

# Federal Emergency and Disaster Requests for Tribal Lands

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## ABSTRACT

Indian tribes have a special relationship with the federal government that dates back to the establishment of the United States. Federal disaster law, however, treats tribes as local governments and gives little weight to the historic relationship and lands of tribes. Instead of communicating as sovereign governments, tribes must first submit a disaster request to state officials, who then have discretion in transmitting the information to the federal government. This additional step in communication harms two important goals in disaster response on tribal lands: Efficiency and respectfulness in emergency communication and assistance. This paper examines how the legal framework that frames that intergovernmental communication. With this short introduction, this paper hopes to draw attention to the unique characteristics of tribal government, Indian law, and disasters on tribal land.

## Keywords

Communication pathways, legality, cultural competency, native peoples, tribal lands

## INTRODUCTION: DISASTER ON THE CHEYENNE RIVER SIOUX RESERVATION, SOUTH DAKOTA

In the winter of 2009-2010, blizzards and ice storms devastated the Cheyenne River Sioux Tribe in South Dakota. Without electricity, water pumps failed, water mains broke, gas and propane tanks ran empty, and food began to spoil. The only reservation grocery store lost its perishables, leaving this rural population without food while temperatures plunged below zero (McCaughan, 2010). People were stranded. The ensuing public outcry over this disaster poses an important structural question for emergency management: How can Indian Country<sup>1</sup> augment local resources in a way that promotes both respect and effective information exchanges? The process of disaster declarations is fundamentally at odds with the broad principles underlying the sovereign, nation-status of tribes who have separate governmental structures rooted in their own histories. Moreover, the information pathways create a needlessly complex legal environment with potential emotional barriers to the necessary, post-disaster dialogue.

This paper outlines the communication pathways between tribal and federal governments. This system is closely defined by statutory and constitutional law. Before offering a solution, this paper describes the legal framework that sets effective communication at odds with Indian law. The intersection of these legal doctrines is important because it is an information network among sovereign nations and a system with special duties upon federal actors. This paper hopes to spark conversation and further research on this level of information exchange.

## LEGAL FRAMEWORK

The Constitution, emergency management statutes, and case law create the legal framework that defines how critical disaster information flows among federal, state, and tribal governments after an emergency. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), only state governors may request federal aid to assist emergency response, even on tribal land. On that land, however, Supreme Court doctrines define the relationships. This paper first provides background on Indian law, discusses the applicable terminology, and summarizes the disaster declaration process. Because contact between the federal government and tribes is neither prescribed nor mandated by the law, communication occurs only on limited occasions.

## Key Terms and Definitions

For simplicity, this paper defines “tribal land” generally as land occupied and self-regulated by Indians. Although this definition glosses over the complexities of ownership, the general concept of tribal land permits a

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<sup>1</sup> This paper uses the term Indian to refer to American Indians and Alaskan Natives to be consistent with current scholarship, as well as to refer to the U.S. Constitution, which specially refers to the status of Indian people. U.S. CONST. art. I, § 8, cl. 3. In addition, this paper limits its scope to address only federally recognized tribes.

smoother analysis of the disaster declaration process and its legal implications. The broad view of tribal land also encompasses the self-identification and the historic conception of tribal sovereignty (Krakoff, 2005). The legal definitions applied in disaster declaration requests should align with a first-responder mentality, which prioritizes efficiency and respect for lost property and parallels local cultural values (Henkels, 2009).

Tribal sovereignty itself has many definitions, although literally sovereignty is simply “supreme power or authority” or “a self-governing state,” modified by the adjective “tribal.” Tribal sovereignty consists of government authority as well as the cultural identity of Indian people. Tribal governments feel tribal sovereignty is “inextricably linked to their existence as separate, self-governing nations” (Krakoff, 2004). This concept spans the cultural and historic meaning that is closely tied to self-identification. Sovereignty ties in psychological and emotional meaning for tribes. Thus, sovereignty guides both tribal economics and politics.

Finally, the definition of “disaster response” encompasses the work of first responders—police, firefighters, and medical personnel—and long-term recovery efforts of restoring essential infrastructure. The term used here identifies the importance of emergency managers at all stages of government. It includes the issues of homeland security and other all-hazard training, such as planning for terrorist attacks and improved border security (Exec. Order 13,228, 2001). The broad scope of activities under the aegis of disaster response causes the term to fall under public safety, health, and regulatory activities.

### Indian Law: The Basics

The Constitution grants Congress the right to regulate commerce with “the Indian tribes” although the Supreme Court has played a major role in structuring the U.S. Government’s treatment of Indians. This section first reviews three early, prominent cases that define the intergovernmental relationship. Second, this section examines how the elected branches attempted to direct federal intervention, and non-intervention, in Indian affairs. The resulting framework of law restricts the communication channels between the governments.

#### *The Marshall Trilogy*

Chief Justice John Marshall established the core of the historic relationship between Indians and the United States in a trilogy of cases in the early 19<sup>th</sup> Century. These cases continue to structure the duties between the Indian governments and the federal and state governments. The trilogy limited the scope of Indian land ownership, gave federal executives duties for management and legislators responsibility for defining the relationship, and barred state authority over tribes within tribal land.

The first case in the Marshall Trilogy, *Johnson v. McIntosh* (1823), established the Discovery Doctrine, under which European or Western nations could receive title to Indian land upon discovery, while the native people retained only a “right of occupancy.” Chief Justice Marshall held that the United States could discover land as conqueror, but the conqueror must not “wantonly oppres[s]” Indian tribes in the name of “humanity.” Indian occupancy could continue, subject to absolute title ownership by the conqueror-discoverer.

The next case, *Cherokee Nation v. Georgia* (1831), established that the federal government held a duty to protect and oversee the tribes (Butts, 2003). In *Cherokee Nation*, Marshall held that, while tribes were sovereign to the extent that they made treaties with the United States, the relationship between tribes and the United States “resembles that of a ward to his guardian.” The “ward-guardian” relationship came from tribes need for protection, relief, and kindness from the United States. Because of the tribes’ reliance on the federal government, the relationship placed fiduciary duties upon the federal government.

Finally, *Worcester v. Georgia* (1832) established that only the United States, not individual states, had control over Indian tribes. In *Worcester*, the Court assigned negotiations with tribes exclusively and solely to Congress. Although the language in *Worcester* was unique to the treaties and circumstances in Georgia, the Marshall opinion created a backdrop for later development of Indian law. Simply, *Worcester* stated that individual states should not interfere with United States’ Indian policies.

#### *Pendulum Theory and Public Law 280*

Since the trilogy of Marshall’s early Indian law cases, federal Indian policy has swung, like a pendulum, from one goal to another. On one end of the spectrum is heavy federal intervention instituted to achieve the “guardian” role stated in *Cherokee Nation*. During these times, Congress has required such extensive interventions as “assimilating” Indian children by placing them in federally run schools. On the other end of the pendulum is respect for the historic self-determination and tribal sovereignty. When this goal took priority, Congress isolated tribes onto reservations, where Indians were to regulate themselves without intervention or aid. The multiple shifts between such divergent policy goals have left a hodgepodge of policies (Getches Wilkinson, & Williams, 1998).

One of the more extreme swings in the assimilation was the enactment of Public Law 83-280 (1953) (“PL 280”). The law granted state governments civil and criminal jurisdiction on Indian reservations within state borders, regardless of past practices. The law originally applied to only five states—California, Minnesota, Nebraska, Oregon, and Wisconsin. The purpose of the law aimed to assimilate and dissolve tribes into their neighboring states (Getches et al, 1998). The impact of this assimilation swing remains in effect: In some states, state civil and criminal laws supersede tribal jurisdiction and, to some extent, regulatory laws. Thus, in these states, the tribes lack exclusive self-governance powers in criminal or civil law.

Finally, the Supreme Court’s recent doctrine of divestiture further limits the scope of tribal sovereignty (Frickey, 1999). Although the Supreme Court recognized some inherent sovereignty with respect to Indian-to-Indian regulation on Indian land (or held in trust by the federal government), regulation of all land and people within reservations has been “divested” from Indians over time. In the Court’s framework, tribal power “cannot survive without express congressional delegation” when it extends beyond self-government or internal relations (*Montana v. United States*, 1981). The concept of tribal sovereignty is legally quite limited by plenary Congressional power, executive guardianship over its ward, and Courts executing a divestiture doctrine.

## FEMA

The Federal Emergency Management Agency was created as a single coordinating agency to facilitate state-federal communication after disasters. The Stafford Act (1988) states that, “because disasters often disrupt the normal functioning of governments and communities[,] . . . special measures, designed to assist the efforts of the affected States in expediting and rendering aid, assistance, and emergency services . . . are necessary.” This law frames how federal emergency response relates to tribes, states, and the communication among these governments. The communication system can be divided into two phases.

The first phase of communication is the transfer of information on damage and local ability to respond. During this step, the state governor follows the emergency procedures of the state, which likely include assessing of damage from local governments, initiating state emergency plans, and declaring a state of emergency. These actions release state resources—financial and physical assets—to assist local governments. The governor may conclude that the damage will require extensive response, such that a federal assistance is necessary. The governor may then formally request a declaration of a “major national disaster” by sending a message to FEMA.

Before advising the President on a potential federal disaster, FEMA conducts a preliminary damage assessment that measures the impact and magnitude of the damage to “individuals, businesses, the public sector, and the community as a whole” (Code of Federal Regulations, 2011). Communication between FEMA and state personnel is vital to relay accurate knowledge of local conditions and abilities. The federal assessment teams join with at least one state representative. Local government officials join “if possible.” Because the law defines “local government” to include “an Indian tribe or authorized tribal organization, or Alaska Native village or organization,” tribal input falls under the “if possible” label. During this information sharing phase, tribes’ input and authority equates with counties, cities, school districts, and other local authorities.

FEMA serves a second communicative function after declaring a federal disaster by coordinating the collaborative, multi-jurisdictional response that coordinates assets and fills budgetary gaps. During this second phase, FEMA communicates to the public the types of aid available, management design, and the cost-sharing arrangements (FEMA, 2012a). The types of aid include public and individual assistance (FEMA, 2012a). At this phase, the question of financing and resource management can expose the deep rifts of mistrust inherent in tribal sovereignty. For impoverished and vulnerable tribes, delay can be seen as yet another abandonment or abuse by federal and state actors. For wealthy tribes, states may have emotional barriers to providing tribes additional financial assistance.

The risk of further damage often grows while the declaration paperwork process unfolds. For the Cheyenne River Sioux Tribe, the threat of a spring thaw brought concern of mold within homes and buildings, a major public health hazard. The President proceeded through three major disaster declarations before, on the fourth declaration made seven months after the first storms, assigned federal disaster assistance to the reservation territory. After months of waiting, individuals could then begin the applications for individual federal assistance. The delay resulted in an at-risk people facing increased suffering and delayed repair.

On a macro-level, the slow progress for receiving aid tests the patience of applicants for federal disaster declarations. The progress demonstrates the importance of information sharing, truthful and transparent disaster reports, and collaborative preliminary damage assessments. However, states’ initial assessments need not include information about tribes’ damage and response expenditures, and tribal participation is seldom included in the preliminary assessments. The disaster is thus exacerbated.

## **MULTIPLE FEDERAL PERSPECTIVES FOR TRIBAL EMERGENCY RESPONSE**

Indian law and federal disaster law intersect in a clash between the legislative design and executive aims. The tension fosters mistrust and uncertainty in jurisdictional and regulatory authority. Because of the legislative and executive confusion, judicial doctrines may provide for constitutional and statutory guidance. Courts have never, however, addressed disaster declaration process and the doctrines that might apply to disaster declarations only add further complications and may limit any potential solutions.

### **Executive Implementation and Cooperation with Tribal Governments**

The executive branch has begun to make proactive agreements with tribes to establish cooperation and respect. The efforts are intended to formalize information pathways, improve cultural understanding, and enhance efficiency of emergency management. The approach alters past practice by aiming to engage tribes directly on a government-to-government basis.

In 2000, President Clinton's Executive Order 13175 instructed the federal government to work more directly with tribal governments. The goal was to fulfill the historic guardian-ward duties and included emergency response. By January 2008, the Department of Homeland Security had decided that tribes could join emergency operation centers. The policy stated that "State Governors must request a Presidential disaster declaration on behalf of a tribe under the Stafford Act. However, Federal . . . agencies can work directly with tribes within existing agency authorities and resources in the absence of such a declaration" (DHS, 2010).

Although not explicitly in the National Response Framework or the National Incident Management System design, the Obama administration has prioritized cooperation and relationship building with tribes. Starting in 2009, the Obama administration held a series of "Tribal Summits" to collaborate and formalize mutual agreements with tribes (Obama, 2009). The objective was to promote more direct "government-to-government" contact with the tribes. The project has continued over the years and specifically cited emergency response as a field demanding more direct sharing between tribes and the executive branch (White House, 2010).

### **Legislative Tension with Executive Goals and Policies Regarding Tribal Emergency Response**

Congress has spoken quite clearly: Tribes are "local governments" and have been since the Stafford Act's precursor, the Disaster Relief Act of 1974, and existing through the major 2004 and 2006 reorganizations of FEMA. Congress consistently defined tribes as "local governments," despite proposals suggesting that Congress raise tribal governments equal with states rather than with cities and municipalities (Kueny, 2007).

Several bills have been proposed to amend the law so that sovereign tribes would possess regulatory power over disaster declarations (Inouye, 2003). In the example of the Cheyenne River Sioux Tribe's disaster, these bills would have permitted Indian governments to directly contact FEMA regarding the aid needed. The cooperation would then skip an administrative step and reflect a government-to-government relationship.

The Obama administration publicly backed these efforts (FEMA, 2011, Dec. 7) and enhanced communication in emergency response through the hiring tribal liaisons and devoting greater resources to training on tribal issues (DHS, 2010). One objective is to "identify and take reasonable, appropriate steps to eliminate or diminish procedural impediments to working directly and effectively with tribal governments" (FEMA, 2010) Like DHS, FEMA acknowledged that open communication provides better public safety services to "all people on tribal lands." These policy statements are consistent in their aim of early engagement with tribes. In recent years, such efforts demonstrate positive results with tribal recovery (Navajo-Hopi, 2010; FEMA, Jan. 27, 2011).

The legislative structure conflicts with the administrators desire to improved communication with tribes. However, political representatives of states keep Congress supportive of bureaucratic state intermediaries between tribes and the federal government when it comes to disaster information sharing. Where divergence between political branches occurs, the judicial interpretation of the law may clarify the dispute.

### **Potential Judicial Framework for Tribal Emergency Response**

No easy court case answers the question of what legal authority exists for information sharing across government-to-tribe systems. Whether tribes legally could request federal assistance without state managers must only rely on loose analogies drawn from the Supreme Court's Indian law decisions. For a disaster response framework, the Court could analogize to principles of tribal regulatory and criminal authority. Because emergency response requires a regulatory structure that coordinates government and community response, it may be analogous to other civilian functions of government, especially regulating local resources on tribal land.

Overall, the Court stated that tribes may not regulate non-Indians unless the regulation is for tribal political integrity, economic security, or tribal health or welfare (*Montana v. United States*, 1981). Outside these

exceptions, tribes cannot regulate non-Indians on non-tribal land, even non-Indian plots within a reservation. *Nevada v. Hicks* (2001) further granted state authority on tribal lands, stating that “[o]ur cases make clear that the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border.” In *Hicks*, the tribe could not limit state regulatory actors on tribal lands and, thus, could not exert civil jurisdiction where the state had an interest. The legal authority tends to uphold tribal authority only where nonmembers are not harmed and the tribal welfare enhanced. Federal disaster declaration requests might be just such an authority.

## SOLUTIONS

Two changes would help limit the differences between legislative and executive approaches and promote the cultural identity of tribal sovereignty. First, tribal governments should be permitted to make their own requests for federal assistance within their territory, without regard to a governor’s request. Second, all actors should enhance communication through memoranda of understanding or mutual assistance agreements. After Hurricane Katrina illustrated that clear communication networks and assignments of responsibility are vital to disaster response—not just best practices (Gheyntanchi et al., 2007). Adopting greater coordination between federal and tribal governments quickens the response in disasters on tribal land because fewer intermediaries reduce the time between disaster, assessment, and requests for aid.

Permitting direct government-to-government disaster declaration requests poses some risk, especially if cooperation decreases between tribes and states. States could view the definition changes as broadly authorizing the unilateral tribal actions. The perceived impact and emotional symbol of change might lead states to not share resources and coordinate with tribes. The states could view tribes as getting special treatment because of the emphasis on direct communication between federal aid and the former local government of tribes (Kalt & Singer, 2004). Preexisting animosity further raises suspicions among tribal and state actors; states may find that “rich” tribes might unduly benefit from federal assistance. In contrast to the stereotype, the Navajo Nation has a strong tradition of representative government and a vibrant judiciary (Krakoff, 2004). Comparatively, half of the Cheyenne River Sioux Tribe is younger than eighteen, life expectancy is under fifty, and unemployment is eighty percent. The local conditions vary widely and generalizations only undermine effective communication.

Expansion of tribal authority over non-Indian residents may also raise constitutional questions of representation and due process rights. Tribal governments are not always representational and nonmembers may not have a voice in local actions by tribal officials. Furthermore, tribal governments may place different values on property and ownership, potentially distorting the disaster request decision; if this were true, an eligible disaster might not receive a federal recognition. Whether or not these constitutional concerns are valid, the questions raise substantial political barriers to change (Frickey, 1999).

However, the concern for non-Indian residents on reservations does not outweigh the benefits of improving the federal response. First, direct tribal requests do not bar nonmembers from contacting states for assistance. State governors still can make requests for assistance for land within the state, even if on tribal land, thus preserving representation of non-Indians on tribal lands. The change would not remove rights but add new channels of communication and increase the speed of response. The questions of representation are much more pertinent in homeland security issues, which could be separated from emergency response to natural disasters, as done in past court jurisdiction questions (Sanders, 2003). This narrow change would permit efficient disaster response without compromising representation of non-Indians on reservations.

This paper offers a modest legislative suggestion of improving disaster communication systems. Most importantly, it begins a dialogue for future improvements to emergency management communication and legal structures with regards to disasters on Indian lands. Scholarship could next address the important steps of administrative oversight and federal disaster fund distribution for emergencies on tribal lands. The improvements to the declaration process are fundamental to tribal sovereignty, efficient response, and establishing a just system of nation-to-nation contact after disasters.

## ACKNOWLEDGMENTS

I thank greatly the individuals and first responders who contributed their suggestions on declaration improvements. Without their assistance, this little discussed issue would continue to be only a passing concern for legal and academic researchers. I am also indebted to the Indian communities of Wisconsin and the Cheyenne River Sioux Tribe, both who generously gave their stories, perspective, and insights. Finally, I thank the ISCRAM editors and reviewers for thoughtful suggestions that have guided this paper’s development.

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