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Maneuvering Challenges:
An Overview of Food Safety For Tribal Producers

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Acknowledgements from First Nations Development Institute

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Acknowledgements from the Author

The perpetuation of food and all the values that are attached to the creation of it remind us daily of our identity, our economic and social value systems, and very simply, they "take us home." While food safety is seemingly technical, understanding the rules that govern food safety is just another tool for food growers and consumers to ensure the continued existence of "our" foods and values – those same foods of our ancestors. I am grateful to all the *Da-oos* and *Ba-bas* who fed me those foods as a child and beyond, and who continue to feed and ensure Cochiti children have a relationship with those foods. I would like to thank my own grandfather, Zero Romero, for ensuring his field was my first classroom. Lastly, I would like to thank Cochiti leadership for recognizing the need to ensure we grow new generations of Cochiti farmers, and First Nations Development Institute for ensuring we at Cochiti, as well as other Indigenous communities, have all the tools to design our own futures.

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About the Author

Vena A-dae Romero was born and raised in Cochiti Pueblo. She is Cochiti and Kiowa. A-dae attended Princeton University and graduated from Princeton's Woodrow Wilson School of Public and International Affairs with a degree in public policy and a focus on economic policy. She later graduated from Arizona State University's College of Law with a J.D. degree, and the University of Arkansas School of Law with an LL.M. degree (master of law) in agricultural and food law.

At Cochiti, she co-founded the Cochiti Youth Experience, Inc., a nonprofit organization dedicated to creating positive opportunities for youth, and which has a special focus on strengthening Pueblo agriculture as an economic, political and social anchor.

In 2014, she was named a U.S. Fulbright Scholar and a USDA/ White House "Champion of Change" in agriculture. *Agri-Pulse*, a national agricultural news source, also named A-dae as one of the most influential rural agricultural advocates in its "50 Under 50" report.

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By Vena A-dae Romero, J.D., LL.M. (Cochiti/Kiowa)

Introduction

Food represents culture. Food is an intimate personal choice that is influenced by historical patterns, environmental considerations and, most importantly, cultural norms. Food choice is as important to a society as education choice, political choice and religious choice, in that food embodies emotional and social attachments that link families and communities together. For centuries, culture and society have defined food and how and when it is eaten through socio-cultural norms that embody generational lessons about what is safe and unsafe in our given environments.

Food safety law is a codification of American food standards that greatly impacts the national food system, but even impacts the more localized food systems within America, including the long-existing food systems of tribal nations. Much like government law and regulation that historically impeded on tribal autonomy to define community – from physical boundaries to social, linguistic and even economic systems – U.S. food law and regulation can greatly limit a tribal nation's autonomy over its food environment. Tribal participation in the promulgation of U.S. food safety law, careful monitoring, documenting the effect of U.S. food safety laws on tribal nations, and encouraging laws that include the nuances of tribal food environments can ensure the protection of all facets of a tribal food environment from land to water to traditional crops that have co-existed with tribal nations for centuries.

There is often confusion about what is meant by food safety. In laymen's terms, food safety can include everything from nutritional value, to general purity or cleanliness, to use or existence of genetically modified organisms (GMOs), or even to the potential of preserving heirloom seeds for future use. However, in legal terms, food safety refers to a very specific body of laws, policies and regulations that sets standards for preparing, storing and transferring food from harvest to consumption, and ensures food is safely prepared and handled for market sales. Because the food-supply chain involves many different players — raw product being handled by many different people or machines prior to and during processing, and often includes food traveling for miles — food safety laws, regulations and policies ensure that the food-supply chain maintains quality, purity and standards that make food safe for consumption.

From pre-contact times to the start of the Industrial Revolution, food safety has always been a consideration in the food supply. But food safety did not become a government priority until the 1993 Escherichia coli (E. coli) outbreak that started in Washington Jack in the Box fast food outlets and spread across the west coast. Since then, there has been an increase in the number of laws and regulations, not to mention technologies, focused on detecting contaminants to ensure food is safe to consume. Within this heavily regulated food-safety environment, it is important that start-up food businesses and established ones that want to grow and maintain their competiveness understand food-safety law and regulation.

What is Food Safety?

Food safety is a set of standard practices for promoting the purity and safety of food handling, storage, transportation and consumption. Today, food safety includes government laws, regulations and policies imposed on different sectors of the food chain from farm to consumption. Many of these laws are promulgated at the federal, state or local/county level. Few tribes, if any, have food-safety codes, per se, but may have food safety codified in cultural and traditional protocols and behaviors regarding food. This type of food-safety understanding may be incomprehensible to federal, state or local food-safety officials or the court system.

Because food-safety law and regulation is at a heightened level of consideration when food enters the market, it is important that tribes ensure that their food-safety protocols and laws are stringent, compliant with and comprehensible to outside agencies such as the Federal Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) in order to protect producers, food processors and food businesses within their jurisdictions. Such laws and protocols can also assist the tribes' business owners in transitioning their sales to markets outside of their reservations.

Food safety is not a new concept. For centuries, Indigenous communities have incorporated both traditional and modern procedures from growing to consumption that ensure the safety of the food being grown, processed and eaten. The difference today is that current legal and political contexts require these laws be formalized and monitored to protect the food chain and in many cases tribal sovereignty and jurisdictional authority.

A Short History of Food Safety

Prior to European contact, Indigenous communities throughout the "Americas" had established communities, nations and strong connections to land and specific geographies. Naturally, these nations and communities could not exist without food sources. In many cases, they developed food-processing, storage and cooking techniques that are still viable today. In fact, the food sources developed by Indigenous peoples ensured the survival of immigrant populations who came from Europe after first contact. For three centuries, food was of high value; therefore people and communities developed techniques that were geographic and environmentally-specific to ensure lasting storage, processing, exchange, and cooking techniques to preserve its value. Upon settlement of the Americas, many of the new European settlers utilized planting, harvesting and processing techniques developed by Indigenous people, while also beginning to develop techniques of their own.

In the 1800s with the onset of the Industrial Revolution and the expansion of railroads, food growing became more "food production." In 1862, President Lincoln founded the U.S. Department of Agriculture and within that bureaucracy the Bureau of Chemistry. Electricity and railroads allowed for year-round food production, especially in the predominate livestock production areas. Meat could now travel thousands of miles from its source and imported meat became more common.

In 1884, President Arthur established the Bureau of Animal Industry (BAI) and this agency was charged with preventing diseased animals from being used as food. Stations in Baltimore, New York, Boston and Philadelphia, along with the customs offices on the Canadian and Mexican borders, served as safeguards against foreign animal diseases. In 1905, public outcry about the meat-packing industry resulted in the establishment of USDA meat inspectors in all U.S. meat-packing plants. "The Pure Food and Drug Act and the Federal Meat Inspection Act (FMIA) became law on the same day in 1906. The Pure Food and Drug Act prevented the manufacture, sale or transportation of adulterated or misbranded foods, drugs, medicines and liquors."[1]

In 1927, USDA's Bureau of Chemistry was reorganized and renamed the Food, Drug and Insecticide Administration. In 1931, it was renamed the Food and Drug Administration (FDA). In 1938, Congress passed the federal Food, Drug and Cosmetic Act (FD&CA), which gave the FDA the authority to issue food-safety standards. In 1957, Congress passed the Poultry Products Inspection Act, which ensured, just like the FMIA did for meat products, that poultry products shipped in interstate commerce were inspected prior to slaughter, after slaughter, before processing and, if the poultry was imported, at the point of entry into the United States. In 1970, Congress passed the Egg Products Inspection Act (EPIA), which provides

1 United States Department of Agriculture. *FSIS History*. Last Modified May 25, 2013. http://www.fsis.usda.gov/wps/portal/informational/aboutfsis/history

for the mandatory inspection of the processing of liquid, frozen and dried egg products. Most recently, in 2010, Congress passed the Food Safety Modernization Act (FSMA) that amended FD&CA and refocused food-safety regulations in response to several major food-borne illness outbreaks in the 1990s.

Who Should be Concerned About Food Safety?

Food safety is everyone's concern. Everyone from producer to consumer has a part to play in ensuring food is safe. Anyone involved in one, some or all parts of the food chain, including retailers and distributors, should understand food-safety law and regulation nationally, locally and within their own tribal jurisdictions As tribal producers, a person should be able to articulate food-safety standards even if a food-safety plan does not exist. It should be noted that food-safety standards are highly dependent upon the type of food product being produced, whether it's processed or unprocessed, whether it's a value-added product, whether it's packaged, and even the market it is intended for. The extent of concern about food safety is dependent upon a number of considerations. Figure 1 offers a look at various types of food businesses and what levels of food-safety standards they should attempt to meet. As this figure shows, the further food travels from point of production, the greater the food safety standards producers must develop and follow. Naturally food safety is always a priority but as the figure notes, standards begin to increase as miles from the farm increase.

Figure 1: Types of Business and Needed Level of Food Safety Standards

Who Enforces Food Safety?

Governments are generally involved in food safety because the general health, safety and welfare of the public are involved when it comes to the food supply chain. Governments include federal, state, tribal and local governments. There are even some international agreements that involve food safety, such as the Country of Origin Labeling (COOL) law that involves the labeling of meat produced in other countries. In recent years, there has been a much greater push for international regulation through contracts and agreements because of global trade. Today, it is common to have entire national agricultural sectors trading and shipping products to other countries.

Governments generally pass food codes, regulations and policies that set some standards for the handling, storage and consumption of food. There are national laws such as the FSMA that govern the production and transportation of some food for sale. Governments also generally pass a range of food and agriculture codes that go well beyond the area of food safety and touch on all aspects of food production, harvest, transportation, retail, wholesale, storage, grading, export and domestic consumption. All this government activity has led to food and agriculture being among the most regulated areas of our daily lives and this phenomenon has been ongoing since before the United States was created. The history of food safety regulation is not new.

On the federal level, there are two major agencies charged with food safety regulation: USDA and FDA. More specifically, the USDA Agricultural Marketing Service (AMS) is charged with the safety and quality of egg products and shell eggs, while the USDA Food Safety and Inspection Service (FSIS) is charged with the safety, regulation and accuracy of labeling on all meat and poultry products. The FDA regulates and ensures the safety of all other food products. The U.S. Environmental Protection Office (EPA) also regulates pesticide products and residues used and found on food.

Food-Safety Planning

Food-safety plans are a critical component of any agricultural or food businesses. They should be created and implemented at the time of business creation, but can be reviewed, edited, and improved upon periodically throughout the life of the business. Since food safety is so heavily regulated, the attention of not only the regulatory community but of the farmer, rancher or food producer or processor is focused first and foremost on analysis of risks and planning to address those risks. Every farm, food business or commercial kitchen assumes different kinds of risks. The risks associated with a farm, food business or commercial kitchen are largely dependent upon many considerations. The following section illustrates the different food-safety plans and regulations for several different types of agricultural and food businesses. However, most food-safety plans include the following:

- Field Operations and Harvesting
    - Management Responsibility
    - Food Safety Plan
    - Documentation and Record Keeping
    - Worker Education and Training
    - Sampling and Testing
    - Traceability

    - Recall Program
    - Corrective Actions
    - Self-Audits
- Field Production
    - Field History and Assessment
    - Worker Health/Hygiene and Toilet/Hand-washing Facilities
    - Agricultural Chemicals/Plant Protection Products
    - Agricultural Water
    - Animal Control
    - Soil Amendments
    - Vehicles, Equipment, Tools and Utensils
- Harvest
    - Pre-Harvest Assessment
    - Water and Ice
    - Containers, Bins and Packaging Materials Policy
    - Field Packing and Handling
    - Post-Harvest Handling and Storage
    - Field Packing and Handling
- Transportation (Field to Storage or Packinghouse)
- Equipment Sanitation and Maintenance

Food Safety Certification (Individual Food Vendors)

One of the most common types of food businesses is the small, individual vendor who prepares and sells food in their local community. These small businesses are also within the range of food-safety regulation. Many states, tribes and localities have established requirements for food vendors to obtain and maintain a food-safety certification in order to sell food legally within a particular jurisdiction. These certification programs are usually run at the local, county or tribal level. At their heart, these requirements are meant to address general health, safety and welfare of the consuming public. Moreover, these requirements are meant to be a tool to address the possible legal exposure and risk associated with allowing food production and sale within the confines of a particular location. These programs are also designed to educate food vendors and food handlers about proper handling techniques to minimize exposure to bacteria and food-illness and viruses that may cause sickness. Individual tribal food producers or processors should first check with their tribe or the county in which they reside or do business to see if a food-safety certification guide or code is available, and whether classes are available in the community to learn more.

GAP (Good Agricultural Practices for agricultural producers of a raw product)

Good Agricultural Practices (GAP) refers broadly to specific methods of handling, producing and processing agricultural products for sale that ensure the safety and wholesomeness of the food. Most GAP plans are required for agricultural businesses that are producing or selling a raw product. There are several organizations that offer differing GAP practices such as the Food and Agricultural Organization (FAO) of the United Nations, and the USDA GAPS program. Each has its own specific methods.

HACCP (for food producers of meat, seafood or food products)

In the early 1990s, food safety became a major issue because of outbreaks of food-borne illnesses throughout the country. The response to these outbreaks was the adoption of the Hazard Analysis and Critical Control Points (HACCP) processes, developed first by scientists in preparation for space launches in order to eliminate possible contaminants in food aboard spaceships and later incorporated into various sectors of the food industry. The meat and seafood industry are mandated to develop HACCP plans while other areas of the food sector can voluntarily submit HACCP plans. However, new proposed food regulations under FSMA may require producers of "registered facilities" to also submit HACCP plans. FDA has proposed these new extensions of the HACCP concepts but those rules are not yet final.

Generally, a HACCP plan includes the following key points:

- A hazard-analysis plan
    - Plans determine the food-safety hazards and identify the preventive measures the plan can apply to control these hazards
    - A food-safety hazard is any biological, chemical or physical property that may cause a food to be unsafe for human consumption.
- Identified critical control points
    - A critical control point (CCP) is a point, step or procedure in a food-manufacturing process at which control can be applied and, as a result, a food-safety hazard can be prevented, eliminated or reduced to an acceptable level
- Established critical limits for each critical control point
    - A critical limit is the maximum or minimum value to which a physical, biological or chemical hazard must be controlled at a critical control point to prevent, eliminate or reduce to an acceptable level
- Established critical control point monitoring requirements
    - Monitoring activities are necessary to ensure that the process is under control at each critical control point
- Established corrective actions
    - These are actions to be taken when monitoring indicates a deviation from an established critical limit
- Established procedures for ensuring the HACCP system is working as intended
    - Validation ensures that the production plants do what they were designed to do; that is, they are successful in ensuring the production of a safe product
- Established record-keeping procedures

Criminalization of Food Safety

In recent years, food safety has become a criminal issue. The first major highly-observed criminal case of food safety involved the Jensen Brothers; owners of Colorado based Jensen Farms, who were convicted of producing cantaloupe that caused a listeria outbreak, killing 33 people that consumed the tainted produce. It wasn't until recently that a farmer or an agricultural producer could be sent to prison and fined for releasing "adulterated" food products into the food market. With this in mind, food safety is a highly important issue for all producers, processors and retailers.

With heightened attention to food safety, there is even greater concern for contamination or "adulteration" of food and water as a matter of homeland security. While food safety was originally conceived as a domestic sanitation concern, , today food safety has evolved and is included in discussions of national security related to the necessity of preserving safety in the national food supply chain. Food-safety issues have long been the subject of case law usually brought by individuals who have been harmed by something related to the food they ingested against those who either sold or processed that food. Over time, and with the advancements of science, those potentially liable for putting "injurious foods" into the food supply have been able to be traced back to the farm. This is a trend that will likely only heighten over time, given the advancements of scientific detection processes and growing national concerns.

Other Food Safety Concerns

When entering the food chain with a food product, there are several other areas that may impact the food producer. Specifically, the contracts or agreements that the producer is involved with in business relationships may contain clauses or allocations of liabilities specifically spelling out food-safety issues. Often times, retail markets have food-sale contracts that incorporate food-safety issues that go beyond the food-safety regulations promulgated by the government. Therefore, food-for-sale contracts should be reviewed carefully. Among the areas where additional food-safety standards can be found include:

- Contracts (between food buyers and sellers and distributors)
- The Uniform Commercial Code deals with transactions of goods (Food is a "good" regulated by the provisions of the UCC addressing transactions in goods)
- Product liability law (Food is a product that can be placed into commerce and to which liability attaches for ensuring the safety of the product)

At its core, buying or selling food is a business and commercial transaction and subject to all laws regarding business transactions.

Conclusion

As this short paper demonstrates, food safety has evolved from merely an issue of sanitation to an elaborate system of legislation, regulation and monitoring that has implications for all involved in the food chain. This means that food safety must be a concern for tribes and individuals and businesses involved in the food chain within tribal jurisdictions. Tribal and non-tribal individuals and business must know the food safety standards of their localities. Tribes should monitor federal food safety law not only to ensure that food safety law includes the long-standing food environments of tribal nations, but to ensure that these food environments are protected for future generations.

Most importantly, tribes can develop food safety laws that codify and protect food sources, resources, practices, customs and patrimony. Moreover, and perhaps most importantly, tribal governments must look critically at their own infrastructure as it relates to food safety. Tribal governments must decide who will regulate the food chain within their jurisdictions: federal agencies, state or local governments? Or will they develop standards, regulations and enforcement agencies and authority for food-related dealings within their jurisdictions. If tribes do not enter their important conversations, sovereignty will be infringed and the food chain will be dictated by others. Most importantly, food is an important socio-economic and socio-cultural asset that is just as important as language, just as important as school choice, and greatly defines tribal nation identity that should be adamantly protected.

Additional Resources

For information about a tribally-created HACCP plan, see:
http://www.critfc.org

A link to information about the Food Safety Modernization Act:
http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm

A link to federal resources regarding food safety:
http://www.foodsafety.gov

For more information about current issues in food safety, see:
www.foodsafetynews.com

This website provides a wide array of information for small farmers and producers:
http://sustainableagriculture.net

For information specific to Native food systems, see:
http://nativefoodsystems.org/

For various resources dealing with Native agriculture and food systems, see:
http://firstnations.org/knowledge-center/foods-health

About First Nations Development Institute

Since 1980, using a three-pronged strategy of educating grassroots practitioners, advocating for systemic change, and capitalizing Indian communities, First Nations has been working to restore Native American control and culturally-compatible stewardship of the assets they own – be they land, human potential, cultural heritage or natural resources – and to establish new assets for ensuring the long-term vitality of Native American communities. First Nations serves Native American communities throughout the United States. For more information, visit **www.firstnations.org**.

About the Indigenous Food and Agriculture Initiative at the University of Arkansas School of Law

The Indigenous Food and Agriculture Initiative (IFAI) at the University of Arkansas School of Law works in multi-disciplinary ways to support tribal governance in food and agriculture; business development in tribal food and agriculture; and professional and youth educational development, specifically in the areas of legal and policy issues important to the success and support of tribal food, agriculture, health, nutrition and economic development. IFAI, with generous support from First Nations Development Institute, also provides education to the next generation of food and agriculture lawyers who will serve Indian Country.

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