

# Tribal Self Regulation of Health Care: The Swinomish Tribe's Dental Health Program

Geoff Strommer, Partner

- Historical Backdrop: Treaties, Trust Responsibility, Direct Services
- Change in Indian Policy: IHCIA, ISDEAA, ACA
- Key Elements for Tribal Self-Regulation: Preemption and Jurisdiction
- Case Study: The Swinomish Tribe's DHAT Program
- Current Developments: WA and OR developments, Pending WA SPA Appeal Against CMS

# Historical Backdrop

- Indian Tribes existed before the U.S.
  - Retain inherent tribal sovereignty over people and lands
- Federal Government's unique legal relationship with American Indians
  - Treaty Making
  - Indian Commerce Clause

# Treaties

- In many treaties the United States agreed to take tribes under its “protection” and provide various resources and services.
- The origins of many federal services, including health care for Indians, can be traced to those treaty promises.

# Federal Trust Responsibility

- Has been consistently acknowledged.
- Has evolved over time.
- Over time the view of this responsibility has changed from a guardian/ward to a trustee/beneficiary.
  - Indians people are capable for caring for themselves but history has created ongoing obligations toward them by the U.S.

# Early Indian Health Care

- **1802/1803** - U.S. took emergency measures to curb smallpox and other diseases among Indian Tribes.
- **1849** - BIA transferred to Interior and scope of Indian health increased. However, Indian Health continued to be funded through patchwork legislation.
- **1954** – Indian health responsibilities transferred to HHS. This paper has been accepted for fall publication in the Journal of Health Care Law &
- **1955** – Indian health appropriations grow to nearly \$18 million, a dramatic increase from the \$40,000 appropriated in 1911.

# A change in Indian Policy

- “It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people...The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”
  - Richard Nixon, Special Message to the Congress on Indian Affairs (1970).

# ISDEAA

- 1975 - Title I gives the right to contract for funds and responsibilities provided by DOI or HHS.
- 1988 – Title III Tribal Demonstration Projects.
  - Originally only DOI but HHS added.
- 1994 – Title IV DOI Self-Gov permanent.
- 2000 – Title V HHS Self-Gov permanent.
- Was intended to promote Indian self-determination by increasing tribal control over service provided to tribal members.
- The ISDEAA allows tribes to take over federal programs for Indians, including health care by contracting to step into the shoes of federal agencies.



# 1976 - Indian Health Care Improvement Act

- Major Turning Point in Indian Health Care.
- Goal was not only to increase the quantity and quality of health services, but also “encourage the maximum participation of Indians in the planning and management of those services.”

# 2010 - Affordable Care Act

- Strengthened and permanently re-enacted Indian Health Care Improvement Act.
- Included important Indian Provisions:
  - Section 2901(b) – Payor of last resort
  - Section 2902 – Medicare Part B sunset removed
  - Section 9021 – Excludes health from tax

# Legal Framework For tribal Self-Regulation

- Two key legal concepts for Tribal self-regulation of health care:
  1. Preemption of State law; and
  2. Tribal Authority over non-Indians on tribal lands.

# When does Tribal Law Preempt State Law?

Fact dependent-balancing test:

**State jurisdiction is pre-empted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.**

*NM v. Mescalero & CA v. Cabazon*

# What Is the Scope of a Tribe's Jurisdiction?

Fact dependent-balancing test:

**Indian tribes retain inherent sovereign power to exercise some form of civil regulatory power over non Indian on their reservations if (1) the non-Indian enters into a consensual relationship with the tribe, or (2) if the non-Indian is engaged in conduct that threatens or has direct effect on the political integrity, economic security, or health and welfare of the tribe.**

*Montana v. US*

# A Few Practical Issues

- ISDEAA and IHClA provisions preempt certain state licensing requirements under federal law.
- Tribal preemption analysis applies if Tribe carries out health programs outside of an ISDEAA agreement.
- Balance between federal benefits and protections and Tribal autonomy.
- Tribal regulation of Health care facilities
- Tribal Court jurisdiction over medical torts

# Case Study Swinomish

- 2016 – Swinomish Indian Tribal Community launched dental Therapist Program
- Allows a dental therapist to provide basic oral health services under tribal licensing and regulatory scheme.

# The DHAT Program

- Dental therapist have been providing care for many years in Alaska.
- Five levels of Dental Health Aides.
- Services include diagnosis and treatment, basic hygiene, radiographs, uncomplicated extractions, restorative services and urgent care.



# Tribal Innovation

- Great need in Swinomish for Dental Health.
- Washington State did not allow dental therapist in the State.
- Unlike Alaska, no clear authority under federal law.
- Only Option was to implement dental therapist program under tribal authority.

# Swinomish's Program

- Tribe enacted its own dental provider licensure code under the authority of the Tribe's constitution and bylaws and its inherent sovereign authority.
- Also enacted tribal tort claims for injuries from dental providers.
- Patterned after Alaska program.

# Tribal Licensing

- Tribe enacted its own dental provider licensure code.
  - Qualifications and standards, continuing education requirements, discipline, suspension and revocation of license, enforcement, appeals.
  - DHATS are supervised by Dentists.
  - Cultural competency requirement.
  - Meets standards that apply to Alaska's DHAT program
- Tribe also enacted tort claims code.

# Current Developments

- July 2017 - WA legislature enacted law that allows DHATs to be certified by tribes to provide services on-reservation to Indian beneficiaries.
- 2017 - OR also implements a DHAT Pilot Project
- Swinomish Dental Health Provider Licensing code amended to allow for the certification of DHATs employed by other tribes in WA and OR.

# WA SPA Appeal

- Currently no federal funding available for Swinomish Tribe's DHAT program yet Medicaid reimbursements available for Alaska DHAT program.
- WA proposed SPA amendment to CMS that would make Tribe's DHAT services be eligible for Medicaid reimbursements.
- CMS denied WA's proposal asserting that it violates:
  - Free choice of provider requirements; and
  - Other licensed practitioner benefit regulations.
- WA appeal of CMS decision pending.

# Questions?