



Shared Use Agreements & Tribal Nations

Tribal Nations are making significant strides in chronic disease prevention efforts. Shared use can be an effective strategy to increase opportunities for physical activity within Native American communities.

Across the country, many Native American communities lack safe and affordable spaces for their children to exercise and play. This lack of adequate recreational facilities is one of several barriers to physical activity for Native American children.¹ Shared use can be a practical and cost-effective strategy to overcome this barrier, but due to the intricacies of laws that apply to Tribal Nations, shared use agreements can seem complicated. This fact sheet introduces some of the legal concepts that are unique to Indian Country and may be relevant when entering into a shared use agreement with a Tribal Nation.



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NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY

Shared Use with Tribal Nations

Native Americans face many challenges when it comes to chronic disease prevention. They are 2.3 times more likely to be diagnosed with diabetes than non-Hispanic whites,² and Native American youth (ages 10–19) are nine times more likely to be diagnosed with type 2 diabetes than non-Hispanic whites in the same age group.³ Native Americans also die from heart diseases at younger ages than any other ethnic group.⁴ Further, childhood obesity remains a significant problem. Nearly a third of Native American four-year-olds are obese, higher than any other ethnic group and almost double the rate of white four-year-olds.⁵ Extreme obesity rates among children ages two to four have recently decreased among all ethnic groups, except for Native Americans.⁶

The Native American population, while small in number, is culturally diverse, with many living off reservations and in rural areas. This makes it difficult to find effective strategies to combat these health challenges. The good news is that Tribal Nations' efforts to combat chronic disease are gaining momentum. The Choctaw Nation in Oklahoma promotes health and fitness among tribal members and employees through community forums, community gardens, and physical activity events.⁷ In Taos Pueblo, New Mexico, tribal leaders used a farmers' market and co-op to bring local produce to schools.⁸ In 2014, the Navajo Nation adopted a 2 percent increase in sales tax on unhealthy food, the first jurisdiction to do so in the United States.⁹ And *Let's Move!* in Indian Country is working with Tribal Nations across the country to decrease childhood obesity rates.¹⁰ These initiatives demonstrate how Tribal Nations are already working to prevent chronic disease in their communities.

Glossary

The following terms are used throughout this fact sheet and are essential to understanding the issues that pertain to developing shared use agreements in or near Indian Country.

Indian: An Indian is a person who has some degree of Indian blood and who is recognized as an Indian by a particular tribe or by the U.S. Government.^{28,29}

Indian Country: Indian Country includes (a) all land within the limits of an *Indian reservation*, even property owned by nonmembers of the governing tribe; (b) all *dependent Indian communities*; and (c) all *Indian allotments* for which Indian titles have not been extinguished.³⁰

- An *Indian Reservation* is an area of land that is reserved for a tribe and where the U.S. Government holds title to the land in trust on behalf of the tribe.¹⁷
- A *Dependent Indian Community* is land explicitly set aside by the U.S. Government for Indian use, where the U.S. Government is authorized to superintend the land for that purpose.³¹
- An *Indian Allotment* is land owned by individual Indians and either held in trust by the U.S. Government or subject to a statutory restriction on alienation (i.e., restriction on selling the land).³²

Jurisdiction: The power or authority of a court to hear a dispute and award remedies for a party.

Member: A member is an individual who satisfies a tribe's membership criteria.

Nonmember: A nonmember is an individual who does not satisfy a tribe's membership criteria.

Tribal Sovereign Immunity: The legal doctrine by which a tribe is immune from legal actions in any court (whether tribal or state) unless the tribe waives its immunity or Congress authorizes a lawsuit.

Tribal Sovereignty: Authority of tribes to govern themselves, including in matters of taxation, membership, laws and regulations, and enforcement.

Tribe: A Native American tribal entity that is recognized as having a government-to-government relationship with the U.S. Government. As of the date of publication, there were 566 federally recognized tribes.¹⁷ Although states also recognize tribes, the terms "Tribal Nation" and "tribe" in this fact sheet refer to federally recognized tribal entities.



Context Matters

Chronic disease is not the only problem disproportionately affecting Native Americans; health disparities persist in other areas and do not exist in a vacuum. A quarter of Native Americans live in poverty, and in some rural communities, their unemployment rate is above 50 percent. Members often lack even basic necessities, such as electricity, internet, and phone service.¹⁵ Tribal Nations are forced to confront many interrelated challenges, including historic trauma and cultural disintegration. These challenges are borne from hundreds of years of significant changes to Native Americans' surroundings and culture. Native Americans have had to endure a shifting environment, including forced relocation and the loss of connection with their land and food.¹⁶ Creating positive change requires an understanding of this important context.



Over the past several years, shared use has emerged as a widely promoted strategy to increase opportunities for physical activity in communities.¹¹⁻¹⁴ Shared use – also called joint use or community use – occurs when government entities, or sometimes private organizations, agree to open or broaden access to their facilities for community use. Because shared use involves using existing resources as opposed to constructing new ones, it can be a cost-effective way to broaden access to recreational facilities that can promote healthy lifestyles.

While certainly not a cure-all, shared use can be an effective strategy to address the health inequities faced by Native Americans. It can also play a role in providing space for cultural learning, which is another pressing need for Tribal Nations.

FORMALIZING A PARTNERSHIP

Public schools are usually the starting point for shared use agreements with Tribal Nations, and creating shared use spaces on tribal land and/or school property can help strengthen relationships between Tribal Nations and the schools that serve their children.

Shared use agreements are one way (but not the only way) to formalize the terms of community access to school district recreational facilities. A shared use agreement is a formal agreement between two separate entities – often a school district and a city, county, or Tribal Nation – setting forth the terms and conditions for the shared use of property. These agreements specify how school districts will share with partnering entities the costs and responsibilities incurred from opening their facilities. Subject to overriding state and local laws, the agreements can allocate some or all of the responsibility for costs, security, supervision, maintenance, repairs, and potential liability.

Tribal Nations that want to increase physical activity opportunities in their communities may look to partnering with school districts as a way to open up access to facilities within or outside of Indian Country. But before entering into a shared use agreement, Tribal Nations and school districts need to understand how the laws that govern Tribal Nations and their relationships with other entities can affect the rights and responsibilities of the parties to an agreement.

Tribal Sovereignty, Immunity, & Jurisdiction

Tribal Nations are sovereign political entities and have the power of self-government. This means that Tribal Nations are empowered to form their own governments; make and enforce laws, both civil and criminal (in limited respects); set up a system of taxation; establish and determine membership; regulate activities within their jurisdiction; and exclude individuals from tribal lands. Similar to the various states and the U.S. Government, Tribal Nations can also enter into binding agreements with other governments, businesses, and private individuals.¹⁷ *Tribal sovereignty* refers to all these different aspects of tribal self-government.

Because Tribal Nations are sovereign entities, U.S. law recognizes *tribal sovereign immunity*. This means that Tribal Nations are generally immune (or protected) from legal actions in any court – regardless of whether it is a federal, state, or even a tribal court – unless the tribe waives its immunity or Congress authorizes a lawsuit.^{18,19} Tribal sovereign immunity also protects the tribe’s government representatives and employees acting within the scope of their employment. For example, sovereign immunity would protect tribal council members involved in negotiating a shared use agreement. Sovereign immunity further extends to businesses or entities acting in an official capacity on behalf of a tribe.^{18,20} Any court that does not have the authority to hear claims against a tribe is said to lack *jurisdiction*.

Public Law 280

As a general principle, states lack jurisdiction over Indians in Indian Country unless Congress specifically authorizes it. Public Law 83-280 (P.L. 280), passed by Congress in 1953, made the criminal laws of six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) applicable to individual Indians in some or all of the Indian Country in those states, and also gave the courts of those states the authority to oversee certain civil causes of action arising in Indian Country and involving individual Indians.²¹⁻²⁴ These six states are sometimes referred to as “mandatory states” because P.L. 280 required them to assume jurisdiction over Indian Country.

P.L. 280 did not, however, give the states jurisdiction over Tribal Nations themselves, nor did it make the laws of local governments (e.g., land use regulations, building codes, etc.) applicable to Indian Country.^{25,26} P.L. 280 applies only to state laws. P.L. 280 also allowed all other states – so-called “optional states” – to choose whether to extend whole or partial jurisdiction over Indian Country.²¹ Since 1968, states have been able to assert new jurisdiction within Indian Country only with the permission of the affected Tribal Nations. Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington have opted to exert some level of jurisdiction over Indian Country.²⁷

In the shared use context, P.L. 280 is most relevant to personal injury lawsuits brought by or against individual Indians, both members and nonmembers of a tribe, for something that happens within Indian Country. In states with whole or partial jurisdiction over Indian Country, state courts may have jurisdiction over lawsuits by or against individuals Indians.





Addressing Tribal Sovereign Immunity in Shared Use Agreements

Before entering into a shared use agreement, Tribal Nations and school districts must discuss how the agreement will be enforced. They should agree on clear, explicit language that specifies which courts can hear a dispute as well as the types of disputes that can be raised.

There are two basic options for addressing tribal sovereign immunity in shared use agreements. The first option is for the Tribal Nation to waive its sovereign immunity and agree that any disputes will be resolved in state court. This option makes the most sense when an agreement between a school district and Tribal Nation provides community access to recreational facilities that are located *outside of Indian Country*. Tribal courts generally do not have jurisdiction over conduct outside Indian Country. And because state courts do not have jurisdiction over Tribal Nations, those courts cannot enforce contracts that tribes are a party to unless the tribe waives sovereign immunity and consents to state court jurisdiction over an agreement. This option also makes sense if a tribe does not have its own court system, which is the case for many tribes.

The second option is for the school district to consent to tribal jurisdiction, and to agree that any disputes arising from the shared use agreement will be settled in tribal court. This option makes the most sense when an agreement between a school district and Tribal Nation provides community access to recreational facilities that are located in *Indian Country*. Tribal courts do not necessarily have jurisdiction over the conduct of nonmembers, such as public school districts, that occurs within the tribe's reservation. But the nonmember (school district) can consent to the tribal court's jurisdiction over disputes arising from the shared use agreement.

To be enforceable in any court, any contract provision waiving tribal sovereign immunity must identify the particular cause(s) of action that can be raised (e.g., breach

of contract, negligence, etc.) and the particular court that the parties consent to hear the dispute (i.e., tribal court or state court). In the case of a Tribal Nation waiving its sovereign immunity, the agreement must be executed by a person or tribal entity specifically authorized under tribal law to waive the tribe's sovereign immunity. School districts entering into an agreement with a tribe that waives sovereign immunity should ask to see the tribe's governing documents that address waivers of tribal sovereign immunity. Similarly, if a school district consents to tribal court jurisdiction, the agreement must be executed by a person from the school district who is specifically authorized to do so under state law.

The single most important factor in determining which court has jurisdiction over a dispute arising from a shared use agreement is what the agreement itself states with regards to jurisdiction and tribal sovereign immunity.

What Does a Sovereign Immunity Waiver Look Like?

A sovereign immunity waiver can easily be inserted into a shared use agreement. Tribal Nations and school districts that work with those communities may already be familiar with this type of provision.

The passage below represents one way that a Tribal Nation and school district incorporated a sovereign immunity provision into their agreement. However, Tribal Nations and school districts are encouraged to consult local attorneys who are familiar with laws affecting tribes when drafting any part of a shared use agreement.

"The School agrees that in any proceeding brought under and consistent with these dispute resolution procedures . . . it will not raise as a defense the sovereign immunity of the Tribe or the School. . . . This limited consent is subject to the following terms and conditions"

Community Highlight: Leasing an Entire School for a Buck a Year

In 2014, the Pascua Yaqui Tribe partnered with the Tucson Unified School District to make use of the former Richey Elementary School building for the tribe's benefit. The school district had shut down the school in 2010 and was no longer using the site facilities. Richey Elementary had served many Pascua Yaqui families, though it was located outside the Pascua Yaqui reservation. Many advocates for the tribe expressed frustration that, by closing the school in 2010, the school district was failing to serve tribal community needs. Thus began a conversation between the school district superintendent and the tribal council about the tribe's possible use of the school site.

The tribe's attorney general helped to address concerns about liability. For example, one question that arose was whether the tribe's insurance extended to tribe staff and volunteers during programs at the school site. The Pascua Yaqui attorney general confirmed that the tribe's insurance did in fact extend to the old Richey Elementary School site, and he put in place a policy that required all tribal employees and volunteers to undergo a background check before providing services there. Also, the tribe's risk management staff would provide regular consultations about any potential liability issues that could arise.

In an agreement signed by both the tribe and the school district, the district leased all of the school grounds and facilities to the tribe for \$1 per year. The tribe is responsible for all utilities and maintenance. The school has several indoor and outdoor facilities, including a multipurpose room, a gym, an auditorium, a field, and outdoor courts. The tribe has already used the school for a job fair benefiting tribal members, and tribal members host weekly boxing classes on the property for youths ages 13 to 18. The community has also established baseball and soccer leagues. Future plans include installing treadmills and workout stations. The tribe has been active in soliciting feedback from the community to learn what other types of resources and activities tribal members are interested in. These include both recreation programs and other services, such as dental screenings and health care services.

Note: This community highlight is based on a telephone interview conducted with Raquel Aviles, Associate Director of Health, Pascua Yaqui Tribe.



Conclusion

Shared use is one strategy among many that can help address high obesity and chronic disease rates among Native Americans. Because Tribal Nations are sovereign political entities, shared use presents unique legal issues for partnerships between Tribal Nations and school districts. But whatever legal issues may arise can easily be addressed within a shared use agreement. With careful planning and discussion, Tribal Nations and school districts can enact successful shared use partnerships that can have broad and lasting benefits.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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Shared Use Agreement Resources

ChangeLab Solutions has a library of resources that Tribal Nations and school districts can refer to when crafting shared use agreements to increase physical activity opportunities in their communities:

Playing Smart: Maximizing the Potential of School and Community Property Through Joint Use Agreements

This nuts-and-bolts guide is designed to help school staff and other community leaders craft and implement shared use agreements. Complete with model agreement language and success stories from communities around the country, this toolkit provides a comprehensive overview of the most common ways to finance shared use arrangements, and guidance on how to overcome obstacles that may arise in negotiating and enforcing an agreement.

Checklist for Developing a Joint Use Agreement

This resource identifies issues that partnering entities should consider when developing a shared use agreement.

Model Joint Use Agreements

This series of model agreements cover the most common shared use scenarios.

Opening School Property After Hours: A Primer on Liability

Some school districts are reluctant to open school property to the community after hours because they are concerned about the legal risks and the costs associated with injury or property damage. This fact sheet explains how state laws, insurance, and shared use agreements can help protect school districts from liability.

Open Use

Shared use can take many forms. In some cases, a school district and Tribal Nation may decide that a formal shared use agreement is not the best option for their community. School districts or Tribal Nations that want to provide free community access to their property without a partnership or agreement with another entity can adopt an Open Use Policy instead. An official Open Use Policy outlines the terms of free community access to property for individual play and physical activity.

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