

# Tribal are Public Health Authorities

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September 21, 2021

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# Hello from Tulsa, Oklahoma!

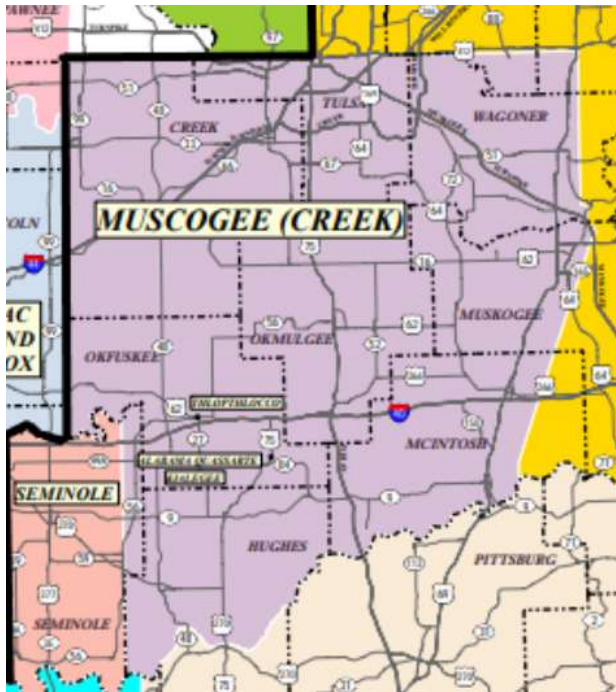
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Disclaimer  
+  
Content  
Warning

# Acknowledgments

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# Why are we here?

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- Confusion regarding Tribal public health powers in practice
- Infringement of Tribal sovereign powers by other governments as it relates to public health activities
- This impacts data access in practice
- Q&A: happy to answer more specific questions on data access & law

# What do you mean by public health authority?

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- **Public Health Authority:** the authority of a government to engage in public health activities as part of its official duties
- BUT, “**public health authority**” is also a legal term under federal law in the context of health information

will talk about both...

# Tribal Gov'ts and Federal Indian Law

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# Tribal Governments & Federal Indian Law

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- 574 federally-recognized Tribes within the boundaries of the United States.
- Tribes are sovereign nations with a government-to-government relationship with state and federal governments.
- Tribes maintain jurisdiction over their lands and people.
- Tribes pass laws; adjudicate disputes; and maintain governments.
- There are complex jurisdictional tests and statutory schemes that govern (**and complicate!**) relationships between Tribes, states, and the federal government in practice.

# Tribal Law v. Federal Indian Law

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## Federal Indian Law

- The body of law that defines the rights, responsibilities, and relationships between Tribes, states, and the federal government.

## Tribal Law

- The laws of individual Tribes including constitutions, codes, case law, and customary law

# What is Tribal Sovereignty?

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- **Sovereignty**: the right to make their own laws and be ruled by them
- Tribal sovereignty extends across Tribal citizens and Tribal lands
- This sovereignty is an inherent authority and not based on federal law.
- Tribal sovereignty remains intact unless explicitly removed by congress or implied by “domestic status”

\* about to discuss more

# Where does Tribal sovereignty come from?

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- “The case . . . depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative.” *Talton v. Mayes* (1896). See also, *US v. Wheeler* (1978)
- “As separate sovereigns pre-existing the Constitution, tribes have . . . been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez* (1978)

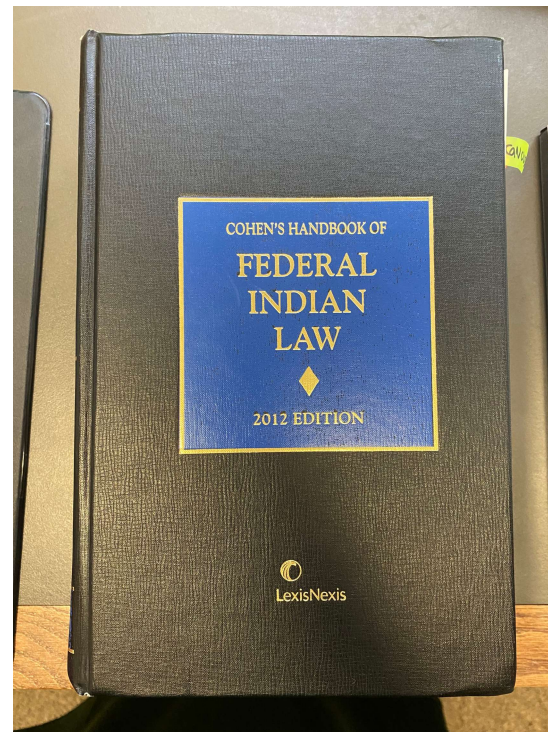
Not the US Constitution or fed govt!!

# Where does Tribal sovereignty come from?

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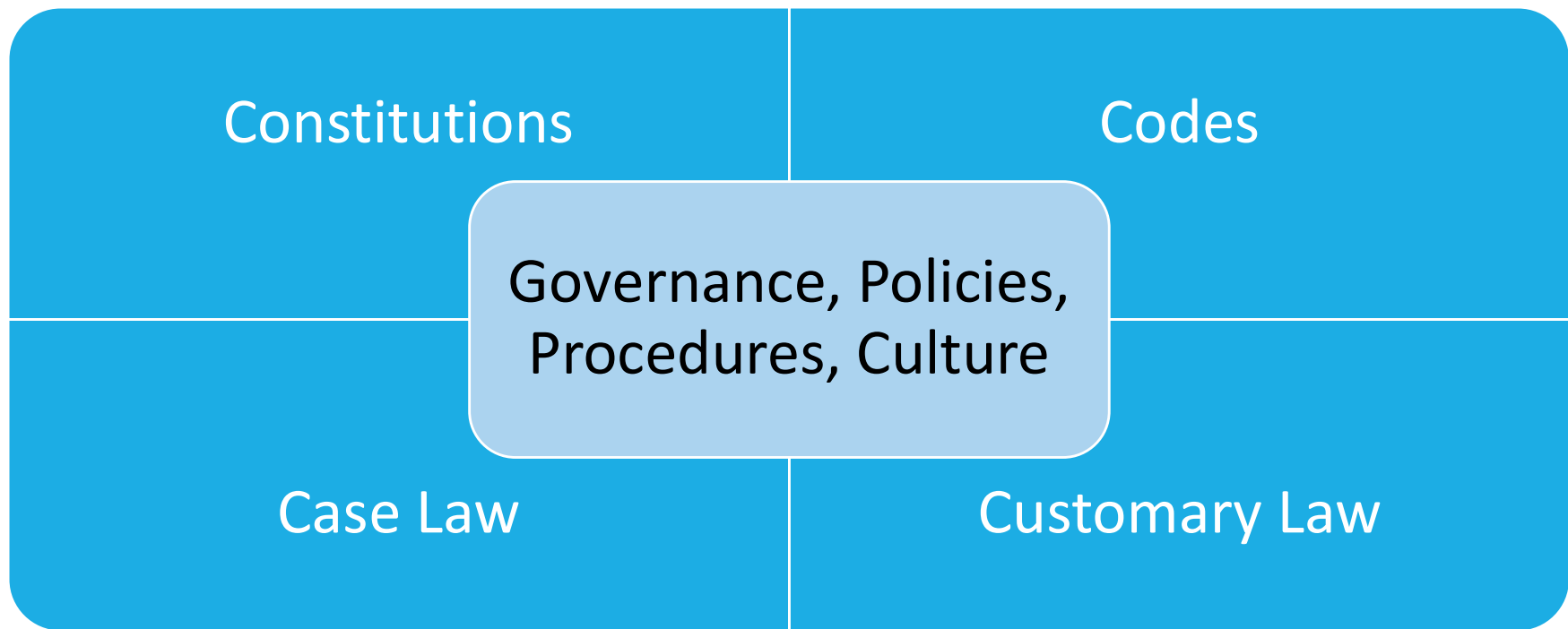
“Those powers which are lawfully vested in an Indian tribe are not . . . delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”

*Cohen's Handbook* (1941)



# Tribal Law

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# Plenary Power Doctrine

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- The Supreme Court held that Congress has plenary power to legislate regarding all matters concerning Indians.

*Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883)

*United States v. Kagama*, 118 U.S. 375, 384–5 (1886)

# Loss of Sovereign Powers & Treaty Rights

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- Loss of Sovereign Powers
  - Express by Congressional plenary power
  - Implied by “dependent status” or by virtue of being “conquered”
- Abrogation of Treaty Rights
  - At will power by Congress
  - Requires clear congressional intent; does not need to be express

# Tribal Sovereignty & Tribal Inherent Public Health Authority

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- 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. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][b]; § 4.01[2]

# What does this all mean?

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- ~~Federal law must grant Tribes government powers to exercise public health.~~

No!!!

- Tribes can exercise public health authority until Congress explicitly says otherwise.

Yes!!! [even if I don't like the Congress part]

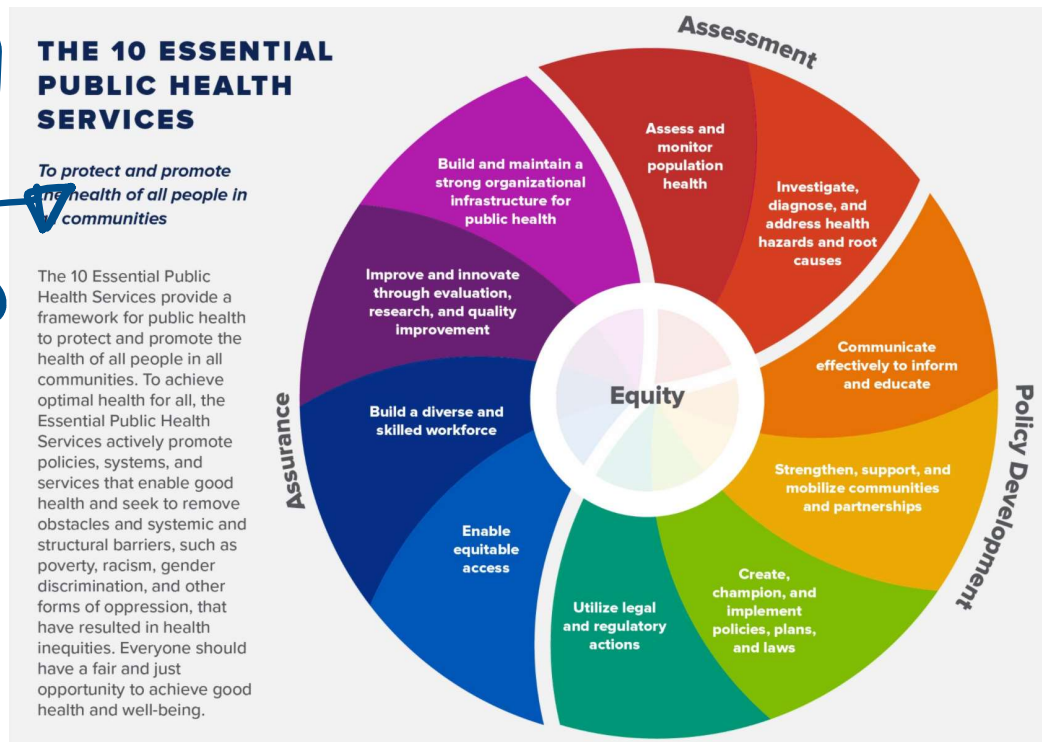
Has Congress said otherwise?

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NO

# What does exercising governmental public health authority look like?

Any of these



**BUT**, it could also anything else a Tribe feels is appropriate, based on financing, history, culture, community, laws etc. Each Tribe is unique and can choose to if, when, and how to exercise their public health powers.

But doesn't the federal gov't have powers and responsibilities too?

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Yes

- In general, the federal government has **concurrent jurisdiction** across many areas in Indian country, including public health (i.e. to intervene in infectious disease threats in Indian country, through isolation and quarantine" 25 U.S.C. § 198)

US Constitution says these are the Supreme law of the land

## Treaty and Statutory Obligations

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- Treaties between the federal government and numerous Tribes obligated the United States to provide health care and other services to Tribes and American Indians in exchange for ceded territory.
- The Snyder Act, Indian Health Care Improvement Act and other laws and legally binding documents reaffirm these obligations.

# Trust Responsibility

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“In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, **it has charged itself with moral obligations of the highest responsibility and trust.**”

*Seminole Nation v. United States*, 316 U.S. 286, 296–7 (1942)

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# Trust Responsibility

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“The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as **a duty to carry out the mandates of federal law** with respect to American Indian and Alaska Native tribes and villages.”

Bureau of Indian Affairs

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# Trust Responsibility

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“The United States has mismanaged Indian trusts for nearly as long as it has been trustee.”

Cobell v. Norton (“Cobell VI”), 240 F.3d 1081, 1086 (D.C. Cir. 2001)

# What does this mean for Tribal authority?

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- The federal obligation to provide health care **does not limit Tribal public health authorities.**
- Each Tribe decides if, when, and how to exercise their public health authorities [especially to mitigate for the consistent and pervasive failures of the United States to honor its legal obligations to Tribes]

# Health Insurance Portability and Accountability Act

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Doesn't HIPAA say something about public health authorities? **Yes!**

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- HIPAA requires “covered entities” (such as hospitals, clinical laboratories, nursing homes, physicians, and health plans) to protect “protected health information” (PHI)
- HIPAA allows for the “covered entities” to provide PHI to “public health authorities” such as state, local, **Tribal agencies** and TECs for certain public health purposes

So, Tribes are PHA under HIPAA... give them data!

# Tribal Law

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## Tribal Public Health Laws

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depends on the  
Tribe

- Some Tribal constitutions explicitly reference promoting public health and safety as powers of the Tribal governments.
- Some Tribes have explicit public health codes and public health agencies
- Some Tribe have public health powers decentralized across multiple offices and agencies
- Public health programming, policies, and activities will vary from Tribe to Tribe

# Do Tribes have to have certain public health laws to engage in public health activities?

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- Not to prove anything to state or local governments on their jurisdiction!
- **BUT**, public health codes can support **external legitimacy** to facilitate relationships with other governments
- **AND**, public health codes can operationalize public health activities internally for some Tribes
- **Remember**: Tribal law may necessitate certain legislative, administrative or other processes to be established for certain public activities. **Depends on the Tribe.**
- Federal grants, agreements, contracts **may** specify certain requirements as a condition of funding.

# Summary

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- No law, federal or Tribal, is needed to grant Tribes the authority to engage in public health activities.
- Engaging in public health activities is an inherent power of Tribes as sovereign nations.
- Federal law recognizes Tribal sovereignty and states that Tribes retain all powers of its inherent sovereignty unless clearly divested by Congress.
- No federal law exists that clearly divests Tribes of their authority to engage in public health activities.
- Although not the source of Tribal public health authority, the federal government recognizes this power under federal law and programming.
- Tribal public health codes designating public health officers, agencies, and duties can be used as a tool to protect Tribal public health jurisdiction from infringement by state and local governments or implied divestment by federal courts.
- State, local, and federal agencies should recognize each Tribe's unique and sovereign authority to engage in public health activities.

Thank you!

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- share resources
- some capacity to provide legal technical assistance

Aila Hoss, JD

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The background of the poster is a photograph of a city waterfront at dusk or dawn. On the left, a modern building with a glass facade reflects the sky. In the center, a body of water with several boats is visible. On the right, a large stadium with a white, curved roof is prominent. The sky is a mix of soft pinks, oranges, and blues. Overlaid on the image are several thin, dotted lines in a teal color, crisscrossing the scene.

# 2021

## **VIRTUAL PUBLIC HEALTH LAW CONFERENCE**

**Building and Supporting  
Healthy Communities  
for All**

**September 21-23**

# **Promoting Data Sharing while Protecting Tribal Sovereignty: The Role of Law**

Ramona Antone Nez, *Navajo - Iroquois Oneida*

Navajo Epidemiology Center

Navajo Department of Health

<https://www.nec.navajo-nsn.gov/>

<https://www.ndoh.navajo-nsn.gov/COVID-19>



# TRIBAL EPIDEMIOLOGY CENTERS

<https://tribalepicenters.org/>

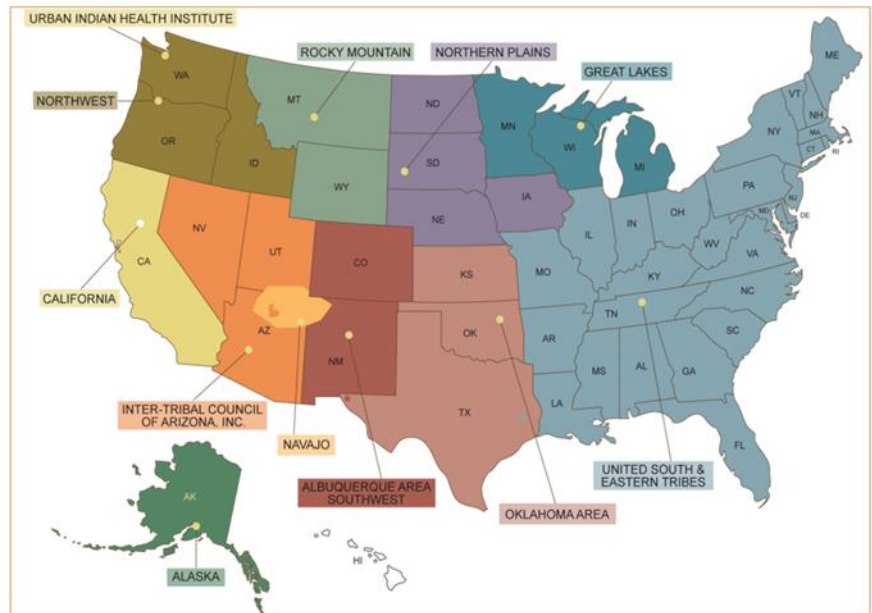
## 12 Tribal Epidemiology Centers

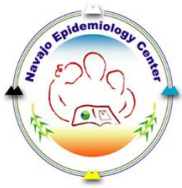


- TECs serve the American Indian, Alaska Native Tribal and urban communities.
- TECs are established and funded by the Indian Health Services DEDP.
- TECs are designated public health authorities.
- TECs have 7 Core Functions.
- TECs are dedicated and contribute to improving the health status of our Populations.

## Tribal Epidemiology Centers

There are 12 Tribal Epidemiology Centers (TECs) throughout the United States. The map below shows the 12 TECs and regions they represent.  
(Click on TEC site for more information).

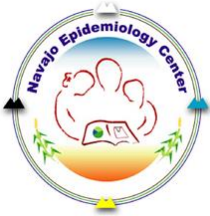




# Tribal Inherent Authority

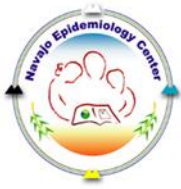
- K'e
  - Clan
  - Kinship
- Navajo language
- Cultural values
  - Roles and responsibilities
  - Traditional medicine
- Navajo Nation Treaties with the United States
- Land-base is similar to the size of the State of West Virginia at approximately 27,000 square miles





# Tribal Public Health Law

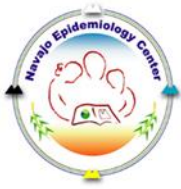
- The Treaty of 1868, United States and Navajo Tribal leaders signed Treaty on June 1, 1868
- Synder Act of 1921 (P.L. 67-85)
- Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638)
- Patient Protection and Affordable Care Act of 2010 (P.L. 111-148)
  - Indian Health Care Improvement Act (P.L. 94-437)
    - Tribal Epidemiology Centers designated as public health authorities
- Navajo Nation Code Title 2 of the Navajo Department of Health Act of 2014 by Amending 2 N.N.C. §§ 1601 et seq. (CO-50-14)
  - Navajo sovereignty and self-government
  - Title 2 N.N.C. § 1604 Powers and Authority
  - To ensure that quality comprehensive and culturally relevant health care and public health services are provided on the Navajo Nation.



# Promoting Public Health

- MOU with AZ, NM, UT Department of Health
- DSA with Navajo Area Indian Health Services
- Connection with Navajo Nation Leadership
- Partnerships





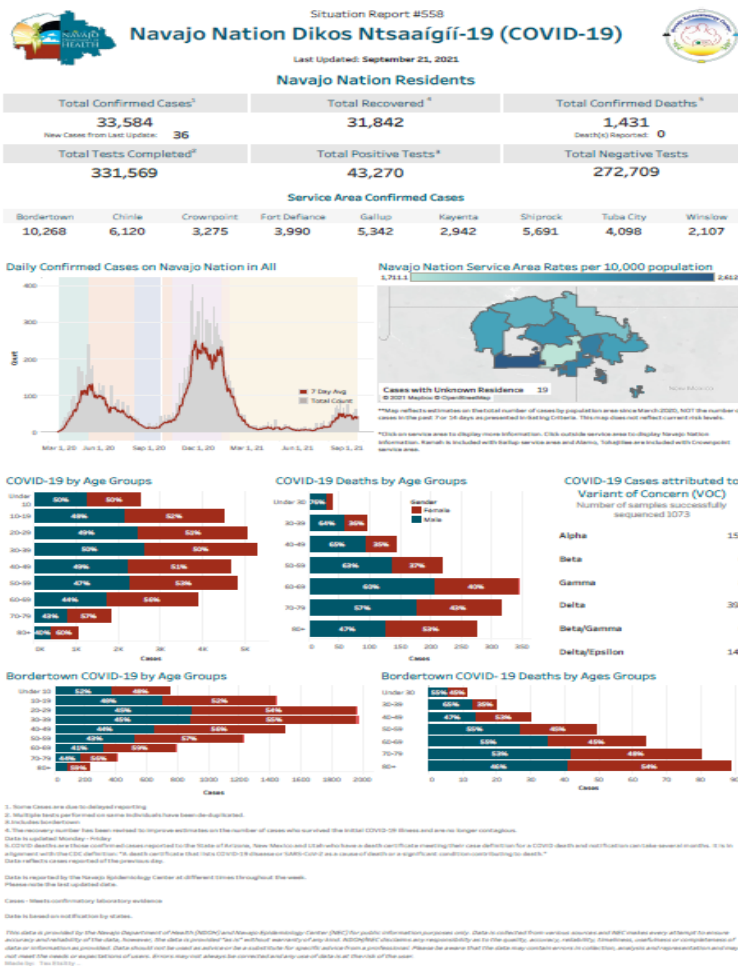
# Navajo Department of Health - Health Command Operating Center

- COVID-19 Public Health and Medical Response
  - Epidemiology & Data Translation
  - Messaging
  - Case Investigation
  - Mitigation

<https://www.ndoh.navajo-nsn.gov/COVID-19>



# Navajo Department of Health - Health Command Operating Center





# The Navajo Nation

- Navajo Language - Hozho
- K'e
- Leadership
- Resilience



J. GORMAN - SANTA FE ARTS



2021

PUBLIC HEALTH LAW  
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Healthy Communities for All

Sep. 21-23, 2021  
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# Ahéhee'

<https://www.nec.navajo-nsn.gov/>

<https://www.ndoh.navajo-nsn.gov/COVID-19>

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# 2021

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**PUBLIC HEALTH LAW  
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**Sep. 21-23, 2021  
PHLC2021.org  
#PHLC2021**

# **Expanding Data Sharing in Indian County**

Joshua Smith

Health Communication and Evaluation Specialist

Northwest Portland Area Indian Health Board

# Who am I?



## Education

- Graduated from Portland State University
- Didn't fair as well in Clinical Psychology

## Career

- Began in addiction research
- Started working at the Urban Indian Health Institute (UIHI)
- Began working at the Northwest Portland Area Indian Health Board (NPAIHB)

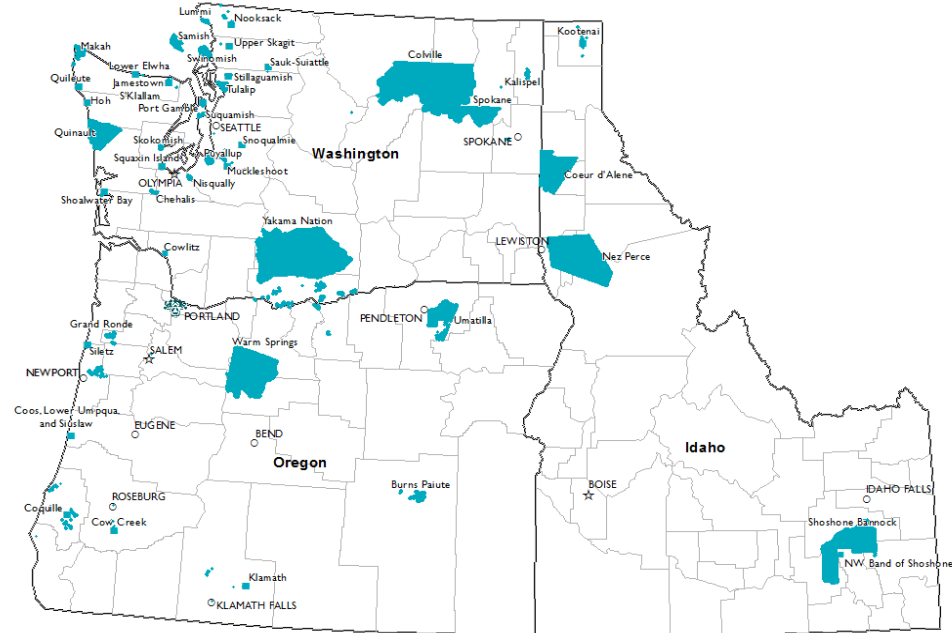
## Personal Information

- Paiute and Modoc
- Enjoys getting old machines to work
- Has an irrational fear of raccoons

# Northwest Portland Area Indian Health Board

## Mission:

To eliminate health disparities and improve the quality of life of American Indians and Alaska Natives by supporting Northwest Tribes in their delivery of culturally appropriate, high quality healthcare



# What makes public health unique?

- Often people find themselves in public health
  - Desire to do good might be higher than specific skills
- Tribes, Tribal Organizations and Urban Indian Health Programs have unique considerations
- History can make data and research a difficult topic to navigate
- Partners may have lack of experience

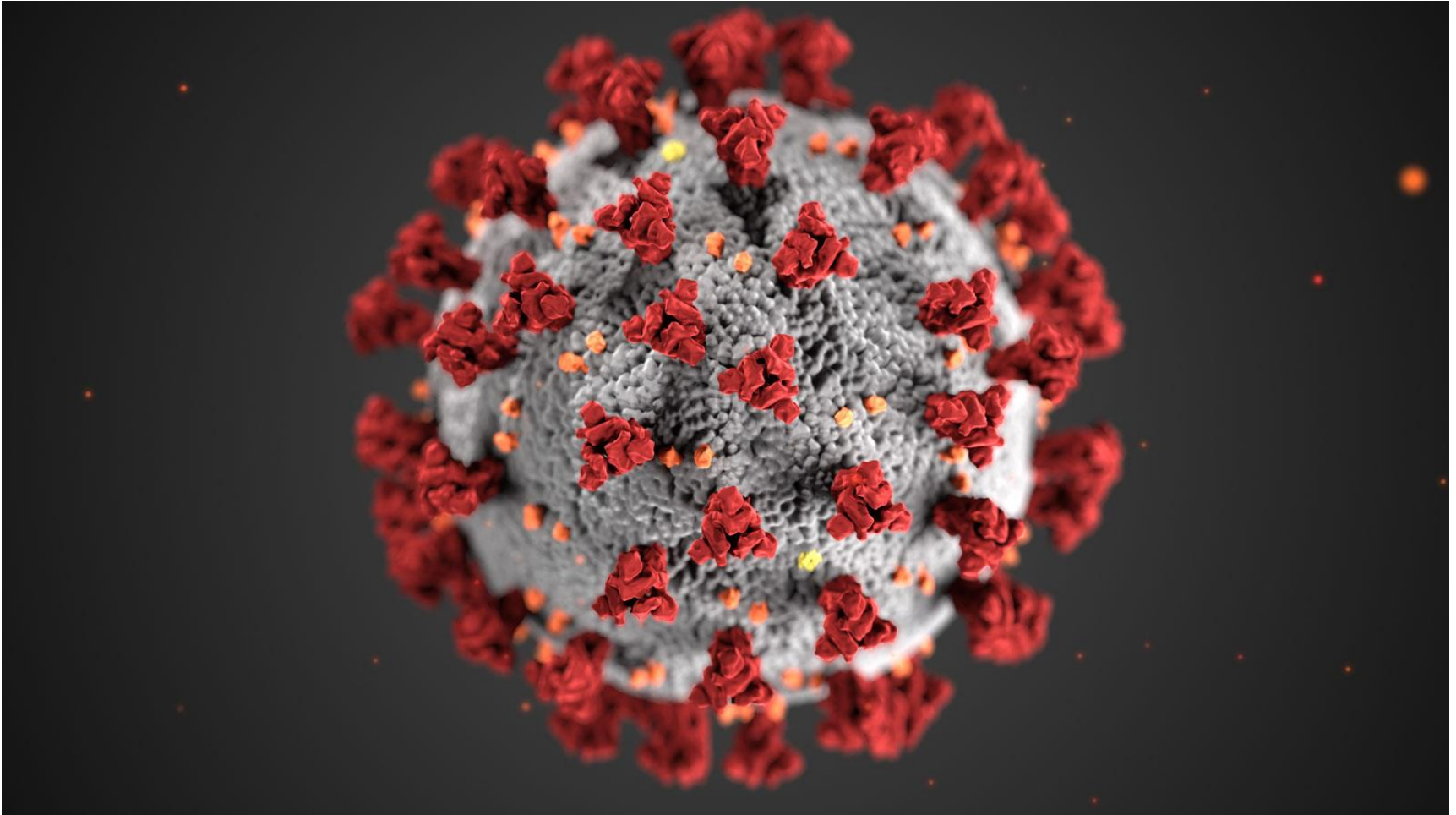
# What we wanted to do

- Help states and federal partners understand the unique situation of Tribes, Tribal Organizations and Urban Indian Programs
- Help Tribes, Tribal Organizations and Urban Indian Programs understand the data sharing process
- Highlight the success stories of those innovators in data sharing

# Scope of the project

- 1 year of funding
  - Approximately 9/20-9/21
- Recruit a workgroup
  - As diverse as our audience
- Hold 2 in-person meetings/ workshops
- Develop a data sharing toolkit
  - Emphasis on success stories
- Disseminate

# Then COVID-19 happened



# Adaptation

- Recruited a workgroup
- Moved to digital
- Held out for in-person meetings



Work Group to

## Promote Successful Data Sharing with American Indian/ Alaska Native Communities

**Purpose**  
The Northwest Portland Area Indian Health Board, in partnership with the National Association of County and City Health Officials (NACCHO) are developing a working group of tribal data experts, public health practitioners serving tribes and other native serving partners. The purpose of the work group is to identify legal and practical strategies that have proven to be successful in supporting, facilitating, and enhancing public health focused data sharing. We hope to improve insight into data the needs of tribes and urban communities along with highlighting success these groups have had with surveillance data.

**Commitment**  
Once a month meetings over 9 months with possible in-person meeting (COVID-19 permitting)

**Compensation**  
\$2500 for 13 members \$4500 for 2 chairs

**Interested?**  
Fill out the form below and send your current resume or curriculum vitae (CV) to [jsmith@npaihb.org](mailto:jsmith@npaihb.org)  
[https://forms.office.com/Pages/ResponsePage.aspx?id=5mOFFQP1QUu-jcyKOf1u6X2zSb02dy5lq\\_N4BPz0Ey9UNTFEQU1VS0NDVzQ2WVIVVjBYNTE3RjQ4VC4u](https://forms.office.com/Pages/ResponsePage.aspx?id=5mOFFQP1QUu-jcyKOf1u6X2zSb02dy5lq_N4BPz0Ey9UNTFEQU1VS0NDVzQ2WVIVVjBYNTE3RjQ4VC4u)

**Questions?**  
Joshua Smith, BS  
[jsmith@npaihb.org](mailto:jsmith@npaihb.org)  
Sujata Joshi, MSPH  
[sjoshi@npaihb.org](mailto:sjoshi@npaihb.org)



**Application Due November 19 2020**

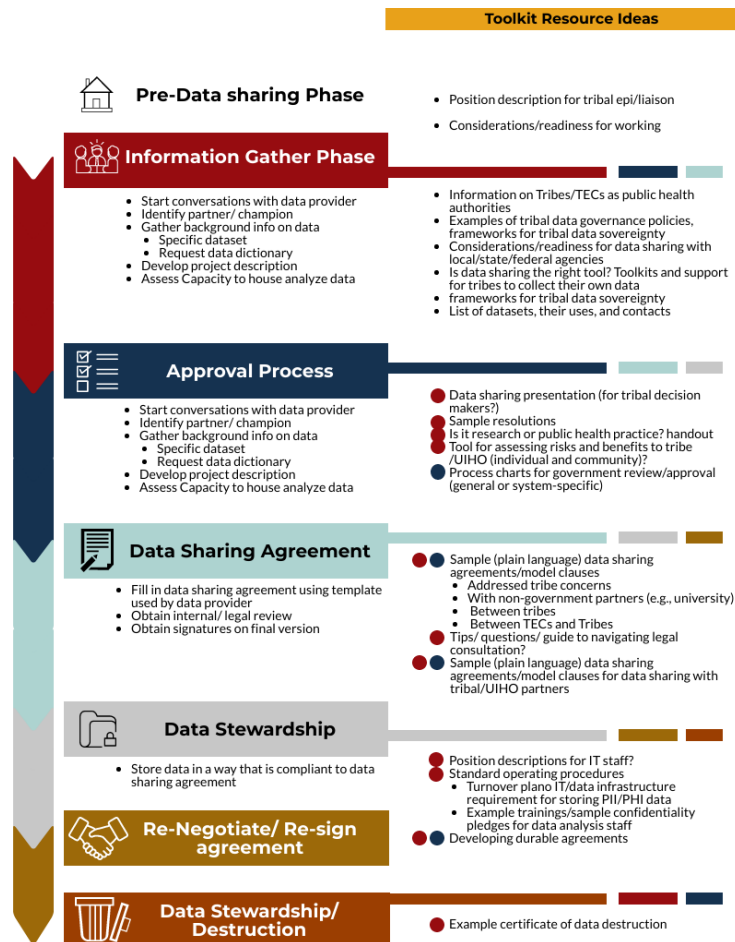
# That first meeting feel

## What we learned

- People were excited
- Struggles are at the forefront
- Partnerships are important
- Sovereignty is important
- Great things are happening
- People were especially busy
- Competing demands
- Less time per session
- Lack of focus
- Fitting in all perspectives

# Where we started

- Made sense to our group
- Provided a roadmap
- Identified gaps
- Too complicated
- Hard to understand
- Too ambitious
- Too linear



# Where we ended up

## Defining Your Goal

- Is sharing a smart choice?
- What are you asking?

## Is sharing data a good idea?

- DSA
- Questions to ask

## Building relationships

- Success stories
- Strategies

## Obtaining data

- Types of data and their location
- Questions to prepare for

## Getting approvals

- Communicating process
- Managing expectations

# Handouts

- Is requesting data the right choice?
- Common databases
- Data supports for Tribes and Native serving organizations
- Tribal data sovereignty considerations
- Public health authority status
- Building successful data partnerships
- Tips for obtaining health data

# Handouts continued

- Making a request for data
- Data agreements worksheet
- Data stewardship considerations
- Clearly communicating about data sharing
- Planning for the approval process
- Is sharing your data a good choice?

# It was a lot of work...



# What we did

- Bi-Weekly meetings to review/ edit
  - (The kind of bi-weekly that is every other week)
- Compiled the resources we could for each section
- Created a couple templates for DSA and policy
- Created 13 targeted handouts to supplement
- Developed a website
- Collected 5 detailed success stories

# Where we see things going

- Website should be finished by the end of this month
  - [nativedata.npaihb.org](http://nativedata.npaihb.org)
- Start email and communication campaign  
October
- Hold a webinar to help people get oriented to the resources

# Lessons learned

- Digital work can be exhausting for everyone
- People have little time but interest in data sharing motivated everyone
- Everything took more time than we thought
- There is a lot of innovation across Tribes, Tribal Organizations, Urban Indian Health Programs, States, Regional and Federal entities



# Outro Slide

Please remember to fill out the conference survey location in the description of this session