term accomplishments of Native legislators to create a framework for Indian Education:

“...the adoption of an Indian Education Policy, the creation of an Indian education division, enacting the Indian Education Act, creating an Assistant Secretary of Indian Education, creation of an Indian education fund, amended statutes to make Indian language a part of the heritage language family, forcing the State to acquiesce to the sovereign Indian nations to develop their own criteria and standards to certify Native language teachers” (Pecos 2018).

But the resources to accomplish many of the goals set by the Department of Indian Affairs and the Legislature never arrived. The effects of a less friendly gubernatorial administration were soon apparent. The “education reform” moved Indian students into a rigid system of make or break testing and teacher evaluation. In 2017 Governor Martinez vetoed a bill that required some public school districts to assess, study, and plan for the needs of Native American students who have long fallen behind their peers (Cimonich, 2017). She said she found the cost was too high amid a “state budget crisis.” New Mexico Senator Lente responded that school districts weren’t making use of existing funding and initiatives to support Native American students. This further showed a lack of interest and failure of the State Department of Education to monitor and manage its operations. Martinez went on to veto \$100,000 for a Native American Institute for curriculum at New Mexico Highlands University, \$185,000 for support for minority students at UNM, \$200,000 for a study of the uranium contamination impacts on Tribes at the University of New Mexico, and \$800,000 for tribal Internet that would support distance education among other things (Jennings, 2018). Her own Department of Indian Affairs recommended these items. Funding approved for state-tribal projects approved by the Legislature were wiped off the chalkboard with her veto power.

Governor Martinez’s recent designate for Secretary of Public Education Christopher Ruszkowski stated that the core values drawn from Manifest Destiny, the theory used to justify the subjugation of indigenous people, were the source of what makes America so great (Strauss, 2018). This comment shocked tribal officials and legislators. In 2018, the Governor used the line item veto on a bill that would have expanded the Indian Education Act with needs assessments for supporting Native American students to receive sufficient services to ensure graduation. She further vetoed two million dollars meant for the State’s tribal communities.

The question became why would Tribes even try to collaborate with the State in the context of politically driven failure of state institutions for state-tribal relations in education? Navajo Nation Speaker of the House LoRenzo Bates spoke clearly in his annual report. He said New Mexico was in violation of its own Tribal Collaboration Act for education and it had failed to meet basic formal consultation, invoking a strong negative reaction from the state legislature (Bates, 2018). Further, he stated that the Department of Indian Affairs was in such disarray that it couldn’t even figure out what tribal representatives to invite to the annual state and tribal sponsored Tribal Summit.

Long-term failures of the State’s educational system to address issues in Native education exploded in the *Yazzie v. New Mexico* lawsuit that was a victory for Native and other underserved students in the First District Judicial Court in 2018. The Court’s finding was that New Mexico had failed to meet the standard of the “adequacy clause” for education in the State Constitution and had failed to comply with the State’s own statutes like the New Mexico Indian Education Act that assure an adequate education for all children in New Mexico. This failure was founded in a failure to develop the government-to-

government relationships needed to meet statutory goals. The Governor had vetoed most of the Legislature's funding bills for Tribes and failed to hold the NM Department of Education accountable for its failures. She was preparing to appeal the Yazzie decision as she exited the Office of Governor.

In a rare coincidence in 2018, the State projected a great surplus in mining fees and revenues due to expansion of petroleum industry development and increased prices in that volatile sector. The result put over \$ 1.2 billion on the table. Where was the State's fabled "budget crisis" now?

The Pueblo Governors were among the first to support the lawsuit that forced the State to confront allegations that the educational quality available to Native American children in the State was so poor as to be in violation of the State Constitution that promises equal opportunity for an adequate education. The Pueblo provided qualified expert witnesses for the trial instead of waiting for a reluctant State administration in the mire of failed government-to-government relationships, led by a Governor not complying with statute. The Legislature held good intent, but with a golden egg in their lap, many interests would pass through the doors of the Legislature to grab a bit of the bounty for their special interests.

Acting outside State institutions, the All Pueblo Council of Governors supported the 2018 Pueblo Convocation on Education. Led by Regis Pecos, the Leadership Institute staff and a consultant team, and Dr. Carnell Chosa of Jemez Pueblo and funded by the W. K. Kellogg Foundation it was "strategically assembled to address the Indian educational issues that have caused Native people and their allies to file a court case against the State of New Mexico" (Norris, 2018). They would develop recommendations on early childhood education, primary, secondary, and higher education and the transfer of cultural knowledge outside the administration within the framework of existing State law and the Court's determination.

Rather than wait for the State to consult, they addressed educational programming, policies, budgets, and developed community education blue prints. It was time to assess the value of standards imposed by a foreign government and make-or-break testing. Given the space created for them by the State Court decision, and the unfriendly administration of an exiting governor, they moved to develop goals for returning the control of educational standards to communities.

Natural Resources and the Office of the State Engineer

Due to the limited supply, water resources are the key conflict-producing resource in New Mexico. Water source issues generally fall under the purview of the State Engineer though there is a strong connection to natural resources in a State with a limited water supply. Federal courts have now finished major federal water right settlements, reducing the heat in a conflict arena for Tribes. The State that has been active for over 20 years while tribal water rights issues languished in the courts. With the new settlements, Tribes reclaimed major water rights and many exact allocations are in place. The Navajo Water Settlement is in place and the required infrastructure to deliver water to the Tribes and State areas is under construction. The State Engineer has recommended 18 million dollars a year for five years to meet the cost share obligations for the Aamodt and Navajo settlement (Bates, 2018). The Aamodt Settlement, a very contentious process that awarded significant water rights to four Pueblos above Santa Fe, is nearing completion. The State now needs to put in its share towards building the infrastructure to implement it (State Engineer, 2018). The Taos water settlement process and allocation

is underway. The State Engineer's Office has implemented a consultation policy and it has collaborated in implementing federal, state and tribal water law due to its long experience in water law.

Relationships with minerals and mining lay mainly with the federal government. The Navajo Nation has complained about impacts from the vast fracking and petroleum exploration in the San Juan Basin and Chaco Canyon, but most of these activities were permitted by the Bureau of Land Management. The Navajo Nation has a long history of environmental justice problems with the mining industry, from uranium to coal and polluted waters. Governor Martinez's veto of the uranium impact study was thus a slap in the face. On the positive side, New Mexico has helped in areas of common concern with cleanup support for abandoned mines. The State has also worked on redevelopment initiatives for San Juan County to help with Navajo unemployment after the closing of the coal-fired power plant.

The Mescalero Apache Tribe has concerns about hard rock mining on the ecologically and culturally significant Otero Mesa, but that too is Federal land. Native Americans have a history of environmental health disparities in Native American communities (Lewis, 2017). Since these leases are largely the purview of the federal government, the State is not directly involved. However, the State's Department of Energy, Mining and Minerals provides support and information about programs for Coal Mine Reclamation Program, the Mining Act Reclamation Program and Abandoned Mine Program. Similarly, Forestry provides technical support. Forestry has a particularly integrated and collaborative relationship with Tribes in fire fighting operations, and it works closely with the Mescalero Apache Tribe on forest restoration and other forest related activities.

MARIJUANA POLICY: A STRENGTH TEST OF STATE-TRIBAL RELATIONS?

Tribal initiatives in medical and/or recreational cannabis initiatives exist within a complex arena of federal, state and tribal policy in the states (Smith, 2015). The Obama administration set forth a policy not to prioritize investigation and prosecution of tribal marijuana businesses. The policy was consolidated in 2014 in the Wilkinson Memo issued to all US Attorneys and tribal liaisons to engage with individual Tribes in government-to-government consultation about such enterprises and not to prioritize investigation and prosecution in those cases (Ramirez, 2018). With a new federal administration, Attorney General Jeff Sessions rescinded Obama-era "smart crime policies" including the Wilkinson memo in 2017-18. The Governors of Oregon, Colorado, Washington and Alaska sent a letter of protest to Sessions. One key point, despite Sessions threats, was the inability of the Federal Government "to preempt state controlled substance laws" (Ramirez, 2018, p. 3). The result was that in those states that had state-tribal compacts, federal enforcement of substance laws regarding marijuana would be mute if state laws were in place. It would not pre-empt state-federal enforcement actions where the Tribe was violating state regulations per their compact, as occurred with three California Tribes. Although the National Congress of American Indians claimed that inherent sovereignty protected tribal marijuana operations, in fact, federal actions could make them vulnerable. Meanwhile, state law could act as a shield for tribal marijuana businesses.

New Mexico legalized medical marijuana in 2007 through NM Senate Bill 523 signed by Governor Richardson. The bill included provisions for a registry, dispensaries, growing operations, retail sales and adult use. It did not include recreational use and through the years implementation efforts encountered some rough spots with access and supply. Governor Susanna Martinez was not particularly supportive of the program. Although a bill to legalize compacts with Tribes was offered in the Legislature, it went no further. Undoubtedly it was known in advance that the Governor Martinez would most likely veto it

as she had other legislation beneficial to Tribes. Some found vulnerabilities in these existing bills SB345 and HB348 introduced in the Legislature because they lacked adequate representation of the State to negotiate with tribes tailored to the unique needs of each Tribe and the lacked regulatory direction to Tribes and the New Mexico Department of Health for establishing the actual programs (Ramirez, 2018). The devil was still in the details. Meanwhile some Tribes forged ahead. Picuris Indian Pueblo opened a growing operation. In November of 2018, federal agents raided the operation and removed all the plants, curiously referring to the Tribe as a federal agency (Alb Journal, 2018).

In the meantime, New Mexico Tribes continued planning and developing growing operations. In the background, federal law made marijuana use illegal and federal enforcement on tribal lands, although not common, was chaotic per the Picuris experience. A recent article that bore the tongue and cheek title “Why Video Poker—Sell Marijuana on Tribal Lands,” chronicles the cases of successful tribal marijuana operations and those who fell under federal attack (Ludlum and Johnson, 2018). It appeared that enforcement actions were more likely to occur to Tribes who did not have state-tribal compacts in place. It is this lack of state compacting that made Picuris particularly vulnerable to the federal enforcement action in early November 2018.

Michelle Lujan Grisham won the 2018 gubernatorial election in November 2018. Strong endorsements from Tribes and Pueblos in the State, her history of supporting legislation beneficial to Tribes in her time in Congress and a platform promising strong state-tribal relationships may bring out the legislation to establish tribal compacts for medical marijuana. As Governor Richardson’s Secretary of Health, she developed and implemented the initial medical marijuana system for the State. Considering her background and campaign, it is expected that the Office of Indian Affairs would again become an important institution in state-tribal relations. The Picuris raid may move the State further forward in compacting with Tribes in order to place a protective shield over tribal medical marijuana initiatives. There is potential for considerable revenue with large out-of-state companies offering technical and investment partnerships. Such partnerships overlap into State benefits especially if the State were to approve recreational marijuana. Because most Tribes and Pueblos are located in rural areas, this could result in considerable benefit to rural communities where unemployment and poverty are at the highest rates in the nation.

Summary

New Mexico has a history of strong legislative initiatives in support of Tribes and Pueblos. They continue to develop positive legislation, but sometimes the legislation is held back until a friendly governor is in place. The political environment can delay collaboration and existing program implementation. New Mexico Tribes have more than 500 years of experience working with external governments and are persistent in taking action to achieve their goals. As a result, the Legislature set forth a strong and detailed legislative agenda for state-tribal relations with the Tribal Collaboration Act to meet this historical level of tribal expertise in government-to-government relations. The dedication of tribal leaders and support from the New Mexico State Legislature brought state-tribal relations ahead in many arenas.

The Legislature continues to be a strong source for ensuring the continuance of positive state-tribal relations, but it is sometimes slow and the Governor can veto bills. The agencies and departments can complete their annual reports, but if the Governor is not engaged or blocks funding, lets key positions lapse and lacks support, objectives will not be accomplished.

The contrast between the administrations of two very different New Mexico Governors could not be starker in its impacts on state-tribal relations. Under Governor Richardson, the capacity for tribal-state relations was expanded at the administrative level. It expanded at the political level with the elevation of the Indian Office to the cabinet level. Economic expansion occurred through the establishment of a bureau to implement the distribution of funding for infrastructure to the Tribes. However, in New Mexico, the Governor holds strong veto power. Even when the legislature moved to strengthen state-tribal relations and award grants and monies to Tribes for mutually beneficial partnerships, the Governor could veto them, and Governor Martinez did veto them based on her justification of a budget crisis. A new Governor is about to take office who has a strong history of supporting tribal-state relationships and so the landscape of tribal-state relations may again change as the political winds blow.

A sea change back to Richardson-era collaboration is expected with the incoming Governor. Governor-elect Grisham stated that she will implement a strong state-tribal relationships policy. She will not appeal *Yazzie v. New Mexico* and she intends to assure that available State funds will be used to improve Native American education and education for other underserved students per the *Yazzie v. New Mexico* decision.

State-tribal relations in New Mexico offer significant challenges. Wide policy swings between Governor Richardson, Governor Susanna Martinez, and the new Governor Michelle Lujan Grisham demonstrate that political forces can have great impacts on tribal-state relations in New Mexico. New Mexico's Governor is key to implementing collaboration. The governor can ignore the IAD and its priorities. The Governor can control appointments and leave acting officials in place, or order the firing of key employees as Martinez did. This was particularly clear in the area of state-tribal relationships in public education. When a Governor violates the Tribal Collaboration Act and even the state constitution, accountability mechanisms do not seem to be sufficient to be effective. In a state with strong veto power placed in the Governors hands, much still depends on the Governor's opinion and interest of state-tribal relations.

State-tribal relations in New Mexico offer some challenges. As a result of the volatile political history, New Mexico Tribes and Pueblos have a history of sometimes acting outside the institutions of state government to meet their basic goals. This may include filing lawsuits, moving ahead without State consultation, blocking roads or just ignoring the state when the State fails to engage. New Mexico, Tribes and Pueblos have diverse forms of governance. Tribal government structures continue to be diverse. Some of the Pueblos remain with their traditional community-based theocratic governments, while other are set up under Governor and council systems and some are all or part self-governance or self-determination. The larger Navajo Tribe operates mainly under Self-Determination, although some health programs are under Self-Governance. This mix means the State must often work individually with Tribes and that agreements are more difficult to generalize.

Collaboration and consultation appears to improve when a strong federal framework is in place for building relationships as it is in areas like health. This collaborative tendency occurs in the area of water settlements and allocation or mine cleanup where a federal framework is present and mutual benefit is clear. The state engages in the discussions and contributes per federal court water settlements.

Previously to the framework of federal settlements, the Governor and state offices did little to collaborate with water policy. Federal frameworks also contribute to state-tribal cooperation in agreements. The two major state-tribal intergovernmental agreements in New Mexico are on the federal Indian Child Welfare Act and Juvenile Justice that are based on implementing federal law. Even in cases of collaboration, the mechanisms for accountability of the Governor to the Legislature have not proved to be as strong as they might be as evidenced by the wide swings in state-tribal policy based on political forces. Federal frameworks and legislation seems to reduce this instability. The future may unveil new directions and a reversal of this tendency. in some areas like marijuana policy, state policy and legislation may act as a shield for the Tribes against federal intervention.

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Appendix

Appendix 1 – Tribal Collaboration Act

