

An aerial photograph of a large crowd of people in a plaza, with a red overlay containing text. The people are scattered across the plaza, which is marked with a grid of lines. The red overlay is a large rectangle in the center of the image, containing the text '2020 PUBLIC HEALTH LAW VIRTUAL SUMMIT COVID-19 Response and Recovery September 16-17'.

2020

PUBLIC HEALTH LAW
VIRTUAL
SUMMIT

**COVID-19 Response
and Recovery**

September 16-17

Executive Decision Making for COVID-19

Public Health Science through a Political Lens

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**Public health decisions should be based on
timely and reliable data and science
. . .But, information absent + a moving target**

» **Who is infected?**

» **Who is infectious?**

» **How does disease spread?**

» **What control measures work?**

» **Who has recovered? Who has died?**

» **Who is immune from re-infection?**

» **What resources do we have, who has them, &
how do we get more?**

Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

MUST I?

Legal question: Does law leave me no choice?

SHOULD I?

Policy & ethics question: How should I exercise my discretion?

Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

POWER . . .

- » **Do I have the power?**
- » **What is the scope of my power?**
- » **What interventions can I use?**
- » **Who else has power?**

Using law to protect the public's health

MUST I?

Legal question: Does law leave me no choice?

DUTY . . .

- » **Am I mandated to take action?**
- » **Am I mandated to take a particular action?**

Using law to protect the public's health

**SHOULD
I?**

Policy & ethics question: How should I exercise my discretion?

PROFESSIONAL JUDGMENT

Based on discretionary power ...

- Should I act?
- How should I act?
- When should I act?
- What should I consider in exercising my discretion to act, and the nature of my actions?

**Making
choices
vs. abusing
discretion**

Consider facts, principles, and law

Be able to articulate basis for decision

Show that you considered/weighed alternatives

Does decision make sense?

Is it reasonable?

vs.

Decisions that are “arbitrary” and “capricious”

**Doing nothing is doing something – make sure
doing nothing is a conscious choice**

**Arbitrary - not considered, ignores the facts,
whimsical**

Capricious - impulsive and unpredictable

Emergency declarations

- Provide maximum flexibility
- Often time-limited
- Often lack criteria/guidance

Legal Background

- Acts granting emergency powers
- Public health codes
 - General authority for state/local health department
- Usually include procedural safeguards

Legal Background

- Political context
 - Economic and scientific constraints
 - Need to balance disease prevention with economic harms
 - Split governance between governor/legislature
 - Attacks on public health officials

Legal Background

- Judicial constraints
 - Time limits on stay-at-home orders
 - Infringements on fundamental rights
 - First Amendment
 - Fourteenth Amendment
- Disputes between governor/state legislature

Executive Decision-Making: COVID-19

- Must I? No
- Can I? Yes—but not required
- Should I? Discretionary
 - When to declare emergency/what to include (i.e., masks, stay-at-home, essential businesses)
 - When to end emergency order
 - Role of scientific data/criteria
 - Balance of science, economics, and politics
 - Or, science through a political lens

State Analysis

- Examined 8 states (non-random sampling) by political party control (gov/legislature)
 - Alabama (R, R)
 - Arizona (R, R)
 - Colorado (D, D)
 - Florida (R, R)
 - Maine (D, D)
 - Michigan (D, R)
 - Texas (R, R)
 - Wisconsin (D, R)

State Analysis

- Party control
 - Four R/R states imposed no initial requirements; encouraged compliance with CDC guidelines
 - Remaining states required masks, social distancing, and phased re-opening
- Role of science
 - Difficult to assess/disentangle from political/economic considerations
 - Maine, Colorado, Wisconsin relied heavily to guide initial order and re-opening
 - Michigan relied specifically in re-opening

State Analysis

- Equity
 - Minimal equity considerations or specific reference to vulnerable populations
- Reopening
 - A function of disease spikes
 - Early relaxers (Alabama, Texas, Arizona, saw spikes after re-opening and imposed new restrictions; Florida imposed minimal restrictions)
 - Late re-openers saw limited spikes

State Analysis: Assessment

- Wide variation—feature of federalism
- National approach preferable
- Governors making political/economic decisions drove the process, not public health
- Four early re-openings show limits of public health in shaping policy
 - But influential for initial emergency declarations and decisions to retrench after spikes
- Public health science through a political lens

State Analysis: Recommendations

- Declarations must include
 - Specific epi data to support the order
 - Explanation of why the order is necessary
 - Explanation of why the order is consistent with personal freedoms
- Communications with public must be transparent
- Governors must protect public health officials
- Governors should instruct public health officials to incorporate equity considerations, including data collection on racial/ethnic disparities

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Questions?

See chapter: *Executive Decision Making for COVID-19: Public Health Science Through a Political Lens*

in on-line publication: **Assessing Legal Responses to COVID-19**

<https://www.publichealthlawwatch.org/covid19-policy-playbook>

UPHOLDING TRIBAL SOVEREIGNTY AND PROMOTING TRIBAL PUBLIC HEALTH CAPACITY DURING THE COVID-19 PANDEMIC

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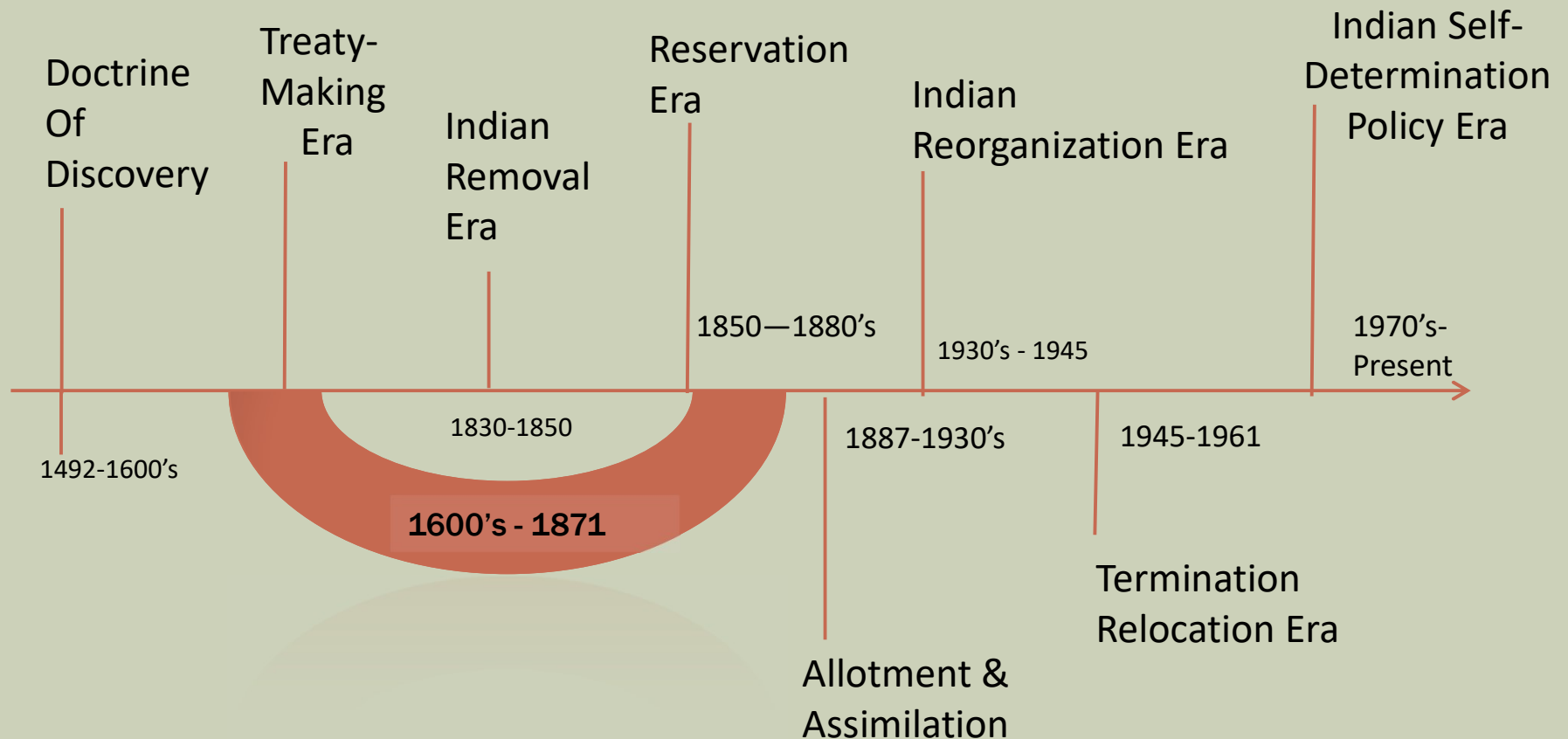
Public Health Law Virtual Summit: COVID-19
Response and Recovery, September 17, 2020



THE BASICS: US HISTORY

- **Articles of Confederation, Article IX (1781)** – States have primary authority
- **U.S. Constitution (1789)** – Federal government has authority to regulate commerce with foreign nations, among the state, and with Indian Tribes; supremacy clause; etc.
- **Doctrine of Discovery (1823)** – Reliance on this doctrine to justify colonization under federal law *Johnson v. M'Intosh*, 21 U.S. 543, 595
- **Indian Civil Rights Act (1968)** – applies many of the protections (not all) found in the Bill of Rights to Tribes

FEDERAL INDIAN POLICY AS A DETERMINANT OF HEALTH





HISTORICAL TRAUMA

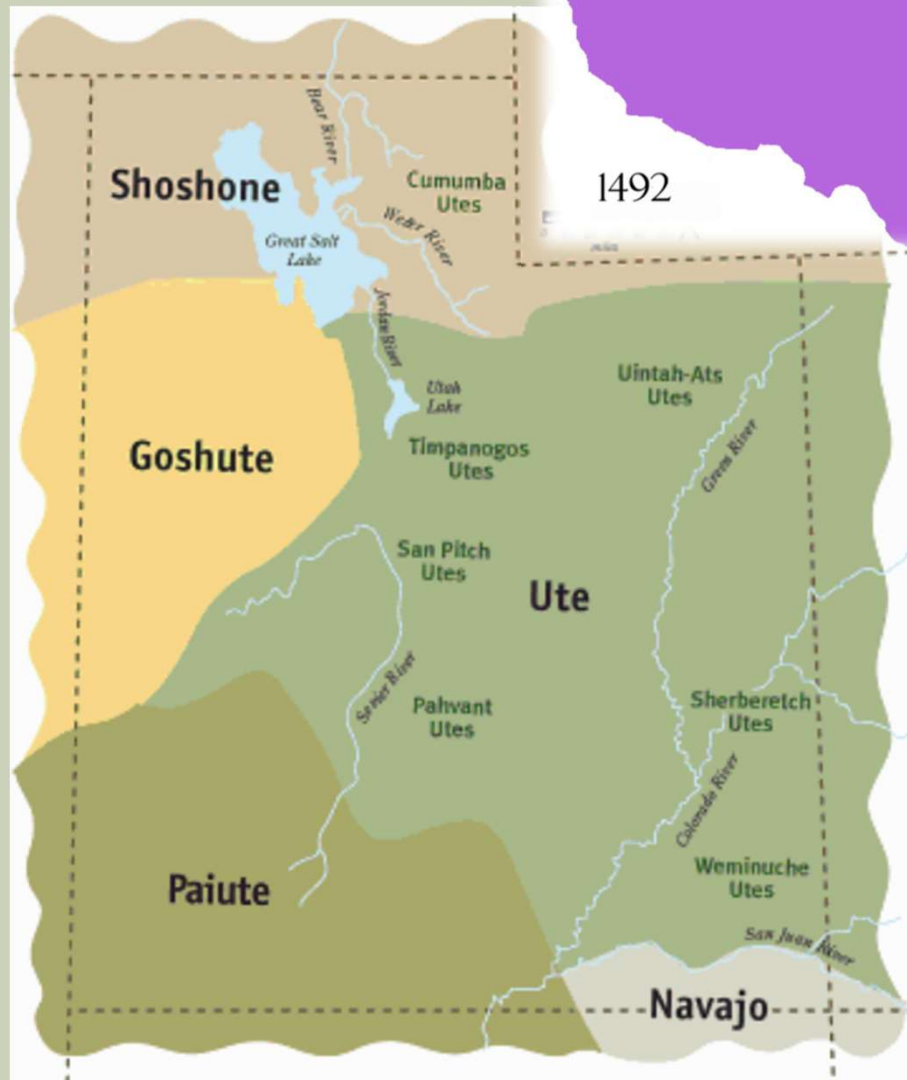
Forced
Relocation

Boarding
Schools

Sterilization

Live Stock
Reduction

Uranium Mining



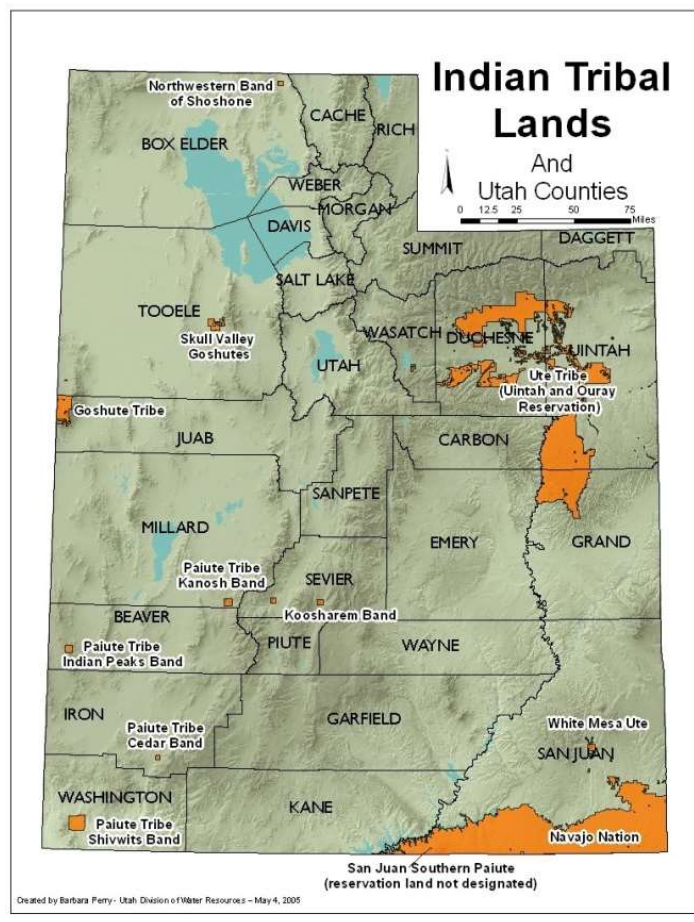
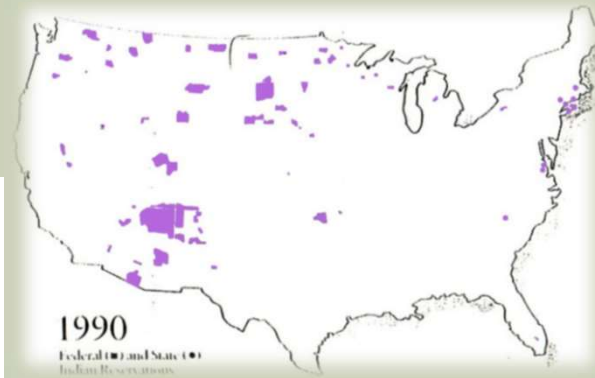
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JURISDICTION

THEN AND
NOW

THEN AND NOW



TRIBAL SOVEREIGNTY & TRIBAL INHERENT AUTHORITY

- Tribes have inherent authority as sovereign nations to protect and promote the health and welfare of their citizens using the methods most relevant for their communities
- Tribal inherent authority is a “plenary and exclusive power over their members and their territory, subject only to limitations imposed by federal law,” and includes the power to determine the form of tribal government and the power to legislate and tax, among others

HEALTH INEQUITIES AND RESILIENCIES

- AI/ANs are experiencing
 - COVID-19 infections at higher rates than other groups in several states; and
 - worse COVID-19 outcomes than other groups in certain locations.
- Tribal Resiliencies
 - Lummi Nation began building a field hospital in early 2020
 - CAREs Act Funding going towards new health facilities, distributions to citizens, community gardens



BARRIERS: FEDERAL LAW

- Reneging on treaty and trust responsibility requirements for health care, personal protective equipment
- Inadequate access to public health data
- Water and food insecurity
- Inadequate or ineffective consultation
- Strategic National Stockpile access

CONSIDERATIONS: INTERGOVERNMENTAL COORDINATION

- Jurisdictional issues in the provision of public health services
 - States have limited jurisdiction on Tribal lands
 - Tribal Civil Jurisdiction over Nonmembers: *Montana* Test
- Cross-jurisdictional agreements and MOUs
- Emergency Management Plans
- Data access

CONSIDERATIONS: TRIBAL LAW

- Establishing new public health processes
- Intragovernmental responsibilities
- Tribal codes, plans, and policies help operationalize public health activities and prevent confusion in real time.
 - Designation of a certain department as the public health authority
 - Designation of a certain position as a public health officer
 - Designation of responsibilities across different departments and entities, including clinics
- Tribal administrative law considerations – hard to predict
- Consideration for clinics: is the activity within the scope of your ISDEAA contract? do you already perform services and programs outside of your contract?

RECOMMENDATIONS FOR ACTION

Tribal governments

- Continue to incorporate culturally appropriate mechanisms when using legal measures to contain the spread of COVID-19.
- If not already in place, consider passing a public health code that contemplates issues of health communications, quarantine and isolation, incident command systems, and a point of contact for public health issues for the Tribe.
- Consider entering into data sharing and mutual aid agreements or memoranda of understanding with neighboring jurisdictions, Tribal Epi Centers, and clinics to support and coordinate COVID-19 responses. Work with Tribal counsel to ensure that Tribal sovereign rights are not compromised in such agreements.

RECOMMENDATIONS FOR ACTION

Federal government



Honor trust responsibility and consultation requirements as outlined by federal law.

- Provide funding mechanisms directly to Tribes at rates equal to or higher than those provided to states and local governments. Do not delay in the distribution of such funds. Do not use Tribal-serving organizations or entities as proxies for funding directly to Tribes.
- Require state and local government recipients of COVID-19 grants and cooperative agreements to meaningfully consult with Tribes in the area in the disbursement of funds or services. Require documentation of such consultation as a condition of funding.
- Sufficiently fund IHS, Tribal health facilities, and Urban Indian health centers.
- Provide additional funding for other Indian health programs. For example, permanently reauthorize the Special Diabetes Program for Indians. Alternatively, provide a long-term reauthorization of SDPI.

RECOMMENDATIONS FOR ACTION

State and local governments

- If not already in place, enact law that requires consultation with Tribes in the area if the state or local government is making law or policy that impacts the Tribe.
- Work with Tribal governments to enter into data sharing and mutual aid agreements or memoranda of understanding. Do not require Tribes to waive sovereign rights as a condition of these agreements.
- Share COVID-19-related public health data with Tribes.
- Respect Tribal authority and jurisdiction to promote the health and welfare of their communities and to implement COVID-19 response measures on their lands, including curfews, checkpoints, mask wearing, and other requirements.

WE WANT YOUR INPUT!

- Ideas? Suggestions?
- This report will be updated and republished.

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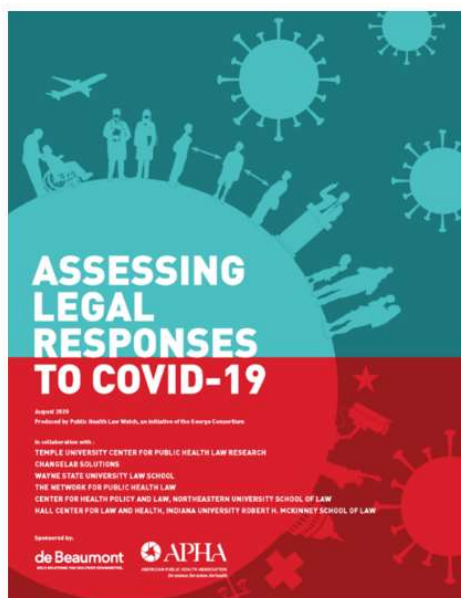
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If you're tweeting from the Summit, remember to use this hashtag to share your insights with Summit attendees and others:
#COVID19PolicyPlaybook

Access the full *Assessing Legal Responses to COVID-19* report or individual chapters at:
COVID19PolicyPlaybook.org