

HOUSE COMMITTEE ON 
NATURAL RESOURCES
REPUBLICANS | RANKING MEMBER ROB BISHOP

July 20, 2020

TO: Republican Members, Subcommittee for Indigenous Peoples of the United States
FROM: Republican Committee Staff - Chris Fluhr (202-441-8064) and Ken Degenfelder (202-306-5328)

The Subcommittee for Indigenous Peoples of the United States will hold a hybrid hearing on four bills on Wednesday, July 22, 2020, at 2pm in 1324 Longworth HOB and online via Cisco Webex. Members will be able to participate in the hearing in 1324 Longworth House Office Building or remotely via Cisco Webex online video conferencing. **By Monday, July 20 at 4:30pm EDT, offices are requested to notify Megan Stookey if their Member intends to participate in person in the hearing room or remotely from his/her laptop from another location.** Submissions for the hearing record must be submitted through the Committee's electronic depository at HNRCDocs@mail.house.gov. Please contact Megan Stookey (801-787-4768) or Austin Hacker (661-549-0853) should any technical difficulties arise if participating remotely.

I. WITNESSES

- **Hon. Rear Admiral Michael D. Weahkee**, Director, Indian Health Service, Department of Health and Human Services, Rockville, MD (*H.R. 6237, H.R. 6535, H.R. 7119*)
- **Mr. Jason O'Neal**, Assistant Deputy Director, Office of Justice Services, Bureau of Indian Affairs, Department of the Interior, Washington, DC (*H.R. 958*)
- **Mr. Alejandro Benally**, Police Chief, San Carlos Apache Tribe, San Carlos, AZ (*H.R. 958*)
- **Mr. William Smith**, Acting Chairman, National Indian Health Board, Washington, DC (*H.R. 6237*)
- **Ms. Robyn Sunday-Allen**, Vice President, National Council of Urban Indian Health Washington, DC (*H.R. 6535*)
- **Mr. Andy Teuber**, Board Chair and President, Alaska Native Tribal Health Consortium, Anchorage, AK (*H.R. 7119*)

II. BACKGROUND

[H.R. 958](#) (O'Halleran D-AZ), To protect Native children and promote public safety in Indian country.

H.R. 958 would amend the Indian Civil Rights Act of 1968 (ICRA) to broaden the criminal jurisdiction of Indian tribes over non-Indians to include (1) crimes against Native youth, tribal police officers, and other employees of the tribe; and (2) jurisdiction over non-Indian “caregivers.” Current law (25 U.S.C. 1304) provides for tribal jurisdiction over domestic violence crimes committed by non-Indians spouses, dating/intimate partners, and employees or residents of the tribe’s lands.

In current law, including as amended by H.R. 958, tribal jurisdiction is limited to crimes occurring in Indian Country (reservations and trust lands) in which Indians are victims. Tribes may not exercise special jurisdiction over non-Indians until they adopt certain measures related to the rights of the defendants. These rights are contained in ICRA, and while they resemble the Bill of Rights, they are not the same and they may be modified or eliminated by an act of Congress.

The federal government generally exercises jurisdiction over most crimes in Indian Country, except when the crimes involve only non-Indians, in which case they fall under State jurisdiction. Another exception is when crimes occur in a “P.L. 280” State, one of several States granted criminal jurisdiction over all persons in the Indian Country of their States by act of Congress.¹ Tribal jurisdiction is concurrent with federal jurisdiction in most cases, and with State jurisdiction in P.L. 280 states.

Congress had never granted tribes criminal jurisdiction over non-Indians until it enacted the reauthorization of the Violence Against Women Act in 2013 (VAWA, Public Law 113-4, Title IX). In April 2019, the House passed a VAWA reauthorization containing provisions to expand these tribal jurisdiction provisions, but that measure has not passed the Senate. H.R. 3977 (Haaland) expands tribal criminal jurisdiction as well. That bill was ordered reported by the Committee after a lengthy debate in December 2019.

H.R. 958 raises serious constitutional concerns. H.R. 958 may allow tribes to violate the rights of American citizens they prosecute in their courts. The measures incrementally reverse another Supreme Court case, *Oliphant v. Suquamish Indian Tribe* (435 U.S. 191 (1978)), wherein the Court held that tribes lack inherent authority over non-Indians. Because tribes are not parties to the Constitution, the guarantees and protections of the Constitution, including the Bill of Rights and the 14th Amendment, are not available to defendants in tribal courts unless Congress provides otherwise. In addition, the subjection of non-Indians to tribal law may violate the “consent of the governed” principle set forth in Article IV, Section 4 of the Constitution.

A tribe’s additional authority comes from the consent of its members, and so, in the criminal sphere, membership marks the bounds of tribal authority. . . Retained criminal jurisdiction [of tribes] over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent . . . With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. . .

¹ These States are Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin,

*this is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system. [Italics added]*²

These objections could be overcome by making tribal power to prosecute and punish non-Indians a federally-delegated power rather than an inherent one. A Republican amendment to make tribal jurisdiction a matter of delegated authority was rejected during the consideration of VAWA in 2013. Similarly, a Republican amendment to apply Bill of Rights and 14th Amendment protections to defendants in tribal court was opposed by Democrats and rejected by a vote of the Committee in the markup of H.R. 3997.

There is very little information available to the Committee related to the prosecution of non-Indians in tribal courts. There are no federal reporting requirements, tribes have shared no official records with Committee Republicans pertaining to the administration of justice in their courts, and the Department of Justice has not, since at least 2012, provided useful or relevant information to the Committee relating to the arrest, trials, and sentencing of defendants in tribal courts.

[H.R. 6237](#) (Gallego D-AZ), To amend the Indian Health Care Improvement Act to clarify the requirement of the Department of Veterans Affairs and the Department of Defense to reimburse the Indian Health Service for certain health care services.

This bill would amend the Indian Health Care Improvement Act (IHCA)³ to further expand the type of health provider or health entity eligible to receive reimbursement from the Department of Veterans Affairs (VA) or the Department of Defense (DOD) for health services provided to Native veterans. Under current law, only “direct care” provided by the Indian Health Service (IHS) or a tribally-operated health facility through an Indian Self-Determination and Education Assistance Act (ISDEAA)⁴ contract or compact are eligible for reimbursement. A similar bill, H.R. 4153,⁵ added urban Indian health organizations to the list of entities eligible for “direct care” reimbursement. H.R. 4153 was ordered favorably reported on March 11, 2020.

Within the Indian healthcare delivery system, medical or dental care “direct care” is provided by either the IHS or a tribally-operated facility. In cases where a health facility lacks the capacity for a service, the health facility will refer patients to other non-Indian health facility providers. This separate appropriation account is known as purchased/referred care (PRC). The PRC funds are used to supplement and complement other health care resources available to eligible Indian people. The funds are used in situations where: (1) no IHS direct care facility exists; (2) the direct care element is incapable of providing required emergency and/or specialty care; (3) the direct care element has an overflow of medical care workload; or (4)

² *Duro v. Reina*, 495 U.S. 676 (1990).

³ 25 USC 1601 et seq.

⁴ 25 USC 5301 et seq.

⁵ H.R. 4153, <https://www.congress.gov/116/bills/hr4153/BILLS-116hr4153ih.pdf>.

supplementation of alternate resources (i.e., Medicare, private insurance) is required to provide comprehensive care to eligible Indian people.⁶

While the VA is the primary agency charged with providing healthcare to veterans, the 2010 permanent reauthorization of the IHCA in the Affordable Care Act provided a new authority for the VA or DOD to reimburse the IHS, an Indian tribe, or tribal organization for direct care health services provided to Native veterans. This bill would further expand the VA and DOD authority to reimburse PRC cases for Native veterans.

[H.R. 6535](#) (Gallego D-AZ), To deem an urban Indian organization and employees thereof to be a part of the Public Health Service for the purposes of certain claims for personal injury, and for other purposes.

This bill would amend the Indian Health Care Improvement Act (IHCA)⁷ to extend Federal Tort Claims Act (FTCA) coverage to Urban Indian Organizations (UIO) and their employees. According to IHS, Congress must specifically authorize, in statute, the extension of federal tort coverage to certain groups or individuals. Under current law, FTCA extends coverage to ISDEAA contractors' employees and personal services contractors.⁸ Federal law does not provide tort liability coverage for injuries that result from the negligent acts of employees at UIOs providing health and medical services. The IHS enters into limited, competing contracts and grants with 41 non-profit organizations to provide health care and referral services for urban Indians throughout the United States. In calendar year 2017, 35 UIOs provided 653,614 health care visits for 75,194 American Indians and Alaska Natives who do not have access to the resources offered through IHS or tribally-operated health care facilities because they do not live on or near a reservation.⁹

Without this protection, UIOs and their employees purchase liability insurance out of pocket.

[H.R. 7119](#) (Don Young R-AK), To convey land in Anchorage, Alaska, to the Alaska Native Tribal Health Consortium, and for other purposes.

The bill would direct the Secretary of Health and Human Services to convey by warranty deed within 180 days of enactment 3.5-acres of federal land located in Anchorage, Alaska, to the Alaska Native Tribal Health Consortium (ANTHC) for use in connection with health and social-services related programs. The bill does not allow for any reversionary interest of the U.S. in the property. The YKHC is a tribal health organization that provides health services under a compact with the IHS, pursuant to ISDEAA. Currently, the two plots of land owned by IHS are currently being used by ANTHC for logistical, fabrication, maintenance and storage support for health-related activities. The first parcel described in the bill, "Lot 1A", is approximately 2 acres and

⁶ Indian Health Service; Purchased Referred Care. <https://www.ihs.gov/prc/>.

⁷ 25 USC 1601 et seq.

⁸ 25 USC 5321(d).

⁹ <https://www.indian.senate.gov/sites/default/files/HHS%20IHS%20testimony%20for%207-1-20%20SCIA%20hearing%20on%20COVID%20and%20S%203650%206-25-20.pdf>

the second plot described in the bill as “Block 32C” is approximately 1.5 acres. According to ANTHC, gaining title to the parcels will enable it to streamline its operations, build updates and refurbishments without reliance on the federal government, therefore expanding capacity to offer health services to patients who live outside of Anchorage.

The land conveyance would allow ANTHC to adapt to the evolving needs of its patient base. It will also bolster the center’s ability to provide more regular and comprehensive treatment for individuals that lack healthcare options in their home communities.

Currently, ANTHC is coordinating with IHS to transfer administrative control of the two parcels and will work with the agency to ensure a smooth and positive conveyance.

III. COSTS

Unknown.

IV. ADMINISTRATION POSITIONS

Senate companion to H.R. 6535: At the July 1, 2020, Senate hearing on S. 3650, a companion bill, the IHS supported the policy to extend FTCA coverage to UIOs. However, IHS prefers formulating the coverage extension as part of the statutory section in the Public Health Service Act where the other various similar extensions are located.¹⁰

Senate companion to H.R. 7119: In a statement for the hearing record for a companion bill, S. 3100, the IHS supports the intent of the bill but does not support a transfer via warranty deed nor does the IHS support being held liable for any environmental contamination on the land.

V. CURRENT LAW AS AMENDED BY EACH OF THE BILLS (RAMSEYERS)

Showing Current Law as Amended by H.R. 958

[text to be added highlighted in yellow; text to be deleted bracketed and highlighted in gray]

Section 204 of Public Law 90-284 (25 U.S.C. 1304)

§1304. Tribal jurisdiction over crimes of domestic violence, CHILD VIOLENCE, AND VIOLENCE AGAINST LAW ENFORCEMENT OFFICERS

(a) Definitions

In this section:

(1) CAREGIVER.—The term “caregiver” means—

¹⁰ Id.

(A) the parent, guardian, or legal custodian of the child;

(B) the spouse or intimate partner of a parent, guardian, or legal custodian of the child;

(C) any relative of the child, including a parent, grandparent, great-grandparent, stepparent, brother, sister, stepbrother, stepsister, half-brother, or half-sister;

(D) a person who resides or has resided regularly or intermittently in the same dwelling as the child;

(E) a person who provides or has provided care for the child in or out of the home of the child;

(F) any person who exercises or has exercised temporary or permanent control over the child; or

(G) any person who temporarily or permanently supervises or has supervised the child.

(2) CHILD.—The term “child” means a person who has not attained the lesser of—

(A) the age of 18; or

(B) except in the case of sexual abuse, the age specified by the child protection law of the participating tribe that has jurisdiction over the Indian country where the child resides.

(3) CHILD VIOLENCE.—The term “child violence” means covered conduct committed against a child by a caregiver of the child.

(4) COVERED CONDUCT.—The term “covered conduct” means conduct that—

(A) involves the use, attempted use, or threatened use of physical force against the person or property of another; and

(B) violates the criminal law of the Indian tribe that has jurisdiction over the Indian country where the conduct occurs.

(5) COVERED INDIVIDUAL.—The term “covered individual” means an officer or employee of an Indian tribe, or an individual authorized to act for or on behalf of an Indian tribe or serving an Indian tribe, who is—

(A) authorized under law to—

(i) engage in or supervise the prevention, detection, investigation, arrest, pretrial detention, prosecution, or adjudication of an offense or the sentencing, including the probation, parole, incarceration, or rehabilitation, of an individual; or

(ii) serve as a probation or pretrial services officer; and

(B) carrying out an activity described in paragraph (11)(C).

(6) [(1)] Dating violence

The term "dating violence" means [violence] covered conduct committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(7) [(2)] Domestic violence

The term "domestic violence" means [violence] covered conduct committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the [violence] covered conduct occurs.

(8) [(3)] Indian country

The term "Indian country" has the meaning given the term in section 1151 of title 18.

(9) [(4)] Participating tribe

The term "participating tribe" means an Indian tribe that elects to exercise special [domestic violence] tribal criminal jurisdiction over the Indian country of that Indian tribe.

(10) [(5)] Protection order

The term "protection order"-

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(11) RELATED CONDUCT.—The term "related conduct" means a violation of the criminal law of an Indian tribe that is committed—

(A) against a covered individual;

(B) by a person—

(i) who is subject to special tribal criminal jurisdiction; and

(ii) has committed criminal conduct that falls into one or more of the categories described in paragraphs (1) and (2) of subsection (c); and

(C) in the course of resisting or interfering with the prevention, detection, investigation, arrest, pretrial detention, prosecution, adjudication, or sentencing, including the probation, parole, incarceration, or rehabilitation, of that person relating to that criminal conduct.

(12) [(6)] Special [domestic violence] tribal criminal jurisdiction

The term "special [domestic violence] tribal criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(13) [(7)] Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special [domestic violence] tribal criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special [domestic violence] tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section-

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exceptions

(A) Victim and defendant are both non-Indians

(i) In general

A participating tribe may not exercise special [domestic violence] tribal criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim

In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special [domestic violence] tribal criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe

A participating tribe may exercise special [domestic violence] tribal criminal jurisdiction over a defendant only if the defendant-

- (i) resides in the Indian country of the participating tribe;
- (ii) is employed in the Indian country of the participating tribe; or
- (iii) is a spouse, intimate partner [, or dating partner] , dating partner, or caregiver of-
 - (I) a member of the participating tribe; or
 - (II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal conduct

A participating tribe may exercise special [domestic violence] tribal criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) Domestic violence [and dating] , DATING VIOLENCE, AND CHILD violence

An act of domestic violence [or dating violence] , dating violence, or child violence that occurs in the Indian country of the participating tribe.

(2) Violations of protection orders

An act that-

- (A) occurs in the Indian country of the participating tribe; and
- (B) violates the portion of a protection order that-
 - (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
 - (ii) was issued against the defendant;
 - (iii) is enforceable by the participating tribe; and
 - (iv) is consistent with section 2265(b) of title 18.

(3) RELATED CONDUCT.—An act of related conduct that occurs in the Indian country of the participating tribe.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special [domestic violence] tribal criminal jurisdiction, the participating tribe shall provide to the defendant-

- (1) all applicable rights under this Act;
- (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
- (3) the right to a trial by an impartial jury that is drawn from sources that-
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
- (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special [domestic violence] tribal criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court-

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) Notice

An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)-

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special [domestic violence] tribal criminal jurisdiction, including-

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe [prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order]; prosecutes—

(A) a crime of domestic violence;

(B) a crime of dating violence;

(C) a crime of child violence;

(D) a criminal violation of a protection order; or

(E) a crime of related conduct;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special [domestic violence] tribal criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, child violence, related conduct, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, consistent with tribal law and custom.

(g) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of appropriations

There are authorized to be appropriated \$5,000,000 for each of fiscal years [2014 through 2018] 2018 through 2022 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

Showing Current Law as Amended by H.R. 6237

[text to be added highlighted in yellow]

Section 405 of the Indian Health Care Improvement Act (25 U.S.C. 1645)

§1645. Sharing arrangements with Federal agencies

(a) Authority

(1) In general

The Secretary may enter into (or expand) arrangements for the sharing of medical facilities and services between the Service, Indian tribes, and tribal organizations and the Department of Veterans Affairs and the Department of Defense.

(2) Consultation by Secretary required

The Secretary may not finalize any arrangement between the Service and a Department described in paragraph (1) without first consulting with the Indian tribes which will be significantly affected by the arrangement.

(b) Limitations

The Secretary shall not take any action under this section or under subchapter IV of chapter 81 of title 38 which would impair-

(1) the priority access of any Indian to health care services provided through the Service and the eligibility of any Indian to receive health services through the Service;

(2) the quality of health care services provided to any Indian through the Service;

- (3) the priority access of any veteran to health care services provided by the Department of Veterans Affairs;
- (4) the quality of health care services provided by the Department of Veterans Affairs or the Department of Defense; or
- (5) the eligibility of any Indian who is a veteran to receive health services through the Department of Veterans Affairs.

(c) Reimbursement

The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided through the Service, an Indian tribe, or a tribal organization to beneficiaries eligible for services from either such Department, notwithstanding any other provision of law, regardless of whether such services are provided directly by the Service, an Indian tribe, or tribal organization, through contract health services, or through a contract for travel described in section 213(b).

(d) Construction

Nothing in this section may be construed as creating any right of a non-Indian veteran to obtain health services from the Service.

Showing Current Law as Amended by H.R. 6535

[text to be added highlighted in yellow; text to be deleted bracketed and highlighted in gray]

Title V of the Indian Health Care Improvement Act (25 U.S.C. 1651 et seq.)

* * * * *

SEC. 519. DEEMING AN URBAN INDIAN ORGANIZATION AND EMPLOYEES THEREOF TO BE A PART OF THE PUBLIC HEALTH SERVICE FOR THE PURPOSES OF CERTAIN CLAIMS FOR PERSONAL INJURY.

Section 102(d) of the Indian Self-Determination and Education Assistance Act shall apply—

(1) to an Urban Indian organization to the same extent and in the same manner as such section applies to an Indian tribe, a tribal organization, and an Indian contractor; and

(2) to the employees of an Urban Indian organization to the same extent and in the same manner as such section applies to employees of an Indian tribe, a tribal organization, or an Indian contractor.
