

THURSDAY AND FRIDAY, SEPTEMBER 5-6, 2019

32ND ANNUAL INDIAN LAW SYMPOSIUM

UNIVERSITY OF WASHINGTON SCHOOL OF LAW, SEATTLE

11.25 CLE CREDITS APPROVED

(INCLUDES 10.25 LAW & LEGAL PROCEDURE CLE CREDITS; 1.00 ETHICS CREDIT)

THURSDAY, SEPTEMBER 5, 2019

4.50 Law & Legal Procedure CLE Credits and 1.00 Ethics CLE Credit Approved

8:30 a.m. **Registration and Coffee**

8:55 a.m. **Introduction and Conference Overview**

Professor **Robert T. Anderson**, University of Washington School of Law, Seattle, WA

9:00 a.m. **Litigation Update**

Thomas Schlosser, Morisset, Schlosser, Jozwiak & Somerville, Seattle, WA

9:45 a.m. **Violence Against Women Act Reauthorization and Federal Legislative Update**

Deborah Parker, (Tulalip), Board Member, National Indigenous Women's Resource Center

Eric Eberhard, Affiliate Assistant Professor, University of Washington School of Law, Seattle, WA

10:45 a.m. **Break**

11:00 a.m. **Trusting Technological Security: Ethical Quicksand for the Unsuspecting Lawyer**

Brenda Williams, Senior Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, WA

Stacey Lara, Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, WA

12:00 p.m. **Lunch (on your own)**

1:30 p.m. **Fisheries Co-Management Issues in Western Washington: The North of Falcon Process**

Lorraine Loomis, Fisheries Manager, Swinomish Indian Community, LaConner, WA

Ron Warren, Assistant Director, Fish Program, State of Washington, Olympia, WA

John Hollowed, Legal/Policy Advisor, Northwest Indian Fisheries Commission, Olympia, WA

3:00 p.m. **Break**

3:15 p.m. **Off-Reservation Hunting Rights after *Herrera v. Wyoming***

Colette Routel, Mitchell-Hamline School of Law, St. Paul, MN

Julie Kane, General Counsel, Nez Perce Tribe, Lapwai, ID

4:30 p.m. **Adjourn**

4:40 p.m. **Meeting of the Washington State Bar Association Indian Law Section**



Northwest Indian Bar Association Annual Dinner and Silent Auction
Thursday, September 5th
UW Center for Urban Horticulture
3501 NE 41st St
Seattle, WA 98105
Networking hour and silent auction begin at 5:00pm

FRIDAY, SEPTEMBER 6, 2019

5.75 LAW & LEGAL PROCEDURE CLE CREDITS APPROVED

- 8:30 a.m. **Registration Check-In and Coffee**
- 9:00 a.m. **Indian Policy Issues at the Department of the Interior: A Discussion with the Hon. Sally Jewell, former Secretary of the Interior**
Sally Jewell, Distinguished Fellow, University of Washington College of the Environment, Seattle, WA
Robert Anderson, Professor of Law, University of Washington School of Law, Seattle, WA
- 10:15 a.m. **Break**
- 10:30 a.m. **Antiquities Act Litigation: The Bears Ears National Monument**
Natalie Landreth, Senior Staff Attorney, Native American Rights Fund, Anchorage, AK
Patrick Gonzalez Rogers, Executive Director, Bears Ears Inter-Tribal Coalition
Sarah Krakoff, Moses Lasky Professor of Law, University of Colorado School of Law, Boulder, CO
- 12:00 p.m. **Lunch (on your own)**
- 1:15 p.m. **Indian Water Rights and the Yakima Basin Integrated Water Management Plan**
Rachael Osborn, Attorney at Law, Vashon Island, WA, *Moderator*
Tom Ring, Hydrogeologist, Yakama Nation Water Resources Program, Toppenish, WA
Jeff Schuster, Law office of Jeff Schuster, Seattle, WA
Phil Rigdon, Superintendent, Department of Natural Resources, Yakama Nation, Toppenish, WA
- 3:15 p.m. **Break**
- 3:30 p.m. **The Future of the Federal Subsistence Fishing and Hunting Priority in Alaska, and Trust Land Regulation Update**
Robert Anderson, Professor of Law, University of Washington School of Law, Seattle, WA
- 4:30 p.m. **Adjourn**



32ND ANNUAL INDIAN LAW SYMPOSIUM SPEAKERS' BIOGRAPHIES

THURSDAY, SEPTEMBER 5, 2019

8:55 a.m. Introduction and Conference Overview

Robert T. Anderson

Professor of Law, University of Washington School of Law, Seattle, Washington

Robert Anderson is a Professor and Director of the Native American Law Center at the University of Washington School of Law and is the Oneida Indian Nation Visiting Professor of Law at Harvard Law School where he teaches annually. He teaches primarily in the areas of American Indian law, water law, natural resources law, and property law. He is a co-author and member of the Board of Editors of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) and (2012). He is a co-author of Anderson, Berger, Frickey and Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY (3RD ED. 2015). He spent twelve years as a Staff Attorney for the Boulder-based Native American Rights Fund where he litigated major cases involving Native American sovereignty and natural resources. He was one of the two attorneys who opened NARF's Alaska office in 1984. From 1995-2001, he served as a political appointee in the Clinton Administration under Interior Secretary Bruce Babbitt, providing legal and policy advice on a wide variety of Indian law and natural resource issues. Bob was the co-chair of the Obama transition team for the Department of the Interior in 2008, and one of five members of the National Commission on Indian Trust Administration and Reform. He is a member of the Bois Forte Band of Ojibwe.

9:00 a.m. Litigation Update

Thomas Schlosser

Morisset, Schlosser, Jozwiak & Somerville, Seattle, Washington

Mr. Schlosser represents Tribes in fisheries, timber, water, energy, cultural resources, contracting, tax and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at <http://forums.delphiforums.com/IndianLaw/messages>. He is a part-time lecturer at the University of Washington School of Law.



9:45 a.m. Violence Against Women Act Reauthorization and Federal Legislative Update

Eric Eberhard

Professor of Law, University of Washington School of Law, Seattle, Washington

Prof. Eric D. Eberhard is an Affiliate Assistant Professor at the University of Washington School of Law. He has been actively engaged in the practice of federal Indian law since 1973, including employment in legal services on the Navajo, Hopi and White Mountain Apache reservations; as the Deputy Attorney General of the Navajo Nation and Executive Director of the Navajo Nation Washington Office, and Staff Director and General Counsel to the Senate Committee on Indian Affairs.

From 2009 to 2016 he was a Distinguished Indian Law Practitioner at the Seattle University School of Law. From 1995 to 2009 Professor Eberhard was a Partner in the Indian Law Practice Group in the Seattle office of Dorsey & Whitney LLP. His practice involved the representation of Indian tribes, tribal organizations and entities doing business with Indian tribes in federal, state and tribal judicial, legislative and administrative forums. Prof. Eberhard's work included the areas of: fee-to-trust transfers, water rights, leasing of land and natural resources, federal contracting, gaming, federal recognition, the formation of Tribal corporations, environmental law, administrative law, jurisdiction, the development of tribal law, self-governance, cultural resource protection and the federal trust responsibility.

He is a Life Fellow of the American Bar Foundation and has been recognized by Best Lawyers in America and Chambers. At Dorsey & Whitney, he was recognized as the Partner of the Year, the Diversity Partner of the Year and the Pro Bono Partner of the Year. He has been honored by the United South and Eastern Tribes, Navajo Nation and its courts, the National Indian Gaming Association, the National Association of Indian Legal Services Programs, the Intertribal Timber Council and the American Indian Religious Freedom Coalition and the Northwest Indian Bar Association for outstanding service and contributions.

Deborah Parker

Board Member, National Indigenous Women's Resource Center

Deborah Parker, Tsi-Cy-Altsa (Tulalip/Yaqui), was elected to the Tulalip Tribes Board of Directors in 2012. As a board member, Deborah brings to Tulalip leadership nearly two decades of experience as a policy analyst, program developer, communications specialist, and committed cultural advocate and volunteer in the tribal and surrounding communities.

Serving as a legislative policy analyst in the Office of Governmental Affairs for the Tulalip Tribes from 2005-2012, Deborah engaged in the legislative process on behalf of the Tulalip Tribes by providing quality analysis of issues most pertinent to the exercise of sovereignty and tribal governance, with particular emphasis in the areas of education, finance, taxation, and healthcare. Before joining legislative affairs, Deborah developed two unique outreach and education programs for the Tulalip Tribes. Young Mothers was a culturally relevant program for teen mothers, and the Tribal Tobacco Program sought to inspire responsible tobacco use among tribal members, while acknowledging tobacco's sacred place in indigenous cultures. Prior to her work for the Tulalip Tribes, Deborah served as Director of the Residential Healing School of the Tseil-Waututh Nation in Canada, and in the Treaty Taskforce Office of the Lummi Nation, where she was mentored by American Indian

leaders such as Joe Delacruz, Billy Frank, Henry Cagey and Jewell James. As a passionate advocate for improved education for tribal members, and a belief in the inherent right of all Native Americans to expect and receive a quality education, one that is free from racial or cultural bias, Deborah is focused on educational reform which includes developing curriculum that is a true reflection of an indigenous ethics and knowledge system.

Deborah remains committed to education by volunteering her time in the local schools where her children are enrolled. In 2010 Deborah was honored with a Parent of the Year award from the Washington State Indian Education Association (WSIEA), and in 2011 the National Association of American Indian Education (NAAIE) also named her Parent of the Year. Deborah spent several years in communications and helped to produce video and print journalism for the Native American community, and her film credits include both documentary and narrative work.

11:00 a.m. Trusting Technological Security: Ethical Quicksand for the Unsuspecting Lawyer

Brenda Williams

Senior Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, Washington

Brenda Williams is a faculty member in the UW School of Law where she serves as Associate Dean for Students, Community Engagement and Equity and as the Co-Director of the Tribal Court Public Defense Clinic. In her role of Associate Dean, she leads the collaborative efforts of UW Law's faculty, staff, and students to promote an open, engaging and welcoming community. Dean Williams received her law degree and her Master of Public Administration from the University of Washington. Her scholarly and policy work focuses on the criminal justice system and tribal courts.

Stacey Lara

Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, Washington

Stacey is the Director of the Parent Advocacy Project at Native American Law Center at University of Washington School of Law. She received her JD from University of Washington School of Law, and her MPA from the Institute of Public Service at Seattle University. Stacey worked for five years at The Defender Association in the criminal, dependency and Becca Bill (youth in need of care and truancy) divisions. Immediately prior to coming to UWLS, she served as Director of the Center of Professional Development at Seattle University School of Law. Stacey provided pro bono legal services for indigent defendants charged in the Tulalip Tribal Court from 2009 – 2013. As the Director of the Parent Advocacy Project, Stacey has provided trainings for legal practitioners in the child welfare community on a statewide level. Stacey has served on the National Advisory Committee for Equal Justice Works, and on the Board of Directors for Legal Counsel for Youth and Children. She is admitted to practice in the Tulalip Tribal Court, the Muckleshoot Tribal Court and is a member of the Washington State Bar Association.

1:30 p.m. Fisheries Co-Management Issues in Western Washington: The North of Falcon Process

Lorraine Loomis

Fisheries Manager, Swinomish Indian Community, La Conner, Washington

Lorraine Loomis has been the tribal fisheries manager for the Swinomish Indian Tribal Community since 1975. She oversees the natural resource management activities of the tribal commission's 65-person staff. Loomis took over as chair of the Northwest Indian Fisheries Commission (NWIFC) in western Washington after the late Billy Frank Jr., who served as NWIFC chairman for 34 years, died on May 5, 2014. Through the decades, Loomis' fish politicking has included helping shape the Puget Sound Salmon Management Plan; advocating hatchery mitigation and habitat restoration where needed; mentoring younger tribal members on the importance of cultural identity; navigating the brief closure of the chinook fishing season in 2016 and implementing the U.S.-Canada Pacific Salmon Treaty. She has also coordinated tribal participation in the annual North of Falcon salmon season development process with the State of Washington.

Ron Warren

Assistant Director, Fish Program, State of Washington, Olympia, Washington

Ron Warren is the Assistant Director for the Fish Program where he is the administrator of fisheries policy and science covering the North Pacific, the Washington Coast, Puget Sound, and throughout the Columbia and Snake River Basins in Washington. His administrative duties also include cooperatively managing fish and shellfish resources with the tribes. He is also responsible for operations of 80 hatcheries across the state, an infrastructure valued at two billion dollars. These facilities annually produce more than 140 million salmon and steelhead and 16.8 million trout. Ron began his career with the Department of Fisheries in 1979 and has served in a variety of positions in the hatchery division, personnel, and regional management, prior to assuming the current role of Assistant Director in 2015.

John Hollowed

Legal/Policy Advisor, Northwest Indian Fisheries Commission, Olympia, Washington

For over 32 years, John Hollowed has coordinated tribal policy, legal, and technical staff regarding *United States v. Washington, Phase II* and other related activities for the Commission. John has also worked with a county prosecutor's office, the Department of Justice, and as a fisheries manager with one of the tribes in eastern Washington. John received his bachelor's degree in biology from the University of Illinois, Master's degree in Oceanography from Old Dominion University, and law degree from Seattle University.

3:15 p.m. Off-Reservation Hunting Rights after *Herrera v. Wyoming*

Colette Routel

Mitchell-Hamline College of Law, St. Paul, Minnesota

Colette Routel teaches and writes in the areas of Federal Indian Law, Natural Resources Law, and Property. She attended Ithaca College and graduated *magna cum laude* with a Bachelor of Music. She then attended the University of Michigan Law School, where she graduated *magna cum laude*, was elected to the *Order of the Coif* and served on the *Michigan Law Review*. After law school, Colette



worked at the law firm now known as Faegre Baker Daniels, where her practice focused on litigation and transactional work for Indian tribes. Colette also developed a robust *pro bono* practice that included matters relating to wildlife law, public land management, and asylum law. After leaving Faegre, Colette worked at the Jacobson Law Group and Hogen Adams, both Indian law boutique firms. She also taught as a visiting professor at Wayne State Law School and the University of Michigan Law School before joining the full-time faculty at Mitchell Hamline in 2009. She has testified on numerous occasions before the U.S. Senate Committee on Indian Affairs, as well as the U.S. House Committee on Natural Resources. In addition, she continues to maintain a substantial *pro bono* practice. Colette has argued and won cases in the U.S. Court of Appeals for the Seventh, Eighth, and Ninth Circuits, and she regularly submits amicus briefs to the U.S. Supreme Court and lower federal courts on Indian law issues.

Julie Kane

General Counsel, Nez Perce Tribe, Lapwai, Idaho

Julie Sobotta Kane graduated from Washington State University with a Bachelor of Arts degree in Communications, and obtained her Juris Doctorate from University of Idaho, College of Law. Her first job out of law school was in the Vancouver Washington Attorney General's Office. After three years there, she moved back to Idaho and took a position as a staff attorney with the in-house legal office for the Nez Perce Tribe. Twenty-eight years later, Julie now serves as Managing Attorney for the Office of Legal Counsel for the Nez Perce Tribe. Enrolled in the Eastern Band Cherokee Tribe, Julie resides in Lapwai, Idaho, with her husband Dan, and has two adult children and one grandchild.

32ND ANNUAL INDIAN LAW SYMPOSIUM SPEAKERS' BIOGRAPHIES

FRIDAY, SEPTEMBER 6, 2019

9:00 a.m. Indian Policy Issues at the Department of the Interior: A Discussion with the Hon. Sally Jewell, former Secretary of the Interior

Hon. Sally Jewell

Distinguished Fellow, University of Washington College of the Environment, Seattle, Washington

As a business executive and public servant serving as U.S. Secretary of the Interior under President Obama, Sally Jewell focused on supporting a robust economy coupled with long-term sustainability of our natural world and its diverse people. During her tenure as Interior Secretary, Jewell used a science-based, landscape-level, collaborative approach to natural resources management. She was deeply engaged in rebuilding a trusting, nation-to-nation relationship with indigenous communities in the U.S., supporting opportunities for greater engagement in public land stewardship and providing improved educational opportunities for native youth. She worked with President Obama and his team on long-term conservation of our nation's most vulnerable and irreplaceable natural, cultural and historical treasures, protecting more lands and waters than any other U.S. president in history. And, she championed efforts to provide a continuum of engagement, encouraging young people to play, learn, serve and work on public lands.

Prior to serving on President Obama's cabinet, Jewell was President and CEO of REI, a \$2.6 billion retailer dedicated to facilitating outdoor adventures. She has received recognition for her community service through numerous awards and honorary degrees, including the University of Washington's highest alumni honor, Alumna Summa Laude Dignata. Jewell continues active volunteer leadership in several organizations including the Center for Native American Youth at the Aspen Institute and The Nature Conservancy. She is currently a Distinguished Fellow at the University of Washington College of the Environment, helping students and faculty across the UW and beyond explore opportunities to put their diverse skills to work in creating a future for our planet that is both economically successful and environmentally sustainable.

Robert Anderson

Professor of Law, University of Washington School of Law, Seattle, Washington

Robert Anderson is a Professor and Director of the Native American Law Center at the University of Washington School of Law and is the Oneida Indian Nation Visiting Professor of Law at Harvard Law School where he teaches annually. He teaches primarily in the areas of American Indian law, water law, natural resources law, and property law. He is a co-author and member of the Board of Editors of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) and (2012). He is a co-author of Anderson, Berger, Frickey and Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY (3RD ED. 2015). He spent twelve years as a Staff Attorney for the Boulder-based Native American Rights Fund where he litigated major cases involving Native American sovereignty and natural resources. He was one of the two attorneys who opened NARF's Alaska office in 1984. From 1995-2001, he served as a political appointee in the Clinton Administration under Interior Secretary Bruce Babbitt, providing legal and



policy advice on a wide variety of Indian law and natural resource issues. Bob was the co-chair of the Obama transition team for the Department of the Interior in 2008, and one of five members of the National Commission on Indian Trust Administration and Reform. He is a member of the Bois Forte Band of Ojibwe.

10:30 a.m. Antiquities Act Litigation: The Bear Ears National Monument

Natalie Landreth

Senior Staff Attorney, Native American Rights Fund, Anchorage, Alaska

Natalie Landreth is a Senior Staff Attorney based in the Anchorage office and member of the Litigation Management Committee. Her practice covers a wide variety of federal Indian law and election law issues, including Voting Rights Act, Constitutional voter protections, tribal jurisdiction, the Indian Child Welfare Act, subsistence hunting and fishing and cultural resource protection. She has been instrumental in establishing key voter protections in Alaska through two significant cases (*Nick v. Bethel* in 2008 and *Toyukak v. Treadwell* in 2015) and she testified in Congress in support of the renewal of the Voting Rights Act in 2006. She has also been at the forefront of the development of tribal jurisdiction in Alaska through her involvement in a series of cases beginning with *Kaltag Tribal Council v. Hogan*, a case that established Alaska tribes have original jurisdiction to adjudicate children's cases. Ms. Landreth also represents the Bering Sea Elders, a consortium of 40 coastal tribes who rely on the Bering Sea for their subsistence hunting and fishing, as they try to protect their way of life which is currently under threat from commercial fishing and expanding shipping lanes.

Ms. Landreth also serves on the Alaska Bar Association Ethics Committee, the Child-In-Need-of-Aid Court Rules Committee, and the Alaska Court Improvement Committee (ICWA Subcommittee). Ms. Landreth is a graduate of Harvard University (*magna cum laude*) and Harvard Law School. She served as a law clerk to the Honorable Dana Fabe, Chief Justice of the Alaska Supreme Court. She is an enrolled member of the Chickasaw Nation of Oklahoma (Imatobby and Colbert families).

Patrick Gonzalez-Rogers

Executive Director, Bear Ears Inter-Tribal Coalition, Albuquerque, New Mexico

Pat Gonzales-Rogers supervises the staff and the direction of the tribal land management plans for the Bears Ears Monument. Prior to coming to the Bears Ears Inter-Tribal Coalition, Pat was most recently the Senior Tribal Policy Advisor at EPA. He has also served as the Director of the Office of Hawaiian Affairs (OHA) Washington, DC Office, where he was in charge of OHA's Federal Advocacy, legislation and congressional affairs. Previous to OHA, Pat was at the Yale School of Management where he was the Interim-Director of the Executive Management Programs for Tribal Leaders. From 2007 to 2012 Pat was the Senior Advisor for Tribal Affairs, as well as the Chief of Congressional and Legislative Affairs for the US Fish and Wildlife Service. Prior to joining the Fish and Wildlife Service he was a "special policy consultant" to the Democratic Governors Association in 2005. In 2004 Patrick was the Director of Policy for Governor Bill Richardson of New Mexico. He has also served as Senior Policy Advisor for the US Affiliated Pacific, Special Assistant at the Administration for Native Americans, and as General Counsel to the US Senate Indian Affairs Committee, then chaired by US Senator Daniel Inouye. Pat holds a Bachelor's degree from UH Mānoa, where he also played football, and is a graduate of the University of New Mexico School of Law.



Sarah Krakoff

Moses Lasky Professor of Law, University of Colorado School of Law, Boulder, Colorado

Sarah Krakoff is the Moses Lasky Professor of Law at the University of Colorado. Her areas of expertise include American Indian law, natural resources and public land law, and environmental justice. She is the co-author of American Indian Law: Cases and Commentary (with Bob Anderson and Bethany Berger), and co-editor of Tribes, Land, and Environment (with Ezra Rosser.) Professor Krakoff's articles appear in the Stanford Law Review, the California Law Review, and the Harvard Environmental Law Review, among other journals. She also runs the Law School's Acequia Project, which provides free legal services to low-income farmers in the San Luis Valley of Colorado. Professor Krakoff has authored amicus briefs in the 6th, 7th, 9th, and 10th Circuits, as well as the Supreme Court of the United States. Before joining the Colorado Law tenure-track faculty, Professor Krakoff directed CU's American Indian Law Clinic and secured permanent University funding to ensure the Clinic's future. Professor Krakoff started her legal career at DNA-Peoples Legal Services on the Navajo Nation, where she initiated DNA's Youth Law Project with an Equal Justice Works fellowship. She received her BA from Yale and her JD from U.C. Berkeley and clerked for Judge Warren J. Ferguson on the 9th Circuit Court of Appeals.

1:15 p.m. Indian Water Rights and the Yakima Basin Integrated Water Management Plan

Rachel Paschal Osborn

Attorney at Law, Vashon Island, Washington, Moderator

Rachael Paschal Osborn is a public interest water lawyer and has provided representation to Indian tribes, environmental organizations, labor unions, and small communities since 1992.

Rachael served as co-founder and executive director of the Center for Environmental Law & Policy (1993-1999, 2007-2011), and co-founder and board member of Washington Water Trust (1997-2001), two organizations dedicated to the protection and restoration of free-flowing waters in Washington state.

Rachael is a dedicated educator and has taught scores of water law and policy courses over the years — in law schools, conferences, seminars, workshops and classrooms — and has written extensively on water resources and environmental issues. She writes a blog at <https://naiads.blog>

Tom Ring

Hydrogeologist, Yakama Nation Water Resources Program, Toppenish, Washington

Tom Ring is a hydrogeologist with the Water Resources Program of the Yakama Nation. He has held this position since 1990 and, in that role, has worked on a variety of projects involving groundwater and surface water quantity and quality, water rights, irrigation and fisheries issues and planning for future water needs. Previously he worked for the Water Resources Program at the Washington Department of Ecology. Tom has Bachelors and Masters of Science degrees in geology from Central Washington University and Northern Arizona University respectively. He has taught geology and hydrogeology classes at Central Washington University and is a licensed geologist and hydrogeologist in Washington State. When not working, he enjoys hiking, climbing, and skiing in the mountains of the west.



Jeff Schuster

Law Office of Jeff Schuster, Seattle, Washington

Jeffrey S. Schuster's practice has focused on federal Indian law, water law and natural resources. He represents the Confederated Tribes and Bands of the Yakama Nation in *Ecology v. Acquavella*.

Phil Rigdon

Superintendent, Department of Natural Resources, Yakama Nation, Toppenish, Washington

Philip Rigdon has been the Yakama Nation Superintendent of Department of Natural Resources for the last 14 years and has worked for the Yakama Nation for 25 years within the Forestry & Natural Resources. In this capacity, he oversees programs working to improve and protect water quality, water rights, fisheries, forestry, wildlife, cultural, and environmental activities for the Yakama Nation. Mr. Rigdon represents the Yakama Nation on the Yakima River Basin Water Enhancement Project Workgroup & Conservation Advisory Group. Mr. Rigdon served as the President of the Intertribal Timber Council and represents the Yakama Nation on the Tapash Sustainable Forest Collaborative.

Mr. Rigdon obtained a B.S. in Forest Management from the University of Washington in 1996 and earned a Master of Forestry from Yale School of Forestry and Environmental Studies in 2002.

3:30 p.m. The Future of the Federal Subsistence Fishing and Hunting Priority in Alaska, and Trust Land Regulation Update

Robert T. Anderson

Professor of Law, University of Washington School of Law, Seattle, Washington

Robert Anderson is a Professor and Director of the Native American Law Center at the University of Washington School of Law and is the Oneida Indian Nation Visiting Professor of Law at Harvard Law School where he teaches annually. He teaches primarily in the areas of American Indian law, water law, natural resources law, and property law. He is a co-author and member of the Board of Editors of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) and (2012). He is a co-author of Anderson, Berger, Frickey and Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY (3RD ED. 2015). He spent twelve years as a Staff Attorney for the Boulder-based Native American Rights Fund where he litigated major cases involving Native American sovereignty and natural resources. He was one of the two attorneys who opened NARF's Alaska office in 1984. From 1995-2001, he served as a political appointee in the Clinton Administration under Interior Secretary Bruce Babbitt, providing legal and policy advice on a wide variety of Indian law and natural resource issues. Bob was the co-chair of the Obama transition team for the Department of the Interior in 2008, and one of five members of the National Commission on Indian Trust Administration and Reform. He is a member of the Bois Forte Band of Ojibwe.

August 2018 – August 2019

CASE LAW ON AMERICAN INDIANS

by Thomas P. Schlosser

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THOMAS P. SCHLOSSER. Mr. Schlosser represents Tribes in fisheries, timber, water, energy, cultural resources, contracting, tax and federal breach of trust. He is a director of Morisset, Schlosser, Jozwiak & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation. In 1970s, Tom represented tribes in the Stevens' Treaty Puget Sound fishing rights proceedings. Tom has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. Tom is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at <http://forums.delphiforums.com/IndianLaw/messages>. He is a part-time lecturer at the University of Washington School of Law and Seattle University School of Law.

Case synopses are reprinted or derived from Westlaw and are used with permission.
For purposes of this symposium, the presenter has revised the synopses.

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UNITED STATES SUPREME COURT

1. *Washington State Department of Licensing v. Cougar Den, Inc.*, No. 16-1498, 139 S.Ct. 1000, 2019 WL 1245535 (U.S. Mar. 19, 2019). Wholesale fuel importer owned by a member of the Yakama Nation, which was incorporated under Yakama law and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe, sought review of the decision of the Washington State Department of Licensing, which concluded that the Tribe's right under treaty to travel on highways did not preempt state fuel taxes and assessed importer \$3.6 million in taxes, penalties, and licensing fees. The Superior Court, Yakima County, No. 14-2-03851-7, Michael G. McCarthy, J., reversed. The Department appealed. The Supreme Court of Washington, Johnson, J., 188 Wash.2d 55, 392 P.3d 1014, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) Washington's fuel tax burdened the treaty right of the Yakama Nation to travel upon all public highways in common with citizens of the United States, and (2) Washington's application of its fuel tax on importer was preempted by treaty's reservation to the Yakama Nation of the right to travel upon all public highways. Affirmed.

2. *Sturgeon v. Frost*, No. 17-949, 139 S.Ct. 1066 (Mar. 26, 2019). Hunter who sought to use hovercraft to reach moose hunting grounds brought action against National Park Service (NPS), challenging NPS's enforcement of a regulation banning operation of hovercrafts on the Nation River, which partially fell within a federal preservation area. State of Alaska intervened as a plaintiff. The United States District Court for the District of Alaska, H. Russel Holland, Senior District Judge, 2013 WL 5888230, entered summary judgment for NPS. Hunter and State appealed. The United States Court of Appeals for the Ninth Circuit, Nguyen, Circuit Judge, 768 F.3d 1066, affirmed in part, vacated in part, and remanded. Certiorari was granted. The Supreme Court, Chief Justice Roberts, 136 S.Ct. 1061, 194 L.Ed.2d 108, vacated and remanded. On remand, the Court of Appeals for the Ninth Circuit, Nguyen, Circuit Judge, 872 F.3d 927, held that regulation preventing use of hovercraft in federally managed conservation areas applied to the River. Certiorari was granted. The Supreme Court, Justice Kagan, held that: (1) the Nation River was not "public land" within the meaning of the Alaska National Interest Lands Conservation Act (ANILCA); (2) even if United States held title to a reserved water right in the Nation River, that right could not justify applying NPS's hovercraft rule; (3) ANILCA exempts non-public lands, including waters, located within national park boundaries in Alaska from NPS's ordinary regulatory authority; (4) hovercraft rule does not apply to non-public lands in Alaska even when those lands lie within national parks; and (5) NPS had no authority to regulate conduct on navigable waters in Alaskan national parks. As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term "public lands," when used in ANILCA's subsistence-fishing provisions, encompasses navigable waters like the Nation River. See *Alaska v. Babbitt*, 72 F.3d 698 (1995); *John v. United States*, 247 F.3d 1032 (2001) (en banc); *John v. United States*, 720 F.3d 1214 (2013); *supra*, at _____. Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters. See generally Brief for State of Alaska as *Amicus Curiae* 29–35 (arguing that this case does not implicate those decisions); Brief for Ahtna, Inc., as *Amicus Curiae* 30–36 (same). Reversed and remanded. Justice Sotomayor filed a concurring opinion in which Justice Ginsburg joined.

3. *Herrera v. Wyoming*, 139 S.Ct. 1686, 2019 WL 2166394 (U.S. May 20, 2019). Defendant, a member of the Crow Tribe, was convicted of taking elk off-season or without a

state hunting license and with being an accessory to the same, and he appealed. The District Court of Wyoming, Sheridan County, affirmed, and the Supreme Court of Wyoming denied defendant's petition for review. Certiorari was granted. The Supreme Court, Justice Sotomayor, held that: (1) defendant was not precluded from arguing the right to hunt under 1868 Treaty between United States and Crow Tribe of Indians barred his conviction; (2) Wyoming's admission to the Union did not abrogate the Crow Tribe of Indians' right to hunt under the treaty; (3) Wyoming's statehood did not render all the lands in the State occupied within the meaning of the treaty; (4) the Bighorn National Forest did not become categorically occupied, within the meaning of the treaty, when it was created; and (5) the presence of exploitative mining and logging operations in the Bighorn National Forest did not render the forest occupied within the meaning of the treaty. Vacated and remanded. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh joined.

OTHER COURTS

A. ADMINISTRATIVE LAW

4. *Oneida Indian Nation v. United States Department of the Interior*, 336 F.Supp.3d 37, 2018 WL 4054097 (N.D. N.Y. Aug. 24, 2018). New York Native American tribe brought action against Department of the Interior under Administrative Procedure Act (APA) alleging abuse of discretion and violation of United States Code arising out of Assistant Secretary's decision to publish changed name of Wisconsin tribe to Oneida Nation, who filed petition to cancel New York tribe's trademark registration, in Federal Register, and approval of constitutional amendment in Department's regional office's secretarial election. Department filed motion to dismiss. The District Court, Mae A. D'Agostino, J., held that: (1) alleged injury in fact arising out of ongoing trademark action was not redressable by New York tribe's action against Department; (2) confusion arising from Department's decisions was not sufficient injury in fact; and (3) confusion was not traceable Department of the Interior's decision. Motion granted.

5. *Kialegee Tribal Town v. Zinke*, 330 F.Supp.3d 255 (D. D.C. Sept. 7, 2018). Federally recognized Indian tribe brought action against Secretary of the Interior and other federal officials, seeking declaratory and injunctive relief in its favor in connection with its claims that it was successor to Creek Nation, and as such, had treaty-protected rights of shared jurisdiction over land within the boundaries of the historic Creek Nation reservation. Defendants moved to dismiss for failure to state claim. The District Court, Colleen Kollar-Kotelly, J., held that: (1) court had subject-matter jurisdiction, but (2) tribe failed to adequately allege specific conduct by Secretary of Interior and other officials that violated Indian Reorganization Act (IRA), as required to state claim for declaratory and injunctive relief. Motion granted.

6. *California Valley Miwok Tribe v. Zinke*, No. 17-16321, 745 Fed.Appx. 46 (9th Cir. Dec. 11, 2018). Plaintiff California Valley Miwok Tribe ("Tribe"), represented by the Burley Council, appeals from summary judgment entered in favor of Defendants the California Valley Miwok Tribe, represented by the Dixie Council, and the United States. The district court held that the 2015 Decision ("Decision") by the Assistant Secretary-Indian Affairs ("Assistant Secretary") did not violate the Administrative Procedure Act ("APA"). We affirm. The district

court correctly held that the Decision did not violate the APA. Tribal membership is a matter to be determined by the tribe, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), but the Department of the Interior also has the responsibility to ensure that organized tribes are representative of potential membership, *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016). The Decision comported with that responsibility. The Assistant Secretary recounted the Tribe's long litigation history but did not rely on those earlier court holdings to reach a decision. Instead, the Assistant Secretary independently examined the facts and the law, before determining that the Tribe was not reorganized, that its membership is not limited to five individuals, and that the United States does not recognize leadership of the tribal government. The Decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and therefore did not violate the APA. *Aguayo*, 827 F.3d at 1226. Affirmed.

7. *Comanche Nation of Oklahoma v. Zinke*, 754 Fed.Appx. 768, 2018 WL 6601858 (10th Cir. Dec. 14, 2018). Native American nation brought action against Secretary of Interior under Administrative Procedure Act and National Environmental Policy Act, challenging acquisition of land in trust for benefit of other Native American nation and seeking preliminary injunction against operation of casino. The United States District Court for the Western District of Oklahoma, Joe Heaton, Chief Judge, 2017 WL 6551298, denied motion for preliminary injunction. Nation appealed. The Court of Appeals, Carlos F. Lucero, Circuit Judge, held that: (1) nation did not have substantial likelihood of success on merits of challenge to regulations governing trust acquisitions, and (2) nation did not have substantial likelihood of success on merits of NEPA claim. Affirmed.

8. *Tsi Akim Maidu Of Taylorsville Rancheria v. United States Department of Interior*, No. 2:17-cv-01156-TLN-CKD, 2019 WL 95511 (E.D. Calif. Jan. 03, 2019). For the reasons set forth below, the Court grants Defendants' Motion to Dismiss. Plaintiff challenges Defendants' determination that it "lost status as a federally recognized Indian Tribe when the United States sold the Taylorsville Rancheria in 1966 pursuant to Congressional mandate." In 1958, Congress enacted the California Rancheria Act ("CRA"), which authorized the Department of the Interior to distribute forty-one rancherias' assets to "individual Indians"; *see* Pub. L. 85-671, 72 Stat. 619 (Aug. 18, 1958), *as amended* Pub. L. 88-419, 78 Stat. 390 (Aug. 11, 1964). After such distribution under the CRA, the recipients would not be entitled to government services "because of their status as Indians ..., all statutes of the United States which affect Indians because of their status as Indians [would] be inapplicable to them, and the laws of the several States [would] apply to them in the same manner as they apply to other citizens." Plaintiff alleges that Defendants sold the Taylorsville Rancheria to Plumas County in 1966. In 1998, Plaintiff alleges it filed a "letter of intent to petition for acknowledgment as an Indian tribe." Plaintiff further alleges it later "sought clarification from the Defendants about its status as a federally recognized Indian Tribe," to which the then-Assistant Secretary of Indian Affairs responded by letter in June 2015. In the letter, the government allegedly explained that Plaintiff's relationship with the government terminated upon the 1966 sale of the Taylorsville Rancheria. Plaintiff challenges Defendants' conclusion that "the sale of the Ranch corresponds with the termination of the status of the tribe." Plaintiff brought suit against the Department of Interior, its Secretary, and the Assistant Secretary for Indian Affairs. Defendants argue that (1) general jurisdiction statutes do not waive sovereign immunity; (2) although the Administrative Procedure

Act (“APA”) waives sovereign immunity, Plaintiff fails to state a claim under the APA; and (3) Plaintiff’s claims are barred by the statute of limitations. Plaintiff responds that (1) the action is not barred by the statute of limitations, and (2) the complaint sufficiently states a claim under the APA. Because the statute of limitations argument is dispositive, the Court will not address the parties’ other arguments. As a preliminary matter, the parties do not dispute that the six-year statute of limitations in 28 U.S.C. § 2401 (“section 2401”) applies to Plaintiff’s APA claims. Under section 2401, “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a). Defendants argue that Plaintiff’s claims stem from one common allegation: that Defendants misinterpreted the CRA to find that the sale of the Taylorsville Rancheria had the legal effect of terminating Plaintiff’s status as a federally recognized tribe. Defendants state in response that Congress enacted the Federally Recognized Tribe List Act, which requires the Secretary of the Interior to publish annually a list of all federally recognized tribes. According to Defendants, Plaintiff has not been included on the list of federally recognized tribes since its initial publication in 1979. As such, Defendants argue that Plaintiff’s claims accrued upon the 1979 publication of the list of federally recognized tribes because Plaintiff could or should have known it was not a federally recognized tribe at that point. Defendants alternatively argue that, at the very latest, Plaintiff’s claims accrued in 1998, when Plaintiff allegedly filed a letter of intent to petition for acknowledgment as an Indian tribe. Thus, the Court finds that Plaintiff’s claims as currently alleged are time-barred and should be dismissed.

9. *National Lifeline Association v. Federal Communications Commission*, 915 F.3d 19, 2019 WL 405020 (D.C. Cir. Feb 01, 2019). Petitions for review were filed challenging Federal Communications Commission (FCC) order limiting enhanced tribal telecommunications support to service provided using tribal facilities, and to low-income consumers living on rural areas of tribal lands. The Court of Appeals, Rogers, Circuit Judge, held that: (1) FCC action in changing its policy to limit enhanced tribal telecommunications subsidy to service provided using tribal facilities was arbitrary and capricious; (2) FCC action in changing its policy to limit enhanced tribal telecommunications subsidy to service provided to low-income consumers living on rural areas of tribal lands was arbitrary and capricious; (3) FCC’s notice was insufficient under Administrative Procedure Act’s (APA) requirements for notice-and-comment rulemaking; and (4) FCC improperly made substantive changes to its former policy without commencing new notice-and-comment-rulemaking proceeding. Petitions granted, order vacated, and matter remanded.

10. *Cayuga Nation v. David Bernhardt*, No. 17-1923 (CKK), 2019 WL 1130445 (D.C. D.C. Mar. 12, 2019). The Cayuga Nation is a federally recognized Indian Nation. This case deals with decisions by the Bureau of Indian Affairs (“BIA”) and the Assistant Secretary for Indian Affairs of the Department of the Interior (“DOI”) that recognized one faction within the Cayuga Nation, Defendant-Intervenor—now referring to itself as the “Cayuga Nation Council,” though alternatively referred to in the administrative record as the “Halftown Group”—as the governing body of the Cayuga Nation for the purposes of certain contractual relationships between that Nation and the United States federal government. These decisions were the product of an adversarial process between Defendant-Intervenor and Plaintiffs, a rival faction within the Cayuga Nation who assert that they represent the Nation’s rightful government. Plaintiffs have filed this lawsuit seeking to overturn the BIA and DOI decisions. The Court denies Plaintiffs’

Motion for Summary Judgment and grants both Defendants' and Defendant-Intervenor's Cross-Motions for Summary Judgment. The Court concludes that Plaintiffs have failed to establish that Defendants violated the Administrative Procedure Act ("APA") in making decisions recognizing Defendant-Intervenor as the governing body of the Cayuga Nation for purposes of certain contractual relationships between the Nation and the United States federal government. The Court further concludes that Plaintiffs failed to establish that Defendants violated Plaintiffs' due process rights in making these decisions. In 2015, the Cayuga Nation's leadership dispute came to a head. The BIA received two requests to modify existing federal-tribal contracts under the Indian Self-Determination Act ("ISDEAA"). One request came from Plaintiffs' group; the BIA determined that the other request came from Mr. Halftown acting as the federal representative for the last Nation Council which had been formally recognized by the BIA in 2006. In response to these competing requests, the BIA declined to address the merits of the Nation's leadership dispute. Instead, the BIA continued to recognize the last undisputed government of the Cayuga Nation which had been identified by the BIA in 2006. The BIA concluded that the 2006 Nation Council, with Mr. Halftown acting as federal representative, had the authority to draw funds from the Nation's ISDEAA contract. In recognizing the 2006 Nation Council for purposes of deciding the 2015 ISDEAA request, the BIA emphasized that "[t]his interim recognition decision is intended to provide additional time to the members of the Nation to resolve this dispute using tribal mechanisms and prevent the need for the BIA to examine Nation law and make a subsequent determination based on the results of that determination." As an initial matter, Plaintiffs contend that Assistant Secretary Black was required to use de novo review on questions of Cayuga Nation law when reviewing Regional Director Maytubby's decision. But, instead of using de novo review, Plaintiffs argue that Assistant Secretary Black impermissibly deferred to Regional Director Maytubby's analysis of Cayuga law. The Court concludes that Assistant Secretary Black was not required to use de novo review over Regional Director Maytubby's analysis of Cayuga Nation law. While it is generally true that the IBIA reviews questions of law de novo, that is not the case with Indian law. Instead, "unless ... tribal law clearly dictate[s] a particular outcome, [the IBIA] will afford BIA latitude to exercise discretion in determining with whom it will deal in carrying on the government-to-government relationship with the Tribe." *Picayune Rancheria*, 62 IBIA at 114; see also *LaRocque v. Aberdeen Area Dir., Bureau of Indian Affairs*, 29 IBIA 201, 204 (1996) (deferring to BIA's "reasonable interpretation" of tribal law). In summary, the Court determines that Assistant Secretary Black was not required to conduct a de novo review of Cayuga law. But, even if he had been so required, Assistant Secretary Black conducted an independent review of the parties' arguments concerning Cayuga law and concluded that Regional Director Maytubby's determinations were valid. The standard of review used by Assistant Secretary Black was not contrary to law.

11. *Cross v. United States Department of Interior*, No. CIV 18-220-TUC-CKJ, 2019 WL 1425141 (D.C. D. Ariz. Mar. 29, 2019). Pending before the Court is the Motion to Dismiss ("MTD") filed by the United States Department of the Interior ("the government"). Cross is an enrolled member of the Three Affiliated Tribes ("TAT"). The TAT is a federally recognized Indian tribe and resides on the treaty-established Fort Berthold Reservation ("Reservation") in northwestern North Dakota. Cross is the spokesman for an *ad hoc* group of tribal members who have decided to request a Secretarial Election, via a Secretarial Petition, that would be administered by the Secretary. More specifically, this *ad hoc* group seeks to petition the Secretary of the Interior ("the Secretary") to call a Secretarial Election "for the purpose of

repealing a 1986 constitutional amendment that had extinguished the pre-existing right of ALL (emphasis added) of the [Three Affiliated Tribes'] non-resident, but otherwise constitutionally qualified, tribal voters to vote by absentee ballot in all tribal elections.” The Complaint asserts many non-resident tribal voters have found returning to the Reservation to be economically or physically impracticable and unduly burdensome. The Complaint alleges the building of the world’s largest earth-filled dam on the Reservation took over 156,035 of TAT’s best and last remaining agricultural lands. This resulted in the destruction of nine historic river bottom communities, geographically fragmented the Reservation, and caused the exodus from the Reservation of TAT’s younger and productive members. Approximately 75%-80% of TAT’s enrolled members live and work off the Reservation. On July 14, 2017, Cross provided a Notice of Appeal (“NOA”) to Danks pursuant to 25 C.F.R. § 2.9. The NOA referenced both Danks’ decision as to the number of signatures required and the conclusion that this decision was not appealable. The Decision on appeal stated: ...You concede in your appeal that the Superintendent properly calculated the number of signatures needed for a valid petition based on the tribally provided number of tribal members who were 18 years of age and older as of May 18, 2017. If the Superintendent’s basic mathematical calculation is correct, as you concede, other than that unchallenged calculation, the Superintendent made no decision and merely acted as a pass-through for information provided by the Tribe as required by 25 C.F.R. § 81.57(a)(2)(i) and (ii). The government asserts the Court lacks subject matter jurisdiction of this matter. As courts of limited jurisdiction, federal courts are presumptively without jurisdiction over civil actions.

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. The Complaint asserts federal question jurisdiction under 28 U.S.C. § 1331 as the primary basis for subject matter jurisdiction. However, the United States has not waived its sovereign immunity by the enactment of 28 U.S.C. §§ 1331 and 1343. *Cuevas v. Department of Homeland Security*, 233 F. App’x 642, 643 (9th Cir. 2007) (citing *N. Side Lumber Co. v. Block*, 753 F.3d 1482, 1484 (9th Cir. 1985)); 14 Fed. Prac. & Proc. Juris. § 3655 (4th ed. Nov. 2018). Similarly, the Declaratory Judgment Act does not provide a basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petr. Co.*, 399 U.S. 667, 671 (1950); *Countrywide Home Loans, Inc. v. Mortgage Guar. Ins. Corp.*, 642 F.3d 849, 852 (9th Cir. 2011); 14 Fed. Prac. & Proc. Juris. § 3655 (4th ed. Nov. 2018). The Complaint also refers to the Administrative Procedure Act (“APA”). The APA “contains a specific waiver of the United States’ sovereign immunity.” *Matsuo v. United States*, 416 F.Supp.2d 982, 988 (D. Haw. 2006) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)); see also *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). While the APA waives the government’s sovereign immunity, the APA also includes requirements for judicial review. As a general matter, the APA permits suits against the United States by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute[.]” 5 U.S.C. § 702. This portion of the statute constitutes the APA’s judicial review provision. See e.g. *Navajo Nation*, 876 F.3d at 1168. Claims asserted pursuant to the APA must satisfy section 702’s “agency action” requirement and the further requirement under section 704 of the APA that a plaintiff must identify a “final agency action” to obtain judicial review. 5 U.S.C. § 704. The APA does not permit review where “statutes preclude judicial review” and “where the agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). The finality requirement is considered a necessary element of any APA claim. *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (“To maintain a cause of action under the APA, a plaintiff must challenge

“agency action” that is “final.”). A plaintiff has the burden of identifying specific federal conduct and explaining how it is “final agency action,” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990), and identifying a discrete agency action that the federal agency was legally required to take but failed to do so, *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004). In considering these factors, the Court finds no final agency action occurred in this matter. Rather, the government provided information to Cross, but did not take any action that represents the consummation of an agency’s decision-making process. As the government has not yet reviewed any Secretarial Petition submitted by Cross, no rights or obligations have been determined. *Bennett*, 520 U.S. at 177–78. As Cross is not challenging a final agency action, his cause of action cannot proceed under the APA. *Jewell*, 730 F.3d at 800. The Court finds it does not have subject matter jurisdiction of this matter and dismissal is appropriate. To the extent Cross argues the government acted in excess or its statutory jurisdiction or authority, the Court declines to address these arguments as it has not been established this Court has subject matter jurisdiction over this matter. This matter is dismissed for lack of subject matter jurisdiction.

12. *Agua Caliente Tribe of Cupeño Indians of Pala Reservation v. Sweeney*, __ F.3d __, 2019 WL 3676342 (9th Cir. Aug 07, 2019). The Agua Caliente Tribe of Cupeño Indians (the “Cupeño”) argue that they are a federally recognized tribe, and, as such, the Assistant Secretary of Indian Affairs (“Assistant Secretary”) within the Department of the Interior (“Interior”) must place the tribe on a list of federally recognized tribes published in the Federal Register. The Cupeño sent a letter to the Assistant Secretary, requesting that they be listed as a federally recognized tribe. When the Assistant Secretary denied their request, the Cupeño filed suit to compel such action. Having jurisdiction pursuant to 28 U.S.C. §§1331, 1361, and 5 U.S.C. § 706, the district court refused to compel the listing of the Cupeño because they had failed to exhaust the administrative process. The district court further concluded that the Assistant Secretary provided a rational explanation for refusing to make an exception to the administrative process for the Cupeño. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. The Part 83 process applies to the relief the Cupeño seek, and the Cupeño failed to exhaust the process. We agree with the district court’s determination that the Cupeño must exhaust administrative remedies, and until they do so, they are not entitled to the relief they seek in this lawsuit. On three occasions since 1979, Interior has recognized tribes outside of the Part 83 process. To treat the Cupeño differently from those three tribes, the Cupeño argue, is arbitrary and capricious and a violation of the Cupeño’s equal protection rights. To prevail on an equal protection claim, the plaintiff must show the government has treated it differently from a similarly situated party and the government’s explanation for different treatment does not meet the relevant level of scrutiny. *Muwekma Ohlone Tribe*, 708 F.3d at 215. We have held, “the recognition of Indian tribes remains a political, rather than racial determination,” and we therefore “appl[y] rational basis review.” *Kahawaiolaa*, 386 F.3d at 1279. The three tribes that Interior has recognized outside of the Part 83 process are: the Ione Band of Miwok Indians (the “Ione”), the Lower Lake Rancheria, and the Tejon Indian Tribe (the “Tejon”). Because Interior has rationally distinguished the Cupeño from the other tribes that were listed outside of the administrative process, we cannot order Interior to add the Cupeño to the list of federally recognized tribes published in the Federal Register. We affirm the district court’s order granting summary judgment for Interior.

13. *Robert Doucette v. United States Department of the Interior*, 2019 WL 3804118 (W.D. Wash. Aug 13, 2019). This matter comes before the Court on (i) a motion for summary judgment, brought by plaintiffs Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette, and (ii) a cross-motion for summary judgment brought by defendants United States Department of the Interior (“Interior”), Interior Secretary David Bernhardt, Assistant Secretary Tara Sweeney, and Principal Deputy Assistant Secretary (“PDAS”) John Tahsuda III. Plaintiffs were unsuccessful candidates for four open positions on the Nooksack Tribal Council, the governing body of the Nooksack Indian Tribe of Washington. They allege that, prior to the most recent change in presidential administrations, Interior had established a policy of “interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal Council was validly seated as the governing body of the Tribe” for purposes of government-to-government relations. The Court concludes that plaintiffs are not, as a matter of law, entitled to relief because Interior never adopted a policy of construing Nooksack law with respect to how Nooksack Tribal Council elections should be conducted, and defendants could not have behaved inconsistently with a non-existent policy. In refusing, for a period of time before the 2017 elections, to recognize actions taken by the Nooksack Tribal Council, Interior did not purport to interpret Nooksack law concerning the manner in which elections must be administered, but rather effectuated the consequences to the Tribe of having failed to even hold an election before the terms of half of the council members expired. Moreover, during the course of and subsequent to the 2017 elections, Interior admirably balanced the deference it owes the Tribe, as a sovereign entity, with its responsibility to ensure that it deals only with a duty constituted governing body for the Tribe. Plaintiffs have not made the requisite showing to survive summary judgment, and their APA claim and this action are therefore dismissed with prejudice.

B. CHILD WELFARE LAW AND ICWA

14. *Matter of P.T.D.*, 376 424 P.3d 619 (S.Ct. Mont. Aug 22, 2018). Department of Public Health and Human Services, Child and Family Services Division, filed a petition to terminate putative father's parental rights to child, who was a member of or eligible for membership in the Fort Peck Indian Tribe. The District Court, 12th Judicial District, Hill County, No. DN-15-010, Daniel A. Boucher, J., granted the petition. Father appealed. The Supreme Court, Mike McGrath, C.J., held that: (1) family relationship did not exist between Indian child and putative father, and therefore, requirements of Indian Child Welfare Act (ICWA) did not apply; and (2) argument that oral pronouncement, minute entry, and order differed in the way they define the active efforts requirement was immaterial. Affirmed.

15. *In re E.H.*, 26 Cal.App.5th 1058, 238 Cal.Rptr.3d 1 (Cal. Ct. App. Sept. 07, 2018). County health and human services agency brought action against mother to terminate her parental rights. The Superior Court, San Diego County, No. SJ13241, Michael J. Popkins, J., entered judgment terminating parental rights. Mother appealed. The Court of Appeal, Aaron, Acting P.J., held that agency's failure to provide Tohono O'odham Nation with notice of information in determining whether child was an Indian child was prejudicial. Reversed and remanded.

16. *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 2018 WL 4374640 (8th Cir. Sept. 14, 2018). Native American tribes and several tribe members brought 1983 putative class action against state officials, alleging policies, practices, and procedures during 48-hour custody hearings relating to the removal of Native American children from their homes based on abuse and neglect allegations violated the Fourteenth Amendment's due process clause and the Indian Child Welfare Act (ICWA) by denying parents a meaningful post-deprivation hearing after their children were taken into temporary state custody. The United States District Court for the District of South Dakota, Jeffrey L. Viken, District Judge, 993 F.Supp.2d 1017, denied defendants' motion to dismiss, 100 F.Supp.3d 749, granted plaintiffs' partial summary judgment motion, and, 2016 WL 7324077, granted declaratory and injunctive relief. Defendants appealed. The Court of Appeals, Colloton, Circuit Judge, held that: (1) *Younger* abstention was warranted, and (2) exception to *Younger* abstention for patently unconstitutional actions did not apply. Vacated and remanded.

17. *In re K.L.*, 27 Cal.App.5th 332, 237 Cal.Rptr.3d 915 (Cal. Ct. App. Sept. 18, 2018). After minor's mother was arrested for child cruelty and possession of a controlled substance, county health and human services agency filed petition to establish child, who was an Indian child, as court dependent. The Superior Court, Alpine County, declared child to be dependent and placed child with presumed father. Noncustodial biological father appealed. The Court of Appeal, Hull, Acting P.J., held that: (1) placement with presumed father was not foster care placement and thus did not trigger Indian Child Welfare Act (ICWA) placement preference requirements, and (2) placement with presumed father was not placement with a guardian and thus also did not trigger ICWA placement preference requirements. Affirmed.

18. *In re N.G.*, 27 Cal.App.5th 474, 238 Cal.Rptr.3d 304 (Cal. Ct. App. Sept. 21, 2018). After Department of Public Social Services (DPSS) sent Indian Child Welfare Act (ICWA) notices to the Blackfeet Tribe of Montana, the Navajo Nation, the Colorado River Indian Tribes, and the Colorado River Tribal Council, the Superior Court, Riverside County, No. RIJ1100389, Jean P. Leonard, Retired Judge, sitting by assignment, terminated mother's parental rights. Mother appealed. The Court of Appeal, Fields, J., held that: (1) trial court, on remand, was required to order DPSS to send ICWA notices to all federally recognized Cherokee tribes; (2) trial court, on remand, was required to fully investigate child's paternal lineal ancestry; and (3) substantial evidence did not show that DPSS complied with sending ICWA notices. Reversed and remanded.

19. *In re A.S.*, 28 Cal.App.5th 131, 239 Cal.Rptr.3d 20 (Cal. Ct. App. Oct. 03, 2018). Dependency proceeding was initiated. The Superior Court, San Diego County entered orders selecting tribal customary adoption proposed by Mesa Grande Band of Mission Indians as permanent plan for children. Parents appealed. The Court of Appeal, Aaron, J., held that: (1) record demonstrated that parents were afforded sufficient opportunity to present evidence to tribe, in accordance with due process; (2) All-County Letter issued by Department of Social services was interpretive, and thus was not binding; (3) any error in trial court's failure to expressly confirm that parents were afforded due process opportunity to present evidence to tribe was harmless under the circumstances; (4) father failed to demonstrate that his due process rights were violated at selection and implementation hearing; (5) mother's testimony about visitation with children and bond with children was relevant to detriment, and thus was admissible in

selection and implementation hearing; (6) trial court acted within its discretion in determining that parents' testimony regarding visitation narratives, visitation scheduling, and progress with services was irrelevant, and thus inadmissible, in selection and implementation hearing; and (7) any error in admitting such testimony about visitation and progress with services was harmless. Affirmed.

20. *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Texas Oct 4, 2018). Foster and adoptive parents and states of Texas, Louisiana, and Indiana brought action against United States, United States Department of the Interior and its Secretary, Bureau of Indian Affairs (BIA) and its Director, BIA Principal Assistant Secretary for Indian Affairs, Department of Health and Human Services (HHS) and its Secretary seeking declaration that Indian Child Welfare Act (ICWA) was unconstitutional. Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians intervened as defendants. Plaintiffs moved for summary judgment. The District Court, Reed O'Connor, J., held that: (1) ICWA's mandatory placement preferences violated equal protection; (2) provision of ICWA granting Indian tribes authority to reorder congressionally enacted adoption placement preferences violated non-delegation doctrine; (3) ICWA provision requiring states to apply federal standards to state-created claims commandeered the states in violation of the Tenth Amendment; (4) Bureau of Indian Affairs (BIA) exceeded its statutory authority in promulgating regulations, in violation of the Administrative Procedure Act (APA); (5) BIA regulations were not entitled to *Chevron* deference; and (6) prospective and adoptive parents whose adoptions were open to collateral attack under ICWA had no fundamental right to care, custody, and control of children in their care. Motions granted in part and denied in part.

21. *Matter of L.A.G*, 393 Mont. 146, 429 P.3d 629 (S.C. Mont. Oct. 16, 2018). Department of Public Health and Human Services filed petition for termination of mother's parental rights as to her two minor children. Following termination hearing, the District Court, Cascade County, Nos. ADN 16-175 and ADN-16-176, Gregory G. Pinski, P.J., terminated mother's parental rights. Mother appealed. The Supreme Court, Beth Baker, J., held that: (1) trial court violated Indian Child Welfare Act (ICWA) when it terminated mother's parental rights before having conclusive determination of children's status in Indian tribe; (2) trial court's oral findings and comments within written order did not implicitly establish that court agreed active efforts to prevent the breakup of Indian family were made, as required under ICWA; but (3) mother's due process rights were not violated when Department raised issue of abandonment during closing argument. Reversed and remanded with instructions.

22. *In re L.D.*, 32 Cal.App.5th 579, 243 Cal.Rptr.3d 894 (Cal. Ct. App. 6th Dis. Jan. 24, 2019). County department of family and children's services filed juvenile dependency petition on behalf of nine-year-old child who may have Native Alaskan ancestry. The Superior Court, Santa Clara County, No. 17JD024833, Michael L. Clark, J., found sufficient notice was sent, pursuant to the Indian Child Welfare Act (ICWA), to Athabascan Indian tribe in Alaska before declaring child dependent. The court subsequently issued restraining order protecting child from mother, and mother was later found to have violated restraining order by possessing or having access to handgun. Mother appealed to challenge the ICWA notice. The Court of Appeal, Grover, J., held that mother's challenge to ICWA notice was untimely. Appeal dismissed.

23. *Mitchell v. Preston*, __ P.3d __, 2019 WL 1614606 (S.Ct. Wyo. Apr. 16, 2019).

Following extensive litigation in child custody action, 2018 WY 110, 426 P.3d 830, father, an Indian tribe member who kept child on reservation, filed motion to establish jurisdiction in tribal court and motion for change of venue, seeking an order relinquishing permanent child custody jurisdiction to the tribal court. Mother, who was not a member of the tribe and who had been awarded primary custody of child, filed motion to strike. The District Court, Sheridan County, Norman E. Young, J., granted mother's motion, and father appealed. The Supreme Court, Kautz, J., held that: (1) Indian Child Welfare Act (ICWA) did not apply, and (2) even assuming ICWA applied, tribal court's emergency orders under Parental Kidnapping Prevention Act (PKPA) did not give tribal court jurisdiction to make permanent custody decisions. Affirmed.

24. *Navajo Nation v. Department of Child Safety*, No. JD527942, 2019 WL 1723574

(Ct. App. Ariz., Div. 1, Apr. 18, 2019). The Navajo Nation appeals the juvenile court's order appointing a permanent guardian for a child subject to the Indian Child Welfare Act ("ICWA") without the testimony of a qualified expert witness that the parent's or the Indian-relative custodian's continued custody would likely result in serious emotional or physical damage to the child. We hold that ICWA applies to guardianships and that it requires a qualified expert witness to provide this testimony. Because such testimony was not provided in this case, we vacate the juvenile court's order and remand the case for a new hearing. In September 2017, the Department informed the court and parties that its designated expert witness was unwilling to provide the requisite testimony for the guardianship. That same month, Mother proposed Ian Service as her expert witness. The Department took no position on Service's qualifications as an expert witness, but the Navajo Nation objected. The court held a *voir dire* hearing to determine whether Service was qualified. During that hearing, Service testified that he had been an attorney for about ten years, mostly as a public defender or prosecutor in Idaho. He stated that 10 to 15 percent of his cases involved ICWA in some way and that he had served as an expert witness in two cases. He admitted, however, that both cases were before the same judge and involved the Shoshone-Bannock Tribe—not the Navajo Nation. He also acknowledged that he was not a member of any Indian tribe, was not recognized as an expert witness by the Navajo Nation, had never been contacted by the Navajo Nation to testify as an expert witness, and was not familiar with the Navajo Nation's parenting customs. Service further stated that he had only minimally reviewed the record and that he had not talked to the proposed Indian-relative placement, R.Y., the Department's expert witness who had refused to testify, or the Navajo Nation case specialist assigned to this case. Section 1912(e)'s plain language states that no foster care placement, which includes permanent guardianships, may be ordered without expert-witness testimony on whether a parent's or an Indian-relative custodian's continued custody of a child will likely result in serious emotional or physical damage to the child. Therefore, a court must hear expert-witness testimony before ordering a permanent guardianship. The record shows that R.Y. was subject to ICWA and a guardianship proceeding took place. Thus, ICWA required the juvenile court to hear expert-witness testimony on whether Mother's or the Indian-relative custodian's continued custody of R.Y. would likely result in serious emotional or physical damage to R.Y. Because such testimony was not provided, the court's order is vacated.

25. *In re Marriage of Stockwell and Dees*, __ P.3d __, 2019 WL 2621228 (Colo. Ct.

App. June 27, 2019). In this proceeding concerning the allocation of parental responsibilities

(APR) for L.D-S., Jennifer Lynn Dees, the child’s mother, appeals the district court’s order denying her motion to vacate a 2013 order giving majority parenting time to Joseph Cody Stockwell, the child’s legal but not biological father. Dees contends that the court erred because it issued the APR order without first inquiring into the child’s possible Indian heritage as required by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2018). Dees is right. In agreeing with her, we clarify that (1) a legal father under Colorado law is not necessarily a “parent” for purposes of ICWA and (2) an APR to a legal father who does not qualify as a “parent” under ICWA is a “child custody proceeding” under ICWA. Because the APR to Stockwell here constituted a child custody proceeding and the court did not comply with ICWA, we reverse the order denying Dees’s motion and remand for further proceedings.

According to ICWA an Indian child who is the subject of an action for foster care placement or termination of parental rights, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition a court of competent jurisdiction to invalidate such action upon a showing that the action violated ICWA provisions. 25 U.S.C. § 1914 (2018). ICWA places no time limit on such a petition. Moreover, barring a parent’s ICWA claim as untimely or waived under state law would contradict our supreme court’s recognition that ICWA is also intended to protect the tribe, which was not at fault for the timing of the ICWA claim and whose interest may have been harmed. See *B.H.*, 138 P.3d at 304 (“Because the protection of a separate tribal interest is at the core of the ICWA, otherwise sufficiently reliable information cannot be overcome by the statements, actions, or waiver of a parent, or disregarded as untimely.”) (citations omitted); see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). We reverse the order denying the ICWA motion and remand for further proceedings as discussed below. Dees argues that the district court failed to comply with ICWA before issuing the October 2013 APR order. Stockwell responds that ICWA is inapplicable because he and Dees are parents of L.D-S. Stockwell is correct that ICWA does not apply to an award of custody to one of the parents, including in a divorce proceeding. 25 C.F.R. § 23.103(b)(3) (2018); see also *In re J.B.*, 178 Cal.App.4th 751, 100 Cal. Rptr. 3d 679, 682 (2009) (a child custody proceeding does not include a proceeding in which a child is removed from one parent and placed with the other because placement with a parent is not foster care). But whether Stockwell qualifies as a parent for purposes of ICWA requires a closer look. As noted, Stockwell is L.D-S.’s legal father. Based on this status, he enjoys all the rights and responsibilities of legal fatherhood under state law. But Stockwell is neither L.D-S.’s biological parent nor an Indian person who has adopted the child. So, Stockwell is not a parent as defined by ICWA. Because Stockwell is not L.D-S.’s parent under ICWA, we consider whether the APR to Stockwell was a “foster care placement,” which is defined as any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.] A foster care placement, which here takes the form of an APR to a person who is not a parent under ICWA, is a child custody proceeding under ICWA because the parent cannot have the child returned upon demand but must instead overcome procedural and substantive barriers to regain custody and control of the child. See also 25 C.F.R. § 23.2 (“Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.”). In sum, the APR to Stockwell was a child custody proceeding for purposes of ICWA. The district court, however, did not inquire into whether L.D-

S. was an Indian child. That was error requiring a remand for further proceedings. See 25 U.S.C. § 1914.

26. *Oliver N. v. Dept. of Health & Social Services, Office of Children's Services, __*

P.2d __, 2019 WL 2896647 (Ak. S. Ct. July 5, 2019). In these separate appeals, consolidated for decision, the question we must decide is whether new federal regulations have materially changed the qualifications required of an expert testifying in a child in need of aid (CINA) case involving children subject to the Indian Child Welfare Act (ICWA). We conclude that they have. To support the termination of parental rights, ICWA requires the “testimony of qualified expert witnesses ... that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Under the new federal regulations, experts who formerly could be presumptively qualified — based on their ability to testify about prevailing cultural and social standards in the child’s tribe, for example — must now also be qualified to testify about the “causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.” We conclude that in these two cases the challenged expert witnesses failed to satisfy this higher standard imposed by controlling federal law. For this reason we reverse the orders terminating the parents’ parental rights and remand for further proceedings. In December 2016 the BIA issued formal regulations accompanied by new guidelines discussing their implementation. The introduction to the new regulations notes they were enacted because the Department of the Interior found that “implementation and interpretation of [ICWA] has been inconsistent across States” and that “[t]his disparate application of ICWA ... is contrary to the uniform minimum [f]ederal standards intended by Congress.” The regulations set out relevant expert witness requirements and the standard for the “likelihood of harm” finding: “Who may serve as a qualified expert witness?” is explained at 25 C.F.R. § 23.122 a): A qualified expert witness must be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child’s Tribe. (Emphasis added). Regarding the likelihood of harm finding, 25 C.F.R. § 23.121 states: (c) For ... termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding; (d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child. In these two parental rights termination appeals, we consider the superior courts’ reliance on experts whose expertise is primarily rooted in their knowledge of tribal customs rather than professional training; the question before us is whether, based on their tribal expertise alone, they have what they “must have” to be qualified to testify under the new regulations. Oliver N. and Lisa B. argue on appeal that in their respective trials the witnesses were not qualified under ICWA to testify as experts about whether returning to the parent’s care would likely result in serious harm to the child. We conclude that under the new BIA regulations, neither Encelewski nor Dale was shown to be a qualified expert witness

under ICWA for this type of testimony. We recognize that this represents a departure from our precedent, but our conclusion is compelled by the recent changes to federal law. In both cases, we reverse the superior court's order terminating parental rights and remand for further proceedings consistent with this opinion.

27. *Watso v. Lourey*, __ F.3d __, 2019 WL 3114047 (8th Cir. July 16, 2019). Mother, individually and for her children, and grandmother brought action against county human services commissioner, tribal courts, and tribal judges contesting tribal courts' jurisdiction over her children's child custody proceedings. The United States District Court for the District of Minnesota, 2018 WL 1512059, Ann D. Montgomery, J., adopted report and recommendation of Katherine M. Menendez, United States Magistrate Judge, 2017 WL 9672393, and dismissed complaint. Plaintiffs appealed. The Court of Appeals, Benton, Circuit Judge, held that: 1) Indian Child Welfare Act (ICWA) did not preclude commissioner from referring tribal-member children's child protection proceedings to tribal courts; 2) federal statute giving Minnesota jurisdiction over civil causes of action to which Indians were party did not require that state court hearing be held before tribal court could exercise jurisdiction; and 3) absence of state court proceeding did not violate plaintiffs' due process rights. Affirmed.

28. *Brackeen v. Bernhardt*, __ F.3d __, 2019 WL 3759491 (5th Cir. Aug 9, 2019). This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. The district court granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we affirm the district court's ruling that Plaintiffs had standing, we reverse the district court's grant of summary judgment to Plaintiffs and render judgment in favor of Defendants. The district court concluded that ICWA's "Indian Child" definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power "over the tribal relations of the Indians ... from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Supreme Court's decisions "leave no doubt that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). "Literally every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Morton v. Mancari*, 417 U.S. at 552. The district court concluded that ICWA sections 1901–2312 and 1951–5213 violated the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law "directly regulated states." Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets minimum procedural standards that preempt conflicting state law.

We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Congress’s legislative powers are limited to those enumerated under the Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, — U.S. —, 138 S. Ct. 1461, 1476 (2018). “[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.” *Id.* The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. Federal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause.” *New York*, 505 U.S. at 178-79. The district court determined that ICWA provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands. However, the Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. *See Mazurie*, 419 U.S. at 557 (“[I]ndependent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority ‘to regulate Commerce ... with the Indian tribes.’ ”). The BIA’s interpretation of section 1915 is also entitled to *Chevron* deference. Plaintiffs had Article III standing, but this court renders judgment in favor of Defendants on all claims.

29. *In re. A.W.*, No. C086160, 2019 WL 3773849 (Cal. Ct. App. 3d Dist. Aug. 12, 2019). Having reason to know the minor may be an Indian child, the juvenile court ordered the County to provide notice to the Picayune Rancheria of the Chukchansi Indians tribe in accordance with the ICWA. The County knew that the maternal grandfather was a member of that tribe and that he lived on the tribe’s reservation. It also knew, or should have known, that mother was found to be an Indian child when she was a dependent of the court and that the Picayune Rancheria of the Chukchansi Indians tribe had intervened in that case. We conclude that the County was required to send ICWA notice to the Picayune Rancheria of the Chukchansi Indians tribe in this case. Here the County only gave the tribe notice of a hearing which had already passed. Less than 60 days after that notice, the juvenile court held an unnoticed ICWA compliance hearing and found the ICWA did not apply. Although it is well established that a non-Indian parent has standing to assert an ICWA notice violation on appeal. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.) Nonetheless, the County argues that this court does not have jurisdiction and parents do not have standing because they did not first bring a petition for invalidation in the juvenile court. The County argues that because a specific remedy [25 U.S.C. 1914] for ICWA violations exists, appeal is an improper remedy. It argues that a petition for invalidation is the exclusive remedy available for ICWA notice and inquiry violations and, as such, parents were required to unsuccessfully pursue such a petition in the juvenile court prior to seeking relief on appeal. Yet despite arguing that a petition for invalidation is the exclusive remedy for an ICWA violation, the County also argues parents do not have standing to file such a petition for invalidation. It argues the petition is only available to parents of Indian children—not parents of a potential Indian child for whom ICWA inquiry and notice was not effectuated.

We decline the County's invitation to reexamine the "non-forfeiture doctrine"—or, more accurately described as the principle that a parent is not foreclosed from raising an ICWA inquiry or notice violation even if the issue could have been more timely raised by appeal from an earlier order.

C. CONTRACTING

30. *Fort McDermitt Paiute and Shoshone Tribe v. Price*, 2018 WL 4637009 (D. D.C. Sept. 27, 2018). This case, brought under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 et seq., concerns a medical clinic in McDermitt, Nevada, a small hamlet located in a remote area of the state near the Oregon border. In February 2016, the Fort McDermitt Paiute and Shoshone Tribe (the "Tribe") informed the Indian Health Service ("IHS")—an agency within the Department of Health and Human Services ("HHS")—that it wished to take over operation of the clinic. In March 2016, IHS announced that it intended to close the clinic. The Tribe and IHS began negotiating a "self-governance compact and funding agreement" pursuant to Title V of ISDEAA, under which the Tribe would operate the clinic. The parties were able to reach agreement in some areas, but not all. On October 13, 2016, the Tribe set forth its position on five remaining sticking points in a "final offer" submitted pursuant to 25 U.S.C. § 5387(b). IHS responded on November 23, 2016, with a letter (the "Declination Letter") rejecting the Tribe's proposal on all five points. The parties subsequently resolved three of the five issues through further negotiations. The parties still disagree whether IHS properly rejected two of the Tribe's proposals under IDSEAA, which sets out limited grounds on which IHS may do so. First, the parties dispute whether IHS's rejection of the Tribe's requested funding level was proper. IHS asserts that it properly rejected the request, because the amount of funds the Tribe proposed exceeded the funding level to which the Tribe was entitled. The Tribe's final offer requested \$1,106,453 in funding. IHS claimed in its Declination Letter that the Tribe was entitled to no more than \$375,533. Second, the parties dispute whether IHS properly rejected the Tribe's proposal to include a provision related to housing for clinic employees in the funding agreement. The parties have cross-moved for summary judgment on these issues. The Court will deny both motions without prejudice as they relate to the funding issue, and order further proceedings. The Court will, however, enter summary judgment for the Tribe on the employee-housing issue.

31. *Cook Inlet Tribal Council v. Mandregan*, 348 F.Supp.3d 1, 2018 WL 5817350 (D. D.C. Nov. 07, 2018). Non-profit corporation that provided services to Alaskan Native people brought action against Indian Health Service (IHS), Department of Health and Human Services, and agency officials, challenging decision declining proposed amendment to self-determination contract pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA) seeking increased funding for substance abuse programs to account for increased facility support costs. Parties filed cross-motions for summary judgment. The District Court, Emmet G. Sullivan, J., held that: (1) funding provision in ISDEAA was ambiguous regarding whether facility support costs needed to be funded exclusively from the Secretarial amount; (2) facility support costs were eligible as contract support costs; and (3) remand to IHS was warranted to determine amount of increased funding non-profit corporation was entitled to under ISDEAA. Plaintiff's motion granted in part; defendants' motion denied.

D. EMPLOYMENT

32. *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 748 Fed.Appx. 12, 2018 WL 4183717 (6th Cir. Aug. 30, 2018). Indian tribe that maintained separate health insurance group policies for its members and its employees brought action against plan administrator, alleging that administrator breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by inflating tribe's medical bills with undisclosed administrative fees, failing to authorize payment of Medicare-like rates for certain health services obtained by tribe's members, and charging hidden fees in connection with its physician group incentive program. The United States District Court for the Eastern District of Michigan, Thomas L. Ludington, J., 200 F.Supp.3d 697, dismissed tribe's claim related to administrator's failure to pay Medicare-like rates, and, 2017 WL 3007074, granted in part and denied in part parties' cross-motions for partial summary judgment as to remaining claims. Tribe appealed. The Court of Appeals, Boggs, Circuit Judge, held that: (1) presumption that employee health benefits offered by employer constituted single ERISA plan was not applicable; (2) tribe's health insurance group policies for its members and its employees were separate plans; (3) tribe's policy for its members was not governed by ERISA; (4) tribe stated breach of fiduciary duty claim relating to Medicare-like rates; but (5) administrator did not violate its fiduciary duties under ERISA through its operation of incentive program; and (6) tribe forfeited any claim to prejudgment interest as component of its damages. Affirmed in part, reversed in part, and remanded.

33. *Luiz v. Northern Circle Indian Housing Authority*, 2018 WL 5733652 (N.D. Cal. Oct. 30, 2018). This is a petition for writ of habeas corpus, filed on August 6, 2018. Respondents have moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. The court will grant Respondents' motion. In his petition, Petitioner states that he is challenging the denial of worker's compensation benefits by the Northern Circle Indian Housing Authority ("NCIHA") and AMERIND Risk Tribal WC Program ("AMERIND"), as administered by the Berkeley Risk Administrators. Petitioner further alleges the following: NCIHA is a tribal housing authority on Indian land in Ukiah, California, which provides assistance for native Americans in Northern California; AMERIND is a federally chartered corporation providing worker's compensation; through contract, AMERIND provides worker's compensation for NCIHA through the AMERIND Tribal Worker's Compensation Program; Petitioner's claim is administered by Berkeley Risk Administration in Scottsdale, Arizona. Petitioner was a non-native employee of NCIHA, where he worked as an IT professional for eighteen years before his claimed injury. On January 22, 2018, and on February 14, 2018, Petitioner filed a claim for worker's compensation benefits with NCIHA for an injury to his neck and shoulder. The claim was denied by Berkeley Risk Administrators as falling outside the coverage plan because the plan does not insure "idiopathic injuries arising from an obscure cause or unknown cause." Respondents move to dismiss on the ground that the court lacks subject matter jurisdiction based on tribal sovereign immunity. "Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (quoting *E.F.W. v. St Stephen's Indian High Sch.*, 264 F.3d 1297, 1302-03 (10th Cir. 2001)). As a court of limited jurisdiction, the federal courts are presumed to lack subject matter jurisdiction unless the party asserting jurisdiction establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America.*, 511 U.S. 375, 377 (1994). When a defendant moves to

dismiss a case for lack of subject matter jurisdiction, the plaintiff has the burden of providing by a preponderance of the evidence that the court possesses jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Generally, a federal court lacks subject matter jurisdiction over an Indian tribe because of tribal sovereign immunity. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). A tribe's sovereign immunity will extend to both tribal governing bodies and tribal agencies which act as arms of the tribe. *Allen v. Gold County Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (tribal casino held entitled to sovereign immunity). "It extends to agencies and subdivisions of the tribe, and has generally been held to apply to housing authorities formed by tribes." *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006) (vacated in part on other grounds). Thus, "[s]uits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Petitioner provides no basis for federal subject matter jurisdiction over this action in his petition. To the contrary, he admits in his petition that NCIHA and its insurer AMERIND enjoy sovereign immunity. Petitioner claims a violation of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, on the ground that he was not fully informed of his rights, duties, and obligations before his claim was denied by the claims administrator and a final order issued by a hearing examiner denying his benefits. The ICRA does not establish or imply a federal civil cause of action except that it provides for a petition for writ of habeas corpus. See *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1189 (9th Cir. 1998). "The term 'detention' in the statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). However, "[a]t the time Congress enacted the ICRA, 'detention' was generally understood to having a meaning distinct from and, indeed, narrower than 'custody.'" *Tavares v. Whitehouse*, 851 F.3d 863, 871 (9th Cir. 2017). "Specifically, 'detention' was commonly defined to require physical confinement." In this case, Petitioner does not allege that he was ever in tribal custody or was detained by the tribe in any way. Thus, the court finds as a matter of law that Petitioner cannot state a claim under the ICRA and his reference to the ICRA provides no basis for federal subject matter jurisdiction. Based on the foregoing, this case is dismissed for lack of subject matter jurisdiction.

34. *Stathis v. Marty Indian School*, __ N.W.2d. __, 2019 WL 2528032 (S. Ct. S. Dakota June 19, 2019). High school principal at Indian reservation school brought action against the school, school employees, and members of school board, asserting claims for wrongful termination, breach of contract, breach of settlement agreement, libel, and slander, and requesting punitive damages arising from termination of his employment. The Circuit Court, First Judicial Circuit, Charles Mix County, Bruce V. Anderson, J., granted defendants' motion to dismiss. Principal appealed. The Supreme Court, Gilbertson, C.J., held that federal law preempted the principal's action. Affirmed.

E. ENVIRONMENTAL REGULATIONS

35. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 2018 WL 4372973 (9th Cir Sept. 14, 2018). Confederated tribes of Colville Reservation brought CERCLA action against State of Washington and Canadian company, seeking to hold them liable for dumping several million tons of industrial waste into Columbia River. After phase one of trifurcated bench trial,

the United States District Court for the Eastern District of Washington, No. 2:04-cv-00256-LRS, Lonny R. Suko, J., found company was a liable party under CERCLA and, in phase two of trial, found company liable for more than \$8.25 million of plaintiffs' response costs. After partial judgment was entered, company appealed. The Court of Appeals, Gould, Circuit Judge, held that: (1) District Court did not abuse its discretion by directing entry of judgment on company's liability under CERCLA for response costs; (2) company expressly aimed waste it dumped into River at State of Washington, thereby establishing requisite effects in Washington for exercise of specific personal jurisdiction; (3) tribes were entitled to recover investigation costs, as recoverable costs of removal; (4) tribes were entitled to recover reasonable attorney fees for prevailing in their action; (5) company was not entitled to divisibility defense. Affirmed.

36. *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 2018 WL 5289028 (9th Cir. Oct. 25, 2018). Environmental groups and Indian tribe brought action challenging United States Forest Service's approval of resumption of uranium mining operation on federal land. Mining companies intervened. The United States District Court for the District of Arizona, No. 3:13-cv-08045-DGC, David G. Campbell, J., 98 F.Supp.3d 1044, entered summary judgment in government's favor, and plaintiffs appealed. The Court of Appeals, Block, District Judge, sitting by designation, held that: (1) plaintiffs had Article III standing to assert claims under National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA); (2) Forest Service's conclusion that mining company had valid existing rights to mine uranium ore on public lands that were established prior to mineral withdrawal was final agency decision; (3) Forest Service's mineral report was not major federal action requiring preparation of environmental impact statement (EIS); (4) Forest Service's mineral report was not undertaking that triggered NHPA's consultation process; (5) groups' claim that Forest Service improperly determined that mining company had valid existing rights to mine uranium ore on public lands fell outside zone of interests protected by General Mining Act; and (6) groups' claim that Forest Service improperly determined that company had valid existing rights to mine uranium ore on public lands fell within zone of interests protected by Federal Land Policy and Management Act (FLPMA). Affirmed in part, vacated in part, and remanded.

37. *Spokane County v. Department of Fish and Wildlife*, 192 Wash.2d 453, 430 P.3d 655 (Wash. Dec. 06, 2018). Counties brought action against Department of Fish and Wildlife, seeking declaratory and injunctive relief regarding Department's authority to regulate construction or performance of work that would occur exclusively above ordinary high-water line. The Superior Court, Thurston County, No. 16-2-04334-5, John C. Skinder, J., entered judgment for Department. Counties sought direct review. The Supreme Court, Owens, J., held that upland projects that are entirely landward of the ordinary high-water line may be subject to the Hydraulic Code and thus subject to regulation by the Department. Affirmed.

38. *Menominee Indian Tribe of Wisconsin v. U.S. Environmental Protection Agency*, 2018 WL 6681397 (E.D. Wis. Dec. 19, 2018). Tribe brought action against Environmental Protection Agency (EPA) and Army Corps of Engineers, seeking declaratory and injunctive relief under Clean Water Act (CWA) and Administrative Procedure Act (APA) in substantive challenge to refusal of EPA and Corps to exercise jurisdiction over CWA permit from state of Michigan for discharge of dredged or fill material into certain navigable waters. Tribe moved to amend complaint to add APA claims challenging EPA's withdrawal of its

objections to permit and alleging that EPA and Corps had violated National Historic Preservation Act (NHPA) section, and EPA and Corps moved to dismiss. The District Court, William C. Griesbach, Chief Judge, held that: (1) EPA's withdrawal of its objections to permit was not reviewable under APA; (2) allegedly violated NHPA section did not apply because no federally funded or federally licensed project was involved; (3) as matter of apparent first impression, CWA citizen suit provision did not waive sovereign immunity for suits against Army Corps of Engineers; (4) CWA could not be used for substantive challenge to EPA's refusal to exercise jurisdiction; and (5) letters from EPA and Corps to tribe explaining refusal to exercise jurisdiction were not final agency actions subject to APA review. Plaintiff's motion denied; defendants' motion granted.

39. *Dine Citizens Against Ruining our Environment v. Bernhardt*, 923 F.3d 831, 2019 WL 1999298, (10th Cir. May 07, 2019). Environmental advocacy groups brought action alleging that Bureau of Land Management (BLM) violated National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) in granting applications for permits to drill (APD) horizontal, multi-stage hydraulically fracked wells on public lands. The United States District Court for the District of New Mexico, No. 1:15-CV-00209-JB-LF, James O. Browning, J., 312 F.Supp.3d 1031, entered judgment in BLM's favor, and groups appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) groups had standing to bring action; (2) environmental assessments (EA) did not arbitrarily define area of potential effects (APE) for each APD in way that excluded cultural sites; (3) EAs adequately analyzed cumulative effects of developing new APDs; (4) BLM did not abuse its discretion under National Historic Preservation Act (NHPA) when it failed to consult with state historic preservation office (SHPO); (5) EAs were properly tiered to its previous environmental impact statement (EIS); (6) NEPA required BLM to consider cumulative impacts of reasonably foreseeable wells in EAs; (7) groups failed to carry their burden to show that BLM acted arbitrarily or capriciously in analyzing air pollution impacts; and (8) BLM abused its discretion by failing to consider cumulative water impacts. Affirmed in part, reversed in part, and remanded.

40. *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, ___ F.3d ___, 2019 WL 3404210 (9th Cir. July 29, 2019). A coalition of tribal, regional, and national conservation organizations ("Plaintiffs") sued the U.S. Department of the Interior, its Secretary, and several bureaus within the agency, challenging a variety of agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. Plaintiffs alleged that these actions violated the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. The Navajo Transitional Energy Company ("NTEC"), a corporation wholly owned by the Navajo Nation that owns the mine in question, intervened in the action for the limited purpose of moving to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7). NTEC argued that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it. The district court agreed with NTEC and dismissed the action. We affirm. The Navajo Mine ("Mine") is a 33,000-acre strip mine. It produces coal from which the Four Corners Power Plant ("Power Plant") generates electricity. The Mine and Power Plant are both on tribal land of the Navajo Nation within New Mexico. The Mine operates pursuant to a surface mining permit issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSMRE") under the Surface Mining Control and Reclamation Act of

1977, 30 U.S.C. § 1201 et seq. This lawsuit stems from changes and renewals to the lease agreements, rights-of-way, and government-issued permits under which the Mine and Power Plant operate. In 2011, APS and the Navajo Nation amended the lease governing Power Plant operations, including by extending the term of the lease through 2041. BHP Billiton (which at the time still owned the Mine) then sought a renewal of the existing surface mining permit for the Mine and a new surface mining permit that would allow operations to move to an additional area within the Mine lease area. The lease amendment and accompanying rights-of-way could not go into effect, and the surface mining permits could not be granted, without approvals from several bureaus within the Department of the Interior. NTEC asserted that it was a required party because of its economic interest in the Mine, that it could not be joined due to tribal sovereign immunity, and that the action could not proceed in its absence. Even though dismissal would have left their decisions intact, Federal Defendants opposed NTEC's motion to dismiss, arguing that the federal government was the only party required to defend an action seeking to enforce compliance with NEPA and the ESA. The district court granted NTEC's motion to dismiss. The court concluded that NTEC had a legally protected interest in the subject matter of this suit, because the "relief Plaintiffs seek could directly affect the Navajo Nation (acting through its corporation, Intervenor-Defendant NTEC) by disrupting its 'interests in [its] lease agreements and the ability to obtain the bargained-for royalties and jobs.'" The court held that Federal Defendants could not adequately represent NTEC's interest in the litigation, because although the agencies had an interest in defending their analyses and decisions, "NTEC's interests in the outcome of this case far exceed" those of the agencies. We agree with the district court that Federal Defendants cannot be counted on to adequately represent NTEC's interests. Although Federal Defendants have an interest in defending their decisions, their overriding interest, as it was in *Manygoats*, must be in complying with environmental laws such as NEPA and the ESA. This interest differs in a meaningful sense from NTEC's and the Navajo Nation's sovereign interest in ensuring that the Mine and Power Plant continue to operate and provide profits to the Navajo Nation. Finally, Plaintiffs and the United States urge us to apply the "public rights" exception to hold that this litigation can continue in NTEC's absence. The public rights exception is a limited "exception to traditional joinder rules" under which a party, although necessary, will not be deemed "indispensable," and the litigation may continue in the absence of that party. *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). We hold that the exception does not apply here. The public rights exception is reserved for litigation that "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *Kescoli*, 101 F.3d at 1311. The public rights exception may apply in a case that could "adversely affect the absent parties' interests," but "the litigation must not 'destroy the legal entitlements of the absent parties'" for the exception to apply. (emphasis added) (quoting *Conner*, 848 F.2d at 1459). Here, although Plaintiffs nominally seek only a renewed NEPA and ESA process, the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form. The result Plaintiffs seek, therefore, certainly threatens NTEC's legal entitlements. We also recognize, as the Tenth Circuit has pointed out, that refusing to apply the public rights exception arguably "produce[s] an anomalous result" in that "[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands." *Manygoats*, 558 F.2d at 559. Or, at least, no one could obtain such review unless the tribe were willing to waive its immunity and participate in the lawsuit. This result, however, is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity. See *Michigan v. Bay Mills*

Indian Cmty., 572 U.S. 782, 790, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). It is undisputed that Congress has not done so here. The public rights exception therefore does not apply. For the foregoing reasons, we affirm.

41. *United Keetoowah Band Of Cherokee Indians v. Federal Communications Commission*, __ F. 3d __, 2019 WL 3756373 (D.C. Cir. Aug 09, 2019). Cellular wireless services, including telephone and other forms of wireless data transmission, depend on facilities that transmit their radio signals on bands of electromagnetic spectrum. The Federal Communications Commission (FCC or Commission) has exclusive control over the spectrum, and wireless providers must obtain licenses from the FCC to transmit. As part of an effort to expedite the rollout of 5G service, the Commission has removed some regulatory requirements for the construction of wireless facilities. These petitions challenge one of the FCC's orders paring back such regulations, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report & Order)(Order)*, FCC 18-30, 2018 WL 1559856 (F.C.C.) (Mar. 30, 2018). The *Order* exempted most small cell construction from two kinds of previously required review: historic-preservation review under the National Historic Preservation Act (NHPA) and environmental review under the National Environmental Policy Act (NEPA). Together, these reviews assess the effects of new construction on, among other things, sites of religious and cultural importance to federally recognized Indian Tribes. We grant in part the petitions for review because the *Order* does not justify the Commission's determination that it was not in the public interest to require review of small cell deployments. In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the *Order* will principally affect small cells that require new construction. The Commission accordingly did not, pursuant to its public interest authority, 47 U.S.C. § 319(d), adequately address possible harms of deregulation and benefits of environmental and historic-preservation review. The *Order's* deregulation of small cells is thus arbitrary and capricious. As for the Tribes' contention that the *Order* is invalid because the Commission did not meet its obligations to consult with Tribes, the Commission responds that it extensively consulted with Tribes, and that in any event its consultation obligation is not judicially enforceable. We conclude that the Commission fulfilled its obligation to consult. The Commission presented abundant evidence that it "consulted" Tribes in the ordinary sense of the word, and the Tribes have offered no other concrete standard by which to judge the Commission's efforts. On this record, we cannot say that the Commission failed to consult with Tribes in its meetings and other communications, which began in 2016 and continued through early 2018. The Commission documented extensive meetings it held with Tribes before it issued the *Order*. Under Advisory Council regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f); *see also* #54 U.S.C. § 302706(b). The dictionary definition of consulting is "seek[ing] advice or information of." *Consult*, *American Heritage Dict.* (5th ed. 2019). Keetoowah complains that the FCC's efforts were "listening sessions, briefings, conference calls, and delivery of remarks by a Commissioner" rather than "consultations," and presents evidence that Tribes did not view these meetings as consultations. But it offers no standard by which to judge which consultations were "listening sessions" or whether a "listening session" or a conference call qualifies as a consultation. We grant the petitions to vacate the *Order's* removal

of small cells from its limited approval authority and remand to the FCC. We deny the petitions to vacate the *Order*'s changes to Tribal involvement in Section 106 review and to vacate the *Order* in its entirety.

F. FISHERIES, WATER, FERC, BOR

42. *Robbins v. Mason County Title Insurance Company*, 5 Wash. App.2d 68, 425

P.3d 885 (Wash. Ct. App. Aug. 28, 2018). Insureds filed action against title insurance company, alleging that terms of title insurance policy obligated insurer to defend them against claim by Squaxin Island Tribe that the 1854 Treaty of Medicine Creek gave Tribe the right to take shellfish on the insureds' tidelands. The Superior Court, Mason County No: 16-2-00686-1, Toni A Sheldon, J., granted summary judgment in favor of insurer and denied insureds' cross-motion for partial summary judgment. Insureds appealed. The Court of Appeals, Bjorgen, J., held that: (1) Tribe's notification to insureds of plan to harvest shellfish in accordance with tribal shellfish rights constituted demand, as required for coverage under policy; (2) Tribe's demand to insureds was not founded upon a claim of title, as required for coverage under policy; (3) Tribe's demand to insureds was founded upon an encumbrance, as required for coverage under policy; (4) Tribe's right to harvest shellfish existed or was claimed to have existed prior to date of title insurance, as required for coverage under policy; (5) Tribe's right to harvest shellfish resembled profit prendre, not easement, and thus did not fall within policy exclusion for easements; and (6) insurer acted in bad faith in denying defense to insureds. Reversed and remanded.

43. *United States v. Uintah Valley Shoshone Tribe*, 2018 WL 4222398 (D. Utah

Sept. 05, 2018). Plaintiff's Motion for Summary Judgment and Defendants' competing Motion for Summary Judgment came before the Court on June 1, 2018. Plaintiff United States of America seeks, among other things, to permanently enjoin Defendants from selling and issuing hunting and fishing permits for use on state, federal, or tribal lands of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribe"). The sale of such licenses allegedly violates 18 U.S.C. § 1343, a criminal statute, which provides the following: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. The UVST, the Defendant, is not a tribe currently recognized by the United States. It is currently an organization composed of "Mixed-Bloods"⁴ (and their descendants) who were formerly members of the Ute Tribe, but whose membership therein and relationship to the federal government was terminated under the Ute Partition and Termination Act of 1954 ("UPTA"). Three UVST "tribal leaders" are named as Defendants. The United States argues that Defendants are engaged in a scheme to obtain money by false representations and promises. Based on the agreed factual stipulations it is difficult for the Court to find such a scheme to obtain money by false representations and promises through the sale of licenses. The question presented to the Court by the United States is more in the nature of a declaration as to the absence of sovereign power in Defendants to issue hunting and fishing licenses. Thus, it appears to the Court the United States as trustee is entitled to a ruling so declaring, but denied relief by way of injunction because of the absence of evidence dealing with a criminal statute. It is clear from the history

since Lincoln's time as a result of congressional and tribal action that Defendants have no power to issue licenses to hunt and fish on trust or Tribal lands. None. They should not do so, not because they have concocted a scheme to defraud purchasers of such licenses, but because they simply lack power to issue such licenses. That resides elsewhere as determined above. It does not reside in Defendants.

44. *Silva v. Farrish*, No. 18-CV-3648 (SJF)(SIL), 2019 WL 117602 (E.D. N.Y. Jan. 07, 2019). Members of the Shinnecock Indian Nation (the "Tribe"), commenced this action alleging violations of their aboriginal usufructuary fishing rights under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and a continuing pattern of race discrimination in violation of Sections 1981 and 1982 of the Civil Rights Act of 1866, as amended, 42 U.S.C. §§ 1981, 1982, by Defendants Brian Farrish ("Farrish"), the New York State Department of Environmental Conservation ("NYDEC") and the Suffolk County District Attorney's Office ("SCDA") (Farrish, Laczi, Seggos and the NYDEC collectively, the "State Defendants"). The Court respectfully recommends that the Complaint be dismissed in its entirety. However, the Court further recommends that Plaintiffs be granted leave to replead, but only as to their statutory claims for monetary damages against Farrish, Laczi and Seggos in their individual capacities. Plaintiffs are members of the Shinnecock Indian Nation, a federally-recognized Indian tribe, who reside on the Shinnecock Indian Reservation (the "Reservation") located in Suffolk County, New York. At all relevant times, Plaintiffs have fished in the waters of Shinnecock Bay and its estuary. According to Plaintiffs, "Colonial Deeds and related documents" support their aboriginal right to fish in such waters without interference. There was a pending state criminal action against him that implicated the State's interest in enforcing its generally applicable fishing regulations, and which provided an adequate opportunity for judicial review of his federal constitutional claim. The State Defendants move to dismiss Plaintiffs' Complaint on the grounds that: (i) all claims against the NYDEC, as well as those against Farrish, Laczi and Seggos in their official capacities, are barred by the Eleventh Amendment and principles of sovereign immunity. The claims for injunctive and declaratory relief as to Silva are precluded under the *Younger* abstention doctrine. It is undisputed by Plaintiffs that the Eleventh Amendment precludes jurisdiction over their claims for monetary damages under 42 U.S.C. §§ 1981 and 1982 against the NYDEC. Plaintiffs maintain, however, that the *Young* exception to sovereign immunity applies to their claims for injunctive and declaratory relief against Farrish, Laczi and Seggos in their official capacities. Plaintiffs also seem to suggest that state regulation of Indian fishing rights is necessarily preempted by federal law. The Court disagrees. Initially, the Court acknowledges that Plaintiffs' claims for declaratory and injunctive relief, as pled in the Complaint, facially satisfy both components of the "straightforward inquiry" under *Verizon* for determining whether *Young* should apply. The Court concludes that this case is governed by *Coeur d'Alene*. Accordingly, the *Young* exception to Eleventh Amendment sovereign immunity does not apply to Plaintiffs' claims against Farrish, Laczi and Seggos in their official capacities. The Court respectfully recommends that Plaintiffs' claims against the NYDEC, along with those against Farrish, Laczi and Seggos in their official capacities, be dismissed as barred by the Eleventh Amendment.

45. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099, 2019 WL 321025 (D.C. Cir. Jan. 25, 2019). Indian tribe filed petition for review of Federal Energy Regulatory Commission orders denying its petition for order declaring that licensee for

hydroelectric project failed to diligently pursue relicensing of project or that states had waived their authority to issue water quality certification for project, 147 FERC 61216, 2014 WL 2794387, and denying its motion for rehearing, 149 FERC 61038, 2014 WL 5293211. The Court of Appeals, Sentelle, Senior Circuit Judge, held that: (1) California and Oregon were not indispensable parties, and (2) states waived their authority under Clean Water Act (CWA) to issue water quality certification for project. Petition granted.

46. *United States v. Turtle*, 2019 WL 423346 (D.C. M.D. Florida, Div. Fort Myers, Feb. 04, 2019). Defendant, a member of the Seminole Tribe of Florida who lived on a Seminole Indian reservation, was charged with selling American alligator eggs in violation of Lacey Act, predicated on the Endangered Species Act (ESA). Defendant moved to dismiss. The District Court, Sheri Polster Chappell, J., held that: (1) the Tribe's usufructuary rights included the right to sell alligator eggs gathered from the reservation; (2) ESA did not abrogate the Tribe's usufructuary right to sell alligator eggs; but (3) Congress could regulate the Tribe's usufructuary rights with reasonable and necessary conservation measures. Motion denied.

47. *Ak-Chin Indian Community v. Central Arizona Water Conservation District*, No. CV-17-00918-PHX-DGC, 2019 WL 1356310 (D.C. D. Arizona Mar. 26, 2019). Plaintiff Ak Chin Indian Community (the "Community") sued Defendant Central Arizona Water Conservation District ("CAWCD") for declaratory judgment and a permanent injunction regarding delivery of Central Arizona Project ("CAP") water to the Community. CAWCD counterclaimed, seeking the opposite result. The Court joined the United States as a party under Rule 19, and the United States filed a crossclaim against CAWCD seeking declaratory relief regarding interpretation of relevant statutes and contracts as they relate to the Community's water rights. CAWCD asserted claims against the United States, but the Court dismissed them on sovereign immunity grounds. The Court will grant the United States' motion for summary judgment on its claims against CAWCD. The Community is a federally recognized Indian tribe. CAWCD is a multi-county water conservation district and municipal corporation authorized to operate and maintain the CAP, a system of canals, aqueducts, and related structures that deliver Colorado River water throughout central and southern Arizona. "The United States" in this case includes a number of federal officials and agencies that oversee reclamation matters. This case concerns the Ak Chin Water Rights Act of 1984, referred to and cited in this order as the "1984 Act." See 1984 Act, Pub. L. No. 98-530, 98 Stat. 2698 (Oct. 19, 1984). The 1984 Act addressed water the Community is entitled to receive from the Colorado River. Section 2(a) of the Act required the Secretary to deliver a permanent water supply to the Community of "not less than seventy-five thousand acre-feet of surface water suitable for agricultural use except as otherwise provided under subsections (b) and (c)." 1984 Act, § 2(a). Section 2(b), which is the section in dispute in this case, concerns an additional 10,000 acre-feet ("AF") of water the Community may receive under certain conditions. It provides that "[i]n any year in which sufficient surface water is available, the Secretary shall deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet." 1984 Act, § 2(b). The section further states that "[t]he Secretary shall be required to carry out this obligation referred to in this subsection only if he determines that there is sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity." It is ordered: The United States' motion for summary judgement on its claims against CAWCD is granted.

48. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al.*, No. 13-00883 (U.S. D.C. C.D. Calif. Apr. 19, 2019). The Tribe utilizes water supplied by CVWD and DWA. In 2016, CVWD's and DWA's public water systems covering the Reservation served a total population of 340,000 people. Today, the Tribe does not pump groundwater from its Reservation. The Tribe currently does not use water for agricultural purposes to any significant degree. For standing purposes, the Tribe must show an invasion to its legally protected interest. Under the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564, the creation of an Indian Reservation contains a right to water "to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). This right is referred to as a "Winters right." The Supreme Court holds this Winters right "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (emphasis added)). In this case, the Ninth Circuit acknowledged limitations on a Winters right and noted that a Winters right "only reserves water to the extent it is necessary to accomplish the purpose of the reservation[.]" *Agua Caliente*, 849 F.3d at 1268. The Federal Circuit, considering a similar issue, reached the same conclusion. See *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018). The tribe in Crow Creek argued any action affecting the water source at issue constitutes an injury to its Winters right, even if the action does not affect the tribe's ability to draw sufficient water to fulfill the purposes of the reservation. The Federal Circuit rejected this argument, noting that a Winters right only entitled a tribe to enough water to fulfill the purposes of its reservation, not more. It elaborated that that the tribe's property right was usufructuary in nature in that the tribe did not own particular molecules of water but the advantage of its use. (citation omitted). The Federal Circuit held that the tribe cannot be injured by "action that does not affect [its] ability to use sufficient water to fulfill the purposes of the [r]eservation." This Court agrees with the Federal Circuit's analysis and finds that the Tribe must provide evidence of injury to its ability to use sufficient water to fulfill the purposes of the reservation.

49. *United States v. Washington*, 2019 WL 2608834 (9th Cir. June 26, 2019). United States, on its own behalf and as trustee for a number of Western Washington Indian tribes, brought action against State of Washington, seeking declaratory and injunctive relief concerning off-reservation treaty rights fishing. After entry of injunction granting tribal fishing rights, 384 F. Supp. 312, and adjudication of tribes' off-reservation rights, 626 F. Supp. 1405, Skokomish tribe commenced subproceeding asserting its claim to usual and accustomed fishing rights in Satsop River. The United States District Court for the Western District of Washington, Nos. 2:17-sp-01-RSM, 2:70-cv-09213-RSM, Ricardo S. Martinez, Chief Judge, 2017 WL 3726774, entered summary judgment in favor of state and other tribes, and Skokomish tribe appealed. The Court of Appeals, Bea, Circuit Judge, held that tribe failed to properly invoke district court's continuing jurisdiction. Affirmed.

G. GAMING

50. *Forest County Potawatomi Community v. United States*, 330 F.Supp.3d 269, 2018 WL 4308570 (D. D.C. Sept. 10, 2018). Indian tribe brought action under Administrative Procedure Act (APA) against the United States, challenging Department of Interior's (DOI) decision not to approve an amendment to a gaming compact between the tribe and State of

Wisconsin under Indian Gaming Regulatory Act (IGRA). After the United States District Court for the District of Columbia, Colleen Kollar-Kotelly, J., 317 F.R.D. 6, granted leave to intervene to nearby tribe that sought to develop competing gaming facility, tribe moved for summary judgment, while United States and nearby tribe cross-moved for summary judgment. The District Court held that: (1) IGRA provision permitting tribal-state compact on any subjects directly related to operation of gaming activities was ambiguous, as would support *Chevron* deference; (2) interpretation of IGRA by Assistant Secretary of Indian Affairs was based upon a permissible construction of statute, as would entitle decision to *Chevron* deference; (3) Secretary's determination that exclusivity provision transferring responsibility for tribe's revenues onto another tribe violated IGRA was reasonable, entitling decision to *Chevron* deference; (4) Secretary's determination that proposed compact would have required another tribe to take responsibility for tribe's revenues was not arbitrary and capricious, as required to support tribe's APA claim; (5) Secretary's determination that compact's inclusion of loss of revenue from class II gaming and ancillary businesses violated IGRA was reasonable, and thus was entitled to *Chevron* deference; and (6) Secretary's determination that proposed compact calculated loss mitigation payments based on revenue from class II gaming and ancillary businesses was not arbitrary and capricious, as required to support tribe's APA claim. Tribe's motion denied; United States and nearby tribe's motions granted.

51. *Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation v. Unite Here International Union*, 346 F.Supp.3d 1365 (S.D. Cal. Sept. 28, 2018). Federally-recognized Indian tribe that operated casino on its reservation brought action alleging that union which represented service and manufacturing employees skirted binding dispute resolution process by filing series of unfair labor practice charges directly with National Labor Relations Board (NLRB), and that State of California failed to take reasonable efforts to ensure that union would comply with dispute resolution process. Union and State moved to dismiss. The District Court, Cynthia Bashant, J., held that: (1) tribe had colorable basis for District Court to have federal question jurisdiction over action against State; (2) dispute between tribe and union over enforceability of alternative dispute mechanism in tribal labor ordinance was not justiciable controversy with State of California; (3) claim by tribe against State for breach of implied covenant of good faith and fair dealing for not enforcing alternative dispute mechanism against union in tribal labor ordinance as implemented into Indian Gaming Regulatory Act (IGRA) gaming compact with State was not justiciable; and (4) court did not have federal question jurisdiction over dispute between tribe against union for opting to pursue its unfair labor charges against tribe with National Labor Relations Board (NLRB) instead of dispute resolution process in tribe's IGRA gaming contract with State of California. Motions granted.

52. *Brownstone, LLC. v. Big Sandy Rancheria of Western Mono Indians et al.*, No. 2:16-cv-04170-CAS(AGR), 2018 WL 6697175 (C.D. Cal. Dec. 17, 2018). Brownstone, LLC filed this action against defendants Big Sandy Rancheria of Western Mono Indians (the "Tribe") and the Big Sandy Rancheria Entertainment Authority (the "Authority"). Plaintiff alleges the following claims: (1) claims for the breaches of two contract; (2) money had and received; (3) conversion; (4) Open Book Account; and (5) declaratory relief. Defendants moved to dismiss. Plaintiff alleges that it was selected by the Tribe to provide expertise in developing a large, Class III gaming facility. The parties entered into contracts aligned with different phases of the Project. Following the initial Memorandum of Understanding ("MOU"), executed on January 16, 2007,

the parties first entered into a Credit Agreement. The parties also entered into the Development Agreement on or about the same date as the Credit Agreement. Under the Development Agreement, plaintiff was to help the Tribe obtain either bridge financing or permanent financing for the Project. Plaintiff claims that the plaintiff and the Tribal Parties continued to negotiate a third agreement, the Consulting Agreement, whereby plaintiff would provide services for the operations of the casino once completed. However, after the Tribe elected new leadership in September 2008, the Tribal Parties ultimately declined to execute the Agreement. Still, plaintiff claims that it continued to seek financing sources to assist the Tribe with pursuing the Project, if without the complete cooperation of the Tribal Parties. Plaintiff alleges that the parties agreed that licensing was unnecessary for the Credit Agreement and the Development Agreement because those agreements only contracted plaintiff to perform certain services before any gaming operations occurred. On June 10, 2016, plaintiff filed this action. The Tribal Parties moved to dismiss plaintiff's complaint on the grounds that (1) the Court lacks subject matter jurisdiction over this matter; (2) that venue is improper; and (3) that plaintiff fails to state a claim for which relief is available. Plaintiff argues that the Court has subject matter jurisdiction in this case under 28 U.S.C. § 1331, commonly referred to as "federal question jurisdiction." Plaintiff contends that this case requires resolution of a substantial question of federal law under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"), as well as the Tribal-State Compact between Big Sandy Rancheria and the State of California. Defendants respond that federal question jurisdiction does not provide this Court subject matter jurisdiction because a federal issue is not apparent on the face of plaintiff's complaint, nor is a question of federal law "a necessary element of one of [plaintiff's] well-pleaded state claims." The Court finds that federal question jurisdiction does not confer jurisdiction over this matter because plaintiff's case does not satisfy the well-plead complaint rule. For the foregoing reasons, the Court grants defendants' motion to dismiss, pursuant to Rule 12(b)(1).

53. *Koi Nation of Northern California v. United States Department of Interior*, ___ F.Supp.3d ___, 2019 WL 250670 (D.C. D.C. Jan. 16, 2019). The Koi Nation of Northern California, which was a landless federally recognized Indian tribe, brought action alleging that United States Department of the Interior's (DOI) decision concluding that the tribe was not eligible to game on lands under the Indian Gaming Regulatory Act (IGRA) restored lands exception violated the Administrative Procedure Act (APA), IGRA, and Indian Reorganization Act (IRA), and challenging the subsection of the regulation on which the DOI's decision relied, seeking declaration that tribe qualified as an Indian tribe restored to federal recognition under IGRA, and injunction invalidating subsection of implementing regulation to extent it excluded from eligibility for IGRA's restored lands exception tribes administratively determined to be recognized outside the formal Part 83 Federal acknowledgement process. Koi Nation and DOI cross-moved for summary judgment. The District Court, Beryl A. Howell, Chief Judge, held that: (1) tribe's claim was ripe for judicial review; (2) statutory six-year limitations period for challenging agency regulation did not apply to tribe's claim challenging DOI regulation; (3) tribe was "restored to Federal recognition," within meaning of IGRA's restored lands exception; (4) even if IGRA's restored lands exception was ambiguous, Indian canon of construction would resolve the ambiguity in tribe's favor; (5) DOI decision violated statute prohibiting classifying, enhancing, or diminishing privileges and immunities available to Indian tribe relative to other federally recognized tribes; and (6) DOI failed to adequately explain its change in policy. Koi Nation's motion granted; DOI's motion denied.

54. *Texas v. Ysleta Del Sur Pueblo*, 2019 WL 542036 (W.D. Texas, Div. El Paso Feb. 11, 2019). In litigation between State of Texas and Ysleta del Sur Pueblo Tribe regarding gaming activities on Pueblo tribal land, Tribe asserted counterclaim seeking declaration that Texas Constitution and Bingo Enabling Act, which enabled charitable bingo in Texas and defined which types of organizations were allowed to conduct charitable bingo, violated the Equal Protection Clause by allowing certain organizations the right to conduct bingo, but omitting Indian nations and their members from that list, and asserting that state Attorney General enforced Texas's gaming laws in a discriminatory manner. Attorney General moved for summary judgment, asserting that §1983 was appropriate vehicle for alleging a constitutional claim and that the Tribe was not a proper claimant pursuant to §1983, and contending that the Tribe's claims failed on the merits because the Bingo Enabling Act was not unconstitutionally written or enforced. The District Court, Philip R. Martinez, J., held that: (1) Section 1983 was appropriate method for Tribe to assert claims; (2) Tribe could assert §1983 Equal Protection claim alleging that State unlawfully discriminated against Indians when it drafted Bingo Enabling Act; (3) Tribe could assert §1983 Equal Protection claim alleging that enforcement of Bingo Enabling Act discriminated against Tribe; (4) Tribe was barred from asserting §1983 claim that its Equal Protection rights were violated because Congress had plenary power to deal with unique issues concerning Indian nations and because Texas sought to unlawfully expand its regulatory reach; (5) district court would apply rational basis scrutiny rather than strict scrutiny; (6) under rational basis review, Bingo Enabling Act did not violate Tribe's equal protection rights; (7) Tribe could not prevail on §1983 claim alleging that enforcement of the Bingo Enabling Act violated Tribe's equal protection rights; and (8) under rational basis review, Texas's decision to have Attorney General, rather than local prosecutors, prosecute Tribe for alleged violations of gaming laws did not violate Tribe's equal protection rights. Motion granted.

55. *Texas v. Ysleta Del Sur Pueblo*, 2019 WL 639971 (W.D. Texas Feb. 14, 2019). Plaintiff State of Texas moved for Summary Judgment and Permanent Injunction. In 1968, the United States Congress simultaneously recognized the Pueblo as a tribe and transferred any trust responsibilities regarding the Tribe to the State of Texas. S. Rep. No. 100-90S. Rep. No. 100-90 (1987), at 7. After the trust relationship was created, Texas held a 100-acre reservation in trust for the Tribe. However, in 1983, Texas Attorney General Jim Mattox issued an opinion in which he concluded that the State may not maintain a trust relationship with an Indian Tribe. Jim Mattox, *Opinion Re: Enforcement of the Texas Parks and Wildlife Code within the Confines of the Alabama-Coushatta Indian Reservation*, No. JM-17 (March 22, 1983). Mattox opined that a trust agreement with Indian tribes discriminates between members of a tribe and other Texas citizens on the basis of national origin in violation of the Texas Constitution. Therefore, Mattox determined that no proper public purpose existed for the trust. Accordingly, the Pueblo, alongside the Alabama-Coushatta Tribe in East Texas, sought to establish a federal trust relationship with the United States government. See S. Rep. No. 100-90S. Rep. No. 100-90 (1987), at 7. In 1999, the State sued the Tribe and sought to enjoin gaming activities on the Pueblo reservation. On September 27, 2001, summary judgment was granted in the State's favor. *Texas v. del Sur Pueblo* ("Ysleta II"), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001) (internal citations omitted), modified (May 17, 2002), aff'd, 31 F. App'x 835 (5th Cir. 2002), and aff'd sub nom. *State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), and order clarified sub nom. *Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4,

2009). In his Memorandum Opinion, Judge Eisele determined that the Tribe cannot engage in “‘regulated’ gaming activities unless it complies with the pertinent regulations.” The court determined that the Tribe’s activities did not comply with Texas’s laws and regulations. Moreover, the court considered equitable factors and concluded that “[t]he fruits of [the Tribe’s] unlawful enterprise are tainted by the illegal means by which those benefits have been obtained.” Accordingly, the Tribe was permanently enjoined from continuing its operations. The Fifth Circuit summarily affirmed Judge Eisele’s opinion. *State v. del sur Pueblo*, 31 F. App’x 835 (5th Cir. 2002). The facts in this case are undisputed. The lawsuit centers around the Tribe’s activities at Speaking Rock Entertainment Center, which is the primary location for the Tribe’s gaming activities. The Tribe’s gaming operations are a significant source of employment for the Pueblo people, and the Tribe uses the money raised at its casino to fund several important governmental initiatives, including education, healthcare, and cultural preservation. The Pueblo’s operations are not conducted pursuant to any license from the Texas Lottery Commission. The Court joins the refrain of Judges who have urged the Tribes bound by the Restoration Act to petition Congress to modify or replace the Restoration Act if they would like to conduct gaming on the reservation. The State of Texas’s Motion for Summary Judgment and Permanent Injunction is granted.

56. *Connecticut v. United States Department of Interior*, 2019 WL 652321 (D.C. Feb. 15, 2019). State and Indian tribe brought action under the Administrative Procedure Act (APA) against defendant, including United States Department of the Interior (DOI), alleging that Secretary of the Interior unlawfully declined to approve amendment to secretarial procedures under the Indian Gaming Regulatory Act (IGRA) that would have allowed them to begin constructing commercial casino on state land. State and tribe moved to amend complaint. The District Court, Rudolph Contreras, J., held that: (1) defendants failed to show that they would be prejudiced by alleged undue delay in moving to amend complaint; (2) Secretary’s letter was final agency action, and thus subject to judicial review; (3) tribe and state sufficiently alleged that Secretary’s letter was arbitrary and capricious on its face; (4) tribe and state sufficiently alleged that political pressure was brought to bear on officials responsible for approving proposed amendments; (5) tribe and state sufficiently alleged that political pressure caused Secretary to make decision that was not dictated by IGRA; and (6) proposed amendments to secretarial procedures plainly fell outside of DOI’s definition of a tribal-state compact. Motion granted in part and denied in part. See also 344 F.Supp.3d 279.

57. *Frank's Landing Indian Community v. National Indian Gaming Commission*, ___ F.3d ___, 2019 WL 1119912 (9th Cir. Mar. 12, 2019). Indian community brought action against Department of Interior and National Indian Gaming Commission, challenging Interior’s determination that tribe was ineligible for gaming for purposes of Indian Gaming Regulatory Act (IGRA). The United States District Court for the Western District of Washington, Benjamin H. Settle, J., 242 F.Supp.3d 1156, granted summary judgment in favor of Department of Interior. Tribe appealed. The Court of Appeals, Morgan Christen, Circuit Judge, held that: (1) a tribe must appear on the Secretary’s annual list of federally recognized tribes in order to be eligible to engage in class II gaming, and (2) Franks Landing Act did not grant Community permission to engage in class II gaming. Affirmed.

58. *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 2019 WL 1199564 (5th Cir. Mar. 14, 2019). Indian tribe brought action against state seeking declaratory judgment that its gaming activities on tribal lands were permitted under Indian Gaming Regulatory Act (IGRA). State filed counterclaim to enjoin tribe from conducting gaming activities based on Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act. After state's motion for permanent injunction was granted, state moved to realign parties, moved for contempt, and sought declaration that IGRA did not apply, and tribe moved for relief from injunction. The United States District Court for the Eastern District of Texas, Keith F. Giblin, United States Magistrate Judge, entered summary judgment in state's favor, 208 F.Supp.2d 670, and denied tribe's motion for relief from injunction, 298 F.Supp.3d 909. Tribe appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that National Indian Gaming Commission's (NIGC) determination that IGRA governed question of whether tribe could conduct class II gaming on tribal lands was not entitled to *Chevron* deference. Affirmed.

59. *Chemehuevi Indian Tribe v. Newsom*, 2019 WL 1285060 (9th Cir. Mar. 21, 2019). Indian tribes brought action against state seeking declaratory judgment that duration provision of tribal-state gaming compacts violated Indian Gaming Regulatory Act (IGRA). The United States District Court for the Central District of California, No. 5:16-cv-01347-JFW-MRW, John F. Walter, J., 2017 WL 2971864, entered summary judgment in state's favor, and tribes appealed. The Court of Appeals, Gilliam, District Judge, sitting by designation, held that as matter of first impression, duration provisions were permitted by IGRA. Affirmed.

60. *City of Council Bluffs, Iowa v. United States Department of Interior*, F.Supp.3d, 2019 WL 1368561 (D.C. S.D. Iowa, Div. W. Mar. 26, 2019). City in state of Iowa filed suit against Department of Interior and National Indian Gaming Commission (NIGC), asserting claims under Administrative Procedure Act (APA) and seeking declaratory judgment invalidating NIGC's amended final order approving site-specific gaming ordinance enacted by Ponca Tribe of Nebraska that allowed tribe to conduct Class II gaming, under Indian Gaming Regulation Act (IGRA), on 4.8-acre tract of land in Iowa that was within tribe's service area, designated pursuant to Ponca Restoration Act (PRA) that restored tribe's government-to-government relationship with United States, and that was subsequently placed into trust by Bureau of Indian Affairs (BIA), as authorized by Indian Reorganization Act (IRA). State of Nebraska and State of Iowa intervened as intervenor-plaintiffs. Parties cross-moved for summary judgment. The District Court, Stephanie M. Rose, J., held that: (1) NIGC appropriately found tribe was not estopped from asserting that parcel qualified for IGRA's restored lands exception; (2) NIGC reasonably interpreted PRA; (3) NIGC was not required to consider new IGRA regulations in interpreting PRA; (4) NIGC reasonably determined that new IGRA regulations did not apply; but (5) NIGC unreasonably failed to consider purported verbal agreement between tribe and Iowa. Plaintiffs' motion granted in part and denied in part; defendants' motion denied.

61. *Pueblo Of Isleta v. Michelle Lujan Grisham*, Civ. No. 17-654 KG/KK, 2019 WL 1429586 (D.C. D. New Mexico Mar. 30, 2019). This matter is before the Court on Defendants' and Plaintiffs' motions for summary judgment. The Court finds that: (1) Defendants' Summary Judgment Motion should be denied; (2) the Pueblos' Summary Judgment Motions should be granted. Plaintiffs the Pueblos of Isleta, Sandia, and Tesuque, and Plaintiffs-in-Intervention the Pueblos of Santa Ana, Santa Clara, and San Felipe (collectively, "the Pueblos"), are six (6)

federally recognized Indian tribes that operate casinos in New Mexico pursuant to identical gaming compacts with the State of New Mexico (“the State”). Defendants are the State Governor, the State Gaming Representative, and the Chair and members of the State Gaming Control Board (“NMGCB”) in their official capacities. The Pueblos and the State entered into gaming compacts in 2007 (“2007 Compacts”), and again in 2015 and 2016 (“2015 Compacts”). *Inter alia*, the compacts require the Pueblos to make quarterly revenue sharing payments to the State, in exchange for the Pueblos’ nearly exclusive right to conduct certain kinds of gaming in New Mexico. In 2017, Defendants sent the Pueblos notices of non-compliance and notices to cease conduct, asserting that the Pueblos had miscalculated their revenue sharing obligations under the 2007 Compacts beginning as early as April 2011. Specifically, Defendants claimed that, in calculating their revenue sharing payments, the Pueblos had improperly excluded the face value of free play and deducted the value of prizes won by patrons as a result of free play wagers from their Class III gaming machines’ “Net Win.” Pursuant to the 2015 Compacts, which preserved Defendants’ claims, Defendants instructed the Pueblos to make additional revenue sharing payments to the State under the 2007 Compacts. The Pueblos of Isleta, Sandia, and Tesuque filed this civil action. In their complaints, the Pueblos ask the Court for a judgment declaring that: (1) Defendants’ claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts violate federal law, and the 2015 Compacts are therefore invalid and ineffective to preserve Defendants’ unlawful claims; (2) neither the Pueblos’ claims in this lawsuit nor Defendants’ claims for additional revenue sharing payments are subject to arbitration under the 2015 Compacts, and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the Pueblos. Plaintiff’s motion for summary judgement is granted.

62. *Stockbridge-Munsee Community v. Wisconsin*, 922 F.3d 818, 2019 WL 1923403 (7th Cir. Apr. 30, 2019). Indian tribe brought action under the Indian Gaming Regulatory Act (IGRA) against second tribe and State, seeking injunctive relief from proposed expansion of second tribe's casino, located in the same county. The United States District Court for the Western District of Wisconsin, James D. Peterson, J., 299 F.Supp.3d 1026 and 2018 WL 708389, dismissed as untimely. First tribe appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that Indian tribe's lawsuit seeking injunctive relief from proposed expansion of second tribe's casino was barred by Wisconsin's six-year statute of limitations for contract actions. Affirmed.

63. *Yocha Dehe Wintun Nation v. Newsom*, 2019 WL 2513788 (E.D. Cal. June 18, 2019). On January 3, 2019, the Yocha Dehe Wintun Nation, Sycuan Band of the Kumeyaay Nation, and Viejas Band of Kumeyaay Indians (collectively “Plaintiffs” or “Tribes”) filed a complaint against the State of California and Governor Gavin Newsom (collectively “Defendants”). Plaintiffs contend Defendants are not enforcing the state’s ban on “banking and percentage card games” against cardrooms in California’s non-tribal casinos. This, they argue, amounts to a breach of their Tribal-State Compacts and the covenant of good faith and fair dealing implied therein. For the reasons discussed below, the Court grants Defendants’ motion to dismiss with prejudice. In September 2015, June 2016, and August 2016, the State of California entered into Tribal-State Compacts with the Sycuan Band of the Kumeyaay Nation, the Viejas Band of Kumeyaay Indians, and the Yocha Dehe Wintun Nation, respectively. These agreements amended and superseded the 1999 Tribal-State Compacts between the parties. Yocha Dehe

Wintun Compact, Viejas Band Compact, and Sycuan Band Compact (collectively “Tribal Compacts”) at § 18.2. Each Compact included a Preamble. See Tribal Compacts at 1-2. In relevant part, the Preambles acknowledged that the tribes’ exclusive right to operate slot machines and banked card games “create[d] a unique opportunity to operate a Gaming Facility in an economic environment free of competition...and that this unique economic environment is of great value to the Tribe.” This “unique opportunity” was born out of a provision in the California constitution exempting Indian tribes from the state’s general prohibition on “banking and percentage card games.” Cal. Const. art. IV, § 19(e). Over the years, Defendants have taken various positions on what type of gaming is allowed in light of the State’s ban on banking and percentage card games. Compl. ¶¶ 33-37, 42, 48, 74, 107, 118. See also Cal. Penal Code §§ 330.11, 337j(f); Oliver v. Los Angeles County, 66 Cal. App. 4th 1397 (1997); Huntington Park Club v. Los Angeles County, 206 Cal. App. 3d 241 (1988). Plaintiffs contend the State’s current interpretation effectively results in non-enforcement of its claimed prohibition. Indeed, Plaintiffs allege Defendants have “been complicit in permitting, and at times even encouraging the cardrooms’ unlawful conduct,” abridging the Tribes right of exclusivity. Plaintiffs fail to state a breach of Compact claim because the Tribal Compacts do not contain a right of exclusivity independent of the one provided by the state constitution. The California constitution provides: Notwithstanding [California’s prohibition on Nevada-style casinos]...the Governor is authorized to negotiate and conclude compacts...for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Cal. Const. Art. IV, § 19(f). The question of whether a federally-recognized tribe has negotiated an agreement with the state to conduct otherwise prohibited gaming is a matter of Compact interpretation. But the question of whether federally-recognized tribes are the only entities who may lawfully conduct otherwise prohibited gaming is not. Plaintiffs’ exclusivity rights flow solely from the California constitution. This is the unavoidable barrier that prevents Plaintiffs from successfully maintaining their breach of Compact claims. Against this backdrop, Plaintiffs negotiated Compacts with the State in 1999. These negotiations culminated in Tribal-State Compacts that would only take effect if California voters enacted an amendment to the State Constitution that exempted tribes from California’s prohibition on New Jersey-and Nevada-style gaming. The referendum passed, and the Compacts took effect. With the 1999 Compacts, Plaintiffs bargained for an economic opportunity, codified in state law, that they did not previously have: the exclusive right to conduct otherwise prohibited gaming. There is no doubt that the 1999 exclusivity provisions imposed an affirmative obligation on the State. But the 1999 compacts do not govern this suit. In 2015 and 2016, Plaintiffs renegotiated their Compacts with the State. See generally Tribal Compacts. Each Plaintiff’s Compact includes a merger clause, noting that the new Compacts “set forth the full and complete agreement of the parties and supersede[] any prior agreements or understandings with respect to the subject matter [t]hereof.” Tribal Compacts at § 18.2. Plaintiffs argue the most-recently entered Compacts guarantee the same right of exclusivity that was bargained for in the 1999 agreements. Opp’n at 4. The Court disagrees. The Compacts, although recognizing the right of exclusivity provided by the California Constitution, do not include any express terms regarding Defendants’ obligation to preserve that right. In fact, the Compacts contemplate the abrogation of that right, providing the Tribes limited recourse in the event their rights of exclusivity lapse. For the reasons set forth above, the Court grants with prejudice Defendants’ Motion to Dismiss.

64. *Kalispel Tribe of Indians and Spokane County v. U.S. Department of the Interior*, 2019 WL 3037048 (E.D. Wash. July 11, 2019). For the reasons detailed below, the Court grants Defendants' Motions for Summary Judgment. Located a few miles west of Spokane in Spokane County, Airway Heights is home to Fairchild Air Force Base, Northern Quest Casino, and, more recently, the Spokane Tribe's casino. Though Airway Heights falls within Spokane Tribe's aboriginal land, the Kalispel Tribe obtained trust land within Airway Heights and successfully obtained permission to build the Northern Quest Casino twenty years ago. Northern Quest Casino has proved lucrative for the Kalispel, bringing in profits that benefited the Kalispel tribal members by funding local governmental interests as well as providing direct payments to tribal members. In 2001, the United States acquired land in trust for the Spokane Tribe nearby the Northern Quest Casino. Five years later, the Spokane Tribe sought Department of the Interior [Department] approval for gaming on the trust land with a proposed casino within two miles of the Northern Quest Casino. Permission for gaming on the property required a two-part determination by the Department of the Interior. Over the course of the next ten years the Department examined the Spokane Tribe's request. The Department consulted an expert to assess how an additional gaming facility would affect the surrounding community including the Kalispel. Local officials engaged with the Department to address concerns about the proposed casino. The Department initiated the processes required under the National Environmental Policy Act [NEPA] to assess the environmental impact. On June 15, 2015, the Department found in favor of Spokane Tribe; Governor Jay Inslee concurred, marking the conclusion of the approval process. In 2018, twelve years after the Spokane Tribe first requested a two-part determination, the casino opened for business with plans for further development into the future. Gaming is prohibited on trust lands unless "the Secretary after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community ..." 25 U.S.C. § 2719(b)(1)(A). Bureau of Indian Affairs [BIA] regulations define "surrounding community" as "local governments and nearby Indian tribes located within a twenty-five-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. Though the Kalispel tribe likely will suffer some detrimental impacts through loss of revenue, the Department's determination that the new casino would not be detrimental to the surrounding community was not arbitrary and capricious. After exhaustive review, the Secretary permissibly weighed the benefits and detriments to the community concluding that approval of the new casino would not be a detriment to the surrounding community. The BIA spent ten years investigating the application, seeking expert review, and working with local officials and governments prior to issuing a decision. The BIA squarely addressed Kalispel's concerns regarding lost profits at the Northern Quest Casino. The Department's expert concluded that while the Kalispel may suffer in the short term, eventually the profits would rebound and both tribes would benefit. Id. Though this conclusion differs from the Kalispel's own expert, reliance on the agency expert was not arbitrary and capricious. In weighing detriment to the community, the Department need not find that the casino has no unmitigated negative impacts whatsoever, but instead the Secretary must weigh the benefits and possible detrimental impacts as a whole, "even if those benefits do not directly mitigate a specific cost imposed by the casino." *Stand Up for California! v. United States Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018), cert. denied sub nom. *Stand Up for California! v. Dep't of the Interior*, 139 S. Ct. 786, 202 L. Ed. 2d 629 (2019). The Department met its statutory obligations for consultation. The parties do not dispute that the Secretary followed the applicable

regulations regarding consultation. Lastly, Kalispel argues that the Department violated the trust relationship with the Kalispel tribe. The Federal Government owes a duty of trust to all tribes; however, the scope of that duty must be established by statute and that trust duty necessarily equally applies to all tribes so the Government may not favor one tribe over another. Lawrence v. Department of Interior, 525 F.3d 916, 920 (9th Cir. 2008), see also Nance v. EPA, 645 F.2d 701, 711-12 (9th Cir. 1981). In this situation, the Spokane and Kalispel's interests are not aligned. Consequently, since the Department fulfilled its statutory duty to examine the benefits and harm to all effected parties, the Department did not violate the trust relationship. Upon review of the record, the Court concludes that the Secretary's decision is supported by substantial evidence. Further, the Environmental Impact Statement met statutory requirements. Federal Defendant's Cross Motion for Summary Judgment, filed March 6, 2019, ECF No. 98, is granted.

H. JURISDICTION, FEDERAL

65. *Consumer Financial Protection Bureau v. Think Finance, LLC*, 2018 WL 3707911 (D. Mont. Aug. 03, 2018). Plaintiff Consumer Financial Protection Bureau (“CFPB”) commenced this action on November 15, 2017. CFPB filed an Amended Complaint on March 28, 2018. The Amended Complaint alleges four violations of the Consumer Financial Protection Act. Defendants Think Finance, LLC (“Think Finance”) and “Subsidiaries” filed the instant Motion to Dismiss on April 24, 2018. Think Finance operates a lending business that extends credit, services loans, and collects debt throughout the United States. CFPB operates as an independent agency of the United States Government created under the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. § 5491(a). The Amended Complaint alleges that Think Finance, through the Tribal Lenders, collected loan payments that customers did not owe, as the loans issued to those customers were void ab initio due to violations of state law. CFPB alleges that Think Finance used unfair and abusive practices to collect on these void loans. Finally, CFPB alleges that Think Finance provided substantial assistance to Tribal Lenders and other entities who, in turn, committed deceptive, unfair, and abuse acts or practices by demanding payment for and collecting void debts. Defendants raise multiple grounds for dismissal, including: (1) that the structure of the CFPB is unconstitutional; (2) that the CFPB’s claims are not permitted by the CFPA; (3) that the Complaint fails to, and cannot, join indispensable parties; (4) that the Court lacks personal jurisdiction over Think SPV; (5) that the Complaint fails to state cognizable claims under the CFPA; and (6) that certain claims against the Subsidiaries are time-barred. Defendants’ Motion to Dismiss is denied.

66. *Chippewa Cree Tribe of Rocky Boy’s Reservation, Montana v. U.S. Department of Interior*, 900 F.3d 1152, 2018 WL 3978542 (9th Cir. Aug 21, 2018). Tribe petitioned for review of order of Department of the Interior (DOI) requiring Tribe to provide back pay and other relief to former chairman of Tribe's governing committee after finding that chairman was removed from committee in retaliation for whistleblowing. The Court of Appeals, Friedland, Circuit Judge, held that: (1) chairman performed services on behalf of Tribe, as required for whistleblower protections of American Recovery and Reinvestment Act (ARRA) to apply to chairman; (2) DOI's order did not infringe Tribe's sovereignty and powers of self-governance; (3) Congress acted within its spending power in conditioning the receipt by Tribe of ARRA funds on the waiver of the right to a hearing with cross-examination before the Tribe could be found to have violated ARRA's whistleblower protections; (4) six months between chairman's disclosure

of misuse of federal funds and his removal from board was within time frame that could have led reasonable person to conclude that chairman's whistleblowing was a contributing factor in his removal; and (5) DOI's finding that Tribe's removal of chairman was retaliatory was not arbitrary or capricious. Petition denied.

67. *Coriz v. Rodriguez*, 347 F.Supp.3d 707, 2018 WL 4179460 (D. N.M. Aug. 31, 2018). Tribal inmate filed petition for writ of habeas corpus. Petitioner moved for immediate release. The District Court, James O. Browning, J., held that: (1) petitioner was entitled to protections provided in Indian Civil Rights Act (ICRA); (2) petitioner's failure to exhaust his tribal court remedies precluded his immediate release; and (3) petitioner failed to demonstrate exceptional circumstances warranting his immediate release. Motion denied.

68. *Narragansett Indian v. Rhode Island Department of Transportation*, 903 F.3d 26, 2018 WL 4140270 (1st Cir. Aug. 30, 2018). Indian tribe brought action against federal and Rhode Island agencies, alleging breach of contract and seeking declaratory and injunctive relief regarding highway bridge reconstruction over historic tribal land. The United States District Court for the District of Rhode Island, William E. Smith, Chief District Judge, 2017 WL 4011149, granted defendants' motion to dismiss for lack of subject matter jurisdiction. Tribe appealed. Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that: (1) National Historic Preservation Act (NHPA) did not expressly or implicitly waive federal government's sovereign immunity, and (2) tribe's breach of contract claim did not have any substantive basis in NHPA, and thus federal court lacked federal question jurisdiction over breach of contract claim against state agencies. Affirmed.

69. *In re National Prescription Opiate Litigation*, 327 F.Supp.3d 1064, 2018 WL 4203535 (N.D. Ohio Sept. 04, 2018). Cherokee tribe of American Indians brought state court action against drug companies, alleging that defendants allowed opioid diversion to occur in the Cherokee Nation via alleged actions and omissions in violation of state law. Defendant company removed case, which was then transferred into multidistrict litigation (MDL) involving various plaintiffs, asserting that manufacturers, distributors, and retailers of prescription opiate drugs were liable for costs related to opioid public health crisis. Band of Chippewa American Indians brought state court action against opioid manufacturers, distributors, and pharmacies asserting state law claims, which the same defendant company removed, and which was also transferred into MDL. Both tribes moved to remand, defendant drug company moved to stay execution of any remand order pending in Chippewa tribe's action, and Cherokee tribe moved for oral argument pending in that case. The District Court, Dan Aaron Polster, J., held that: (1) company was acting under direction of federal officer, as required for removal under federal officer removal statute; (2) causal nexus existed between company's action under direction of federal officer and company's actions that gave rise to tribes' allegations, as required for removal under federal officer removal statute; and (3) company had colorable federal defense, as required for removal under federal officer removal statute. Motions denied.

70. *Navajo Nation v. Wells Fargo & Company*, 344 F.Supp.3d 1292, 2018 WL 4608245 (D. N.M. Sept. 25, 2018). Indian tribe filed suit on its own behalf and as parens patriae on behalf of its members against financial services company and national banking association that was company's primary subsidiary, asserting claims under federal, state, and tribal law

arising out of unfair, deceptive, fraudulent, and illegal banking practices that allegedly harmed the tribe's sovereign and quasi-sovereign interests. Company and association moved to dismiss. The District Court, James A. Parker, Senior District Judge, held that: (1) consent order between Consumer Financial Protection Bureau (CFPB) and association finding that association violated the Consumer Financial Protection Act (CFPA) operated as final judgment on the merits of CFPA claims against the association, as required for the order to bar under the res judicata doctrine tribe's CFPA claims; (2) company was in privity with association, as required for consent order to bar under the res judicata doctrine tribe's CFPA claims; (3) tribe's CFPA claims formed same cause of action as claims resolved by consent order, as required for the consent order to bar under the res judicata doctrine the tribe's claims; (4) tribe was in privity with CFPB for its CFPA claims, as required for consent order to bar under the res judicata doctrine tribe's CFPA claims; and (5) tribe did not allege injury to quasi-sovereign interest that was sufficiently concrete to create actual controversy, and thus, tribe lacked standing in its parens patriae capacity to maintain claims for violations of the Equal Credit Opportunity Act (ECOA), the Electronic Funds Transfer Act (EFTA), the Truth in Lending Act (TILA), and the Fair Credit Reporting Act (FCRA). Motion granted.

71. *Cheykaychi v. Geisen*, 2018 WL 6065492 (D. Colo. Nov. 19, 2018). Petitioner Harrison Cheykaychi has filed a Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 and 28 U.S.C. § 2241. Petitioner asserts that his tribal court convictions were obtained in violation of his rights under the Indian Civil Rights Act ("ICRA"), at 25 U.S.C. § 1302. Petitioner is a member of the Pueblo of Kewa (formerly known as the Pueblo of Santo Domingo) ("Tribe"), a federally recognized Indian Tribe in New Mexico. See 82 Fed. Reg. 4915-02 (Jan. 17, 2017). Petitioner alleges that he was arrested on September 17, 2016 within the external boundaries of the reservation and charged with five separate offenses arising from his exchange with the Tribal Police that morning. Petitioner alleges that during a September 19, 2016 hearing, he was coerced by threats from the Tribal Court to plead guilty to criminal trespass, assault on a tribal officer, and terroristic threats, in exchange for the Tribe's promise that it would drop the charges of eluding, intoxication, and disorderly conduct and that he would receive a two and one-half year sentence. Petitioner states that he was not appointed counsel at the hearing or afforded the opportunity to retain counsel. He was taken into custody immediately after the sentencing and was eventually transferred to the San Ignacio Detention Center in Colorado. On May 2, 2017, Petitioner filed a Petition for Writ of Habeas Corpus, asserting that the tribal court convictions were obtained in violation of the ICRA. Petitioner asks the Court to deem his tribal court conviction(s) invalid and to order Respondent to release him from custody. On May 9, 2017, the District of New Mexico issued an order dismissing the Kewa Pueblo based on sovereign immunity. On August 22, 2017, the Court issued an order directing Respondent Geisen to show cause why the § 1303 Petition should not be granted. Docket No. 13. On September 21, 2017, Respondent filed a Response in which he represented that, as the mere physical custodian of Petitioner, he was unable to address the merits of Petitioner's ICRA claims challenging the validity of his tribal court convictions or afford any relief beyond Petitioner's release from custody. Respondent maintained that one or more tribal officials are necessary parties to this action. On December 28, 2017, pursuant to the parties' joint motion, Petitioner was released from custody, under terms of supervision, pending final disposition of the Petition. On September 6, 2018, the Court issued an order directing Respondent to contact the proper tribal official(s) to obtain their position as to the merits of the ICRA. See *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 60 (1978) (recognizing that the ICRA authorizes habeas corpus relief against tribal officers); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899-900 (2d Cir. 1996) (concluding that tribal officials are appropriate respondents to a § 1303 petition because they have an interest in opposing the petition or granting the requested relief).

Respondent filed a status report on October 5, 2018, in which he states that no one from the Santo Domingo Tribe will be entering an appearance or contesting the claims in Mr.

Cheykaychi's Petition for Writ of Habeas Corpus. Mr. Cheykaychi remains subject to the Tribe's 2011 Banishment Order, which was not challenged in Mr. Cheykaychi's Petition, so he should not be released at the Pueblo, or allowed to enter the Pueblo without the prior consent of the Tribe. The Kewa Pueblo officials have informed Respondent that they do not intend to contest the merits of the ICRA claims. Respondent indicates that he is without authority to address the merits of the Petitioner's claims. Because the § 1303 Petition is unopposed, the Petition will be granted and the tribal court convictions vacated.

72. *Napoles v. Rogers*, 743 Fed.Appx. 136 (9th Cir. Nov 21, 2018). Plaintiffs-Appellants, seven members of the Bishop Paiute Indian Tribe (collectively "Plaintiffs"), a federally recognized Indian tribe, appeal from the district court's dismissal of their petition for a writ of habeas corpus under 25 U.S.C. § 1303, the Indian Civil Rights Act ("ICRA"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Jeffredo v. Macarro*, 599 F.3d 913, 917 (9th Cir. 2010), and we may affirm on any ground supported by the record, *Bd. of Trustees of Const. Laborers' Pension Tr. for S. Cal. v. M.M. Sundt Const. Co.*, 37 F.3d 1419, 1420 (9th Cir. 1994), as amended on denial of reh'g (Nov. 23, 1994). We affirm. The district court may not exercise jurisdiction over a habeas petition arising under 25 U.S.C. § 1303 unless Plaintiffs have exhausted their tribal remedies. See *Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016). This requirement is rooted in the "policy of nurturing tribal self-government," and thus a federal court must "stay its hand until the party has exhausted all available tribal remedies." *Jeffredo*, 599 F.3d at 918 (internal quotation marks omitted). Plaintiffs have not exhausted the available tribal remedies. Plaintiffs argue they were detained within the meaning of § 1303 because they have been evicted from property in which they claim a possessory right and because the tribal police issued trespass citations against them. Plaintiffs conceded, both in their motion for a stay before the district court and at oral argument, however, that a tribal court decision considering the validity of the trespass citations and their claim to the property is currently on appeal before the recently reinstated tribal appellate court. Because an appeal is pending in tribal court regarding the subject of Plaintiffs' § 1303 habeas claim, Plaintiffs have not exhausted their tribal remedies and the district court did not have jurisdiction. *Jeffredo*, 599 F.3d at 918. The district court's order dismissing the petition is affirmed.

73. *United States v. Cleveland*, __ F.Supp.3d __ 2018 WL 6112174 (D. N.M. Nov. 21, 2018). Defendant moved to dismiss indictment charging him under statute punishing murder of certain federal officers or persons assisting those officers, arising from killing of Navajo Nation Department of Public Safety (NDPS) officer, alleging that NDPS officer was not federal employee and that statute thus did not apply. The District Court, James O. Browning, J., held that under the Self-Determination Contract, which granted Navajo Nation authority to enforce United States and Tribal Law, a Tribal officer without a Special Law Enforcement Commission (SLEC) does not have authority from the Secretary of the Interior to enforce federal laws, and so is not a federal employee for purposes of the Indian Law Enforcement Reform Act (ILER), and thus

statute punishing murder of certain federal officers or persons assisting those officers does not apply.

74. *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 2019 WL 150627 (10th Cir. Jan. 10, 2019). Native American landowners brought trespass action against owner and operator of network of natural gas transmission pipelines The United States District Court for the Western District of Oklahoma, No. 5:15-CV-01262-M, Vicki MilesLaGrange, J., 247 F.Supp.3d 1233, granted summary judgment to plaintiffs and entered permanent injunction requiring removal of pipeline. Defendant appealed. The Court of Appeals, Tymkovich, Chief Judge, held that: (1) consent of minority of allottees did not form complete defense to remaining allottees' federal trespass claim; (2) expiration of easement permitting natural gas pipeline across allotted tribal land created duty on part of pipeline's owner to remove pipeline; and (3) district court was required to apply federal courts' traditional equity jurisprudence, rather than simplified injunction rule from Oklahoma law, in determining whether to grant injunctive relief. Affirmed in part, reversed in part, and remanded.

75. *United States v. I. Merle Denezpi*, No. 18-cr-00267-REB-JMC, 2019 WL 295670 (D. Colo. Jan. 23, 2019). Mr. Denezpi maintains indictment in this case is duplicative of his prior conviction by the Court of Indian Offenses of the Ute Mountain Ute Agency and thus constitutes double jeopardy. On July 17, 2017, Mr. Denezpi and V.Y. traveled from Teec Nos Pos, Arizona, to Mr. Denezpi's girlfriend's home in Towaoc, Colorado. Once inside the house, Mr. Denezpi allegedly barricaded the door and, by physical force and threats, forced V.Y. to engage in a nonconsensual sexual act. Tribal authorities arrested Mr. Denezpi the following day and charged him with one count of assault and battery in violation of Title 6, Ute Mountain Ute Code, Section 2; one count of making terroristic threats in violation of 25 C.F.R. § 11.402; and one count of false imprisonment in violation of 25 C.F.R. § 11.404. On December 6, 2017, Mr. Denezpi entered an *Alford* plea to the assault and battery count and was sentenced to time served. Six months later, a federal grand jury indicted Mr. Denezpi on one count of aggravated sexual abuse in Indian Country. *See* 18 U.S.C. §§ 2241(a)(1)-(2) & 1153(a). Mr. Denezpi claims this prosecution violates the Fifth Amendment proscription against double jeopardy because it was imposed not by a tribal court but by a so-called "CFR court," which, Mr. Denezpi argues, is an arm of the federal government and not a separate sovereign. This argument misunderstands the source and nature of the CFR courts' authority. The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. 5. This motion implicates the dual sovereignty doctrine, an exception to the general principle of double jeopardy, whereby "a single act gives rise to distinct offenses – and thus may subject a person to successive prosecutions – if it violates the laws of separate sovereigns." *Puerto Rico v. Sanchez Valle*, — U.S. —, 136 S.Ct. 1863, 1867, 195 L.Ed.2d 179 (2016). *See also Heath v. Alabama*, 474 U.S. 82, 88, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985) ("[W]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences.") (internal quotation marks omitted). The determination whether two entities are separate sovereigns "does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course." *Sanchez Valle*, 136 S.Ct. at 1867. Instead, the determination lies in the answer to "a narrow, historically focused question.... whether the prosecutorial powers of the two

jurisdictions have independent origins – or, said conversely, whether those powers derive from the same ‘ultimate source.’ ” (citing *United States v. Wheeler*, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). “The inquiry is thus historical, not functional – looking at the deepest wellsprings, not the current exercise, of prosecutorial authority.” The CFR courts were created by the Indian Department Appropriations Act of 1888. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, n. 7, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). At first, all tribal courts were CFR courts. Along with a reduced BIA role and increased authority delegated to the tribes, the IRA paved the way for tribes to develop tribal courts and phase out the C.F.R. courts.” Today, most tribes have established tribal courts. *See* 25 C.F.R. § 11.104 (setting forth criteria for creation of tribal court). Only seven CFR courts – including those administered by the Ute Mountain Ute Agency – remain in operation. Although the CFR courts “retain some characteristics of an agency of the federal government,” *Tillett*, 931 F.2d at 640, the logic of *Wheeler* and its progeny clearly indicates that the CFR courts’ power to punish crimes occurring on tribal lands derives from their original sovereignty, not from a grant of authority by the federal government. When Indian courts were first established in the 19th century, *all* such courts were CFR courts.

Therefore, the CFR court which convicted Mr. Denezpi was exercising the sovereign powers of the Ute Mountain Ute Tribe and is not an arm of the federal government. The charges brought in the present federal indictment thus are not duplicative of Mr. Denezpi’s conviction in that independent and sovereign court, and therefore his prosecution in this jurisdiction does not violate the Fifth Amendment’s Double Jeopardy Clause. Mr. Denezpi’s motion to dismiss therefore must be denied.

76. *People ex rel. Becerra v. Huber*, 32 Cal.App.5th 524, 244 Cal.Rptr.3d 79 (Cal. Ct. App. 1st Dist., Div. 4 (Feb. 25, 2019)). State brought enforcement action against owner of tobacco烟店, who was a member of the Wiyot Band of Indians, alleging violation of Unfair Competition Law (UCL). The Superior Court, Humboldt County, No. DR110232, W. Bruce Watson, J., granted summary adjudication to State and entered permanent injunction. Owner appealed. The Court of Appeal, Streeter, Acting P.J., held that: (1) exercise of state court jurisdiction over enforcement action did not infringe tribal sovereignty, supporting application of default rule of existence of general jurisdiction on part of state court, and (2) State’s enforcement of UCL was not preempted under doctrine of Indian preemption. Affirmed.

77. *Outliers Collective v. The Santa Ysabel Tribal Development Corporation*, No. 3:18-cv-00834-JAH-KSC, 2019 WL 1200232 (D.C. S.D. Calif. Mar. 13, 2019). Pending before the Court is Defendants The Santa Ysabel Tribal Development Corporation (“SYTDC”) and David Chelette’s (“Chelette”) (collectively referred to as “Tribal Defendants”) motions to dismiss plaintiff Outliers Collective’s (“Outco” or “Plaintiff”) Complaint pursuant to Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(1) and 12(b)(7). For the reasons set forth below, Defendants’ motions to dismiss are granted and the action is dismissed in its entirety as to all Defendants with prejudice. This action arises out of a Land Use Agreement (“Agreement”) entered into by a tribally chartered corporation, wholly owned by the Iipay Nation of Santa Ysabel, a federally recognized Indian Tribe, and a Nonprofit Mutual Benefit Corporation, organized under the laws of the State of California. In pertinent part, the Agreement set forth the terms by which Plaintiff would lease from SYTDC interior and exterior space on tribal lands for the cultivation, harvesting, and processing of medical cannabis pursuant to the Santa Ysabel Tribal Medicinal Cannabis Enterprise Act. In early 2017, a dispute arose regarding Plaintiff’s

obligation to pay the Tribe's Medical Cannabis Tax. Negotiations were unsuccessful and the Agreement was eventually terminated. The Tribal Cannabis Regulatory Agency revoked Plaintiff's license and prohibited Plaintiff and its affiliates from accessing the facility, although some of Plaintiff's property remained. On April 30, 2018, Plaintiff filed a complaint against Tribal Defendants for: (1) Breach of Contract; (2) Breach of Covenant of Quiet Enjoyment; (3) Conversion; (4) Unjust Enrichment; and (5) Declaratory Relief. Tribal Defendants each timely filed motions to dismiss pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) and 12(b)(7). The motions have been fully briefed and are now before the Court. The Complaint alleges jurisdiction under 28 U.S.C § 1331. Plaintiff cites to *Williams v. Lee*, 358 U.S. 217 (1959) to support jurisdiction over a matter brought by a non-tribal plaintiff against a tribal defendant when the cause of action arises on Indian territory. The Complaint further alleges that SYTDC agreed to waive its sovereign immunity from suit in favor of Plaintiff. In response to Defendants' motions to dismiss¹, Plaintiff contends that the subject matter of the agreement is sufficient to invoke federal-question jurisdiction. First, Plaintiff's reliance on *Williams* is misplaced. The *Williams* Court reversed the Arizona Supreme Court's decision affirming judgment for plaintiff, a non-tribal member, in an action against a tribal member. The Court held that state courts did not have authority to exercise jurisdiction over civil suits against tribal members where the cause of action arose on an Indian reservation. 358 U.S. at 223. The Court reasoned that the exercise of jurisdiction by the state would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." The lack of authority by state courts to exercise jurisdiction, however, cannot be interpreted to mean jurisdiction automatically vests in District Courts. To be certain, the Supreme Court notes in *Williams* that Congress has acknowledged the authority of Indian governments over their reservations and the Court has consistently protected it. Second, SYTCD's limited waiver of sovereign immunity has no bearing on whether this Court has subject-matter jurisdiction. Subject-matter jurisdiction cannot be forfeited or waived. *Arbaugh*, 546 U.S. at 514 (quoting *United States v. Cotton*, 535 U.S. 625, 630, (2002)); See also *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (waiver of sovereign immunity by tribal housing authority did not by fiat confer jurisdiction on the federal courts). Even if the parties agreed, as Plaintiff contends, that a dispute arising out of the Agreement may be submitted to any federal court of *competent* jurisdiction within this District, this Court has an "independent obligation to determine whether subject-matter jurisdiction exists.

78. *United States v. Cooley*, __ F.3d __, 2019 WL 1285055 (9th Cir. Mar. 21, 2019). Motorist charged with narcotics offenses, as result of evidence discovered by tribal officer after seizing motorist on public highway that ran across reservation, filed motion to suppress this evidence. The United States District Court for the District of Montana, No. 1:16-cr-00042-SPW-1, Susan P. Watters, J., 2017 WL 499896, granted motion, and government appealed. The Court of Appeals, Berzon, Circuit Judge, held that: (1) as matter of first impression, exclusionary rule applies in federal court prosecutions to evidence obtained in violation, not of the Fourth Amendment itself, but of the Indian Civil Rights Act's (ICRAs) Fourth Amendment counterpart, and (2) tribal officer's extra-jurisdictional acts violated the ICRAs Fourth Amendment counterpart and required suppression of evidence. Affirmed.

79. *United States v. Aysheh*, 2019 WL 1877178 (D.N.M. April 26, 2019). Mr. Iyad "Ed" Aysheh and his three brothers are charged in an 18-page indictment with conspiring to sell

“Indian-style” jewelry in violation of the Indian Arts and Crafts Act (“IACA”), 18 U.S.C. § 1159. That statute criminalizes offering or selling a good “in a manner that falsely suggests it is ... an Indian product.” 18 U.S.C. § 1159(a). According to the indictment, in 2014 Mr. Aysheh’s brother Imad established a business in the Philippines called “Imad’s Jewelry” to manufacture Indian-style jewelry using Filipino labor. Imad imprinted the letters “IJ” on the jewelry, but not a country-of-origin stamp. After importing the jewelry into the United States, the other Aysheh brothers supposedly sold it to retailers and customers throughout the country, including New Mexico, misrepresenting it as Indian made. The indictment accuses the Defendants of criminal misrepresentation of Indian produced goods in violation of 18 U.S.C. § 1159, alleging that the Defendants conspiring to knowingly display and offer for sale for \$ 1,000 and more, jewelry manufactured in the Philippines, in a manner that suggested the jewelry was Indian produced ... when in truth and in fact, ... the good was not Indian produced ... in violation of 18 U.S.C. § 1159. As noted earlier, 18 U.S.C. § 1159 criminalizes offering or selling a good “in a manner that falsely suggests it is ... an Indian product.” 18 U.S.C. § 1159(a). In his motion to dismiss, Mr. Aysheh explains that the criminal penalty provision of § 1159 has been challenged for vagueness and overbreadth under the First Amendment. Mr. Aysheh especially relies on a federal district court’s examination in *United States v. Pourhassan*, 148 F. Supp. 2d 1185 (D. Utah 2001) of whether the phrases “Indian produced” and “falsely suggests” under § 1159 were unconstitutionally vague or overbroad. The Pourhassan court held that – even applying a “strict” vagueness test – the phrases “Indian produced” and “falsely suggests” were not unconstitutionally vague and consequently denied the defendant’s motion to dismiss the indictment. It is therefore ordered that Defendant Iyad Aysheh Opposed Motion to Dismiss all Counts in the Indictment is Denied.

80. *Taguma v. Benton*, 2019 WL 1877171 (W.D. Wis. April 26, 2019). In this civil action for monetary relief, plaintiff Lori Taguma, who is a member of the Lac Courte Oreilles Tribe, contends that fellow members of the tribe, defendants Edward and Danielle Benton, violated her rights by threatening her and her family members with violence, shooting at her and her family members, using their influence within the tribe to encourage others to terminate her job and discontinue her mother’s Bureau of Indian Affairs lease, damaging her and her family’s vehicles and other property and otherwise harassing her. After reviewing the complaint, I conclude that plaintiff may not proceed on any claim because her complaint does not involve any federal claim over which this court has jurisdiction. Plaintiff’s claims all seem to relate to matters involving state tort or criminal law and therefore must be brought in state court. *Bresette*, 2006 WL 3017256, at *1 (“Federal jurisdiction is not present just because the alleged [violation of state law] occurred on an Indian reservation.”). Plaintiff does not allege any facts that suggest that defendants were public officials or acting under the color of state law. The “under-color-of-state-law element of § 1983 excludes from its reach ‘merely private conduct, no matter how discriminatory or wrongful.’” Id. (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)). Although plaintiff has made it clear that defendants have strong ties to members of the tribal council and are powerful within the community, federal courts have found that “[a] § 1983 action is unavailable ‘for persons alleging deprivation of constitutional rights under color of tribal law.’” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (quoting *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983)). Similarly, plaintiff may not sue defendants as tribal actors under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides relief for alleged constitutional violations by

federal officials. *Evans v. Little Bird*, 656 F. Supp. 872, 874 (D. Mont. 1987), aff'd in part, *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989). Accordingly, this case must be dismissed for lack of subject matter jurisdiction. Plaintiff must bring her claims in state court or in the tribal court that has jurisdiction over the Lac Courte Oreilles Tribe.

81. *United States v. Santistevan*, 2019 WL 1915791 (D.S.D. April 30, 2019). The Government charged Aaron Santistevan (Santistevan) with possession of ammunition by a prohibited person. Santistevan moved to suppress from use at trial the evidence seized from him and the vehicle he was driving on December 28, 2018, on the basis that the officers violated his rights under the Fourth Amendment. Magistrate Judge Mark A. Moreno held a suppression hearing, during which he received seven exhibits and heard testimony from five Rosebud Sioux Tribe Law Enforcement officers. The tribal officers' detention of Santistevan was reasonable under the Fourth Amendment. Officers conducted a traffic stop for speeding and discovered Santistevan was driving with a suspended driver's license. When Officer Antman learned that Santistevan was a non-Indian, he contacted the Todd County Sheriff's Office immediately. Before Officer Antman was able to secure Santistevan, Santistevan led officers on a high-speed chase. The officers had probable cause to search the vehicle based on Officer Antman's observations during the traffic stop even before the high-speed chase, Santistevan's flight, and the fire in the backseat of the vehicle that appeared to destroy evidence. Santistevan argues that "all evidence obtained following the issuance of the search warrant must be suppressed as the illegal fruit of the unreasonable stop and search of the car on December 28, 2018." Because this Court finds that the stop and search were reasonable and constitutional, there is no illegal fruit to suppress. Ordered that Santistevan's Motion to Suppress is denied.

82. *Wolf v. Alutiiq Education and Training, LLC*, 2019 WL 1966642 (M.D. Alabama, May 02, 2019). Pending before the court is a Motion to Dismiss filed by Defendant Altuiiq Education & Training, LLC ("AET"). Plaintiff Monisha Wolf brings claims against AET denominated as race discrimination, gender discrimination, and mental suffering and emotional distress. After careful consideration of the parties' submissions and the applicable law, the Motion to Dismiss is due to be granted, but Wolf will be allowed to re-plead the claims over which this court has subject-matter jurisdiction. Wolf is a black woman who began her employment with AET's predecessor, Career Education Services. AET took over the contract and asked Wolf to reapply for her position. AET did not retain Wolf, and she alleges that Adam Bennett, a white man, was retained over her. AET is a wholly-owned subsidiary of Alutiiq, which is a wholly-owned direct subsidiary of Afognak Native Corporation, which was formed in 1977 under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601. AET argues that Counts I and II must be dismissed for lack of subject-matter jurisdiction because these claims are asserted pursuant to Title VII, which does not apply to AET, an Alaskan Native Corporation. Pursuant to 43 U.S.C. § 1626(g), [f]or the purposes of implementation of the Civil Rights Act of 1964 [42 U.S.C. § 2000a, et seq.], a Native Corporation and corporations, partnerships, joint ventures, trusts, or affiliates in which the Native Corporation owns not less than 25 per centum of the equity shall be within the class of entities excluded from the definition of "employer" by section 701(b)(1) of Public Law 88-352 (78 Stat. 253), as amended [42 U.S.C. § 2000e(b)(1)], or successor statutes. 43 U.S.C. § 1626(g). If Title VII does not apply, the district court lacks subject-matter jurisdiction over those claims. See *Mastro v. Seminole Tribe of Fla.*, 578 F. App'x 801, 802 (11th Cir. 2014). AET is not subject to suit under Title VII, and this court lacks subject-

matter jurisdiction over Wolf's gender and race claims asserted pursuant to Title VII in Counts I and II. See *Jones v. Chugach Educ. Servs., Inc.*, 2012 WL 472722, at *1 (M.D. Fla. Jan. 10, 2012), adopted, 2012 WL 473503 (M.D. Fla. Feb. 2, 2012). Wolf has argued that she can proceed on race discrimination claims pursuant to 42 U.S.C. § 1981. AET does not dispute that this court has subject-matter jurisdiction over § 1981 race claims. See also *Jones*, 2012 WL 472722, at *1 ("Defendant was exempt from employer liability under Title VII, as Defendant is an Alaskan Native Corporation ... however ... several cases have held that ANCs may be sued for retaliation under 42 U.S.C. § 1981."). AET argues, however, that the § 1981 claim is due to be dismissed because Wolf has not sufficiently alleged a § 1981 race claim in Count I. AET correctly points out that Count I expressly invokes the Civil Rights Act of 1964 and not 42 U.S.C. § 1981. Because the Amended Complaint expressly refers to Title VII within the paragraphs of Count I but not to § 1981, the court concludes that the claim in Count I is due to be dismissed, but the court will allow Wolf an additional opportunity to plead her race discrimination claim pursuant to § 1981.

83. *United States v. Washington*, 2019 WL 1989645 (W.D. Wash. May 06, 2019). This matter is before the Court on the Stillaguamish Tribe of Indians ("Stillaguamish") Motion seeking an order of the Court to permit it to take a perpetuation deposition of its expert witness, Doctor C. Jill Grady, due to the expert's age and the risk of further memory loss. Finding the Motion moot, the Court denies the Motion. Dr. Grady is a Cultural Anthropologist and an expert in the field of Native American Anthropology. She has a Bachelor's of Arts Degree in Anthropology, and a Master's degree and Ph.D. in Sociocultural Anthropology from the University of Washington. Stillaguamish first retained Dr. Grady to conduct research related to the Native American Graves Protection and Repatriation Act in 2002. Beginning in 2007, Dr. Grady began assembling evidence of Stillaguamish's marine fishing treaty rights in a capacity as an expert witness and researcher. In order to provide her expert opinions, Dr. Grady developed a comprehensive understanding of the ethnohistory of the Stillaguamish's people as well as that of other neighboring tribes and non-Indian settlers in the Puget Sound and their interactions with territorial, state and federal government. Dr. Grady's expert opinions rely on her knowledge of the natural ecosystem that supports Stillaguamish fishing, hunting and gathering. Dr. Grady is about to turn 77 years old. Dr. Grady currently experiences certain challenges typically associated with her age, some of which impact her memory recall. While Dr. Grady's capacity remains fairly sound today, she has expressed uncertainty regarding her memory, physical health and stamina six months from now, much less over more than a year from now when her testimony may be required. The Swinomish Indian Tribal Community ("Swinomish") opposes Stillaguamish's Motion partly on the basis that the procedural posture of this case has changed while this Motion was pending before the Court. Swinomish argues that case deadlines have been reset, that the case and discovery will proceed in the normal course, and that the Motion is therefore moot. Stillaguamish recognizes that discovery may now proceed but feels that the concerns initially leading it to file its Motion persists. The Court agrees that its prior Order moots the Stillaguamish Motion. Stillaguamish no longer needs leave from the Court under Rule 26(d)(1) to proceed with discovery. Accordingly, having reviewed the Motion and the remainder of the record, the Court finds and orders that Stillaguamish Tribe of Indians' Motion is denied as moot.

84. *United States v. Smith*, 925 F.3d 410, 2019 WL 2263344 (9th Cir. May 28, 2009). Defendant Indian member of Confederated Tribes of Warm Springs was convicted in the United States District Court for the District of Oregon, Anna J. Brown, J., of fleeing or attempting to elude police officer under Assimilative Crimes Act (ACA) and Indian Country Crimes Act (ICCA). Defendant appealed. The Court of Appeals, Callahan, Circuit Judge, held that: (1) ACA applied to Indian country; (2) Indian-on-Indian exception in ICCA did not preclude application of ACA to all victimless crimes, and certainly not to offense of fleeing and eluding police; and (3) federal prosecution of defendant was not unlawful intrusion into tribal sovereignty. Affirmed.

85. *Jim v. Shiprock Associated Schools, Inc.*, 2019 WL 2285918 (D.N.M. May 29, 2019). This matter is before the Court on Defendant's Supplemental Motion for Summary Judgment. The Court finds the motion should be granted and this case dismissed. Plaintiff Kim R. Jim is a former employee of Defendant Shiprock Associated Schools, Inc. (SASI). SASI was incorporated as a nonprofit corporation under the laws of New Mexico in 1979 and is registered to conduct business within the Navajo Nation. At the time of the allegations in the Complaint, SASI was (and still is) authorized by the Navajo Nation Board of Education to operate Navajo community schools on the Navajo reservation in Shiprock, New Mexico, pursuant to the Navajo Nation Code, see 10 N.N.C. § 201, and the Tribally Controlled Schools Act (TCSA), 25 U.S.C. § 2501. SASI is the grantee of Bureau of Indian Education (BIE) funds received for operation of educational programs on the Navajo Nation for the benefit of Indian students. Ms. Jim alleges that SASI discriminated against her and terminated her because of her pregnancy and maternity leave. She now brings suit for pregnancy discrimination pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). For the Court to have subject matter jurisdiction over Ms. Jim's claims, SASI must be a covered employer under both statutes. SASI contends that it is a "tribal organization" exempted from the definition of an employer under both Title VII and the ADA and disagrees that the Court has subject matter jurisdiction over this lawsuit. Relying on the Tenth Circuit's reasoning in Dille, the Giedosh court found that the Little Wound School Board, Inc. (the Board) qualified as an "Indian tribe" for purposes of Title VII and the ADA. See 995 F. Supp. 2d at 1056–59. The Giedosh court found the following factors significant: (1) the Board was a nonprofit corporation incorporated under state law, id. at 1054; (2) "the Board's membership [was] comprised solely of members of the Oglala Sioux Tribe[,"] and board members were democratically-elected "[t]o further the Tribe's policy of community participation[,"] id. at 1055 (citations omitted); (3) the school was required to adhere to tribal resolutions and ordinances and was tribally chartered, meaning the Tribe had the authority to "step in at any time, for good reason, and assume the control and operation of the school[,"] id. (citations omitted); (4) "[l]ike in Dille, the purpose of establishing the organization [was] to further the development, in this case the educational development, of the children living in Indian country, and to involve the Indian community in the education of the Indian children[,"] id. at 1057; (5) "[t]he Board is made up of members of the Tribe, and those members are democratically elected[,"] id.; and (6) "[t]he school, which is operated by the Board, services tribally enrolled members in the Kyle community and the surrounding area of the Pine Ridge Indian Reservation," id. The record before the Court supports the same conclusion in this case.

86. *People ex rel. Becerra v. Native Wholesale Supply Co.*, __ Cal.Rptr.3d __, 2019 WL 2762926 (Cal. Ct. App. July 2, 2019). Attorney General brought action against Indian-chartered corporation headquartered on out-of-state reservation for sale of contraband cigarettes to general public. The Superior Court, Sacramento County, No. 34200800014593CUCLGDS, David I. Brown, J., granted summary judgment in Attorney General's favor. Corporation appealed. The Court of Appeal, Robie, J., held that: (1) corporation was subject to personal jurisdiction; (2) corporation was considered a non-Indian for purposes of the Indian Commerce Clause analysis; (3) Indian Commerce Clause did not preempt Directory Statute or the California Cigarette Fire Safety and Firefighter Protection Act; and (4) Directory Statute did not violate the equal protection clause. Affirmed.

87. *Cedar Band of Paiutes v. U.S. Dept. of Housing and Urban Development*, 2019 WL 3305919 (D. Utah July 23, 2019). On April 22, 2019, Plaintiffs Cedar Band of Paiutes (the “Cedar Band”), Cedar Band Corporation (“CBC”), and CBC Mortgage Agency (“CBCMA”) (collectively, “Plaintiffs”) filed a Complaint against Defendants U.S. Department of Housing and Urban Development (“HUD”). The central aim of Plaintiffs’ Complaint is to have the Mortgagee Letter 19-06 (the “2019 Mortgagee Letter”) that Defendants issued on April 18, 2019, set aside under the Administrative Procedures Act (“APA”). On the same day Plaintiffs filed their Complaint, Plaintiffs also filed the Motion For Ex Parte Temporary Restraining Order and Preliminary Injunction (“Motion”). CBCMA is registered as a Governmental Mortgagee with HUD. Through its program, the Chenoa Fund, CBCMA provides down payment assistance (“DPA”) for mortgage loans insured by the FHA that are originated by other lenders, as well as a small number of conventional loans. The FHA insures the vast majority of loans for which CBCMA provides DPA. CBCMA then purchases the first mortgages and sells them on a secondary market. Provisions related to FHA insurance, including provisions related to the minimum required investment (“MRI”) for FHA insured loans, are codified at 12 U.S.C § 1709. In 2007, HUD published a final rule (the “2007 Rule”) that prohibited “sellers” from providing DPA “in their own home sales transactions” through an arrangement where “a so-called charitable organization provides a so-called gift to a homebuyer from funds that it receives, directly or indirectly, from the seller.” The 2007 Rule exempted governmental entities from this prohibition. The rule expressly specified that DPA “is permitted ... from ... governments.” The 2007 Rule also specifically provided “that a tribal government ... is a permissible source of down payment assistance.” Congress enacted changes to 12 U.S.C § 1709, formally incorporating some of the guidance of the 2007 Rule into statute. Specifically, 12 U.S.C. § 1709 was amended to provide that the MRI for a FHA insured loan could not consist, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale: i) The seller or any other person or entity that financially benefits from the transaction. ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause i). Notably, the 2008 amendments did not address the provision of DPA towards FHA insured loans by governmental entities. In 2012, HUD addressed that issue in an interpretive rule published in the Federal Register (the “2012 Rule”). According to the 2012 Rule, it was HUD’s interpretation that 12 U.S.C. § 1709 “did not prohibit FHA from insuring mortgages originated as part of the homeownership programs of Federal, State, or local governments or their agencies or instrumentalities when such agencies or instrumentalities also directly provide funds toward the required minimum cash investment.” The path running from the statute—12 U.S.C. § 1709(b)(9)—through the 2012 Interpretive Rule and HUD Handbook and finally to the 2019

Mortgagee Letter does not clearly show how Defendants arrived at its new interpretive jurisdictional limitations. Furthermore, apart from the 2019 Mortgagee Letter, it does not appear that Defendants would readily have an adequate basis to enforce jurisdictional limitations on governmental entities providing DPA. Instead, the 2019 Mortgagee Letter imposes unprecedented, new duties on mortgagees to obtain letters showing that the governmental entity is providing DPA to someone within its own jurisdictional boundaries (and in the case of tribes, to a tribal member) or the DPA will be used toward an FHA insured loan to purchase property within that governmental entity's jurisdiction. The 2019 Mortgagee Letter is more legislative in character than interpretive because it articulates new duties that were immediately imposed on mortgagees for the first time. Therefore, HUD's action in the 2019 Mortgagee Letter should likely have been preceded by notice and comment. It is hereby ordered that the Motion is granted. It is further ordered Defendants are enjoined from any enforcement of Mortgagee Letter 19-06 until further order of this court. Specifically, Defendants shall not deny insurance nor cause insurance to be denied based on noncompliance with Mortgagee Letter 19-06 and shall provide public notice that the effective date of Mortgagee Letter 19-06 is suspended until after a final determination on the merits of the case.

88. *Kodiak Oil & Gas (USA) Inc. v. Burr*, __ F.3d __, 2019 WL 3540423 (8th Cir. Aug 05, 2019). Oil and gas company brought declaratory judgment action against four members of an Indian tribe and the Chief Judge of a tribal court, seeking a declaration that the tribal court lacked jurisdiction over a breach of contract action filed by the four individual defendants which sought to recover royalties pursuant to an oil and gas mining lease. Similarly, a resources company which was a defendant in the same tribal court lawsuit also filed a declaratory judgment action against the same defendants, as well as against the Court Clerk/Consultant of the tribal court. Both federal court actions were stayed pending resolution of the tribal court action, but after tribal supreme court ruled that the tribal district court had jurisdiction over the matter, the federal plaintiffs filed motions for preliminary injunction preventing defendants from proceeding further with the underlying tribal court action. The Tribal court judge and clerk moved to dismiss. Thereafter, the first two federal lawsuits were consolidated, and the United States District Court for the District of North Dakota, Daniel L. Hovland, Chief Judge, 303 F.Supp.3d 964, issued a preliminary injunction. Tribal court officials appealed. The Court of Appeals, Grasz, Circuit Judge, held that: (1) oil and gas companies claims for declaratory and injunctive relief against tribal court officials were not barred by tribal sovereign immunity; (2) oil and gas companies properly exhausted their tribal court remedies before filing suit in federal court; and (3) factors weighed in favor of issuance of a preliminary injunction against any tribal court exercise of jurisdiction in the case. Affirmed.

89. *Chemehuevi Indian Tribe v. McMahon*, __ F.3d __, 2019 WL 3886168 (9th Cir. Aug 19, 2019). An action was brought pursuant to 42 U.S.C. § 1983 by the Chemehuevi Indian Tribe and four of its enrolled members alleging violations of various federal statutory and constitutional rights in connection with citations by San Bernardino County Sheriff's Deputies of four Tribe members for violating California regulatory traffic laws within the Reservation. The Court analyzed the history and establishment of the Chemehuevi Reservation and concluded that the area where the Tribe members were cited was within the boundaries of the Reservation and hence was "Indian country" under 18 U.S.C. § 1151(a). Accordingly, the court held that San Bernardino County did not have jurisdiction to enforce California regulatory traffic laws within

that area. The Court held that the individual plaintiffs, but not the Tribe, could challenge the citations under § 1983. The Court held that because § 1983 was designed to secure private rights against government encroachment, tribal members could use it to vindicate their individual rights, but not the tribe's communal rights. The Court therefore vacated the district court's judgment dismissing the complaint as to the individuals, but affirmed the judgment as to the Tribe.

I. RELIGIOUS FREEDOM

90. *Priest v. Holbrook*, 741 Fed.Appx. 510 (Mem) (9th Cir. Oct. 31, 2018). David R. Priest, a Washington state prisoner and member of the Colville Indian tribe, appeals pro se from the district court's judgment dismissing his action under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") alleging that defendants' confiscation of his golden eagle feathers violated his First Amendment right to free exercise of his Native American religion and his rights under RLUIPA. We have jurisdiction under 28 U.S.C. § 1291. We reverse and remand. The district court dismissed Priest's free exercise claim on the ground that Priest failed to allege a substantial burden to the practice of his religion. However, Priest alleged that the prison confiscated his sacred golden eagle feathers, he was unable to secure any additional feathers while incarcerated, and as a result he was unable to participate in Native American religious ceremonies in accordance with his religious beliefs. Liberally construed, these allegations were "sufficient to warrant ordering [defendant] to file an answer." *Wilhelm*, 680 F.3d at 1116; *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015) (elements of a free exercise claim). Furthermore, contrary to the district court's holding, Priest's free exercise claim is not barred even if state remedies exist for the loss of property. See *Wood v. Ostrander*, 851 F.2d 1212, 1215 (9th Cir. 1988) ("[T]he existence of state remedies is irrelevant ... where the plaintiff alleges a violation of a substantive right under ... the Bill of Rights...."). We reverse and remand Priest's free exercise claim for further proceedings consistent with this disposition. The district court dismissed Priest's RLUIPA claim on the ground that money damages are not available as a remedy for RLUIPA violations. However, in addition to monetary relief, plaintiff also requested "such other relief as it may appear plaintiff is entitled to." Because the relief Priest seeks is not limited to monetary relief, we reverse dismissal of Priest's RLUIPA claim and remand for the district court to consider the merits of this claim in the first instance. Reversed and remanded.

91. *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, 245 Ariz. 397, 430 P.3d 362 (S.Ct. Ariz. Nov. 29, 2018). Hopi Tribe brought an action against city for public nuisance after city moved forward with sale to ski resort of reclaimed wastewater for artificial snowmaking on public land. City filed a third-party indemnification claim against resort. The Superior Court, Coconino County, No. CV2011-00701, Mark R. Moran, J., dismissed action against resort. Tribe appealed. The Court of Appeals, 244 Ariz. 259, 418 P.3d 1032, reversed in part, vacated in part, and remanded. A petition for review was granted. The Supreme Court, Pelander, J., held that Tribe's alleged injury from environmental damage to land, which had religious and cultural significance to Tribe, was different in degree but not in kind or quality suffered by the public, and thus Tribe did not sufficiently allege the required special injury to maintain claim. Court of Appeals' opinion vacated and remanded; trial court's judgment affirmed.

J. SOVEREIGN IMMUNITY

92. *Romero v. Wounded Knee, LLC*, 2018 WL 4279446 (D. S.D. Aug. 31, 2018).

Plaintiff Leslie Romero initiated this action against defendant Wounded Knee LLC. Plaintiff claims she was sexually assaulted and harassed while employed by defendants. She alleges torts and violations of Title VII of the Civil Rights Act of 1964 and the South Dakota Human Relations Act of 1972. Plaintiff is an enrolled member of the Oglala Sioux Tribe (“Tribe”) and the incidents alleged in the complaint occurred within the exterior boundaries of the Pine Ridge Indian Reservation at Manderson, South Dakota. Defendants failed to file answers to plaintiff’s complaint, so the clerk entered default against them. Plaintiff filed a motion for default judgment, and the court entered an order finding she was entitled to default judgment. The court later acknowledged it will not enter final judgment in plaintiff’s favor until the court makes findings regarding the specific claims in the complaint on which it would enter judgment and the appropriate amount of damages supported by evidence. To prevent an adverse final judgment, WKCDC raised the issues of tribal court exhaustion and tribal sovereign immunity in a motion to set aside default judgment. WKCDC indicates that nearly two decades ago the Oglala Oyata Woitancan (“OOW”) was established in coordination with the federal government. The OOW was a geographic designation covering primarily Pine Ridge. An emphasis of the OOW was facilitating infrastructure development funds from the federal government to Pine Ridge. The Tribe’s Constitution created community governments called Districts that represent local interests, and each District could choose whether to participate in the OOW. WKCDC claims there was an OOW Board with a member who was also a member of an entity WKCDC refers to as the Wounded Knee District Task Force. According to WKCDC, once the OOW expired, the District Task Force became WKCDC and the District Task Force’s assets and property were transferred to WKCDC. WKCDC alleges its articles of incorporation demonstrate its affiliation with the Tribe and WKCDC’s tribal sovereign immunity. Ordered that the case is stayed pending tribal court exhaustion and a further order from this court. It is further Ordered that WKCDC, as the party asserting there is tribal court jurisdiction and tribal court exhaustion must occur, must file within thirty (30) days of the date of this order a declaratory judgment action in the Oglala Sioux Tribal Court naming the plaintiff Leslie Romero to address to that court at least the issues of tribal court jurisdiction and WKCDC’s tribal sovereign immunity defense. In the tribal court case, Ms. Romero may contest tribal court jurisdiction and assert her arguments regarding WKCDC’s tribal sovereign immunity without waiving her assertion in this court that there is no tribal court jurisdiction.

93. *JW Gaming Development, LLC v. James*, 2018 WL 4853222 (N.D. Cal. Oct. 05, 2018). From 2008 to 2011, Plaintiff JW Gaming, LLC (“JW Gaming”) invested \$5,380,000 in the Pinoleville Pomo Nation’s casino project, believing that it was matching an investment in the same amount from the Canales Group, LLC (“the Canales Group”). JW Gaming now alleges that leaders and members of both Pinoleville Pomo Nation (“the Tribe”) and the Canales Group were part of a years-long scheme to fraudulently induce its investment and to conceal that fraud. It brings suit alleging breach of contract, fraud, and violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–68. Before the court is a motion to dismiss brought by the Tribal Defendants. Because the Tribal Defendants are not entitled to sovereign immunity and the other claims are properly pleaded, the motions are denied. From

December 2011 to April 2012, JW Gaming, tribal leadership, and the Canales Group engaged in negotiations, mostly via email, regarding the future of the Casino Project. In a promissory note dated July 10, 2012 (“the Note”), “The Tribe and/or the Gaming Authority” promised to repay JW Gaming its \$5,380,000.00 investment plus interest. Tribal Defendants Leona Williams and Angela James signed the note, which included a limited waiver of sovereign immunity. The Tribal Defendants and the Canales Group represented that they were entering into a separate note (“the 2012 Canales note”) regarding the Canales investment. After learning about the alleged fraud, JW Gaming brought suit in Mendocino County Superior Court on March 1, 2018.

Defendants removed it to federal court on May 7, 2018. The Tribal Defendants argue that JW Gaming’s suit primarily focuses on contractual recovery for alleged breach of the Note. Because the Tribe, not its representatives, was party to the contract, it is the real party in interest. JW Gaming counters that it is suing the tribal employees in their individual capacities for their own fraudulent conduct and that it asserts no claims of vicarious liability. The Supreme Court allowed a personal-capacity suit against a tribal employee who was acting within the scope of his employment because a judgment would not “operate against the [t]ribe” but was “simply a suit against [the employee] to recover for his personal actions.” *Lewis*, 137 S. Ct. at 1291. The Court rejected the tribe’s argument that the indemnification clause in the employment contract should permit the application of sovereign immunity. Instead, “[t]he critical inquiry [was] who may be legally bound by the court’s adverse judgment, not who [would] ultimately pick up the tab.” Applying *Lewis* to the facts alleged here, this suit is against the Tribal Defendants in their individual capacities and the Tribe is not the real party in interest. JW Gaming alleges that the individuals themselves engaged in fraud and that it suffered damages as a result. In the event of an adverse judgment, the individual defendants—not the Tribe—will be bound. See *Lewis*, 137 S. Ct. at 1192–93.

94. *Wilson v. Horton’s Towing*, 906 F.3d 773, 2018 WL 4868025 (9th Cir. Oct. 09, 2018). Truck owner brought action against tribal police officer and towing company alleging that towing company converted his truck by impounding it on reservation at state patrol’s direction, towing it off of reservation, and releasing it to tribal police officer pursuant to tribal court order of forfeiture. United States substituted for officer. The United States District Court for the Western District of Washington, 2016 WL 1221655, entered summary judgment in defendants’ favor, and owner appealed. The Court of Appeals, Pregerson, District Judge, sitting by designation, held that: (1) owner was required to exhaust his remedies before tribal court before filing suit against company in federal court, and (2) officer was entitled under Westfall Act to immunity from truck owner’s conversion claim. Affirmed in part, vacated in part, and remanded.

95. *Wilhite v. Awe Kualawaache Care Center*, 2018 WL 5255181 (D. Mont. Oct. 22, 2018). In the late 1990s, the Crow Tribe (Tribe) determined that a significant number of its tribal members were in need of an on-reservation nursing facility. On April 11, 1998, by tribal resolution, the Tribe established the Awe Kualawaache Care Center (Care Center), a 40 bed long-term nursing facility located in Crow Agency, Montana, that provides 24-hour medical services exclusively to members of the Crow and Northern Cheyenne Tribes. The resolution stated the Care Center was an “instrumentality of the Crow Tribe,” created to meet the medical needs of its members. Pursuant to tribal law, the Care Center gives hiring preference to Indians living in or near the reservation. Attached to the resolution was an ordinance that governed operation of the Care Center. The ordinance stated that, “[a]s an instrumentality of the Tribe, the

Care Center, its officers, employees, agents and attorneys shall be clothed by federal and tribal law with all the privileges and immunities of the Tribe ... including sovereign immunity from suit in any state, federal, or tribal court." The ordinance further stated sovereign immunity may only be waived in accordance with the specific procedure provided in the ordinance. The Care Center operates under what is known as a 638 contract, which is a contract between a tribe and the federal government that provides for tribal administration of federal programs. *Demontiney v. U.S. ex rel. Dept of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 805-806 (9th Cir. 2001). Tammy Wilhite was employed as a registered nurse at the Care Center. One day, a patient at the Care Center informed Wilhite that he had been molested during transport. Wilhite reported the conversation to her supervisor. When nothing was done, Wilhite reported the incident to law enforcement. Allegedly, Wilhite was subsequently harassed by her supervisor and terminated from employment by the Care Center's board of directors. Wilhite filed suit in federal district court, alleging solely that she was entitled to damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., (RICO). Wilhite named the Care Center and its board and administrator as defendants. The individually named defendants are all members of the Tribe. Wilhite does not dispute the tribe's sovereign immunity extends to the Care Center. Instead, Wilhite argues (A) the Defendants may not assert sovereign immunity because the Court already determined it has subject matter jurisdiction, (B) an insurance company is precluded under 25 U.S.C. § 5321(c)(3) from asserting the Tribe's sovereign immunity as a defense, and (C) the individual defendants are not protected under sovereign immunity. Here, the Court determined it had subject matter jurisdiction over civil RICO claims in its prior order denying the Defendants' motion to dismiss on that basis. It did not address sovereign immunity because the issue was not raised at that time. However, the Defendants notified Wilhite they would raise a sovereign immunity defense in the event the Court denied their initial motion to dismiss. 25 U.S.C. § 5321(c)(1) obligates the United States to obtain or provide liability insurance for tribes operating under a 638 contract. Such insurance policies must "contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit." 25 U.S.C. § 5321(c)(3). Wilhite asserts § 5321(c)(3) operates as a waiver of sovereign immunity because she seeks nothing more than policy limits, and thus it is really the insurance company that is asserting sovereign immunity, not the Defendants. The Ninth Circuit rejected a similar argument in *Evans v. McKay*, where it held § 5321(c)(3) exclusively applies to insurers, not tribes, and therefore did not serve as a waiver of the tribe's sovereign immunity. 869 F.2d 1341, 146 (9th Cir. 1989). Wilhite argues *Evans* is distinguishable because it dealt with a § 1983 claim rather than a civil RICO claim. However, Wilhite does not articulate how or why the type of claim changes the meaning of the statute. The Court rejects Wilhite's argument as precluded under *Evans*. If the plaintiff seeks to recover from the tribe, tribal sovereign immunity extends to tribal officials and tribal employees who act in their official capacity and within the scope of their authority. *Cook*, 548 F.3d at 726-727. *Cook* plainly bars Wilhite's claim against the individual defendants because the acts complained of consist of official action taken by the Care Center's board and administrator and Wilhite expressly seeks to recover from the tribe. Wilhite argues *Cook* does not apply because she seeks recovery from the tribe's insurance policy, not tribal assets. Wilhite cites no authority for the proposition that she may circumvent sovereign immunity by limiting her claim to policy limits and the Court is aware of none. Carried to its conclusion, the argument would mean tribes effectively waive their sovereign immunity by purchasing insurance, so long as a claim was limited to policy limits. Such a conclusion is at odds with Supreme Court precedent,

which states sovereign immunity is not waived absent “express authorization by Congress or clear waiver by the tribe.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The purchase of insurance hardly constitutes a “clear waiver” of immunity, as noted by other courts faced with similar arguments. See *Seminole Tribe of Fla. v. McCor*, 902 So.2d 353, 359 (Fla. Dist. Ct. App. 2005); *Atkinson v. Haldane*, 569 P.2d 151, 167-170 (Alaska 1977). The Court lacks subject matter jurisdiction because the Defendants are immune from suit. The Defendants’ motion to dismiss is granted.

96. *Mitchell v. Tulalip Tribes of Washington*, 740 Fed.Appx. 600, 2018 WL 5307748 (9th Cir. Oct. 25, 2018). Thomas Mitchell, his wife, and two other married couples are non-tribal property owners in fee simple of residences within the historical boundaries of the Tulalip Indian Reservation in Snohomish County, Washington. They appeal dismissal of their claims for declaratory and injunctive relief seeking to quiet title against the Tulalip Tribes of Washington (“the Tribes”) regarding tribal ordinances that they allege create a cloud on their title. The district court dismissed the claims as unripe and did not address the Tribes’ alternative grounds for dismissal including res judicata and tribal sovereign immunity. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the dismissal on grounds of tribal sovereign immunity. When the district court dismissed on grounds of ripeness, it did not address Washington law that recognizes cloud on title as a hardship fit for judicial determination. See, e.g., *Robinson v. Khan*, 89 Wash.App. 418, 948 P.2d 1347, 1349 (1998)); Wash. Rev. Code § 7.28.010. Nevertheless, we affirm because this case must be dismissed under the doctrine of tribal sovereign immunity, which protects Indian tribes from suit absent congressional abrogation or explicit waiver. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Indian tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers;” see also *McClellon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) (“Because they are sovereign entities, Indian tribes are immune from unconsented suit in state or federal court.”). This common-law immunity from suit applies to actions for injunctive and declaratory relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Congress must “unequivocally express” its intent to abrogate immunity. *Michigan v. Bay Mills Indian Cnty.*, 572 U.S. 782, 134 S.Ct. 2024, 2031, 188 L.Ed.2d 1071 (2014) (internal quotation omitted). “The tribe’s immunity is not defeated by an allegation that it acted beyond its powers.” *Imperial Granite Co.*, 940 F.2d at 1271. The claims here are not brought under any federal law that abrogates tribal immunity and the Tribes have not waived their immunity. The Tribes, therefore, cannot be sued in federal court. Affirmed.

97. *Laake v. Turning Stone Resort Casino*, 2018 WL 5344936 (2nd Cir. Oct 29, 2018). Appellant John Laake (“Laake”), proceeding *pro se*, appeals from the district court’s judgment dismissing his complaint against Turning Stone Resort Casino (“Turning Stone”) for lack of subject matter jurisdiction based on tribal sovereign immunity. Laake had purchased a vendor booth for a multi-day event hosted by Turning Stone and attempted to use the booth to conduct tarot card readings, occult readings, and other paranormal demonstrations. Turning Stone employees, finding this conduct improper, informed Laake that he would have to stop or he would be forced to leave the casino. Laake later sued Turning Stone for alleged violations of his First Amendment and equal protection rights, as well as for infliction of emotional distress and defamation under New York common law. The district court dismissed the complaint. Here, the district court properly concluded that it lacked subject matter jurisdiction over the complaint

against Turning Stone. Indian tribes have sovereign immunity from suit unless “Congress has authorized the suit or the tribe has waived its immunity.” *C&L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 416, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)). Tribal immunity extends to tribal commercial enterprises, such as gambling venues. See *Kiowa Tribe*, 523 U.S. at 754–55, 118 S.Ct. 1700. Turning Stone is a commercial enterprise, owned and operated by the Oneida Indian Nation of New York, a federally recognized Indian tribe. See *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915-02, 4917 (Jan. 17, 2017). Neither congressional abrogation of immunity nor waiver has occurred here. Therefore, Turning Stone, as a commercial enterprise of the Oneida Indian Nation of New York, is entitled to sovereign immunity. Laake argues that the Indian Civil Rights Act of 1968 (“ICRA”) supersedes Turning Stone’s immunity. However, it is settled law that suits like this against a tribe under ICRA are also barred by sovereign immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). ICRA provides no private right of action against a tribe and may be enforced only in tribal court or by a petition for habeas corpus in federal court. 98 S.Ct. 1670; *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 713–14 (2d Cir. 1998). We affirm the judgment of the district court.

98. *Cayuga Indian Nation of New York v. Seneca County, New York*, 354 F.Supp.3d 281, 2018 WL 6510728 (D.C. W.D. N.Y. Dec. 11, 2018). Indian tribe brought action challenging county’s ability to impose and collect ad valorem property taxes on parcels of real estate it owned. Parties filed cross-motions for summary judgment. The District Court, Charles J. Siragusa, J., held that tribal sovereign immunity barred county from bringing suit against tribe. Tribe’s motion granted.

99. *Barron v. Alaska Native Tribal Health Consortium*, __ F.Supp.3d __, 2019 WL 80889 (D. Ak. Jan. 02, 2019). Former employee brought §1981 action in state court against employer, an Alaska Native tribal health consortium, alleging disparate treatment and retaliation on the basis of race. After removal, employer moved to dismiss for lack of subject matter jurisdiction. The District Court, Sharon L. Gleason, J., held that: (1) employer was an arm of Alaska’s tribes with tribal sovereign immunity, and (2) as a matter of first impression, Congress did not abrogate tribal sovereign immunity as to §1981 claims. Motion granted.

100. *Alaska Logistics, LLC v. Newtok Village Council*, 357 F.Supp.3d 916, 2019 WL 181115 (D.C. Ak. Jan. 11, 2019). Logistics company brought action against the governing body of Newtok Village tribe and contractor, asserting claims for breach of contract, breach of good faith and fair dealing, quantum meruit, misrepresentation, and unfair trade practices, arising out of an agreement to transport construction materials and cargo. Governing body brought counterclaims, alleging fraud, misrepresentation, unfair and deceptive practices, and breach of contract. Company filed counterclaims to counterclaims, which were identical to company’s original causes of action. Governing body moved to dismiss and to strike company’s counterclaims to counterclaims. The District Court, Sharon L. Gleason, J., held that: (1) governing body did not waive its tribal sovereign immunity by asserting counterclaims; (2) company failed to establish that governing body agreed to a forum selection clause that manifested the tribe’s intent to surrender tribal sovereign immunity in clear and unmistakable

terms; (3) company failed to show that jurisdictional discovery was warranted on the issue of tribal sovereign immunity; and (4) company's counterclaims to counterclaims, were redundant, and thus, could be stricken. Motions granted.

101. *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 2019 WL 274040 (9th Cir. Jan. 22, 2019). Stillaguamish Tribe of Indians brought action against State of Washington and the Attorney General of Washington, seeking a declaration that its tribal sovereign immunity barred any lawsuit for indemnification arising from a contract with the State of Washington concerning construction of a revetment to protect salmon populations in a river on tribal lands following a landslide near the river. The United States District Court for the Western District of Washington, Robert J. Bryan, Senior District Judge, 2017 WL 3424942, granted tribe's summary judgment motion. Defendants appealed. The Court of Appeals, McKeown, Circuit Judge, held that under the well-pleaded complaint rule, district court lacked federal question jurisdiction over declaratory judgment action that was based on existence of a tribal immunity defense. Vacated and remanded.

102. *Edwards v. Foxwoods Resort Casino*, 17-CV-05869 (JMA) (SIL), 2019 WL 486077 (E.D. N.Y. Feb. 07, 2019). On October 6, 2016, Plaintiff Curtis Edwards and Victoria Edwards visited the Foxwoods Resort Casino. Plaintiffs are both New York residents. While inside the Casino, they were confronted and detained by Casino security on suspicion of credit card fraud at the neighboring Mohegan Sun Casino. Curtis was informed that he was being arrested and that the police were on their way. Upon the arrival of Tribal police, Curtis was advised again that he was under arrest and would be transported to police headquarters. Victoria insisted the officers examine a photo of the suspect. Once the police confirmed that Curtis did not match the appearance of the suspect, he was released from custody. When Plaintiffs returned to their hotel room, an unidentified employee of the hotel opened Plaintiffs' room, saw them, and abruptly left. Defendant Foxwoods Resort Casino is a business "located in the State of Connecticut[.]" Plaintiffs' complaint alleges violations of the Fourth Amendment based on: (1) false imprisonment; (2) false arrest; and (3) unlawful detention. Plaintiffs also allege that the actions of the Tribal police officers underlying these violations were motivated by Plaintiffs' race. Additionally, Plaintiffs bring state law claims of (1) assault and battery; (2) negligent hiring; and (3) trespass. Defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction. Defendants argue that subject matter jurisdiction is lacking because: (1) Plaintiffs fail to raise a federal question; (2) Indian tribes are not citizens of a state and therefore destroy complete diversity; (3) 28 U.S.C. § 1343 is not an independent source of jurisdiction; and (4) Tribal Sovereign Immunity precludes Plaintiff's claim. In response, Plaintiffs' motion papers argue that: (1) the allegations of racial profiling and constitutional violations are sufficiently pled and raise federal questions; and (2) any claim of sovereign immunity has been waived by "Sovereign Immunity Waiver Ordinance Number 011092-01," which the Tribe enacted. Here, there are no colorable federal claims. To the extent Plaintiffs seek to invoke federal question jurisdiction by claiming the Defendants violated their rights under the Fourth and Fourteenth Amendments, such an argument is unavailing. These constitutional protections do not apply to Defendants. Moreover, Plaintiffs cannot sue Defendants under 42 U.S.C. § 1983 ("Section 1983") because none of the Defendants were

acting under the color of state law. Defendants' motion to dismiss for lack of jurisdiction is granted.

103. *Long v. Snoqualmie Gaming Commission*, 435 P.3d 339, 2019 WL 912132

(Wash Ct. App. Div.1, Feb. 25, 2019). Former chief executive officer (CEO) of Native American tribe's casino brought action against tribe's gaming commission, alleging commission violated terms of a settlement agreement by refusing to rescind revocation of former CEO's gaming license. The Superior Court, King County, No. 17-2-01853-8, Jeffrey M. Ramsdell, J., dismissed action. Former CEO appealed. The Court of Appeals, Leach, J., held that: (1) any waiver by tribe of its own sovereign immunity, without more, did not also necessarily waive commission's sovereign immunity in matters falling within exclusive purview of commission, and (2) settlement agreement executed between tribe and former CEO, waiving tribe's sovereign immunity for purposes of resolving any dispute arising under agreement, did not constitute waiver of immunity of commission. Affirmed.

104. *In re Greektown Holdings, LLC*, 917 F.3d 451, 2019 WL 92265866 (6th Cir.

Feb. 26, 2019). Litigation trustee brought strong-arm proceeding to avoid allegedly fraudulent transfers, and Indian tribe named as defendant moved to dismiss on sovereign immunity grounds. The United States Bankruptcy Court for the Eastern District of Michigan, Walter Shapero, J., 516 B.R. 462, denied the motion, and Indian tribe appealed. The District Court, Paul D. Borman, J., 532 B.R. 680, reversed and remanded. On remand, the Bankruptcy Court, Shapero, J., 559 B.R. 842, granted motion to dismiss, and litigation trustee appealed. The District Court, Borman, J., 584 B.R. 706, affirmed. Appeal was taken. The Court of Appeals, Clay, Circuit Judge, held that: (1) Congress did not unequivocally express intent to abrogate Indian tribe's sovereign immunity from cause of action by litigation trustee in strong-arm capacity to set aside allegedly fraudulent prepetition transfers made by Chapter 11 debtor to tribe; (2) while tribal sovereign immunity could be waived by litigation conduct, it could not be waived by the litigation conduct, not of tribe, but of tribe's alleged alter ego or agent; and (3) litigation conduct of filing bankruptcy petition does not waive tribal sovereign immunity as to a separate, adversarial fraudulent transfer avoidance claim. Affirmed.

105. *Solomon v. American Web Loan*, No. 4:17cv145, 2019 WL 1324490 (D.C. E.D.

Va. Mar 20, 2019). These motions arise out of complicated lending scheme that appears to weave tribal immunity, forced arbitration, and several layers of corporate entities together in an attempt to avoid liability for allegedly usurious interest rates. At its core, this case involves a lending scheme envisioned by Mark Curry ("Curry"), whereby he and his corporate entities attempt to use the sovereign immunity of the Otoe-Missouria Indian Tribe (the "Tribe") to evade this lawsuit. Mindful of the strong federal policy favoring tribal immunity, self-governance, and a safe treasury, the Court cannot accept his arguments. Plaintiffs have produced enough evidence to show that Curry shifted all of the risk of his scheme to the Tribe and kept the lion's share of the revenue for himself, through a scheme that infringed upon the Tribe's self-governance and placed the Tribe's treasury at risk. In other words, Plaintiffs have made a sufficient showing that Curry was acting for himself, not for the Tribe. Defendants' motions are denied.

106. *Gingras v. Think Finance, Inc.*, Docket Nos. 16-2019-cv (L), 2019 WL

1780951(2nd Cir. Apr. 24, 2019). The federal government and many states have laws designed to protect consumers against predatory lending practices. In this case, we must determine what

happens when those laws conflict with the off-reservation commercial activities of Indian tribes. In so doing, we probe the boundaries of tribal sovereign immunity and hold that, notwithstanding tribal sovereign immunity, federal courts may entertain suits against tribal officers in their official capacities seeking prospective, injunctive relief prohibiting off-reservation conduct that violates state and substantive federal law. We also consider the specific lending agreements between these Plaintiffs and these Defendants and hold that the agreements' arbitration clauses are unenforceable and unconscionable. Payday loans are ostensibly short-term cash advances for people who face unexpected obligations or emergencies. The loans are typically for small sums that are to be repaid quickly—in anywhere from several weeks to a year. “Typically, online lenders charge fees and interest that, when annualized, result in interest rates far in excess of legal limits or typical borrowing rates, often exceeding 300%, 500%, or even 1,000%.” This suit involves payday loans made by Plain Green, LLC, an online lending operation, which holds itself out as a “tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy’s Indian Reservation, Montana.” J. App. 150. The borrowers are Plaintiffs-Appellees Jessica Gingras and Angela Given, who are Vermont residents. In July 2011, Gingras borrowed \$1,050 at an interest rate of 198.17% per annum. She repaid that loan and borrowed an additional \$2,900 a year later, this time with an interest rate of 371.82%. She has not repaid the second loan. To receive their loans, Gingras and Given were required to sign loan agreements. Those loan agreements provide for arbitration in the event of a dispute between the borrower and Plain Green. The loan agreements also provide that Chippewa Cree tribal law governs the loan agreement and any dispute arising under it. An arbitrator, whom the borrower may select from the American Arbitration Association (“AAA”) or JAMS, “shall apply Tribal Law” and any arbitral award must “be supported by substantial evidence and must be consistent with [the loan agreement] and Tribal Law.” Chippewa Cree tribal courts are empowered to set aside the arbitrator’s award if it does not comply with tribal law. Gingras and Given allege that the loan agreements violate Vermont and federal law. The loans originated from Plain Green, LLC. Plain Green’s Chief Executive Officer is Defendant Joel Rosette; two members of Plain Green’s Board of Directors, Ted Whitford and Tim McInerney, are also defendants. Gingras and Given brought this class action in the District of Vermont, seeking, among other relief, an order barring Defendants from continuing their current lending practices. Tribal Defendants moved to dismiss, arguing that they are entitled to tribal sovereign immunity. The district court disagreed and denied their motion. It concluded that tribal sovereign immunity does not bar suit against the Tribal Defendants in their official capacities for prospective, injunctive relief under a theory analogous to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Specifically, the district court read the Supreme Court’s decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014), to condone that form of action to vindicate violations of state law. All Defendants also moved to compel arbitration pursuant to the loan agreements. The district court denied those motions. It concluded that the arbitration agreements are unconscionable and unenforceable because they insulate Defendants from claims that they have violated state and federal laws. In particular, it held that because the agreements apply tribal law exclusively and restrict all arbitral awards review solely by a tribal court, the neutral arbitral forum is illusory. All Defendants timely appealed. First, we conclude that the arbitration agreements are unenforceable because they are designed to avoid federal and state consumer protection laws. Similar to the agreement in *Hayes*, Plaintiffs’ agreements here require the application of tribal law only and disclaim the application of state and federal law.⁴ See J. App. 116–17. The arbitration mechanism in these agreements purports to offer neutral dispute

resolution but appears to disallow claims brought under federal and state law. And the Supreme Court has made clear that arbitration agreements that waive a party's right to pursue federal statutory remedies are prohibited. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). By applying tribal law only, arbitration for the Plain Green borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law. We agree with the Fourth Circuit that “[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce.” Plain Green is a payday lending entity cleverly designed to enable Defendants to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity. That immunity is a shield, however, not a sword. It poses no barrier to plaintiffs seeking prospective equitable relief for violations of federal or state law. Tribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law. Attempts to disclaim application of federal and state law in an arbitral forum subject to exclusive tribal court review fare no better. The judgment of the district court is affirmed.

107. *Bell v. City of Lacey*, 2019 WL 2578582 (W.D. Wash. June 24, 2019). This matter is before the Court on Defendants Nisqually Tribe, John Simmons, and Elatta Tiam's (collectively “the Tribe Defendants”) Motion for Judgment on the Pleadings. After being arrested and charged with a crime in the City of Lacey, Bell was held for 19 days at a detention facility owned and operated by the Nisqually Tribe on Reservation land. The facility detains non-tribal members pursuant to an Agreement between the Tribe and the City of Lacey whereby the latter pays the former for incarceration services. At the end of his time at the facility, Bell suffered a stroke. He has now sued numerous parties including the Nisqually Tribe and the Tribe's Chief Executive Officer, John Simmons, and its Chief Financial Officer Eletta Tiam (Bell also sued several Doe Defendants who allegedly failed to give him medical treatment, but they are not the subject of this Order). Bell alleges claims for false imprisonment, declaratory and injunctive relief, negligent infliction of emotional distress, and negligence against all three Tribe Defendants. The Tribe Defendants moved to dismiss Bell's claims against them, arguing that the claims are barred by sovereign immunity, factually implausible, and time-barred. However, the Ninth Circuit has held that tribal officers allegedly violating federal law are not immune from suits seeking prospective relief under the doctrine of Ex Parte Young. See *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Burlington N.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir. 1991) (overruled on other grounds)). In this case, no waiver or abrogation has occurred. Consequently, the claims for monetary relief against the Tribe Defendants must be dismissed. However, because Bell's complaint cites Ex Parte Young but the parties do not address it in their briefs, the Court lacks sufficient materials to decide whether Bell's claim for declaratory and injunctive relief against Simmons and Tiam can be dismissed. That question is therefore reserved pending further briefing. Bell's primary argument is that he may sue the Tribe as a third-party beneficiary of the Tribe's Agreement with the City. The Agreement waives the Tribe's sovereign immunity to the following extent: The Nisqually Indian Tribe is a Sovereign Nation with all immunities attendant thereto with the following exception that the parties to this agreement have specifically negotiated: The Nisqually Indian Tribe does hereby expressly consent to venue in the courts of the State of Washington for any legal dispute by and between the parties to this agreement and further agrees that any such dispute shall be interpreted pursuant to the laws of the state of Washington. According to Bell, he is included as a “party” to the Agreement and can

therefore sue the Tribe in a state or federal court. Under Washington law, “[t]he creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.” Postlewait Const., Inc. v. Great Am. Ins. Companies, 106 Wash. 2d 96, 99 (1986) (quoting Lonsdale v. Chesterfield, 99 Wash.2d 353, 361 (1983)). Here, the Agreement expressly allocates mandatory responsibilities for medical treatment and transportation to the City. While the Agreement states that the Tribe must provide “room and board” to inmates, this does not show that the parties intended to create a contractual obligation. Furthermore, even if inmates could be considered third-party beneficiaries under the Agreement, the waiver of sovereign immunity does not clearly encompass claims brought by third parties. The Agreement only waives sovereign immunity for disputes between “the parties to this agreement,” the same “parties to this agreement” that are also referred to as having “specifically negotiated” the waiver exception. Consequently, the Agreement does not “unequivocally express” an intent to waive sovereign immunity for third-party beneficiaries. See Santa Clara Pueblo, 436 U.S. at 58. Bell’s remaining arguments also lack merit. Bell spends much space arguing that his claim “sounds in habeas” because he alleges that the Tribe’s Agreement to detain state prisoners is illegal. However, as the Tribe Defendants correctly point out, Bell cannot maintain a habeas action when he is no longer being detained. See Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004). There is no dispute that Bell has been released from Tribal custody and there is no clear indication that he will be returned to it. Finally, Bell contends that Simmons and Tiam cannot invoke sovereign immunity because they were sued in their individual capacities. See Lewis v. Clarke, 137 S. Ct. 1285, 1288 (2017). However, courts “may not simply rely on the characterization of the parties in the complaint” when assessing whether a claim is actually against an officer in their official capacity. *Id.* at 1290. Here, Bell’s claims against Simmons and Tiam stem from policy-level decisions made as representatives of the Tribe and administrative conduct undertaken as officers of the Tribe. None of Simmons and Tiam’s actions were directed at Bell personally. Sovereign immunity thus extends to Simmons and Tiam for Bell’s claims seeking monetary relief. For the above reasons, all claims against the Tribe are dismissed and the false imprisonment, conspiracy, negligent and reckless infliction of emotional distress, and negligence claims against Simmons and Tiam are dismissed. The Court orders further briefing on the issue of whether Bell’s claim for declaratory and injunctive relief against Simmons and Tiam should survive under the doctrine of *Ex Parte Young*.

108. *Williams v. Big Picture Loans, LLC*, __ F.3d. __, 2019 WL 2864341 (4th Cir. July 3, 2019). Borrowers brought putative class action against lending entity, and related defendants, alleging that payday loans carried unlawfully high interest rates. The United States District Court for the Eastern District of Virginia, No. 3:17cv00461REPRCY, Robert E. Payne, Senior District Judge, 329 F.Supp.3d 248, denied motion to dismiss for lack of subject matter jurisdiction. Defendants filed interlocutory appeal. The Court of Appeals, Gregory, Chief Judge, held that: (1) burden of proof to demonstrate tribal immunity as an arm of the tribe was on party seeking such immunity, and (2) entities were entitled to sovereign tribal immunity. Reversed and remanded with instructions.

109. *Joan Wilson and Paul Franke, M.D., v. Alaska Native Tribal Health Consortium*, 2019 WL 2870080 (D. Alaska, July 3, 2019). The matter comes before this Court on Defendants Alaska Native Tribal Health Consortium's (“ANTHC”), Andrew Teuber's

(“Teuber”) and Roald Helgesen’s (“Helgesen”) (collectively “Individual Defendants”) Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Claim (“Motion to Dismiss”). For the reasons explained below, Defendants’ Motion to Dismiss is granted. ANTHC is a “Tribal Organization and inter-Tribal consortium of federally recognized Alaska Tribes and Tribal Organizations” which co-manages Alaska Native Medical Center (“ANMC”), a tertiary-care hospital that provides medical services in Anchorage, Alaska. From 2014 to 2016, ANTHC employed Wilson as Chief Ethics and Compliance Officer. From 2013 to 2016, ANTHC employed Franke by contract as the Chief Medical Officer of ANMC. Wilson and Franke assert that they have “intimate knowledge of the day-to-day operations” of ANTHC, including billing practices of ANMC. They repeatedly allege that Teuber, President of ANTHC, and Helgesen, Chief Executive Officer of ANTHC and Hospital Administrator of ANMC, were “well-aware” that ANMC and ANTHC’s various billing practices were fraudulent. Specifically, Plaintiffs allege that ANTHC engaged in the following fraudulent practices: double billing for certain medical services; billing for services performed by ineligible providers; billing for unauthenticated services; and accepting incentive payments from Medicaid and Medicare without satisfying program requirements. Plaintiffs allege that Wilson “repeatedly brought these issues to the attention of ANTHC and Helgesen,” “repeatedly attempted to reverse these [inappropriate] practices.” On May 6, 2016, Helgesen terminated Wilson’s employment with approval from Teuber, his direct supervisor. In June 2016, ANTHC notified Franke that his contract, which was due to expire on June 7, 2016, would not be renewed. On August 29, 2016, Plaintiffs initiated this action against ANTHC as a qui tam lawsuit on behalf of the government and under seal pursuant to the False Claims Act (“FCA”). On December 6, 2017, the United States declined to intervene in the action. On June 21, 2018, Plaintiffs filed an Amended Complaint as a private action on behalf of themselves against ANTHC. Plaintiffs allege that their employment at ANTHC was terminated as a result of Plaintiffs’ opposition to ANTHC’s fraudulent billing practices in violation of federal and state laws. Defendants move for dismissal of each of Plaintiffs’ four claims. ANTHC contends that dismissal is appropriate because ANTHC is an “arm of the tribe,” which means it is both entitled to tribal sovereign immunity, which bars all claims against it, and is not “a person” subject to liability under the FCA retaliation provision. The quasi-jurisdictional nature of sovereign immunity means that if ANTHC is found to maintain such immunity, this Court lacks jurisdiction to resolve this action as it pertains to ANTHC. “Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe.” Tribal sovereign immunity extends to tribal governing bodies or entities acting as “an arm of the tribe” as well as organizations comprised of multiple tribes. In *White v. University of California*, the Ninth Circuit Court of Appeals set forth the appropriate analysis to determine whether an entity is an “arm of the tribe.” If a Court finds that an entity is an “arm of the tribe,” that entity is both (1) entitled to maintain tribal sovereign immunity, and (2) is not liable under the FCA retaliation provision, because it is not “a person” under the FCA. *White*, established a five-factor analysis to determine if an entity is an “arm of the tribe:” (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities. Plaintiffs argue that ANTHC is not an “arm of the tribe” because it was created by Congress, not directly by resolution of the tribes; and tribal status is not required in order to obtain federal funding through the Indian Self-Determination and Education Assistance Act (“ISDEAA”). The

ISDEAA, in pertinent part, determines that an “inter-tribal consortium … shall have the rights and responsibilities of the authorizing Indian tribe and § 325(a) authorizes the fifteen tribes and tribal health organizations to form “a consortium,” which eventually became ANTHC. Furthermore, ANTHC was incorporated as a tribal non-profit organization. Based on these facts, the Court finds that ANTHC’s creation, authorized by Congress and formed by regional health entities and tribes, supports a finding that it is “an arm of the tribe.” The Court finds that the tribes and regional health entities identified in § 325(a) P.L. 105-83 intend to share their immunity with ANTHC, which supports a finding that ANTHC is “an arm of the tribe.” For the foregoing reasons, this Court finds that an analysis of the five factors articulated in White demonstrates that ANTHC is an “arm of the tribe.” Because ANTHC is an “arm of the tribe,” it maintains tribal sovereign immunity, which deprives this Court of subject matter jurisdiction over the claims brought against ANTHC and simultaneously establishes that ANTHC is not a “person” subject to the FCA. Accordingly, Defendants’ Motion to Dismiss is granted with respect to the FCA claim against ANTHC identified in Count I, which is dismissed with prejudice.

110. *Jason Matyascik v. Arctic Slope Native Ass’n Ltd., d/b/a Samuel Simmonds Memorial Hospital*, (D. Alaska Aug 05, 2019). Plaintiff is Jason Matyascik. Defendant is Arctic Slope Native Association, Ltd., d/b/a Samuel Simmonds Memorial Hospital. Defendant is “the P.L. 93-638 regional health organization for the Arctic Slope Region of Alaska.” Plaintiff alleges that “[o]n or about May 14, 2018,” he “contracted with” defendant “to renew his employment contract” at defendant’s “hospital as a physician.” Plaintiff alleges that defendant “refused to honor the contract, terminating [his] employment without providing him” the three-month notice called for in the contract for early termination. Plaintiff also alleges that “[d]uring the 2017-2018 term of [his] employment, [defendant] promised to reimburse several unpaid sums to him, yet failed to fulfill those promises.” Defendant now moves to dismiss plaintiff’s claims, arguing that the court lacks subject matter jurisdiction because it is entitled to tribal sovereign immunity and because plaintiff has not exhausted his administrative remedies. “Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.” *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014). Defendant argues that it is an arm of its member tribes. Defendant is entitled to sovereign immunity because it is an arm of its member tribes. And, if defendant is entitled to sovereign immunity, defendant has not waived that immunity as to plaintiff’s contract and statutory claims. As for plaintiff’s conversion claim, plaintiff concedes that he has not exhausted his administrative remedies as required by the Federal Tort Claims Act (FTCA). See *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011) (quoting *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992) (“FTCA ‘provides that before an individual can file an action against the United States in district court,[he] must seek an administrative resolution of [his] claim’ ”)). Thus, plaintiff’s conversion claim must also be dismissed. Defendant’s motion to dismiss is granted. Plaintiff’s contract and statutory claims are dismissed with prejudice, and plaintiff’s conversion claim is dismissed without prejudice.

K. SOVEREIGNTY, TRIBAL INHERENT

111. *Gustafson v. Poitra*, 916 N.W.2d 804, 2018 WL 4087949 (S.Ct. N.D. Aug. 28, 2018). Non-Indian fee owner of two parcels of land located on Indian reservation by virtue of a

foreclosure judgment brought action against claimants claiming an interest in the parcels. Following a bench trial, the District Court, Rolette County, Northeast Judicial District, Anthony S. Benson, J., entered judgment quieting title to fee owner, finding claimants' lessor's lien to be void, and awarding fee owner a money judgment in the amount of \$67,567.98 and attorneys fees in the amount of \$6,620. Claimants appealed. The Supreme Court, McEvers, J., held that: (1) an express determination by the trial court in a prior foreclosure action, that it had jurisdiction over non-Indian owned fee land located within Indian reservation, had res judicata effect in fee owner's subsequent action to quiet title to the land, and (2) the tribal court did not have jurisdiction over non-Indian fee owner's quiet title action. Affirmed.

112. *World Fuel Services, Inc. v. Nambe Pueblo Development Corporation*, __

F.Supp.3d __, 2019 WL 293231 (D.C. N.M. Jan. 23, 2019). Petroleum fuel supplier brought action against federally chartered tribal corporation seeking to compel arbitration of contract dispute concerning unpaid federal excise taxes allegedly owed to supplier pursuant to fuel supply agreement with respect to fuel sales on tribal land. Tribal corporation moved to dismiss for lack of subject-matter jurisdiction, or in the alternative, for failure to state a claim. The District Court, James O. Browning, J., held that: (1) District Court had diversity jurisdiction; (2) District Court would construe tribal corporation's motion to dismiss for failure to exhaust tribal remedies as motion to dismiss for failure to state a claim, rather than as motion to dismiss for lack of subject-matter jurisdiction; (3) Indian tribe's sovereign immunity extended to tribal corporation; (4) tribal corporation waived its sovereign immunity for purposes of arbitration; (5) supplier was required to exhaust tribal remedies; and (6) stay pending exhaustion of tribal court remedies was warranted. Motion granted in part and denied in part.

113. *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 2019 WL 846573 (8th Cir. Feb. 22, 2019). An arrestee who was not a member of an Indian tribe brought §1983 action against a federally recognized tribe, the Oglala Sioux Tribe, and various tribal officers, seeking damages for violation of the plaintiff's constitutional and civil rights in connection with allegations that the arrestee was traveling on a federally-maintained highway on reservation land was when he was arrested, detained, assaulted, battered, and robbed. The United States District Court for the District of South Dakota, Jeffrey L. Viken, Chief District Judge, 2017 WL 4217113, granted defendants' motion to dismiss for failure to state a claim. Arrestee appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) arrestee did not state an Indian Civil Rights Act (ICRA) claim, and (2) arrestee failed to exhaust available tribal court remedies. Affirmed.

114. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 2019 WL 1781404 (9th Cir. Apr. 24, 2019). Former tribal administrator sought declaratory and injunctive relief against tribe, tribal court, and tribal court judge to avoid tribal court jurisdiction over claims that she defrauded tribe and breached her fiduciary duties to it. The United States District Court for the Eastern District of California, William Horsley Orrick, J., 234 F.Supp.3d 1042, dismissed action. Former administrator appealed. The Court of Appeals, Piersol, Senior Judge for the District of South Dakota, sitting by designation, held that: (1) tribal court had subject matter jurisdiction over tribes claims against administrator; (2) administrator reasonably should have anticipated that her conduct on tribal land would have fallen within tribes regulatory jurisdiction; (3) conduct of administrator threatened or had some direct effect on political integrity, economic security, or health or welfare of tribe; and (4) tribes adjudicatory authority

did not exceed its regulatory authority over conduct of administrator during her employment. Affirmed.

115. *Employers Mutual Casualty Company v. Branch*, No. CV-18-08110-PCT-DWL, 2019 WL 1489121 (U.S. D.C. Az. Apr. 4, 2019). This case involves an attempt by a tribal court to assert jurisdiction over a party that never set foot within the tribe's reservation, never contracted with any tribal members or organizations, and never expressly directed any activity within the reservation's confines. Employers Mutual Casualty Company ("EMC") is an Iowa-based insurance company. In 2004, EMC sold commercial general liability policies to Service Station Equipment and Sales, Inc. ("SSES") and Milam Building Associates, Inc. ("Milam"). Neither company has any tribal affiliation. While these insurance policies were in place, SSES and Milam were each hired to perform certain work on a gas station in Chinle, Arizona. This gas station was situated on tribally-owned land within the Navajo Nation reservation. In March 2005, an employee of a subcontractor that had been hired by Milam accidentally breached a fuel line. This breach, which went undetected for five months, caused over 15,000 gallons of gasoline to leak into the ground. In response, the Navajo Nation sued an array of parties, including SSES, Milam, and EMC, in Navajo tribal court. EMC, in turn, moved to dismiss on the ground that it wasn't subject to tribal jurisdiction. After the tribal courts rejected this argument, EMC filed this action in federal court seeking declaratory and injunctive relief. The Court holds that EMC isn't subject to tribal jurisdiction. The Supreme Court has never held that a tribal court has jurisdiction over a non-member, and although the Ninth Circuit has issued several decisions recognizing (or noting the possibility of) such jurisdiction, those cases have almost exclusively involved instances where a non-member was physically present on tribal land and thereafter engaged in the conduct giving rise to liability. Moreover, to the extent the Ninth Circuit has suggested an insurance company may be sued in tribal court despite the absence of any physical presence on tribal land, its decisions have been limited to circumstances where the policyholder was a tribal member and the insurance company engaged in conduct specifically directed toward the reservation. No court has ever recognized tribal jurisdiction under the circumstances presented here, where an insurance company simply sold a policy to a non-tribal member. The Court thus concludes this case doesn't satisfy either of the jurisdictional tests recognized by the Ninth Circuit: (1) EMC isn't subject to jurisdiction under the "right to exclude" test because EMC has never done anything to enter tribal land (and thus can't be excluded), and (2) neither of the exceptions recognized in *Montana v. United States*, 450 U.S. 544 (1981), is applicable.

116. *Hestand v. Gila River Indian Community*, No. 17-16583, 2019 WL 1765219 (9th Cir. Apr. 19, 2019). Plaintiff-Appellant John Hestand filed a complaint in tribal court against Defendants-Appellees Gila River Indian Community and Linus Everling, in his official capacity, (Defendants) alleging age discrimination. The tribal court dismissed Hestand's complaint on the basis of tribal sovereign immunity. After the tribal court of appeals affirmed, Hestand filed a complaint in the district court. He now appeals the court's order granting Defendants' motion to dismiss with prejudice, and its conclusion that claim and issue preclusion barred his claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Hestand argues that federal questions involving sovereign immunity are always subject to de novo review. However, we have previously explained the general "rule that federal courts may not readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid

reason.” *AT & T Corp. v. Coeur d’Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002). While we review de novo a *district court’s* determination whether sovereign immunity applies, *Linneen v. Gila River Indian Cnty.*, 276 F.3d 489, 492 (9th Cir. 2002), this case involves a *tribal court’s* determination. Principles of comity generally require us to recognize and enforce tribal court decisions. *See AT & T Corp.*, 295 F.3d at 903. There are, however, “[t]wo circumstances [that] preclude recognition: when the tribal court either lacked jurisdiction or denied the losing party due process of law.” *Id.* Neither applies here. The tribal court’s jurisdiction was never challenged—Hestand himself brought the claims to tribal court. For the first time on appeal, Hestand claims that violations of due process entitle him to de novo review. But the district court did not consider this issue, and it is therefore waived. *See Tibble v. Edison Int’l*, 843 F.3d 1187, 1193 (9th Cir. 2016). Even if we were to consider the claim, Hestand alleges no actual due process violations by the tribal court; instead, he includes a general accusation that “the actions of the Defendants and tribal court denied Plaintiff’s due process rights.” This conclusory allegation does not preclude recognition of the tribal court’s decision. Moreover, Hestand does not appeal the factual and legal bases for the district court’s holding that claim and issue preclusion barred his claims. Instead, he attempts to argue the merits of his suit, claiming that the Indian Civil Rights Act somehow abrogates sovereign immunity in suits involving tribal employees, and that sovereign immunity was not a viable defense. Yet this is precisely what claim preclusion seeks to prevent. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (“*Res judicata* … bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.” (quoting *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997))). Because the district court correctly held that claim and issue preclusion barred Hestand’s claims, we need not reach their merits. Affirmed.

117. *Muscogee Creek Indian Freedmen Band, Inc v. Bernhardt*, __ F.Supp. 3d __, 2019 WL 1992787 (U.S. D.C.D.C. May 6, 2019). Persons whose lineal ancestors were Creek Nation Freedmen and citizens of Muscogee Creek Nation (MCN) brought action against MCN’s principal chief, Interior Secretary, and other federal officials seeking declaratory and injunctive relief to secure rights and privileges of MCN citizenship. Defendants moved to dismiss. The District Court, Colleen Kollar-Kotelly, J., held that: (1) plaintiffs were required to exhaust their tribal remedies before bringing action; (2) presence of federal defendants did not obviate plaintiffs’ obligation to first seek administrative and judicial remedies in tribal forums; and (3) plaintiffs failed to establish that it would be futile to require them to exhaust their tribal remedies. Motions granted in part and denied in part.

118. *State v. Thompson*, __ N.W.2d __, 2019 WL 2079426 (Minn. Ct. App. May 13, 2019). Defendant was convicted in the District Court, Beltrami County, John G. Melbye, J., of first-degree driving while impaired (DWI). Defendant appealed. The Court of Appeals, Johnson, J., held that: (1) the fact that tribal police officer who initially observed defendant’s impairment was not a peace officer for purposes of impaired driving laws was irrelevant to defendant’s conviction; (2) as a matter of first impression, a state law-enforcement agency is authorized to enforce impaired-driving laws on an Indian reservation to the extent that such an offense is committed by a non-Indian; and (3) tribal officer did not unlawfully detain or arrest defendant. Affirmed.

119. *Rincon Mushroom Corporation of America v. Mazzetti*, 2019 WL 2341376

(D.C.S.D. Cal. June 3, 2019). The matter before the Court is the Ex Parte Motion for an Emergency Order Staying Enforcement of the Rincon Tribal Court “Judgment” Pending Appeal in Tribal Court of Appeals filed by Plaintiff Rincon Mushroom Corporation of America. On October 20, 2009, Plaintiff Rincon Mushroom Corporation of America (RMCA) initiated this action by filing the Complaint. The action concerns tribal regulation of non-Indian fee simple land (the Property) located within the boundaries of the reservation of the Rincon Band of Luiseno Mission Indians (the Tribe). Defendants Bo Mazzetti, John Currier, Vernon Wright, Gilbert Parada, Stephanie Spencer, Charlies Kolb, and Dick Watenpaugh (the Rincon Band Defendants) are tribal officials sued in their individual and official capacities. The Complaint alleges the following ten causes of action: (1) intentional interference with contract; (2) intentional interference with advantageous economic relationship; (3) conspiracy to intentionally interfere with contract; (4) conspiracy to intentionally interfere with advantageous economic relationship; (5) conspiracy to deprive plaintiff of equal protection and equal privileges and immunities under 42 U.S.C. § 1985(3); (6) civil RICO; (7) civil RICO conspiracy; (8) negligent interference with contract; (9) negligent interference with advantageous economic relationship; and (10) violation of 42 U.S.C. § 1983. On September 21, 2010, the Court granted a motion to dismiss filed by the Rincon Band Defendants. Court dismissed the Complaint for failure to exhaust tribal court remedies. The Court of Appeals for the Ninth Circuit affirmed that Plaintiff RMCA must exhaust tribal remedies on the issue of tribal jurisdiction before bringing suit in federal court. The Court of Appeals stated, We emphasize that we are not now deciding whether the tribe actually has jurisdiction under the second Montana exception. We hold only that where, as here, the tribe’s assertion of jurisdiction is “colorable” or “plausible,” the tribal courts get the first chance to decide whether tribal jurisdiction is actually permitted. If the tribal courts sustain tribal jurisdiction and Rincon Mushroom is unhappy with that determination, it may then repair to federal court. However, the Court of Appeals held that this Court abused discretion by dismissing the case rather than staying it. The Court of Appeals reversed the dismissal and remanded with instructions to stay the case pending Plaintiff RMCA’s exhaustion of tribal remedies. In the years following the Order staying the case, the Court ordered and the parties filed three status reports as to the exhaustion of tribal remedies. On June 25, 2015, the Court issued an Order administratively closing the case “without prejudice to any party to move to reopen, and without prejudice to the resolution of any statute of limitations issue associated with the filing of this complaint.” On July 26, 2017, the Court denied Plaintiff RMCA’s motions to reopen the case. The Court stated, [T]he record reflects that RMCA has been afforded multiple opportunities to challenge tribal jurisdiction through motions for partial summary judgment and a trial on the issue of jurisdiction. Finally, RMCA will also have the opportunity to seek tribal court appellate review of the tribal court’s ruling on jurisdiction in the trial court. The Court concludes that RMCA has failed to establish that it lacks an adequate opportunity to challenge tribal court jurisdiction. The Court has reviewed the record, which establishes legal and factual disputes between the Rincon Band Defendants and Plaintiff RMCA but does not demonstrate that the assertion of tribal jurisdiction was motivated by a desire to harass or was conducted in bad faith. The Court concludes that the evidence in the record is insufficient to “prove[] the enforcement of the statutory scheme was the product of bad faith conduct or was perpetuated with a motive to harass.” *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986). For the reasons stated in the Court’s July 26, 2017 Order, the Court finds that no exception to the exhaustion requirement applies in this case based on express

jurisdictional prohibition, lack of opportunity to challenge jurisdiction, or a plain lack of jurisdiction.

120. *Coeur D'Alene Tribe v. Hawks*, __ F.3d __, 2019 WL 3756886 (9th Cir. Aug 09, 2019). The panel reversed the district court's order dismissing for lack of subject matter jurisdiction an action filed by an Indian tribe seeking to enforce a tribal court judgment against nonmembers. The panel held that inherent in the recognition of a tribal court's judgment against a nonmember is a question regarding the extent of the powers reserved to the tribe under federal law. Because the action presented a substantial issue of federal law, the district court had federal question jurisdiction under 28 U.S.C. § 1331. In 2016, the Tribe sued the Hawks in the Coeur d'Alene Tribal Court (the "Tribal Court") for encroachment on submerged lands without a permit in violation of tribal law. The Hawks were served with notice but did not answer the complaint or otherwise contest the allegations. The Tribal Court accordingly entered default judgment against the Hawks in the form of a \$3,900 civil penalty and a declaration that the Tribe was entitled to remove the encroachments. The Tribe subsequently sought federal recognition and enforcement of the Tribal Court's judgment by filing a complaint in the U.S. District Court for the District of Idaho. A tribe's authority does not spring from federal law but rather derives from the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted) (quoting Felix Cohen, *Handbook of Federal Indian Law* 122 (ed. 1945)). Tribal sovereignty nevertheless "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 323. Thus, because "federal law defines the outer boundaries of an Indian tribe's power over non-Indians," *Nat'l Farmers*, 471 U.S. at 851, the question of "whether a tribal court has adjudicative authority over nonmembers is a federal question," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

L. TAX

121. *Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046, 2018 WL 4811893 (W.D. Wash. Oct. 04, 2018). Indian tribe and municipality located on Indian reservation brought action against State of Washington, its governor, director of the Washington State Department of Revenue, county, county treasurer, and county assessor, seeking declaration and injunction prohibiting State and county from collecting retail sales and use tax, business and occupation tax, and personal property tax from non-Indian owned businesses located in the municipality, arguing that the collection of taxes imposed on tribal sovereignty and was preempted by operation of federal law. The District Court, Barbara Jacobs Rothstein, J., held that: (1) State and county's collection of taxes from non-Indian owned businesses in municipality located on Indian reservation was not preempted by operation of federal law, and (2) State and county's collection of taxes did not infringe on Indian tribe's tribal sovereignty. Ordered accordingly.

122. *Seminole Tribe of Florida v. Biegalski*, Fed.Appx., 2018 WL 6437564 (11th Cir. Dec. 07, 2018). Indian tribe brought action against executive director of state department of revenue for injunctive and declaratory relief regarding state's imposition of tax on electricity delivered to tribe's reservations. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:16-cv-62775-RNS, Robert N. Scola, Jr., 2017 WL 4570790, dismissed with prejudice based on claim preclusion and later, 2018 WL 1902838, denied tribe's

motion for consideration. Tribe appealed. The Court of Appeals held that action was barred, on claim preclusion grounds, by previous judgment that tax was not preempted by federal law. Affirmed.

123. *Everi Payments, Inc. v. Washington State Department of Revenue*, 6

Wash.App.2d 580, 432 P.3d 411 (Wash. Ct. App. Div.2 Dec. 11, 2018). Taxpayer brought action seeking business and occupational (B&O) tax refund. The Superior Court, James Dixon, J., 2017 WL 3317325, granted summary judgment in favor of the Department of Revenue, and taxpayer appealed. The Court of Appeals, Worswick, J., held that: (1) State was not categorically barred from levying a B&O tax on taxpayer; (2) Indian Gaming Regulatory Act (IGRA) did not expressly preempt B&O tax imposed on taxpayer; (3) cash access services provided by taxpayer at tribal casinos fell outside the realm of the IGRA, and were, therefore, capable of being subject to generally-applicable state tax laws, including a B&O tax; (4) Washington-Tribal Compacts did not operate to preempt B&O tax imposed on taxpayer; (5) Indian Trader Statutes did not apply, and thus, did not preempt imposition of a B&O tax on taxpayer; (6) B&O tax was not preempted by federal law; and (7) Department of Revenue rule governing taxation of non-enrolled persons doing business in Indian county did not apply to prevent the Department from assessing a B&O tax on taxpayer. Affirmed.

124. *Agua Caliente Band Of Cahuilla Indians v. Riverside County*, No. 17-56003, 749 Fed.Appx. 650 (9th Cir. Jan. 08, 2019). Plaintiff Agua Caliente Band of Cahuilla Indians appeals the summary judgment entered in favor of Defendant Riverside County and Intervenor-Defendant Desert Water Agency, upholding the right of the County to assess and collect a possessory interest tax (“PIT”) from non-Indian lessees of Indian trust lands on the Agua Caliente Reservation. In *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), we held that this very tax is permissible. Plaintiff argues that our cursory preemption analysis there is clearly irreconcilable with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and therefore not controlling. In *Bracker*, the Supreme Court recognized that “[m]ore difficult” preemption questions arise in cases like this, in which “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” 448 U.S. at 144. In such cases, *Bracker* instructs that a court’s inquiry should not be “dependent on mechanical or absolute conceptions of state or tribal sovereignty.” Instead, courts should engage in “a particularized inquiry into the nature of the state, federal, and tribal interests at stake.” In *Agua Caliente*, decided nine years before *Bracker*, we did not expressly engage in that particularized, interest-balancing inquiry. But we did consider the congressional purpose behind “the legislation dealing with Indians and Indian lands,” the PIT’s legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members. See *Agua Caliente*, 442 F.2d at 1186–87. A few years later, in *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), we again upheld the assessment and imposition of a PIT on non-Indian lessees of land held in trust by the federal government for an Indian tribe.¹ In *Fort Mojave*, we engaged in a more extensive analysis of the PIT’s effect on federal and tribal interests, foreshadowing the later requirements of *Bracker*. Indeed, in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2013), we observed that our PIT cases, including *Fort Mojave*, “applied a similar mode of analysis” to *Bracker*. We conclude that our PIT precedents are not clearly irreconcilable with *Bracker*. Additionally, relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. Plaintiff argues that 25 U.S.C. § 465 bars this

tax. Once again, we already addressed this issue: “In Agua Caliente, for example, we stressed that ‘[t]he California tax on possessory interests does not purport to tax the land as such,’ which would be barred by § 465, ‘but rather taxes the “full cash value” of the lessee’s interest in it,’ which is not covered by § 465.” Chehalis, 724 F.3d at 1158 n.7 (alteration in original) (quoting Agua Caliente, 442 F.2d at 1186). Affirmed.

125. *Blue Lake Rancheria Economic Development Corporation v. Commissioner of Internal Revenue*, 152 T.C. No. 5, 2019 WL 1077266 (U.S. Tax Ct. Mar. 06, 2019). Corporation of federally recognized Indian Tribe, and corporation's division, petitioned separately for review of IRS determinations to proceed with liens to collect unpaid employment taxes arising from division's business operations. Actions were consolidated. The Tax Court, Goeke, J., held that: (1) IRS notices of determination to sustain tax liens were sufficient to provide Tax Court with jurisdiction; (2) state law did not restrict Indian tribal corporation's power, pursuant to charter issued by Department of Interior (DOI) under Indian Reorganization Act (IRA), to create legally distinct corporate division whose federal employment tax liabilities were not collectible from corporation by IRS; (3) Indian tribal corporation's power to create legally distinct corporate division was within scope of Indian Reorganization Act (IRA); and (4) Indian tribal corporation's division acted as legally distinct entity, and thus IRS could not collect division's employment tax liabilities from corporation. Ordered accordingly.

126. *Big Sandy Rancheria Enterprises v. Xavier Becerra*, 2019 WL 3803627 (E.D. Cal. Aug 13, 2019). Plaintiff Big Sandy Rancheria Enterprises (“BSRE”) brings this action challenging the application of California’s cigarette tax and licensing statutes. BSRE is a tribal corporation incorporated under section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124 (“IRA”), which authorizes the Secretary of the Interior to issue a charter of incorporation to any Indian tribe upon petition by such tribe. Although only BSRE, and not the Tribe, is a plaintiff to the instant action, BSRE alleges that corporations created pursuant to section 17 of the IRA are “essentially alter egos of the tribal government.” Defendants do not dispute that Indian tribes are exempt from the Tax Injunction Act’s (“TIA”) prohibition, but do dispute that plaintiff BSRE is equivalent to an Indian tribe. Defendants argue that BSRE, as a corporation organized under section 17 of the IRA, is a distinct entity from the Big Sandy Rancheria Band of Western Mono Indians—regardless of how the latter is constitutionally organized—and that BSRE therefore cannot invoke the Tribe’s jurisdiction under 28 U.S.C. § 1362 or its exemption from the TIA. Here BSRE emphasizes that it “exclusively distributes tobacco products to Indian tribes and Indian tribal members on their land” and does not make any sales to non-members or the general public. Notably, tribe-to-tribe transactions involving the movement of goods through a State, including outside of Indian country, are not immune from state regulation. Indeed, many courts have affirmed states’ off-reservation authority to enforce state laws. See, e.g., *Colville*, 447 U.S. at 161–62 (authorizing off-reservation seizures, noting “[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries”); *Narrangansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 21 (1st Cir. 2006) (“It is beyond peradventure that a state may seize contraband located outside Indian lands but in transit to a tribal smoke shop.”). The court finds that plaintiff’s challenge to the State’s licensing requirements fails as a matter of law. For the reasons set forth above, (1) The Attorney General’s motion to dismiss and CDTFA’s motion to dismiss for lack of jurisdiction are granted; (2) Plaintiff’s fifth cause of action is

dismissed for lack of jurisdiction; (3) Plaintiff's remaining causes of action are dismissed with prejudice for failure to state a claim.

M. TRUST BREACH AND CLAIMS

127. *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed.Cl. 447, 2018 WL 5069161 (Fed. Cl. Oct. 17, 2018). Inter-tribal council representing Arizona Indian tribes sued United States, claiming breach of tribal trust obligations under Arizona-Florida Land Exchange Act (AFLEA) by failing to ensure sufficient security for full payments to be made by landowner for land exchange involving sale of land that was former site of Indian boarding school, by failing to collect and deposit or make up trust payments on which landowner defaulted, and by failing to prudently invest trust funds. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The Court of Federal Claims, Firestone, Senior Judge, held that: (1) claim based on insufficient initial security requirements was time barred; (2) government fulfilled its trust obligation to ensure adequate security; (3) government was not required to make up defaulted payments; (4) portion of prudent investment claim was time barred; and (5) timely portion of prudent investment claim was sufficiently alleged. Motion granted in part and denied in part.

128. *Oneida Indian Nation v. Phillips*, __ F.Supp.3d__, 2018 WL 6001002 (D. N.M. Nov. 15, 2018). Oneida Nation of American Indians brought action against trustee and trust, alleging that Oneida Nation had right to possess 19.6 acres of land as part of Oneida reservation under federal treaty, statutory and common law, and the federal constitution, and that trustee's conduct in executing and recording various documents in county land records was an unlawful attempt to obtain possession and control over that land, seeking declaratory judgment and permanent injunction. Trustee and trust counterclaimed that trust had right to possess land under federal and state treaty, statutory and common law, and the federal constitution, and that trustee's conduct was lawful action to maintain possession and control over land. Oneida Nation moved to dismiss counterclaim for failure to state a claim. The District Court, Glenn T. Suddaby, Chief District Judge, held that trust and trustee failed to plausibly allege a claim to the disputed land. Motion granted.

129. *Pueblo of Jemez v. United States*, __ F.Supp.3d__, 2018 WL 6002913 (D. N.M. Nov. 15, 2018). Pueblo of Jemez Indian Tribe brought action under federal common law and the Quiet Title Act (QTA), seeking a judgment that the Tribe had exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands. United States objected to admission of hearsay contained in testimony of Tribe member and the Tribe's memorandum of law. District Court, James O. Browning, J., held that: (1) American Indian oral tradition evidence was inadmissible hearsay; (2) oral tradition evidence was admissible under enumerated exceptions to rule against hearsay; and (3) oral tradition evidence was inadmissible under residual hearsay exception. Requests granted in part and denied in part.

130. *Pueblo of Jemez v. United States*, No. CIV 12-0800 JB\JHR, 2019 WL 1139724 (D.C. D. New Mexico Mar. 12, 2019). This matter comes before the Court on: (i) the United

States' Motion on the Pleadings and for Summary Judgment, filed August 17, 2018; and (ii) the United States' Motion On the Pleadings and For Summary Judgment, filed August 17, 2018 (collectively the "Motion"). The primary issues are: (i) whether Plaintiff Pueblo of Jemez' admissions that other Tribes used the Valles Caldera National Preserve lands defeat its claim that it was the exclusive aboriginal user of the lands; (ii) whether admissions that the third-party owners interfered with Jemez Pueblo's Valles Caldera use means that Jemez Pueblo did not maintain any aboriginal title through continuous use; (iii) whether any statutes of limitations accrued and expired in the decades preceding the United States purchase of the Valles Caldera; (iv) whether rule 19 of the Federal Rules of Civil Procedure bars Jemez Pueblo's claim, because the Pueblo of Santa Clara is a necessary and indispensable party; (v) whether the laches doctrine bars Jemez Pueblo's claim, because Jemez Pueblo supported the United States' acquisition of the Valles Caldera rather than asserting its aboriginal title claim. First, the Court concludes that whether other Tribes used the Valles Caldera does not per se defeat Jemez Pueblo's claim to aboriginal title over that land. The Court concludes further that genuine issues of material fact remain regarding the extent of other Tribes' Valles Caldera use. The United States asserts that "[i]t cannot reasonably be disputed that other tribes used the Preserve lands in a manner that defeats Plaintiff's aboriginal title claim." Although the United States Court of Appeals for the Tenth Circuit in this case stated that, "to establish aboriginal title, a Tribe "must show that it used and occupied the land to the *exclusion of other Indian groups*," Pueblo of Jemez v. United States, 790 F.3d 1143, 1165-66 (10th Cir. 2015) (emphasis in original) (internal quotation marks omitted), the exclusive-use-and-occupancy rule is subject to exceptions for joint and amicable use, dominant use, and permissive use, see Alabama-Coushatta Tribe of Tex. v. United States, No. 3-83, 2000 WL 1013532, at *12 (Fed. Cl. June 19, 2000). Hence, evidence of other Pueblos' Valles Caldera use will not necessarily defeat Jemez Pueblo's aboriginal title claim. Jemez Pueblo asserts that its "use of the Valles Caldera was dominant." Plaintiff Pueblo of Jemez's Response in Opposition to Defendant United States' Motion on the Pleadings and for Summary Judgment at 19, filed August 31, 2018 ("Response"). The dominant use exception to the exclusive use rule recognizes that, where another Tribe commonly uses the land with the claimant Tribe, proof of the claimant Tribe's dominance over the other Tribe preserves its exclusive use of the land. See United States v. Seminole Indians of Fla., 180 Ct. Cl. 375, 383-86 (1967). Moreover, the claimant Tribe's dominance illustrates its ability to exclude other Tribes from the area, even if it never chooses to exercise that ability. Second, the Court concludes that Jemez Pueblo's admission that third-party owners interfered with its Valles Caldera use does not defeat Jemez Pueblo's aboriginal title claim. The United States asserts that the "[t]he Tenth Circuit remanded this case so that the parties could submit evidence about whether 'the Baca grant or use of the land by the Baca heirs or their successors' 'actually interfered with the Jemez Pueblo's traditional occupancy and uses of the land in question here before or after 1946,''" (quoting Pueblo of Jemez v. United States, 790 F.3d at 1168), and contends that "[t]he Bond and Dunigan families exercised their ownership in a manner that defeats Jemez's claims that it maintained any title to the Preserve," Indeed, the Tenth Circuit has directed the Court to determine whether there was "actually substantial interference by others" with Jemez Pueblo's traditional uses of the Valles Caldera, Pueblo of Jemez v. United States, 790 F.3d at 1166, and mentions that substantial interference could result from "white settlement and use, authorized by the federal government both statutorily and in fact," 790 F.3d at 1166 (citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1393 (Ct. Cl. 1975)). The Court, however, in accord with controlling Supreme Court of the United States of America precedent, interprets this

statement to indicate that aboriginal title extinguishment could result only from Congressionally authorized interference with Jemez Pueblo's traditional Valles Caldera use. See, e.g., United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme."); Cty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985)

("[C]ongressional intent to extinguish Indian title must be 'plain and unambiguous,' and will not be 'lightly implied.' " (quoting United States v. Santa Fe Pac. R.R. Co., 314 U.S. at 346, 354)). Hence, based on the Tenth Circuit's mandate to consider evidence of "substantial interference by others," Pueblo of Jemez v. United States, 790 F.3d at 1166, the Court has identified five factors, none of which by itself is dispositive, that could support a finding that non-Indians substantially interfered with aboriginal title over time so as to effectuate a gradual taking absent express Congressional intent: (i) the creation of an Indian reservation; (ii) Congressionally authorized non-Indian settlement of historic Tribal lands; (iii) a Congressionally ratified Executive Order increasing the size of reservation lands set aside for exclusive Indian use; (iv) a cabinet-level order, pursuant to a Congressional act, imposing restrictions on Indian use of their historic lands; and (v) Congressional or executive action designating Tribal land for conservation, recreation, or commercial use, such as a forest reserve, grazing district, or the like.Third, the Court concludes that the statutes of limitations to which the United States directs the Court do not bar Jemez Pueblo's aboriginal title claim. The United States contends that Jemez Pueblo's claim is time-barred if the United States permitted "interference with its aboriginal title," Motion at 27 (quoting Pueblo of Jemez v. United States, 790 F.3d at 1147), then asserts that "the facts make clear that Baca heirs' successors precluded traditional Indian use in a manner that caused Plaintiff's claims to accrue both before and after 1946," Motion at 27. In addressing the United States' argument that the Baca heirs' use of the Valles Caldera is a cloud on title sufficient to trigger accrual against the United States in 1860, the Tenth Circuit counters that "simultaneous occupancy and use of land pursuant to fee title, and aboriginal title, can occur, because the nature of Indian occupancy differs significantly from non-Indian settlers' occupancy." Pueblo of Jemez v. United States, 790 F.3d at 1165. The Tenth Circuit highlights such disparate use when it states that "it is ... easy to see how a peaceful and private Indian pueblo might have used portions of this large area of land for its traditional purposes while one agreeable rancher was using portions of it for grazing livestock." Pueblo of Jemez v. United States, 790 F.3d at 1165. Jemez Pueblo argues that Jemez people "alive during both periods of Bond and Dunigan ownership" continued to access the Valles Caldera for traditional purposes, to include hunting game, taking eagles, and conducting religious pilgrimages to Redondo Peak, see Response at 22-23, and that "its claim accrued only when the United States acquired an interest in the Valles Caldera in 2000 and began limiting the Jemez Pueblo's access to the land in a manner inconsistent with its aboriginal title," Response at 27 (quoting Pueblo of Jemez v. United States, 790 F.3d at 1152). Based on the nature of aboriginal occupancy, the Court is not convinced that, as a matter of law, a taking occurred between 1860 and 2000, and, therefore, will not bar Jemez Pueblo's claim based on the United States' theory that the statute of limitations accrued. Defendants' motions are denied.

131. *Goss v. Bonner*, 2019 WL 2137266 (D. Az. May 16, 2019). Plaintiff Keith Goss is a podiatrist who previously worked for Tuba City Regional Health Care Corporation ("TCRHCC"), which is owned by the Navajo Nation and is operated under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. 93-638, 88 Stat. 2203. Plaintiff filed this action in Coconino County Superior Court. The FAC brings individual counts

of defamation against the Individual Defendants. Plaintiff alleges that beginning around March 1, 2017 and continuing throughout June, he became aware of statements made by each of the Individual Defendants to people outside of official workplace proceedings. He alleges that the statements were published to people and impeached his honesty, integrity, or reputation. He also alleges that the Individual Defendants knew that the statements were false. In the alternative, Plaintiff brings a Bivens claim for violation of right to privacy. On October 19, 2018, the United States concurrently removed this action from the Superior Court to this Court and filed a “Notice of Substitution,” substituting the United States for the Individual Defendants in each of the seven defamation claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the “Westfall Act,” 28 U.S.C. § 2679. (the “Scope Certification”). The Director of the Torts Branch, Civil Division, United States Department of Justice, acting on behalf of the Attorney General, certified that the Individual Defendants “were covered persons acting within the scope of their deemed federal employment as employees of the Indian Health Service in carrying out functions authorized under the Self-Governance Compact with TCRHCC at the time of the incidents giving rise to suit.” The United States then brought a motion to dismiss the Defamation Counts pursuant to Rule 12(b)(1). When a federal employee is sued for a wrongful or negligent act, the Westfall Act “authorizes the Attorney General to certify that a United States employee was acting within the scope of his employment at the time of an incident which gives rise to a civil claim.” Meridian, 939 F.2d at 743 (citing 28 U.S.C. § 2679(d)(1)-(2)). The action then proceeds under the Federal Tort Claims Act (“FTCA”). Gutierrez, 515 U.S. at 420. However, “[b]ecause the government has not waived its sovereign immunity under the ... FTCA ... for claims arising out of libel or slander,” the Court lacks subject matter jurisdiction over a defamation claim against the United States, and such claim must be dismissed. See Dora v. Achey, 300 F. App'x 550, 551 (9th Cir. 2008). “[T]he Attorney General's certification is ‘the first, but not the final word’ on whether the federal officer is immune from suit and correlatively, whether the United States is properly substituted as defendant.” Osborn v. Haley, 549 U.S. 225, 246 (2007) (quoting Lamagno, 515 U.S. at 432). The party challenging the certification “bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence.” Jackson v. Tate, 648 F.3d 729, 732 (9th Cir. 2011). The question of whether a federal employee is acting within the course and scope of his employment is determined by applying respondeat superior principles of the state in which the alleged tort occurred. Green v. Hall, 8 F.3d 695, 698–99 (9th Cir. 1993). In cases where the United States is substituted for an employee that is also a tribal employee, “[t]he tribal employee must also be deemed to have acted as a federal employee in carrying out the allegedly tortious activity.” Wilson v. Horton's Towing, 906 F.3d 773, 781 (9th Cir. 2018), cert. denied, (2019 WL 825553, Apr. 22, 2019). The Ninth Circuit recently articulated that the test found in Shirk v. U.S. ex rel. Dep't of Interior, 773 F.3d 999 (9th Cir. 2014), also applied to challenges to Attorney General Certifications. Wilson, 906 F.3d at 781. The Wilson court found that the test had two parts. First, the district court looks at whether the language of the federal contract encompassed “the activity that the plaintiff ascribes to the employee.” Id. (quoting Shirk, 773 F.3d at 1007). Second, the court looks at whether the employee's activity fell within the scope of employment as defined by state law. Id. In Arizona, “[t]he conduct of a servant is within the scope of employment if it is of the kind the employee is employed to perform, it occurs substantially within the authorized time and space limit, and it is actuated at least in part by a purpose to serve the master.” Smith v. Am. Express Travel Related Servs. Co., Inc., 876 P.2d 1166, 1170 (Ariz. Ct. App. 1994). As to the first prong of the Shirk test—whether the language of the federal

contract encompassed the activity that the plaintiff ascribes to the employee—Plaintiff only raises this issue in his Response to the Motion to Dismiss. Plaintiff’s argument is somewhat circular, alleging that the statements were not made in the scope of employment, and thus cannot be “carrying out the contract or agreement.” In the FAC, Plaintiff alleges that the Individual Defendants acted outside the scope of their employment, but does not specifically state how the allegations were not related to functions of the hospital. It is the Plaintiff’s burden to provide evidence that disproves the Scope Certification, and Plaintiff has not shown that the Individual Defendants were not acting pursuant to the Self-Governance Compact. As to the second prong of the Shirk test—whether the employee’s activity fell within the scope of employment—Plaintiff argues that the Individual Defendants were not acting in the scope of their employment. Plaintiff argues that “there was no legitimate work activity when the Defendants off the work site and in social settings made statements about Plaintiff being dangerous and taking kick-backs.” Taken as true, Plaintiff’s allegations do not establish that the defendant’s actions exceeded the scope of his employment. Now that the Court has determined that the United States is the proper defendant for the Defamation Counts, the Court now considers the United States’ motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The United States argues that dismissal is warranted because the action is covered under the FTCA, and the government has not waived its sovereign immunity in defamation claims. The United States also argues that dismissal is warranted due to Plaintiff’s failure to exhaust administrative remedies. Here, Plaintiff does not dispute that the Defamation Claims cannot go forward under the FTCA. Rather Plaintiff argues that there are questions as to whether the Individual Defendants are considered federal actors and whether they were acting within the scope of employment. For the reasons stated above, the Court finds that the United States is the proper Defendant. Accordingly, the Defamation Counts must be dismissed, and the Court need not address the United States’ additional arguments.

132. *Western Shoshone Identifiable Group by Yomba Shoshone Tribe v. United States*, 2019 WL 2480154 (Fed. Cl. June 13, 2019). Yomba Shoshone Tribe, Timbisha Shoshone Tribe, Duckwater Shoshone Tribe, and individual enrolled tribal members sued United States, asserting breach of trust claim due to federal government, as trustee, allegedly breaching its fiduciary duty by mismanaging three tribal trust funds due to imprudent investing in securities that were too short-term, resulting in less than maximum returns over 33-year period, for which tribes sought to recover \$216,386,589.83 in damages. Bench trial was held. The Court of Federal Claims, Marian Blank Horn, J., held that: (1) tribes had standing to pursue breach of trust claim for all three funds; (2) government had fiduciary duty to invest tribal trust funds; (3) Department of Interior’s (DOI) investment policies did not warrant deference; (4) largest fund was prudently invested for several time periods; (5) largest fund was imprudently invested for other time periods; (6) smaller two funds were imprudently invested except during final year. Ordered accordingly.

133. *Moody v. United States*, __ F.3d __, 2019 WL 3309394 (Fed. Cir. July 24, 2019). Lessees, who had entered into five agricultural leases with Indian tribe, brought action against United States, alleging that government breached leases by terminating them and ordering lessees to vacate land, and that government’s actions constituted taking without just compensation under Fifth Amendment. The United States Court of Federal Claims, No. 1:16-cv-00107-EJD, Edward J. Damich, Senior Judge, 135 Fed.Cl. 39, dismissed complaint, and lessees appealed. The Court of Appeals, Dyk, Circuit Judge, held that: (1) United States was not party to

leases; (2) United States' alleged revival of leases did not subject it to liability for breach of implied-in-fact contracts; and (3) Bureau of Indian Affairs' (BIA) alleged violation of regulations in canceling leases did not give rise to takings claim. Affirmed.

134. *Bell v. City of Lacey*, 2019 WL 3412713 (W.D. Wash. July 29, 2019). On June 24, 2019, the Court issued an order dismissing the Nisqually Tribe from the case and dismissing all claims for damages against Nisqually CEO John Simmons and CFO Eletta Tiam. However, the Court declined to dismiss the declaratory and injunctive relief claim against Simmons and Tiam pending additional briefing on whether that claim may proceed under the doctrine of *Ex parte Young*. After reviewing the submissions from both parties, the Court hereby grants the Tribe Defendants' Motion for Judgment on the Pleadings in full and dismisses all claims against Defendants Simmons and Tiam. Although a state official acting within the scope of their valid authority normally enjoys sovereign immunity, if the official is enforcing a law that conflicts with federal authority they are "stripped of [their] official or representative character." *Ex parte Young*, 209 U.S. 123, 159–60 (1908). A court may therefore issue declaratory judgment and enjoin official conduct in conflict with the Constitution or congressional statutes. *Id.* at 155–56; *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir.) (explaining that *Ex parte Young* extends to claims for declaratory relief). This doctrine applies equally to tribal officials. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). The Tribe Defendants argue that *Ex parte Young* does not support Bell's claim for injunctive and declaratory relief against Simmons and Tiam for several reasons. First, they argue that Simmons and Tiam are not proper defendants for an *Ex parte Young* action because they lack the requisite connection to enforcement. Second, they assert that Bell's requested relief would require affirmative acts by the Tribe itself, rather than just tribal officials. Third, they contend that Bell lacks standing and his claim for declaratory and injunctive relief is not ripe. The Court agrees. If a plaintiff wants to enjoin unlawful government action, *Ex parte Young* does not permit them to sue just *any* official. *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001). Rather, the defendant "must have some connection with the enforcement of the act" to avoid making that official a mere representative of the state." *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (quoting *Ex parte Young*, 209 U.S. at 157). "This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). The Court cannot conclude that Simmons and Tiam are proper defendants in an *Ex parte Young* action. Attempts to assert a claim under *Ex parte Young* may amount to an "end run around tribal sovereign immunity" if the tribe itself "is the real, substantial party in interest." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002); *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (quoting *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)). This may be the case "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Shermoen*, 982 F.2d at 1320 (quoting *State of Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969)). Courts have also addressed this issue by asking whether the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dawavendewa*, 276 F.3d at 1160 (quoting *Shermoen*, 982 F.2d at 1320). The Tribe

Defendants' Motion for Judgment on the Pleadings is granted in full. Defendants Simmons and Tiam are dismissed from the case.

135. *Little Traverse Bay Band of Odawa Indians v. Whitmer*, __ F.Supp.3d __, 2019 WL 3854299 (W.D. Mich. Aug 15, 2019). Plaintiff, the Little Traverse Bay Band of Odawa Indians (the “Tribe”) claims that in 1855, the United States entered a treaty with its predecessors and created an Indian reservation spanning more than 300 square miles in the Northwest portion of Michigan's Lower Peninsula. The Tribe seeks a declaratory judgment from the Court that the claimed reservation has continued to exist to this day and has not been diminished or disestablished by any government action. The matter is before the Court on the Defendant's and Intervenor-Defendants' motions for summary judgment. Collectively, the Defendants assert that summary judgment is warranted on the Plaintiff's claim for a declaratory judgment and injunctive relief because no Indian reservation was ever created, or in the alternative, any reservation created was subsequently diminished. Whether a reservation was created depends upon the construction of an 1855 treaty between the United States and the Tribe's political predecessors. But treaties between Indian tribes and the United States are not interpreted like other international compacts, other laws, or even other contracts. Instead, when construing an Indian treaty, the Court must “look beyond the written words to the larger context that frames the Treaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943)). Once versed in the relevant history, “[c]ourts cannot ignore plain language that, viewed in historical context and given a ‘fair appraisal,’ runs counter to a tribe's later claims.” *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). Ultimately the Court concludes that, after a review of the entirety of the historical record, summary judgment is warranted on the Tribe's claims because the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians. The 1855 Treaty simply cannot bear the construction that the Tribe would place on it, especially considering the historical context. The Tribe's predecessor bands bargained for—and received—permanent homes in Michigan in the form of individual allotments. They did not bargain for an Indian reservation, and no such reservation was created by the unambiguous treaty terms because the terms do not establish a federal set aside of land for Indian purposes or indefinite federal superintendence over the land. See *Citizen Band*, 498 U.S. at 511, 111 S.Ct. 905. The Tribe asserts that their predecessors understood that a treaty requiring the United States to withdraw land from sale for their benefit created an Indian reservation. But when the Treaty is placed in the relevant historical context, it cannot plausibly be read to have created an Indian reservation, and the Tribe's predecessors did not believe that it did so. Accordingly, summary judgment is warranted on the Tribe's claims. The Defendants' motions for summary judgment are granted.

N. MISCELLANEOUS

136. *Little Traverse Bay Bands of Odawa Indians v. Whitmer*, __ F.Supp.3d __, 2019 WL 687882 (W.D. Mich. Jan. 31, 2019). American Indian tribe brought action against Michigan

state and municipal officials for failure to recognize reservation land. Government moved for judgment on the pleadings. The District Court, Paul L. Maloney, J., held that: (1) tribe was not judicially estopped from claiming interest in reservation land; (2) prior proceeding before Indian Claims Commission did not collaterally estop tribe from claiming interest in reservation land; and (3) tribe's claims were not barred by Indian Claims Commission Act. Motion denied.

137. *Navajo Nation v. San Juan County*, __ F.3d __, 2019 WL 3121838 (10th Cir. July 16, 2019). Indian tribe and tribal members brought action alleging that county commission and school board districts within county violated Equal Protection Clause. The United States District Court for the District of Utah, No. 2:12-CV-00039-RJS, Robert J. Shelby, J., denied county's motion to dismiss, 2015 WL 1137587, entered summary judgment in tribe's favor, 150 F.Supp.3d 1253, 162 F.Supp.3d 1162, rejected county's proposed remedial plan, 266 F.Supp.3d 1341, and adopted special master's remedial election districts, 2017 WL 6547635. County appealed. The Court of Appeals, Moritz, Circuit Judge, held that: (1) tribe was not prohibited by consent decree and settlement order in Voting Rights Act (VRA) litigation from bringing lawsuit; (2) United States' approval of original district boundaries pursuant to consent decree did not deprive district court of jurisdiction over tribe's action; (3) county commission districts were unconstitutionally based on race; (4) deviation of 38% in populations between school board districts violated Equal Protection Clause's one-person, one-vote principle; (5) district court did not clearly err in concluding that racial considerations predominated in creating county's proposed remedial redistricting plans; (6) county's drawing of race-based boundaries for districts was not narrowly tailored to its compelling interest in complying with VRA; (7) district court did not clearly err in concluding that race was not predominate factor in its expert's redistricting plans; and (8) district court did not abuse its discretion when it prioritized compliance with one-person, one-vote principle over county's administrative burden. Affirmed.

138. *Brakebill v. Jaeger*, __ F.3d __, 2019 WL 3432470 (8th Cir. July 31, 2019). This appeal arises from a challenge by six Native American plaintiffs to portions of North Dakota's elections statutes. North Dakota requires a voter to present a specific form of identification at the polls before receiving a ballot. That identification must provide, among other things, the voter's current residential street address. Six plaintiffs sued the North Dakota Secretary of State, alleging that the provisions place an unconstitutional burden on the right to vote of many Native Americans. The district court agreed and enjoined the Secretary from enforcing certain statutory requirements statewide. The Secretary appealed. We conclude that the alleged burdens do not justify a statewide injunction, and vacate the district court's order. We conclude first that the plaintiffs' facial challenge to the residential street address requirement likely fails, and that the statewide injunction as to that provision cannot be justified as a form of as-applied relief. The district court thought the residential street address requirement posed an impermissible legal obstacle because Native American communities often lack residential street addresses. The Secretary disputes whether street addresses are truly lacking in these communities, and complains the district court mistakenly relied on outdated evidence about two counties that had not finished assigning addresses as of 2011. But even assuming that a plaintiff can show that an election statute imposes "excessively burdensome requirements" on some voters that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to all voters. Here, the plaintiffs have not presented evidence that the residential street address requirement imposes a substantial burden on most North Dakota voters. Even assuming that some communities do not have residential street addresses, that fact does not justify a statewide

injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have them. We also conclude that the statute's requirement to present an enumerated form of identification does not impose a burden on voters that justifies a statewide injunction to accept additional forms of identification. The district court found that 4,998 otherwise eligible Native Americans and 64,618 non-Native voters lacked a qualifying identification. The court also found that 65.6% of the Native American group were missing at least one of the underlying documents needed to obtain a valid identification from the State. These data, however, leave 513,742 of 583,358 eligible voters in the State, or 88 percent, as to whom the plaintiffs have not shown a lack of qualifying identification. In short, the evidence is insufficient to show that the valid form of identification requirement places a substantial burden on most North Dakota voters. The district court's order of April 3, 2018, granting a preliminary injunction is vacated, and the case is remanded for further proceedings.

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<i>In re Greektown Holdings, LLC</i> , 917 F.3d 451, 2019 WL 92265866 (6th Cir. Feb. 26, 2019)	57
<i>In re K.L.</i> , 27 Cal.App.5th 332, 237 Cal.Rptr.3d 915 (Cal. Ct. App. Sept. 18, 2018)	11
<i>In re L.D.</i> , 32 Cal.App.5 th 579, 243 Cal.Rptr.3d 894 (Cal. Ct. App. 6 th Dis. Jan. 24, 2019).....	12
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<i>Romero v. Wounded Knee, LLC</i> , 2018 WL 4279446 (D. S.D. Aug. 31, 2018)	51
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<i>United States v. Turtle</i> , 2019 WL 423346 (D.C. M.D. Florida, Div. Fort Myers, Feb. 04, 2019).	27
<i>United States v. Uintah Valley Shoshone Tribe</i> , 2018 WL 4222398 (D. Utah Sept. 05, 2018).	25
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<i>Williams v. Big Picture Loans, LLC</i> , __ F.3d. __, 2019 WL 2864341 (4 th Cir. July 3, 2019)....	60
<i>Wilson v. Horton's Towing</i> , 906 F.3d 773, 2018 WL 4868025 (9 th Cir. Oct. 09, 2018).....	52
<i>Wolf v. Alutiiq Education and Training, LLC</i> , 2019 WL 1966642 (M.D. Alabama, May 02, 2019).....	45
<i>World Fuel Services, Inc. v. Nambe Pueblo Development Corporation</i> , __ F.Supp.3d __, 2019 WL 293231 (D.C. N.M. Jan. 23, 2019)	63
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Judicial Update

Tom Schlosser

September 5, 2019

Learning Goals

- Case summaries: chronologically arranged within overlapping topics
- Target top cases for tribal counsel
- Practical points, tactics
- Ask questions throughout

Economical Research

- [Google] site:narf.org [search terms]
- turtletalk.wordpress.com
- forums.delphiforums.com/IndianLaw/
- scholar.google.com
- www.wsba.org Casemaker
www.uscourts.gov/
- www.findlaw.com/casecode/index.html
- Indian Law Reporter
- guides.lib.uw.edu/law/indian-tribal

1. *Wash. v. Cougar Den*, (U.S. 2019)

- Tax on fuel imported to Indian country by ground transportation
- Tax incidence is on Yakama member business
- Yakama treaty right “to travel upon all public highways” preempts
- Indians’ understanding was that right protected goods used for trade

28. *Brackeen v. Bernhardt*, (5th Cir. 2019)

- ICWA is constitutional (reversing #20)
- “Indian child” definition isn’t race-based
- Application of federal standards preempts and isn’t commandeering under 10th Amend.
- Congress can delegate power to tribes

31. Cook Inlet Tribal Council v. Mandregan, (D.D.C. 2018)

- IHS '638 contractor seeks facility support funds
- IHS declined, saying Secretarial amount exclusively covered this
- Sec. 5325(a)(1), (2) and (3)
- Facility costs are eligible as contract support costs

40. *Dine Citizens v. BIA*, (9th Cir. 2019)

- Environmental groups assert ESA, NEPA violations
- Navajo Nation owns mine and leases
- Navajo entity is necessary party with immunity
- USA isn't an adequate representative

48. *Agua Caliente Band v. Coachella Valley W.D.*, (C.D. Cal. 2019)

- 9th Cir. ruled in 2017 that *Winters* rights include groundwater
- Case trifurcated; proceedings re scope of water reserved
- Non use doesn't forfeit right but affects standing
- Overdraft doesn't show injury
- Quantification and quality claims dismissed!

66. *Chippewa Cree v. Interior*, (9th Cir. 2018)

- Whistleblower awarded \$650k back pay
- \$27 million ARRA funds in SG compact incl. whistleblower protections
- ARRA refers to tribes and tribe accepted funds with conditions
- Tribe's justifications for removal were pretextual

94. *Wilson v. Horton's Towing*, (9th Cir. 2018)

- Drunk visitor arrested at Lummi with marijuana
- Tribal court forfeited truck
- Tribal jurisdiction is colorable so must exhaust tribal court remedies against Horton's
- Substitution of U.S. as defendant pursuant to FTCA, Westfall Act, 28 U.S.C. 2679(d).
- Tribal employee within scope and carrying out contract?

101. *Stillaguamish Tribe v. WA*, (9th Cir. 2019)

- Oso landslide blamed on Tribe's revetment contract work
- Are indemnification and waiver provisions enforceable?
- No unequivocal waiver of immunity
- No 1331 jurisdiction: immunity is a defense

107 and 134. *Bell v. City of Lacey, (W.D. WA. 2019)*

- Prisoner at Nisqually jail under city contract asserts inadequate medical treatment
- Tribe has immunity and didn't waive
- Individual defendants aren't subject to suit under *Ex parte Young*
- Little connection to enforcement

110. *Knighton v. Cedarville Rancheria*, (9th Cir. 2019)

- Former employee challenges tribe's suit for fraud
- Actions were on or regarding tribal lands
- *Montana I, II* and power to exclude are separate sovereign powers
- Rehearing and superseding opinion



LEGISLATIVE UPDATE

SEPTEMBER 5TH & 6TH 2019
UNIVERSITY OF WASHINGTON
32ND ANNUAL INDIAN LAW SYMPOSIUM
SEPTEMBER 5TH & 6TH 2019
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW

Eric D. Eberhard
Affiliate Assistant Professor

Overview of the 116th Congress

- 178 bills were introduced with provisions relating to American Indians and Alaska Natives
- House Committees – Appropriations, Budget, Natural Resources, Financial Services, Energy & Commerce, Agriculture, Oversight & Reform, Education & Labor, Ways & Means
- Senate Committees – Appropriations; Budget; Indian Affairs; Finance; Health, Education, Labor & Pensions; Environment & Public Works; Energy & Natural Resources; Commerce, Science & Transportation; Banking, Housing & Urban Affairs
- The House sent nine bills to the Senate.
- The Senate sent eleven bills to the House.
- One bill was signed into law. (Pub. L. No. 116-14, April 16, 2019, Colorado River Drought Contingency Plan Authorization Act)

House Bills Sent to the Senate

- [H.R.91](#) — 116th Congress (2019-2020) Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act Sponsor: [Rep. Blumenauer, Earl \[D-OR-3\]](#) (Introduced 01/03/2019) Cosponsors: (1) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))
- [H.R.266](#) — 116th Congress (2019-2020) Department of the Interior, Environment, and Related Agencies Appropriations Act, 2019 Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 01/08/2019) Cosponsors: (0) Committees: House - Appropriations **Latest Action:** Senate - 01/15/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 12. ([All Actions](#))

House Bills Sent to the Senate

- [H.R.312](#) – 116th Congress (2019-2020) Mashpee Wampanoag Tribe Reservation Reaffirmation Act **Sponsor:** [Rep. Keating, William R. \[D-MA-9\]](#) (Introduced 01/08/2019) **Cosponsors:** (35) **Committees:** House - Natural Resources **Committee Reports:** [H. Rept. 116-54](#) **Latest Action:** Senate - 05/20/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 92. ([All Actions](#))
- [H.R.317](#) – 116th Congress (2019-2020) Santa Ynez Band of Chumash Indians Land Affirmation Act of 2019 **Sponsor:** [Rep. LaMalfa, Doug \[R-CA-1\]](#) (Introduced 01/08/2019) **Cosponsors:** (1) **Committees:** House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

House Bills Sent to the Senate

- [H.R.375](#) — 116th Congress (2019-2020) To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes. Sponsor: [Rep. Cole, Tom \[R-OK-4\]](#) (Introduced 01/09/2019) Cosponsors: (28) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 05/16/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))
- [H.R.1388](#) — 116th Congress (2019-2020) Lytton Rancheria Homelands Act of 2019 Sponsor: [Rep. Huffman, Jared \[D-CA-2\]](#) (Introduced 02/27/2019) Cosponsors: (0) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

House Bills Sent to the Senate

- [H.R.1585](#) — 116th Congress (2019-2020) **Violence Against Women Reauthorization Act of 2019** **Sponsor:** [Rep. Bass, Karen \[D-CA-37\]](#) (Introduced 03/07/2019) **Cosponsors:** ([167](#)) **Committees:** House - Judiciary, Energy and Commerce, Financial Services, Ways and Means, Education and Labor, Natural Resources, Veterans' Affairs **Committee Reports:** [H. Rept. 116-21](#) **Latest Action:** Senate - 04/10/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 66. ([All Actions](#))
- [H.R.2030](#) — 116th Congress (2019-2020) **Colorado River Drought Contingency Plan Authorization Act** **Sponsor:** [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 04/02/2019) **Cosponsors:** ([36](#)) **Committees:** House - Natural Resources **Latest Action:** 04/16/2019 Became Public Law No: 116-14. ([All Actions](#))

House Bills Sent to the Senate

- [H.R.2030](#) — 116th Congress (2019-2020) **Colorado River Drought Contingency Plan Authorization Act** **Sponsor:** [Rep. Grijalva, Raul M.](#) [\[D-AZ-3\]](#) (Introduced 04/02/2019) **Cosponsors:** [\(36\)](#) **Committees:** House - Natural Resources **Latest Action:** 04/16/2019 Became Public Law No: 116-14. ([All Actions](#))

Senate Bills Sent to the House

- **S.46** – 116th Congress (2019-2020) Klamath Tribe Judgment Fund Repeal Act Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-6 Latest](#) **Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))
- **S.50** – 116th Congress (2019-2020) **Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act** Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) Cosponsors: (3) Committees: Senate - Indian Affairs Committee Reports: [S. Rept. 116-7 Latest](#) **Action:** House - 06/28/2019 Held at the desk. ([All Actions](#))

Senate Bills Sent to the House

- [S.199](#) — 116th Congress (2019-2020) **Leech Lake Band of Ojibwe Reservation Restoration Act** **Sponsor:** [Sen. Smith, Tina \[D-MN\]](#) (Introduced 01/24/2019) **Cosponsors:** (1) **Committees:** Senate - Indian Affairs | House - Natural Resources **Committee Reports:** [S. Rept. 116-3](#) **Latest Action:** House - 07/03/2019 Referred to the Subcommittee on National Parks, Forests, and Public Lands. ([All Actions](#))
- [S.209](#) — 116th Congress (2019-2020) PROGRESS for Indian Tribes Act **Sponsor:** [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) **Cosponsors:** (5) **Committees:** Senate - Indian Affairs | House - Natural Resources **Committee Reports:** [S. Rept. 116-34](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

Senate Bills Sent to the House

- [S.212](#) – 116th Congress (2019-2020) Indian Community Economic Enhancement Act of 2019 Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources, Education and Labor Committee Reports: [S. Rept. 116-28](#) **Latest Action:** House - 06/28/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))
- [S.216](#) – 116th Congress (2019-2020) Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act Sponsor: [Sen. Cantwell, Maria \[D-WA\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-4](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

Senate Bills Sent to the House

- [S.224](#) – 116th Congress (2019-2020) A bill to provide for the conveyance of certain property to the Tanana Tribal Council located in Tanana, Alaska, and to the Bristol Bay Area Health Corporation located in Dillingham, Alaska, and for other purposes. Sponsor:[Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 01/24/2019) Cosponsors: ([1](#)) Committees: Senate - Indian Affairs | House - Natural Resources, Energy and Commerce Committee Reports: [S. Rept. 116-10 Latest](#) **Action:** House - 06/28/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

Senate Bills Sent to the House

- [S.256](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate - Indian Affairs | House - Education and Labor Committee Reports: [S. Rept. 116-11](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))
- [S.257](#) — 116th Congress (2019-2020) Tribal HUD-VASH Act of 2019 Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate – Indian Affairs | House - Financial Services Committee Reports: [S. Rept. 116-21](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Financial Services. ([All Actions](#))

Senate Bills Sent to the House

- [S.294](#) — 116th Congress (2019-2020) Native American Business Incubators Program Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/31/2019)
Cosponsors: ([5](#)) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-29](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))
- [S.832](#) — 116th Congress (2019-2020) A bill to nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865.Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 03/14/2019)
Cosponsors: ([1](#)) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-45](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))



32ND ANNUAL INDIAN LAW SYMPOSIUM
SEPTEMBER 5TH & 6TH 2019
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW

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Overview of the 116th Congress¹

- 178 bills introduced with provisions relating to American Indians and Alaska Natives
- House Committees – Appropriations, Budget, Natural Resources, Financial Services, Energy & Commerce, Agriculture, Oversight & Reform, Education & Labor, Ways & Means
- Senate Committees – Appropriations; Budget; Indian Affairs; Finance; Health, Education, Labor & Pensions; Environment & Public Works; Energy & Natural Resources; Commerce, Science & Transportation; Banking, Housing & Urban Affairs

House Bills Sent to the Senate

[H.R.91](#) — 116th Congress (2019-2020) Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act Sponsor: [Rep. Blumenauer, Earl \[D-OR-3\]](#) (Introduced 01/03/2019) Cosponsors: (1) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[H.R.266](#) — 116th Congress (2019-2020) Department of the Interior, Environment, and Related Agencies Appropriations Act, 2019 Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 01/08/2019) Cosponsors: (0) Committees: House - Appropriations **Latest Action:** Senate - 01/15/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 12. ([All Actions](#))

[H.R.297](#) — 116th Congress (2019-2020) Little Shell Tribe of Chippewa Indians Restoration Act of 2019 Sponsor: [Rep. Gianforte, Greg \[R-MT-At Large\]](#) (Introduced 01/08/2019) Cosponsors: (0) Committees: House - Natural Resources **Latest Action:** Senate - 03/28/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 48. ([All Actions](#))

Sponsor: [Rep. Keating, William R. \[D-MA-9\]](#) **Cosponsors:** 35 **Committees:** Committee Reports: [H. Rept. 116-54](#) **Latest Action:** [All Actions](#) [H.R.317](#) — 116th Congress (2019-2020) Santa Ynez Band of Chumash Indians Land Affirmation Act of 2019 Sponsor: [Rep. LaMalfa, Doug \[R-CA-1\]](#) (Introduced 01/08/2019) Cosponsors: (1) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[H.R.375](#) — 116th Congress (2019-2020) To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes. Sponsor: [Rep. Cole, Tom \[R-OK-4\]](#) (Introduced 01/09/2019)

¹ Source: <https://congress.gov/> Note that all information is current as of August 2, 2019. The House went into recess on July 26, 2019. The Senate went into recess on August 1, 2019. They will not reconvene for business until Monday, September 9, 2019.

Cosponsors: (28) Committees: House - Natural Resources | Senate - Indian Affairs
Latest Action: Senate - 05/16/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[H.R.1388](#) — 116th Congress (2019-2020) Lytton Rancheria Homelands Act of 2019
Sponsor: [Rep. Huffman, Jared \[D-CA-2\]](#) (Introduced 02/27/2019) Cosponsors: (0)
Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[H.R.1585](#) — 116th Congress (2019-2020) **Violence Against Women Reauthorization Act of 2019** Sponsor: [Rep. Bass, Karen \[D-CA-37\]](#) (Introduced 03/07/2019)
Cosponsors: (167) **Committees:** House - Judiciary, Energy and Commerce, Financial Services, Ways and Means, Education and Labor, Natural Resources, Veterans' Affairs **Committee Reports:** [H. Rept. 116-21](#) **Latest Action:** Senate - 04/10/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 66. ([All Actions](#))

[H.R.2030](#) — 116th Congress (2019-2020) **Colorado River Drought Contingency Plan Authorization Act** Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 04/02/2019)
Cosponsors: (36) **Committees:** House - Natural Resources **Latest Action:** 04/16/2019 Became Public Law No: 116-14. ([All Actions](#))

Senate Bills Sent to the House

[S.46](#) — 116th Congress (2019-2020) Klamath Tribe Judgment Fund Repeal Act
Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) Cosponsors: (1)
Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-6](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.50](#) — 116th Congress (2019-2020) **Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act** Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) **Cosponsors:** (3) **Committees:** Senate - Indian Affairs **Committee Reports:** [S. Rept. 116-7](#) **Latest Action:** House - 06/28/2019 Held at the desk. ([All Actions](#))

[S.199](#) — 116th Congress (2019-2020) **Leech Lake Band of Ojibwe Reservation Restoration Act** Sponsor: [Sen. Smith, Tina \[D-MN\]](#) (Introduced 01/24/2019)
Cosponsors: (1) **Committees:** Senate - Indian Affairs | House - Natural Resources **Committee Reports:** [S. Rept. 116-3](#) **Latest Action:** House - 07/03/2019 Referred to the Subcommittee on National Parks, Forests, and Public Lands. ([All Actions](#))

[S.209](#) — 116th Congress (2019-2020) PROGRESS for Indian Tribes Act Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (5) **Committees:** Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-34](#) **Latest**

Action: House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.212](#) — 116th Congress (2019-2020) Indian Community Economic Enhancement Act of 2019 Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources, Education and Labor Committee Reports: [S. Rept. 116-28](#) **Latest Action:** House - 06/28/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

[S.216](#) — 116th Congress (2019-2020) Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act Sponsor: [Sen. Cantwell, Maria \[D-WA\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-4](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.224](#) — 116th Congress (2019-2020) A bill to provide for the conveyance of certain property to the Tanana Tribal Council located in Tanana, Alaska, and to the Bristol Bay Area Health Corporation located in Dillingham, Alaska, and for other purposes. Sponsor: [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources, Energy and Commerce Committee Reports: [S. Rept. 116-10](#) **Latest Action:** House - 06/28/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

[S.256](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate - Indian Affairs | House - Education and Labor Committee Reports: [S. Rept. 116-11](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[S.257](#) — 116th Congress (2019-2020) Tribal HUD-VASH Act of 2019 Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate – Indian Affairs | House - Financial Services Committee Reports: [S. Rept. 116-21](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Financial Services. ([All Actions](#))

[S.294](#) — 116th Congress (2019-2020) Native American Business Incubators Program Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/31/2019) Cosponsors: (5) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-29](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.832](#) — 116th Congress (2019-2020) A bill to nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865.Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 03/14/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-45](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

Public Laws

[H.R.2030](#) — 116th Congress (2019-2020) **Colorado River Drought Contingency Plan Authorization Act** Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 04/02/2019) Cosponsors: (36) Committees: House - Natural Resources **Latest Action:** 04/16/2019 Became Public Law No: 116-14. ([All Actions](#))

Appropriations

Senate

[S.229](#) — 116th Congress (2019-2020) Indian Programs Advance Appropriations Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/25/2019) Cosponsors: (9) Committees: Senate - Budget. **Latest Action:** Senate - 01/25/2019 Read twice and referred to the Committee on the Budget. ([All Actions](#))

House

[H.R.195](#) — 116th Congress (2019-2020) Pay our Doctors Act of 2019 Sponsor: [Rep. Mullin, Markwayne \[R-OK-2\]](#) (Introduced 01/03/2019) Cosponsors: (16) Committees: House - Appropriations **Latest Action:** House - 01/03/2019 Referred to the House Committee on Appropriations. ([All Actions](#))

[H.R.266](#) — 116th Congress (2019-2020) Department of the Interior, Environment, and Related Agencies Appropriations Act, 2019 Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 01/08/2019) Cosponsors: (0) Committees: House - Appropriations **Latest Action:** Senate - 01/15/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 12. ([All Actions](#))

Sponsor: [Rep. Price, David E. \[D-NC-4\]](#) **Cosponsors:** 0 **Committees:** **Latest Action:** [All Actions](#) [H.R.1128](#) — 116th Congress (2019-2020) Indian Programs Advanced Appropriations Act Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 02/08/2019) Cosponsors: (32) Committees: House - Budget, Natural Resources, Energy and Commerce **Latest Action:** House - 02/28/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1135](#) — 116th Congress (2019-2020) Indian Health Service Advance Appropriations Act of 2019 Sponsor: [Rep. Young, Don \[R-AK-At Large\]](#) (Introduced 02/08/2019) Cosponsors: (23) Committees: House - Budget, Natural Resources, Energy and Commerce **Latest Action:** House - 03/13/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.3052](#) — 116th Congress (2019-2020) Department of the Interior, Environment, and Related Agencies Appropriations Act, 2020 Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 06/03/2019) Cosponsors: (0) Committees: House – Appropriations Committee Reports: [H. Rept. 116-100](#) **Latest Action:** House - 06/03/2019 Placed on the Union Calendar, Calendar No. 75. ([All Actions](#))

Border Crossing

[H.R.2496](#) — 116th Congress (2019-2020) Tribal Border Crossing Parity Act Sponsor: [Rep. Kilmer, Derek \[D-WA-6\]](#) (Introduced 05/02/2019) Cosponsors: (6) Committees:

House - Judiciary **Latest Action:** House - 05/31/2019 Referred to the Subcommittee on Immigration and Citizenship. ([All Actions](#))

Broadband

House

[H.R.292](#) — 116th Congress (2019-2020) **Rural Broadband Permitting Efficiency Act of 2019** **Sponsor:** [Rep. Curtis, John R. \[R-UT-3\]](#) (Introduced 01/08/2019) **Cosponsors:** (0) **Committees:** House - Natural Resources, Agriculture **Latest Action:** House - 02/08/2019 Referred to the Subcommittee on Conservation and Forestry. ([All Actions](#))

Children

Senate

[S.290](#) — 116th Congress (2019-2020) **Native Youth and Tribal Officer Protection Act** **Sponsor:** [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/31/2019) **Cosponsors:** (4) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

[S.305](#) — 116th Congress (2019-2020) **Tribal Adoption Parity Act** **Sponsor:** [Sen. Klobuchar, Amy \[D-MN\]](#) (Introduced 01/31/2019) **Cosponsors:** (3) **Committees:** Senate - Finance **Latest Action:** Senate - 01/31/2019 Read twice and referred to the Committee on Finance. ([All Actions](#))

[S.1181](#) — 116th Congress (2019-2020) **Help Grandfamilies Prevent Child Abuse Act** **Sponsor:** [Sen. Hassan, Margaret Wood \[D-NH\]](#) (Introduced 04/11/2019) **Cosponsors:** (1) **Committees:** Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 04/11/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.1329](#) — 116th Congress (2019-2020) **AI/AN CAPTA** **Sponsor:** [Sen. Warren, Elizabeth \[D-MA\]](#) (Introduced 05/06/2019) **Cosponsors:** (6) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 05/06/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

House

[H.R.958](#) — 116th Congress (2019-2020) Native Youth and Tribal Officer Protection Act Sponsor: [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 02/04/2019) Cosponsors: (7) Committees: House - Natural Resources, Education and Labor, Energy and Commerce **Latest Action:** House - 02/22/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.2549](#) — 116th Congress (2019-2020) AI/AN CAPTA Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 05/07/2019) Cosponsors: (2) Committees: House - Education and Labor, Natural Resources **Latest Action:** House - 05/16/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Claims

[S.46](#) — 116th Congress (2019-2020) Klamath Tribe Judgment Fund Repeal Act Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-6](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.216](#) — 116th Congress (2019-2020) Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act Sponsor: [Sen. Cantwell, Maria \[D-WA\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-4](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

Climate Change

[S.1482](#) — 116th Congress (2019-2020) **Safeguarding America's Future and Environment Act** Sponsor: [Sen. Whitehouse, Sheldon \[D-RI\]](#) (Introduced 05/15/2019) Cosponsors: (8) Committees: Senate - Environment and Public Works **Latest Action:** Senate - 05/15/2019 Read twice and referred to the Committee on Environment and Public Works. ([All Actions](#))

Cultural Resources

Senate

[S.256](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate - Indian Affairs | House - Education

and Labor Committee Reports: [S. Rept. 116-11](#) **Latest Action:** House - 06/28/2019
Referred to the House Committee on Education and Labor. ([All Actions](#))

[S.1079](#) — 116th Congress (2019-2020) **Chaco Cultural Heritage Area Protection Act of 2019** **Sponsor:** [Sen. Udall, Tom \[D-NM\]](#) (Introduced 04/09/2019) **Cosponsors:** (1) **Committees:** Senate - Energy and Natural Resources **Latest Action:** Senate - 05/14/2019 Committee on Energy and Natural Resources Subcommittee on Public Lands, Forests, and Mining. Hearings held. ([All Actions](#))

[S.2165](#) — 116th Congress (2019-2020) **A bill to enhance protections of Native American tangible cultural heritage, and for other purposes.** **Sponsor:** [Sen. Heinrich, Martin \[D-NM\]](#) (Introduced 07/18/2019) **Cosponsors:** (7) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 07/18/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.Res.100](#) — 116th Congress (2019-2020) A resolution recognizing the heritage, culture, and contributions of American Indian, Alaska Native, and Native Hawaiian women in the United States. **Sponsor:** [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 03/07/2019) **Cosponsors:** (31) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 03/28/2019 Resolution agreed to in Senate without amendment and with a preamble by Voice Vote. (text: CR 3/7/2019 [S1743](#)-1744) ([All Actions](#))

House

[H.R.912](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act **Sponsor:** [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 01/30/2019) **Cosponsors:** (24) **Committees:** House - Education and Labor **Latest Action:** House - 01/30/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[H.R.2181](#) — 116th Congress (2019-2020) **Chaco Cultural Heritage Area Protection Act of 2019** **Sponsor:** [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 04/09/2019) **Cosponsors:** (9) **Committees:** House - Natural Resources **Latest Action:** House - 07/17/2019 Ordered to be Reported by the Yeas and Nays: 19 - 14. ([All Actions](#))

[H.R.3846](#) — 116th Congress (2019-2020) **Safeguard Tribal Objects of Patrimony Act of 2019** **Sponsor:** [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 07/18/2019) **Cosponsors:** (10) **Committees:** House - Natural Resources, Judiciary, Foreign Affairs **Latest Action:** House - 07/18/2019 Referred to the Committee on Natural Resources, and in addition to the Committees on the Judiciary, and Foreign Affairs, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of each committee. ([All Actions](#))

[H.R.3916](#) — 116th Congress (2019-2020) **To provide for a study on the protection of Native American seeds and traditional foods, and for other purposes.** **Sponsor:** [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 07/23/2019) **Cosponsors:** (3) **Committees:** House - Agriculture, Energy and Commerce, Natural Resources **Latest Action:** House -

07/23/2019 Referred to the Committee on Agriculture, and in addition to the Committees on Energy and Commerce, and Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of each committee. ([All Actions](#))

[H.Res.83](#) — 116th Congress (2019-2020) **Expressing the Sense of Congress that the Eagle Staff shall be recognized as the first flag of the sovereign Native American tribal nations and the first flag of the Americas, and to encourage programs promoting the cultural significance of the Eagle Staff.** Sponsor: [Rep. Krishnamoorthi, Raja \[D-IL-8\]](#) (Introduced 01/28/2019) Cosponsors: (0) Committees: House - Natural Resources **Latest Action:** House - 02/05/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.Res.173](#) — 116th Congress (2019-2020) Recognizing the heritage, culture, and contributions of American Indian, Alaska Native, and Native Hawaiian women in the United States. Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 03/05/2019) Cosponsors: (34) Committees: House - Natural Resources **Latest Action:** House - 03/06/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.Res.139](#) — 116th Congress (2019-2020) **Supporting the goals and ideals of International Mother Language Day in bringing attention to the importance of preserving linguistic and cultural heritage through education.** Sponsor: [Rep. Meng, Grace \[D-NY-6\]](#) (Introduced 02/19/2019) Cosponsors: (3) Committees: House - Oversight and Reform **Latest Action:** House - 02/19/2019 Referred to the House Committee on Oversight and Reform. ([All Actions](#))

Economic Development

Senate

[S.126](#) — 116th Congress (2019-2020) Native American Millennium Challenge Demonstration Act Sponsor: [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 01/15/2019) Cosponsors: (2) Committees: Senate - Indian Affairs **Latest Action:** Senate - 01/15/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.212](#) — 116th Congress (2019-2020) Indian Community Economic Enhancement Act of 2019 Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources, Education and Labor Committee Reports: [S. Rept. 116-28](#) **Latest Action:** House - 06/28/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

[S.294](#) — 116th Congress (2019-2020) Native American Business Incubators Program Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/31/2019) Cosponsors: (5) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-29](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

[S.804](#) — 116th Congress (2019-2020) **Empowering Rural Economies Through Alaska Native Sustainable Arts and Handicrafts Act** Sponsor: [Sen. Sullivan, Dan \[R-AK\]](#) (Introduced 03/14/2019) Cosponsors: (1) Committees: Senate - Commerce, Science, and Transportation **Latest Action:** Senate - 03/14/2019 Read twice and referred to the Committee on Commerce, Science, and Transportation. ([All Actions](#))

[S.1216](#) — 116th Congress (2019-2020) **A bill to amend the Internal Revenue Code of 1986 to permanently extend the depreciation rules for property used predominantly within an Indian reservation.** Sponsor: [Sen. Inhofe, James M. \[R-OK\]](#) (Introduced 04/11/2019) Cosponsors: (0) Committees: Senate - Finance **Latest Action:** Senate - 04/11/2019 Read twice and referred to the Committee on Finance. ([All Actions](#))

House

[H.R.558](#) — 116th Congress (2019-2020) Native American Millennium Challenge Demonstration Act Sponsor: [Rep. Young, Don \[R-AK-At Large\]](#) (Introduced 01/15/2019) Cosponsors: (2) Committees: House - Natural Resources **Latest Action:** House - 02/04/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1416](#) — 116th Congress (2019-2020) Tribal Marijuana Sovereignty Act of 2019 Sponsor: [Rep. Young, Don \[R-AK-At Large\]](#) (Introduced 02/27/2019) Cosponsors: (3) Committees: House - Natural Resources, Energy and Commerce **Latest Action:** House - 03/18/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1900](#) — 116th Congress (2019-2020) Native American Business Incubators Program Act Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 03/27/2019) Cosponsors: (10) Committees: House - Natural Resources **Latest Action:** House - 04/11/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1937](#) — 116th Congress (2019-2020) Indian Community Economic Enhancement Act of 2019 Sponsor: [Rep. Torres, Norma J. \[D-CA-35\]](#) (Introduced 03/27/2019) Cosponsors: (2) Committees: House - Natural Resources, Education and Labor **Latest Action:** House - 04/16/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Education

Senate

[S.256](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate - Indian Affairs | House - Education and Labor Committee Reports: [S. Rept. 116-11](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[S.279](#) — 116th Congress (2019-2020) Tribal School Federal Insurance Parity Act Sponsor: [Sen. Thune, John \[R-SD\]](#) (Introduced 01/30/2019) Cosponsors: (5) Committees: Senate - Indian Affairs Committee Reports: [S. Rept. 116-54](#) **Latest Action:** Senate - 07/09/2019 Placed on Senate Legislative Calendar under General Orders. Calendar No. 135. ([All Actions](#))

[S.759](#) — 116th Congress (2019-2020) Native American Indian Education Act Sponsor: [Sen. Gardner, Cory \[R-CO\]](#) (Introduced 03/12/2019) Cosponsors: (4) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 03/12/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.1161](#) — 116th Congress (2019-2020) Native Educator Support and Training Act Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 04/11/2019) Cosponsors: (1) Committees: Senate - Indian Affairs **Latest Action:** Senate - 04/11/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.1964](#) — 116th Congress (2019-2020) **Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2019** Sponsor: [Sen. Hirono, Mazie K. \[D-HI\]](#) (Introduced 06/25/2019) Cosponsors: (14) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 06/25/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.2037](#) — 116th Congress (2019-2020) Building Indigenous STEM Professionals Act Sponsor: [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 06/27/2019) Cosponsors: (1) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 06/27/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.Res.37](#) — 116th Congress (2019-2020) A resolution designating the week beginning February 3, 2019, as "National Tribal Colleges and Universities Week". **Sponsor:** [Sen. Tester, Jon \[D-MT\]](#) **Cosponsors:** 23 **Latest Action:** [All Actions](#)

House

[**H.R.895**](#) — 116th Congress (2019-2020) **Tribal School Federal Insurance Parity Act** **Sponsor:** [Rep. Johnson, Dusty \[R-SD-At Large\]](#) (Introduced 01/30/2019) **Cosponsors:** (2) **Committees:** House - Natural Resources, Oversight and Reform, Energy and Commerce **Latest Action:** House - 07/16/2019 Subcommittee Hearings Held. ([All Actions](#))

[**H.R.912**](#) — 116th Congress (2019-2020) Esther Martinez Native American Languages Programs Reauthorization Act Sponsor: [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 01/30/2019) Cosponsors: (24) **Committees:** House - Education and Labor **Latest Action:** House - 01/30/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[**H.R.1688**](#) — 116th Congress (2019-2020) Native American Indian Education Act **Sponsor:** [Rep. DeGette, Diana \[D-CO-1\]](#) (Introduced 03/12/2019) Cosponsors: (16) **Committees:** House - Education and Labor **Latest Action:** House - 03/12/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[**H.R.2599**](#) — 116th Congress (2019-2020) **Suicide and Threat Assessment Nationally Dedicated to Universal Prevention Act of 2019** **Sponsor:** [Rep. Peters, Scott H. \[D-CA-52\]](#) (Introduced 05/08/2019) **Cosponsors:** (12) **Committees:** House - Energy and Commerce **Latest Action:** House - 05/08/2019 Referred to the House Committee on Energy and Commerce. ([All Actions](#))

[**H.R.3513**](#) — 116th Congress (2019-2020) **Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2019** **Sponsor:** [Rep. Matsui, Doris O. \[D-CA-6\]](#) (Introduced 06/26/2019) **Cosponsors:** (3) **Committees:** House - Education and Labor **Latest Action:** House - 06/26/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

[**H.Res.104**](#) — 116th Congress (2019-2020) Expressing support for designation of the week beginning February 3, 2019, as "National Tribal Colleges and Universities Week". **Sponsor:** [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 02/06/2019) **Cosponsors:** (15) **Committees:** House - Oversight and Reform **Latest Action:** House - 02/06/2019 Referred to the House Committee on Oversight and Reform. ([All Actions](#))

[**H.Res.139**](#) — 116th Congress (2019-2020) **Supporting the goals and ideals of International Mother Language Day in bringing attention to the importance of preserving linguistic and cultural heritage through education.** **Sponsor:** [Rep. Meng, Grace \[D-NY-6\]](#) (Introduced 02/19/2019) **Cosponsors:** (3) **Committees:** House - Oversight and Reform **Latest Action:** House - 02/19/2019 Referred to the House Committee on Oversight and Reform. ([All Actions](#))

Elections and Voting Rights

Senate

[S.739](#) — 116th Congress (2019-2020) Native American Voting Rights Act of 2019
Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 03/12/2019) Cosponsors: ([15](#))
Committees: Senate - Judiciary **Latest Action:** Senate - 03/12/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

House

[H.R.1694](#) — 116th Congress (2019-2020) Native American Voting Rights Act of 2019
Sponsor: [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 03/12/2019) Cosponsors: ([87](#))
Committees: House - House Administration, Judiciary **Latest Action:** House - 05/03/2019 Referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. ([All Actions](#))

Fee-To-Trust (Carcieri)

House

[H.R.375](#) — 116th Congress (2019-2020) To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes. Sponsor: [Rep. Cole, Tom \[R-OK-4\]](#) (Introduced 01/09/2019)
Cosponsors: ([28](#)) Committees: House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate - 05/16/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

Gaming

Sponsor: [Rep. Babin, Brian \[R-TX-36\]](#) **Cosponsors:** [25](#) **Committees:** **Latest Action:** [All Actions](#)

Health

Senate

[S.467](#) — 116th Congress (2019-2020) Native American Suicide Prevention Act of 2019
Sponsor: [Sen. Warren, Elizabeth \[D-MA\]](#) (Introduced 02/13/2019) Cosponsors: ([16](#))
Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 02/13/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.498](#) — 116th Congress (2019-2020) Assessment of the Indian Health Service Act of 2019
Sponsor: [Sen. Rounds, Mike \[R-SD\]](#) (Introduced 02/14/2019) Cosponsors: ([0](#))

Committees: Senate - Indian Affairs **Latest Action:** Senate - 02/14/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.1180](#) — 116th Congress (2019-2020) Urban Indian Health Parity Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 04/11/2019) Cosponsors: (11) Committees: Senate - Finance **Latest Action:** Senate - 04/11/2019 Read twice and referred to the Committee on Finance. ([All Actions](#))

[S.1307](#) — 116th Congress (2019-2020) **Tribal Nutrition Improvement Act of 2019** Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 05/02/2019) Cosponsors: (2) Committees: Senate - Agriculture, Nutrition, and Forestry **Latest Action:** Senate - 05/02/2019 Read twice and referred to the Committee on Agriculture, Nutrition, and Forestry. ([All Actions](#))

[S.1365](#) — 116th Congress (2019-2020) **Comprehensive Addiction Resources Emergency Act of 2019** Sponsor: [Sen. Warren, Elizabeth \[D-MA\]](#) (Introduced 05/08/2019) Cosponsors: (11) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 05/08/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.1524](#) — 116th Congress (2019-2020) Real Education for Healthy Youth Act of 2019 Sponsor: [Sen. Booker, Cory A. \[D-NJ\]](#) (Introduced 05/16/2019) Cosponsors: (11) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 05/16/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.2365](#) — 116th Congress (2019-2020) **A bill to amend the Indian Health Care Improvement Act to authorize urban Indian organizations to enter into arrangements for the sharing of medical services and facilities, and for other purposes.** Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 07/31/2019) Cosponsors: (4) Committees: Senate - Indian Affairs **Latest Action:** Senate - 07/31/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.Res.190](#) — 116th Congress (2019-2020) A resolution promoting minority health awareness and supporting the goals and ideals of National Minority Health Month in April 2019, which include bringing attention to the health disparities faced by minority populations of the United States such as American Indians, Alaska Natives, Asian Americans, African Americans, Hispanics, and Native Hawaiians or other Pacific Islanders. Sponsor: [Sen. Cardin, Benjamin L. \[D-MD\]](#) (Introduced 05/06/2019) Cosponsors: (16) **Latest Action:** Senate - 05/06/2019 Submitted in the Senate, considered, and passed without amendment and with a preamble by Voice Vote. ([All Actions](#))

House

[H.R.1191](#) — 116th Congress (2019-2020) Native American Suicide Prevention Act of 2019 Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 02/13/2019) Cosponsors:

(36) Committees: House - Energy and Commerce **Latest Action:** House - 02/14/2019
Referred to the Subcommittee on Health. ([All Actions](#))

Sponsor: [Rep. Watson Coleman, Bonnie \[D-NJ-12\]](#) **Cosponsors:** [43 Committees](#):
Latest Action: [All Actions](#) [H.R.2316](#) — 116th Congress (2019-2020) To amend title XIX of the Social Security Act to require a Federal medical assistance percentage of 100 percent for urban Indian organizations, and for other purposes. Sponsor: [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 04/12/2019)
Cosponsors: (18) Committees: House - Energy and Commerce **Latest Action:** House - 04/12/2019 Referred to the House Committee on Energy and Commerce. ([All Actions](#))

[H.R.2599](#) — 116th Congress (2019-2020) **Suicide and Threat Assessment Nationally Dedicated to Universal Prevention Act of 2019** **Sponsor:** [Rep. Peters, Scott H. \[D-CA-52\]](#) (Introduced 05/08/2019) **Cosponsors:** (12) Committees: House - Energy and Commerce **Latest Action:** House - 05/08/2019 Referred to the House Committee on Energy and Commerce. ([All Actions](#))

[H.R.2720](#) — 116th Congress (2019-2020) **Real Education for Healthy Youth Act of 2019** **Sponsor:** [Rep. Lee, Barbara \[D-CA-13\]](#) (Introduced 05/14/2019) **Cosponsors:** (56) Committees: House - Energy and Commerce, Education and Labor **Latest Action:** House - 05/14/2019 Referred to the Committee on Energy and Commerce, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee... ([All Actions](#))

[H.R.2826](#) — 116th Congress (2019-2020) **Stop Mental Health Stigma in Our Communities Act** **Sponsor:** [Rep. Chu, Judy \[D-CA-27\]](#) (Introduced 05/17/2019)
Cosponsors: (1) Committees: House - Energy and Commerce **Latest Action:** House - 05/17/2019 Referred to the House Committee on Energy and Commerce. ([All Actions](#))

[H.R.3916](#) — 116th Congress (2019-2020) **To provide for a study on the protection of Native American seeds and traditional foods, and for other purposes.** **Sponsor:** [Rep. Lujan, Ben Ray \[D-NM-3\]](#) (Introduced 07/23/2019) **Cosponsors:** (3) Committees: House - Agriculture, Energy and Commerce, Natural Resources **Latest Action:** House - 07/23/2019 Referred to the Committee on Agriculture, and in addition to the Committees on Energy and Commerce, and Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of each committee. ([All Actions](#))

[H.R.3340](#) — 116th Congress (2019-2020) **Tribal Healthcare Careers Act** **Sponsor:** [Rep. Gomez, Jimmy \[D-CA-34\]](#) (Introduced 06/19/2019) **Cosponsors:** (0) Committees: House - Ways and Means **Latest Action:** House - 06/19/2019 Referred to the House Committee on Ways and Means. ([All Actions](#))

[H.Res.316](#) — 116th Congress (2019-2020) Promoting minority health awareness and supporting the goals and ideals of National Minority Health Month in April 2019, which

include bringing attention to the health disparities faced by minority populations of the United States such as American Indians, Alaska Natives, Asian Americans, African Americans, Hispanics, and Native Hawaiians or other Pacific Islanders. Sponsor: [Rep. Johnson, Eddie Bernice \[D-TX-30\]](#) (Introduced 04/12/2019) Cosponsors: (39)
Committees: House - Oversight and Reform **Latest Action:** House - 04/12/2019
Referred to the House Committee on Oversight and Reform. ([All Actions](#))

Labor

Senate

[S.226](#) — 116th Congress (2019-2020) Tribal Labor Sovereignty Act of 2019 Sponsor: [Sen. Moran, Jerry \[R-KS\]](#) (Introduced 01/24/2019) Cosponsors: (9) Committees: Senate - Indian Affairs Committee Reports: [S. Rept. 116-30](#) **Latest Action:** Senate - 04/09/2019 Placed on Senate Legislative Calendar under General Orders. Calendar No. 65. ([All Actions](#))

House

[H.R.779](#) — 116th Congress (2019-2020) Tribal Labor Sovereignty Act of 2019 Sponsor: [Rep. Moolenaar, John R. \[R-MI-4\]](#) (Introduced 01/24/2019) Cosponsors: (22)
Committees: House - Education and Labor **Latest Action:** House - 01/24/2019 Referred to the House Committee on Education and Labor. ([All Actions](#))

Land

Senate

[S.199](#) — 116th Congress (2019-2020) **Leech Lake Band of Ojibwe Reservation Restoration Act** Sponsor: [Sen. Smith, Tina \[D-MN\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-3](#) **Latest Action:** House - 07/03/2019 Referred to the Subcommittee on National Parks, Forests, and Public Lands. ([All Actions](#))

[S.224](#) — 116th Congress (2019-2020) A bill to provide for the conveyance of certain property to the Tanana Tribal Council located in Tanana, Alaska, and to the Bristol Bay Area Health Corporation located in Dillingham, Alaska, and for other purposes. Sponsor: [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 01/24/2019) Cosponsors: (1)
Committees: Senate - Indian Affairs | House - Natural Resources, Energy and Commerce Committee Reports: [S. Rept. 116-10](#) **Latest Action:** House - 06/28/2019
Referred to the Committee on Natural Resources, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

[S.790](#) — 116th Congress (2019-2020) A bill to clarify certain provisions of Public Law 103-116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, and for other purposes. Sponsor: [Sen. Graham, Lindsey \[R-SC\]](#) (Introduced 03/13/2019) Cosponsors: (2) Committees: Senate - Indian Affairs Latest Action: Senate - 05/01/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

House

[H.R.184](#) — 116th Congress (2019-2020) Winnebago Land Transfer Act of 2019 Sponsor: [Rep. King, Steve \[R-IA-4\]](#) (Introduced 01/03/2019) Cosponsors: (3) Committees: House - Natural Resources **Latest Action:** House - 02/05/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.274](#) — 116th Congress (2019-2020) **Cottonwood Land Exchange Act of 2019** Sponsor: [Rep. Gosar, Paul A. \[R-AZ-4\]](#) (Introduced 01/08/2019) Cosponsors: (6) Committees: House - Natural Resources **Latest Action:** House - 02/05/2019 Referred to the Subcommittee on National Parks, Forests, and Public Lands. ([All Actions](#))

Sponsor: [Rep. Keating, William R. \[D-MA-9\]](#) **Cosponsors:** 35 **Committees:** Committee Reports: [H. Rept. 116-54](#) **Latest Action:** [All Actions](#)

[H.R.317](#) — 116th Congress (2019-2020) Santa Ynez Band of Chumash Indians Land Affirmation Act of 2019 Sponsor: [Rep. LaMalfa, Doug \[R-CA-1\]](#) (Introduced 01/08/2019) Cosponsors: (1) Committees: House - Natural Resources | Senate - Indian Affairs Latest Action: Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[H.R.396](#) — 116th Congress (2019-2020) To provide for the equitable settlement of certain Indian land disputes regarding land in Illinois, and for other purposes. Sponsor: [Rep. Mullin, Markwayne \[R-OK-2\]](#) (Introduced 01/09/2019) Cosponsors: (3) Committees: House - Natural Resources **Latest Action:** House - 02/05/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.453](#) — 116th Congress (2019-2020) Eastern Band of Cherokee Historic Lands Reacquisition Act Sponsor: [Rep. Fleischmann, Charles J. "Chuck" \[R-TN-3\]](#) (Introduced 01/10/2019) Cosponsors: (6) Committees: House - Natural Resources **Latest Action:** House - 02/05/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.729](#) — 116th Congress (2019-2020) **Tribal Coastal Resiliency Act** Sponsor: [Rep. Kilmer, Derek \[D-WA-6\]](#) (Introduced 01/23/2019) Cosponsors: (14) Committees: House - Natural Resources **Latest Action:** House - 07/25/2019 Subcommittee Hearings Held. ([All Actions](#))

[H.R.733](#) — 116th Congress (2019-2020) **Leech Lake Band of Ojibwe Reservation Restoration Act** Sponsor: [Rep. McCollum, Betty \[D-MN-4\]](#) (Introduced 01/23/2019)

Cosponsors: (0) **Committees:** House - Natural Resources **Latest Action:** House - 06/05/2019 Subcommittee Hearings Held. ([All Actions](#))

[H.R.871](#) — 116th Congress (2019-2020) **Bears Ears Expansion And Respect for Sovereignty Act** **Sponsor:** [Rep. Gallego, Ruben \[D-AZ-7\]](#) (Introduced 01/30/2019)

Cosponsors: (108) **Committees:** House - Natural Resources **Latest Action:** House – 02/13/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.933](#) — 116th Congress (2019-2020) To provide for the conveyance of certain property to the Tanana Tribal Council located in Tanana, Alaska, and to the Bristol Bay Area Health Corporation located in Dillingham, Alaska, and for other purposes.

Sponsor: [Rep. Young, Don \[R-AK-At Large\]](#) (Introduced 01/30/2019) **Cosponsors:** (0) **Committees:** House - Natural Resources, Energy and Commerce **Latest Action:** House - 02/15/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1031](#) — 116th Congress (2019-2020) Pala Band of Mission Indians Land Transfer Act of 2019 **Sponsor:** [Rep. Vargas, Juan \[D-CA-51\]](#) (Introduced 02/06/2019) **Cosponsors:** (1) **Committees:** House - Natural Resources **Latest Action:** House - 06/05/2019 Subcommittee Hearings Held. ([All Actions](#))

[H.R.1146](#) — 116th Congress (2019-2020) **Arctic Cultural and Coastal Plain Protection Act** **Sponsor:** [Rep. Huffman, Jared \[D-CA-2\]](#) (Introduced 02/11/2019) **Cosponsors:** (182) **Committees:** House - Natural Resources **Committee Reports:** [H. Rept. 116-133](#) **Latest Action:** House - 06/27/2019 Placed on the Union Calendar.

[H.R.1225](#) — 116th Congress (2019-2020) **Restore Our Parks and Public Lands Act** **Sponsor:** [Rep. Bishop, Rob \[R-UT-1\]](#) (Introduced 02/14/2019) **Cosponsors:** (301) **Committees:** House - Natural Resources, Education and Labor **Latest Action:** House - 06/26/2019 Ordered to be Reported (Amended) by the Yeas and Nays: 36 - 2. ([All Actions](#))

[H.R.1312](#) — 116th Congress (2019-2020) Yurok Lands Act of 2019 **Sponsor:** [Rep. Huffman, Jared \[D-CA-2\]](#) (Introduced 02/19/2019) **Cosponsors:** (4) **Committees:** House - Natural Resources **Latest Action:** House - 03/07/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[H.R.1373](#) — 116th Congress (2019-2020) **Grand Canyon Centennial Protection Act** **Sponsor:** [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 02/26/2019) **Cosponsors:** (116) **Committees:** House - Natural Resources **Latest Action:** House - 07/17/2019 Ordered to be Reported (Amended) by the Yeas and Nays: 21 - 14. ([All Actions](#))

[H.R.1388](#) — 116th Congress (2019-2020) Lytton Rancheria Homelands Act of 2019 **Sponsor:** [Rep. Huffman, Jared \[D-CA-2\]](#) (Introduced 02/27/2019) **Cosponsors:** (0) **Committees:** House - Natural Resources | Senate - Indian Affairs **Latest Action:** Senate

- 06/19/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[H.R.2717](#) — 116th Congress (2019-2020) **To authorize the Secretary of the Interior to convey to the San Felipe Pueblo certain Federal land in Sandoval County, New Mexico, and for other purposes.** Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 05/14/2019) **Cosponsors:** (0) **Committees:** House - Natural Resources **Latest Action:** House - 05/31/2019 Referred to the Subcommittee on National Parks, Forests, and Public Lands. ([All Actions](#))

[H.R.2961](#) — 116th Congress (2019-2020) Samish Indian Nation Land Reaffirmation Act Sponsor: [Rep. Larsen, Rick \[D-WA-2\]](#) (Introduced 05/23/2019) Cosponsors: (14) Committees: House - Natural Resources **Latest Action:** House - 06/05/2019 Subcommittee Hearings Held. ([All Actions](#))

Law Enforcement

Senate

[S.210](#) — 116th Congress (2019-2020) Tribal Law and Order Reauthorization and Amendments Act of 2019 Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (4) Committees: Senate - Indian Affairs Committee Reports: [S. Rept. 116-37](#) **Latest Action:** Senate - 05/06/2019 Placed on Senate Legislative Calendar under General Orders. Calendar No. 77. ([All Actions](#))

[S.954](#) — 116th Congress (2019-2020) **POWER Act** Sponsor: [Sen. Brown, Sherrod \[D-OH\]](#) (Introduced 03/28/2019) **Cosponsors:** (14) **Committees:** Senate - Judiciary **Latest Action:** Senate - 03/28/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

[S.982](#) — 116th Congress (2019-2020) **Not Invisible Act of 2019** Sponsor: [Sen. Cortez Masto, Catherine \[D-NV\]](#) (Introduced 04/02/2019) **Cosponsors:** (4) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

House

[H.R.2438](#) — 116th Congress (2019-2020) Not Invisible Act of 2019 Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 05/01/2019) Cosponsors: (35) Committees: House - Natural Resources, Judiciary **Latest Action:** House - 05/31/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

Mineral Leasing and Development

House

[H.R.2579](#) — 116th Congress (2019-2020) **Hardrock Leasing and Reclamation Act of 2019** Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 05/08/2019) Cosponsors: (19) Committees: House - Natural Resources **Latest Action:** House - 05/09/2019 Subcommittee Hearings Held. ([All Actions](#))

Missing or Murdered Indians

Senate

[S.227](#) — 116th Congress (2019-2020) Savanna's Act Sponsor: [Sen. Murkowski, Lisa \[R-AK\]](#) (Introduced 01/25/2019) Cosponsors: (22) Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

[S.336](#) — 116th Congress (2019-2020) Studying the Missing and Murdered Indian Crisis Act of 2019 Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 02/05/2019) Cosponsors: (6) Committees: Senate - Indian Affairs **Latest Action:** Senate - 02/05/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.1853](#) — 116th Congress (2019-2020) BADGES for Native Communities Act Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 06/13/2019) Cosponsors: (5) Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

[S.1892](#) — 116th Congress (2019-2020) TRAC Act Sponsor: [Sen. Daines, Steve \[R-MT\]](#) **Latest Action:** Senate - 06/19/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.1893](#) — 116th Congress (2019-2020) FIND Act Sponsor: [Sen. Daines, Steve \[R-MT\]](#) (Introduced 06/19/2019) Cosponsors: (0) Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[S.Res.36](#) — 116th Congress (2019-2020) A resolution supporting the observation of National Trafficking and Modern Slavery Prevention Month during the period beginning on January 1, 2019, and ending on February 1, 2019, to raise awareness of, and opposition to, human trafficking and modern slavery. Sponsor: [Sen. Feinstein, Dianne \[D-CA\]](#) (Introduced 01/31/2019) Cosponsors: (12) Committees: Senate - Judiciary **Latest Action:** Senate - 02/12/2019 Resolution agreed to in Senate without amendment and with a preamble by Unanimous Consent. (text: CR 1/31/2019 [S810-811](#)) ([All Actions](#))

[S.Res.144](#) — 116th Congress (2019-2020) A resolution designating May 5, 2019, as the "National Day of Awareness for Missing and Murdered Native Women and Girls". Sponsor: [Sen. Daines, Steve \[R-MT\]](#) (Introduced 04/04/2019) Cosponsors: (12) Committees: Senate - Judiciary **Latest Action:** Senate - 05/02/2019 Resolution agreed

to in Senate without amendment and with a preamble by Unanimous Consent. ([All Actions](#))

House

[H.R.2029](#) — 116th Congress (2019-2020) Studying the Missing and Murdered Indian Crisis Act of 2019 Sponsor: [Rep. Gallego, Ruben \[D-AZ-7\]](#) (Introduced 04/02/2019) Cosponsors: (7) Committees: House - Judiciary, Natural Resources **Latest Action:** House - 05/15/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[H.R.2733](#) — 116th Congress (2019-2020) Savanna's Act Sponsor: [Rep. Torres, Norma J. \[D-CA-35\]](#) (Introduced 05/14/2019) Cosponsors: (28) Committees: House - Judiciary, Natural Resources **Latest Action:** House - 06/26/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[H.Res.48](#) — 116th Congress (2019-2020) **Supporting the observation of "National Trafficking and Modern Slavery Prevention Month"** during the period beginning on January 1, 2019, and ending on February 1, 2019, to raise awareness of, and opposition to, human trafficking and modern slavery. Sponsor: [Rep. LaHood, Darin \[R-IL-18\]](#) (Introduced 01/16/2019) Cosponsors: (1) Committees: House - Judiciary **Latest Action:** House - 01/16/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[H.Res.90](#) — 116th Congress (2019-2020) **Supporting the observation of "National Slavery and Human Trafficking Prevention Month"** during January 2019 to promote efforts to prevent, eradicate, and raise awareness of human trafficking and modern slavery. Sponsor: [Rep. Costa, Jim \[D-CA-16\]](#) (Introduced 01/30/2019) Cosponsors: (7) Committees: House - Judiciary **Latest Action:** House - 01/30/2019 Referred to the House Committee on the Judiciary. ([All Actions](#))

NEPA

Senate

[S.1518](#) — 116th Congress (2019-2020) Rebuild America Now Act Sponsor: [Sen. Sullivan, Dan \[R-AK\]](#) (Introduced 05/16/2019) Cosponsors: (4) Committees: Senate - Environment and Public Works **Latest Action:** Senate - 05/16/2019 Read twice and referred to the Committee on Environment and Public Works. ([All Actions](#))

House

[H.R.2607](#) — 116th Congress (2019-2020) **Resilient Federal Forests Act of 2019** Sponsor: [Rep. Westerman, Bruce \[R-AR-4\]](#) (Introduced 05/08/2019) Cosponsors: (23) Committees: House - Agriculture, Natural Resources **Latest Action:** House - 06/07/2019 Referred to the Subcommittee on Conservation and Forestry. ([All Actions](#))

Opiod Addiction and Treatment

Senate

[S.1365](#) — 116th Congress (2019-2020) **Comprehensive Addiction Resources Emergency Act of 2019** Sponsor: [Sen. Warren, Elizabeth \[D-MA\]](#) (Introduced 05/08/2019) Cosponsors: (11) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 05/08/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

House

[H.R.1303](#) — 116th Congress (2019-2020) Examining Opioid Treatment Infrastructure Act of 2019 Sponsor: [Rep. Foster, Bill \[D-IL-11\]](#) (Introduced 02/15/2019) Cosponsors: (0) Committees: House - Energy and Commerce, Natural Resources **Latest Action:** House - 03/08/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Recognition and Restoration

Senate

[S.51](#) — 116th Congress (2019-2020) Little Shell Tribe of Chippewa Indians Restoration Act of 2019 Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 01/08/2019) Cosponsors: (1) Committees: Senate - Indian Affairs **Latest Action:** Senate - 01/29/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[S.1368](#) — 116th Congress (2019-2020) Lumbee Recognition Act Sponsor: [Sen. Burr, Richard \[R-NC\]](#) (Introduced 05/08/2019) Cosponsors: (0) Committees: Senate - Indian Affairs **Latest Action:** Senate - 05/08/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

House

[H.R.297](#) — 116th Congress (2019-2020) Little Shell Tribe of Chippewa Indians Restoration Act of 2019 Sponsor: [Rep. Gianforte, Greg \[R-MT-At Large\]](#) (Introduced 01/08/2019) Cosponsors: (0) Committees: House - Natural Resources **Latest Action:** Senate - 03/28/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 48. ([All Actions](#))

[H.R.1964](#) — 116th Congress (2019-2020) Lumbee Recognition Act Sponsor: [Rep. Butterfield, G. K. \[D-NC-1\]](#) (Introduced 03/28/2019) Cosponsors: (2) Committees: House - Natural Resources **Latest Action:** House - 04/17/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Revisions to Title 25 of the United States Code

Senate

[**S.2071**](#) — 116th Congress (2019-2020) **Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes Act** Sponsor: [Sen. Rounds, Mike \[R-SD\]](#) (Introduced 07/10/2019) **Cosponsors:** (2) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 07/17/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[**S.2159**](#) — 116th Congress (2019-2020) **A bill to repeal the Act entitled "An Act to confer jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation".** Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 07/18/2019) **Cosponsors:** (1) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 07/18/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

House

[**H.R.3684**](#) — 116th Congress (2019-2020) **An Act Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes** Sponsor: [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 07/10/2019) **Cosponsors:** (3) **Committees:** House - Natural Resources **Latest Action:** House - 07/10/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

Self-Determination and Self-Governance

Senate

[**S.209**](#) — 116th Congress (2019-2020) **PROGRESS for Indian Tribes Act** Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) **Cosponsors:** (5) **Committees:** Senate - Indian Affairs | House - Natural Resources **Committee Reports:** [S. Rept. 116-34](#) **Latest Action:** House - 07/03/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

House

[**H.R.2031**](#) — 116th Congress (2019-2020) **PROGRESS for Indian Tribes Act** Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 04/02/2019) **Cosponsors:** (12) **Committees:** House - Natural Resources **Latest Action:** House - 07/16/2019 Subcommittee Hearings Held. ([All Actions](#))

Surface Mining and Reclamation

Senate

[S.1232](#) — 116th Congress (2019-2020) **RECLAIM Act of 2019 Sponsor:** [Sen. Manchin, Joe, III \[D-WV\]](#) (Introduced 04/30/2019) **Cosponsors:** (6) Committees: Senate - Energy and Natural Resources **Latest Action:** Senate - 04/30/2019 Read twice and referred to the Committee on Energy and Natural Resources. ([All Actions](#))

House

[H.R.2156](#) — 116th Congress (2019-2020) **RECLAIM Act of 2019 Sponsor:** [Rep. Cartwright, Matt \[D-PA-8\]](#) (Introduced 04/09/2019) **Cosponsors:** (58) Committees: House - Natural Resources **Latest Action:** House - 05/01/2019 Ordered to be Reported (Amended) by the Yeas and Nays: 26 - 10. ([All Actions](#))

Taxation

House

[H.R.2484](#) — 116th Congress (2019-2020) Tribal Tax and Investment Reform Act of 2019 Sponsor: [Rep. Kind, Ron \[D-WI-3\]](#) (Introduced 05/02/2019) Cosponsors: (14) Committees: House - Ways and Means, Education and Labor **Latest Action:** House - 05/02/2019 Referred to the Committee on Ways and Means, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee. ([All Actions](#))

Termination of Federal-Tribal Relations

House

[H.R.1514](#) — 116th Congress (2019-2020) To sever United States Government relations with the Creek Nation of Oklahoma until such time as the Creek Nation of Oklahoma restores full Tribal citizenship to the Creek Freedmen disenfranchised in the October 6, 1979, Creek Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes. Sponsor: [Rep. Davis, Danny K. \[D-IL-7\]](#) (Introduced 03/05/2019) Cosponsors: (0) Committees: House - Natural Resources, Judiciary **Latest Action:** House - 05/03/2019 Referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. ([All Actions](#))

Transportation

Senate

[S.207](#) — 116th Congress (2019-2020) A bill to enhance tribal road safety, and for other purposes. Sponsor: [Sen. Barrasso, John \[R-WY\]](#) (Introduced 01/24/2019) Cosponsors: (1) Committees: Senate - Indian Affairs **Latest Action:** Senate - 01/29/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[S.1211](#) — 116th Congress (2019-2020) Addressing Underdeveloped and Tribally Operated Streets Act Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 04/11/2019) Cosponsors: (2) Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Ordered to be reported with an amendment in the nature of a substitute favorably. ([All Actions](#))

Treaties

Senate

[S.50](#) — 116th Congress (2019-2020) **Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act** Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 01/08/2019) Cosponsors: (3) Committees: Senate - Indian Affairs Committee Reports: [S. Rept. 116-7](#) **Latest Action:** House - 06/28/2019 Held at the desk. ([All Actions](#))

[S.832](#) — 116th Congress (2019-2020) A bill to nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865. Sponsor: [Sen. Merkley, Jeff \[D-OR\]](#) (Introduced 03/14/2019) Cosponsors: (1) Committees: Senate - Indian Affairs | House - Natural Resources Committee Reports: [S. Rept. 116-45](#) **Latest Action:** House - 06/28/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

House

[H.R.91](#) — 116th Congress (2019-2020) Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act Sponsor: [Rep. Blumenauer, Earl \[D-OR-3\]](#) (Introduced 01/03/2019) Cosponsors: (1) Committees: House - Natural Resources | Senate - Indian Affairs Latest Action: Senate - 04/30/2019 Received in the Senate and Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[H.R.1803](#) — 116th Congress (2019-2020) To nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865. Sponsor: [Rep. Walden, Greg \[R-OR-2\]](#) (Introduced 03/14/2019) Cosponsors: (4) Committees: House - Natural Resources Latest Action: House - 06/05/2019 Subcommittee Hearings Held. ([All Actions](#))

Veterans

Senate

[S.257](#) — 116th Congress (2019-2020) Tribal HUD-VASH Act of 2019 Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 01/29/2019) Cosponsors: (9) Committees: Senate – Indian Affairs | House - Financial Services Committee Reports: [S. Rept. 116-21 Latest](#) **Action:** House - 06/28/2019 Referred to the House Committee on Financial Services. ([All Actions](#))

[S.445](#) — 116th Congress (2019-2020) **Veterans Medical Marijuana Safe Harbor Act** Sponsor: [Sen. Schatz, Brian \[D-HI\]](#) (Introduced 02/12/2019) Cosponsors: (1) Committees: Senate - Judiciary **Latest Action:** Senate - 02/12/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

[S.524](#) — 116th Congress (2019-2020) **Department of Veterans Affairs Tribal Advisory Committee Act of 2019** Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 02/14/2019) Cosponsors: (7) Committees: Senate - Veterans' Affairs **Latest Action:** Senate - 05/22/2019 Committee on Veterans' Affairs. Hearings held. ([All Actions](#))

[S.1001](#) — 116th Congress (2019-2020) Tribal Veterans Health Care Enhancement Act Sponsor: [Sen. Thune, John \[R-SD\]](#) (Introduced 04/03/2019) Cosponsors: (1) Committees: Senate - Indian Affairs **Latest Action:** Senate - 04/03/2019 Read twice and referred to the Committee on Indian Affairs. (text: CR [S2241-2242](#)) ([All Actions](#))

House

[H.R.1151](#) — 116th Congress (2019-2020) **Veterans Medical Marijuana Safe Harbor Act** Sponsor: [Rep. Lee, Barbara \[D-CA-13\]](#) (Introduced 02/12/2019) Cosponsors: (1) Committees: House - Energy and Commerce, Judiciary, Veterans' Affairs **Latest Action:** House - 03/25/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[H.Res.403](#) — 116th Congress (2019-2020) **Honoring and recognizing the military service and contributions of Native American veterans and communities.** Sponsor: [Rep. Gallego, Ruben \[D-AZ-7\]](#) (Introduced 05/23/2019) Cosponsors: (1) Committees: House - Veterans' Affairs, Natural Resources, Armed Services **Latest Action:** House - 05/28/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Victims of Crime

Senate

[**S.211**](#) — 116th Congress (2019-2020) SURVIVE Act Sponsor: [Sen. Hoeven, John \[R-ND\]](#) (Introduced 01/24/2019) Cosponsors: (14) Committees: Senate - Indian Affairs

Committee Reports: [S. Rept. 116-40](#) **Latest Action:** Senate - 05/13/2019 Placed on Senate Legislative Calendar under General Orders. Calendar No. 84. ([All Actions](#))

[**S.288**](#) — 116th Congress (2019-2020) Justice for Native Survivors of Sexual Violence Act Sponsor: [Sen. Smith, Tina \[D-MN\]](#) (Introduced 01/31/2019) Cosponsors: (2) Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

[**S.627**](#) — 116th Congress (2019-2020) **SAFE Act of 2019 Sponsor:** [Sen. Murray, Patty \[D-WA\]](#) (Introduced 02/28/2019) **Cosponsors:** (16) Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 02/28/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[**S.1352**](#) — 116th Congress (2019-2020) **Resources for Victims of Gun Violence Act of 2019 Sponsor:** [Sen. Casey, Robert P., Jr. \[D-PA\]](#) (Introduced 05/07/2019) **Cosponsors:** (2) Committees: Senate - Judiciary **Latest Action:** Senate - 05/07/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

[**S.1624**](#) — 116th Congress (2019-2020) **HEALS Act Sponsor:** [Sen. Cornyn, John \[R-TX\]](#) (Introduced 05/22/2019) **Cosponsors:** (3) Committees: Senate - Banking, Housing, and Urban Affairs **Latest Action:** Senate - 05/22/2019 Read twice and referred to the Committee on Banking, Housing, and Urban Affairs. ([All Actions](#))

[**S.1959**](#) — 116th Congress (2019-2020) **Ensuring Representation for Survivors Act Sponsor:** [Sen. Sullivan, Dan \[R-AK\]](#) (Introduced 06/25/2019) **Cosponsors:** (1) Committees: Senate - Judiciary **Latest Action:** Senate - 06/25/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

House

[**H.R.1351**](#) — 116th Congress (2019-2020) **SURVIVE Act Sponsor:** [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 02/25/2019) **Cosponsors:** (15) Committees: House - Judiciary **Latest Action:** House - 03/25/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.1468**](#) — 116th Congress (2019-2020) **SAFE Act of 2019 Sponsor:** [Rep. Roybal-Allard, Lucille \[D-CA-40\]](#) (Introduced 02/28/2019) **Cosponsors:** (61) Committees: House - Education and Labor, Financial Services, Ways and Means, Judiciary **Latest**

Action: House - 04/08/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[H.R.2585](#) — 116th Congress (2019-2020) **Resources for Victims of Gun Violence**

Act of 2019 Sponsor: [Rep. Evans, Dwight \[D-PA-3\]](#) (Introduced 05/08/2019)

Cosponsors: (50) **Committees:** House - Judiciary **Latest Action:** House - 05/31/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

Violence Against Women and Sexual Violence

Senate

[S.290](#) — 116th Congress (2019-2020) **Native Youth and Tribal Officer Protection Act**

Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 01/31/2019) **Cosponsors:** (4)

Committees: Senate - Indian Affairs **Latest Action:** Senate - 06/19/2019 Committee on Indian Affairs. Hearings held. ([All Actions](#))

[S.402](#) — 116th Congress (2019-2020) **SASCA Sponsor:** [Sen. Murray, Patty \[D-WA\]](#)

(Introduced 02/07/2019) **Cosponsors:** (14) **Committees:** Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 02/07/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.506](#) — 116th Congress (2019-2020) **Extreme Risk Protection Order Act of 2019**

Sponsor: [Sen. Feinstein, Dianne \[D-CA\]](#) (Introduced 02/14/2019) **Cosponsors:** (27)

Committees: Senate - Judiciary **Latest Action:** Senate - 02/14/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

[S.855](#) — 116th Congress (2019-2020) **Closing the Law Enforcement Consent**

Loophole Act of 2019 Sponsor: [Sen. Blumenthal, Richard \[D-CT\]](#) (Introduced

03/25/2019) **Cosponsors:** (2) **Committees:** Senate - Judiciary **Latest Action:** Senate - 03/25/2019 Read twice and referred to the Committee on the Judiciary. ([All Actions](#))

[S.976](#) — 116th Congress (2019-2020) **Campus Accountability and Safety Act**

Sponsor: [Sen. Gillibrand, Kirsten E. \[D-NY\]](#) (Introduced 04/01/2019) **Cosponsors:** (13)

Committees: Senate - Health, Education, Labor, and Pensions **Latest Action:** Senate - 04/01/2019 Read twice and referred to the Committee on Health, Education, Labor, and Pensions. ([All Actions](#))

[S.1777](#) — 116th Congress (2019-2020) **Accountability for Sexual and Gender-based**

Violence as a Tool in Conflict Act of 2019 Sponsor: [Sen. Markey, Edward J. \[D-MA\]](#)

(Introduced 06/11/2019) **Cosponsors:** (2) **Committees:** Senate - Foreign Relations

Latest Action: Senate - 06/11/2019 Read twice and referred to the Committee on Foreign Relations. ([All Actions](#))

House

[**H.R.505**](#) — 116th Congress (2019-2020) **CARE Act Sponsor:** [Rep. Calvert, Ken \[R-CA-42\]](#) (Introduced 01/11/2019) **Cosponsors:** (3) **Committees:** House - Judiciary
Latest Action: House - 02/25/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.958**](#) — 116th Congress (2019-2020) Native Youth and Tribal Officer Protection Act Sponsor: [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 02/04/2019) Cosponsors: (7) Committees: House - Natural Resources, Education and Labor, Energy and Commerce
Latest Action: House - 02/22/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

[**H.R.973**](#) — 116th Congress (2019-2020) **Violence Against Women Health Act of 2019 Sponsor:** [Rep. Dingell, Debbie \[D-MI-12\]](#) (Introduced 02/05/2019) **Cosponsors:** (25) **Committees:** House - Energy and Commerce **Latest Action:** House - 02/05/2019 Referred to the House Committee on Energy and Commerce. ([All Actions](#))

[**H.R.1082**](#) — 116th Congress (2019-2020) **SASCA Sponsor:** [Rep. Jayapal, Pramila \[D-WA-7\]](#) (Introduced 02/07/2019) **Cosponsors:** (1) **Committees:** House - Energy and Commerce, Ways and Means, Education and Labor **Latest Action:** House - 02/07/2019 Referred to the Subcommittee on Health. ([All Actions](#))

[**H.R.1100**](#) — 116th Congress (2019-2020) **Nicole's Law Act of 2019 Sponsor:** [Rep. Smith, Christopher H. \[R-NJ-4\]](#) (Introduced 02/07/2019) **Cosponsors:** (1) **Committees:** House - Judiciary **Latest Action:** House - 03/25/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.1239**](#) — 116th Congress (2019-2020) **Protecting Women Act of 2019 Sponsor:** [Rep. Lesko, Debbie \[R-AZ-8\]](#) (Introduced 02/14/2019) **Cosponsors:** (1) **Committees:** House - Judiciary, Energy and Commerce, Natural Resources, Financial Services
Latest Action: House - 03/25/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.1310**](#) — 116th Congress (2019-2020) **VAWA Protections for Rural Women Act of 2019 Sponsor:** [Rep. Gonzalez, Vicente \[D-TX-15\]](#) (Introduced 02/19/2019) **Cosponsors:** (4) **Committees:** House - Financial Services **Latest Action:** House - 02/19/2019 Referred to the House Committee on Financial Services. ([All Actions](#))

[**H.R.1574**](#) — 116th Congress (2019-2020) **Closing the Law Enforcement Consent Loophole Act of 2019 Sponsor:** [Rep. Speier, Jackie \[D-CA-14\]](#) (Introduced 03/06/2019) **Cosponsors:** (9) **Committees:** House - Judiciary **Latest Action:** House - 04/08/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.1585**](#) — 116th Congress (2019-2020) **Violence Against Women Reauthorization Act of 2019** Sponsor: [Rep. Bass, Karen \[D-CA-37\]](#) (Introduced 03/07/2019)

Cosponsors: (167) **Committees:** House - Judiciary, Energy and Commerce, Financial Services, Ways and Means, Education and Labor, Natural Resources, Veterans' Affairs

Committee Reports: [H. Rept. 116-21](#) **Latest Action:** Senate - 04/10/2019 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 66. ([All Actions](#))²

[**H.Amdt.143**](#) — 116th Congress (2019-2020) Amends Bill: [H.R.1585](#) Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Offered 04/03/2019) **Latest Action:** 04/03/19 On agreeing to the Haaland amendment (A027) Agreed to by voice vote. ([All Actions](#))

[**H.R.1741**](#) — 116th Congress (2019-2020) **Violence Against Women Extension Act of 2019** Sponsor: [Rep. Stefanik, Elise M. \[R-NY-21\]](#) (Introduced 03/13/2019)

Cosponsors: (67) **Committees:** House - Judiciary, Energy and Commerce, Natural Resources, Financial Services **Latest Action:** House - 05/03/2019 Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. ([All Actions](#))

[**H.R.3212**](#) — 116th Congress (2019-2020) **Accountability for Sexual and Gender-based Violence as a Tool in Conflict Act of 2019** Sponsor: [Rep. Pingree, Chellie \[D-ME-1\]](#) (Introduced 06/11/2019) **Cosponsors:** (10) **Committees:** House - Foreign Affairs, Judiciary **Latest Action:** House - 06/28/2019 Referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. ([All Actions](#))

[**H.R.3381**](#) — 116th Congress (2019-2020) **Hold Accountable and Lend Transparency on Campus Sexual Violence Act** Sponsor: [Rep. Speier, Jackie \[D-CA-14\]](#) (Introduced 06/20/2019) **Cosponsors:** (50) **Committees:** House - Education and Labor, Judiciary **Latest Action:** House - 06/20/2019 Referred to the Committee on Education and Labor, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of each committee. ([All Actions](#))

[**H.R.3977**](#) — 116th Congress (2019-2020) **To amend the Indian Civil Rights Act of 1968 to extend the jurisdiction of tribal courts to cover crimes involving sexual violence, and for other purposes.** Sponsor: [Rep. Haaland, Debra A. \[D-NM-1\]](#) (Introduced 07/25/2019) **Cosponsors:** (4) **Committees:** House - Natural Resources **Latest Action:** House - 07/25/2019 Referred to the House Committee on Natural Resources. ([All Actions](#))

² The Congressional Research Service has identified 10 bills as related to H.R. 1585. They are: H.R. 570 and S. 134, Combat Online Predators Act; H.R. 600 and S.171, Abby Honold Act; H.R. 1574 and S. 855, Closing the Law Enforcement Consent Loophole Act of 2019; H.R. 2029 and S. 336, Studying the Missing and Murdered Indian Crisis Act of 2019; H.R. 3552, Unlawful Gun Buyer Alert Act; and S. 1432 Improve Data on Sexual Violence Act. Links to these bills may be accessed at <https://congress.gov>

[**H.Res.278**](#) — 116th Congress (2019-2020) **Expressing the sense of the House of Representatives to recognize the crisis of violence against Native women.**

Sponsor: [Rep. Moore, Gwen \[D-WI-4\]](#) (Introduced 04/01/2019) **Cosponsors:** (6)

Committees: House - Natural Resources **Latest Action:** House - 04/02/2019 Referred to the Subcommittee for Indigenous Peoples of the United States. ([All Actions](#))

Water

Senate

[**S.886**](#) — 116th Congress (2019-2020) **Indian Water Rights Settlement Extension Act**

Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 03/27/2019) **Cosponsors:** (2)

Committees: Senate - Energy and Natural Resources, Indian Affairs **Latest Action:** Senate - 07/17/2019 Committee on Indian Affairs. Ordered to be reported with an amendment in the nature of a substitute favorably. ([All Actions](#))

[**S.1207**](#) — 116th Congress (2019-2020) **Navajo Utah Water Rights Settlement Act of 2019**

Sponsor: [Sen. Romney, Mitt \[R-UT\]](#) (Introduced 04/11/2019) **Cosponsors:** (3)

Committees: Senate - Indian Affairs **Latest Action:** Senate - 05/15/2019 Committee on Indian Affairs. Ordered to be reported without amendment favorably. ([All Actions](#))

[**S.1277**](#) — 116th Congress (2019-2020) **Hualapai Tribe Water Rights Settlement Act of 2019**

Sponsor: [Sen. McSally, Martha \[R-AZ\]](#) (Introduced 05/01/2019) **Cosponsors:** (1)

Committees: Senate - Indian Affairs **Latest Action:** Senate - 05/01/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[**S.1875**](#) — 116th Congress (2019-2020) **Aamodt Litigation Settlement Completion Act of 2019**

Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 06/18/2019) **Cosponsors:**

(1) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 06/18/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

[**S.1977**](#) — 116th Congress (2019-2020) **Kickapoo Tribe in Kansas Water Rights Settlement Act**

Sponsor: [Sen. Moran, Jerry \[R-KS\]](#) (Introduced 06/26/2019)

Cosponsors: (0) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 06/26/2019 Read twice and referred to the Committee on Indian Affairs. ([All Actions](#))

House

[**H.R.644**](#) — 116th Congress (2019-2020) **Navajo Utah Water Rights Settlement Act of 2019**

Sponsor: [Rep. Bishop, Rob \[R-UT-1\]](#) (Introduced 01/17/2019) **Cosponsors:** (5)

Committees: House - Natural Resources **Latest Action:** House - 06/26/2019 Subcommittee Hearings Held. ([All Actions](#))

[**H.R.2030**](#) — 116th Congress (2019-2020) **Colorado River Drought Contingency Plan Authorization Act**

Sponsor: [Rep. Grijalva, Raul M. \[D-AZ-3\]](#) (Introduced 04/02/2019)

Cosponsors: (36) **Committees:** House - Natural Resources **Latest Action:** 04/16/2019 Became Public Law No: 116-14. ([All Actions](#))

[H.R.2459](#) — 116th Congress (2019-2020) Hualapai Tribe Water Rights Settlement Act of 2019 Sponsor: [Rep. O'Halleran, Tom \[D-AZ-1\]](#) (Introduced 05/01/2019) Cosponsors: (7) Committees: House - Natural Resources **Latest Action:** House - 06/26/2019 Subcommittee Hearings Held. ([All Actions](#))

[H.R.3491](#) — 116th Congress (2019-2020) Kickapoo Tribe in Kansas Water Rights Settlement Act Sponsor: [Rep. Watkins, Steve \[R-KS-2\]](#) (Introduced 06/25/2019) Cosponsors: (1) Committees: House - Natural Resources, Agriculture **Latest Action:** House - 06/25/2019 Referred to the Committee on Natural Resources, and in addition to the Committee on Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. ([All Actions](#))

Wildlife

Senate

[S.689](#) — 116th Congress (2019-2020) **Chronic Wasting Disease Management Act** Sponsor: [Sen. Tester, Jon \[D-MT\]](#) (Introduced 03/06/2019) Cosponsors: (7) Committees: Senate - Agriculture, Nutrition, and Forestry **Latest Action:** Senate - 03/06/2019 Read twice and referred to the Committee on Agriculture, Nutrition, and Forestry. ([All Actions](#))

[S.1499](#) — 116th Congress (2019-2020) Wildlife Corridors Conservation Act of 2019 Sponsor: [Sen. Udall, Tom \[D-NM\]](#) (Introduced 05/16/2019) Cosponsors: (11) Committees: Senate - Environment and Public Works **Latest Action:** Senate - 05/16/2019 Read twice and referred to the Committee on Environment and Public Works. ([All Actions](#))

House

[H.R.2795](#) — 116th Congress (2019-2020) Wildlife Corridors Conservation Act of 2019 Sponsor: [Rep. Beyer, Donald S., Jr. \[D-VA-8\]](#) (Introduced 05/16/2019) Cosponsors: (2) Committees: House - Natural Resources, Agriculture, Armed Services, Transportation and Infrastructure **Latest Action:** House - 06/10/2019 Referred to the Subcommittee on Conservation and Forestry. ([All Actions](#))

AUGUST 16, 2019

Congresswoman Haaland and Senator Warren Release Legislative Proposal to Address Chronic Underfunding and Barriers to Sovereignty in Indian Country

Outline of the Honoring Promises to Native Nations Act offers ideas to enact recommendations from the U.S. Commission on Civil Rights’ “Broken Promises” Report; Lawmakers welcome input from tribal nations and citizens, experts, and other stakeholders on future legislation that will honor America’s promises to Native peoples.

[Legislative Proposal \(PDF\)](#) | [Legislative Appendices \(PDF\)](#) | [One-Pager \(PDF\)](#)

Report by USCCR: *Broken Promises: Continuing Federal Funding Shortfall for Native Americans (PDF)*

Washington, DC - United States Congresswoman Deb Haaland (D-N.M.), Co-Chair of the Congressional Native American Caucus and the first Native woman to preside over the House floor during the 116th Congress, and Senator Elizabeth Warren (D-Mass.) today released a proposal for a forthcoming bill, the *Honoring Promises to Native Nations Act*. The legislation will address chronic underfunding and barriers to sovereignty in Indian

Country and hold the federal government accountable for honoring America's legal promises to Native peoples.

These legal promises—to provide resources for housing, education, health care, self-determination, and public safety—are known as the federal government's 'Trust Responsibility.' While the federal government has substantial trust and treaty obligations to tribal nations, it has repeatedly failed to honor these obligations, leaving many programs affecting Native communities under-resourced and inefficiently structured.

The lawmakers have opened a public discussion on the proposal and are seeking feedback from tribal governments and citizens, tribal organizations, experts, and other stakeholders in advance of the bill's introduction in Congress. The proposal outlines options for legislatively implementing the recommendations of last year's U.S. Commission on Civil Rights (USCCR) report, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, which the lawmakers view as a call to action for the entire U.S. Congress.

Based on tribal feedback, expert and public input, and extensive research and analysis, the USCCR's *Broken Promises* report, released on December 20, 2018, evaluated the extent to which the federal government is meeting its trust and treaty responsibilities. The report also examined resources provided by the federal agencies that administer programs for Native Americans and Native Hawaiians, including the Departments of Health and Human Services, Interior, Housing and Urban Development, Justice, and Education, and concluded that federal programs designed to support the social and economic wellbeing of tribal nations and Native peoples remain chronically underfunded and often inefficiently structured. The report put it bluntly: "The United States expects all nations to live up to their treaty obligations and it should live up to its own."

"Native American communities have endured a long history of oppression and broken promises – from blankets laced in disease to times when my grandparents and others in their communities were taken away from their

families and put into boarding schools – the federal government has failed to live up to its responsibility to Native Nations to provide support for basic necessities in exchange for land and mass extermination of Native people,” said **Congresswoman Deb Haaland**. “Congress will have an opportunity to address the longstanding failures of the federal government. This legislative proposal is the vehicle to further the conversation about what Indian Country needs for these promises to be adequately fulfilled, and to empower tribal governments to serve their people. The federal government must honor its promises.”

“It’s beyond time to make good on America’s responsibilities to Native peoples, and that is why I’m working with Congresswoman Haaland to draft legislation that will ensure the federal government lives up to its obligations and will empower tribal governments to address the needs of their citizens,” **Senator Warren said**. “We look forward to working closely with tribal nations to advance legislation that honors the United States’ promises to Native peoples.”

“With the release of our report, the U.S. Commission on Civil Rights called for immediate Congressional action to ensure Native Americans and Native Hawaiians live, work, and learn with the same expectations for opportunity and equality to which all other Americans have access,” said **USCCR Chair Catherine E. Lhamon**. “We are grateful that Senator Warren and Representative Haaland heard that urgent call, and we look forward to working with them on legislation to address the Commission’s recommendations.”

Senator Warren and Congresswoman Haaland’s proposal offers a number of provisions to reaffirm the unique government-to-government relationship between the federal government and tribal nations and to improve the federal programs that support the social and economic wellbeing of tribal nations and Native peoples. The proposal invites feedback on how best to achieve budgetary certainty and transparency for Native programs, increase Tribal representation in the Executive Branch, require meaningful and timely

consultation by the federal government with tribes, and improve tribal self-governance and self-determination.

The proposal's five titles—mirroring the five chapters of the *Broken Promises* report—highlight areas where the federal government has failed to fulfill its Trust Responsibility, including criminal justice and public safety, health care, education, housing, and economic development, and propose options for addressing the chronic underfunding of programs associated with these areas to strengthen the wellbeing of all Native American communities and their ability to function as self-governing entities.

Their proposal has earned the following statements of support:

“The recent *Broken Promises* report confirms what Indian Country knows all too well – the federal government is failing to live up to its trust and treaty obligations to tribal nations through both its policy making and its budget process. Federal programs designed to support the social and economic wellbeing of American Indians and Alaska Natives remain chronically underfunded, leaving many basic needs unmet, and tribal governments must still wrestle with barriers to economic prosperity that no other governments must contend with,” **said Jefferson Keel, President of the National Congress of American Indians (NCAI).** “NCAI welcomes the 116th Congress having a genuine legislative conversation about the solutions the federal government must embrace if it is to finally make good on its promises to Indian Country.”

“NAIHC is excited that members of Congress are considering serious reforms to tribal programs in light of the recent U.S. Commission on Civil Rights’ *Broken Promises Report,*” **said National American Indian Housing Council Board Chairman Gary Cooper.** “NAIHC has maintained that housing programs have been underfunded for years and can be reformed to improve their effectiveness of creating affordable housing opportunities in our tribal communities. We look forward to working with Senator Warren, Representative Haaland, and all other members of Congress who are committed to fulfilling the obligations of the United States to tribal nations and improving lives throughout Indian Country.”

"American Indians and Alaska Natives are this Continents' First Peoples, yet we remain last in health care status and accessibility despite the sacred promises the United States negotiated with us. This must change. The U.S. Commission on Civil Rights Broken Promises report exposes the often desperate and largely invisible struggles our Nations, communities, and the health systems that serve us endure because the United States continues to break its promises to Tribes. The National Indian Health Board applauds any congressional efforts to turn this around and honor the Trust and Treaty obligations of the United States to Tribal Nations," **said Victoria Kitcheyan, Chairwoman of the National Indian Health Board, and Councilwoman for the Winnebago Tribe of Nebraska.**

"NIEA is thrilled Congress is taking steps towards fulfilling their federal trust responsibility to Native people by addressing federal failures identified in the U.S. Commission on Civil Rights' Broken Promises Report. Full funding for Native education is pivotal to Native governance and community development leading to empowered Native youth thriving in the classroom and beyond. We look forward to working with Congresswoman Haaland, Senator Warren, and all other members of Congress to advance educational opportunities for Native students through this and future legislative proposals." -- **National Indian Education Association**

"The National Council of Urban Indian Health (NCUIH) has long encouraged Members of Congress and the Administration to honor the United States trust obligations to Indian Country including American Indians and Alaska Natives (AI/AN) on and off reservations. For over 20 years, we have advocated for proper funding of IHS, which includes Urban Indian health care, the overall betterment of Indian Country and the rights of Sovereign nations. NCUIH agrees with the Broken Promises report that emphasizes the critical role of the 41 Title V Urban Indian Organizations (UIOs) funded by Indian Health Service that provide "the only affordable, culturally competent health care services available in urban areas. " The report accurately states that 70% of AI/ANs live in urban areas and 'many of the recurring health problems faced by Native Americans in general are more acute for those living in urban

areas.’ We look forward to working with the 116th Congress on incorporating suggestions on how best to provide full, guaranteed funding to IHS for Tribes and UIOs including outlining steps to ensure UIOs are able to do their critical work,” **said NCUIH Executive Director Francys Crevier.**

“NIWRC continues to call on Congress for a deeper and broader response to the inadequacies identified by the U.S. Commission on Civil Rights’ *Broken Promises* Report and supports the further development of the Honoring Promises to Native Nations Act.” -- **National Indigenous Women’s Resource Center**

“American Indian and Alaska Native children and families have long been disadvantaged because of inequities in federal funding for tribal nations and barriers they experience as they exercise their sovereignty to protect the well-being of their citizens,” **said Gil Vigil, President of the National Indian Child Welfare Association Board of Directors.** “These disadvantages extend to not only to tribal children and families living on tribal lands, but also those living off tribal lands, especially those involved in state child welfare systems. We applaud Senator Warren and Congresswoman Haaland for introducing this legislation that provides some common sense solutions to helping improve the lives of American Indian and Alaska Native children and increasing the ability of tribes to meet the basic needs of their children and families.”

“We welcome this Congressional effort to address the important findings of the Broken Promises report. It is time for our federal government to work toward meeting its responsibilities to Indian Country. We look forward to working with Congresswoman Haaland and Senator Warren on designing this legislation.” -- **Native American Finance Officers Association**

“The National Indian Gaming Association is very supportive of Representative Haaland and Senator Warren’s joint legislation to address the civil rights commission’s *Broken Promises* report. The bill will promote Indian self-determination, sovereignty, and true government to government relations. The bill seeks to remedy the United States’ long time failure to adequately

find federal Indian programs and to ensure that the United States lives up to the federal trust responsibility to Indian tribes. Finally, the draft bill considers elevating the assistant secretary for Indian affairs to deputy secretary for Indian nations and mandating the National Council on Native Nations has a standing White House Executive Office Council. NIGA joins our tribal nations and sister organizations in supporting this important legislation.” -- **National Indian Gaming Association**

“The Native American CDFI Assistance program has proved instrumental in promoting entrepreneurship and growing Native economies. Unfortunately, however, it is routinely underfunded and oversubscribed. We applaud this proposal – it is time to fully fund the NACA program and grow Native American economies,” **said Pete Upton, Chairman of the Native CDFI Network.**

“Seattle Indian Health Board endorses the *Broken Promises* legislative proposal and thanks Senator Warren and Representative Haaland for working to address the chronic underfunding of tribal and urban Indian communities,” **said Aren Sparck (Cup’ik), Government Affairs Officer of the Seattle Indian Health Board.** “We look forward to working with our congressional champions to strengthen the federal trust and create a path to full funding for American Indian and Alaska Native programs that helps the federal government honor the treaties and serve all Native peoples, regardless of where we reside.”

“Thank you for your leadership and we look forward to working with you on legislation to mandate that all Federal agencies administering Native American programs identify and regularly assess unmet needs based on their authority, and that the Federal government will ensure that funding is adequate to meet these needs,” **said Chairman Robert Miguel of the Ak-Chin Indian Community.**

“The All Pueblo Council of Governors commends the leadership of Senator Warren and Representative Haaland in providing a foundation for advocacy following the *Broken Promises* Report to address the significant unmet needs

and federal funding in Indian Country as a central part of the federal government's ongoing trust responsibilities to our sovereign Pueblo and tribal nations,” said **E. Paul Torres of the All Pueblo Council of Governors**. “We look forward to the Congresswoman working with our member Pueblos to design this legislation in fulfillment of resources necessary to support the public safety, health care, education, housing, and economic development of our communities.”

“On behalf of the Great Plains Tribal Chairmen’s Association, we applaud Senator Warren and Congresswoman Haaland for taking the leadership role in addressing the Civil Right’s Report on the United States ‘Broken Promises’ to our Native Peoples,” said **Chairman Harold Frazier of the Great Plains Tribal Chairman’s Association**. “We need respect for our original treaties with the United States, and respect for our governments.” [Read the Chairman’s full statement here.](#)

“The Gun Lake Tribe strongly supports the efforts of Congresswoman Deb Haaland and Senator Elizabeth Warren to address the issues raised in the U.S. Commission on Civil Rights’ *Broken Promises* report. There are so many unmet needs in Indian Country and it’s long overdue for the Federal Government to commit the necessary resources that have long been promised to Indian Tribes,” said **Tribal Chairman Bob Peters of the Gun Lake Tribe**.

“A definitive and responsible Congressional response to the U.S. Commission on Civil Rights’ *Broken Promises* Report of 2018, as well as the *Quiet Crisis* Report of 2003, is long overdue,” said **W. Ron Allen, Tribal Chairman/CEO of the Jamestown S’Klallam Tribe**. “It is critical that Congress enacts legislation that empowers the 573 American Indian and Alaska Native Nations to overcome the systematic inequities that inhibit Tribal Nations from exercising their inherent sovereignty and Self-Governing authority that promotes Self-Reliance, as well as, addresses how the federal government will bridge the injustices identified in the report.”

“The U.S. Civil Rights Commissions *Broken Promises* report only reaffirms what Indian Country has known for a long time - the U.S. Government has failed to live up to its treaty obligations to our nation’s Indian Tribes. We highly commend the diligent work of Congresswoman Haaland and Senator Warren to finally address these issues and work to improve the quality of life in Indian Country,” **said Chairman Rodney Butler of the Mashantucket Pequot Tribal Nation.**

“Indian Country is chronically underfunded. Either through the trust responsibility or through our Treaty of 1868, we have been promised by the government that they will provide for education, healthcare, public safety, build our communities and provide much-needed infrastructure and development. Unfortunately, we have to continuously visit Washington to ensure that the federal government fully funds our programs and infrastructure so that they uphold their trust responsibility and treaty obligations. We ask that the administration and Congress work with us to continue to reach overarching goals of self-determination and provide for our physical, social, and economic well-being. We applaud Senator Warren and Representative Haaland for their leadership and hard work in addressing the federal government's funding shortfall in Indian Country. We support their efforts and look forward to working with them on these crucial issues,” **said Navajo Nation President Jonathan Nez.**

“The Oglala Sioux Tribe, signatory to several treaties with the United States (including the 1851 Treaty of Fort Laramie and the 1868 Great Sioux Nation Treaty) appreciates that Representative Haaland and Senator Warren are taking this important next step towards making the U.S. Commission on Civil Rights' recommendations in its *Broken Promises* report a reality for Tribal Nations,” **said President Julian Bear Runner of the Oglala Sioux Tribe.** “For too long, my people have had to live with a lack of promises kept by the federal government. We look forward to engaging with Representative Haaland and Senator Warren to shape this proposal and obtain action on the Commission's recommendations.”

“This proposal provides a meaningful and comprehensive policy framework for finally meeting the treaty and trust obligations of the United States to its Native people,” **said Tribal Chairman Mark Macarro of the Pechanga Band of Luiseño Indians.**

“I am eager to work with Congress as we embark on a commendable endeavor to begin to address the historical neglect of Tribal Nations by the United States as reported in the U.S. Commission on Civil Rights’ *Broken Promises* report,” **said Rosebud Sioux Tribe President Rodney Bordeaux.**

“The San Carlos Apache Tribe deeply appreciates Rep. Haaland and Senator Warren’s proposed legislation to address a history of structural inequality in Indian country as highlighted in the updated *Quiet Crisis* report,” **said Chairman Terry Rambler of the San Carlos Apache Tribe.** “The legislation will support tribal sovereignty and ensure the federal government is upholding its treaty and trust responsibilities. We thank the Congresswoman and Senator for shining a light on these issues and working to ignite meaningful change.”

“Ours has been a consistent Quiet Crisis of Broken Promises that remain today. Thank you Congresswoman Haaland and Senator Warren for leading this legislative effort to correct the unmet Federally funding needs of our citizens and our communities,” **said Chairman Arnold Cooper of the Squaxin Island Tribe.**

“We are so pleased that once again, Senator Warren and Congresswoman Haaland demonstrate their commitment to Indian Country. They work side by side with Indians and Indian Country advocates to raise awareness about our issues, and I support their efforts to address them through legislative actions. I look forward to continuing to work with Senator Warren, Congresswoman Haaland, and other legislators to finally bring fairness and parity to Indian Country,” **said Chairwoman Cheryl Andrews-Maltais of the Wampanoag Tribe of Gay Head (Aquinnah).**

“We are excited to see Congresswoman Haaland and Senator Warren’s effort to address the U.S. Commission on Civil Rights’ *Broken Promises* report and look forward to working with them on this important legislation. Indian Country has waited far too long for the United States to live up to its obligations to native people and this legislation will be a huge step in the right direction,” **said Chairman Anthony Roberts of the Yocha Dehe Wintun Nation.**

“The US Commission on Civil Rights outlined all of the areas in which the Federal government is failing to meet its trust and treaty financial responsibilities to Indian Country. The United States has contracts, treaties, to use our lands, and they must uphold those lease payments. We are grateful that Congress is taking these shortfalls seriously. While ambitious, drafting legislation which lists out the full set of obligations and needs is crucial to really understanding and tackling the gaps,” **said Wizipan Little Elk, CEO of the Rosebud Economic Development Corporation.**

In addition, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon also expressed support for the proposal.

Senator Warren and Congresswoman Haaland have released this legislative proposal to launch a public discussion and input process. They invite and welcome feedback on the scope and aims of the future legislation, on the specific provisions proposed in this proposal, and on additional provisions that should be considered for inclusion in the legislation.

The lawmakers request that written input be sent to HonoringPromises@mail.house.gov or HonoringPromises@warren.senate.gov by September 30, 2019. In the coming months, members of Senator Warren’s and Congresswoman Haaland’s staff will also conduct stakeholder outreach on the proposal.

During her time in the Senate, Senator Warren has worked to protect and advance tribal sovereignty, to emphasize the federal government’s trust and

treaty responsibilities to tribal nations, and to affirm Washington's government-to-government relationship with tribal nations:

- She has supported efforts to address violence in Indian Country, especially against women and girls. When the Violence Against Women Act (VAWA) was last reauthorized in 2013, she joined the call to ensure the law contained new safeguards for Native abuse victims. She cosponsored that reauthorization, which recognized tribal sovereignty in crucial new ways.
- She has been a leader in calling for better data and reporting to help address the crisis of missing and murdered indigenous women, including in urban areas.
- Senator Warren twice introduced a bipartisan bill to give Native tribes a seat at the table in addressing the elevated suicide rates in their communities.
- Senator Warren worked with Representative Raúl Grijalva (D-Ariz.) and introduced the American Indian and Alaska Native Child Abuse Prevention and Treatment Act, legislation that would amend the Child Abuse Prevention and Treatment Act to help provide tribal nations with resources to combat child abuse and neglect.
- The Comprehensive Addiction Resources Emergency (CARE) Act, her major legislation to address the nationwide crisis of opioid addiction and substance use disorders, has robust tribal provisions that would provide funding and resources directly to tribes and tribal organizations and mandate tribal consultation.
- Senator Warren worked hard to ensure that her bipartisan cannabis legislation, the Strengthening the Tenth Amendment Through Entrusting

States (STATES) Act, would protect cannabis laws and policies that tribal nations adopted for themselves.

- Senator Warren's major housing legislation, the American Housing and Economic Mobility Act, would provide a significant increase in funding for Indian Housing Block Grants and restore the ability of tribal housing authorities to administer Housing Choice Vouchers. The National American Indian Housing Council passed a resolution supporting the bill.
- She has twice partnered with Senate Committee on Indian Affairs Vice Chair Tom Udall (D-N.M.) to introduce the Native American Voting Rights Act, landmark legislation to provide the necessary resources and oversight to ensure Native people have equal access to the electoral process.
- Senator Warren's Universal Child Care and Early Learning Act, introduced with Congresswoman Deb Haaland, would provide millions of families in Indian Country with free, high-quality child care and early learning options. The legislation allows Tribal governments to be local administrators of the universal child care and pre-K program.

As one of the first Native American women elected to Congress, Congresswoman Haaland has brought issues facing Indian Country to national attention and is using her platform to highlight the federal government's responsibility to Native Nations:

- Congresswoman Haaland is putting a focus on the silent crisis of missing and murdered indigenous women with seven bills addressing the root causes of chronic underfunding of public safety, increasing communications between law enforcement agencies, and increasing victim services.

- Congresswoman Haaland introduced the Bipartisan PROGRESS for Indian Tribes Act, a bill that aims to uphold the government-to-government relationship and fulfill the trust responsibility that the federal government has with Tribal Nations.
- She co-led the Remove the Stains Act to rescind 20 Medals of Honor that were awarded after the Wounded Knee Massacre of 1890 to members of the U.S. 7th Cavalry for acts during the massacre.
- Congresswoman Haaland also joined in reintroducing the Native American Voting Rights Act, landmark legislation that would provide the necessary resources and oversight to ensure Native Americans and Alaska Natives have equal access to the electoral process.
- Congresswoman Haaland is a champion to protect the ancestral homelands of Native Americans including her work to protect Chaco Canyon from the negative impacts of oil and gas drilling, restore Bears Ears National Monument, and protect national monuments from being cut to pieces leaving sacred sites at risk of being lost forever.
- She is working to ensure racist depictions of Native Americans in the U.S. Capitol are catalogued and that the sacrifices of Native American communities in the founding of the United States is acknowledged.
- Congresswoman Haaland fought to include updates to Department of Defense tribal consultation measures, so that impacts to tribal communities from Department of Defense construction projects are considered earlier in the approval process in the National Defense Authorization Act.

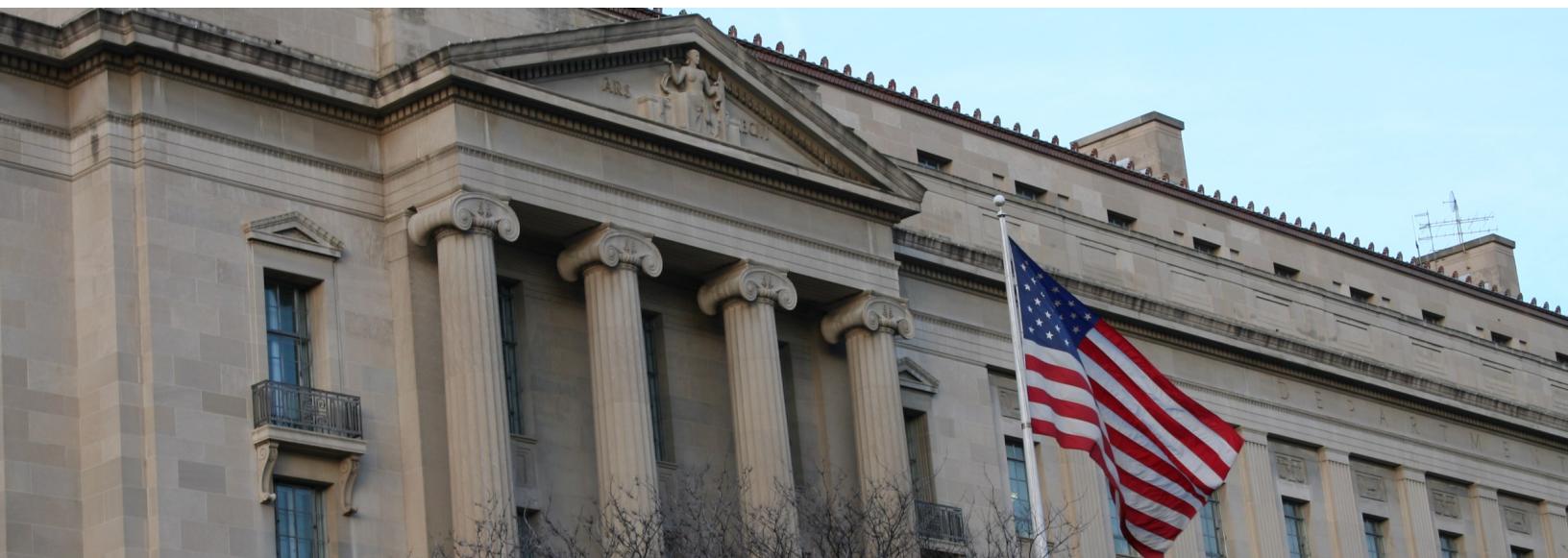
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Office of the Inspector General

U.S. Department of Justice

OVERSIGHT ★ INTEGRITY ★ GUIDANCE



Review of the Department's Tribal Law Enforcement Efforts Pursuant to the *Tribal Law and Order Act of 2010*



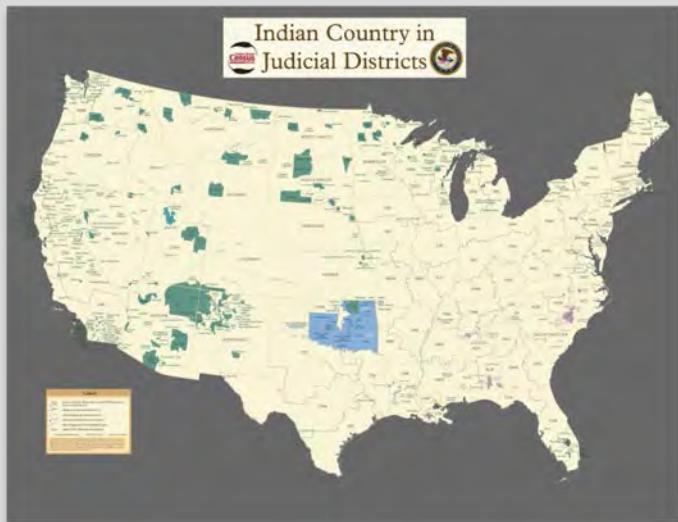
Executive Summary

Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010

Introduction

According to the most recent crime data available, which is from 2002, Native Americans and others living on tribal lands, known as Indian country, experience a per capita rate of violent crime twice that of other racial and ethnic groups.¹ In 2009, the U.S. Department of Justice (Department) announced that increasing engagement and coordination in tribal communities was a top priority. The following year, the U.S. Congress passed the *Tribal Law and Order Act of 2010* (TLOA). Among other things, TLOA requires the Department to provide legal and investigative assistance to tribes, provide training for tribal justice and law enforcement personnel, and collect data related to crimes in Indian country. The Office of the Inspector General conducted this review to assess the steps the Department and its components have taken to implement these TLOA requirements.

Figure
Indian Country in the United States



Source: Federal Bureau of Investigation

Results in Brief

We found that the Department has taken some steps to carry out TLOA's mandates. However, the Department and its components still lack a coordinated approach to overseeing the assistance it provides in Indian country. Further, the Department has not prioritized assistance to Indian country at the level consistent with its public statements or annual reports to Congress. We also found that the Department needs to do more to ensure it provides all of the training TLOA requires. Finally, crime data in Indian country remains unreliable and incomplete, limiting the Department's ability to engage in performance based management of its efforts to implement its TLOA responsibilities.

The Department Lacks a Coordinated Approach to the Assistance It Provides in Indian Country, which Compromises Its Ability to Comply with TLOA Requirements

We found that no Department-level entity oversees Indian country law enforcement activities or ensures the Department's compliance with TLOA mandates. The Office of the Deputy Attorney General convenes a weekly Indian Country Working Group; but not all components with TLOA responsibilities participate, and TLOA requirements are discussed only if a component brings an issue to the group's attention. Further, the Department's Office of Tribal Justice, despite its central role in Native American issues, does not have responsibility for ensuring that components coordinate their law enforcement activities in Indian country.

In the absence of Department-wide coordination, we found that law enforcement activities in Indian country and TLOA compliance vary across components. For example, the United States Attorney's Offices (USAO) we visited differed in their prioritization and implementation of TLOA requirements and no one in the Department, including the Executive Office for United States Attorneys (EOUSA), ensures that USAOs comply with all TLOA requirements. Finally, we found that despite the Department establishing Indian country as a priority area, Indian country funding and resources have decreased since TLOA's implementation.

Across Districts, USAOs Do Not Consistently Communicate or Effectively Coordinate with the Tribes Regarding Their Activities in Indian Country

TLOA requires USAOs to designate an Assistant United States Attorney (AUSA) as a Tribal Liaison to

¹ We use the term "Indian country" because that is the term used in 18 U.S.C. § 1151 (2012).



Executive Summary

Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010

facilitate communication and oversee outreach and training to the tribes. However, the primary responsibility for these AUSAs remains to prosecute federal criminal cases. Accordingly, many Tribal Liaisons continue to carry full-time caseloads. We found that these caseloads, if not appropriately balanced with their TLOA responsibilities, may hamper their ability to develop relationships and provide training to tribes. We also found that communication and coordination efforts between USAOs and tribes vary across USAOs. While in certain situations USAOs are limited in the information they can share with tribal authorities, we found in some districts that AUSAs prosecuting Indian country cases do not communicate with tribal prosecutors with enough detail. We also found that tribal prosecutors often have insufficient understanding of the USAO's role in cases that may warrant federal consideration and USAO policies for providing case updates. In addition, we found that within districts the USAOs' processes to consult with or notify tribes about charging decisions are inconsistent and tribal prosecutors often do not receive sufficient explanation for case declinations.

TLOA also "authorized and encouraged" the Department to use tribal prosecutors as Special Assistant United States Attorneys (SAUSA) to assist in prosecuting crimes in Indian country. The Department allows each U.S. Attorney to decide whether to have a SAUSA program, and USAOs cannot require tribes to participate. We found that there are significant benefits from the SAUSA program, such as improved communication and information sharing between USAOs and tribes. However, factors such as the absence of written eligibility criteria and inconsistent funding hamper its use and expansion, which currently stands at only 22 SAUSAs in Indian country.

Finally, we found that most USAOs do not maintain updated and comprehensive operational plans to ensure a coordinated approach to guide their work in Indian country, as Department leadership directed them to do even prior to TLOA's passage.

The Department Must Do More to Ensure that It Provides All TLOA-Required Trainings

Under TLOA, USAOs are responsible for providing training to tribal justice officials, while the Drug Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI) are required to coordinate with the U.S. Department of the Interior's Bureau of Indian Affairs (BIA) to establish new training programs or supplement existing programs to ensure that BIA and tribal law enforcement have access to training. EOUSA's National Indian Country Training Institute fulfills most of

the training responsibilities assigned to USAOs. We found that some USAOs provide additional, ad hoc training and that they do not consistently track or report on this training. We also found that the DEA and FBI have provided some training but need to do more to improve coordination with the BIA and tribal law enforcement, as TLOA requires. In 2016, the FBI and BIA piloted the Indian Country Criminal Investigators Training Program (ICCITP), but limited funding may inhibit efforts to provide consistent training to BIA and tribal law enforcement.

We also found that DEA and FBI Special Agents receive inadequate training prior to working Indian country, despite its unique cultural, jurisdictional, and geographic challenges. DEA Special Agents receive no such specialized training, while a few FBI Special Agents received training through the ICCITP pilot.

The Department Collects Limited Tribal Crime and Prosecution Data but Does Not Use It to Assess Law Enforcement Efforts or Identify Resource and Program Needs

TLOA established mandates for the Department to report to Congress on its law enforcement activities in Indian country, including the prosecution and investigation of federal cases. To comply with this requirement, EOUSA reports the number of declination, prosecution, and pending decisions each calendar year and the FBI reports all decisions not to refer an Indian country investigation for federal prosecution. However, we found that neither component effectively uses the collected data to evaluate and improve its law enforcement activities in Indian country. In addition, limitations with EOUSA's and the FBI's data collection prevent an accurate assessment of their activities in Indian country.

TLOA requires the Department's Bureau of Justice Statistics to collect data related to crimes in Indian country. However, 7 years after TLOA became law, its data collection and reporting efforts are still in development. Moreover, because participation in the FBI's Uniform Crime Reporting (UCR) Program is voluntary, not all tribes report crime statistics into the UCR database. As a result, Indian country crime statistics are so outdated and incomplete as to be virtually useless.

Recommendations

We make 14 recommendations to improve the Department's ability to meet its obligations under TLOA and to improve its law enforcement activities in Indian country through increased communication and coordination with tribes and informed, performance based management.

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INTRODUCTION

Background

According to the most recent crime data available, the U.S. Department of Justice (Department, DOJ) found that in 2002 American Indians experienced a per capita rate of violence more than twice that of other racial and ethnic groups.² The Department found that, compared to other groups, American Indians were twice as likely to experience a rape or sexual assault.³ The Department also found that approximately 62 percent of American Indian victims of violence reported that the offender was under the influence of alcohol, compared to 42 percent for the national average. For American Indians and others living on tribal lands, known under the law as Indian country, scarce law enforcement resources and geographic isolation escalate the challenges tribal communities face in addressing crime.⁴ For example, a 2008 Bureau of Justice Statistics (BJS) report found that the Navajo Police Department had only 393 sworn personnel to serve a population of over 192,000 across approximately 22,000 square miles.⁵

Enactment of the *Tribal Law and Order Act of 2010*

In 2009, Attorney General Eric Holder “made it a Department of Justice priority to increase engagement, coordination and action on public safety in Indian country.”⁶ Holder and other Department officials met with tribal leaders to learn about issues facing tribal communities, including their disproportionate rates of violence and victimization and the need to improve collaboration and access to law enforcement and justice resources. The U.S. Congress passed and President Barack Obama signed into law the *Tribal Law and Order Act of 2010* (TLOA) for the stated purposes of clarifying responsibilities with respect to prosecuting crimes committed in Indian country; increasing coordination and communication between federal, state, tribal, and local law enforcement; empowering tribal governments to provide public safety; and increasing and standardizing the collection of criminal data.⁷ Recognizing the complicated jurisdictional scheme in Indian country, TLOA

² We use the term “American Indian” throughout this report because that is the term the Department uses in all of its official documents and its annual report to the Congress.

The most recent statistics from the Department that describe the American Indian population and crime are from 2002 and were published in 2004. The most recent information about tribal law enforcement is from 2008. We discuss the lack of current data in the Results of the Review.

³ DOJ BJS, *A BJS Statistical Profile, 1992–2002: American Indians and Crime*, NCJ 203097 (December 2004).

⁴ We use the term “Indian country” in this report because that is language used in 18 U.S.C. § 1151 (2012).

⁵ BJS, *Tribal Law Enforcement, 2008*, NCJ 234217 (June 2011).

⁶ DOJ, “Tribal Law and Order Act,” October 20, 2016, <https://www.justice.gov/tribal/tribal-law-and-order-act> (accessed January 31, 2017).

⁷ *Tribal Law and Order Act of 2010*, Pub. L. No. 111-121, Title II, § 202 (b), 124 Stat. 2258 (2010).

aims to increase commitment and cooperation among tribal, federal, and state law enforcement officials. The passage of TLOA, as well as other legislation, including the *Violence Against Women Reauthorization Act of 2013*, resulted in Department mandates to increase engagement and coordination in Indian country.⁸

The Office of the Inspector General (OIG) conducted this review to assess the steps the Department and its components have taken to implement TLOA requirements, including legal assistance, investigative training, and other technical assistance provided to enhance law enforcement activities in Indian country, as well as related data collection. In the next section, we define and describe Indian country, the Department's responsibilities in Indian country, and the roles the Department's components have in implementing TLOA requirements as they relate to law enforcement activities in Indian country.

Indian Country

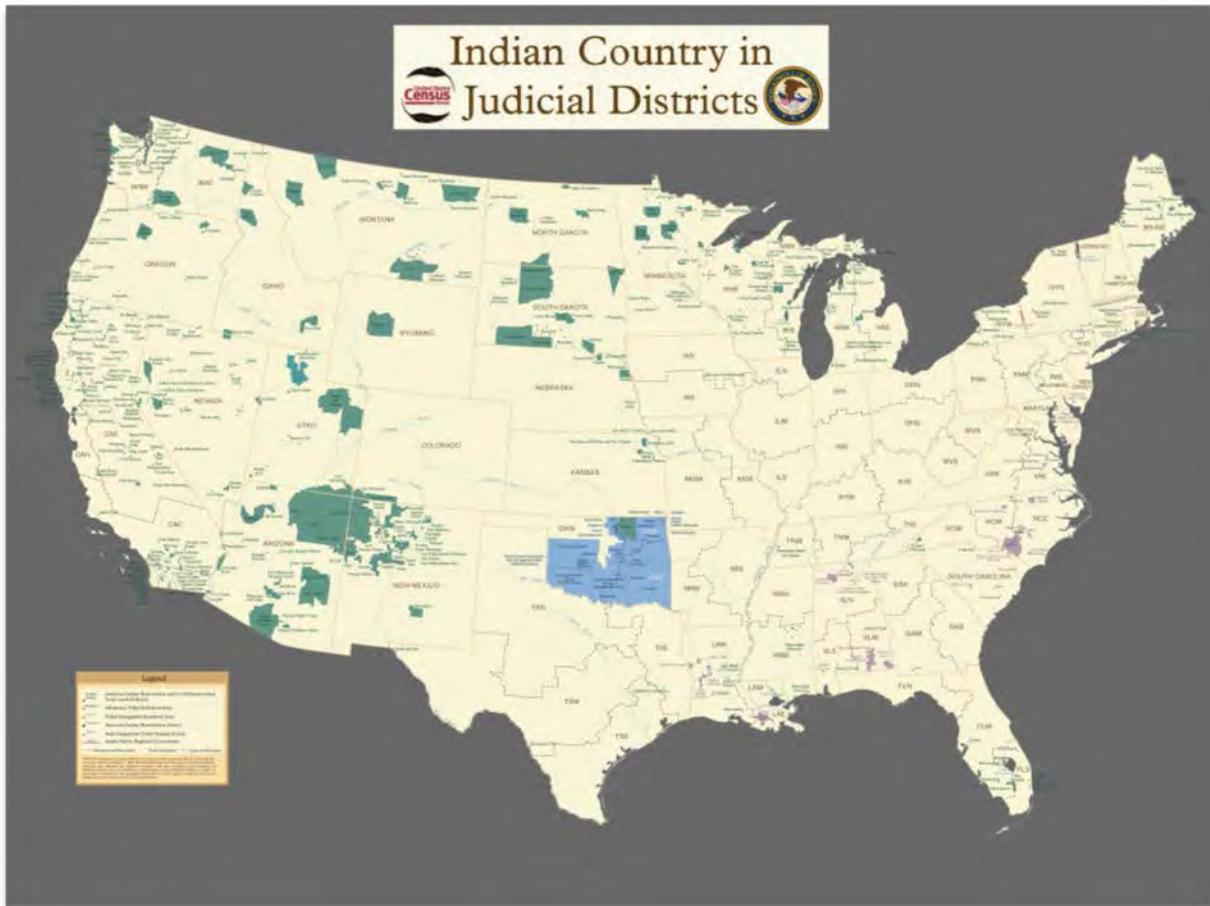
The federal government defines Indian country as all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all existing Indian allotments. Indian country comprises about 2.3 percent of the United States' total land area, and 1.7 percent of the U.S. population identifies as American Indian or Alaska Native.⁹ In total, there are 567 federally recognized tribes that reside on 310 reservations in 36 states.¹⁰ Figure 1 below highlights Indian country in the United States.

⁸ The *Violence Against Women Reauthorization Act of 2013* recognized certain tribes' power to exercise concurrent criminal jurisdiction over domestic violence cases, regardless of whether the defendant is Indian or non-Indian; clarified that tribal courts have civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian; created federal statutes to address crimes of violence committed against a spouse or intimate partner; and provided more robust federal sentences for certain acts of domestic violence in Indian country. We did not evaluate the implementation of the *Violence Against Women Reauthorization Act* as part of this review.

⁹ U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (2012).

¹⁰ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (January 29, 2016).

Figure 1
Indian Country in the United States



Note: Areas highlighted in green and blue represent American Indian reservations under the jurisdiction of the U.S. government. Purple areas are State Designated Tribal Statistical Areas.¹¹

Source: Federal Bureau of Investigation, with OIG revisions

Federally recognized tribes are unique and possess certain rights of self-government (i.e., sovereignty), which are intended to ensure that decisions about a tribe with regard to its property and citizens are made with the tribe's participation and consent. In addition, federally recognized tribes are entitled to receive certain federal benefits, services, and protections because of their government-to-government relationship with the United States.

¹¹ The U.S. Census Bureau defines a State Designated Tribal Statistical Area as "a statistical geographic area identified and delineated for state recognized tribes that not are federally recognized and do not have an American Indian reservation or off-reservation trust land." Because State Designated Tribal Statistical Areas are not federally recognized and have no trust land, they are excluded from this report.

The Department's Responsibility to Indian Country

While tribes have sovereign authority to prosecute any American Indian who commits a misdemeanor-level crime on tribal territory and to maintain concurrent jurisdiction with federal or state courts on any crime an American Indian commits on tribal lands, most tribes do not have the authority to prosecute crimes that non-Indians commit on tribal lands. Further, tribal courts have little punitive sentencing authority for even the most violent offenders.¹² For example, prior to TLOA's passage, under the *Indian Civil Rights Act of 1986*, tribes could sentence a convicted offender to a term of imprisonment not to exceed 1 year and could impose a maximum fine of \$5,000 per offense. As a result, federal agencies, including the Department of Justice and the U.S. Department of the Interior's (DOI) Bureau of Indian Affairs (BIA) play a role in Indian country law enforcement that local criminal justice systems would otherwise handle.¹³

Under the *General Crimes Act of 1817* and the *Major Crimes Act of 1885*, the Department has the legal authority to investigate and prosecute certain felony level offenses, including manslaughter, rape, and sexual abuse, committed in Indian country, whether the offender is Indian or non-Indian.¹⁴ Therefore, in much of Indian country, most of these offenses fall under the jurisdiction of a United States Attorney's Office (USAO) and the Federal Bureau of Investigation (FBI).¹⁵

¹² *Indian Civil Rights Act of 1986* (25 U.S.C. § 1301 (Definitions); § 1302 (Constitutional rights); § 1303 (Habeas corpus)).

¹³ The *Indian Law Enforcement Reform Act of 1990* (24 U.S.C. 30) established a branch of Criminal Investigations within the BIA's Division of Law Enforcement, which is responsible for providing or assisting in the provisions of law enforcement services in Indian country. The Division of Law Enforcement's responsibilities include cooperation with appropriate federal and tribal law enforcement agencies and the investigation and presentation for prosecution of cases involving violations of 18 U.S.C §§ 1152 and 1153.

The BIA provides government and community services to federally recognized tribes to improve the quality of life for their members. For the purposes of this review, we received information primarily from the BIA's Office of Justice Services, which provides law enforcement services and technical assistance to tribal communities. BIA Office of Justice Services agents have the authority to partner with federal agencies, including the Drug Enforcement Administration (DEA) and Federal Bureau of Investigation (FBI).

¹⁴ Under 18 U.S.C. §§ 1152 and 1153, the federal government has jurisdiction over certain offenses and certain circumstances in Indian country. In particular, 18 U.S.C. § 1153, the *Major Crimes Act*, gives federal courts jurisdiction over murder, manslaughter, kidnapping, maiming, rape, sexual abuse, sexual abuse of a minor, abusive sexual contact, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under 16 years of age, felony child abuse or neglect, arson, burglary, robbery, felony embezzlement, and theft within Indian country.

¹⁵ The Department typically maintains the sole authority to prosecute violent crimes committed within Indian country unless a state has been granted jurisdiction through Public Law (PL) 280. PL 280 authorizes Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to prosecute most crimes that occur in Indian country. Optional PL 280 states have concurrent state and federal criminal jurisdiction. These states include Arizona, Florida, Idaho, Iowa, North Dakota, Nevada, South Dakota, Utah, and

(Cont'd)

In response to concerns that tribal leaders raised in October 2009 about public safety in tribal communities, in January 2010 Attorney General Holder announced initiatives to “enable the Justice Department to bring the federal justice system closer to Indian country.”¹⁶ These efforts, intended in part to create better communication and coordination between USAOs and the tribes within their districts, included a directive from Deputy Attorney General David Ogden to all USAOs with Indian country jurisdiction (49 out of 94 USAOs) to:

- meet and consult with tribes in their district annually,
- develop an operational plan addressing public safety in Indian country,
- provide summaries of their operational plans to the Office of the Deputy Attorney General (ODAG) and make those summaries available to the tribes in their districts, and
- work closely with law enforcement to pay particular attention to violence against women in Indian country and to make these crimes a priority.¹⁷

Following these initiatives, the President signed TLOA into law in July 2010, codifying the responsibilities of federal and tribal law enforcement agencies, including the Department, with respect to crimes committed in Indian country.

DOJ Component TLOA Roles and Responsibilities

TLOA prescribed responsibilities to the Department and its components in the areas of legal assistance, investigative training, and data collection to enhance law enforcement activities in Indian country. This section describes each component’s TLOA requirements within these areas.

Office of Tribal Justice

The Office of Tribal Justice (OTJ) acts as the Department’s primary point of contact for federally recognized tribes and coordinates complex tribal matters, policy, and legislation among DOJ components relating to public safety and justice in Indian country.¹⁸ The OTJ also serves as the program and policy legal advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian tribes and coordinates with other bureaus, agencies,

Washington. PL 280 effectively limits federal criminal jurisdiction and expands state jurisdiction by transferring the federal government’s authority to the state to prosecute Indian country crimes. However, PL 280 jurisdiction does not affect tribal criminal jurisdiction.

¹⁶ DOJ Office of Public Affairs, “Attorney General Announces Significant Reforms to Improve Public Safety in Indian Country,” January 11, 2010, <https://www.justice.gov/opa/pr/attorney-general-announces-significant-reforms-improve-public-safety-indian-country> (accessed February 1, 2017).

¹⁷ See Appendix 3 for a list of all the USAOs that have Indian country within their jurisdiction.

¹⁸ 25 U.S.C. § 3665(a).

offices, and divisions within the Department.¹⁹ Although the OTJ has existed as a unit within the ODAG since 1995, it became a permanent DOJ component with the enactment of TLOA. The OTJ was funded through reimbursable agreements with several DOJ components until it became part of the Department's permanent budget in fiscal year (FY) 2014.

Executive Office for United States Attorneys

The Executive Office for United States Attorneys (EOUSA) provides executive and administrative support, including legal education, administrative oversight, technical support, and a vehicle for the creation of uniform policies for U.S. Attorneys throughout the United States and its territories. TLOA required that EOUSA create a Native American Issues Coordinator position to provide advice and assistance to USAOs on Indian country legal and policy issues. The position's duties include serving as the point of contact on all matters criminal and civil, pertaining to American Indian issues, for U.S. Attorneys who have the authority to prosecute crimes in Indian country; coordinating with DOJ components, the Department, and relevant advisory groups to the Attorney General and Deputy Attorney General; and compiling statistics on Indian country investigations and prosecutions for the Department's annual report to Congress.²⁰

U.S. Attorneys

TLOA also established several requirements for U.S. Attorneys. For example, TLOA states that if a U.S. Attorney declines to prosecute or acts to terminate the prosecution of an alleged violation of federal criminal law in Indian country, the U.S. Attorney must coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in tribal court. U.S. Attorneys must annually report to EOUSA's Native American Issues Coordinator regarding all declinations of cases that law enforcement agencies had referred for prosecution of crimes allegedly committed in Indian country.

In addition, TLOA required the U.S. Attorney for each district with Indian country jurisdiction to designate at least one Assistant United States Attorney (AUSA) as a Tribal Liaison to coordinate the prosecution of crime in Indian country, develop relationships with tribes, and serve as a link between tribes and the federal justice process. According to TLOA, Tribal Liaisons must also:

- develop multidisciplinary teams to combat child abuse and domestic and sexual violence against Indians;

¹⁹ The OTJ Director hosts consultations with tribes 6 to 8 times a year. Consultations cover topics such as law enforcement and policy and legislative changes that affect Indian country.

²⁰ USAOs report to EOUSA's Native American Issues Coordinator data about decisions to prosecute and decline cases, including, but not limited to: (1) the type of crime(s) alleged; (2) the status of the accused as Indian or non-Indian; (3) the status of the victim(s) as Indian or non-Indian; and (4) the reasons for declining or terminating a prosecution.

- consult and coordinate with tribal justice officials and victims' advocates to address case backlogs in the prosecution of major crimes in Indian country;
- develop working relationships and maintain communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials, to gather and share appropriate information;
- coordinate with tribal prosecutors when a tribal government has concurrent jurisdiction over an alleged crime, in advance of the expiration of any statute of limitation;
- provide technical assistance and training on evidence-gathering techniques and strategies to address victim and witness protection for individuals and entities that respond to Indian country crimes;
- conduct training sessions and seminars to certify Special Law Enforcement Commissions for tribal justice officials and other individuals and entities that respond to Indian country crimes;
- coordinate with the OTJ, as necessary; and
- conduct other activities to address and prevent violent crime in Indian country, as the U.S. Attorney determines appropriate.

As of March 2016, there were 98 Tribal Liaisons working in 49 districts with Indian country jurisdiction to establish relationships with tribal communities.

TLOA also "authorized and encouraged" each U.S. Attorney with Indian country jurisdiction to appoint a tribal prosecutor as a Special Assistant United States Attorney (SAUSA) to help coordinate the prosecution of crimes, particularly when tribal crime rates or case declination rates exceed the national average.²¹ Under TLOA, appointed tribal prosecutors who participate in the SAUSA program should receive training in federal law, procedure, and investigative techniques. The Department has stated that tribal prosecutors' participation increases the potential for viable criminal offenses to be prosecuted in both federal and tribal court because tribal prosecutors are cross-designated to serve as co-counsel with AUSAs on Indian country investigations and prosecutions.²² As of September 2016, there were 22 SAUSAs working in Indian country.

To address the training requirements for DOJ prosecutors and tribal justice personnel that USAO Tribal Liaisons originally had to fulfill, in July 2010 EOUSA launched the National Indian Country Training Institute (NICTI). The NICTI, which has two staff members, including EOUSA's National Indian Country Training

²¹ *Tribal Law and Order*, 111th Cong., 2nd Sess., H.R. 725-12, Title I, Subtitle A, Sec. 13 (d) (1).

Pursuant to 28 U.S.C. § 543(a), SAUSAs are cross-deputized tribal prosecutors who can prosecute crimes in both tribal and federal court.

²² DOJ, *Indian Country Investigations and Prosecutions* (2015), 19.

Coordinator, facilitates Indian country training courses, lectures, and webinars that are held at the National Advocacy Center (NAC) and in the field; trainings are free for participants.²³ The NICTI ensures that federal prosecutors, Special Agents, and state and tribal criminal justice officials receive training and support to address areas relevant to Indian country prosecutions. Training includes topics such as cultural property law, domestic violence, and criminal jurisdiction in Indian country. The NICTI also provides joint training with DOJ components and other federal agencies with Indian country responsibility, including the DOI.

The Drug Enforcement Administration and the Federal Bureau of Investigation

Both the Drug Enforcement Administration (DEA) and the FBI have the authority to assist in the investigation of federal crimes occurring on tribal lands.²⁴ The DEA's Regional and Local Impact Section at DEA headquarters oversees the DEA's activities in Indian country. Although the DEA has field offices whose coverage areas include Indian country, it does not specifically assign its Special Agents to work exclusively on Indian country matters. The FBI's Indian Country Crimes Unit (ICCU) at FBI headquarters oversees the FBI's activities in Indian country; as of July 2017, the ICCU consists of a Unit Chief, three Supervisory Special Agents, two Intelligence Analysts, a Management Program Analyst, and a Management Program Assistant. Of the FBI's 56 field offices across the country, 34 have Indian country within their areas of responsibility. In FY 2016, 125 FBI Special Agents were assigned primarily to work on Indian country matters in field offices around the country.

DEA and FBI agents often work with tribal law enforcement when conducting investigations because tribal law enforcement officers are typically the first responders to crimes in Indian country. The DEA and FBI may also work with other federal law enforcement, including Special Agents from the DOI's BIA. TLOA required the DEA and FBI to coordinate with the DOI, specifically the BIA, to

²³ The NAC is an EOUSA facility in Columbia, South Carolina, dedicated to training federal, state, and local prosecutors.

²⁴ Under 28 U.S.C. § 533, the FBI has investigative authority to detect and prosecute crimes against the United States. FBI jurisdiction for the investigation of federal violations in Indian country derives specifically from 18 U.S.C. § 1162 (a) and (c).

DEA jurisdiction for narcotics investigations in Indian country derives from the *Federal Controlled Substances Act of 1970*, 21 U.S.C. §§ 801–971, which applies throughout the United States, including in Indian country. Congress provided exemption from the *Controlled Substance Act* only for American Indians using peyote in bona fide religious practices of Native American churches.

The U.S. Marshals Service and the Bureau of Alcohol, Tobacco, Firearms and Explosives also have a presence in Indian country. However, we did not include them as part of this review because they do not have specific responsibilities pursuant to TLOA.

provide training to the BIA, as well as to tribal law enforcement and judicial personnel, on illegal narcotics and alcohol and substance abuse.²⁵

In addition to the FBI's training responsibilities, the FBI must also annually submit information to the Department about criminal matters and investigations not referred to a USAO for prosecution — also known as administrative closures.²⁶ The DEA does not have data reporting requirements under TLOA. From calendar year (CY) 2011 through CY 2015, the number of FBI administrative closures, or cases not referred for federal prosecution consideration, remained consistent.²⁷ See Table 1.

Table 1
FBI Administrative Closures
CYs 2011–2015

Calendar Year	Administrative Closures
2011	611
2012	658
2013	679
2014	657
2015	668
Total	3,273

Source: FBI

The Bureau of Justice Statistics

The BJS collects, analyzes, and disseminates information on crime, criminal offenders, crime victims, and criminal justice operations. The BJS also provides financial and technical support to state, local, and tribal governments to improve their data collection capabilities and the quality and the utility of their criminal

²⁵ We did not review alcohol or substance abuse training to tribal law enforcement. According to the BIA, the Indian Health Services and the Substance Abuse and Mental Health Services Administration provide this training.

²⁶ The FBI reports data on: (1) the type of crime(s) alleged, (2) the status of the accused as Indian or non-Indian, (3) the status of the victim(s) as Indian or non-Indian, and (4) the reasons for deciding to decline or terminate prosecutions. We further discuss Department reporting requirements later in this report.

TLOA did not task the DEA with data reporting requirements. Section 212 of TLOA amends Title 25 U.S.C. § 2809 and states that "any federal department or agency" in cases of nonreferrals or declinations of criminal investigations in Indian country "shall coordinate" with its tribal counterparts. This requirement extends to the Bureau of Alcohol, Tobacco, Firearms and Explosives; DEA; FBI; U.S. Attorney's Offices (USAO); and others conducting investigations on tribal lands. Coordination includes the status of the investigation and the use of relevant evidence in tribal court. No reporting requirements are included.

²⁷ Because other federal law enforcement agencies such as the DEA and the BIA can investigate and close cases prior to presentation to a USAO, FBI administrative closures alone will not provide a holistic picture of federal cases that are not presented to a USAO for prosecution.

history records. TLOA required that the BJS establish a tribal data collection system and annually report on its data collection efforts to Congress.

Investigations and Prosecutions in Indian Country

According to the Department, TLOA is intended to establish accountability measures for federal agencies responsible for investigating and prosecuting crimes in Indian country.²⁸ We requested from EOUSA all cases related to Indian country, including cases that were pending, declined, or prosecuted from CY 2011 through CY 2015. We analyzed the data to assess district volume, referring agency, declination and prosecution rates, and reasons for declination. Table 2 represents the results of our analysis of the Department's data and provides a snapshot of the Department's currently reported work in Indian country. However, while we present descriptive statistics here, later in this report we discuss several limitations that prevented a complete and accurate analysis of the Department's investigations and prosecutions in Indian country.

Table 2
Number of USAO Defendants Prosecuted and Declined
CYs 2011–2015

	2011	2012	2013	2014	2015 ^a
Defendants Declined	1,043	972	866	987	1,043
Defendants Filed in District Court	1,592	1,590	1,405	1,352	1,343

^a EOUSA collects its data according to fiscal year, and complete sets of data are not available until the end of the next fiscal year. Although our scope extended to FY 2015, the most complete set of data we received was for CY 2014. To complete the CY 2015 dataset, EOUSA waited until the end of FY 2016 and created a permanent snapshot of CY 2015 for posterity. As a result of EOUSA's data collection parameters, current CY data is always delayed. However, we included CY 2015 here to show that as of September 30, 2015, districts had declined to bring charges against as many defendants in 2011 as they had in 2015.

Source: EOUSA data

As Table 2 shows, USAOs reported a 17 percent decrease in the number of defendants against whom charges were declined from CY 2011 through CY 2013, followed by a 20 percent increase from CY 2013 to CY 2015. Table 2 also shows a 16 percent decrease in the number of defendants against whom charges were filed in District Court from CY 2011 to CY 2015.²⁹ We also found that from CY 2013 to CY 2015, of the 42 USAO districts that reported at least 1 defendant against whom charges were filed, 21 districts (50 percent) charged fewer defendants than they

²⁸ DOJ, *Indian Country Investigations and Prosecutions* (2015), 5.

²⁹ This analysis does not include Indian country defendants prosecuted in magistrate courts. In response to a draft of this report, EOUSA noted the number of defendants filed in magistrate court as follows: CY 2011, 196; CY 2012, 471; CY 2013, 233; CY 2014, 527; and CY 2015, 278.

previously had. While EOUSA's Deputy Director attributed this change to the *Smart on Crime* initiative and the overall decline in federal prosecutions during this time period, he acknowledged that EOUSA had not specifically analyzed prosecution trends in Indian country.³⁰

Various law enforcement agencies refer investigations to USAOs for prosecution. For the purposes of this review, we limited our analysis to investigations referred to USAOs by the BIA; DEA; FBI; joint DEA and FBI-led task forces; and local law enforcement, including tribal law enforcement. According to our analysis of EOUSA data, from CY 2011 through CY 2014, the FBI, BIA, and local law enforcement referred over 90 percent of cases to USAOs on Indian country matters.³¹ See Table 3 for EOUSA's data reflecting the number of Indian country matters that USAOs received.

Table 3
Number of Indian Country Matters That USAOs Received, by Agency
CYs 2011–2014

Agency	2011	2012	2013	2014	Percent Change
Bureau of Indian Affairs	443	445	581	488	10%
Drug Enforcement Administration	37	2	6	7	-81%
Federal Bureau of Investigation	966	969	821	718	-26%
Tribal Law Enforcement ^a	252	240	288	267	6%

^a Tribal law enforcement also includes matters received by state, county, and municipal authorities.

Source: EOUSA data

Previous Reviews Related to Indian Country

In 2010, the U.S. Government Accountability Office (GAO) examined the declination rates and declination reasons for all Indian country matters that USAOs received from FY 2005 through FY 2009. The GAO found that USAOs declined to prosecute 50 percent of the 9,000 matters received, with violent crime cases

³⁰ In August 2013, the Department announced the *Smart on Crime* initiative, which highlighted five principles to reform the federal criminal justice system. The OIG recently released a review of the Department's implementation of certain principles regarding prosecution and sentencing practices under the *Smart on Crime* initiative. See DOJ OIG, *Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the Smart on Crime Initiative*, Evaluation and Inspections Report 17-04 (June 2017).

³¹ The BIA sometimes collaborates with the DEA and the FBI on investigations in Indian country. A BIA official explained that collaboration among the agencies is of benefit because it is a force multiplier for law enforcement personnel in Indian country. Currently, there are 35 BIA drug agents across the country. In one district we visited, agents from the BIA's Drug Diversion Unit partner with the DEA to conduct drug investigations on tribal lands. The BIA similarly collaborates with the FBI in some districts. A BIA Special Agent told us that in his district the BIA and the FBI meet monthly to discuss ongoing issues and the agencies have a memorandum of understanding that outlines the FBI's responsibility to respond to certain violent crimes in Indian country. Further, BIA agents may also participate on FBI task forces in their district.

declined at a higher rate than nonviolent crime cases.³² FBI officials also told the GAO that they may elect not to refer to a USAO matters that they believe lack sufficient evidence for prosecution. A 2011 GAO report examined the coordination efforts between DOJ and the DOI when providing support for tribal courts.³³ The GAO found that coordination could be strengthened by improving information sharing and resource distribution to tribal courts.

Purpose, Scope, and Methodology of the OIG's Review

The OIG assessed the Department's tribal law enforcement responsibilities pursuant to TLOA. We did not review each TLOA requirement directed at the Department and its components. Rather, we focused on the legal assistance, investigative training, and other data collection activities provided to enhance law enforcement efforts in Indian country. For FY 2011 – FY 2015, through data analysis, document review, and interviews, we: (1) reviewed the Department's coordination among its components in providing assistance to Indian country; (2) evaluated EOUSA's use of Tribal Liaisons to assist tribal justice officials in prosecuting cases in Indian country; (3) examined the training that USAOs, the FBI, and the DEA provide to tribal law enforcement and the BIA; and (4) assessed the Department's processes for collecting and reporting crime and prosecution data. Our fieldwork, conducted from April through November 2016, included site visits to seven federal USAO districts and video teleconference site visits to two USAOs. We interviewed officials and staff from the DEA, FBI, and USAOs, as well as the BIA, tribal law enforcement, and tribal justice officials. We also interviewed headquarters officials and staff from the BJS, DEA, EOUSA, FBI, ODAG, OTJ, as well as officials from the DOI. A more detailed description of the methodology of our review is in Appendix 1.

³² GAO, *U.S. Department of Justice Declinations of Indian Country Criminal Matters*, GAO-11-167R (December 2010).

³³ GAO, *Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, GAO-11-252 (February 2011).

RESULTS OF THE REVIEW

The Department Lacks a Coordinated Approach to the Assistance It Provides in Indian Country, which Compromises Its Ability to Comply with TLOA Requirements

The *Tribal Law and Order Act of 2010* (TLOA) required the U.S. Department of Justice (Department, DOJ) and its components to provide legal and investigative assistance, train tribal justice and law enforcement personnel, and collect data related to crimes in Indian country. We found that several DOJ components had taken actions to comply with TLOA's requirements. However, we also found that there is no Department-level entity that oversees component activities or coordinates these efforts to fulfill TLOA mandates. In the absence of a Department-level entity to oversee Indian country efforts, law enforcement activities in Indian country and the implementation of TLOA requirements vary by component. As a result, the Department cannot ensure that it is prioritizing its Indian country responsibilities or meeting these important requirements.

No Department Individual or Entity Coordinates the Department's Tribal Law Enforcement Activities, Including the Implementation of TLOA Requirements, and Component Compliance with TLOA Requirements Varies

While TLOA established several mandates to the Department and its components, we found that no Department individual or entity ensures the implementation of or compliance with these mandates across the Department. We also found that Department components with TLOA responsibilities do not coordinate their law enforcement activities in Indian country to ensure compliance with TLOA mandates.

Officials with the Office of the Deputy Attorney General (ODAG) told us that it is not the ODAG's role to formally oversee activities associated with TLOA requirements and that each component is responsible for fulfilling its responsibilities in Indian country. ODAG officials said that the ODAG does not provide assistance to the components unless a specific issue is raised to the Department. While the ODAG convenes a weekly working group composed of representatives from various components, including the Executive Office for United States Attorneys (EOUSA), the Federal Bureau of Investigation (FBI), and the Office of Tribal Justice (OTJ) to discuss Indian country issues, officials told us that TLOA activities may or may not be addressed, depending on the issues the representatives choose to discuss.³⁴ In

³⁴ After the completion of our fieldwork, the Department announced several actions to support law enforcement and maintain public safety in Indian country as part of its Task Force on Crime Reduction and Public Safety. The OTJ coordinated a series of listening sessions with tribal law enforcement officials and created a Federal Law Enforcement Coordination group to enhance responses to violent crime in Indian country. The Department also expanded the Tribal Access Program, which ensures that tribes have access to national crime information databases. We discuss data collection activities provided to enhance law enforcement efforts in Indian country later in this (Cont'd)

addition, while the Department's Indian Country Working Group includes representatives from EOUSA and the FBI, each of which has specific TLOA responsibilities, the Drug Enforcement Administration (DEA) does not participate in the working group despite its specific training responsibility established in TLOA. EOUSA's Native American Issues Coordinator told us that, because a lot of components are involved in Indian country, coordinating work can be challenging and that participation in the working group provides another mechanism for communication and coordination throughout the Department.

TLOA formally established the OTJ as a permanent entity within the Department to, among other things, coordinate with DOJ components to ensure each has a process for consulting with tribal leaders in developing policies and other activities that affect tribes. However, we found that the OTJ does not have a role in ensuring that components coordinate their law enforcement activities in Indian country. Rather, the OTJ Director told us that one of the OTJ's primary purposes is to liaise between tribes and the Department regarding jurisdictional issues or other tribal matters that may arise.³⁵ EOUSA's Assistant Director of Indian, Violent, and Cyber Crime Staff told us that she believes that the OTJ's focus is different from EOUSA's and that the OTJ is a voice and advocate for the tribes, whereas EOUSA serves the Department by supporting the United States Attorney's Offices (USAO).³⁶ She said that while the two offices work together, she believes the Department is well served by keeping the two separate.

While the OTJ does not serve in a law enforcement capacity, we believe that, as the Department's primary component with tribal responsibilities, the OTJ should have greater involvement in coordinating with EOUSA, as well as the Department's law enforcement components, to carry out the Department's law enforcement activities in Indian country. We were therefore encouraged to learn after our fieldwork that the OTJ had initiated monthly meetings with all Indian country law enforcement agencies, including the FBI, DEA, and the Department of the Interior's (DOI) Bureau of Indian Affairs (BIA). The OTJ told us that the first of these meetings was held in February 2017 and that the group has been meeting regularly

report. See DOJ Press Release, "Attorney General Jeff Sessions Announces New Actions to Support Law Enforcement and Maintain Public Safety in Indian Country," April 18, 2017.

In response to a working draft of this report, EOUSA stated that the Native American Issues Coordinator now chairs the Violent Crime in Indian Country Subcommittee as a derivative of the Attorney General's Task Force on Crime Reduction and Public Safety. EOUSA further indicated that, since the committee's April 2017 inception, the committee has held 4 meetings and made 40 recommendations to the Office of Legal Policy to combat violent crime in Indian country. Members of the subcommittee include the BIA; DEA; FBI; Office of Justice Programs; OTJ; U.S. Marshals Service; Bureau of Alcohol, Tobacco, Firearms and Explosives; and Federal Bureau of Prisons. We did not review these more recent recommendations to determine whether or not they specifically address TLOA requirements.

³⁵ In response to a working draft of this report, the OTJ stated that its liaison responsibilities bear equal weight with its other responsibilities as outlined in 28 C.F.R. 0.134.

³⁶ In response to a working draft of this report, the OTJ stated that its involvement in law enforcement activities is not advocacy, but rather fulfilling a legal requirement that its office coordinate the Department's activities, policies, and positions relating to tribes, specifically with respect to public safety in Indian country.

since then. The OTJ Director also informed us that, as of March 2016, the OTJ had begun meeting with the DEA about how the DEA can do more outreach in Indian country. However, in these meetings, the OTJ provides input only for issues that arise, such as training questions or jurisdiction. Because the OTJ's mission does not include oversight, the OTJ Director said that there needs to be consistent guidance from the Attorney General and the ODAG to ensure that the Department coordinates its Indian country activities. He further stated that he would like to see Indian country consistently treated as a priority across districts. As noted above, ODAG officials told us that oversight of the Department's TLOA responsibilities rests with each component.

While EOUSA, the USAOs, the DEA, and the FBI provide assistance to tribal law enforcement and judicial officials, we found that, as described below, their implementation of TLOA-mandated activities varies and there is no Department-level accountability for their TLOA compliance.

Executive Office for United States Attorneys

TLOA established specific requirements for EOUSA and the USAOs, as outlined in the Introduction of this report. However, we found that implementation of these requirements varies across USAOs and that no one in the Department has responsibility for ensuring that all USAOs comply with all TLOA requirements. For example, TLOA required EOUSA to establish a Native American Issues Coordinator position to coordinate with U.S. Attorneys who have authority to prosecute crimes in Indian country and with other DOJ components that have Indian country responsibilities. We found that EOUSA created the position, and that the Native American Issues Coordinator serves as a liaison with other DOJ components and federal agencies, provides legal guidance to USAOs, and compiles data on case declinations for USAO annual reporting requirements established under TLOA.³⁷ However, EOUSA has limited authority to direct how individual U.S. Attorneys implement programs and, consistent with its general support function, the Native American Issues Coordinator's role is not to direct or assess USAOs' implementation of or compliance with TLOA requirements.

The Department required all USAOs with Indian country jurisdiction to develop operational plans that outline the districts' work in Indian country; to update their plans annually; and, upon adoption, revision, or update, provide the ODAG, through EOUSA, a summary of the plan.³⁸ However, the Department's directive did not specifically state the purpose of the operational plans, and we found that no individual or entity was tasked under the directive with evaluating the plans to ensure adoption, update, or compliance. The Native American Issues

³⁷ USAOs are required to annually report to the Coordinator all declinations to prosecute alleged violations of federal criminal law that occurred in Indian country and that law enforcement agencies referred to them.

³⁸ David W. Ogden, Deputy Attorney General, memorandum to United States Attorneys with Districts Containing Indian Country, Indian Country Law Enforcement Initiative, January 11, 2010 (see Appendix 2).

Coordinator told us that he was not familiar with each district's operational plan, but he said that he ensures that districts have completed them per the Department's directive.³⁹ He later told us that he was unaware of what happens if a plan is outdated or not in compliance with the Department's directive. We discuss USAO implementation of TLOA requirements and operational plans later in this report.

EOUSA evaluates the performance of each USAO approximately every 3 years through its Evaluation and Review Staff (EARS), which conducts peer evaluations to assess how well USAOs are following Department policies and the Attorney General's priorities. However, we found that EARS evaluations do not review TLOA compliance or ensure that each district is meeting its goals, objectives, and performance measures in Indian country. The Assistant Director for EARS told us that EARS has not done program evaluations in the last 5 years because of the need to reduce duplicative efforts and contain spending. She told us that, because EOUSA's Office of Legal and Victim Programs (OLVP) had more frequent contact with USAOs with Indian country jurisdiction and has evaluated Indian country programs, EARS removed Indian country issues from its evaluation. However, the Assistant Director of the OLVP told us that the OLVP does not conduct USAO program evaluations and that its work extends to all USAOs, not just districts with Indian country jurisdiction. She also said that the OLVP will not conduct evaluations independent of a specific USAO request.

In response to a working draft of this report, EOUSA stated that the Native American Issues Coordinator oversees implementation of and compliance with TLOA requirements for the USAO community. However, EOUSA also stated that the Native American Issues Coordinator does not assess the work being done in the USAOs and relies on districts to evaluate their full compliance with TLOA. Given EOUSA's role in providing executive and administrative support for U.S. Attorneys throughout the United States, as well as guidance and programmatic support to USAOs on TLOA matters, we believe that EOUSA should include TLOA program evaluations as part of its EARS program.

Drug Enforcement Administration

TLOA required the DEA and FBI to coordinate with the BIA to provide training to BIA and tribal law enforcement personnel.

In March 2016, the former Chief of the DEA headquarters' Regional and Local Impact Section (OGR), which manages the DEA's activities in Indian country, assigned a Staff Coordinator to serve as BIA liaison as a collateral duty and to initiate coordination between the DEA and the BIA.⁴⁰ The Staff Coordinator said

³⁹ The Native American Issues Coordinator had been in his current position for 4 months when the OIG initially interviewed him in March 2016.

⁴⁰ In response to a working draft of this report, the DEA told us that the Staff Coordinator was a new, full-time BIA liaison. However, when we interviewed the Staff Coordinator in August 2016, he told us that while he believes the liaison position needs to be full time, he spends a considerable amount of time on other assigned duties and DEA priorities.

that he had consulted with OTJ and BIA representatives to identify ongoing law enforcement and training activities in Indian country to help determine what the DEA's role should be. He told us that his goal was to provide field offices with detailed information regarding the DEA's role in Indian country because DEA agents did not know what they are supposed to do to support investigations with training. Officials from the DEA's Office of Training also told us that they were unaware of the training the DEA has facilitated in Indian country and that they would not know about such training unless a field office requested additional funding.

As discussed later in this report, we found that DEA headquarters personnel were generally unaware of the DEA's law enforcement activities in Indian country and its TLOA requirements to train BIA and tribal law enforcement personnel. The former Chief of the DEA's OGR told us that he did not know how TLOA has affected the DEA's activities.⁴¹ He added that the DEA has little involvement in Indian country and, in line with what we found, the OGR has only recently begun coordinating with other components working in Indian country.

In response to a working draft of this report, the BIA stated that its Drug Division has not worked directly with the DEA headquarters' Office of Training on drug training, but that BIA drug agents in the field work closely with their DEA counterparts in the field on any drug training that the BIA Drug Enforcement program conducts for tribal law enforcement. The DEA told us that although the OGR is, and has been for years, responsible for liaising with the BIA, in FY 2012 the DEA was under a self-imposed hiring freeze followed by a period of federal government sequestration that led to understaffing and the OGR's minimal coordination with the BIA. When we asked the Staff Coordinator in August 2016 about DEA liaison efforts that had occurred before he assumed his position, he told us that there was nothing in place when he arrived at the OGR and that "he had to start from the ground up." Because of these staffing and budgetary issues, the DEA said that the lack of manpower continued for several years and may have impacted the DEA's ability to liaise properly at the headquarters level. The DEA further stated that, despite budget and staffing constraints, its divisions did make training available to state, local, and tribal counterparts. We further discuss the DEA's implementation of TLOA training requirements at the division level and our remaining concerns regarding its training efforts later in this report.

Federal Bureau of Investigation

The FBI's Indian Country Crimes Unit (ICCU) manages the FBI's Indian country activities, including compliance with TLOA training and data reporting requirements and operational support for issues that arise in FBI field offices with Indian country jurisdiction. We found that FBI field offices inform the ICCU of significant investigations occurring in Indian country and submit investigative case statistics to the ICCU to comply with TLOA data collection and reporting requirements.

⁴¹ In response to a working draft of this report, the DEA told us that the OGR Chief had been in his current position for 3 months when the OIG interviewed him and that he was in the process of learning the extent of the DEA's involvement with Indian country drug-related investigations.

We also found that the ICCU has attempted to implement some of TLOA's training requirements, although training efforts have been limited. For example, in 2016, the FBI partnered with the BIA to develop the Indian Country Criminal Investigator Training Program (ICCITP) to train law enforcement officers new to federal investigations in Indian country. However, the ICCITP can accommodate only eight BIA participants and eight tribal participants at a time, which makes it a challenge to meet the training needs of BIA and tribal law enforcement officers working in Indian country. In addition, while not a TLOA requirement, the ICCU tracks some ad hoc training that Special Agents provide to tribal law enforcement in the field. We discuss the FBI's implementation of TLOA training requirements, including its ICCITP training program, later in the report.

DOJ Resources Dedicated to Indian Country Efforts Have Decreased since TLOA's Passage

Despite the Department's prior statements that public safety in Indian country is a priority, we found that funding and resources for Indian country prosecutions have decreased since TLOA's implementation. While the Department initially made efforts to provide greater funding for Indian country prosecutions, this has not continued over time. In FY 2010, as part of a Department-wide initiative on public safety in Indian country, the Department obtained and allocated an additional \$6 million for at least 35 additional Assistant United States Attorneys (AUSA) in offices with Indian country jurisdiction. While USAO resources for Indian country increased from FY 2011 through FY 2013, since that time both total funding and the number of attorneys have decreased 40 percent. The FBI's resources allocated to Indian country grew slightly from FY 2011 through FY 2016, though they dropped somewhat in FY 2016. In contrast, the DEA has never received funding specifically for Indian country work. Our analysis in Table 4, based on DOJ Budget Fact Sheets, shows the Department's Indian country funding for FY 2010 through FY 2016.

Table 4
Indian Country Funding Enacted for the USAOs and the FBI
By Position, in Millions, FYs 2010–2016

Fiscal Year Enacted	USAOs			FBI		
	Total Positions	Total Attorneys	Amount	Total Positions	Total Agents	Amount
2010	182	127	\$27.6	115	110	\$25.6
2011	173	123	\$28.3	121	111	\$22.8
2012	173	123	\$32.7	171	142	\$32.7
2013	207	144	\$34.6	143	126	\$26.7
2014	199	136	\$33.4	134	125	\$27.5
2015	124	91	\$21.8	203	125	\$34.0
2016	114	85	\$19.8	163	124	\$30.6

Source: DOJ Budget Fact Sheets

After we completed our fieldwork, EOUSA and the OTJ each provided a spreadsheet that the OTJ was using to track and monitor the Department's

compliance with TLOA. EOUSA said that in 2012 implementation of TLOA was extremely important to the Department's Indian Country Working Group and compliance was monitored and tracked. The OTJ stated that in early 2011 it began tracking TLOA implementation throughout the Department and, where necessary, facilitating coordination between components, including hosting conference calls and providing periodic updates to Department leadership and all components involved in TLOA implementation.

We reviewed a copy of the spreadsheet that the OTJ provided and found that it was created in October 2011 and updated twice, in July 2012 and February 2016.⁴² Those updates reflected in the OTJ's spreadsheet were in line with what we found during the course of this review. For example, the OTJ's spreadsheet includes a column regarding TLOA's requirement that the DEA and FBI establish "a new training program" or supplement "existing training programs" for BIA and tribal law enforcement on the investigation and prosecution of illegal drug offenses and alcohol and substance abuse prevention and treatment. We found that initial updates to the spreadsheet in 2012 stated "no status provided." In 2016, updates were limited to (1) the FBI's efforts to coordinate joint training with the BIA and the Federal Law Enforcement Training Center focused on forensic evidence collection and investigations and (2) the DEA's one training that was open to federal, state, local, and tribal partners in 2015. Later in this report, we discuss the DEA's and FBI's efforts to coordinate with the BIA to ensure that both BIA and tribal law enforcement have access to training.

Across Districts, USAOs Do Not Consistently Communicate or Effectively Coordinate with the Tribes Regarding Their Activities in Indian Country

TLOA recognized that many tribes rely solely on USAOs to prosecute felony and misdemeanor crimes occurring in Indian country. U.S. Attorneys establish law enforcement policies and priorities within their federal judicial districts, and they may carry out TLOA responsibilities differently based on tribal populations and district priorities. We found that not all districts ensure that TLOA requirements are being met and most Tribal Liaisons work autonomously and carry out duties at their own discretion.⁴³

⁴² In response to a working draft of this report, the OTJ provided additional spreadsheets that highlighted status updates for 2011 and 2015. We reviewed the spreadsheets and found that from 2015 to 2016 there were no updates and six cells noted pending changes.

⁴³ After the completion of our fieldwork, EOUSA stated that in June 2016 Attorney General Loretta Lynch issued a memorandum to all U.S. Attorneys with Indian country jurisdiction, directing them to ensure that performance appraisals of AUSAs with Indian country jurisdiction include, among other metrics, consideration of outreach to tribal leaders and victims, training received or delivered, successful and innovative collaboration with federal and tribal partners, and efforts to enhance a victim-centered prosecution process. We did not initially review this memorandum because it was implemented outside of the scope of our review. However, in April 2017, we requested from EOUSA any evaluations or reports that directly addressed Indian country. We were told that EOUSA does not do evaluations of individual programs in Indian country and that individual program evaluations are left to the USAOs.

Although the Attorney General directed U.S. Attorneys with Indian country jurisdiction to create an operational plan that would guide the Department's strategic approach to working in Indian country, we found that these plans were created for compliance only and are not comprehensive or updated to reflect changes in USAO operations. We found the following deficiencies in the USAO districts' operational plans and work in Indian country:

- Most plans have not been updated to reflect changes since TLOA's passage, including the role of the Tribal Liaison.
- Within each district, dual responsibilities oftentimes prevent Tribal Liaisons from carrying out their TLOA responsibilities. As a result, some districts have case backlogs and USAOs do not adequately or consistently communicate case statuses with tribes.
- There is limited communication between tribal prosecutors and AUSAs prosecuting cases. Even taking into account the diversity of tribes and relations with USAOs, we found that the process to notify tribes of case decisions, particularly case declinations, is inconsistent even within individual USAOs.
- TLOA encouraged each USAO with Indian country jurisdiction to participate in the Special Assistant United States Attorney (SAUSA) program, but we found that the program lacks consistent funding and standard criteria to guide program participants.

Most USAOs Do Not Maintain Comprehensive or Updated Operational Plans to Guide Their Indian Country Work

In January 2010, the Department directed each U.S. Attorney with Indian country jurisdiction to establish a plan for leadership and law enforcement activities in its district.⁴⁴ Recognizing that any intergovernmental relationship is based on consistent and effective communication, the Department required each USAO to engage annually with law enforcement partners and to use those consultations to develop an operational plan and to review and, as necessary, revise on an annual basis. While not a TLOA requirement, collectively these plans help institutionalize the Department's commitment to Indian country and further the Department's goal of building a more efficient, effective, and sustainable response to the public safety crisis facing American Indians.⁴⁵ We reviewed the operational plans of 47 USAO

⁴⁴ Ogden, memorandum to U.S. Attorneys, January 11, 2010.

⁴⁵ DOJ, Offices of the United States Attorneys, "Planning a Safer Future in Indian Country: Identifying Problems and Finding Solutions through Collaboration," updated December 8, 2014. We note that this "strategy" document was available on EOUSA's webpage during the course of our review. The strategy reiterates the Deputy Attorney General's 2010 memorandum to U.S. Attorneys declaring the improvement of public safety in tribal communities a top Department priority as well as guidance from the EOUSA Director regarding the "core elements" that U.S. Attorneys with Indian country jurisdiction were to include in their operational plans. In June 2017, at the completion of our fieldwork, EOUSA staff told us that in March 2017 they were directed to remove all information regarding EOUSA's "Priority Areas," including this strategy document, from their webpage, to coincide

(Cont'd)

districts with Indian country jurisdiction. Thirty-eight plans were from districts that do not have tribes with Public Law (PL) 280 status (that is, districts with exclusive federal jurisdiction), and nine plans were from districts that have tribes with PL 280 status (that is, districts with state jurisdiction). Of the 38 non-PL 280 plans, we found that 21 (55 percent) did not include core elements such as communication regarding declinations, investigations, victim advocacy, training, outreach, violence against women, and accountability.⁴⁶ We also found inconsistencies in other elements, including annual updates, purpose, communication, and Tribal Liaisons.

- **Annual Updates:** Of the 47 total plans we reviewed, we found that 24 were updated in 2016, outside the period of our review; 3 were updated in 2015; and, from what we can determine, 18 were updated only in 2014 or years prior. Two plans did not include a year of update at all (see Table 5).

Table 5
Annual Updates of USAO District Operational Plans
FYs 2011–2016

Year of Update	Number of Plans Updated
2011	8
2012	3
2013	1
2014	6
2015	3
2016	24
No Date	2

Source: EOUSA

All districts submitted their plans to EOUSA's Native American Issues Coordinator after initially drafting them in accordance with the Department's directive. However, while districts may have submitted their operational

with the arrival of the new Attorney General. EOUSA no longer uses this strategy document, and, as of October 2017, it does not have an updated or new strategy in Indian country.

⁴⁶ Although there are 49 districts with Indian country jurisdiction, we reviewed only 47 operational plans because we excluded 1 district that has a federally recognized tribe but does not have Indian country jurisdiction and we excluded Alaska.

According to the Department, districts that have non-PL 280 tribes (those without any state jurisdiction) should generally consider including the following elements in their operational plans: (1) develop and foster an ongoing government-to-government relationship; (2) improve communications with each tribe, including the timely transmittal of charging decisions to tribal law enforcement, where appropriate; (3) initiate cross-deputization agreements, Special Law Enforcement Commission training, and a Tribal SAUSA program, where appropriate; and (4) establish training for USAO staff and all relevant criminal justice personnel on issues related to Indian country criminal jurisdiction and legal issues.

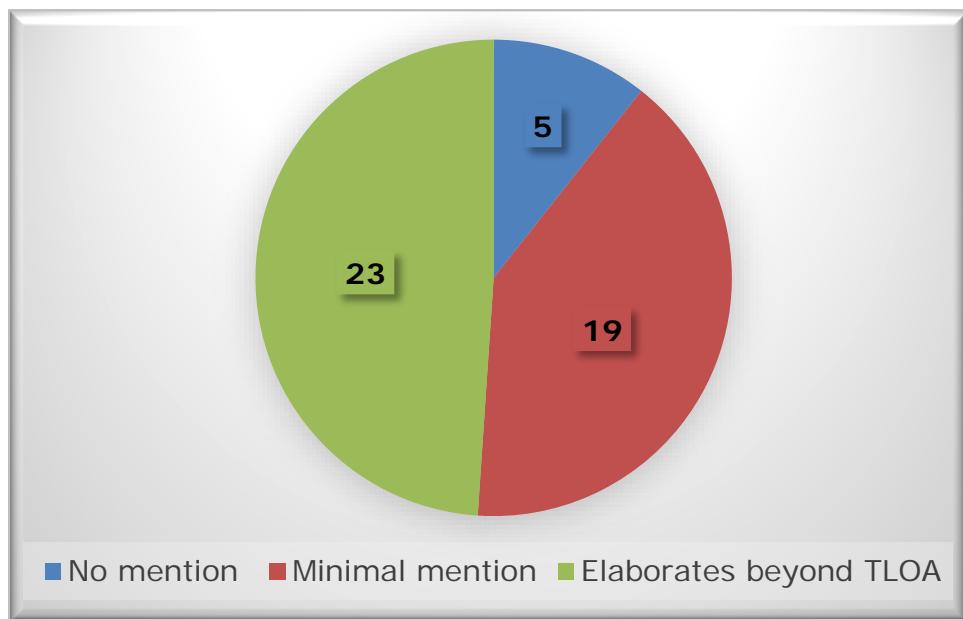
plans, we found that these plans are not reviewed by anyone in a position to ensure that they reflect a district's current strategy and activities in Indian country. EOUSA's Assistant Director for Indian, Violent, and Cyber Crime Staff told us that plans are intended to carry out a mission and to force the districts to think without proceeding, on autopilot or by default. However, as stated earlier, there is no person or office within the Department to ensure that USAO plans are appropriately coordinated with the Department's law enforcement strategy and with the requirements of TLOA in Indian country.

- **Purpose:** We found that the understanding of an operational plan's intent or purpose differed from district to district and even within the same office. One Tribal Liaison told us that the plan serves as an annual reminder of what is expected in the office. However, the Chief of the Violent Crimes Section in the same office told us that the plan does not drive the section's work but rather reflects the work it has already done in Indian country. In another district, the plan was referred to as a strategic plan, serving merely as a reminder to the office "not to fall behind" on the USAO's work in Indian country, as well as a useful tool to maintain institutional knowledge. Other districts use their plans to evaluate staff performance based on the delivery of activities outlined in the plan. For example, an AUSA told us that what is required in the district's plan is also included in staff performance work plans.
- **Communication:** Although the Department directed each district with Indian country jurisdiction to develop an operational plan in consultation with tribes and to engage with them annually, 11 of the 47 plans that we reviewed (23 percent) did not reflect annual consultation with tribes. In fact, tribal prosecutors from each tribe that we interviewed told us that they were neither aware of nor consulted with regard to their USAO's plan. One tribal prosecutor told us that he would have liked to provide input but did not have the opportunity. Because the plans serve as a coordinated strategy for addressing public safety in Indian country, tribes and law enforcement partners should be involved in their creation and in the required annual review and updates to them.

The Department also recommended that operational plans outline the timely transmittal of charging decisions to tribal law enforcement. However, we found that only 19 of 47 (40 percent) of the plans that we examined state that AUSAs and Tribal Liaisons will issue case declination letters. Of the remaining 28 plans, 15 simply state that tribes will be notified and 13 make no mention of communicating charging decisions to tribes at all. Even those plans that we found provide for declination letters, not all specify who should receive those letters. And we found that designated recipients of declination letters range from the investigative agent assigned to the case to tribal law enforcement officials and tribal prosecutors. Because the Department's memorandum stated that charging decisions should be communicated to tribal law enforcement, we believe that all districts should outline their communication method for charging decisions. Below, we further discuss USAOs' communication with tribal law enforcement, including the issuance of declination letters.

We found that Tribal Liaisons are essential for communicating and building relationships with tribes. Although Tribal Liaisons' duties are extensive, covering areas such as training, outreach, and consultation and coordination with tribes, their appointment is critical to improving public safety in Indian country. Tribal Liaisons have specific responsibilities detailed in TLOA, but we found that not all USAO operational plans outline the liaisons' role as contemplated by the statute. While not a requirement, we found that of the 47 district plans we reviewed, many do not describe how TLOA's requirements, particularly those of the Tribal Liaison, apply to their USAO's individual structures. In fact, we found that five plans do not mention the Tribal Liaison at all. While the remaining 42 reference the position, 8 simply state that it exists, 7 only generally describe the position, and 4 inserted verbatim TLOA language. We found that only 23 plans (49 percent) elaborate on the duties of the Tribal Liaison, beyond what TLOA provides, and describe how the position is carried out in their respective districts. Last, 2 of these 23 plans that elaborate on the Tribal Liaison position do so only with regard to training tribal personnel and not other Tribal Liaison responsibilities consistent with TLOA (see Figure 2).

Figure 2
Count of USAO Operational Plans that Mention the Role of Tribal Liaisons



Source: OIG Analysis

We found that variance in how the Tribal Liaison position is described and carried out can have an impact on how USAOs communicate and coordinate with tribes. For example, one plan states that AUSAs, including Tribal Liaisons, should visit their assigned tribes to gain familiarity, remain in contact with federal agencies and tribal prosecutors to determine the most appropriate avenue for prosecution, and promote the USAO's availability to provide training. Plans like this example, which elaborates on a Tribal Liaison's role, acknowledge the importance of building

a relationship with the tribes. These additional details make expectations clear to tribes, the district, and the Tribal Liaison. However, such examples are few. We further discuss the role of Tribal Liaisons below.

Even though a USAO district's operation plan may include every required statutory criterion, the usefulness of that information depends on the plan's detail and specificity. We believe that comprehensive plans should provide an overview of a district's operations and ensure that all staff members have a common understanding of the district's approach to guide their work in Indian country. For example, one U.S. Attorney told us that if the office were not carrying out the strategy set forth in the plan, he would identify gaps and incorporate them into training opportunities.

While the Department's directive to create district plans was issued prior to TLOA, the Department also directed U.S. Attorneys to update their plans on an annual basis as necessary to address changes in USAO operations. We believe that if U.S. Attorneys are committed to ensuring that plans build the foundation for Indian country success, districts should update their plans as necessary to ensure that they include core elements required under TLOA, such as the addition of Tribal Liaison responsibilities. Also, because operational plans are intended to institutionalize the Department's commitment to Indian country, we believe that districts should use their plan as a management tool to hold themselves accountable for carrying out their Indian country responsibilities and improve the effectiveness of operations accordingly.

Dual Responsibilities Prevent Some Tribal Liaisons from Fulfilling All of Their TLOA Responsibilities

TLOA establishes several responsibilities for Tribal Liaisons to coordinate the prosecution of crime in Indian country and to develop relationships and maintain communication with tribes through training and outreach. The Department acknowledges that the Tribal Liaison program is one of the most important aspects of its Indian country efforts and that many districts rely on Tribal Liaisons to address challenging cultural and legal issues in Indian country.⁴⁷ The OTJ Director told us that an effective Tribal Liaison maintains communication between the tribe and the U.S. Attorney and ultimately makes investigations and prosecutions easier.

TLOA required that each USAO district with Indian country jurisdiction appoint a Tribal Liaison to, among many things, coordinate the prosecution of crimes in Indian country, coordinate with tribal prosecutors, provide technical assistance and training, develop multidisciplinary teams, and maintain communication with tribes. However, Tribal Liaisons often have additional responsibilities, such as carrying a federal criminal caseload and sometimes prosecuting crimes from outside Indian country. As AUSAs, Tribal Liaisons' primary responsibility is to prosecute federal criminal cases, and we found that if this is not

⁴⁷ DOJ, *Indian Country Investigations and Prosecutions* (2015), 2, 22.

appropriately balanced with their TLOA responsibilities, it may hamper their ability to meet all of their TLOA responsibilities.⁴⁸

Several Tribal Liaisons told us that they find it difficult to carry out both the prosecution and liaison functions of their position. We found that in the districts we visited, caseloads vary among Tribal Liaisons, depending on the tribes, and can occupy from 40 to 90 percent of their time. For example, one Tribal Liaison told us that he spends 40 percent of his time prosecuting cases and 60 percent of his time doing outreach, coordination, and training with the 22 tribes in his district. Another told us that he believes that, because he wears too many hats, a case backlog is inevitable. A Tribal Liaison from a different district told us that she has too many responsibilities and has a backlog of training requests from tribes. She said that there are four trainings that a tribe has requested and not received because she was prosecuting a large case. She said that it would be helpful if there were another AUSA prosecuting cases, but she acknowledged that the workload and time spent traveling to tribes do not appeal to most. A USAO Criminal Chief told us that he too would like the Tribal Liaison in his district to focus more on Indian country but limited funding prevents that. He said that in addition to Indian country and federal case assignments that include complex matters such as white collar securities fraud, the Tribal Liaison is also expected to coordinate other initiatives.

Tribal Liaisons must also provide training to tribal personnel, develop relationships, and maintain communication with tribes. However, to do so often involves travel to tribes located in rural areas and a significant distance from their USAO. Even in a state with three USAO districts, a Tribal Liaison told us that the closest tribe he serves is 45 minutes away by car and the farthest is a 4-hour drive. We note that the amount of time Tribal Liaisons may spend on training and outreach depends on the number of tribes they serve as well as the location of the tribes relative to the USAO (some USAOs do coordinated or regional training to help address this). However, we found that for most districts we visited, Tribal Liaisons' dual responsibilities limited their ability to travel and dedicate time to training and outreach with tribes. A Supervisory AUSA told us that because Tribal Liaisons are at the center of Indian country work, each should have the time to liaise effectively. Yet we found this was not always the case.

To ensure that Tribal Liaisons' workloads are appropriately balanced, we believe that USAOs should consider the number of tribes in each district, the tribes' geographic locations relative to the USAO, and the Tribal Liaisons' extensive responsibilities. Because Tribal Liaisons are critical for establishing relationships and ongoing communication with tribes, their time and responsibilities must be appropriately balanced. Appropriately balanced workloads for Tribal Liaisons would help improve communication between the USAO and the tribes and ensure that USAOs are able to meet TLOA responsibilities.

⁴⁸ TLOA itself provides that the Attorney General should take into consideration the dual responsibilities of Tribal Liaisons in evaluating their performance.

Limited Communication in Some Districts Between Tribal Prosecutors and the AUSAs Prosecuting Cases in Indian Country Leaves Both Tribes and USAOs Not Fully Informed

One of TLOA's purposes was to increase coordination and communication among federal, state, tribal, and local law enforcement agencies.⁴⁹ Because tribal prosecutors frequently maintain concurrent jurisdiction and can coordinate parallel prosecutions in tribal court, it is particularly important for USAOs to maintain communication with tribal justice officials.⁵⁰ One AUSA said that successful work in Indian country depends on establishing good partnerships from the beginning. The OTJ Director emphasized the role of tribal prosecutors and told us that if an AUSA does not spend time with tribal prosecutors, learn from them, and understand what is happening on the ground in Indian country, he or she will miss a huge asset in casework. Despite the importance of strong working relationships and the integral role of tribal prosecutors in the coordination of prosecutions, we found that limited communication sometimes occurs between AUSAs and tribal prosecutors.

We found that the level of communication that tribal prosecutors have with the AUSA often depends on the individual AUSA rather than the USAO's expectations. In some districts, the AUSA assigned to a particular case is responsible for providing tribal prosecutors with case updates. In other districts, the Tribal Liaison, who may be assigned to a particular tribe but not to a particular case, is responsible. However, in two of the seven districts we visited, we found that when a Tribal Liaison was unfamiliar with the case but responsible for communicating case updates, the prosecuting AUSA did not always know who the tribal prosecutor was and the tribal prosecutor did not have a direct line of communication with the AUSA prosecuting the case.

In addition, many USAOs do not allow tribal prosecutors to submit cases directly for federal prosecution. Rather, USAOs accept cases from federal agents, and case-assigned AUSAs generally provide case updates to federal agents. Therefore, tribal prosecutors must contact federal agents, instead of the case-assigned AUSA, for subsequent case updates. A tribal prosecutor told us that the tribe's relationship with the USAO would not be as strong if federal agents did not assist with communication. The tribal prosecutor credited BIA Special Agents for facilitating communication between the USAO and the tribal prosecutor. Another tribal prosecutor told us that she does not receive any formal documentation from the USAO and relies on the tribe's federal liaison, who is a criminal investigator, to inform her of case decisions.

We believe that, even in districts where Indian country cases are presented for federal prosecution through federal agents, it is important that tribal prosecutors have not only the ability to communicate directly with the prosecuting

⁴⁹ In response to a working draft of this report, the BIA stated that a major obstacle to bringing cases forward to the USAOs are the USAOs' local prosecution guidelines, particularly minimum-weight amounts in narcotics investigations, an issue that is beyond the scope of this review.

⁵⁰ Some tribal prosecutors will pursue a tribal conviction in addition to a federal conviction because it shows tribal accountability and is documented on the offender's tribal record.

AUSA, but also a relationship with the USAO that encourages such communication. This would allow the tribe to receive case updates and give tribal prosecutors an avenue to relay vital case information, such as the offender's tribal history, directly to the AUSA. Later in this report, we discuss the SAUSA program, which could enhance communication between USAOs and tribes.

USAOs' Processes to Notify Tribes about Case Declinations Are Inconsistent, and Tribal Prosecutors Often Do Not Receive a Record of the Declination

When a USAO closes a case without prosecution, the declination should be documented in EOUSA's Legal Information Office Network System (LIONS), as well as in a declination notification letter.⁵¹ We found that the USAOs do not have a consistent process for AUSAs and Tribal Liaisons to formally notify tribal authorities when a USAO declines a case arising from Indian country and that, when they do provide such notification, the USAOs do not always adequately communicate the reason for declination. We attempted to review declination letters for 44 cases that USAOs had declined immediately on intake but had not yet documented the declination in LIONS.⁵² Of the 44 cases, we found that in 6 cases (14 percent) there was no declination letter sent to tribal authorities and in 24 cases (55 percent) there was a letter with a general declination reason, such as "insufficient evidence."⁵³ Of these 24 cases, only 3 of the letters included additional information that would further clarify the reason for declination or assist the tribal prosecutor in trying the case in tribal court. In these three cases, the USAO's decision to decline was fully explained in writing and verbally; in one case, the USAO and the tribe jointly decided that the tribe should prosecute the case.

One AUSA told us that a record of declination is important to the tribe because understanding the reasons for declination can help the tribe work through its internal challenges. Another AUSA said that it could be very frustrating for a tribe to receive declination reasons that do not help move a case forward in tribal court or that provide little information to relay to the crime victim. An assistant tribal prosecutor told us that more descriptive declination letters would help the tribe prosecute in tribal court without redoing work the USAO has already done.⁵⁴

⁵¹ LIONS is a database that permits USAOs and EOUSA to compile, maintain, and track information relating to defendants, crimes, criminal charges, court events, and witnesses. See also Offices of the United States Attorneys, U.S. Attorneys' Manual, Title 9-2.020 – Declining Prosecution (1997).

⁵² An immediate declination occurs when an investigative agency presents to the USAO a case referral that states that the case does not warrant federal prosecution. We requested these particular declination letters to ensure that notification was provided in the instances in which cases were immediately declined but the disposition was not immediately recorded in LIONS.

⁵³ Of the 14 remaining cases, 6 case files could not be located, 5 cases were never officially declined, in 1 case a suspect was charged, in 1 case the defendant pleaded guilty, and in 1 case the declination letter was sealed because it involved a juvenile.

⁵⁴ We recognize that in certain situations there may be limits on the type and amount of information that USAOs can share. In response to a working draft of this report, EOUSA said that USAOs cannot share information that would jeopardize the safety of victims or witnesses or the integrity of the USAO's investigation or prosecution.

In our review of declination letters, we found two cases in which both the investigator and the AUSA had left their assignments before the investigation was complete. In both cases, we found no record of the USAO having declined the case or having notified the tribes that the investigator and AUSA had left. In one case related to child abuse/assault, although a new FBI Special Agent was assigned to the case, the case was not investigated for 2 years. According to the documents we reviewed, when the FBI finally investigated the case, the agents could not collect sufficient evidence and the USAO declined the case. After the case was declined, the USAO sent an email notification only to the FBI agents, not to the tribe; the email noted that the child's mother was notified by telephone at that time, but she never received written notification of the declination.

One U.S. Attorney told us that, if a case cannot be tried in federal court, he feels he owes it to the victim and the family to be forthcoming about the reasons. Further, he said that he expects all of his AUSAs to explain their decisions to federal and tribal agents, as well as to the victims and their families. While AUSAs are not legally required to notify victims when a case referred for federal prosecution is declined prior to charges being filed, TLOA requires U.S. Attorneys to maintain communication with tribal justice officials, the tribal community, and victims' advocates to share information. We believe that USAOs with Indian country jurisdiction can do more to communicate case status and declinations to victims in a timely fashion, to include appropriate explanation of the reasons for declinations.

We also found several instances in which we could not confirm whether the USAO had notified the tribal prosecutor of a case declination; if the USAO did notify the tribal prosecutor, the notification consisted of a declination reason but no additional details.⁵⁵ As described above, such limited communication between tribal prosecutors and AUSAs prosecuting cases in Indian country leaves both tribes and USAOs not fully informed about case status. A tribe's Attorney General, who is a tribal prosecutor, told us that he does not receive notification but would like to be informed; otherwise, tribal members believe that the USAO will simply reject cases and let them sit and expire. One AUSA said that when cases are declined for insufficient evidence she does not typically forward case information to the tribal prosecutor. A Supervisory AUSA also told us that prior to our interview he had not considered informing the tribal prosecutor but that it could be a best practice for the district in the future.

In addition to inconsistencies in notifying the tribes of case declinations, we found that declinations by phone occurred in each USAO district we visited. USAOs typically do not decline cases by phone because there would be no record in LIONS or formal notification letter issued to the tribe. AUSAs in three districts told us that federal agents request case declinations by phone to move cases along. When some AUSAs decline a case by phone, they request a follow-up email from the agent so that the declination is in writing. A Criminal Chief told us that if an agent calls regarding a case with no federal jurisdiction or insufficient evidence, he will

⁵⁵ In these cases, we found the declination reasons recorded in LIONS but no corresponding declination letter.

decline the case by phone and follow up with a written declination in email only if the agent requests one. One AUSA told us that he rarely declines cases over the phone because declinations can have a negative connotation to the tribe and he wants the reason that the USAO will not accept the case to be clear.

The Department requires USAOs to communicate charging decisions to tribal law enforcement. While sometimes conversations between AUSAs and investigative agents could lead to a declination decision, we believe that these decisions should be recorded in writing to ensure a declination notification to the tribe. Written declination notifications ensure that all relevant parties have been informed, increase transparency and communication between the USAO and the tribe, and ultimately lead to improved relationships.⁵⁶

The SAUSA Program Enhances Communication between USAOs and Tribes; but There Are No Formal Criteria to Become a SAUSA and Funding Is Inconsistent

TLOA "authorized and encouraged" each USAO with Indian country jurisdiction to appoint a SAUSA to prosecute crimes in Indian country. In Indian country, the SAUSA program allows tribal prosecutors to serve as co-counsel with federal prosecutors on felony investigations and prosecutions. The program benefits the tribal prosecutors in many ways, including enhanced communication, greater understanding of federal prosecutorial procedures, and professional development. As of September 2016, there were only 22 SAUSAs working in Indian country serving 9 of 49 USAO districts (18 percent) with Indian country jurisdiction. We found that program participation is low, in part due to tribal sovereignty, conflicts of interest with other tribal duties, and a lack of tribal prosecutors with the appropriate skill sets and experience. Also, despite the potential benefits, there are no written Tribal SAUSA guidelines to establish criteria for applicants and the program lacks consistent funding.

One of TLOA's purposes was to empower tribal governments with the authority, resources, and information necessary to safely and effectively ensure public safety in Indian country. We found that tribal prosecutors who serve as SAUSAs have improved information sharing with USAOs and greater involvement in federal case prosecutions. SAUSAs told us that the program has enhanced their communication with AUSAs and has assisted in their understanding of the kinds of cases the USAO will accept, as well as the evidence needed to prosecute those cases in federal court.⁵⁷ One tribal prosecutor said that before he became a

⁵⁶ EOUSA told us that TLOA does not require a particular means of communicating declinations and that it is a decision best left to the U.S. Attorney because of tribal leadership dynamics and the sophistication of tribal criminal justice systems. While the means of communicating this important information may be best left to the U.S. Attorney based on the particular relationships between the USAOs and the tribal authorities, we believe that within districts the communication method should be considered and consistently applied as to those authorities.

⁵⁷ We also found that the SAUSA program is an educational tool for tribal prosecutors and AUSAs. SAUSAs said that greater communication with AUSAs has led to ad hoc mentoring

(Cont'd)

SAUSA, the AUSA would make decisions and rarely consult with the tribe. As a SAUSA, he is more involved and can advocate the tribe's views and needs, which helps the tribe have more input into prosecutions. Another SAUSA told us that before she participated in the program communication with the AUSA was limited to monthly meetings, which were the only instances in which case updates were provided. After becoming a SAUSA, she has been able to work alongside the AUSA to prosecute cases federally, which has resulted in sentences for serious crimes greater than the 1-year maximum available in tribal court. A third SAUSA told us that his relationship with the AUSA has improved since he became involved in the program and that he now has the opportunity to present tribal cases to be considered for federal prosecution. Acknowledging the mutual benefits of the relationship, an AUSA explained that SAUSAs can recognize cases that could be tried federally that might otherwise "fall through the cracks."

Despite the various benefits that the SAUSA program offers to tribes, we found that some tribes do not have prosecutors who meet federal SAUSA requirements or who are willing to participate.⁵⁸ EOUSA's Assistant Director of Indian, Violent, and Cyber Crime Staff told us that U.S. Attorneys have to ensure that everyone appearing in federal court has the experience and qualifications necessary to do so.⁵⁹ A Tribal Liaison in a USAO district without a SAUSA told us that the tribes in her district express no interest in the program because they do not have either a full-time or an experienced attorney. We also found that not all tribal prosecutors want to participate and pursue federal prosecution. For example, while some tribes are interested in implementing stronger punishments for criminal activities through federal sentencing, others do not believe that lengthy sentences are the appropriate solution. A U.S. Attorney told us that there are no SAUSAs in his district because tribal prosecutors believe that the program presents a conflict of interest; the tribes want to maintain their sovereignty and do not want to work with the federal government to federally prosecute their own tribal members. A tribal Attorney General told us that she was not interested in supporting a SAUSA because she does not want to prosecute more tribal members.

While some tribes cannot participate in the program, or choose not to, we found that other tribes may not know how to participate because the Tribal SAUSA program lacks eligibility guidelines or criteria. EOUSA told us that it did not maintain program guidelines or criteria because the Department's Office on

opportunities. One SAUSA believed that attending USAO weekly staff meetings and discussing case strategy and ideas with AUSAs had contributed to his professional development.

The National Indian Country Training Institute also facilitated Tribal Liaison, SAUSA, and AUSA trainings during FY 2014 and 2015. However, the number of SAUSAs who participated in these trainings was not available.

⁵⁸ To meet federal SAUSA requirements, applicants must have a juris doctor degree and be an active member of the bar in any U.S. jurisdiction.

⁵⁹ The program also requires an extensive background investigation, which may present an obstacle for some applicants.

Violence against Women (OVW) funded and facilitated the Tribal SAUSA program.⁶⁰ According to Ovw staff, while there are no guidelines or criteria for the Tribal SAUSA program, Ovw requires a memorandum of understanding (MOU) between the participating tribe and the USAO in its district, which may outline SAUSA responsibilities. However, Ovw staff noted that MOUs differ by district and the Ovw has no standard of uniformity for them. The lack of written criteria for potential SAUSAs may mean that tribal prosecutors are unaware of their eligibility for the program and that districts may miss opportunities that the program provides to both USAOs and tribal participants.

TLOA required that each USAO district with a SAUSA provide him or her with appropriate training, supervision, and staff support. However, we found that training, supervision, and support vary by district and can depend on the SAUSA's initiative. One SAUSA told us that the success of the program is based on each SAUSA's willingness to pursue such opportunities because there is no comprehensive structure for the program to ensure professional development and mentorship.

Finally, we found that the Tribal SAUSA program does not have a consistent funding source. The Ovw provided grant funding for Tribal SAUSA positions as a pilot program, including \$1.7 million in FY 2012 (for four positions), \$890,000 in FY 2014 (for two positions) and \$300,000 in FY 2016 (for four positions).⁶¹ The lack of funding in 2015 led three U.S. Attorneys with Tribal SAUSAs in their district to request BIA funding through a one-time interagency transfer of \$250,000.⁶² The remaining 19 SAUSAs without consistent DOJ funding are tribe funded or unpaid volunteer positions. An Ovw official said that when the Ovw cannot provide additional funding, tribes are left to seek it through other private organizations or government agencies. She added that she believes that the program is tremendously helpful and that it is unfortunate that the Department has been unable to find an alternative funding source. EOUSA's Assistant Director of Indian, Violent, and Cyber Crime Staff told us that although the Tribal SAUSA program is a very positive and popular initiative, the future of the program is unknown because funding for it is concluding.⁶³

⁶⁰ After the completion of our fieldwork, EOUSA provided USAO district MOUs for their respective SAUSAs. While these documents vary based on district needs, the MOUs generally describe the nomination and selection process, the duration of the appointment, the SAUSA's duties and responsibilities, case assignments, and standards of performance. The guidelines are established after tribal participants are selected for the program.

⁶¹ The fluctuations relate to the status of the funding for the SAUSA program as "no year money." Tribes receive all funding when the grant is awarded and can withdraw funds for the duration of the grant. Therefore, funding awarded in one particular year may span multiple years.

⁶² Although the Ovw and the BIA entered into an interagency agreement for a transfer of funds totaling \$250,000, the agreement is reimbursable. Therefore, the Ovw did not receive a lump sum but rather receives funds from the BIA each time the grantees withdraw funds.

⁶³ According to the Ovw's Supervisory Attorney Advisor, as of March 2017 the Tribal SAUSA program is no longer accepting applications because the pilot program was not extended and additional funding has not been allocated.

Because the Tribal SAUSA program is a tool to improve collaboration and cultivate relationships with tribes, we believe that there should be formal eligibility guidelines and clear qualification criteria for applicants. We also were concerned by the lack of consistent funding for the program. We believe that formal guidelines and criteria for applicants, as well as a consistent funding source for the program, would improve the coordination of prosecutions for both tribal communities and USAOs.

The Department Must Do More to Ensure that It Provides All TLOA-Required Trainings

TLOA required that USAOs, the DEA, and the FBI provide certain training to tribes and that the DEA and FBI coordinate with the BIA to ensure that tribes receive this training. We found that EOUSA's National Indian Country Training Institute (NICTI) fulfills most of the training responsibilities assigned to USAOs and that some USAOs provide additional, ad hoc training. We also determined that USAOs do not consistently track or report to EOUSA the training they provide so that EOUSA can determine whether USAOs are meeting all TLOA training requirements. We further concluded that, while the DEA and FBI have provided some training, neither have taken sufficient actions to coordinate their training with the BIA and have not done enough to ensure that they are complying with their TLOA training requirements. Additionally, while not a TLOA requirement, we found that a few FBI Special Agents received training through the ICCITP pilot, but DEA Special Agents receive no specialized training prior to working in Indian country. When DOJ components do not fully satisfy their TLOA training responsibilities, they do not fulfill TLOA's mission to help tribal law enforcement and other personnel investigate and prosecute crimes that occur in Indian country.

The NICTI Provides Training to Tribal Law Enforcement and Tribal Justice Officials, but That Training Does Not Meet All of TLOA's Requirements

TLOA required Tribal Liaisons to provide tribal justice officials with technical assistance and training on evidence-gathering techniques and strategies to address victim and witness protection. TLOA also tasked Tribal Liaisons with conducting Criminal Jurisdiction in Indian Country (CJIC) training sessions and seminars to certify Special Law Enforcement Commissions for tribal justice officials.⁶⁴ To comply with these training requirements, in July 2010 EOUSA created the NICTI, which has assumed many Tribal Liaison training responsibilities.⁶⁵

In general, we found that the NICTI's training meets many of TLOA's requirements. For example, TLOA sought to help reduce violent crime and address sexual and domestic violence against American Indian women. We found that the

⁶⁴ CJIC trainings fulfill one of the requirements for tribal law enforcement officers to receive their Special Law Enforcement Commission certification, which permits tribal officers to assist in federal investigations of major crimes that occur in Indian country.

⁶⁵ In addition, the NICTI plans, prepares, and executes distance education projects on public safety matters affecting tribes.

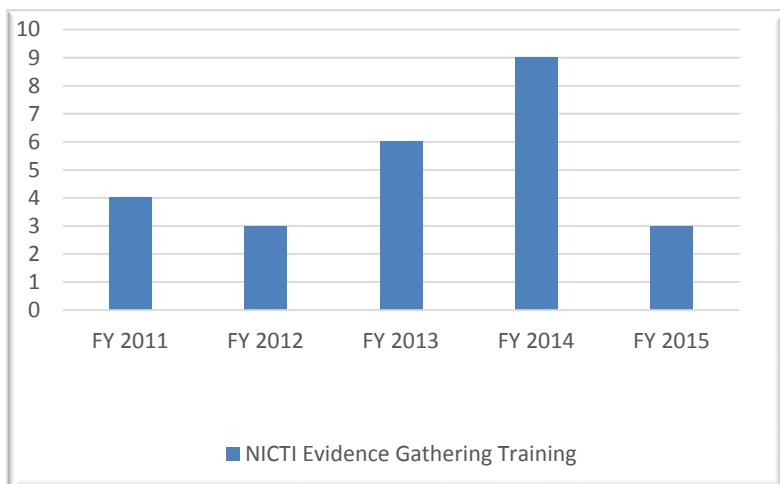
NICTI has facilitated several trainings at EOUSA's National Advocacy Center (NAC) related to domestic violence and sexual assault and victim and witness assistance, as well as other issues related to concerns in Indian country such as cultural property law and criminal jurisdiction. According to EOUSA data, the NICTI conducted 54 trainings from FY 2011 through FY 2015, 22 (41 percent) of which were related to domestic violence and sexual assault of adults and children.⁶⁶ Additionally, between FY 2011 and FY 2015, the NICTI facilitated approximately 21 CJIC trainings each year at the NAC and across the country. By annually facilitating multiple CJIC trainings, the NICTI has made CJIC training accessible for tribal personnel across the country.

We found limitations with regard to the NICTI's training in evidence-gathering techniques, which is a TLOA requirement. Such training may be especially important since "insufficient evidence" is the most frequent reason USAOs cite for declining to prosecute a case.⁶⁷ According to EOUSA training data, from FY 2011 through FY 2015, the NICTI held only three trainings specifically focused on evidence gathering. EOUSA told us that instruction on evidence gathering was also included as a portion of instruction in 22 additional NICTI courses, including Strangulation and Suffocation, Human Trafficking in Indian Country, and Forensic Interviewing of Child and Adolescent Victims. By providing additional evidence-gathering training to tribes, NICTI would not only fully address this TLOA requirement, it would also help improve communication with tribal law enforcement and prosecutors and provide tribes with more information on the types of evidence that warrant federal consideration, including what cases a USAO will accept for prosecution. See Figure 3 below for NICTI training related to evidence gathering.

⁶⁶ Throughout the sequence of EOUSA's responses to our data requests about NICTI training, the number and category of participants changed slightly, indicating that the reported numbers could be erroneous in comparison to true values.

⁶⁷ DOJ, *Indian Country Investigations and Prosecutions* (2011–2015).

Figure 3
NICTI Evidence-Gathering Technique Training Data
FYs 2011–2015



Source: EOUSA NICTI training data

We identified other areas in which NICTI training could be improved. Tribal officials told us about concerns regarding the abilities of new tribal law enforcement to secure crime scenes. One tribe's Public Safety Director told us that he is only 30 percent confident that his new officers can secure a crime scene. He believes that crime scene training could be strengthened so that tribal police know what evidence USAOs need to move a case forward for prosecution. Another tribal officer told us that her comfort level in securing a crime scene and gathering evidence depends on how many officers are available to assist her. She believes that more training focused on using computers for evidence analysis would be helpful because her office receives a lot of information that no one is able to analyze. For these reasons, we believe that the NICTI could provide additional training in order to fully enable tribal personnel to appropriately gather and analyze the evidence necessary to support a federal prosecution.

While the NICTI is fulfilling most of the USAO requirements for training under TLOA, we note that the NICTI has only two staff at the NAC to facilitate training opportunities on issues related to Indian country. As such, we believe that USAOs should do more to assist EOUSA and the NICTI in providing training to tribes.

Some USAOs Provide Ad Hoc Training to Tribal Law Enforcement and Tribal Justice Officials, but Tracking and Reporting of these Efforts Is Not Required

We found that some USAOs provide additional training to tribal law enforcement and tribal justice officials on an ad hoc basis; however, EOUSA may not be aware of all of this ad hoc training because USAOs do not track such training or report it to EOUSA. As a result, we were unable to determine the specific types and exact amount of training provided within districts. Of the 49 USAOs with Indian country jurisdiction, only 11 reported district-level training on topics such as report writing, federal court procedures, and child abuse cases. The training these

11 districts provided ranged from 1 to 37 total trainings between FY 2011 and FY 2015. A Tribal Liaison told us that the training he provides is not tracked and that all AUSAs assigned to Indian country cases, either as Tribal Liaisons or as AUSAs who prosecute cases in Indian country, provide training on their own. Another Tribal Liaison estimated that she has facilitated dozens of trainings and recognized that her office should do a better job of tracking the training topics and the number of tribal attendees.

Since the USAO districts do not track the ad hoc training they provide, USAOs cannot ensure that training occurs in all the areas that TLOA requires. Further, EOUSA is unaware of the training that USAOs provide to tribes and is thus unable to assess whether the USAOs' training is meeting TLOA requirements. We believe that EOUSA and the USAOs should do more to ensure that the NICTI and USAO training is complementary and not duplicative, and that it meets the needs of tribes as well as TLOA requirements. As part of that effort, we believe that the USAOs should report their Indian country training activities to EOUSA, and that EOUSA should centrally track the training that the NICTI and USAOs are providing so that EOUSA can ensure USAOs are appropriately addressing training needs in Indian country.

The DEA and FBI Have Provided Some Training but Need to Do More to Improve Coordination with the BIA and Tribal Law Enforcement, as TLOA Requires

One of TLOA's purposes was to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country. TLOA required that the DEA and FBI coordinate with the BIA to establish a new training program or supplement existing training programs that ensure that BIA, tribal law enforcement, and tribal judicial personnel have access to training opportunities for the investigation and prosecution of offenses relating to illegal narcotics and alcohol and substance abuse prevention and treatment. However, we found limitations in the DEA's and FBI's coordination with the BIA and tribal officials to ensure adequate access to training opportunities in these areas.

The DEA Has Provided Some Training to BIA and Tribal Authorities but Should Do More to Consistently Coordinate with Them as TLOA Requires

We found that, during the period of our review, despite TLOA requirements, the DEA provided limited training that was exclusive to BIA and tribal law enforcement. For example, to comply with TLOA requirements, the DEA headquarters' Office of Training implemented two training initiatives for tribal law enforcement: a Drug Unit Commanders Academy in 2011 and a 2-week Tribal Law Enforcement Basic Narcotics Investigations Course in 2012. However, according to the former Unit Chief for Specialized Training of the DEA's Office of Training, tribal law enforcement attendance at these trainings was low and the DEA did not continue the training after 2012.⁶⁸

⁶⁸ Both the DEA and the BIA told us that in some instances they scheduled training for tribal law enforcement in the field, as requested, and tribal officers failed to show up for the training.

As noted earlier in our report, we found that DEA headquarters personnel were generally unaware of the DEA's TLOA training responsibilities in Indian country. In March 2016, after the initiation of the OIG's review, the DEA assigned a Staff Coordinator with the collateral duty of liaising with BIA and tribal law enforcement agencies to determine how the DEA can help enhance their law enforcement and training activities in Indian country. The Staff Coordinator told us that he associated the FBI and the BIA, rather than the DEA, with Indian country law enforcement responsibilities. While the DEA has a responsibility in Indian country similar to that of the FBI and the BIA, he was not aware of how Indian country fit with the DEA's priorities.⁶⁹ He acknowledged that the DEA needs to provide more training specifically geared toward narcotics investigations because drugs and narcotics often underlie crimes that occur in Indian country. He said that the DEA could have a greater impact in Indian country if it became more engaged with the BIA and tribal law enforcement.

Several tribal law enforcement officials we interviewed told us that they had not received training on how to conduct drug investigations and that more narcotics training would be helpful. We found that the 2012 trainings are the only DEA training programs specifically for tribal law enforcement that the DEA headquarters' Office of Training has offered since the passage of TLOA. The Unit Chief in the Office of Training told us that his office does not facilitate any training specific to Indian country; rather, it provides in-service training for DEA Special Agents.⁷⁰ The former Unit Chief stated that determining training for Indian country was not a DEA headquarters function but rather the responsibility of individual Division Training Coordinators at the division level. Division Training Coordinators are Special Agents who have a collateral duty of planning and implementing DEA training in each division's area of responsibility.

We found that the Division Training Coordinators from the five DEA divisions with Indian country jurisdiction that we visited do not coordinate and were unaware of any training provided to BIA or tribal law enforcement. One Division Training Coordinator, whose response was typical of those in the divisions we visited, told us that she has never worked in Indian country; provided training to tribal law enforcement; or been made aware that DEA Special Agents in her division were providing training, as none was reported.

Regarding Special Agents coordinating and providing training, we found that low staffing levels in some DEA field offices make it difficult for their Special Agents to provide training to tribal law enforcement. For example, at the time of our site

⁶⁹ In August 2016, the DEA Staff Coordinator attended a 2-week training session with the BIA in Artesia, New Mexico. The DEA told us that the purpose of this training was to educate attendees on how the BIA conducts its investigations. The Staff Coordinator told us that he was the first DEA Special Agent to ever attend and that through his participation he was able to establish networks with the FBI and the BIA.

⁷⁰ As stated earlier, the BIA stated that although its Drug Division has not worked directly with the DEA Office of Training on drug training, BIA drug agents work closely with their DEA counterparts in the field on any drug training the BIA Drug Enforcement program conducts for tribal law enforcement or any drug training requests from tribes.

visit, the DEA had three Special Agents assigned to cover the entire state of South Dakota. Nevertheless, some Special Agents told us that they believe the DEA should support the BIA and the tribes through education and training. One DEA Special Agent told us that the DEA has a responsibility to develop tribal police departments in remote areas with unique challenges. While DEA field offices in Indian country may have limited numbers of staff to coordinate and provide training, we believe that, by working with BIA and tribal law enforcement, the DEA could serve as a force multiplier to assist the BIA in covering large tribal areas where its available manpower may be limited. To do so, the DEA must improve its coordination with the BIA to more systematically establish and clarify its training roles and responsibilities in Indian country.

The DEA provided the OIG with documents and data describing trainings, from FY 2011 through FY 2015, about a variety of topics, including narcotics-related issues that were sponsored by the five divisions that the OIG visited. The DEA told us that BIA and tribal police are invited to attend and do attend these trainings. We reviewed the DEA's data and found that these trainings appeared to be existing training courses that all law enforcement could attend, rather than a new training program or supplemented training for tribal law enforcement. We also found that despite TLOA requirements, some courses, such as a Forklift Certification course, appeared to be unrelated to the investigation of illegal narcotics.

Additionally, we found that BIA and tribal law enforcement attendance at these trainings appeared to be relatively limited. For example, of the 5 divisions, 1 division sponsored 353 courses and trained 77 tribal law enforcement officers. A second division sponsored 401 trainings and trained no tribal law enforcement officers. A third division sponsored 152 trainings, during which 2 tribal law enforcement officers received training. A fourth division sponsored 18 training courses, 3 of which were specifically targeted at tribal law enforcement. One of those trainings was attended by 124 tribal officers, a second was attended by 30 tribal officers, and the DEA did not provide information about attendance at the third. A fifth division provided a list of three trainings but was unable to indicate how many tribal law enforcement officers had received the training. Finally, while not a TLOA requirement, we found that BIA and tribal law enforcement participation was not consistently tracked in these division trainings, and that the DEA could evaluate and plan its training activities based on such information. DEA officials told us in response to a draft of this report that TLOA does not require the creation of separate classes exclusively for tribal law enforcement and that given the DEA's size, limited resources, and jurisdiction, it believes that providing joint law enforcement courses, not separate courses for tribal law enforcement, is the best approach.

We concluded that the DEA should do more to communicate to BIA and tribal law enforcement its available training opportunities and to encourage them to attend. Although the DEA advertises its trainings using a variety of methods such as email listservs, community outreach, and personal phone calls, a DEA agent told us that some groups may be missed because people are informed of training through word of mouth. In Oklahoma, for example, where the BIA has an

embedded drug agent in the DEA's field office, a DEA Special Agent told us that if the DEA did not have the BIA drug agent, the DEA would not have the same level of involvement with tribes because Indian country is not their primary focus. Another DEA Special Agent in the same field office told us that while tribal law enforcement has never contacted him about training, this would occur through the BIA Special Agent who also acts as a liaison. In other DEA divisions that do not have an embedded BIA Special Agent, DEA agents told us that communication with BIA and tribal law enforcement is infrequent. We believe that the DEA needs to do more to ensure robust communication and outreach with BIA and tribal officials so that they are aware of all available DEA training opportunities.

While the FBI Has Taken Positive Steps to Coordinate and Provide Training in Indian Country, Additional Efforts Must Be Made to Ensure that Training is Provided as TLOA Requires

Reflective of the FBI's primary role under TLOA to investigate major crimes in Indian country, we found that the FBI has taken positive steps to coordinate with the BIA and provide some training. However, similar to the DEA, during the period of our review we found that the FBI offered training opportunities to its law enforcement counterparts, including BIA and tribal law enforcement, but not as part of a new training program or by supplementing existing training programs as TLOA required. For example, from FY 2011 through 2015, FBI data indicated that FBI headquarters' Indian Country Crimes Unit (ICCU) provided 23 verified trainings to 624 FBI and BIA agents, as well as tribal, state, and local law enforcement personnel, on topics such as interviewing and interrogation, child abuse investigations (physical and sexual), death investigations, and evidence collection.⁷¹ However, we found that the number of these trainings decreased over this period, from nine verified trainings in FY 2011 to three verified trainings in FY 2015, and no FBI-sponsored training was provided in FY 2013 due to sequestration. While FBI data indicates that 348 BIA, tribal, state, and local officers participated in these verified trainings from FY 2011 to FY 2015, not all trainings included the number of attendees, and FBI data does not differentiate between how many personnel from each agency received training.

We also found that other training opportunities the FBI provides are limited in number and that the ICCU does not track them. For example, we found that some FBI Special Agents in field offices provide ad hoc training to tribal law enforcement when they identify a training need. One FBI Special Agent told us that she provided training on evidence processing and interviewing child victims because

⁷¹ The FBI provided data to the OIG on 48 trainings from FY 2011 through FY 2015. However, we did not include 20 trainings in our analysis because the FBI could not verify that the trainings had occurred and because 5 trainings were duplicated.

In response to a working draft of this report, the FBI stated that the previously reported number of law enforcement officers who received FBI training was overly conservative and unfairly underreported. The FBI amended its previously reported number of law enforcement officers who received FBI training to include 315 students for which the ICCU was unable to locate specific class rosters. However, the OIG was unable to confirm the attendance of these additional students based on data the FBI provided.

she had identified a gap in the tribal police department's ability to conduct child forensic interviews. However, we determined that the ICCU is not aware of all ad hoc trainings that Special Agents provide because Special Agents do not track or report them to the ICCU. The ICCU's Management Analyst told us that she did not believe that a lot of ad hoc training occurs in the field, but she confirmed that reporting it to the ICCU is not required. We believe that the FBI should track the training that its Special Agents provide in Indian country to determine whether tribal training needs are being addressed.

ICCU officials told us that they have not been able to consistently provide training because they have not had adequate funding. In the absence of funding, ICCU officials said that they rely on EOUSA's NICTI to train tribal law enforcement. We found that the FBI coordinated with EOUSA to provide training at the NICTI, and that training increased from 4 trainings in FY 2011 to 15 trainings in FY 2015.⁷² While coordinated training efforts between the FBI and EOUSA on overlapping areas of interest are important and a positive step, we believe that the FBI has its own law enforcement training requirements under TLOA and that an over-reliance on the NICTI for training places an undue burden on the NICTI's already limited staff, which is currently only two individuals at the NAC.

Finally, the FBI told us that, in FY 2016 (after the period of our review), the ICCU established with the BIA the Indian Country Criminal Investigator Training Program (ICCITP) for tribal law enforcement, as well as FBI and BIA Special Agents. The FBI developed the ICCITP for law enforcement officers new to federal investigations, specifically to address investigations in Indian country, covering topics that include child abuse investigations (physical and sexual), death investigations, crime scene reporting, and criminal jurisdictions in Indian country.

While the establishment of the ICCITP is a positive development, we do not believe that it alone will be able to meet the needs of all BIA and tribal law enforcement personnel in Indian country because its training programs are offered infrequently and to a limited number of participants. Specifically, each session of the ICCITP accommodates 24 total attendees and participation is divided equally among FBI, BIA, and tribal law enforcement. Therefore, only eight attendees from each group can attend an ICCITP session. Moreover, the ICCU Management Analyst who helps coordinate FBI training told us that only three sessions of the ICCITP were provided in 2016 and only two are planned for 2017.⁷³ In addition, the ICCITP is located in Artesia, New Mexico, which can make it difficult for most tribal law enforcement to attend. One tribal Police Chief told us that it is a

⁷² We note that only one FBI training was provided at EOUSA's NICTI in FY 2012. However, according to the FBI, the ICCU did not maintain records for trainings taught at the NAC during FY 2011–2013. The ICCU provided to the OIG a list of nine NAC-sponsored Indian country training events during FY 2011–2013, which had FBI instructors and/or presentations.

⁷³ In response to a working draft of this report, the FBI stated that as of July 2017 four iterations of the ICCITP have trained approximately 96 law enforcement officers from numerous federal, state, and tribal agencies. A fifth iteration was to be conducted in August 2017.

challenge to attend ICCITP training because his department would lose officers for at least 2 travel days in addition to the training days.

The FBI and DEA Do Not Provide Their Special Agents with Adequate Training Specific to Indian Country, which Differs from Their Other Assignments

The geographic and cultural conditions associated with Indian country present unique challenges to DEA and FBI Special Agents assigned to work there. We found that not all Special Agents receive training to address these challenges in connection with their assignment to Indian country. According to the ICCU Section Chief, responding to crimes that occur in Indian country can be difficult because reservations are often far away from FBI field offices. Often, new Special Agents are unfamiliar with the extensive and serious violent crimes (such as domestic abuse, child sexual assaults, or hand-to-hand bludgeoning) that often occur in Indian country. During interviews, DEA officials and Special Agents expressed similar concerns.

FBI Special Agents we interviewed told us that they had not received any training specific to Indian country prior to or during their assignment. Instead, they rely on on-the-job training from colleagues, tribal law enforcement, or skills from previous work experiences, which may be different from Indian country work. One Special Agent said that he had not received any training specifically for Indian country, which he said was "crazy" to him given the prevalence of violent crime that occurs on the reservations. Other FBI Special Agents who also did not receive training specific to Indian country suggested that new Special Agents should receive training on homicide, rural tactics, and cultural awareness before investigating crimes on reservations. As mentioned above, while the FBI began offering the ICCITP in 2016, this training, as currently structured and funded, can train only 8 FBI Special Agents per session and cannot ensure that all 125 FBI Special Agents assigned on a full-time basis to Indian country receive training.

DEA Special Agents also do not receive training specifically related to working in Indian country. The Unit Chief of the DEA's Office of Training stated that none of the training the DEA provides is tailored specifically to working in Indian country, and DEA management and Special Agents in the field said they were unaware of any Indian country-specific training that the DEA may have provided to Special Agents. Several DEA Special Agents told us that training related to Indian country could have been beneficial to their cases on a reservation.

Although TLOA does not require training specifically for FBI and DEA Special Agents, one of its primary purposes was to improve communication and collaboration between federal and tribal law enforcement agencies.⁷⁴ We believe that the FBI and DEA should provide training specific to Indian country to help

⁷⁴ Since 2012, the OIG has collaborated with the FBI and the Internal Revenue Service on the U.S. Attorney's Guardian Project. Thus far, this anti-corruption task force has successfully resulted in over 100 felony convictions for crimes including bribery, fraud, embezzlement, and extortion in federally funded programs in Indian country.

ensure that personnel assigned to these locations understand their law enforcement roles and responsibilities and are prepared for the work they will encounter there.

The Department Collects Limited Tribal Crime and Prosecution Data but Does Not Use It to Assess Law Enforcement Efforts or Identify Resource and Program Needs

TLOA, recognizing that crime data is a fundamental tool of law enforcement, placed data reporting requirements on the Department, EOUSA, the FBI, and the Bureau of Justice Statistics (BJS). Consistent with this requirement, EOUSA and the FBI collect data on their investigation and prosecution efforts in Indian country, which the Department uses to submit an annual report to Congress.⁷⁵ However, more than 7 years after the enactment of TLOA, the BJS is still developing its process for collecting and analyzing data about crimes in Indian country. As a result, we found that crime statistics for Indian country continue to be outdated and incomplete.

We attempted to assess the Department's efforts in Indian country by analyzing the EOUSA and FBI investigations and prosecutions data that the Department annually submits to Congress. We found several limitations to EOUSA's and the FBI's data collection that prevent accurate data analysis, and we found that EOUSA and the FBI do not use the information they collect to assess their activity in Indian country.

EOUSA's and the USAOs' TLOA Data Collection Has Limitations

To meet TLOA reporting requirements, EOUSA collects data on all Indian country cases that were pending, declined, or prosecuted each calendar year.⁷⁶ Congressional and Department leadership rely partly on EOUSA's data to measure the success of the USAOs in carrying out law enforcement priorities, using taxpayer dollars effectively, and achieving Department goals. We found several limitations to EOUSA's data, such as inconsistent data entry, coding errors, a transition to a new database, and a lack of internal controls, all of which prevented in-depth analysis. We discuss these limitations below.

- **Data Entry in LIONS:** EOUSA acknowledges in the Department's annual *Indian Country Investigations and Prosecutions* reports several limitations with its LIONS database; for example, LIONS is not designed to check data entries for accuracy and internal consistency; it does not require a case to be identified as having occurred in Indian country or not; and it does not cross-

⁷⁵ DOJ, *Indian Country Investigations and Prosecutions*. For the Department's annual report to Congress, EOUSA reports the number of federal prosecution declinations each calendar year and the FBI reports the reason for all administrative closures that occur in Indian country. Administrative closure refers to an Indian country investigation that the FBI opens and closes without forwarding to a USAO for federal prosecution consideration.

⁷⁶ EOUSA submits its annual report to Congress according to calendar year. However, EOUSA collects its data according to fiscal year.

check data entry fields or responses against those previously recorded in the database.

Our review identified several additional limitations. We found that the manner by which the USAO districts entered information in LIONS created inconsistencies in data entry and the level of detail captured. We determined that this is due in part to the fact that in some districts multiple Legal Assistants are responsible for data entry, which creates greater room for error because each may input information differently. Some districts use Docketing Technicians for data entry, and USAO staff told us that if Docketing Technicians are not detail oriented in their approach no one will know or identify errors. EOUSA's Deputy Director said that EOUSA does not have the staff to double check districts' work and must trust that it is correct.

Given the importance of consistent data entry both within and across USAOs, training is critical to ensure uniformity. However, EOUSA's Deputy Director told us that he could not recall the last time EOUSA had conducted national training on LIONS data entry. Of the seven districts we visited, we also found that none have provided training on data entry using the CaseView interface that is replacing LIONS. Although some districts have transitioned to CaseView, LIONS will remain the underlying database.⁷⁷

- **Transition to CaseView:** CaseView is a new interface that all USAO districts are required to use. In November 2013, the EOUSA Director issued a memorandum on a new coding policy to track Indian country cases in CaseView.⁷⁸ Beginning January 1, 2014, districts were to switch from LIONS to CaseView to enter immediate referrals or declinations that occurred in Indian country. If a case is identified as an immediate referral or declination, unlike the LIONS interface, CaseView will capture "location of offense," "tribal affiliation," and the status of the victim and the defendant as "Indian" or "Non-Indian." Districts can enhance CaseView's functionality by collecting and accurately recording data in required Indian country fields to ensure all statutorily required data is collected. However, we found that, as of September 2016, not all districts had transitioned to CaseView and, as a result, not all required data is being collected.⁷⁹
- **CaseView Coding Errors:** When a case is declined for prosecution, individuals responsible for data entry select one of six declination codes in CaseView. We found that declination coding errors had occurred, which adds to the inaccuracy of EOUSA's data. For example, both "alternative to federal

⁷⁷ After the completion of our fieldwork, EOUSA reported that in September 2016 it hosted an Indian country Data Entry Webinar Training with 36 participants to help improve its data collection efforts. EOUSA also reported that it hosted an additional 24 CaseView training webinars in August 2017.

⁷⁸ H. Marshall Jarrett, Director, Executive Office for United States Attorneys, memorandum to Districts Containing Indian Country, Guidance on USA-5/5A Coding in Indian Country Cases, November 6, 2013.

⁷⁹ EOUSA completed the transition to CaseView in August 2017.

prosecution" and "matter referred to another jurisdiction" are different declination reasons that districts appear to use interchangeably when coding declinations. In CaseView, the record sheet, which staff use to manually record declinations at the district level, indicates that "alternative to federal prosecution" should be used for instances such as payment of restitution, suspect cooperation, or pretrial diversion, not when a case is simply referred to another jurisdiction.

- **Internal Controls:** We found that few districts have internal controls to ensure data accuracy.⁸⁰ USAO management told us that for consistency's sake their districts limit the number of users who determine case codes; but USAO data entry staff agreed that additional training would be helpful. A Legal Assistant told us that CaseView training would be useful for data entry staff to determine where a crime occurred and how to enter that information in the system.⁸¹ EOUSA's Deputy Director told us that if all staff received training or became familiar with the LIONS database coding manual, it would create consistency among individuals entering data.

USAOs and EOUSA Do Not Effectively Use the Data They Collect

We found that EOUSA and the USAOs do not analyze the data that they collect to assist in evaluating USAO activities in Indian country. An ODAG official told us that components should use the data they collect to determine how their resources should be allocated and to assist in identifying resource challenges in investigations and prosecutions. EOUSA acknowledged that USAO supervisors could use the data they collect to measure caseloads, workflow, and staffing needs. For example, from calendar year (CY) 2011 through CY 2015, we noted several trends in the number of EOUSA-reported case prosecutions and declinations in Indian country. From CY 2011 to CY 2015, USAOs reported an increase in the number of defendants against whom charges were declined and a decrease in the number of defendants against whom charges were filed in District Court.⁸² When we asked EOUSA's Deputy Director how he would evaluate such a trend, he said that it is likely a combination of increased referrals to USAOs and greater attention paid to docketing. However, we found that the number of Indian country cases that

⁸⁰ After the completion of our fieldwork, EOUSA stated that it discovered errors in previous *Indian Country Investigations and Prosecutions* reports. EOUSA corrected the data in the 2015 report and provided additional training for all districts on "Native Status" data. However, we note that in February 2016, as part of this review, we found errors in the 2014 *Indian Country Investigations and Prosecutions* report and notified EOUSA. Subsequently, additional changes were made.

⁸¹ While EOUSA is not required to capture location of offense, we believe this information is useful to districts when analyzing prosecution data and determining how and where to allocate resources. In the April 2010 Jarrett memorandum, EOUSA requested that USAOs populate this field. Staff we interviewed did not know how to populate the field.

⁸² As noted in Table 2 in the Introduction, USAOs reported a 17 percent decrease in the number of defendants against whom charges were filed in District Court from CY 2011 to CY 2013, followed by a 20 percent increase from CY 2013 to CY 2015.

the DEA and FBI referred to USAOs decreased during that same time period and, as noted above, EOUSA docketing has not improved in a way that would explain this.

We also found that there is no priority placed on USAOs' learning to create and utilize customizable database reports, or "crystal reports." Crystal reports can be used, for example, to analyze trends in specific crimes by tribe or to determine administrative timeliness by the amount of time between the date a case is received and the date of its disposition. EOUSA's Deputy Director told us that USAO staff can run a crystal report based on the information they would like to assess; however, he said that some USAO staff do not know how to run them. We found that, in the seven USAOs we visited, only one USAO staff member responsible for Indian country data collection and reporting said they knew how to create crystal reports for further analysis.⁸³

EOUSA's Deputy Director told us that EOUSA does not have the time or resources to conduct proactive trend analysis, and we found that most of the USAOs we visited do not have that capability, perhaps due to limited time and/or knowledge. Because CaseView and LIONS provide a statistical illustration of all USAO activities, we believe that training for consistent data entry is critical to ensuring accurate data collection and enabling meaningful analysis of the Department's Indian country law enforcement efforts. We also believe that USAOs should analyze such data to better manage their efforts to address public safety in Indian country and to provide a complete picture of their work in certain areas, such as domestic violence, and with particular tribes. Without such analysis, the Department cannot accurately evaluate its efforts and accomplishments in this priority area.

The FBI's TLOA Data Collection Has Limitations, and the FBI Does Not Analyze the Data It Does Collect

To comply with TLOA reporting requirements, the FBI reports to the Department on all decisions not to refer an Indian country investigation to a USAO for prosecution — also known as an administrative closure.⁸⁴ We found that the FBI has not addressed limitations in its data that have persisted since the Department's first *Indian Country Investigations and Prosecutions* report. In that report, the FBI acknowledged that its data is subject to limitations. For example, the FBI is able to track only allegations reported to the FBI because BIA tribal law enforcement investigations are not reported; the data cannot be used to calculate crime rates; and cases initially identified as non-referrals may be reopened and referred for prosecution if new information is received.⁸⁵ Additionally, in annual reports since

⁸³ In response to a working draft of this report, EOUSA said that it believed the OIG was overstating the value of these reports. However, we believe that they are an important tool that can be utilized to help analyze trends and thereby inform prioritization and resource allocation.

⁸⁴ The FBI's report must include the type of crime(s) alleged, the statuses of the accused and of the victim(s) as Indian or non-Indian, and the reasons for not referring the investigation for prosecution.

⁸⁵ The FBI also told us that its computer systems are designed for case management rather than serving as statistical databases.

then, the FBI has continually acknowledged that having multiple people manually enter data into the FBI's case management system leaves room for error. We found that multiple FBI Special Agents across field offices still manually collect and enter data into the FBI's case management system. Through a Management Analyst, the ICCU consolidates and verifies the information on administrative closures with the field offices before submitting the data for the Department's annual report to Congress. The ICCU Management Analyst told us that some FBI agents are better than others at updating their cases. She further stated that she does not know how to address such limitations because inaccuracies in entering and updating data are due to human error and the FBI's database is not set up for reporting purposes.

We also learned that FBI divisions can use as many as 132 categories or codes to denote the alleged crime that was investigated and administratively closed. However, the final report that FBI headquarters prepared has only 10 crime categories. Therefore, the categories that are chosen from among 132 in the field are up to the data entrant's discretion and are reduced to 10 once they reach FBI headquarters. This could lead to incorrect categorizations and the failure to identify trends in criminal activity in Indian country.

Additionally, we found that the FBI does not use the data that it does collect for analysis. FBI ICCU staff told us that the FBI collects administrative closure data only to comply with TLOA, that the staff does not analyze the data for program improvement, and that it does not see any benefit from collecting the data. The ICCU's Management Analyst told us that, while analyzing administrative closures would not help with investigations, it could help to identify cases closed for a lack of resources. In addition to administrative closures, the FBI tracks all cases that the USAOs have prosecuted or declined. Yet, we found that the FBI does not analyze this additional data to identify or highlight resource or staffing trends or possible training needs. The ICCU Management Analyst also said that, for resource purposes, the FBI could analyze the data it collects on pending cases. Because funding constraints continue to present a challenge for the FBI's ICCU, we believe that analysis of such data, though not a TLOA requirement, could assist both FBI field offices and the ICCU in identifying resource, program, or potential training and law enforcement needs.⁸⁶

BJS Crime Statistics for Indian Country Are Outdated and Incomplete

TLOA requires the BJS to submit to Congress an annual report that describes the data the BJS collects and analyzes related to crimes in Indian country.⁸⁷

⁸⁶ Every fiscal year the FBI relies on data from field offices across all criminal programs to complete a threat analysis, which it uses to direct resources and help mitigate risks. During analysis, the FBI uses a Threat Issue Matrix to place each threat into one of six threat bands. The ICCU Management Analyst told us that in FY 2016, although Indian country elevated from Band 4 to Band 3, it did not receive additional funding or staffing because there are higher priorities for the FBI.

⁸⁷ This is in addition to the Department's annual *Indian Country Investigations and Prosecutions* report.

Despite this requirement, we found that the BJS's most recent comprehensive statistical profile specific to Indian country crime data was collected in 2002 and published in 2004; the BJS has not issued information about tribal law enforcement since 2011.⁸⁸ As part of this statistical profile, the BJS noted several challenges with the collection of representative statistical data on American Indians. In particular, the BJS noted that the sampling methods that federal surveys use are not easily applied to American Indians because most federal surveys are based on nationally representative samples and cannot be used to describe small population subgroups. According to the BJS, the design of national surveys, such as the BJS's National Crime Victimization Survey, does not allow the calculation of separate crime statistics for each American Indian tribe.⁸⁹ In addition to the statistical profile about Indian country crime that the BJS issued in 2004, the BJS reported data about tribal law enforcement in 2011; but the latter report provided no updated crime data.⁹⁰

We also found that the BJS's more recent annual reports about Indian country data focus more on data collection activities that are in progress, with most yet to be completed. For example, in the 2016 BJS report, *Tribal Crime Data Collection Activities*, the narrative reiterated that the BJS has various activities planned or in progress, including a census of tribal law enforcement agencies and a national survey of tribal court systems. However, only the national survey of tribal court systems has been completed to date.⁹¹ BJS officials said that low response rates from tribes and the tribes' lack of trust with providing data to the Department have prevented the progress of its data collection.

The Uniform Crime Reporting Program

Although the BJS collects American Indian crime statistics from multiple federal statistical agencies, it derives most of its crime data from the FBI's Uniform Crime Reporting Program (UCR), which collects data from law enforcement agencies and makes this data publicly available.⁹² We found that since TLOA was enacted, the FBI has tried to increase the number of tribes that report crime data

⁸⁸ BJS, *A BJS Statistical Profile, 1992–2002: American Indians and Crime*, NCJ 203097 (December 2004).

⁸⁹ The BJS's annual National Crime Victimization Survey gathers a detailed picture of crime incidents, victims, and trends and is one of the primary statistical programs that the Department uses to measure the magnitude, nature, and impact of crime in the United States. As part of the survey, the BJS collects information on the frequency and nature of the crimes of rape, sexual assault, personal robbery, aggravated and simple assault, household burglary, theft, and motor vehicle theft. It does not measure homicide or commercial crimes.

⁹⁰ BJS, *Tribal Law Enforcement, 2008*, NCJ 234217 (June 2011).

⁹¹ The BJS also told us that the results of the survey will go through FY 2014 only because the survey was delayed on multiple occasions. The BJS will collect information regarding FY 2015 at the end of CY 2016.

⁹² In addition to the UCR, the BJS derives its Indian country data from the National Crime Victimization Survey, the Census Bureau, the Federal Justice Statistics Program, the Law Enforcement Management and Administrative Statistics, and the Survey of Jails in Indian country.

through the FBI's UCR by providing training on the program and allowing tribes to directly report to the UCR.⁹³

There are several limitations to the BJS's reliance on the UCR for crime data related to Indian country. While federal law requires that federal law enforcement agencies provide information to the UCR, participation of other agencies — including tribal law enforcement — is voluntary and difficulties in reporting crime data persist. Therefore, UCR data provides only a fraction of the full picture of crime in Indian country. Also, FBI officials told us that while tribes can report their crime data to the UCR through the BIA, the FBI, or state law enforcement, if a state submits tribal crime data, there is no way for the UCR to distinguish what portion of the data should be attributed to a particular tribe within that state.⁹⁴ In addition, FBI officials told us that, even though a tribe may report crime data to the UCR, the UCR program publishes crime data in its reports only if the information submitted is complete. While 207 tribes reported to the UCR in 2014, only 115 tribes submitted complete information that was included in the final UCR report. According to the Section Chief for the FBI Law Enforcement Support Section, the FBI has attempted to address the number of tribes reporting complete information by posting user manuals on the FBI website and providing the BIA with three online trainings from November 2014 through February 2015.

Given that reporting to the UCR is ultimately voluntary for tribal law enforcement and that limitations to providing accurate and complete data persist, the Department faces challenges in fully understanding crime and law enforcement issues in Indian country. A BJS official told us that there is no federal database to accurately capture crime in Indian country because no one has been able to consolidate the data from all sources. Without efforts to update and consolidate data, the Department and others must rely on outdated or incomplete statistics, anecdotes, and periodic news articles to assess crime and law enforcement issues in Indian country. None of these sources enable the Department to engage in appropriate, performance based management of its activities in this important area.⁹⁵

⁹³ Through the UCR, local, county, state, tribal, and federal law enforcement agencies submit crime statistics. The UCR collects statistics on violent crime (murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault) and property crime (burglary, larceny-theft, and motor vehicle theft).

⁹⁴ In *A BJS Statistical Profile: 1992–2002*, the BJS also noted that statistical coverage of incidents in Indian country using law enforcement, judicial, or corrections data is difficult to quantify because federal, state, and local authorities may have overlapping jurisdiction on tribal lands.

The FBI told us that if a tribal Originating Agency Identifier is used, data can be attributed to a particular tribe. However, if the data is submitted using the Originating Agency Identifier of a city, county, state, or federal law enforcement agency, FBI's UCR program cannot distinguish which portion of the data should be attributed to a particular tribe.

⁹⁵ The OIG's 2016 *Top Management and Challenges Report* identified "Using Performance Based Management to Improve DOJ Programs" as a pressing concern. The Department's failure to collect and evaluate "big data" on such important criminal justice issues limits its ability to implement a data-driven approach to planning and management that would support targeting its limited resources as efficiently and productively as possible. See DOJ OIG, "Top Management Challenges," May 2017.

CONCLUSION AND RECOMMENDATIONS

Conclusion

The Department of Justice has publicly stated that public safety in Indian country is a top priority, and the *Tribal Law and Order Act of 2010* (TLOA) reflects Congress's direction to increase coordination and communication among law enforcement agencies and improve public safety in Indian country. TLOA established additional responsibilities and requirements for the Department and some of its components to engage tribal communities and enhance law enforcement activities in Indian country. In reviewing the Department's Indian country activities pursuant to TLOA requirements, we concluded that while the Department and its components have taken some steps to implement TLOA, communication and coordination are lacking, resulting in the Department not effectively fulfilling all of its TLOA roles and responsibilities. We identified several areas that the Department and its components need to improve to increase engagement, coordination, and action on furthering public safety in Indian country.

First, no Department-level entity coordinates the Department's law enforcement activities in Indian country, including the implementation of TLOA mandates, and components with TLOA responsibilities are not held accountable at the Department level for their work in Indian country. The Office of the Deputy Attorney General (ODAG) states that responsibility for the oversight of the Department's TLOA mandates rests with each component; however, we believe that a central Department entity should have this responsibility. Without Department-level coordination, components with TLOA responsibilities are not fully accountable for their overall implementation of and compliance with TLOA mandates. We therefore believe that an individual or entity at the Department level should have the responsibility to increase coordination of TLOA implementation across components.

Second, while the Executive Office for United States Attorneys (EOUSA) and United States Attorney's Offices (USAO) have taken some steps to implement TLOA's mandates, we believe that more coordinated communication would improve the USAOs' relationships with tribes. During our review, we found several areas in which the USAOs can improve collaboration and communication with the tribes under their jurisdiction.

Third, as TLOA recognized, training is fundamental to enhancing the capabilities of tribal law enforcement and other personnel who work in Indian country and can improve the quality of investigations and thereby further action on public safety in those areas. Components with TLOA responsibilities need to do more to ensure that BIA and tribal law enforcement receive all the training that the law requires. We believe that USAOs could assist EOUSA's National Indian Country Training Institute in providing training, and they must track and report the ad hoc training they conduct. We believe that the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI) must improve coordination with the Department of the Interior's Bureau of Indian Affairs, as well as communications

and outreach with tribal law enforcement authorities, to ensure that they receive training that addresses the areas that TLOA specifies. The FBI and DEA should also provide their Special Agents assigned to work in Indian country with training that specifically addresses Indian country's unique cultural and geographic issues and prepares them for the work that they will encounter there.

Finally, while the FBI, EOUSA, USAOs, and the Bureau of Justice Statistics all collect some data to comply with TLOA's reporting requirements, there are limitations to the data's accuracy and these components do not analyze the data they collect. We believe that by fully analyzing available data, as well as by continuing efforts to collect and report more complete and accurate tribal crime data, the Department can identify potential areas for improvement in investigations and prosecutions, as well as potential resource and training needs, to enhance its commitment to public safety in Indian country.

Recommendations

To improve the Department's oversight of law enforcement activities in Indian country, we recommend that the ODAG:

1. Update the 2010 policy memoranda to U.S. Attorneys and heads of components to incorporate *Tribal Law and Order Act* mandates.
2. Designate a person or office at the Department level to coordinate the Department's implementation of the *Tribal Law and Order Act* and ensure that each component carries out its responsibilities.
3. Reconsider whether to allow the tribal Special Assistant United States Attorney program to expire given its benefits to tribal communication and case prosecution coordination.

To improve communication between USAOs and tribes and coordination of prosecutions in Indian country, we recommend that EOUSA:

4. Ensure that all district operational plans are reviewed and updated as necessary, in cooperation with Department components, tribal law enforcement, and tribal justice officials, to consistently and accurately reflect the Department's and U.S. Attorneys' requirements and the priorities that guide their work in Indian country, including *Tribal Law and Order Act* mandates and the role of the U.S. Attorney's Office Tribal Liaisons.
5. Work with U.S. Attorney's Offices to ensure that Tribal Liaisons' workloads are appropriately balanced so that they can effectively carry out their responsibilities, as mandated by the *Tribal Law and Order Act*, in light of local district conditions.
6. Work with U.S. Attorney's Offices to develop district-specific and, where appropriate, tribe-specific guidelines for Assistant United States Attorneys and Tribal Liaisons with regard to communicating case status and

declinations, including appropriate explanation of the reasons for declinations, directly to tribal prosecutors and victims in a timely fashion.

7. Work with U.S. Attorney's Offices to ensure the development and dissemination of guidelines and eligibility criteria for the tribal Special Assistant United States Attorney program, should it be continued.
8. Work with U.S. Attorney's Offices to ensure that they consistently track and report course subjects and agency participation for all training that U.S. Attorney's Offices and the National Indian Country Training Initiative provide, and coordinate additional training accordingly.

To improve training for law enforcement personnel working in Indian country, we recommend that the DEA and FBI:

9. Coordinate with the Department of the Interior, particularly the Bureau of Indian Affairs, and tribal authorities to ensure the delivery of training as the *Tribal Law and Order Act* requires.
10. Track all training provided to the Bureau of Indian Affairs and tribal law enforcement, including ad hoc training that Special Agents provide, and develop procedures to incorporate this information in planning future training.
11. Provide Department Special Agents assigned to Indian country with training specific to Indian country.

To improve oversight of the DEA's activities and TLOA responsibilities in Indian country, we recommend that the DEA:

12. Consider establishing a permanent position at Drug Enforcement Administration headquarters to coordinate with Department components with Indian country responsibility in developing and implementing strategies, programs, and training policies.

To improve the collection of data necessary to engage in performance based management of law enforcement activities in Indian country and ensure TLOA compliance, we recommend that EOUSA and the FBI:

13. Analyze available data to help to identify resource, program, and potential training and law enforcement needs.
14. Provide training to all staff responsible for Indian country data collection to ensure data is captured uniformly.

PURPOSE, SCOPE, AND METHODOLOGY

For this review, the OIG analyzed the Department's law enforcement activities and policies in Indian country from FY 2011 through FY 2015. We focused on the Department's legal assistance, investigative training, and other data collection activities pursuant to the *Tribal Law and Order Act of 2010* (TLOA). Our fieldwork, conducted from April 2016 through November 2016, included data collection and analysis, interviews, site visits, and policy and document review.

Standards

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation* (January 2012).

Data Collection and Analysis

Executive Office for United States Attorneys Data

To comply with TLOA reporting requirements, the Executive Office for United States Attorneys (EOUSA) collects data on all Indian country cases that were pending, declined, or prosecuted during each calendar year. We sought to evaluate trends in prosecution and case declinations in Indian country using EOUSA's Legal Information Office Network System (LIONS) database. Recognizing the limited nature of LIONS data, we requested all cases related to Indian country, including cases that were pending, declined, or prosecuted from CY 2011 through CY 2015. We analyzed the data to assess district volume, referring agency, declination and prosecution rates, and reason for declination. We also analyzed data on all Indian country cases that law enforcement agencies referred to the United States Attorney's Offices (USAO) from CY 2011 through CY 2015. EOUSA provided data on cases that the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Bureau of Indian Affairs (BIA), and tribal law enforcement agencies had referred. Data related to the BIA was captured as "Native American Affairs Bureau," and cases referred to USAOs from tribal law enforcement agencies were captured as "State County Municipal."

FBI Data

To comply with TLOA reporting requirements, the FBI reports to the Department on all decisions not to refer an Indian country investigation to a USAO for prosecution — also known as administrative closure. To understand trends in the administrative closures that TLOA requires the FBI to report to Congress, we analyzed data on all Indian country cases that the FBI investigated and decided not to refer to the USAO for prosecution over a 5-year period. We identified trends in administrative closures using the following criteria: (1) total number of administrative closures per calendar year, (2) total number of administrative closures by FBI division, (3) status of the accused and victim(s) as Indian or non-Indian, and (4) the reasons for administratively closing investigations.

Interviews

We interviewed headquarters officials from the Bureau of Justice Statistics, the DEA, EOUSA, the FBI, the Office of the Deputy Attorney General (ODAG), the Office of Justice Programs, and the Department of the Interior (DOI). We also interviewed staff during site visits to seven USAO districts. At each site visit, we interviewed staff from the DEA, FBI, and USAOs, as well as BIA staff, tribal law enforcement, and tribal justice officials.

DOJ Interviews

We conducted 190 interviews for this review. At Department headquarters, we interviewed 16 staff. We interviewed ODAG officials, including three Associate Deputy Attorneys General and the Director of the Office of Tribal Justice. At EOUSA, we interviewed the Native American Issues Coordinator; the National Indian Country Training Coordinator; the Deputy Director; and the Assistant Director of the Indian, Violent, and Cyber Crimes Staff. At FBI headquarters, we interviewed Indian Country Crimes Unit (ICCU) staff, including the Unit Chief, a Supervisory Special Agent, the Acting Section Chief for the Law Enforcement Support Section, and a Management Analyst. At DEA headquarters, we interviewed staff from the Regional Impact Section of the Office of Global Enforcement, including the Section Chief and the Staff Coordinator. We also interviewed the former Unit Chief for Specialized Training and an Assistant Special Agent in Charge from the DEA's Office of Training.

In the field, we interviewed 94 USAO staff and DEA and FBI Special Agents.⁹⁶ At the USAOs, we interviewed U.S. Attorneys, Assistant U.S. Attorneys, Tribal Liaisons, Criminal Section Chiefs, and Law Enforcement Coordinators. For USAO data purposes, we interviewed a Database Manager, Docketing Clerks, Executive Assistants, and Legal Assistants. At the DEA field offices, we interviewed District Training Coordinators, Special Agents in Charge, Assistant Special Agents in Charge, Resident Agents in Charge, and Special Agents. At the FBI field offices, we interviewed Assistant Special Agents in Charge, Senior Supervisory Resident Agents, and Special Agents. For FBI data purposes, we interviewed Operations Support Technicians, Staff Operations Specialists, and Victims Specialists.

DOI Interviews

We interviewed 12 BIA personnel. At BIA headquarters, we interviewed the Associate Director of the Field Operations Directorate and the Deputy Assistant Director of the Division of Drug Enforcement. In the field, we interviewed Special Agents in Charge, Assistant Special Agents in Charge, and Resident Agents in Charge.

⁹⁶ In the field, the OIG team interviewed 41 USAO staff, 30 FBI Special Agents, and 23 DEA Special Agents.

Tribal Interviews

We interviewed 52 tribal law enforcement and tribal justice officials who represented 11 tribes detailed below under Site Visits. For tribal law enforcement, we interviewed Police Lieutenants, Police Chiefs, Criminal Investigators, Narcotics Investigators, Patrol Officers, and Victim Officers. For tribal justice officials, we interviewed tribal prosecutors, tribal Attorneys General, tribal solicitors, and a tribal President and Vice President.

Site Visits

We visited 11 federally recognized tribes across 5 states: (1) Navajo Nation, (2) Gila River, and (3) Salt River in Arizona; (4) Jicarilla Apache and (5) Pueblo Laguna in New Mexico; (6) Oglala Sioux and (7) Rosebud Sioux in South Dakota; (8) White Earth and (9) Red Lake in Minnesota; and (10) Cherokee Nation and (11) Citizen Potawatomi in Oklahoma. We selected these tribes because they were located in the seven USAO districts with Indian country jurisdiction that accounted for 73 percent of all USAO Indian country matters that were referred and resolved. These tribes also represented tribes with the most and least number of tribal law enforcement personnel; USAO declinations; FBI administrative closures; and a varying degree of Public Law (PL) 280, non-PL 280, and concurrent federal jurisdiction statuses.

We also visited the 7 USAO districts that have the 11 tribes stated above within their jurisdiction. We conducted our site visits in (1) District of Arizona, (2) District of Minnesota, (3) District of New Mexico, (4) District of South Dakota, (5) Eastern District of Oklahoma, (6) Northern District of Oklahoma, and (7) Western District of Oklahoma. We also conducted video teleconferences with the Northern District of New York and the District of Oregon.

We visited 10 FBI field offices: (1) Phoenix Division Office, (2) Farmington Resident Agency, (3) Albuquerque Regional Office, (4) Rapid City Resident Agency, (5) Pierre Resident Agency, (6) Bemidji Resident Agency, (7) Oklahoma City Resident Agency, (8) Tulsa Resident Agency, (9) Muskogee Resident Agency, and (10) Stillwater Resident Agency.

We visited eight DEA field offices: (1) Phoenix Division Office, (2) Albuquerque Division Office, (3) Sioux Falls Resident Agency, (4) Rapid City Post of Duty, (5) Minneapolis District Office, (6) Tulsa Resident Office, (7) Oklahoma City District Office, and (8) McAlester Resident Office. We conducted telephone interviews with four division offices: (1) El Paso Division Office, (2) St. Louis Division Office, (3) Chicago Division Office, and (4) Dallas Division Office.

We selected both FBI and DEA field offices because they work with the 11 tribes referenced above and refer cases to the 7 USAO districts we visited.

Policy and Document Review

We reviewed policies, procedures, and guidance related to the Department's implementation of TLOA. To evaluate the Department's oversight and

accountability of Indian country law enforcement activities, we reviewed EOUSA documents including Deputy Attorney General memoranda, policy statements, and program statements. From the USAO, we also reviewed the operational plans of 47 USAOs with Indian country jurisdiction to evaluate USAO compliance with TLOA. We identified 19 criteria and determined whether each criterion was included or discussed in each district's operational plan.⁹⁷

We also reviewed training-related documents to determine the type of training that the FBI, DEA, and EOUSA provided to tribal law enforcement and tribal justice officials from FY 2011 through FY 2015. From the FBI, we reviewed ICCU documentation of all FBI-sponsored trainings, which included course schedules and attendance rosters for the Indian Country Criminal Investigator Training Program in Artesia, New Mexico. From the DEA, we reviewed course listings of DEA-sponsored trainings that were available to tribal law enforcement. From EOUSA, we reviewed course listings and attendance documentation from the National Indian Country Training Initiative for all training at the National Advocacy Center. We also reviewed ad hoc training that USAOs provided and tracked in the field.

⁹⁷ The 19 criteria our operational plan evaluation were: (1) year enacted, (2) number of tribes, (3) accountability, (4) communication for cases, (5) communication with tribes, (6) coordination with federal agencies, (7) coordination with state and local agencies, (8) cross-deputization, (9) declinations, (10) investigations, (11) LIONS database, (12) outreach to tribes, (13) Special Assistant United States Attorneys, (14) Special Law Enforcement Commission training, (15) statute of limitations, (16) training, (17) tribal liaison, (18) *Violence Against Women Act*, and (19) victim specialists.

**DEPUTY ATTORNEY GENERAL MEMORANDUM TO U.S.
ATTORNEYS WITH DISTRICTS CONTAINING INDIAN COUNTRY,
JANUARY 2010**



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 11, 2010

**MEMORANDUM FOR UNITED STATES ATTORNEYS
WITH DISTRICTS CONTAINING INDIAN COUNTRY***

FROM:

David W. Ogden
Deputy Attorney General

SUBJECT: Indian Country Law Enforcement Initiative

This memorandum implements a critical component of the Attorney General's initiative to improve public safety in tribal communities by setting forth new policy for U.S. Attorneys' Offices (USAOs) with Indian Country jurisdiction, and by identifying as a Justice Department priority the goal of combating violence against women and children in tribal communities.

The Department of Justice recognizes the unique legal relationship that the United States has with federally recognized tribes. As one aspect of this relationship, in much of Indian Country, the Justice Department alone has the authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed. Our role as the primary prosecutor of serious crimes makes our responsibility to citizens in Indian Country unique and mandatory. Accordingly, public safety in tribal communities is a top priority for the Department of Justice.

Indian Country Law Enforcement Initiative

The Attorney General has launched a Department-wide initiative on public safety in tribal communities. As part of this effort, Department of Justice leadership conducted a series of meetings across the country addressing violent crime in Indian Country. On October 28-29, 2009, the Justice Department convened a national tribal leaders listening session in St. Paul, Minnesota. Also in October, the Justice Department held its annual tribal consultation on violence against women, as required by the Violence Against Women Act of 2005. The Department again had the opportunity to engage with tribal leaders on public safety in tribal communities during the White House Tribal Nations Conference in November. In addition to these sessions with tribal leaders, Department leadership has conducted meetings with Indian Country experts on law enforcement and public safety efforts. I also have had the opportunity to

* A list of districts that contain Indian Country as of the date of this memorandum is attached hereto as Appendix A.

meet with our own Justice Department specialists in the field – including U.S. Attorneys with significant Indian Country responsibility, Assistant U.S. Attorneys serving as Tribal Liaisons, and FBI Special Agents and Victim Witness personnel working in Indian Country – and have relied on their invaluable insights.

Tribal leaders have confirmed what our own experts working in Indian Country have reported: violent crime in Indian Country is at unacceptable levels and has a devastating impact on the basic quality of life there. Many tribes experience rates of violent crime far higher than most other Americans; indeed, some face murder rates against Native American women more than ten times the national average. Tribal law enforcement resources are typically scarce, a problem exacerbated by the geographic isolation and/or vast size of many reservations. Federal and state resources devoted to Indian Country have also typically been insufficient to address law enforcement needs.

Despite these challenges, tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities. And the tireless efforts of the dedicated women and men working for the Department of Justice in Indian Country to seek justice for victims of crime, hold offenders accountable, and safeguard tribal communities are commendable. Assistant U.S. Attorneys and federal prosecutors serving as Tribal Liaisons continue to contribute greatly to the success of those efforts; Safe Trails Task Forces, coordinated by the FBI, play a critical role in coordinating law enforcement in tribal communities; FBI agents work tirelessly to investigate Indian Country crimes; and FBI and USAO victim specialists working in Indian Country are often the sole providers of essential services for the victims of violent crime there.

There is no one-size-fits-all solution to the challenges confronting Indian Country. Indeed, each district and each tribe presents a different set of issues. It is clear, however, that our success depends on the leadership of our U.S. Attorneys, and the focus and commitment of our law enforcement personnel in the field. This memorandum therefore directs each U.S. Attorney with Indian Country jurisdiction to establish a structure and plan for that leadership and focus in his or her district.

In developing this directive, I have worked closely with the Attorney General's Advisory Committee through its Native American Issues Subcommittee (NAIS) and the Executive Office for United States Attorneys (EOUSA), and I am grateful to them for their leadership in this area. I have also asked the NAIS and EOUSA to identify next steps for implementing this directive at the NAIS's January meeting.

U.S. Attorney Consultations and District-Level Operational Plans

The United States has a government-to-government relationship with federally recognized Indian tribes. The success of any intergovernmental relationship is based on consistent and effective communication. Moreover, the public safety challenges in Indian Country are not uniform; they vary widely from district to district – and from tribe to tribe – based upon unique conditions, a complex set of legal jurisdictional issues, geographic challenges, differences in tribal cultures and the number of tribes and reservations within a particular district.

Accordingly, I direct every USAO with Indian Country in its district to engage annually, in coordination with our law enforcement partners, in consultation with the tribes in that district. In addition to tribal governmental and law enforcement leaders, consultation sessions should include other federal law enforcement partners, including FBI, BIA, USMS, DEA, and ATF, and, where appropriate, state and local law enforcement. In addition, it may be appropriate and helpful to include other federal agency representatives with Indian Country responsibility in your district, for example, the Department of Housing and Urban Development, the Department of Health and Human Services' Indian Health Service, and the Interior Department's Bureau of Indian Education.

Following such consultation, I direct all such USAOs to develop an operational plan addressing public safety in Indian Country.

In coordination with the law enforcement agencies and tribes in that district, every USAO with Indian Country jurisdiction should review and, as necessary, revise its operational plan on an annual basis. Every newly confirmed U.S. Attorney in such districts, upon assuming office, should conduct a consultation with tribes in his or her district and develop or update the district's operational plan within eight months of assuming office, unless an extension of time is provided by EOUSA.

The subject matter of each district's plan will depend on the legal status of the tribes in that district (i.e., whether the jurisdiction is Public Law 280, non-Public Law 280, or partial-Public Law 280) as well as the unique characteristics and challenges confronting those tribal nations. Districts that include non-Public Law 280 or partial-Public Law 280 tribes should generally consider inclusion of the following elements in their operational plans: a plan to develop and foster an ongoing government-to-government relationship; a plan to improve communications with each tribe, including the timely transmittal of charging decisions to tribal law enforcement, where appropriate; a plan to initiate cross-deputization agreements, Special Law Enforcement Commission training and a tribal SAUSA program, where appropriate; and a plan to establish training for USAO staff and all relevant criminal justice personnel on issues related to Indian Country criminal jurisdiction and legal issues. Districts that include non-Public Law 280 or partial-Public Law 280 tribes are encouraged to meet individually with each of those

tribes in the course of the planning process. Districts containing only Public Law 280 tribes may consult with EOUSA on an appropriate strategy to ensure regular engagement with tribes and an appropriate assessment of the Justice Department's responsibility with respect to those reservations.

To assist in this process, I have asked EOUSA to develop and provide to the USAOs, by February 1, 2010, model approaches for district tribal consultations and operational planning. These models may be used as guidance to develop individual consultations and operational plans for each district. To help districts address training needs, EOUSA has also created a new position devoted to Indian Country prosecution and investigation training.

Upon adoption of its plan, or revision or update thereto, I request that each district provide the Office of the Deputy Attorney General, through EOUSA, a summary of its operational plan to improve public safety in Indian Country. I also direct that you make these summaries available to the tribes in your district.

The public safety challenges confronting Indian Country are great, and I realize that our efforts in Indian Country can be resource intensive. I am therefore pleased to be able to inform you that the Justice Department's FY 2010 appropriation includes an additional \$6,000,000 for Indian Country prosecution efforts. Overall, at least 35 additional Assistant U.S. Attorneys and 12 additional FBI victim specialists will be added in offices with an Indian Country caseload. These new resources will also enable the Justice Department to bring the federal justice system closer to Indian Country, including through a Community Prosecution Pilot Project that EOUSA is currently developing.

The Attorney General is depending upon you, as leaders of the Justice Department in your respective districts, to craft individual tribal assessments and action plans that respond to the unique challenges facing tribal communities in your district.

Violence against Women and Children in Tribal Communities

Addressing violence against women and children in Indian Country is a Department of Justice priority. The Department, through the USAOs, has a duty to investigate and prosecute serious crimes in Indian Country, including crimes against women and children. In much of Indian Country, the federal government alone has authority to prosecute certain violent crimes against Native Americans where the offender is non-Indian and to obtain meaningful punishment for any serious offender. In those circumstances, only USAOs can pursue justice for the victim and the community.

Reports of sexual assault or domestic violence in Indian Country should be investigated wherever credible evidence of violations of federal law exists, and prosecuted when the

Principles of Federal Prosecution are met. Although sexual assault offenses may often occur outside the presence of witnesses and may present other prosecutorial challenges, these factors should not deter law enforcement personnel from diligently and thoroughly investigating the crime or pursuing prosecution. Where federal jurisdiction exists, the responsibility to investigate and prosecute violence against women in Indian Country also extends to misdemeanor assaults committed by non-Indian offenders against Native American women on federally recognized reservations. Due care should be exercised to recognize ongoing risks to victims in sexual assault and domestic violence cases, and to expeditiously make charging decisions in high-risk cases to minimize or eliminate those risks.

In developing district-specific operational plans for public safety in tribal communities, I direct every U.S. Attorney to pay particular attention to violence against women, and to work closely with law enforcement to make these crimes a priority. This may include reevaluating, together with law enforcement partners including the FBI and the Department of Interior's BIA, existing memoranda of understandings addressing such crimes. Federal law provides for a number of felony level domestic violence offenses in addition to those crimes listed in the Major Crimes Act (18 U.S.C. §1153) and the General Crimes Act (18 U.S.C. §1152), and I have asked EOUSA, working closely with the NAIS, to develop guidance on these additional statutes.

Many sexual assault cases arising in Indian Country require a team investigative effort involving FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship. Tribal Liaisons and Assistant U.S. Attorneys assigned to cases of child sexual abuse on the reservations currently use the multidisciplinary model provided in 18 USC §3509(g) with great success. USAOs are encouraged to consider also using this team approach in cases where adult women are the victims of sexual assault. EOUSA will provide further guidance on this issue in coming weeks.

Conclusion

The Department has a responsibility to build a successful and sustainable response to the scourge of violent crime on reservations. In partnership with tribes, our goal is to find and implement solutions to immediate and long-term public safety challenges confronting Indian Country. This directive creates a structure through which U.S. Attorneys will develop targeted plans to help make tribal communities in their districts safer, and to turn back the unacceptable tide of domestic and sexual violence there.

Attachment

cc: All United States Attorneys

B. Todd Jones
United States Attorney
District of Minnesota
Chair, Attorney General's Advisory Committee

Robert S. Mueller, III
Director
Federal Bureau of Investigation

Michele Leonhart
Acting Director
Drug Enforcement Administration

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms & Explosives

John F. Clark
Director
United States Marshals Service

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

**U.S. ATTORNEY'S OFFICE DISTRICTS WITH FEDERALLY
RECOGNIZED TRIBES**

1. Middle District of Alabama,
2. Southern District of Alabama,
3. District of Alaska,
4. District of Arizona,
5. Central District of California,
6. Eastern District of California,
7. Northern District of California,
8. Southern District of California,
9. District of Colorado,
10. District of Connecticut,
11. Middle District of Florida,
12. Southern District of Florida,
13. District of Idaho,
14. Northern District of Indiana,
15. Northern District of Iowa,
16. District of Kansas,
17. Western District of Louisiana,
18. District of Maine,
19. District of Massachusetts,
20. Eastern District of Michigan,
21. Western District of Michigan,
22. District of Minnesota,
23. Northern District of Mississippi,
24. Southern District of Mississippi,
25. District of Montana,
26. District of Nebraska,
27. District of Nevada,
28. District of New Mexico,
29. Eastern District of New York,
30. Northern District of New York,
31. Western District of New York,
32. Western District of North Carolina,
33. District of North Dakota,
34. Eastern District of Oklahoma,
35. Northern District of Oklahoma,
36. Western District of Oklahoma,
37. District of Oregon,
38. District of Rhode Island,
39. District of South Carolina,
40. District of South Dakota,
41. Western District of Tennessee,
42. Eastern District of Texas,
43. Western District of Texas,
44. District of Utah,

45. Eastern District of Washington,
46. Western District of Washington,
47. Eastern District of Wisconsin,
48. Western District of Wisconsin, and
49. District of Wyoming.

Source: EOUSA

THE DEPARTMENT'S RESPONSE TO THE DRAFT REPORT



U.S. Department of Justice
Office of the Deputy Attorney General

Office of the Deputy Attorney General

950 Pennsylvania Ave., N.W. (202) 305-7848
Room 4113, RFK Main Justice Bldg.
Washington, D.C. 20530

MEMORANDUM

TO: Nina S. Pelletier
Assistant Inspector General
Evaluation and Inspections
Office of the Inspector General

FROM: Scott Schools 
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: December 8, 2017

SUBJECT: Amended Status Update in Response to OIG's Review of the Department's Tribal Law Enforcement Efforts Pursuant to the *Tribal Law and Order Act of 2010*, Assignment Number A-2015-009

The Office of the Deputy Attorney General (ODAG) provides this status update regarding the Office of the Inspector General's (OIG) Review of the Department's Tribal Law Enforcement Efforts Pursuant to the *Tribal Law and Order Act of 2010*, Assignment Number A-2015-009.

I. Responses to ODAG Recommendations

Recommendation 1: Update 2010 policy memoranda to U.S. Attorneys and heads of components to incorporate Tribal Law and Order Act mandates.

The Deputy Attorney General (DAG) is committed to public safety in Indian country and actively engaged in Indian country issues. The U.S. Attorneys working in Indian country and the focused efforts of the Native American Issues Subcommittee (NAIS) of the Attorney General's Advisory Committee (AGAC) are a crucial part of the Department's overall efforts to improve public safety. ODAG looks forward to working with the incoming NAIS to ensure that policies meet Indian country's needs. The NAIS will review the 2010 memorandum and make recommendations to Department leadership concerning whether to amend or replace that policy.

Recommendation 2: Designate a person or office at the Department level to coordinate the Department's implementation of the Tribal Law and Order Act and ensure that each component carries out its responsibilities.

ODAG coordinates criminal activity across the Department, which includes implementation of the Tribal Law and Order Act (TLOA). DOJ components that are statutorily required to fulfill a mandate are responsible for doing so with ODAG's oversight and direction. ODAG's coordination of TLOA implementation is reflected in general oversight activities and in regular opportunities for coordination, such as a bi-weekly criminal Indian country coordination meeting, led by ODAG, and the Indian Country Federal Law Enforcement Coordination Group (ICFLECG). ICFLECG was announced by the Attorney General in April of 2017 and provides 12 federal law enforcement components with a forum to discuss common Indian country issues and how to best coordinate efforts. The bi-weekly criminal Indian country coordination meeting focuses on implementing TLOA, specifically by enhancing coordination between relevant components and discussing ongoing training initiatives. In consultation with the NAIS after it is constituted, ODAG will consider whether it would be necessary and beneficial to designate an entity to oversee TLOA implementation beyond current practice.

Recommendation 3: Reconsider whether to allow the tribal Special Assistant United States Attorney (SAUSA) program to expire given its benefits to tribal communication and case prosecution coordination.

The DAG recognizes the value of the Special Assistant United States Attorney (SAUSA) program, which is an ongoing program that has been continuously supported by ODAG. This general program does not expire. Recognizing that each U.S. Attorney's office (USAO) has unique considerations, the Department will work with incoming U.S. Attorneys and the NAIS to maximize the efficacy of the SAUSA program. We will also continue to evaluate how best to support our USAOs with Indian country responsibilities.

ODAG respectfully requests that this Recommendation be closed.

II. Responses to EOUSA Recommendations

EOUSA appreciates the opportunity to comment on the review undertaken by OIG regarding the Department's law enforcement efforts to implement the Tribal Law and Order Act of 2010.

As an initial matter, there are a number of factors that make uniform guidelines, policies, and data collection requirements inappropriate and ineffective in Indian country. There are currently 567 federally recognized tribes in the United States. Each sovereign tribal nation is unique. There is no one-size-fits-all approach to Indian country due to the differences among the tribes and the USAOs. And tribal needs are as diverse as the tribes themselves. Tribal Liaisons and Assistant United States Attorneys (AUSAs) working in USAOs with Indian country responsibilities spend a great deal of time learning the specific cultural and community aspects of each tribe they serve and understand the intragovernmental dynamics that are present on each reservation. The Tribal Liaisons and AUSAs are best situated to determine how to communicate

with the tribes in their districts. In addition, by virtue of the tribes' sovereign status, the federal government cannot require tribal prosecutors or tribal law enforcement to consult with the USAOs regarding cases or provide tribal crime data to the United States.

EOUSA agrees that communication between USAOs and tribes regarding prosecutions can be an effective strategy in increasing the value of prosecutorial efforts, law enforcement initiatives, and investigations in specific tribal communities. Since the passage of TLOA, EOUSA has taken a number of significant steps to increase Department coordination and strengthen USAO Indian country understanding and involvement. These steps include (1) hosting in-person trainings for all United States Attorneys, AUSAs, key USAO staff, federal and tribal law enforcement, tribal prosecutors, and victim advocates through the National Indian Country Training Initiative and (2) hosting an annual law enforcement summit for all relevant federal components to discuss solutions for various criminal trends that are affecting Indian country. In addition, the EOUSA Native American Issues Coordinator oversees the implementation of, and compliance with, TLOA requirements for the USAO community. While not a TLOA requirement, the Coordinator ensures that each district's Indian country operational plan is in place. The Coordinator also ensures that training is being conducted, and that Tribal Liaisons are appointed and performing their required duties. The Coordinator has assisted numerous districts in developing their operational plans and alerts new AUSAs and Tribal Liaisons to their Indian country responsibilities. The Coordinator also routinely contacts AUSAs and discusses specific issues and initiatives in their respective districts. The Coordinator does not assess the legal work being done in the districts. However, he does report potential issues to individual United States Attorneys, in addition to Department and EOUSA leadership.

Recommendation 4: Ensure that all district operational plans are reviewed and updated as necessary, in cooperation with Department components, tribal law enforcement, and tribal justice officials, to consistently and accurately reflect the Department's and U.S. Attorneys' requirements and the priorities that guide their work in Indian country, including Tribal Law and Order Act mandates and the role of the U.S. Attorney's Office Tribal Liaisons.

EOUSA fully embraces its role in supporting the USAOs and helping to implement policies consistent with leadership's vision. Although operational plans are not required by TLOA, they are required by current Department policy. EOUSA looks forward to working with leadership offices and the AGAC to determine how best to implement Indian country policies that will work to reduce crime; strengthen native communities; and ensure better coordination across federal, state, and tribal law enforcement organizations.

Consistent with Recommendation 1 above, DOJ leadership will coordinate with the NAIS to determine whether the 2010 memorandum that *inter alia* requires the operational plans should be revised or updated.

Recommendation 5: Work with U.S. Attorneys' Offices to ensure that Tribal Liaisons' workloads are appropriately balanced so that they can effectively carry out their responsibilities, as mandated by the Tribal Law and Order Act, in light of local district conditions.

TLOA created ancillary duties but did not fund or authorize additional FTE for the USAOs. Thus, while Tribal Liaisons are tasked with the ancillary responsibility of working with tribes, their primary responsibility is prosecuting crimes. TLOA Sec. 213(D)(2)(B) expressly states that the Attorney General should take all appropriate measure to encourage aggressive prosecution of federal crimes committed in Indian country, while noting the dual role of Tribal Liaisons. In Section 13(c), TLOA states, however, “Nothing in this section limits the authority of any United States Attorney to determine the duties of a tribal liaison officer to meet the needs of the Indian tribes located within the relevant Federal district.” EOUSA agrees to assist United States Attorneys, as needed, in ensuring that the workloads of Tribal Liaisons are appropriately balanced so that they can carry out their TLOA duties.

Recommendation 6: Work with U.S. Attorneys' Offices to develop district-specific and, where appropriate, tribe-specific guidelines for Assistant United States Attorneys and Tribal Liaisons with regard to communicating case status and declinations, including appropriate explanation of the reasons for declinations, directly to tribal prosecutors and victims in a timely fashion.

EOUSA agrees that enhanced communication between AUSAs and tribal prosecutors regarding case status would increase both entities’ ability to achieve justice in individual matters. TLOA does not require AUSAs to discuss the internal deliberative process of policy making with tribes or tribal prosecutors. It is up to United States Attorneys to determine what prosecution-related information is appropriate to share with tribes. This must be a case-by-case determination due to various factors that may affect the sharing of law enforcement sensitive information with tribal law entities and victims. In addition, due to legal and ethical obligations, providing specific details regarding declinations can be problematic. Information regarding the identity of witnesses and victims, the specifics of evidence collection, and other law enforcement sensitive information, including grand jury materials, must be carefully managed by the USAO. Nonetheless, EOUSA will work with the NAIS to assess the feasibility of district-specific or tribe-specific guidelines consistent with these issues.

Recommendation 7: Work with U.S. Attorneys' Offices to ensure the development and dissemination of guidelines and eligibility criteria for the tribal Special Assistant United States Attorney program, should it be continued.

EOUSA agrees to take steps to assist United States Attorneys in the development and dissemination of guidelines and eligibility criteria for the Tribal SAUSA program as needed. In many circumstances, a Tribal SAUSA may facilitate communication between a tribe and the USAO and strengthen that relationship. The appointment of a Tribal SAUSA is the prerogative of the United States Attorney in each district. Although general criteria may be useful in determining qualifications for the position, there may be circumstances in which a Tribal SAUSA may not be appropriate for a particular district.

Recommendation 8: Work with U.S. Attorneys' Offices to ensure that they consistently track and report course subjects and agency participation for all training that U.S. Attorney's Offices and the National Indian Country Training Initiative provide, and coordinate additional training accordingly.

EOUSA, through the National Indian Country Training Initiative, will work with the USAOs to more accurately track all training that is provided at the National Advocacy Center, regionally, or in individual districts.

Recommendation 13: Analyze available data to identify resource, program, and potential training and law enforcement needs.

EOUSA understands this recommendation to mean that EOUSA should use the available data as part of its overall analysis when considering these issues. While the statistical data collected by EOUSA and the USAO community provides a snapshot of Indian country matters and cases handled by the USAOs, that data alone will not identify resource, program, training, and law enforcement needs. The identification of such needs involves an examination of a variety of qualitative factors, not only statistical information. Rather than placing undue focus on statistical data, EOUSA believes that the attention to the intensified coordination and communication anticipated in the recommendations above would better enhance public safety in Indian country.

With those caveats, EOUSA agrees to use available data as one of many tools to identify needs.

Recommendation 14: Provide training to all staff responsible for Indian country data collection to ensure data is captured uniformly.

EOUSA agrees to continue training all USAO staff with Indian country docketing responsibilities on proper coding of Indian country case information. Currently, all data entry personnel have access to relevant guidance, user manuals, factsheets, and policy memos. EOUSA will compile that information and send it to USAOs with Indian country responsibilities.

EOUSA appreciates the opportunity to respond to this report, and looks forward to following up on these recommendations. In addition, the following are critical issues that need to be corrected in the final OIG report.

Page 10, Table 2, Footnote a – The statistics that appear in Table 2 for Calendar Year (CY) 2015 are confirmed, finalized numbers. EOUSA recommends eliminating the footnote or changing it to read as follows:

EOUSA collects its data according to fiscal year, and finalized sets of full fiscal year data are not available until the end of the fiscal year. Reports derived from the current fiscal year are subject to change before the end of the fiscal year. Although our scope extended to CY 2015, the most recent fully finalized CY set of data we received was for CY 2014. To create CY 2015 data, EOUSA combined data from FY 2015 and FY 2016. FY 2016 was ongoing at the time EOUSA initially provided data for this report. For CY 2015 in Table 2 above, statistics for January 1, 2015 to September 30, 2015 were derived from the fully

finalized end of FY 2015 set of data. Statistics for October 1, 2015 to December 31, 2015, came from a set of data taken in April 2016. In response to a working draft of this report following the close of FY 2016, EOUSA compiled statistics for CY 2015 based on end-of-FY 2016 data, and confirmed that the CY 2015 statistics in Table 2 are accurate and final.

Page 10, Table 2, Footnote 29 – EOUSA requests that OIG include the number of defendants filed in magistrate courts for each year for a more accurate reflection of the work being done in Indian country. Here are the statistics for the number of magistrate defendants filed: CY 2011: 196; CY 2012: 471; CY 2013: 233; CY 2014: 527; CY 2015: 278.

Page 16, paragraphs 2 and 3 – The EOUSA EARS evaluation program reviews the management and performance of a USAO and functions as a management consulting tool. Each evaluation takes a holistic view of USAO management and operations, and generally does not focus on specific legal program requirements or compliance. The evaluation program is structured and staffed to assess and evaluate office management. Accordingly, any attempt by EARS to assess an office's compliance with TLOA requirements would be incomplete or partial, and would not provide a true and accurate assessment of whether a USAO is in compliance. USAOs are reviewed every four years, and this evaluation timeframe cannot accurately assess ongoing or even annual compliance of any particular program.

Separate audits are conducted by EOUSA subject matter experts when needed or directed by the EOUSA Director (e.g. financial audits, HR compliance audits, etc.). Some of TLOA requirements placed on USAOs require frequent and ongoing action (e.g., the development, adoption, updating, and revision of operational plans for work in Indian country). EARS would be unable to accurately access compliance with these or other ongoing requirements.

The EOUSA EARS program is not equipped by process, manpower, or other resources to ensure compliance with TLOA requirements. The current 4-year evaluation rotational timeframe cannot be altered without significant increases in manpower and financial resources, or without a significant expansion of the EARS mission, program, and staff. Similarly, it is not equipped to provide the level of expertise, oversight, and review the report contemplates is needed.

III. Responses to DEA Recommendations

Recommendation 9: Coordinate with the Department of the Interior, particularly the Bureau of Indian Affairs, and tribal authorities to ensure the delivery of training as the Tribal Law and Order Act requires.

DEA will establish a point of contact at the Office of Training (TR) who will coordinate with Staff Coordinators (SC) within DEA's Office of Global Enforcement on all training requests from the Bureau of Indian Affairs (BIA). This will facilitate specific training to Tribal Law Enforcement Officers conducting narcotics investigations. Examples of training that can be coordinated through TR include: the Tribal Law Enforcement Basic Narcotics Investigation Course, a two-week class developed in coordination with BIA; training modules taught at conferences such as the National Native American Law Enforcement Association (NNALEA)

conference; invitations to attend training offered at DEA Divisions through Division Training Coordinators (DTCs); and trainings provided by DEA Chemists.

Recommendation 10: Track all training provided to the Bureau of Indian Affairs and tribal law enforcement, including ad hoc training that Special Agents provide, and develop procedures to incorporate this information in planning future training.

DEA/TR will establish a protocol with DEA's DTCs to track all division-level training provided to BIA tribal members through the DEALS Training Platform, to include the number of attendees who participated.

Recommendation 11: Provide Department Special Agents assigned to Indian country with training specific to Indian country.

DEA will request that a training module be conducted by BIA to educate all Special Agents who operate in BIA territory. This training will provide Special Agents with knowledge beneficial to working in Indian Country. DEA/TR will work with its BIA partners to establish a curriculum to assist DEA offices.

Recommendation 12: Consider establishing a permanent position at Drug Enforcement Administration headquarters to coordinate with Department components with Indian country responsibility in developing and implementing strategies, programs, and training policies.

DEA currently has a GS-14 SC assigned to Indian Country Affairs with a back-up SC to assist when needed. The SC is DEA's primary point of contact for all Indian country issues. Based on this information, DEA believes this recommendation is now moot.

IV. Responses to FBI Recommendations

Recommendation 9: Coordinate with the Department of Interior, particularly the Bureau of Indian Affairs, to coordinate the delivery of training and tribal law enforcement and judicial personnel.

The FBI coordinates with BIA to host the annual FBI-BIA Indian Country Criminal Investigator Training Program (ICCITP). This is a two-week class focused on core Indian country (IC) investigative knowledge and skills, such as: IC law and jurisdiction; culture; evidence collection; death investigations; child sexual/physical abuse; major cases; drug investigations; trial preparation; and victim/witness assistance. Each ICCITP participant receives a robust evidence collection kit to support the collection of forensic evidence. This class is designed for law enforcement officers (LEO) who are new to federal investigations in IC and was implemented in early 2016. As of August 2017, five iterations of ICCITP have been conducted and 120 LEOs attended from numerous federal, state, and tribal agencies.

In addition, the FBI conducts additional IC training courses across the country for federal, state, and tribal LEOs. These FBI IC training courses cover topics such as: death investigations; child sexual/physical abuse; interviewing and interrogation; evidence collection;

drug investigations; tactics; crisis negotiation; Multi-Disciplinary Teams; Safe Trails Task Forces; and IC operations and management. The FBI has always provided these types of training to federal, state, and tribal law enforcement annually. The FBI will continue these efforts.

Recommendation 10: Track all training provided to the Bureau of Indian Affairs and tribal law enforcement, including ad hoc training that Special Agents provide, and plan additional training accordingly.

Going forward, the Indian Country Crimes Unit (ICCU) will request that all field offices notify and report all ad-hoc IC trainings. Additionally, ICCU will report all FBI IC trainings to EOUSA at the end of every calendar year.

Recommendation 11: Provide Special Agents assigned to Indian country with training specific to Indian country.

All FBI Special Agents (SAs) must pass a rigorous 20-week academy before being certified and assigned to investigative duties. The FBI Academy curriculum for SAs includes extensive instruction in core law enforcement knowledge and skills, including: federal criminal law and jurisdiction; interviewing and interrogation; evidence collection; Confidential Human Source (CHS) development and handling; firearms; physical fitness; defensive tactics; surveillance; emergency driving; arrest and search/clearing tactics; trial preparation; victim/witness assistance; as well as basic investigative strategy and case management in areas of FBI jurisdiction, from counter-terrorism to criminal enterprises to violent incident crimes. The primary goal of the FBI Academy is to provide a well-rounded introduction to the FBI and criminal investigations, as well as developing the core knowledge, skills and abilities necessary to conduct safe, efficient, and effective criminal investigations and supporting operations. The FBI Academy provides new SAs with the basic knowledge and skills necessary to begin their LE career, regardless of their background or initial assignment. The FBI provides appropriate intermediate and advanced continuing education to SAs to enhance their efficiency and effectiveness throughout their career.

The first step in this continuing education occurs immediately after graduation, when every new FBI SA is assigned a Field Training Agent (FTA), who is an experienced FBI SA in the same office and squad as the new SA. The FTA provides guidance and mentorship and works alongside the new SA on a daily basis, until the new SA completes numerous mandatory on-the-job training (OJT) requirements and is removed from probation, which usually takes approximately 2 years. New FBI SAs assigned to IC have FTAs and must complete the same probationary requirements as all other FBI SAs. In addition to this OJT and FTA mentorship, the FBI provides numerous training opportunities throughout each SAs career, and as previously noted, it is no different for SAs assigned to IC.

As previously noted, FBI IC SAs had dozens of opportunities to attend continuing education on numerous IC-related topics during 2010–2016. In addition to these ICCU, FBI-DOJ NICTI and FBI-BIA courses, other elements of the FBI provided hundreds of training opportunities for FBI SAs during 2010–2016, that benefitted SAs assigned to IC. The vast

majority of these training opportunities are ongoing. For example, IC SAs can attend gang training conducted by the Safe Streets Gang Unit, or Special Weapons and Tactics Team (SWAT) training conducted by the SWAT Operations Unit, or Advanced Evidence Response Team (ERT) training conducted by the ERT Unit, or Crisis Negotiator training conducted by the Crisis Negotiation Unit, or financial crime training conducted by the Financial Crimes Unit (FCU), or numerous other topics that can and do assist in the response to, or investigation of, IC crimes. FBI SAs have a wealth of training opportunities, and although scheduling conflicts may prevent attendance at any single one, each SA is responsible for participating in essential training and continuing education.

The joint FBI-BIA ICCITP focuses on core IC investigative knowledge and skills, and was designed for LEOs who are new to federal investigations in IC. Thus, it was never intended for seasoned IC SAs, which represents the bulk of the FBI IC SA workforce. As previously noted, there are numerous other training opportunities for IC SAs, and the FBI dramatically exceeded the training requirements contained in TLOA during 2010–2016.

The FBI will continue to pursue these and other Indian country training programs.

Recommendation 13: Analyze available data to identify resource, program, or potential training and law enforcement needs.

Analyzing FBI's TLOA non-referral data is not an effective way to measure and analyze justice, success, criminal activity, resources, programs, trainings, or other operational needs. The FBI uses more appropriate methods to evaluate and analyze operational needs. For example, every fiscal year the FBI completes a threat analysis in consultation with USAOs across the country, which relies on data from the field offices across all criminal programs, including Indian Country, to analyze crime trends, which are then used for directing resources to help mitigate threats. FBI's TLOA non-referral data alone does not show the FBI's commitment to combating crime on Indian reservations.

Recommendation 14: Provide training to all staff responsible for Indian country data collection to ensure that data is captured uniformly.

ICCU has provided training and assistance to field office and HQ personnel regarding the reporting of case declination data, as required by TLOA, since the implementation of the statute. However, ICCU's leadership is in the planning phase of developing a more formal and comprehensive training course to cover appropriate data collection and reporting compliance for all FBI staff responsible for TLOA reporting.

OIG ANALYSIS OF THE DEPARTMENT'S RESPONSE

The OIG provided a formal draft of this report to the Department of Justice's (Department) Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), Executive Office for United States Attorneys (EOUSA), the Office Justice Programs, and the Office of the Deputy Attorney General (ODAG).⁹⁸ The ODAG responded to the formal draft report on behalf of the Department, including the DEA, FBI, EOUSA, and the ODAG. The Department's response is included in Appendix 4. The report includes 14 recommendations directed to the Department and its components. Recommendations 1, 2, and 3 are directed to the ODAG. Recommendations 4, 5, 6, 7, and 8 are directed to EOUSA. Recommendations 9, 10, and 11 are directed to both the DEA and the FBI. Recommendation 12 is directed to the DEA. Recommendations 13 and 14 are directed to both EOUSA and the FBI. EOUSA also provided general comments in response to the formal draft. Below we discuss the OIG analysis of EOUSA's comments and the Department's responses to the recommendations and actions necessary to close the recommendations.

General Comments from EOUSA

EOUSA Comment: EOUSA stated that there are a number of factors that make uniform guidelines, policies, and data collection requirements inappropriate and ineffective in Indian country. There are 567 federally recognized tribes in the United States, and each sovereign tribal nation is unique. Therefore, there is not a one-size-fits-all approach to Indian country. EOUSA stated that Tribal Liaisons and Assistant U.S. Attorneys (AUSA) with Indian country responsibilities spend time learning specific cultural and intergovernmental dynamics that are present within each tribe and on the reservation. As such, Tribal Liaisons and AUSAs are best situated to determine how to communicate with the tribes in their district. In addition, by virtue of the tribes' sovereign status, the federal government cannot require tribal prosecutors to consult with the United States Attorney's Offices (USAO) regarding cases or provide tribal crime data.

OIG Analysis: The OIG agrees that there is not a one-size-fits-all approach to Indian country. In this report, the OIG recognizes that federally recognized tribes are unique and possess certain rights of self-government (i.e., sovereignty). In addition, the OIG notes that the means of communicating important information, such as case declinations, is a decision best left to the U.S. Attorney based on the particular relationships between the USAO and tribal authorities. However, the OIG continues to believe that, within a district, the communication method should be consistently applied. The OIG does not suggest that tribal prosecutors must consult with USAOs or provide tribal crime data.

EOUSA Comment: EOUSA agreed that communication between USAOs and tribes can increase the value of prosecutorial efforts, law enforcement initiatives, and investigations in specific tribal communities. As such, EOUSA has taken a

⁹⁸ The Office of Justice Programs did not have any formal comments on the formal draft report.

number of steps to increase Department coordination and strengthen USAO Indian country understanding. These steps include hosting in-person trainings for all federal and tribal law enforcement through the National Indian Country Training Initiative (NICTI) and hosting an annual law enforcement summit for all relevant federal components to discuss solutions for various criminal trends that are affecting Indian country. In addition, the EOUSA Native American Issues Coordinator (Coordinator) oversees the implementation of, and compliance with, *Tribal Law and Order Act* (TLOA) requirements for the USAO community. The Coordinator ensures that operational plans are in place, training is being conducted, and Tribal Liaisons are appointed and performing their required duties. Last, the Coordinator routinely discusses district-specific issues and initiatives with respective USAOs.

OIG Analysis: The OIG agrees that increased communication between the USAOs and tribes can be beneficial. Our report discusses many actions EOUSA has taken to increase Department communication and coordination, as TLOA intended. Also, the OIG acknowledges that TLOA required that EOUSA create the Coordinator position to provide advice and assistance to USAOs on Indian country legal and policy issues, and the Introduction of the report describes the position's duties.

EOUSA Comment: EOUSA stated that on page 10, Table 2, footnote a, the statistics that appear in Table 2 for Calendar Year (CY) 2015 are confirmed, finalized numbers. EOUSA recommended eliminating or revising the footnote. EOUSA provided suggested revised language.

OIG Analysis: The OIG does not agree that the footnote needs to be eliminated or revised. When the OIG requested the data from EOUSA, in March 2016, EOUSA described a data limitation that the OIG included as a footnote. At that time, EOUSA informed the OIG that it collects data by fiscal year (FY) but reports data by calendar year. When the OIG requested the data, EOUSA was in the middle of FY 2016; therefore, we included the footnote to state that the data did not include the last 3 months of the calendar year for 2015. EOUSA did not question the footnote during the OIG's issuance of its first working draft report. In response to the OIG's reissued working draft, EOUSA stated that the data presented in Table 2 was final. However, we did not remove the footnote because we did not believe that EOUSA did not decline or prosecute additional cases at the end of the year for FY 2015 only. For all other years, EOUSA updated the data at the end of each fiscal year. Given the context of our presentation in Table 2, we believe that it was important to note the limitation for accuracy.

EOUSA Comment: EOUSA requested that on page 10, Table 2, footnote 29, the OIG include the number of defendants filed in magistrate courts for each year for a more accurate reflection of the work being done in Indian country. The number of magistrate defendants filed are as follows: CY 2011, 196; CY 2012, 471; CY 2013, 233; CY 2014, 527; and CY 2015, 278.

OIG Analysis: The OIG has included the information above in a footnote on page 10 of the report.

EOUSA Comment: Regarding page 16, paragraphs 2 and 3, EOUSA stated that Evaluation and Review Staff (EARS) evaluations are management consulting tools used to review the management and performance of USAOs. Generally, each evaluation takes a holistic view of USAO management and operations and does not focus on specific legal program requirements or compliance, but rather office management. Any EARS attempt to assess an office's compliance with TLOA requirements would be incomplete and would not provide a true and accurate assessment of whether a USAO is in compliance. Also, EARS evaluations are conducted every 4 years and that evaluation timeframe cannot assess ongoing or annual compliance, nor can it be altered without significant expansion of the EARS mission, program, and staff. Further, EOUSA subject matter experts conduct separate audits as necessary, or as the EOUSA Director specifies. Some TLOA requirements placed on USAOs require frequent and ongoing action, such as the development, adoption, updating, and revision of operational plans for work in Indian country. EARS would be unable to accurately access compliance with these or other ongoing requirements. The current 4-year evaluation timeframe cannot be altered without significant increases in manpower and financial resources or without a significant expansion of the EARS mission, program, and staff. Similarly, EARS is not equipped to provide the level of expertise, oversight, and review the report contemplates is needed.

OIG Analysis: The OIG acknowledges that U.S. Attorneys establish law enforcement policies and priorities within their federal judicial districts and may carry out TLOA responsibilities differently based on tribal populations and district priorities. However, during the scope of our review, we did not find that EOUSA had ensured TLOA requirements were being met in each USAO district with Indian country responsibility. As noted in the report, EOUSA has a role in providing executive and administrative support for U.S. Attorneys throughout the United States. The OIG continues to encourage EOUSA to include TLOA program evaluations as part of its EARS program. Currently, evaluations of districts' activities in Indian country are not conducted and TLOA implementation is not assessed through that process.

The Department's and Components' Responses to the OIG's Recommendations

Recommendations to the ODAG

Recommendation 1: Update the 2010 policy memoranda to U.S. Attorneys and heads of components to incorporate *Tribal Law and Order Act* mandates.

Status: Resolved.

ODAG Response: The ODAG stated that the U.S. Attorneys working in Indian country and the focused efforts of the Native American Issues Subcommittee (NAIS) of the Attorney General's Advisory Committee are a crucial part of the Department's overall efforts to improve public safety. The ODAG looks forward to working with the incoming NAIS to ensure that policies meet Indian country's needs. The NAIS will review the 2010 memoranda and make recommendations to Department leadership concerning whether to amend or replace that policy.

OIG Analysis: The ODAG's actions are responsive to the recommendation. As noted in the report, the 2010 policy memoranda to U.S. Attorneys and heads of components directed U.S. Attorneys with Indian country jurisdiction to create an operational plan that would guide the Department's strategic approach to working in Indian country. However, the directive to create operational plans was issued prior to TLOA, and we found that most plans have not been updated to reflect changes since TLOA's passage. By March 14, 2018, please provide NAIS meeting minutes reflecting review and deliberation regarding the 2010 memorandum. Also, please provide any recommendations to Department leadership to amend or replace the 2010 policy memoranda, or a status update on your progress.

Recommendation 2: Designate a person or office at the Department level to coordinate the Department's implementation of the *Tribal Law and Order Act* and ensure that each component carries out its responsibilities.

Status: Resolved.

ODAG Response: The ODAG stated that it coordinates TLOA implementation, which is reflected in its general oversight activities and in regular opportunities for coordination with DOJ components that are statutorily required to fulfill a mandate with ODAG's oversight and direction. Coordination opportunities include the ODAG Indian country bi-weekly meetings that focus on implementing TLOA, specifically by enhancing coordination between relevant components and discussing ongoing training initiatives. The Attorney General's Indian Country Federal Law Enforcement Coordination Group (ICFLECG), established in April 2017, also provides 23 federal law enforcement components with a forum to discuss Indian country issues and how to best coordinate their efforts. The ODAG stated that, after the NAIS is constituted, in consultation with the NAIS, the ODAG would consider designating an entity to oversee TLOA implementation beyond current practice.

OIG Analysis: The ODAG's actions are partially responsive to the recommendation. As noted in the report, an ODAG official told us that the ODAG's role is not to formally oversee activities associated with TLOA requirements and that each component is responsible for fulfilling its responsibilities in Indian country. Also, we found that TLOA activities may or may not be addressed in the ODAG Indian country bi-weekly meetings. Without Department-level coordination, components are not fully accountable for their implementation of TLOA mandates. However, the OIG believes that the Department's creation of the ICFLECG represents a meaningful opportunity to coordinate TLOA implementation. By March 14, 2018, please provide bi-weekly meeting and ICFLECG meeting minutes that reflect coordination between relevant components with responsibility for implementing TLOA mandates, including TLOA training mandates, as well as a status update on designating an entity to oversee TLOA implementation beyond current practice.

Recommendation 3: Reconsider whether to allow the tribal Special Assistant United States Attorney program to expire given its benefits to tribal communication and case prosecution coordination.

Status: Unresolved.

ODAG Response: The ODAG stated that the Deputy Attorney General recognizes the value of the Special Assistant United States Attorney (SAUSA) program, which is a continuously supported and ongoing program that does not expire. Recognizing that each USAO has unique considerations, the Department will work with incoming U.S. Attorneys and the NAIS to maximize the efficacy of the SAUSA program and continue to evaluate how best to support USAOs with Indian country responsibilities.

OIG Analysis: It is unclear whether the ODAG concurs with this recommendation. As noted in the report, the OIG acknowledges that the general SAUSA program is ongoing and has program requirements. However, the tribal SAUSA program is no longer accepting applications because its pilot program has not been extended and additional funding has not been allocated. Please provide a statement of concurrence or non-concurrence on or before March 14, 2018. If the ODAG concurs with this recommendation, on or before March 14, 2018, please describe how the ODAG will reconsider whether to allow the tribal SAUSA program to expire given its benefits to tribal communication and case prosecution coordination.

Recommendations to EOUSA

Recommendation 4: Ensure that all district operational plans are reviewed and updated as necessary, in cooperation with Department components, tribal law enforcement, and tribal justice officials, to consistently and accurately reflect the Department's and U.S. Attorneys' requirements and the priorities that guide their work in Indian country, including *Tribal Law and Order Act* mandates and the role of the U.S. Attorney's Offices Tribal Liaisons.

Status: Resolved.

EOUSA Response: EOUSA stated that although TLOA does not require operational plans, current Department policy does require them. EOUSA looks forward to working with Department leadership and the Attorney General's Advisory Committee to determine how best to implement Indian country policies that will work to reduce crime; strengthen native communities; and ensure better coordination across federal, state, and tribal law enforcement organizations. Consistent with Recommendation 1 above, Department leadership will coordinate with the NAIS to determine whether to amend or replace the policy that required operational plans be revised or updated.

OIG Analysis: EOUSA's actions are responsive to the recommendation. By March 14, 2018, please describe EOUSA's coordination with the ODAG and the NAIS to determine whether the 2010 memorandum requiring operational plans should be revised or updated, and what revisions or updates are under consideration, including core elements under TLOA, or a status update on your progress. Also, please describe how EOUSA will ensure that all district operational plans are reviewed and updated as necessary.

Recommendation 5: Work with U.S. Attorney's Offices to ensure that Tribal Liaisons' workloads are appropriately balanced so that they can effectively carry out their responsibilities, as mandated by the *Tribal Law and Order Act*, in light of local district conditions.

Status: Resolved.

EOUSA Response: EOUSA stated that TLOA created ancillary duties but did not fund or authorize additional full-time employees for USAOs. While Tribal Liaisons are tasked with the ancillary responsibility of working with tribes, their primary responsibility is prosecuting crimes. EOUSA stated that TLOA expressly stated that the Attorney General should take all appropriate measures to encourage aggressive prosecution of federal crimes committed in Indian country, while noting the dual role of Tribal Liaisons. EOUSA also referenced a section of TLOA stating that nothing in that section limits the authority of any U.S. Attorney to determine the duties of a Tribal Liaison to meet the needs of the tribes located within a district. EOUSA agreed to assist U.S. Attorneys, as needed, in ensuring that the workloads of Tribal Liaisons are appropriately balanced so that they can carry out their TLOA duties.

OIG Analysis: EOUSA's actions are responsive to the recommendation. However, while we acknowledge that, as AUSAs, Tribal Liaisons' primary responsibility is to prosecute federal criminal cases, we do not agree with the characterization of Tribal Liaison responsibilities that TLOA established as "ancillary responsibilities." The Department itself acknowledges that the Tribal Liaison program is one of the most important aspects of its Indian country efforts and that many districts rely on Tribal Liaisons to address challenging cultural and legal issues in Indian country. By March 14, 2018, please provide documentation or describe how EOUSA will work with U.S. Attorneys to ensure that Tribal Liaisons' workloads are appropriately balanced.

Recommendation 6: Work with U.S. Attorney's Offices to develop district-specific and, where appropriate, tribe-specific guidelines for Assistant United States Attorneys and Tribal Liaisons with regard to communicating case status and declinations, including appropriate explanation of the reasons for declinations, directly to tribal prosecutors and victims in a timely fashion.

Status: Resolved.

EOUSA Response: EOUSA agreed that enhanced communication between AUSAs and tribal prosecutors regarding case status would increase both entities' ability to achieve justice in individual matters. EOUSA stated that TLOA did not require AUSAs to discuss the internal deliberative process of policy making with tribes or tribal prosecutors. It is up to U.S. Attorneys to determine what prosecution-related information is appropriate to share with tribes, which must be a case-by-case determination due to various factors that may affect the sharing of law enforcement sensitive information with tribal law entities and victims. In addition, due to legal and ethical obligations, providing specific details regarding declinations can be problematic. USAOs must carefully manage information

regarding the identity of witnesses and victims, the specifics of evidence collection, and other law enforcement sensitive information, including grand jury materials. Nonetheless, EOUSA stated that it will work with the NAIS to assess the feasibility of district-specific or tribe-specific guidelines consistent with these issues.

OIG Analysis: The EOUSA's actions are responsive to the recommendation. The OIG acknowledges in the report that certain situations may limit the type and amount of information shared with tribal prosecutors. However, we found that tribal prosecutors often do not receive sufficient explanation for case declination and AUSAs in some districts do not communicate with tribal prosecutors with enough detail. By March 14, 2018, please provide a status update of EOUSA and NAIS's feasibility assessment of creating district-specific or tribe-specific guidelines to communicate case status and declinations, including appropriate explanation of the reasons for declinations, directly to tribal prosecutors and victims in a timely fashion.

Recommendation 7: Work with U.S. Attorney's Offices to ensure the development and dissemination of guidelines and eligibility criteria for the tribal Special Assistant United States Attorney program, should it be continued.

Status: Resolved.

EOUSA Response: EOUSA agreed to take steps to assist U.S. Attorneys in the development and dissemination of guidelines and eligibility criteria for the tribal SAUSA program, as needed. EOUSA stated that in many circumstances a tribal SAUSA may facilitate communication between a tribe and the USAO and strengthen that relationship. The appointment of a tribal SAUSA is the prerogative of the U.S. Attorney in each district. Although general criteria may be useful in determining qualifications for the position, there may be circumstances in which a tribal SAUSA may not be appropriate for a particular district.

OIG Analysis: EOUSA's actions are responsive to the recommendation. By March 14, 2018, please describe what steps EOUSA has taken to assist U.S. Attorneys in developing and disseminating guidelines and eligibility criteria for the tribal SAUSA program.

Recommendation 8: Work with U.S. Attorney's Offices to ensure that they consistently track and report course subjects and agency participation for all training that U.S. Attorney's Offices and the National Indian Country Training Initiative provide, and coordinate additional training accordingly.

Status: Resolved.

EOUSA Response: EOUSA stated that, through the NICTI, it will work with USAOs to more accurately track all training provided at the National Advocacy Center, regionally, or in individual districts.

OIG Analysis: EOUSA's actions are responsive to the recommendation. However, as noted in the report, only 11 USAOs could report ad hoc training, and it was limited to course titles and PowerPoint presentations. The OIG believes that

EOUSA should centrally track all training to ensure that it occurs in all areas that TLOA requires. Also, EOUSA did not describe how USAOs and the NICTI will coordinate training. As noted in the report, EOUSA is unaware of all training that USAOs provide to tribes and is therefore unable to assess whether the USAOs' training is meeting TLOA requirements. The OIG believes that EOUSA and the USAOs should ensure that NICTI and USAO training is complementary, not duplicative, and that all training provided is appropriately addressing training needs in Indian country. By March 14, 2018, please describe what steps EOUSA has taken to work with USAOs and the NICTI to accurately track all training and coordinate additional training accordingly.

Recommendations to the DEA and the FBI

Recommendation 9: Coordinate with the Department of the Interior, particularly the Bureau of Indian Affairs, and tribal authorities to ensure the delivery of training as the *Tribal Law and Order Act* requires.

DEA Status: Resolved.

DEA Response: The DEA stated that it will establish a point of contact at its Office of Training to coordinate with Staff Coordinators within the DEA's Office of Global Enforcement on all training requests from the Bureau of Indian Affairs (BIA); this coordination will facilitate specific training to tribal law enforcement officers conducting narcotics investigations. The DEA stated that examples of training that can be coordinated through its Office of Training include the Tribal Law Enforcement Basic Narcotics Investigation Course, a 2-week class developed in coordination with the BIA; training modules taught at conferences, such as the National Native American Law Enforcement Association conference; invitations to attend training offered at DEA divisions through Division Training Coordinators; and trainings that DEA Chemists provide.

OIG Analysis: The DEA's actions are responsive to the recommendation. Please provide a copy of BIA training requests and the subsequent training provided, including course subjects and agency participation.

FBI Status: Unresolved.

FBI Response: The FBI stated that it coordinates with the BIA to host the annual Indian Country Criminal Investigator Training Program (ICCITP), which is a 2-week class focused on core Indian country investigative knowledge and skills. The FBI also conducts additional Indian country training courses across the country for federal, state, and tribal law enforcement officers. The FBI has always provided annual training to federal, state, and tribal law enforcement and will continue these efforts.

OIG Analysis: We found that the FBI has taken positive steps to coordinate with the BIA and provide some training to its law enforcement counterparts, including BIA and tribal law enforcement, through the ICCITP and other training opportunities. However, the OIG believes that the ICCITP alone is not enough to

meet the needs of tribal law enforcement personnel in Indian country because it is offered infrequently and to a limited number of participants. Specifically, the ICCITP can accommodate only 24 total attendees; participation is divided equally among FBI, BIA, and tribal law enforcement; and only 2 sessions of the ICCITP were planned for 2017.

It is unclear whether the FBI concurs with this recommendation. Please provide a statement of concurrence or non-concurrence on or before March 14, 2018. If the FBI concurs with this recommendation, on or before March 14, 2018, please provide an update on the number of planned ICCITP sessions that the FBI will conduct in CY 2018, as well as the number of participants by agency. Also, please provide a list of other training opportunities that the FBI provided, including the number of participants by agency. Last, please describe how the FBI will increase the number of participants in its Indian country training efforts to ensure TLOA requirements are met.

Recommendation 10: Track all training provided to the Bureau of Indian Affairs and tribal law enforcement, including ad hoc training that Special Agents provide, and develop procedures to incorporate this information in planning future training.

DEA Status: Resolved.

DEA Response: The DEA stated that it will work with the DEA's District Training Coordinators to track all division-level training, to include the number of participants, through its DEALS training platform.

OIG Analysis: The DEA's actions are responsive to the recommendation. However, we note that the FBI's response below stated that it will track all trainings and report those trainings to EOUSA. The DEA's response does not mention reporting such training to EOUSA. The OIG encourages FBI and DEA officials to coordinate the type of training data that will be collected and reported to EOUSA to ensure a coordinated Department approach to the training provided in Indian country. By March 14, 2018, please provide a report of all division-level training provided, to include the number of participants and their agency. Please also describe how the DEA will coordinate with the FBI to provide the same training data or information to EOUSA.

FBI Status: Resolved.

FBI Response: The FBI stated that the Indian Country Crimes Unit (ICCU) will request that all field offices notify and report all ad hoc Indian country trainings. The ICCU will report all FBI Indian country trainings to EOUSA at the end of every calendar year.

OIG Analysis: The FBI's actions are responsive to the recommendation. By March 14, 2018, please provide the guidance that the FBI will issue to all field offices to notify and report all ad hoc Indian country trainings and describe how the

ICCU will track all Indian country training, to include all ad hoc training that Special Agents provide in the field.

Recommendation 11: Provide Department Special Agents assigned to Indian country with training specific to Indian country.

DEA Status: Resolved.

DEA Response: The DEA stated that it will request that the BIA conduct a training module to educate all Special Agents who operate in BIA territory. This training will provide Special Agents with knowledge beneficial to working in Indian country. The DEA will also work with its BIA partners to establish a curriculum to assist DEA offices.

OIG Analysis: The DEA's actions are responsive to the recommendation. By March 14, 2018, please describe the steps the DEA has taken to work with the BIA to establish a training module for DEA Special Agents and provide a copy of the training curriculum established to assist DEA offices.

FBI Status: Unresolved.

FBI Response: The FBI stated that all new FBI Special Agents must pass a rigorous 20-week academy before being certified and assigned to investigative duties. The FBI also described the curriculum for Special Agents. After graduating from the academy, Special Agents continue their education through a Field Training Agent (FTA), who is an experienced Special Agent in the same office and squad as the new Special Agent. For approximately 2 years, the FTA provides guidance and mentorship and works alongside the new Special Agent on a daily basis, until the new Special Agent completes numerous mandatory on-the-job training requirements and is removed from probation. New FBI Special Agents assigned to Indian country have FTAs and must complete the same probationary requirements as all other FBI Special Agents. In addition to on-the-job training and FTA mentorship, the FBI provides numerous training opportunities throughout each Special Agent's career that is no different for Special Agents assigned to Indian country. FBI Indian country Special Agents had dozens of opportunities to attend continuing education on numerous Indian country-related topics during fiscal years 2010–2016. In addition to ICCU, NICTI, and FBI/BIA courses, other elements of the hundreds of training opportunities that the FBI provided for FBI Special Agents during 2010–2016 benefited those assigned to Indian country and assisted in the response to, or investigation of, Indian country crimes. Each Special Agent is responsible for participating in essential training and continuing education. Also, the ICCITP, which focuses on core Indian country investigative knowledge and skills, was designed for law enforcement officers who are new to federal investigations in Indian country and was never intended for seasoned Indian country Special Agents, which represent the bulk of the FBI Indian country Special Agent workforce. Finally, the FBI stated that it has dramatically exceeded TLOA training requirements and will continue to pursue these and other Indian country training programs.

OIG Analysis: As noted in the report, the geographic and cultural conditions associated with Indian country present unique challenges to FBI Special Agents who work there. FBI Special Agents whom we interviewed told us that they had not received any training specific to Indian country prior to or during their assignment. As such, the OIG believes that, while the FBI's training approach is beneficial to all Special Agents, it should consider how these programs are specific to the unique cultural, jurisdictional, and geographical challenges that Special Agents will encounter.

It is unclear whether the FBI concurs with this recommendation. Please provide a statement of concurrence or non-concurrence on or before March 14, 2018. If the FBI concurs with this recommendation, on or before March 14, 2018, please describe how the FBI will ensure that the training Special Agents receive when assigned to Indian country prepares them for the unique conditions that they will encounter.

Recommendation to the DEA

Recommendation 12: Consider establishing a permanent position at Drug Enforcement Administration headquarters to coordinate with Department components with Indian country responsibility in developing and implementing strategies, programs, and training policies.

Status: Resolved.

DEA Response: The DEA stated that it currently has a GS-14 Staff Coordinator assigned to Indian country affairs, as well as a back-up Staff Coordinator to assist when needed. The Staff Coordinator is the DEA's primary point of contact for all Indian country issues.

OIG Analysis: The DEA's actions are responsive to the recommendation. As noted in the report, the Staff Coordinator's liaison responsibilities are collateral duties. By March 14, 2018, please describe how the DEA will work with the Staff Coordinator to ensure that his workload is appropriately balanced so that the Staff Coordinator can adequately enhance the DEA's law enforcement and training activities in Indian country.

Recommendations to EOUSA and the FBI

Recommendation 13: Analyze available data to help to identify resource, program, or potential training and law enforcement needs.

EOUSA Status: Resolved.

EOUSA Response: EOUSA stated that it understands this recommendation to mean that EOUSA should use available data as part of its overall analysis when considering these issues. While the statistical data EOUSA and the USAO community collect provides a snapshot of Indian country matters and cases USAOs handle, that data alone will not identify resource, program, training, and law enforcement needs. The identification of such needs involves an examination of a

variety of qualitative factors, not only statistical information. Rather than placing undue focus on statistical data, EOUSA believes that the attention to the intensified coordination and communication anticipated in the recommendations above would better enhance public safety in Indian country. With those caveats, EOUSA agreed to use available data as one of many tools to identify needs.

OIG Analysis: EOUSA's actions are responsive to the recommendation. We acknowledge that data alone will not identify resource, program, training, and law enforcement needs. In the report, we found that tools such as crystal reports can be used, for example, to analyze trends in specific crimes by tribe or to determine administrative timeliness. The OIG believes that such data can be used to help analyze trends and thereby inform prioritization and resource allocation. We agree that when EOUSA engages in communication and coordination in response to the recommendations above, it will be able to make more informed decisions regarding its efforts in Indian country. By March 14, 2018, please describe how EOUSA will use available data to assist in determining how resources, including staff, should be allocated to manage challenges associated with caseloads and workflow.

FBI Status: Unresolved.

FBI Response: The FBI stated that analyzing TLOA non-referral data is not an effective way to measure and analyze justice, success, criminal activity, resources, programs, trainings, or other operational needs. The FBI uses more appropriate methods to evaluate and analyze operational needs. For example, every fiscal year, in consultation with USAOs across the country, the FBI completes a threat analysis, which relies on data from the field offices across all criminal programs, including Indian country, to analyze crime trends, which are then used for directing resources to help mitigate threats. The FBI's non-referral data alone does not show the FBI's commitment to combating crime in Indian country.

OIG Analysis: We acknowledge the FBI's efforts to measure and analyze its operational needs in Indian country. For example, as noted in the report, every fiscal year the FBI relies on data from field offices across all criminal programs to complete a threat analysis to direct resources and help mitigate risks. However, we also note that, in addition to administrative closures (or non-referral data), the FBI tracks all cases that the USAOs have prosecuted or declined but does not analyze this additional data to identify or highlight resource, staffing, or training needs.

It is unclear whether the FBI concurs with this recommendation. Please provide a statement of concurrence or non-concurrence on or before March 14, 2018. If the FBI concurs with this recommendation, on or before March 14, 2018, please describe how the FBI will analyze available data to assist in identifying resource, program, or potential training and law enforcement needs.

Recommendation 14: Provide training to all staff responsible for Indian country data collection to ensure that data is captured uniformly.

EOUSA Status: Resolved.

EOUSA Response: EOUSA agreed to continue to provide all USAO staff with docketing responsibilities training on proper coding of Indian country case information. EOUSA stated that, currently, all data entry personnel have access to relevant guidance, user manuals, factsheets, and policy memoranda. EOUSA will compile that information and send it to all USAOs with Indian country responsibilities.

OIG Analysis: EOUSA's actions are responsive to the recommendation. Please describe the training provided to all USAO staff with Indian country docketing responsibilities on proper coding of Indian country case information, as well as a list of training dates and the number of participants. Also, please provide a list of all guidance, user manuals, factsheets, and policy memoranda provided to USAOs with Indian country responsibility.

FBI Status: Resolved.

FBI Response: The FBI stated that its ICCU has provided training and assistance to field office and headquarters personnel regarding the reporting of case declination data, as TLOA required, since the implementation of the statute. The ICCU's leadership is in the planning phase of developing a more formal and comprehensive training course to cover appropriate data collection and reporting compliance for all FBI staff responsible for TLOA reporting.

OIG Analysis: The FBI's actions are responsive to the recommendation. By March 14, 2018, please provide a status update on the FBI's progress to develop training on data collection and reporting for FBI staff with TLOA reporting responsibilities.



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CHAPTER TWO

REFORMING JUSTICE FOR ALASKA NATIVES: THE TIME IS NOW

Section 205 of the Tribal Law and Order Act of 2010 (TLOA) states, “*Nothing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State.*” Yet, the Indian Law and Order Commission’s opinion is that problems in Alaska are so severe and the number of Alaska Native communities affected so large, that continuing to exempt the State from national policy change is wrong. It sets Alaska apart from the progress that has become possible in the rest of Indian country. The public safety issues in Alaska—and the law and policy at the root of those problems—beg to be addressed. These are no longer just Alaska’s issues. They are national issues.

The most recent example of harmful Alaska exceptions in Federal law and policy came with the March 7, 2013 enactment of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments). Title IX (“Safety for Indian Women”), Section 910, contains a rule that limits the Act’s “Special Domestic Violence Criminal Jurisdiction” to just 1 of the 229 federally recognized tribes in Alaska. Given that domestic violence and sexual assault may be a more severe public safety problem in Alaska Native communities than in any other Tribal communities in the United States, this provision adds insult to injury. In the view of the Commission, it is unconscionable.

Every woman you've met today has been raped. All of us. I know they won't believe that in the lower 48, and the State will deny it, but it's true. We all know each other and we live here. We know what's happened. Please tell Congress and President Obama before it's too late.

Tribal citizen (name withheld)

*Statement provided during an Indian Law and Order Commission site visit to Galena, AK
October 18, 2012*

The strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern to the Indian Law and Order Commission. They do not serve local and Native communities adequately, if at all. The Commission believes that devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so—or to work out voluntary agreements with each other, and with local governments and the State on mutually beneficial terms.

While it is not within the scope of the Commission's work to address needed reforms within Alaska's State government, matters relating to the public safety of the Alaska Native communities are. The Commission's study of Alaska and its recommendations to Congress and the President are focused on what can and should be done to restore and enhance authority to local Native communities.

FINDINGS AND CONCLUSIONS

Centralized administration falls short of local needs. Forty percent (229 of 566) of the federally recognized Tribes in the United States are in Alaska, and Alaska Natives represent one-fifth of the total State population.¹ Yet, these simple statements cannot capture the vastness or the Nativeness of Alaska. The State covers 586,412 square miles, an area greater than the next three largest states combined (Texas, California, and Montana).² There are only 1.26 inhabitants per square mile—as compared to 5.85 for Wyoming, which is the next least populous state.³ (See map.)

Many of the 229 federally recognized tribes are villages located off the road system and “more closely resemble villages in developing countries” than small towns in the lower 48.⁴ Frequently, Native villages are accessible only by plane, or during the winter when rivers are frozen, by snow-machine. Food, gasoline, and other necessities are expensive and often in short supply. Subsistence hunting, fishing, and gathering (caribou, moose, reindeer, beluga whale, seal, salmon, halibut, berries, greens, etc.) are a part of everyday life. While Alaska Natives constitute a majority of the rural population, each community is nonetheless quite small; typical populations are in the range of 250-300 residents, many of whom share family or clan affiliations.⁵ Villages are politically independent from one another and have institutions that support that local autonomy—village councils and village Corporations.⁶ Historically, each village has managed its own local affairs, including issues of justice, and many are seeking ways to do so again. These conditions pose significant challenges to the effective provision of public safety for Alaska Natives.

*Justice efforts, however, are often hampered.*⁷ Problems with safety in Tribal communities are severe across the United States—but they are systematically the worst in Alaska. This is evident in an array of data concerning available services, crime, and community distress.

Alaska's True Proportion to the Continental United States

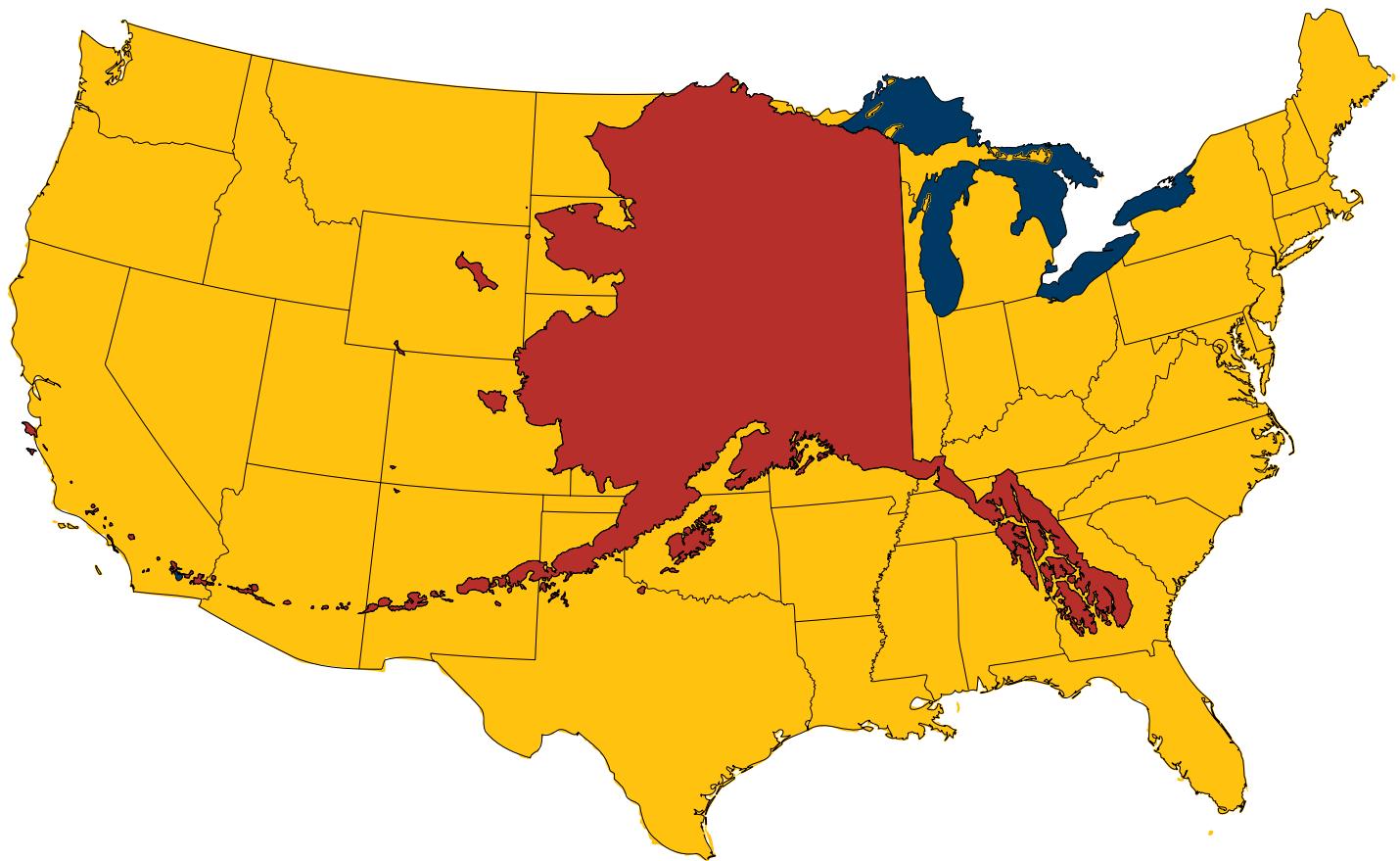


Table 2.1 Law Enforcement Personnel Serving Native Communities in Alaska

	DUTIES	TRAINING	LOCATION	FUNDED FORCE* (2011-12)	GUN?
State Troopers	Enforce all criminal laws Investigate crimes Assist other LE agencies Transport offenders Provide court security	15 weeks Accredited	Urban and rural posts across the state	573	Yes
Village Public Safety Officers (VPSOs)	Search and rescue Fire protection Emergency medical assistance Crime prevention Basic law enforcement	10 weeks	Rural villages	101	No
Village Police Officers (VPOs)	Basic law enforcement	2 weeks	Rural villages and tribes	104	Yes
Tribal Police Officers (TPOs)					

*Some positions may not be filled

Sources: (1) Division of Alaska State Troopers main website, Alaska Department of Public Safety, <http://www.dps.state.ak.us/ast/>; (2) Village Public Safety Officer Program website, Alaska Department of Public Safety, <http://www.dps.state.ak.us/ast/vpso/>; (3) *Legislative Hearing on S. 1192, Alaska Safe Families and Villages Act of 2011 and S. 1763 Stand Against Violence and Empower Native Women Act Before S. Comm. on Indian Affairs*, 112th Cong. 54 (Written Testimony of Joseph Masters, Commissioner, Alaska Department of Public Safety) (2013), available at <http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=9515>

Our Tribe needs the State to recognize and respect our Tribal courts. We don't get much justice in Fairbanks.

*Curtis Summer, Vice Chairman, Tanana Village
Testimony before the Indian Law and Order Commission, Meeting in Tanana Village, AK
October 29, 2012*

Alcohol is probably 95 percent of our problem, but the State says we have no Tribal authority to fight bootlegging locally when they're hundreds of miles away—and only by airplane much of the year. The State and the Feds won't step up to prevent alcohol and drugs from flowing in here from Anchorage and Fairbanks. We're on our own, except they [the State] won't respect or enforce what we do.

*Dave Richards, City Manager, Fort Yukon, AK
Testimony before the Indian Law and Order Commission, Meeting in Fort Yukon, AK
October 30, 2012*

Most Alaska Native communities lack regular access to police, courts, and related services:

- Alaska Department of Public Safety (ADPS) officers have primary responsibility for law enforcement in rural Alaska, but ADPS provides for only 1.0–1.4 field officers per million acres.⁸ Since ADPS's 370 officers cannot serve on a 24/7 basis, the actual ratio of officers to territory is much lower. According to ADPS, troopers' efforts "are often hampered by delayed notification, long response distance, and the uncertainties of weather and transportation."⁹
- Funding is available for just over 100 Village Public Safety Officers (VPSOs), although only 88 positions serving 74 communities were filled in 2011. Local Alaska Native Corporations hire VPSOs and villages have input into their selection; but, the officers actually work under Alaska State Trooper oversight. VPSO presence helps improve the coverage ratio, but technically their role is restricted to basic law enforcement and emergency first response. They do not carry firearms, although most offenders in rural villages do, a fact tragically emphasized through the death of VPSO Thomas Madole in March 2013.¹⁰
- 104 more officers serve 52 communities as Village or Tribal Police Officers, and both the Bristol Bay and North Slope Boroughs have borough-wide police departments. These officers do carry firearms, but the positions exist only in those communities with the economic resources to support them.¹¹
- At least 75 communities in Alaska lack any law enforcement presence at all.¹²
- Each of the four judicial districts in the Alaska court system serves rural Alaska, but the district courts frequently delegate responsibility to magistrates to serve low population, remote communities. Magistrates serving rural circuits visit individual communities regularly, but infrequently. Yet, often they are the sole face of the State court in Native villages.¹³
- By Federal law, Alaska Native Tribes may establish Tribal courts. As of 2012, 78 Tribes in Alaska had done so; 17 more Tribes were in the process of court development.¹⁴ However, funding constraints and narrow jurisdiction limit Alaska Tribal courts' efforts. Not all Alaska Tribal courts are fulltime or even operated with paid staff. These courts typically address only child welfare cases, customary adoptions, public drunkenness, disorderly conduct, and minor juvenile offenses.¹⁵

[Alaska Natives experience the] highest rates of family violence, the highest rates of suicide, and the highest rates of alcohol abuse anywhere in the nation and, unfortunately, at the top of the list in Indian country in the United States. And those challenges...are exacerbated, in part, because of the enormous geographical size of Alaska, the remoteness of these communities, the skyrocketing costs of transportation, the lack of any economic opportunity, and the enormous gaps in the delivery of any form of government service, particularly from the State of Alaska.

*Mayor Bruce Botelho, Commissioner, Alaska Rural Justice and Law Enforcement Commission
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2011*

- The Emmonak Women's Shelter, which closed for several weeks in 2012 for lack of resources, is “one of two facilities dedicated to domestic violence protection in the State. It is also the only facility located in a Native American community.”¹⁶ It is located “in a region in which there are few police officers, no transitional housing for women, and limited options for women seeking to escape.”¹⁷
- Alaska funds only 16 juvenile probation offices across all of Alaska; on average, each office’s service area is the size of Tennessee.¹⁸
- Of the 76 substance abuse treatment and/or mental health treatment centers in the State, most are in southern and southeastern Alaska, with approximately one-third in Anchorage alone; for residents of southwestern, central, and northern Alaska, help is typically provided a very long way from home.¹⁹

Alaska Natives are disproportionately affected by crime, and these effects are felt most strongly in Native communities:

- Based on their proportion of the overall State population, Alaska Native women are over-represented in the domestic violence victim population by 250 percent; they comprise 19 percent of the population, but 47 percent of reported rape victims.²⁰
- On average, in 2003-2004 an Alaska Native female became a victim of reported sexual assault or of child sexual abuse every 29.8 hours, as compared to once every 46.6 hours for non-Native females. Victimization rates, which take account of underlying population proportions, are even more dissimilar: the rate of sexual violence victimization among Alaska Native women was at least seven times the non-Native rate.²¹
- In Tribal villages and Native communities (excluding the urban Native population), problems are even more severe. Women have reported rates of domestic violence up to 10 times higher than in the rest of the United States and physical assault victimization rates up to 12 times higher.²²
- During the period 2004-2007, Alaska Natives were 2.5 times more likely to die by homicide than Alaskans who reported “White” as their race and 2.9 times more likely to die by homicide than all Whites in the United States.²³
- Alaska Natives’ representation in the Alaska prison and jail population is twice their representation in the general population (36 percent versus 19 percent).²⁴ Nearly 20 percent of the Alaska Natives under supervision by the Alaska State Department of Corrections are housed out of State, nearly all at Hudson Correctional Facility in New York State—4,419 road miles from Anchorage.²⁵

“It nonetheless bears repeating that the Commission’s findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike: It is the Commission’s considered finding that Alaska’s approach to criminal justice issues is fundamentally on the wrong track.”

- In Fairbanks, the city that serves a large rural and Tribal village population, Alaska Native youth who come into contact with the juvenile justice system are four times more likely than non-Natives to be referred to juvenile court and three times more likely to be sentenced to confinement.²⁶

Social distress, which can be a cause of crime or other threats to public safety, is also high among Alaska Natives and in Alaska's Tribal communities:

- The suicide rate among Alaska Natives is almost four times the U.S. general population rate, and is at least six times the national average in some parts of the State.²⁷
- In 2011, over 50 percent of the 4,499 reports of maltreatment substantiated by Alaska's child protective services and over 60 percent of the 769 children removed from their homes were Alaska Native children.²⁸
- More than 95 percent of all crimes committed in rural Alaska can be attributed to alcohol.²⁹
- The alcohol abuse-related mortality rate was 38.7 per 100,000 for Alaska Natives over the period 2004–2008, 16.1 times higher than rate for the U.S. White population over the same period.³⁰

Origins and further impacts. Why do these grave crime and safety issues persist in Alaska's tribal communities? Responsibility, it appears, lies primarily with the State's justice system.

In Alaska's criminal justice system, State authority is privileged: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes, and it exercises this jurisdiction through the provision of law enforcement and judicial services from a set of regional locations, under the direction and control of the relevant State commissioners. This approach has led to a dramatic under-provision of criminal justice services in rural and Native regions of the State. It also has limited collaboration with local governments (Alaska Native or not), which could be the State's most valuable partners in crime prevention and the restoration of public safety.

It is not the Commission's intent in any way to criticize the many dedicated and accomplished State officials who serve Native communities day in and day out. They deserve the nation's respect, and they have the Commission's.

Yet, control and accountability directed by local Tribes is critical for improving public safety. It brings to the table place-specific knowledge of what may work best to prevent crime and social disorder. It prioritizes the

use of scarce criminal justice resources according to community needs. It creates possibilities for intervention before disagreements or stressful situations become violent. It makes it easier for law enforcement officials to respond to crime, creates better access to the institutions of justice for victims and witnesses, and allows for trials by jury of a defendant's peers.

Through these improved means of responding to problems, de-escalating conflict, and providing justice, local control may even decrease demand for certain criminal justice services and related social services.⁵¹ By contrast, Alaska's criminal justice system can only weakly respond to crime, do little to prevent it, and ultimately, perpetuates public safety concerns.

The Commission appreciates the State of Alaska's support of the Commission's visits to the State during the course of performing its statutory duties, including, but not limited to the cooperation that Attorney General Michael Geraghty and the Alaska State Troopers repeatedly extended. Similarly, we are grateful for the senior Federal leaders who did not hesitate to enable the Commission's work or engage individual Commissioners on these important matters. Where this report differs on interpretation of law, legal issues, and policies, we want to make clear that it is not for a lack of dialogue or a willingness to engage in robust discussion and debates. (See Appendix F for letters from Attorney General Geraghty and Donald Mitchell, Esq.)

It nonetheless bears repeating that the Commission's findings and conclusions represent the unanimous view of nine independent citizens, Republicans and Democrats alike: It is the Commission's considered finding that Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize and frequently ignores the potential of tribally based justice systems, intertribal institutions, and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer. If given an opportunity to work, Tribal approaches can be reasonably expected to make all Alaskans safer—and at less cost.

The Alaska State Attorney General has reviewed the distinct history of Tribal-territorial and Tribal-State relationships regarding land occupancy, ownership, and jurisdiction for the benefit of the Indian Law and Order Commission (Appendix F). The Commission understands that from the State's perspective, Alaska's criminal justice system is rooted in U.S. statutory and case law. The Attorney General's review notes that given the U.S. Supreme Court's interpretation of the Alaska Native Claims Settlement Act of 1971 (ANCSA) in *Alaska v. Native Village of Venetie Tribal Government*,⁵² there is very little Indian country in Alaska (as defined by the Indian Country Act, 18 U.S.C. § 1151).

The Alaska Attorney General's review also emphasizes that Alaska is subject to P.L. 83-280, which assigns certain aspects of Federal jurisdiction

over Indian country to the State government.⁵⁵ The Attorney General takes the position that its law enforcement authority is exclusive throughout the State, maintaining that Tribes do not have a land base on which to exercise any inherent criminal jurisdiction.

In the Commission's view, each of the Attorney General's arguments is incomplete and unconvincing.

- The U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government* addressed fee land, not Alaska Native town site land or Alaska Native allotments, and a number of strong arguments can be made that this land may be taken into trust and treated as Indian country. Recently, for example, after exhaustively reviewing all the statutory authorities, a Federal court has decided that the Secretary of Interior does have authority to take land into trust in Alaska for Alaska Native communities.⁵⁴
- The State of Alaska rests its argument for exclusive criminal law jurisdiction on P.L. 83-280. Yet, courts within and outside Alaska have unanimously affirmed that P.L. 83-280 left concurrent State and inherent Tribal jurisdiction intact within Indian country. The State cannot simultaneously assert that, outside the Metlakatla Reservation, there is no Indian country in Alaska and that P.L. 83-280 prevails.
- Evidence in Alaska suggests that Tribes do have a land base on which to exercise criminal jurisdiction. At least some Alaska municipalities already are entering into agreements with Native villages that acknowledge the exclusive operation of Native law and law enforcement within overlapping municipal and village boundaries. One such example is the agreement between Alaskan city of Quinhagak and the Native Village of Kwinhagak.⁵⁵

Without doubt, the Commission understands that the structure of Alaska's criminal justice system is consistent with the overall organization of Alaska State government, which is more centralized than any other U.S. state's.⁵⁶ In Alaska, most State programs and functions operate from a designated hub or hubs, and less attention is paid in Alaska than in other States to developing local capacity. Given this orientation, when Federal policy augmented State authority to include authority over Alaska Native lands, the State reflexively absorbed and centralized that authority.

But understanding the history of Alaska's system does not imply that it should continue, especially as its population keeps growing. The serious and ongoing crime and disorder problems in rural and Native regions of the State are evidence that the system is deeply flawed and that it has failed. From the standpoint of public safety, to leave the system unchanged makes the State of Alaska's continued assertion of exclusive jurisdiction seem not only unwise, but also incautious. It also is indefensibly expensive

to all Alaskans in terms of the human and economic toll it is taking on this and future generations of Alaskans.

The VPSO and VAWA Amendment exclusions are two specific examples of way the organization and orientation of the State's criminal justice system fail to prevent crime and imperil public safety

- **The Village Public Safety Officer position.** The VPSO position is emblematic of the deficiencies in Alaska's criminal justice system for Tribal communities. These quasi-law enforcement field officers are paid by Alaska Native Corporations, but report to the Alaska State Patrol, and are not accountable directly to Alaska Native communities. They perform numerous nonpolicing functions, have limited training, and cannot carry firearms—despite the great volatility of many situations they encounter. There is no reason for Alaska to use this model other than cost savings. VPSOs themselves can be exceptional officers, but the plans to expand the VPSO system do not translate into the scale of public safety enhancements that are necessary.
- **The harms in the VAWA Amendments exclusion.** Title IX, Section 901 of the Violence Against Women Reauthorization Act of 2013 includes a special rule limiting the Special Domestic Violence Criminal Jurisdiction in the Act to the Metlakatla Indian Community, leaving 228 other Tribes in Alaska without its benefit. The VAWA Amendments provisions allow Tribal courts to exercise this jurisdiction even against non-Natives under certain circumstances, and in several respects may apply in the absence of Indian country (for example, when the victim is a spouse, intimate partner, or dating partner of a member of the participating Tribe). The civil provisions allowing for protective orders also are not tied to the requirement of "Indian country." Exempting all but one of Alaska's Tribes from this legislation deprives them—and the State overall—of an essential tool in the fight against domestic violence and sexual assault.

Furthermore, crime and safety problems are only one the system's many negative consequences:

- Alaska's approach to providing criminal justice services is unfair. Alaska Natives, especially those living in rural areas of the State, have not had access to the level and quality of public safety services available to other State residents or that they should rightly expect as U.S. citizens. Given the higher rates of crime that prevail in Alaska Native communities, the inequities are even greater in relative terms. The State of Alaska's overarching lack of respect for Tribal authority further magnifies fairness concerns.

- Alaska's approach creates and reinforces discriminatory attitudes about Alaska Natives and the governing capacities of Alaska Native Tribes. As long as the system that helped create the problems is allowed to persist, the general public will be tempted to assume that the fault lies with the victims—when instead, Alaska Natives and Alaska Native Tribal governments have had relatively little say in the way crime and justice are addressed in their communities.
- Alaska's approach puts the State out of step with the rest of the United States and with international norms. As the State Attorney General's letter demonstrates, Alaska steadfastly relies on ANCSA as the basis of its interactions with Tribes. But placed in context, ANCSA was the last gasp of Federal “Termination Policy,” which focused on ending government-to-government relationships with Native nations. A mere 4 years later, Congress passed the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638), and Federal policy moved strongly in the direction of Tribal empowerment. Since then, evidence has accumulated that Tribal self-government is the best means of improving outcomes for American Indians living in Tribal communities,⁵⁷ and international law has affirmed the importance of self-determination for Indigenous peoples.⁵⁸
- Alaska's approach will lead to significant criminal justice and litigation costs. A variety of legal rulings and court decisions underscore the strong differences of opinion about State and Tribal government powers in Alaska. These decisions include: the 133-page opinion of the Department of the Interior Solicitor in 1993 that ANCSA had not terminated villages' status as Tribes,⁵⁹ the U.S. Supreme Court's decision in *Venetie*, and the Alaska Supreme Court's 1999 decision in *John v. Baker*⁶⁰ that Alaska Native Tribal courts can regulate internal domestic affairs even if Tribes do not have federally recognized Indian country. Without policy change, the future will look much like the contested past, only with much bigger and costlier problems compounded over time. As one expert has observed, “the extent of Tribal jurisdiction in Alaska is not yet clear, and will likely be the subject of State and Federal court cases for years to come.”⁶¹ Even if Alaska wins cases, the financial and social costs of litigation will be considerable and could be avoided altogether if State-Tribal relations instead were characterized by respect, mutual recognition, and partnership.
- Alaska's approach may result in irrevocable harm. The 75 Alaska Native villages that lack any law enforcement presence must contend with the prevailing sentiment in the State, which the Commissioners frequently heard from State and Federal leaders, that they should “just move.” The Commission was told repeatedly, in other words, that many Alaska Natives should relocate to larger, semi-urban centers, where there are law enforcement,

Circle Peacemaking in the Organized Village of Kake is a community-based restorative justice process for both adults and juveniles. State judges can defer to it for sentencing decisions and community members can turn there before problems deteriorate into official concerns. Kake circle peacemaking focuses on restoring balance to offenders' lives and to healing ruptures in their family, clan, Tribe, and community relationships. While literally sitting in a circle, justice system personnel, village elders, service providers, and any interested or affected community members meet with the offender and victim(s) to "speak from the heart in a shared search for understanding of the event" and to "together identify the steps necessary to assist in healing all affected parties and prevent future crimes." Kake Circle Peacemaking has led to decreased substance abuse, decreased offending, which is reflected in recidivism rates as much as 40 percentage points lower than the comparable State of Alaska figure, and greater Tribal self-determination.⁴⁵

One of the vehicles of change which I view as a hopeful, empowering mechanism is catching on in some villages in this region. The Western way of locking people up to sit in a jail cell and receive three meals a day and not really have to do anything meaningful to make things right is not too effective....Some of our State Magistrates and some State Judges are offering the option of the offender who has been charged and pled guilty to a misdemeanor or lower offence, to go before their home communities and be in a circle and to take ownership of their mistake in a meaningful way which can only happen in the safety and caring of a circle by the people who helped raise you. This is an example of a positive solution.

*Mishal Tooyak Gaede, Tribal Court Facilitator, Tanana Chiefs Conference
Letter to the Commission,
October 31, 2012*

One of the concluding observations I would make is that as a result of our activities within the State we become painfully aware that there was a tendency to be a wide gap between State governments and Tribal governments with regard to the roles in rural Alaska.

*Mayor Bruce Botelho, Commissioner, Alaska Rural Justice and Law Enforcement Commission
Testimony before the Indian Law and Order Commission, Hearing at Tulalip Indian Reservation
September 7, 2011*

court services, and support for victims and offenders. For communities that already are under great stress from natural resource development, environmental degradation, climate change, competition over subsistence resources, complex restrictions on subsistence activities, high prices for food and fuel, and substandard housing and sanitation conditions, this relatively callous attitude toward village public safety may be the final straw, leading to the dissolution of villages and the abandonment of life ways forged in the crucible of the Arctic thousands of years ago. While cultural change is to be expected, it should be guided by community choices—not forced by colonial policy.

Making change. Some important initial reforms have gained toeholds within the current system, particularly within the Alaska State judiciary. In her 2013 “State of the Judiciary Address,” Chief Justice Dana Fabe of the Alaska Supreme Court praised both the State-deputized circle sentencing program, a traditional Native practice for restoring breaches in the community caused by wrongdoing, which the State has piloted as a sentencing practice in a limited number of State court proceedings, and Tribal courts, which are fully independent of State control:

Tribal courts bring not only local knowledge, cultural sensitivity, and expertise to the table, but also are a valuable resource, experience, and a have a high level of local trust. They exist in at least half the villages of our State and stand ready, willing, and able to take part in local justice delivery. Just as the three branches of State government must work together closely to ensure effective delivery of justice throughout the State court system, State and Tribal courts must work together closely to ensure a system of rural justice delivery that responds to the needs of every village in a manner that is timely, effective, and fair.⁴²

Backing up words with action, Justice Fabe and her colleagues have been instrumental in improving the enforceability of Tribal court orders concerning domestic violence and engaging State and Tribal courts in shared training meetings.

This outreach and innovation by the Alaska judiciary is impressive and welcome, but it falls far short of what is truly needed. More Tribal villages need Tribal courts and sentencing circles, and where such institutions already exist, greater Tribal jurisdiction could make them even more effective.

Native villages without reasonable access to law enforcement should have that access, and all of their law enforcement officers should have the training and approval to carry firearms subject to standards that accord with all State peace officers. Native village residents should be able to participate locally in substance abuse treatment, technology-assisted alternatives to detention, and anger management programs. Not only the

State's judicial branch, but also all of State government should be working in greater collaboration with Alaska Native Tribes. The immediate and overriding need is for a criminal justice system that fully recognizes, respects, and empowers their governments.

What policy adjustments the State of Alaska should make in support of greater Tribal authority over criminal justice is something the State and its citizens should decide, not the Indian Law and Order Commission. The Commission notes only that a variety of organizational models support greater empowerment and that the shift must include the financial means for Tribal governments to do their share. Among others, options include:

- collaborating with Tribes on other criminal justice issues
- deputizing Tribes to provide a wide array of criminal justice services
- delegating or deputizing Tribal judges, including the expanded use of circle sentencing and traditional dispute resolution
- leveraging the State and Tribal governments' concurrent criminal jurisdiction to develop specific, locally optimal criminal justice approaches
- adopting a policy of State deference to Tribal authority in Tribal communities

Questions about how Tribal government services will be paid for immediately draw attention to an important difference between village and urban Alaska communities. Village subsistence economies do not lend themselves to many traditional means of government revenue generation, such as imposing a sales tax. Instead, other forms of finance must be found. Tribal governments may have access to certain Federal income streams (especially if the Commission's recommendations concerning base funding are implemented), and some may have site-specific revenue opportunities, such as in wildlife management, extractable resources, and government contracts.

The State government can also generate funds for Tribal criminal justice programming by rooting out inefficiencies and wasteful spending in its current organization, taking advantage of cost-savings from the increased use of alternatives to detention and other innovations in service provision, and moving money out of regional centers when increases in Tribal capacity make the current extent of service provision unnecessary.⁴⁴

Regional Alaska Native Corporations, the largest beneficiaries from Tribal resources over the last four decades, also should increase their contributions to the governments that justify their existence. The bottom line is that as Alaska Native Tribal governments must have adequate finances to carry out the functions of government, meet their

responsibilities to citizens, and work to improve their citizens' lives. As a legal matter, such changes may require statutory and constitutional change in Alaska, as well as corresponding reforms to ANSCA and other laws.⁴⁵

While acknowledging that change in the criminal justice system that serves Native Alaska is primarily a State and Tribal responsibility, the Indian Law and Order Commission observes that there also is a role for Congress. By making relatively modest changes to law and policy, Congress can help create a jurisdictional framework that supports Tribal sovereignty, provides a clearer role for the State, and lays groundwork for the resolution of resourcing issues.

Because the vast majority of public safety concerns in rural and Native Alaska relate to substance abuse, minimizing harms from alcohol and drug use will be key to addressing public safety issues in Native villages. There must be creative thinking about substance abuse problems and other local public safety concerns, by a broader set of individuals, (especially Tribal governments, but others as well), who can leverage a wider set of resources.

When Tribal governments have a larger decision-making role, it is likely that even more locally based, therapeutic sentencing models will emerge; that treatment resources in Native villages will be more integrated with law enforcement; that criminal justice and social services will be deployed more often for prevention and harm reduction than for intervention and punishment; and that new players, such as nonprofit organizations or Tribal collaboratives, will join in. This is not to minimize the difficulty in solving problems related to transportation, access, and infrastructure, but to suggest that even for very entrenched problems like substance abuse reduction, expanding local Tribal governments' authority offers more hope than does the status quo.

RECOMMENDATIONS

2.1: Congress should overturn the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*,⁴⁶ by amending ANCSA⁴⁷ to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.

The *Venetie* decision was based on an outdated and static understanding of ANCSA. Although that statute was first enacted under the influence of Termination Policy, it has been amended and reinterpreted many times since then, moving gradually but unmistakably toward a Tribal self-determination model. Thus, although the original language of ANCSA disavowed "lengthy wardship or trusteeship"⁴⁸ for Alaska Natives, later amendments deliberately extended restrictions on transfer of shares in Alaska Native Corporations out of Native ownership, and included other measures to ensure continued Native control of Alaska Native Corporations and the lands they own.⁴⁹

Further, as noted above, in 1993 the executive branch confirmed recognition of Alaska Native villages as federally recognized Indian nations with a government-to-government relationship with the United States. Since then Federal agencies have been providing services to Alaska Native villages that clearly qualify as Indian country much as they do for Tribes on reservation lands. Nothing in ANCSA expressly barred the treatment of these former reservation and other Tribal fee lands as Indian country. As a consequence, the *Venetie* decision has been widely criticized for failing “to honor longstanding principles of Indian law favoring the preservation of Tribal rights and powers until Congress clearly expresses its intent to terminate those rights and powers.”⁵⁰ Congress should step forward and correct the Supreme Court’s misguided interpretation of ANCSA.

2.2: Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

There is an archipelago of lands—individual Indian allotments and commonly held lands within Alaska Native town sites—that ANCSA did not affect. These are geographies over which the Federal government retains a trust responsibility, and they should be fully recognized as Indian country.

These parcels are not insignificant—conservative estimates place their total area somewhere between 4 and 6 million acres.⁵¹ If a land base is what is needed to exercise criminal jurisdiction (and other kinds of land-based jurisdiction), the change would clarify that at least some Alaska Native Tribes do have one. Furthermore, these lands are foothold from which Indian country in Alaska can be expanded.

2.3: Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned fee simple land similarly into trust; and to channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

To assert substantial land-based jurisdiction, Alaska Native Tribes need more land, with a focus on restoring and consolidating Tribal authority within Native villages and town sites. Transfers of Regional Corporation land back to Tribes and conversion of this land to trust status makes that possible. Tribes also should have the option of converting any land held in fee simple to trust status to further enlarge the reach of territorial jurisdiction.

Where Tribes in Alaska pursue such land consolidation and create larger swaths of Indian country in Alaska, the argument for them to opt out of P.L. 83-280 jurisdiction (as provided for in Commission recommendation

1.1) is at least as strong as it is for P.L. 83-280 Tribes in the lower 48. Indeed, Alaska Native Tribes may have a stronger case for exiting State jurisdiction under P.L. 83-280 because the State of Alaska centralizes its jurisdiction much more than other States, allowing even less local control.

Significantly, there are benefits of larger Tribal land bases that extend beyond improved criminal justice. For one, larger land bases help secure economic opportunity, that is, market opportunities that could help fund Tribal government and subsistence activities that provide Tribal citizens with greater food and financial security.

In fact, a larger tribally controlled land base for subsistence may have a variety of positive consequences. It can be protective of the environment, as Alaska Native communities have a vested interest in sustaining ecological health. It can decrease the criminalization of subsistence harvesting by expanding the geography in which community members can harvest without facing a choice between breaking the law and feeding their families. And, it may decrease social distress (which ultimately relates to public safety concerns) by providing productive, self-esteem enhancing “employment” for community members.

Some lawmakers have considered ANCSA sacrosanct, and may object to its amendment. But the Commission notes that ANCSA has been amended many times before with the intention of protecting Alaska Native resources, and the Commission’s proposals share that commitment.⁵² Indeed, from its passage in 1971, ANCSA was amended by nearly every Congress for the next 35 years, so it is hardly set in stone.⁵³

Moreover, while the Commission’s proposals for amendment are relatively modest, its members also observe that ANCSA got Indian policy in Alaska wrong. ANCSA has strong similarities to the General Allotment Act of 1887, which by converting communal land into individual land assets was intended to assist American Indians in adapting to Western life ways. The legislation’s implicit assumption was that after a generation or two, Indigenous peoples would no longer desire Tribal settlement arrangements. But, by the early 1930s, the empirical evidence generated by five decades of allotment invalidated the idea that American Indians would assimilate or that land allotment was the best way forward.

The U.S. government acknowledged its error and repudiated its policy with the Indian Reorganization Act of 1934 (IRA).⁵⁴ While the IRA has been problematic in some ways, it firmly recognized Tribal sovereignty and Tribes’ right to hold lands in common. It also led to reinvestment in American Indian communities with the understanding clarified in P.L. 93-638 that local Tribal governments are best positioned to address the social and economic needs of their citizens. Forty years after the passage of ANCSA, the Commission finds that the United States again has empirical evidence that allotment—albeit in a newer form—does not work. As Congress did with passage of the IRA, it is time to respond to the evidence

As the Federal government feverishly works to ward off a looming cash crunch, Alaska needs to work with Tribes creatively to conserve dwindling resources. The models are already there. The proverbial wheel need not be re-invented. Isn't the goal to solve the problems associated with jurisdiction, not perpetuate them? States like Wisconsin, Maine, and Arizona are to be applauded in their efforts to push through outdated prejudices and fears to create cooperative, problem-solving protocols. In some States, a simple cup of coffee between historic adversaries grew into powerful partnerships. We stand on fertile ground to develop both responsible and effective tools to reduce the domestic violence epidemic in Alaska and enter a new age of mutual understanding and cooperation.

Myron Naneng, Sr., President of the Association of Village Council Presidents
Alaska Dispatch
March 17, 2013

Overarching Themes of the 2006 Alaska Rural Justice and Law Enforcement Commission Report

1. Engage in more partnering and collaboration, especially through cross-jurisdictional agreements
2. Make systemic changes to improve rural law enforcement, especially changes that would support the training and certification of more Tribal officers
3. Enlarge the use of community-based solutions, especially through the delegation of authority to Tribes to address juvenile matters
4. Broaden the use of prevention approaches, with a special concentration on cultural relevance
5. Broaden the use of therapeutic approaches, including linking these approaches to culturally appropriate child welfare services
6. Increase employment of rural residents in law enforcement and judicial services by recruiting rural and Alaska Natives, creating opportunities for in-community probation supervision, and contracting with tribes for community service
7. Build additional capacity through infrastructure investments in housing for public safety officers, holding facilities in rural Alaska, and improve equipment
8. Increase access to judicial services, especially through increased jurisdiction and funding for Tribal courts
9. Expand the use of new technologies, especially by learning from the implementation of tele-medicine

that Alaska Native nations are not going away and reaffirm the status of Alaska Native Tribal governments as the key players in improving the lives of Alaska Natives. The recommended amendments to ANCSA for the return of land assets and for financial support of Tribal governments are based on this understanding.

2.4: Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.

The special rule applying Title IX of the VAWA Amendments to only one Native community in Alaska is inimical to providing effective public safety in Alaska. A simple fix is the removal of the one section relating to Alaska, which puts Alaska Native communities on par with Native communities throughout the nation. Allowing Tribal courts to issue protective orders, to enforce them, and provide the local, immediate deterrence effect of these judicial actions may be the single-most effective tool in fighting domestic violence and sexual assault in Native communities in Alaska. Significantly, many of the VAWA Amendments provisions apply even in the absence of Indian country and clearly should be in the purview of Tribal courts in Alaska.⁵⁵

2.5: Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.

P.L. 83-280 does not fit well in Alaska, predicated as it was on the presence of Indian country as defined by the Federal criminal code. The changes wrought by ANCSA effectively diminished any real meaning for P.L. 83-280 in Alaska, yet it is the law that the State relies on to hold that Alaska Native Tribes cannot exercise concurrent criminal law jurisdiction over their own members, frustrating the development of local-level criminal justice institutions. Regardless of what lands Tribes own or whether they are considered Indian country, this recommendation offers an opportunity to use new tools to respond to the public safety crisis in Alaska Native communities.

These changes authorize Tribes to locally and immediately attend to violence and criminal activity. They make it easier to create State-Tribal MOUs for law enforcement deputization and cross-deputization, cooperate in prosecution and sentencing, and apply criminal justice resources for optimal, mutual benefit. Such reforms also facilitate the ability of Alaska Native Tribes and nations to work together for mutual benefit, such as creating intertribal courts and institutions. Of course, to make the most of this Federal affirmation, Tribes should take action to clarify and, as necessary, formalize Tribal law for governing their recognized territories, especially law that relates to public safety.

CONCLUSION

In the words of Chief Justice Fabe:

Every study or survey of rural justice over the past two decades has acknowledged the unique and compelling justice needs of Alaska's small and isolated villages. The Alaska Sentencing Commission, the Alaska Natives Commission, the Alaska Judicial Council, the Alaska Supreme Court's Advisory Committee on Fairness and Access, the Alaska Commission on Rural Governance and Empowerment, and the Alaska Rural Justice and Law Enforcement Commission, have each studied the issues thoroughly. Consistent among their recommendations is a theme heard with increasing urgency: the need for greater opportunities for local community leaders and organizations to engage in justice delivery at the local level. Quite simply, for courts to effectively serve the needs of rural residents, justice cannot be something delivered in a far-off court by strangers, but something in which local people—those most intimately affected—can be directly and meaningfully involved.⁵⁶

The Chief Justice's framing of the systemic dysfunction that flows from the State's existing justice system may give reason for hope. Yet hope is not a strategy.

The Indian Law and Order Commission is not the first advisory board to recognize the lack of access to safety and public safety services in Alaska Native communities. But it should be the last. The situation in Alaska is urgent and of national, and not just State or regional, importance. Only the combined efforts of Federal, State, and Tribal leaders will be sufficient to change course and put all Alaskans on a better path.

ENDNOTES

¹ The statistic includes those who reported American Indian and Alaska Native alone or in combination with other races. Data are available in *Demographic Profile for Alaska, 2010 U.S. Census*, accessed February 28, 2013, <http://live.laborstats.alaska.gov/cen/dp.cfm>

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³ *List of U.S. States by Population Density*, accessed September 6, 2013, http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density

⁴ Alaska Federation of Natives, *Alaska Day 2012, Renewable Energy Solutions for Rural Alaska: Alaska Energy Brief*, May 2012, 4, accessed September 6, 2013, <http://www.nativefederation.org/wp-content/uploads/2012/10/2012-afn-cap-alaska-day-brief.pdf>

⁵ Estimates calculated from data on the webpage “Demographic and Geographic Sketches of Alaska Natives,” Alaska Natives Commission, accessed September 6, 2013, <http://www.alaskool.org/resources/anc/anc07.htm>

⁶ For a description of Alaska’s unique corporation model as created by the Alaska Native Claims Settlement Act of 1971, see DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2012)

⁷ *About VPSO Program*, Alaska Department of Public Safety, accessed February 22, 2013, <http://dps.alaska.gov/ast/vpsos/about.aspx>

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⁹ *About VPSO Program*, *supra* note 7.

¹⁰ *Legislative Hearing on S. 1192, Alaska Safe Families and Villages Act of 2011, and S. 1763 Stand Against Violence and Empower Native Women Act Before S. Comm. on Indian Affairs*, 112th Cong. 54(Written Testimony of Joseph Masters, Commissioner, Alaska Department of Public Safety) (2013), available at <http://www.indian.senate.gov/hearings/loader.cfm?cs-Module=security/getfile&pageid=9515>; *Frequently Asked Questions, Village Public Safety Officer Program*, Alaska Department of Public Safety, accessed February 28, 2013, <http://dps.alaska.gov/ast/vpsos/faq.aspx>; and Dave Bendigner, *VPSO Thomas Madole Killed In Manokotak*, ALASKA PUBLIC MEDIA, March 20, 2013, accessed March 21, 2013, <http://www.alaska-public.org/2013/03/20/vpsos-thomas-madole-killed-in-manokotak/>

¹¹ Masters, *supra* note 10; Alaska Natives and Law Enforcement (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/l/law_enf_local.html.

¹² Masters, *supra* note 10.

¹³ Alaska Natives and the Courts (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/a/alaska_natives_courts.html; ALASKA COURT SYSTEM, ANNUAL REPORT FY 2012, <http://courts.alaska.gov/reports/annualrep-fy12.pdf> (describing the structure of the Alaskan court system and discussing some of the problems with providing services in rural communities).

¹⁴ ALASKA LEGAL SERVICES CORPORATION, 2012 ALASKA TRIBAL COURT DIRECTORY i, <http://alaskatribes.org/uploads/2012-tc-directory.pdf>.

¹⁵ Alaska Natives and the Courts (gateway page and publication list), Justice Center, University of Alaska at Anchorage, http://justice.uaa.alaska.edu/directory/a/alaska_natives_courts.html.

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¹⁷ Timothy Williams, *With Grant, an Alaska Women's Shelter Can Reopen*, N.Y. TIMES, July 5, 2012, http://www.nytimes.com/2012/07/06/us/alaskan-womens-shelter-can-reopen-with-grant.html?_r=0.

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²⁰ Marny Rivera, André B. Rosay, Darryl S. Wood, Greg Postle, & Katherine TePas, Descriptive Analysis of Assaults in Domestic Violence Incidents Reported to Alaska State Troopers: 2004 at 7, Justice Center, University of Alaska at Anchorage, JC 0601.04 (2008) <http://justice.uaa.alaska.edu/research/2000/0601intimatepartnerviolence/0601.04.dv-assaults.pdf>.

²¹ For victimization statistics, see Greg Postle, André B. Rosay, Darryl S. Wood, & Katherine TePas, *Descriptive Analysis of Sexual Assault Incidents Reported to Alaska State Troopers: 2003-2004*, Justice Center, University of Alaska at Anchorage at 41-42 (2007), <http://justice.uaa.alaska.edu/research/2000/0601intimatepartnerviolence/0601.02.sexualassault.pdf>; for population statistics (used to calculate victimization rates) see 2003 ANNUAL REPORT and 2004 ANNUAL REPORT, ALASKA BUREAU OF VITAL STATISTICS, http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/2003/annual_report/Web_Book2003.pdf and http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/2004/annual_report/2004web_book.pdf

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²⁵ STATE OF ALASKA DEPARTMENT OF CORRECTIONS, 2011 id. at 32.

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²⁷ Centers for Disease Control and Prevention, National Center for Injury Prevention and

Control, Web-based Injury Statistics Query and Reporting System (WISQARS) [online], 2004-2008 Alaska Suicide Injury Deaths and Rates per 100,000, accessed March 4, 2013; Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (WISQARS) [online], 2004-2008 United States Suicide Injury Deaths and Rates per 100,000, accessed March 4, 2013; and Gretchen Day, Peter Holck, & Ellen M. Provost, *Alaska Native Mortality Update: 2004-2008*, ALASKA NATIVE EPIDEMIOLOGY CENTER (2011) at 4 , http://www.anthetoday.org/epicenter/publications/mortality/AlaskaNativeMortalityUpdate2004_2008_17_jan_2012.pdf

²⁸ Alaska Department of Health and Social Services, Office of Children's Services, *Data Overview of Disproportionality in Alaska's Child Welfare System* (2012) <http://dhss.alaska.gov/ocs/Documents/icwa/pdf/Disproportionality-data.pdf>.

²⁹ Alaska Rural Justice and Law Enforcement Commission, *Initial Report and Recommendations* (2006) http://akjusticecommission.org/pdf/reports/ARJLEC_Initial_Report_Recommendations.pdf

³⁰ Gretchen Day, Peter Holck, & Ellen Provost, *supra* note 27 at 15, 263.

³¹ For example, in dry villages with law enforcement, there is a 40 percent lower rate of serious injury caused by an assault as compared to dry villages without a law enforcement presence. Darryl S. Wood & Paul J. Gruenewald, *Local Alcohol Prohibition, Police Presence and Serious Injury in Isolated Alaska Native Villages*, 101 ADDICTION 393 (2006).

³² 522 U.S. 520 (1998).

³³ While these statements are true, the Commission finds the Alaska Attorney General's argument to be inconsistent. The assertion of P.L. 83-280 jurisdiction is unnecessary if there is no Indian country in Alaska.

³⁴ *Akiachak Native Community v. Salazar*, Civ. 06-969 (RC), 2013 WL 1292172 (D.D.C. 2013).

³⁵ See M.J. ex rel. Beebe v. United States, 721 F.3d 1079 (9th Cir. 2013).

³⁶ David Joulfaian and Michael L. Marlow, *Centralization and Government Competition*, 23 Applied Econ. 1603 (1991).

³⁷ HARV. PROJECT ON AM. INDIAN ECON. DEVEL., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (2008).

³⁸ See UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, especially sections 4 and 5, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf on February 28, 2013.

³⁹ Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members, Memorandum to the Secretary from the Solicitor, Department of the Interior (Thomas Sansonetti) (1993), <http://www.doi.gov/solicitor/opinions/M-36975.pdf> on February 28, 2013. The Opinion concluded that there were tribes in Alaska, but that their territorial jurisdiction had been limited by the by passage of the Alaska Native Claims Settlement Act.

⁴⁰ 982 P.2d 738 (Alaska 1999)

⁴¹ LISA JAEGER, TRIBAL COURT DEVELOPMENT: ALASKA TRIBES (3rd ed. 2002) at Chapter 2: *Tribal Jurisdiction Exercise by Alaska Tribal Courts*, http://thorpe.ou.edu/AKtribalct/chapter_two.html.

⁴² Dana Fabe, The State of the Judiciary: A Message by Chief Justice Dana Fabe to the First Session of the Twenty-Eighth Alaskan Legislature (Feb. 13, 2013) at 13, <http://courts.alaska.gov/soj/state13.pdf> on March 3, 2013. The Commission wishes to acknowledge the cooperation of Chief Justice Fabe and the Alaska State Judiciary during Commission field hearings and site visits including her meeting with Commissioners at the State Supreme Court in Anchorage.

⁴³ HARV. PROJECT ON AM. INDIAN ECON. DEVEL., Honoring Contributions in the Governance of American Indian Nations, Kake Circle Peacemaking, (2005), <http://www.hpaied.org/images/resources/publibrary/Kake%20Circle%20Peacemaking.pdf>; U.S. Dept. of Just., Natl. Inst.

of Just., “Sentencing Circles,” <http://www.nij.gov/topics/courts/restorative-justice/promising-practices/sentencing-circles.htm> (quotations); NEIL NESHEIM, EVALUATING RESTORATIVE JUSTICE IN ALASKA: THE KAKE CIRCLE (2010), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/293> (statistics).

⁴⁴ Experience with system reform in the lower 48 suggest that these cost savings are achievable. See, for example, ANNIE E. CASEY FOUNDATION, FIXING A BROKEN SYSTEM: TRANSFORMING MAINE’S CHILD WELFARE SYSTEM 8 (2009) (describing the cost savings from structural reform) http://www.aecf.org/~media/Pubs/Topics/Child%20Welfare%20Permanence/Other/FixingaBrokenSystemTransformingMainesChildWel/AECF_FixingABrokenSystemFinal_Final.pdf;

⁴⁵ A complete analysis of these options is essential to lay the groundwork for a more cost-effective, tribally based criminal justice system that places greater emphasis on the power of local control and accountability. This includes such basic issues as ensuring that Tribal villages can swiftly enforce their own laws related to alcohol, domestic violence, and other pervasive challenges whose implications are predominately local in nature, as is common place in the lower 48. A worthwhile place to begin would be to extend the very general framework from enhanced Alaska Native tribal sovereignty articulated in DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS (2012), especially Chapter 10 (“Sovereignty”). While Case and Voluck do not examine criminal justice issues per se, their insights on the interplay among State, tribal, and Federal laws are instructive.

⁴⁶ 522 U.S. 520 (1998).

⁴⁷ 43 U.S.C. § 1601.

⁴⁸ 43 U.S.C. § 1601(b).

⁴⁹ See NELL JESSUP NEWTON ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b][ii] [C] (2012 ed.).

⁵⁰ *Id.* at 355.

⁵¹ Natalie Landreth and Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska’s Tribes*, 36 AM. INDIAN L. REV. 321, 345-46 (2012).

⁵² J. Tate London, The ‘1991 Amendments’ to the Alaska Native Claims Settlement Act: Protection for Native Lands, 8 STAN. ENVTL. L.J. 200 (1989).

⁵³ Case and Voluck, *supra* note 46 at 165.

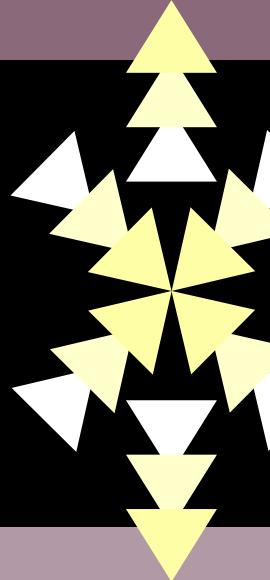
⁵⁴ 48 Stat. 984 (1934), also known as the Wheeler-Howard Act or “Indian New Deal.”

⁵⁵ Sen. Mark Begich (D-AK) introduced a bill entitled “Alaska Safe Families and Villages Act of 2013” (S. 1474) on August 1, 2013, which was intended as a “fix” to the special Alaska exclusion in the Violence Against Women Act Reauthorization of 2013. However, the version Begich introduced fell far short of the version that many Alaska Native advocates had been expecting. Earlier draft language had proposed to supplement State jurisdiction in Alaska Native villages with enhanced Tribal and local authority to address domestic violence and reduce alcohol and drug abuse. The final bill was about the Tribes entering into agreements to implement State law, which advocates claim they do not need Federal legislation to do. *Native Sun News* reported that “Begich’s aide Andrea Sanders said the changes came about through consultations between both Alaska senators and the state’s Attorney General Michael C. Geraghty on July 31.” At the time of writing (fall 2013), S. 1474 had stalled in committee, but this outcome further underscores the importance of finally standing up for Alaska Natives’ rights, as implementation of the Commission’s recommendations would do. See Talli Nauman, *Violence Against Women Act Amendment Falls Short of Protecting Women*, NATIVE SUN NEWS, August 12, 2013, <http://www.indianz.com/News/2013/010769.asp> (reprint), and “S.1474: Alaska Safe Families and Villages Act of 2013,” <http://www.govtrack.us/congress/bills/113/s1474/text>.

⁵⁶ Fabe, *supra* note 42 at 8. These are the citations for the reports mentioned in the address: (1) Alaska Sentencing Commission, *1992 Annual Report to the Governor and the Alaska*

Legislature, <http://www.ajc.state.ak.us/reports/sent92.pdf>; (2) Alaska Natives Commission, *Final Report* (1994) http://www.alaskool.org/resources/anc_reports.htm; (3) Alaska Judicial Council, *Resolving Disputes Locally: Alternatives for Rural Alaska* (1992) <http://www.ajc.state.ak.us/reports/rurj92.pdf>; (4) Alaska Supreme Court Advisory Committee on Fairness and Access & State Justice Institute & State Justice Institute, *Report* (1997) <http://www.ajc.state.ak.us/Reports/fairness.pdf>; (5) Alaska Commission on Rural Governance and Empowerment, Final Report to the Governor (1999) http://www.commerce.state.ak.us/dca/RGC/RGC_Final_6_99.pdf; (6) Alaska Rural Justice and Law Enforcement Commission, Initial Report and Recommendations (2006) http://akjusticecommission.org/pdf/reports/ARJLEC_Initial_Report_Recommendations.pdf; (7) Alaska Rural Justice and Law Enforcement Commission, Report to the United States Congress and the Alaska State Legislature (2012) http://akjusticecommission.org/pdf/reports/ARJLEC_2012_Report.pdf; (8) Alaska Supreme Court Fairness and Access Implementation Committee, *2007 Status Report of the Alaska Supreme Court Fairness and Access Implementation Committee* (2007), <http://courts.alaska.gov/fair-access2007.pdf>. A report that is not mentioned, but makes similar points is: Alaska Advisory Committee to the U.S. Commission on Civil Rights, *Racism's Frontier: The Untold Story of Discrimination and Division in Alaska* (2002), <http://www.eric.ed.gov/PDFS/ED468839.pdf>.

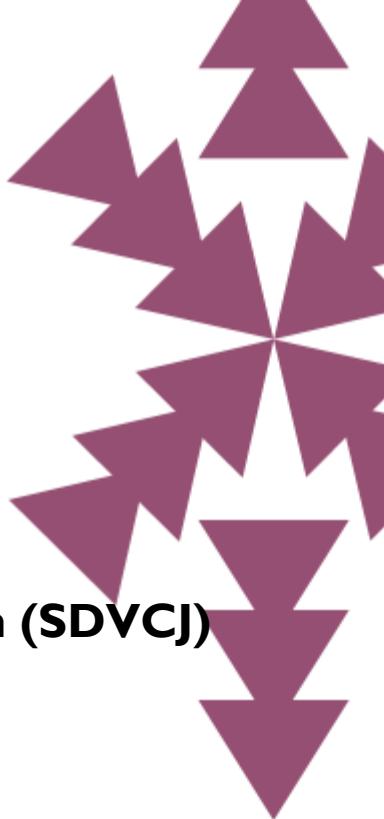
VAWA 2013's SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT



National
Congress of
American
Indians



National
Congress of
American
Indians



VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report

March 20, 2018

"We have always known that non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it....Now, our tribal officers have jurisdiction for the first time to do something about certain crimes. But it is just the first sliver of the full moon that we need to protect us."

—Lisa Brunner
White Earth Ojibwe Nation
Intergenerational Domestic Violence Survivor

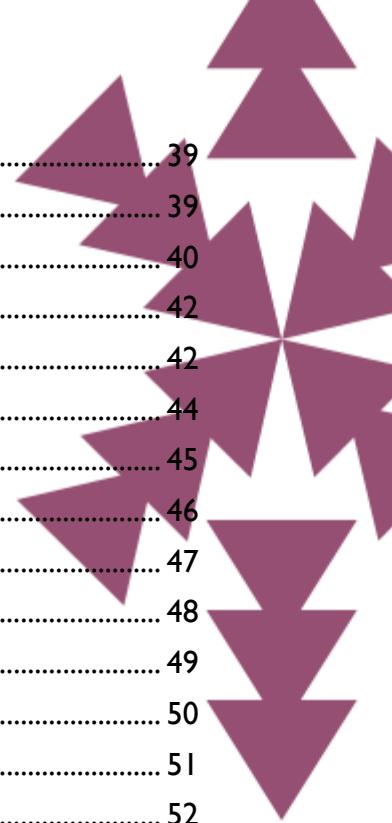


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For 35 years, the law failed to protect women like Taryn Minthorn.

Like many Indian women, Minthorn dated a non-Indian man. Eventually the relationship ended and her former boyfriend became dangerous. He spent months verbally abusing her before things became physically violent in September 2016. Her former boyfriend assaulted her in front of her children. When tribal police arrived, they promptly arrested him.

Her case was referred to the federal government for prosecution; however, they declined to prosecute her abuser. As Ms. Minthorn describes it, “I felt like I was seriously let down....I felt like he could do all the crime in the world, and it was just a slap on the hand. I just wanted to give up.”

Until recently, Minthorn’s case would have ended there, with her abuser walking free because only federal courts had jurisdiction to prosecute her non-Indian abuser.

However, because Minthorn’s tribal Nation, the Confederated Tribes of the Umatilla Indian Reservation, was one of the first tribes to exercise Special Domestic Violence Criminal Jurisdiction over non-Indians under the Violence Against Women Act of 2013, Minthorn was able to receive justice. Umatilla prosecutors were ready and willing to do something about her abuse.

In March 2017, her former boyfriend pled guilty in Umatilla Tribal Court. His sentence included two years of incarceration, three years of probation, abstaining from drugs and alcohol, anger management and batterer intervention treatment, and obeying a no contact order.

In Minthorn’s words, “[t]o hear him saying that he was pleading to these charges, I literally felt the load come off of me, off my shoulders, off my mind, off my heart.” Without her tribe being able to step in and prosecute, Minthorn and her children would not have seen justice.

Tribal court jurisdiction over non-Indian abusers makes all the difference for women like Minthorn who previously had nowhere else to turn. As she says, “It’s important for future generations to know that eventually there is justice.”¹



EXECUTIVE SUMMARY

Five years ago, Congress passed the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).² In response to the high rates of domestic violence being perpetrated against American Indian and Alaska Native women by non-Indian men,ⁱ and harrowing stories from victims whose abusers seemed out of justice's reach, the law contained a new provision. VAWA 2013 recognized and affirmed the inherent sovereign authority of Indian tribal governments to exercise criminal jurisdiction over certain non-Indians who violate qualifying protection orders or commit domestic or dating violence against Indian victims on tribal lands.³ This provision in VAWA 2013 created a framework for tribal courts to prosecute non-Indians again—something that had not happened in 35 years, since the U.S. Supreme Court decision in *Oliphant v. Suquamish Tribe*, which removed tribal authority to prosecute non-Indians.⁴

VAWA 2013's limited reaffirmation of inherent tribal criminal jurisdiction over non-Indians, known as Special Domestic Violence Criminal Jurisdiction (SDVCJ), has fundamentally changed the landscape of tribal criminal jurisdiction in the modern era. By exercising SDVCJ, many communities have increased safety and justice for victims who had previously seen little of either. SDVCJ has allowed tribes to "respond to long-time abusers who previously had evaded justice"⁵ and has given a ray of hope to victims and communities that safety can be restored.

To date, 18 tribes are known to be exercising SDVCJ (throughout this report these tribes are referred to collectively as "implementing tribes").ⁱⁱ Tribes are implementing SDVCJ with careful attention to the requirements of federal law and in a manner that upholds the rights of defendants. In order to exercise SDVCJ, tribes must comply with a series of federal statutory requirements that include, among other things, providing certain due process protections to non-Indian defendants.⁶ Most of these implementing tribes have worked closely with a group of over 50 other tribes as part of an Inter-tribal Technical-Assistance Working Group (ITWG) on SDVCJ that has been an important forum for tribal governments to work collaboratively to develop best practices.

To date, the implementing tribes report 143 arrests of 128 non-Indian abusers. These arrests ultimately led to 74 convictions, 5 acquittals, and 24 cases currently pending. There has not been a single petition for habeas corpus review brought in federal court in an SDVCJ case. Although preliminary, the absence of habeas petitions suggests the fairness of tribal courts and the care with which tribes are implementing SDVCJ.

Implementation of SDVCJ has had other positive outcomes as well. For many tribes, it has led to much-needed community conversations about domestic violence. For others it has provided an impetus to more comprehensively update tribal criminal codes. Implementation of SDVCJ has also resulted in increased collaboration among tribes and between the local, state, federal, and tribal governments. It has revealed places where federal administrative policies and practices needed to be strengthened to enhance justice, and it has shown where the jurisdictional framework continues to leave victims—including children and law enforcement—vulnerable. Implementation thus far has also revealed that additional resources are necessary in order for the benefits of the law to expand to more reservations.

ⁱ See *infra* Section I.

ⁱⁱ Since the end of the pilot period, tribes are not required to notify the U.S. Department of Justice if they begin exercising SDVCJ. This report covers the 18 implementing tribes that have reported implementation to the National Congress of American Indians and its partner technical assistance providers, although it remains a possibility that there are other tribes implementing SDVCJ.

This report summarizes how VAWA 2013's landmark provision has been implemented and analyzes its impacts in the 5 years since it was enacted.ⁱⁱⁱ This examination of the tribes' early exercise of SDVCJ suggests that VAWA 2013 has been a success. As Congress intended, the law has equipped tribes with the much-needed authority to combat the high rates of domestic violence against Native women, while at the same time protecting non-Indians' rights in impartial, tribal forums.⁷

The report begins in Section I with a brief overview of the need for the tribal provisions in VAWA 2013 and the context for their passage. It then provides in Section II, an overview of nationwide SDVCJ prosecution statistics and analyzes tribal experiences exercising SDVCJ over the past four years. It identifies four key findings, which are as follows:

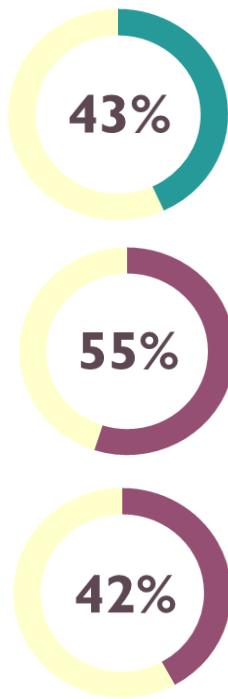
1. Tribes use SDVCJ to combat domestic violence by prosecuting offenders harming their communities
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 - 4-1. SDVCJ promotes positive tribal reforms
 - 4-2. Inter-tribal collaboration creates successes beyond SDVCJ
 - 4-3. SDVCJ promotes better relationships with other jurisdictions

Following the findings in Section II, Section III provides an overview of the requirements of those provisions and how they are structured. After supplying this context on the law, Section IV includes brief profiles of the 18 implementing tribes, including individual prosecution statistics. Finally, Section V examines the diversity in how tribes have chosen to meet the statutory requirements of VAWA 2013 and illustrates how the statute has allowed tribes to implement SDVCJ differently depending on the needs and values of their communities. The appendices to this report include resources on implementation of SDVCJ and other materials that may be of interest.

ⁱⁱⁱ Although VAWA 2013 was enacted 5 years ago, the SDVCJ provision took effect as a Pilot Project 1 year later and became effective nationwide in March of 2015.

I. THE NEED FOR AND ENACTMENT OF SDVCJ

A series of studies from the past several decades found staggering rates of violence against Native women on reservations—rates that far exceeded those of any other group in the United States.



Percent of American Indian & Alaska Native Men who experience Physical Violence from an Intimate Partner in their lifetime

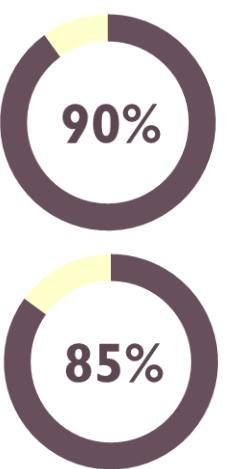
Percent of American Indian & Alaska Native Women who experience Physical Violence from an Intimate Partner in their lifetime

Percent of American Indian & Alaska Native Women who experience Severe Physical Violence from an Intimate Partner in their lifetime

Contrary to most other populations where rape, sexual assault, and other forms of violence are usually *intra-racial*, evidence suggested that American Indian and Alaska Native women are more likely to be raped or assaulted by someone of non-Indian descent.⁸ In 2013, when Congress enacted SDVCJ, it was motivated by this well-documented crisis of inter-racial violence against women in Indian Country.⁹

Recently, the Department of Justice's (DOJ) National Institute of Justice (NIJ) examined this issue and commissioned an in-depth study on violence against Native people. That study confirmed not only the presence of this crisis, but found that the scope is even greater than previously thought. According to the study, not only are there incredibly high rates of domestic violence in Indian Country, but non-Indian intimate partner violence accounts for the overwhelming majority of it.

NIJ found that more than half (55 percent) of American Indian and Alaska Native women have experienced physical violence by an intimate partner in their lifetimes—and 90 percent of these victims report being victimized by a non-Indian perpetrator, while only 18 percent report being victimized by an Indian. Overall, American Indian and Alaska Native women are five times as likely as non-Hispanic white women to have experienced physical violence by an inter-racial intimate partner.¹⁰



Percent of American Indian & Alaska Native Female Victims of Intimate Partner Physical Violence Report an Inter-Racial Perpetrator

Percent of American Indian & Alaska Native Male Victims of Intimate Partner Physical Violence Report an Inter-Racial Perpetrator

The higher rate of inter-racial violence would not necessarily be as significant if it were not for jurisdictional complexities in Indian Country. Criminal jurisdiction in Indian Country is divided among federal, tribal, and state governments, depending on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. The rules of jurisdiction were created over 200 years of Congressional legislation and Supreme Court decisions – and are often referred to as a “jurisdictional maze.”¹¹

The complexity of the jurisdictional rules creates significant impediments to effective law enforcement in Indian Country. Each criminal investigation

involves a cumbersome procedure to establish who has jurisdiction over the case according to the nature of the offense committed, the identity of the offender, the identity of the victim and the exact legal status of the land where the crime took place. The first law enforcement officials called to the scene are often tribal police or BIA officers, and these officers may initiate investigations and/or detain a suspect. Then a decision has to be made—based on the race of the individuals involved in the crime, the type of crime committed, and the legal status of the land where the crime occurred—whether the crime is of the type warranting involvement by the FBI or state law enforcement.

Oftentimes answering these questions can be very difficult. Each of the three sovereigns has less than full jurisdiction, and the consequent need for multiple rounds of investigation often leads to a failure to act. Overall, law enforcement in Indian Country requires a degree of cooperation and mutual reliance between federal, tribal and state law enforcement that—while theoretically possible—has proven difficult to sustain.

“The combination of the silence that comes from victims who live in fear and a lack of accountability by outside jurisdictions to prosecute that crime, you’ve created if you will, the perfect storm for domestic violence and sexual assault, which is exactly what all of the statistics would bear out.”

—The Honorable Theresa Pouley
Former Chief Judge, Tulalip Tribes of Washington¹²

For over three decades before VAWA 2013, tribes did not have jurisdiction over any crimes committed by non-Indians on their reservations.¹³ In 1978, the Supreme Court ruled in *Oliphant v. Suquamish* that, absent specific direction from Congress, tribal nations do not have jurisdiction over crimes committed by non-Indians in Indian Country.¹⁴ Congress recognized the impacts of this ruling.

“Criminals tend to see Indian reservations and Alaska Native villages as places they have free reign, where they can hide behind the current ineffectiveness of the judicial system. Without the authority to prosecute crimes of violence against women, a cycle of violence is perpetuated that allows, and even encourages, criminals to act with impunity in Tribal communities and denies Native women equality under the law by treating them differently than other women in the United States.”

— Senate Committee on Indian Affairs¹⁵

Numerous researchers and policy commissions have concluded that jurisdictional complexities in Indian Country were a part of the problem. As the Ninth Circuit summarized in a 1994 report, “Jurisdictional complexities, geographic isolation, and institutional resistance impede effective protection of women subjected to violence within Indian Country.”¹⁶

For years, Indian tribal governments have raised concerns about the high rates of domestic violence on Indian reservations and the inadequate criminal justice response to those crimes.¹⁷ On July 21, 2011, following extensive consultation with tribal governments, the DOJ took the unusual step of submitting a legislative proposal to Congress intended to address the “jurisdictional framework [that] has left many serious acts of domestic violence and dating violence unprosecuted and unpunished” in Indian Country.¹⁸ That proposal formed the basis of what would become the tribal provisions of VAWA 2013.

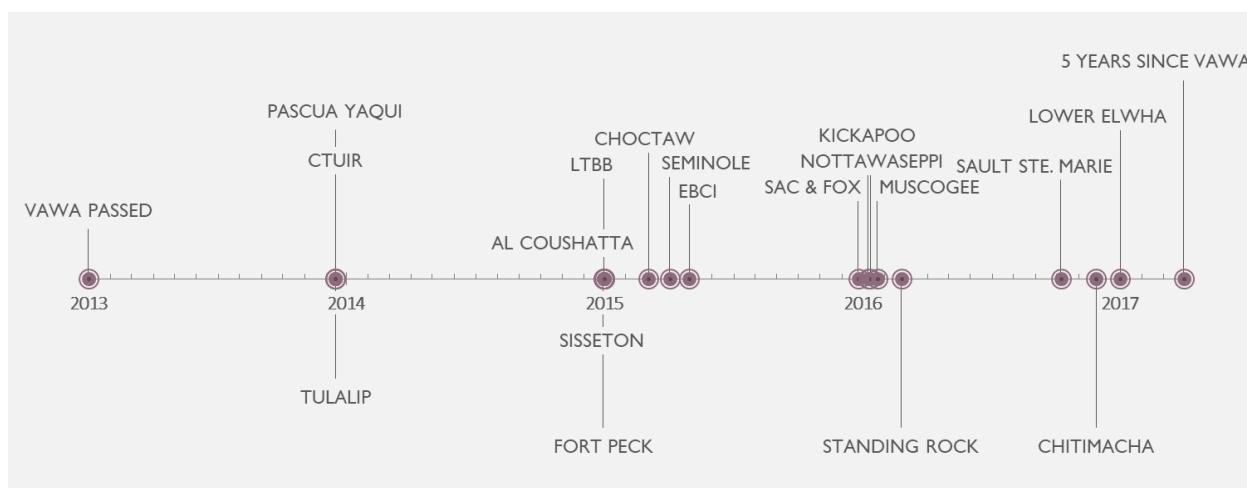
II. OVERVIEW & FINDINGS

NATIONWIDE IMPLEMENTATION

As of the 5-year anniversary of VAWA 2013—and the 3-year anniversary since the SDVCJ statute took general effect—the National Congress of American Indians (NCAI) is aware of a total of 18 tribes who have opted to implement SDVCJ.^{iv} Those tribes have lands within the borders of 11 different states across the nation, and represent a great diversity of Native nations.

For some tribes whose judicial systems already complied with the statutory requirements of VAWA 2013, implementing SDVCJ required only small changes to the jurisdiction section of their tribal codes, and they were able to implement very quickly. Other tribes had to rewrite large portions of their tribal code or amend their constitutions to comply with the statute. Several tribes had to build or contract for additional services—such as indigent defense counsel—that either did not exist or the tribe could not easily expand to non-Indian defendants. Some had to renegotiate detention contracts with neighboring jurisdictions or the Bureau of Indian Affairs (BIA) to allow them to house non-Indian offenders. Depending on the changes necessary, the process required significant time and resources on the part of the tribe.

SDVCJ IMPLEMENTATION TIMELINE



^{iv} Since the end of the pilot period, tribes are not required to notify the DOJ if they begin exercising SDVCJ. This report covers the 18 implementing tribes that have reported implementation to NCAI and its partner technical assistance providers, although it remains a possibility that there are other tribes implementing SDVCJ.

TRIBES IMPLEMENTING SDVCJ:

The Pascua Yaqui Tribe in Arizona

The Tulalip Tribes in Washington

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota

The Little Traverse Bay Band of Odawa Indians in Michigan

The Alabama-Coushatta Tribe of Texas

The Choctaw Nation in Oklahoma

The Eastern Band of Cherokee Indians in North Carolina

The Seminole Nation in Oklahoma

The Sac and Fox Nation in Oklahoma

The Kickapoo Tribe of Oklahoma

The Nottawaseppi Huron Band of Potawatomi in Michigan

The Muscogee (Creek) Nation in Oklahoma

The Standing Rock Sioux Tribe in North and South Dakota

The Sault Ste. Marie Tribe of Chippewa in Michigan

The Chitimacha Tribe of Louisiana

The Lower Elwha Klallam Tribe in Washington

5-YEAR PROSECUTION STATISTICS

PROSECUTIONS AND OUTCOMES			
143 ARRESTS	74 CONVICTIONS	24 CASES PENDING	5 ACQUITTALS
14 FEDERAL REFERRALS	73 GUILTY PLEAS	21 DISMISSEALS	19 DECLINATIONS
6 TRIALS	5 JURY TRIALS	1 BENCH TRIAL	1 JURY TRIAL CONVICTION

DEMOGRAPHICS			
128 DEFENDANTS		128 VICTIMS	
90% MALE DEFENDANTS	10% FEMALE DEFENDANTS	90% FEMALE VICTIMS	10% MALE VICTIMS
115 MALE DEFENDANTS	13 FEMALE DEFENDANTS	115 FEMALE VICTIMS	13 MALE VICTIMS
8 NON-U.S. CITIZEN DEFENDANTS		19 VICTIMS REQUIRED MEDICAL CARE	

MAJOR TAKEAWAYS			
0 PETITIONS FOR A FEDERAL WRIT OF HABEAS CORPUS	51% INCIDENTS INVOLVED DRUGS OR ALCOHOL^v	58% INCIDENTS INVOLVED CHILDREN^{vi}	AT LEAST 73 DEFENDANTS HAD CRIMINAL RECORDS^{vii}
125 DOMESTIC OR DATING VIOLENCE CASES	34 PROTECTION ORDER VIOLATIONS	AT LEAST 33 DEFENDANTS SENTENCED TO INCARCERATION^{viii}	3 YEARS LONGEST INCARCERATION SENTENCE
85 DEFENDANTS ACCOUNT FOR 378 PRIOR CONTACTS WITH TRIBAL POLICE BEFORE THEIR TRIBE IMPLEMENTED SDVCJ^{ix}			
51% DEFENDANTS SENT TO BATTERER INTERVENTION, OR OTHER REHABILITATION PROGRAM^x			

Note: Unless otherwise cited to another source, the information in this report—including the statistics above—is attributable to the sum of the experiences of the technical assistance providers, NCAI, the Tribal Law and Policy Institute (TLPI), and the National Council of Juvenile and Family Court Judges (NCJFCJ), including numerous meetings, phone calls, trainings, webinars, and emails. The information collected about implementation is documented and corroborated in NCAI's internal notes and reports. They are not cited specifically, unless they are a direct quotation.

^v Pascua Yaqui, Fort Peck Tribes, and Tulalip provided approximate values.

^{vi} Fort Peck Tribes provided an approximate value.

^{vii} Fort Peck Tribes provided an approximate value, and Pascua Yaqui could only confirm 18 of their defendants had criminal records. Like many tribes, Pascua Yaqui did not always have access to state conviction records—including through the FBI's National Instant Criminal Background Check System (NCIC) program—prior to their inclusion in the Tribal Access Program (TAP) program as discussed later in this report in Section II, Finding 4-3.

^{viii} Pascua Yaqui did not provide this information.

^{ix} This number does not include contacts from Fort Peck Tribes, Eastern Band of Cherokee Indians, and Choctaw Nation who reported arrests, but do not track that information.

^x Tulalip provided an approximate.

FINDINGS

In the five years since VAWA 2013 was enacted, NCAI and its partners on this project, the Tribal Law and Policy Institute (TLPI) and the National Council of Juvenile and Family Court Judges (NCJFCJ), have worked closely with the tribes as they navigate the early years of implementing the statute.^{xi} The findings highlighted in this report are a synthesis of those experiences providing technical assistance or otherwise working with the implementing tribes and tribes considering implementation. Through nine in-person meetings of the full ITWG, monthly calls with the tribal prosecutors, defenders, and judges, site visits, check-in calls, webinars, and trainings, NCAI has kept track of the general trends reported by tribes, and collected illustrative case studies that highlight common experiences. These are collected, organized, and reported as findings.

1. TRIBES USE SDVCJ TO COMBAT DOMESTIC VIOLENCE BY PROSECUTING OFFENDERS HARMING THEIR COMMUNITIES

Appropriate criminalization of domestic violence is one of the primary ways a community can send the message that domestic violence is unacceptable and will not be tolerated. Prior to passage of VAWA 2013, non-Indians could largely commit domestic violence crimes with impunity on tribal lands. Many of the implementing tribes expressed a similar sentiment when asked about their reason for implementing SDVCJ.

“It is incredible for us to be able to say, we can do this, we can protect you. You are our citizen, and it matters to me as a tribal leader—it is my responsibility in fact—to say that this tribe will do everything we can to protect you.”

—Terri Henry,
Former Tribal Council Chairwoman of the Eastern Band of Cherokee Indians¹⁹

“We knew we had a problem with non-Indians committing crimes on the reservation, we knew that we had victims and tribal members that were facing dark days and dark nights on the reservation. I don’t think it was something that the tribal council was willing to wait.”

—Alfred Urbina, Former Attorney General, Pascua Yaqui Tribe²⁰

“SDVCJ has enabled the Sac and Fox Nation to provide for the safety and protection of its people, which is inherently the responsibility of any government. Through the SDVCJ the community has seen how importantly the Nation takes its responsibility of protecting its people. The Nation is proud to be able to provide security to victims that their abusers will not go unpunished.”

—Kay Rhoads, Principal Chief of the Sac and Fox Nation²¹

^{xi} The technical assistance provided by NCAI and NCJFCJ since 2013 has been funded through Office on Violence Against Women (OVW) grants whereas the technical assistance provided by TLPI since 2013 has been funded through Bureau of Justice Assistance (BJA) grants.

CASE FROM THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

While in custody, DV defendant makes serious threats of further violence

The defendant was a non-Indian with a record of previous arrests for domestic assault. Tribal police arrived to find the defendant holding a knife. The defendant allegedly struck the victim in the face, resulting in a nose bleed, swelling, and marks on her face. According to the victim, this was not the first time the defendant assaulted her.

The victim was pregnant with the defendant's child at the time of the assault, and the assault was witnessed by the victim's two daughters, who were the ones who ran for help.

The defendant was arrested and the Tribal Court immediately issued an automatic Protection Order.

It was noted in the report that during transport to jail, the suspect stated multiple times that if he was going to jail "the next time, there would be more blood."

The defendant pled guilty to a one year jail sentence and two years of probation. Though most of his incarceration was initially suspended, due to probation violations he ultimately spent nearly a year behind bars. As part of his probation he was required to take batterer intervention courses, undertake community service, and abide by the terms of the court's Protection Order.

1-1. NON-INDIAN PERPETRATED DOMESTIC VIOLENCE IS A REAL PROBLEM

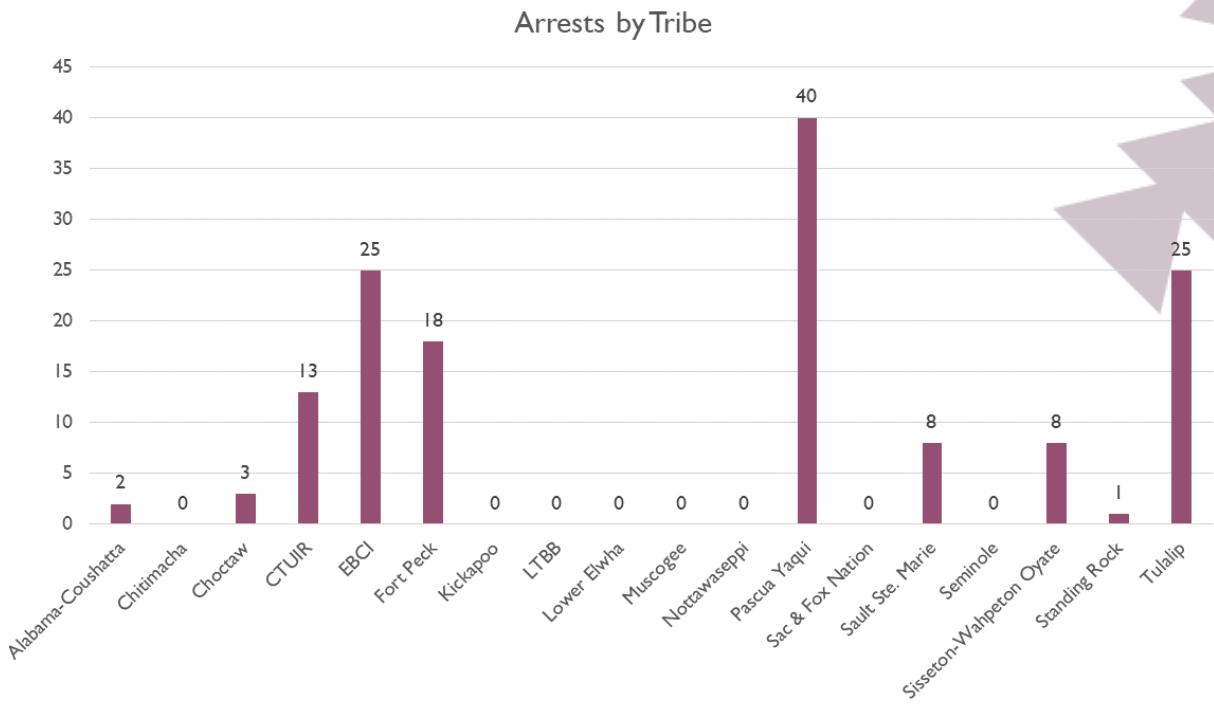
As discussed in Section II, American Indian and Alaska Natives experience domestic violence at disproportionately high rates. When VAWA 2013 was pending before Congress, some policymakers and commentators questioned whether a significant number of non-Indians were committing domestic violence crimes in Indian Country and whether the tribal jurisdiction provision was needed. Five years after passage of VAWA 2013, the prosecution numbers from the implementing tribes provide an unequivocal answer to that question.

143
ARRESTS

74
CONVICTIONS

24
CASES PENDING

The 18 implementing tribes have made a total of 143 SDVCJ arrests, resulting in 74 convictions. The tribe with the highest number of SDVCJ arrests, Pascua Yaqui, reports that SDVCJ cases account for 15-25 percent of the tribe's overall domestic violence caseload.



CASE FROM THE CHOCTAW NATION

Defendant severely beat his wife in front of their three children

The defendant is married to a tribal member and is the father of three tribal member children. Defendant was arrested and charged with domestic assault after he severely beat his wife in front of their three children. The victim was hit and then pushed to the ground where the defendant proceeded to kick her repeatedly and then broke a beer bottle over her head. The victim was so severely beaten she had to take medical leave from her job. Defendant pled guilty in tribal court and is serving a sentence which includes a mandatory batterer intervention course.

**125 DOMESTIC OR
DATING VIOLENCE CASES**

**34 PROTECTION ORDER
VIOLATIONS**

The vast majority of SDVCJ cases are domestic or dating violence cases. Among the implementing tribes, 125 of the cases are domestic or dating violence cases, while 34 involved criminal violations of a protection order. Protection order violations make up a comparatively small proportion of the prosecutions thus far. Protection order violations are arguably the broadest recognition of tribal authority under VAWA 2013. The federal framework recognizes the inherent power of tribal courts to prosecute offenders for violating a protection order that protects *anyone*, not just an intimate partner, so long as the other jurisdictional requirements are met.²² The implementing tribes,

however, have largely not yet used this provision in this broad manner. Of the implementing tribes, only Pascua Yaqui reported a potential SDVCJ case for violation of a protection order where the protected party was not an intimate partner. However, many of the tribes rely heavily on protection orders to protect SDVCJ victims, and NCAI and its partners expect to see an increase in the number of SDVCJ cases involving protection order violations where a child or other family member is the protected party.

CASE FROM THE PASCUA YAQUI TRIBE

Protection Order for Grandmother

An elderly grandmother lived with her minor granddaughter on the Pascua Yaqui Reservation. The granddaughter began dating a non-Indian. After a time, the grandmother came to fear that her granddaughter's boyfriend would physically harm her and filed for a Protection Order from the Pascua Yaqui Tribal Court. Before the boyfriend could be served, he violated the terms sought by the grandmother. Had the Protection Order been in place, the Pascua Yaqui tribe would have prosecuted the boyfriend for violating the Protection Order. He was later arrested by the state for a separate incident involving the daughter.

AT LEAST 33 DEFENDANTS

**SENTENCED TO
INCARCERATION^{xii}**

3 YEARS

**LONGEST INCARCERATION
SENTENCE**

The sentences for individuals convicted of SDVCJ-related crimes have ranged from probation to 3 years. The vast majority of offenders were sentenced to probation or less than a year of incarceration. Several tribes are also using banishment as a punishment in SDVCJ cases, and many SDVCJ offenders are sent to batterer intervention or other programs aimed at offender rehabilitation. Several of the tribes report that they have arrested and charged the same defendant for an SDVCJ-related offense more than once. While the defendants are primarily male, several tribes have arrested and charged women with SDVCJ-related crimes. All races are represented among the defendants, and several of the defendants have been non-U.S. citizens.

| 28 DEFENDANTS

115

MALE DEFENDANTS

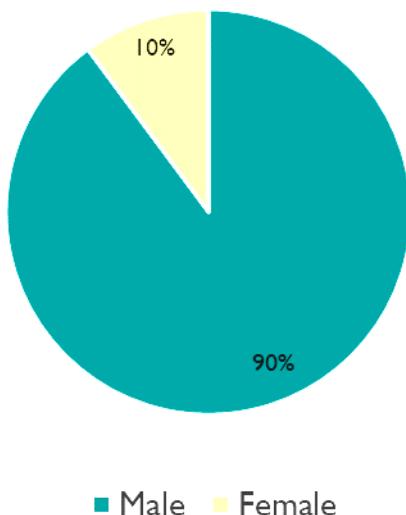
13

FEMALE DEFENDANTS

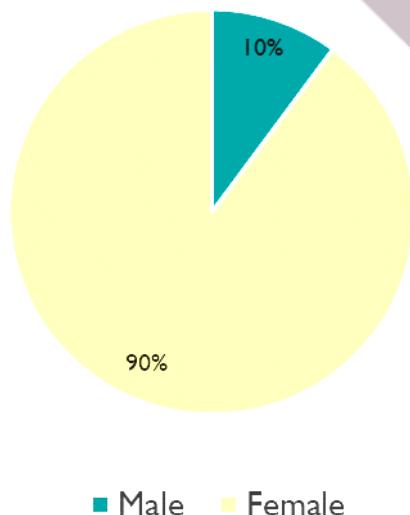
**8 NON-U.S. CITIZEN
DEFENDANTS**

^{xii} This number does not include Pascua Yaqui, which did not provide this information.

Gender of Defendants



Gender of Victims



Prosecution numbers alone do not paint the full picture. In addition to the arrests and prosecutions, multiple tribes have anecdotally reported an increase in victims seeking help, even if they do not choose to report their abuse to law enforcement or file charges.²³ According to victim service providers at these tribes, the choice to implement SDVCJ has increased awareness in their communities about domestic violence, and thereby made many victims (1) more aware of services, and (2) feel safer asking for help given the tribe's public commitment to ending domestic violence.

“[I]t’s going to take time for our women to have trust in the system that has failed them so many times... But the amount of women coming forward and talking about domestic violence, sexual assault and women’s rights, it has definitely...I would say doubled [since implementation], and some of those women are now talking that were holding onto this silence for many years. And once they start to talk and start to feel like, ‘This wasn’t my fault and I don’t have to carry the pain. I don’t have to carry the hurt.’ That’s part of the healing process. That’s when the awakening of their spirit becomes alive and they can find justice and peace. Will we capture all the perpetrators, will we close that door? Not entirely, but we’re definitely taking the right steps and I certainly hope the message is getting out there because our women need this justice desperately.”

—Deborah Parker, Former Vice-Chair of the Tulalip Tribes Board of Directors²⁴

1-2. MANY DEFENDANTS HAVE NUMEROUS PRIOR CONTACTS WITH TRIBAL POLICE, DEMONSTRATING SDVCJ CAN END IMPUNITY

Prior to implementing SDVCJ, tribal justice systems could not hold criminally abusive non-Indians who were continuing to harm their Indian partners accountable. SDVCJ was enacted to end the era of little to no prosecution of non-Indian domestic abusers. Today, in the 18 implementing tribes, many victims have finally seen their long-time abusers prosecuted—and by their own community law enforcement.

Many of the offenders had a significant number of tribal police contacts prior to implementation and had been menacing their victims and straining the tribes' law enforcement resources. The Tulalip Tribes, for example, has reported that their 17 SDVCJ defendants had a total of 171 contacts with tribal police in the years prior to SDVCJ implementation and their ultimate arrests.

85 DEFENDANTS ACCOUNT FOR 378 PRIOR CONTACTS WITH TRIBAL POLICE BEFORE THEIR TRIBE IMPLEMENTED SDVCJ^{xiii}

CASE FROM THE TULALIP TRIBES

Defendant with 19 prior contacts with tribal police

An Indian woman was assaulted and raped by the non-Indian father of her children. The couple's 8-year old son disclosed in his statement to police that he was "punched in the face" by his father. This incident, the latest in a long history of abuse, resulted in charges of Assault in the First Degree Domestic Violence and Rape Domestic Violence, but the defendant was not immediately apprehended. Based on the conduct alleged, the victim petitioned for a protection order, which was granted. Prior to defendant's arraignment on the violent crimes, he was served with, and twice violated, the Protection Order. At the scene of these violations, the defendant was taken into custody. The defendant had nineteen contacts with Tulalip Police prior to these incidents. However, after the implementation of SDVCJ, the defendant was finally held accountable for his crimes. The defendant served a significant jail sentence and is now supervised by Tulalip Probation. He is getting the treatment he needs. The victim and her children were finally able to make a life for themselves away from the violence and abuse.

CASE FROM THE SISSETON-WAHPETON OYATE

Before VAWA, tribal police could only give an abuse victim "a head start" to flee the scene

In 2014, a non-Indian man attacked his Indian wife in a public parking lot of a gas station. During the assault in the car, he also bit her. When she ran out of the car and rushed into a women's restroom to seek shelter, he followed her and continued to assault her. The police were called, and tribal and state officers arrived at the scene. In any other case, the man would have been arrested and charged. However, because the assault took place on the Sisseton-Wahpeton Oyate's reservation land and the defendant was a non-Indian, only the federal government had jurisdiction. So, the tribal and state police who responded did

^{xiii} This number does not include contacts from Fort Peck Tribes, Eastern Band of Cherokee Indians, and Choctaw Nation who reported arrests, but do not track that information.

the best they could do. They held the man in custody and painfully told the woman all they could do is try to “give her a head start.”

While the state has no jurisdiction over a crime in Indian Country involving an Indian victim, it does have jurisdiction over victimless crimes. Fortunately for the victim during this particular incident, the non-Indian perpetrator caused enough of a scene in the presence of the state police that he was arrested for disorderly conduct.

Ultimately, after VAWA’s passage, Sisseton-Wahpeton Oyate was able to bring the man who beat his wife in the parking lot to justice. When he beat his wife again, the tribal government was finally able to arrest and charge the man with assault. He eventually pled guilty in tribal court.

1-3. MANY SDVCJ DEFENDANTS HAVE CRIMINAL RECORDS OR OUTSTANDING WARRANTS

Many of the defendants who have been arrested and convicted under SDVCJ have prior convictions or outstanding warrants. Because of SDVCJ, tribes are able to arrest, prosecute, and convict non-Indians with a documented history of violent behavior. Additionally, tribal convictions can now lay the groundwork for future federal habitual offender charges.^{xiv} State, federal, and tribal law enforcement are now able, through cooperation and information sharing across jurisdictions, to ensure that defendants with a pattern of dangerous behavior are identified and receive appropriate sentences.

AT LEAST 73 DEFENDANTS HAD CRIMINAL RECORDS^{xv}

CASE FROM THE PASCUA YAQUI TRIBE

Defendant with three prior felony convictions, including a domestic violence conviction

The defendant, a non-Indian, Hispanic male, was charged with Domestic Violence Assault and Domestic Violence Threatening and Intimidating. On March 4, 2015, the defendant was arrested for threatening to harm his live-in girlfriend and mother of his six children. In this instance, a relative of the victim witnessed the defendant dragging the victim by her hair across the street back towards their house. The defendant pled guilty to Domestic Violence Assault and was sentenced to over two months of detention followed by supervised probation and domestic violence counseling. The defendant had at least seven

^{xiv} The crime of Domestic Assault by an Habitual Offender (18 U.S.C. § 117) was created with the passage of VAWA 2005. This statute punishes any person who commits a domestic assault within the special maritime and territorial jurisdiction (SMTJ) of the United States or Indian Country who has two prior federal, state, or tribal court convictions for offenses that would be, if subject to federal jurisdiction, an assault, a sexual abuse offense, an offense under Chapter 110A, or a serious violent felony against a spouse or intimate partner.

^{xv} Fort Peck Tribes provided an approximate value, and Pascua Yaqui could only confirm 18 of their defendants had criminal records. Like many tribes, Pascua Yaqui did not always have access to state conviction records—including through the FBI’s NCIC databases—prior to their inclusion in the TAP as discussed later in this report in Section I, Finding 4-3.

prior contacts with Pascua Yaqui Law Enforcement and three felony convictions out of Pima County, Arizona. This was the defendant's second domestic violence conviction, and the first on the Pascua Yaqui Reservation. Because of the tribal conviction, if the defendant reoffends, he will now be eligible for federal domestic violence prosecution as a habitual offender.

Offenders crossing jurisdictional boundaries create challenges for all of the jurisdictions involved. However, the implementing tribes all work closely with not only federal law enforcement but state law enforcement to ensure that defendants with outstanding warrants are extradited to the appropriate jurisdiction if they are picked up.

CASE FROM THE FORT PECK TRIBES

Defendant has outstanding warrant for drug possession and is able to use same counsel in both cases

The defendant, a male in his 50s, moved to the area for a job during a recent oil boom. He met and began dating a tribal member, and then moved into her reservation residence after his job ended. He lived there for three to four years.

Tribal police responded to a call about a domestic disturbance. They found that the defendant had been beating his girlfriend with a wooden stick and threatened to kill her. He was arrested by tribal police. The victim was treated for severe bruising across her legs and head—one of her eyes was completely swollen shut. This became Fort Peck's first SDVCJ case.

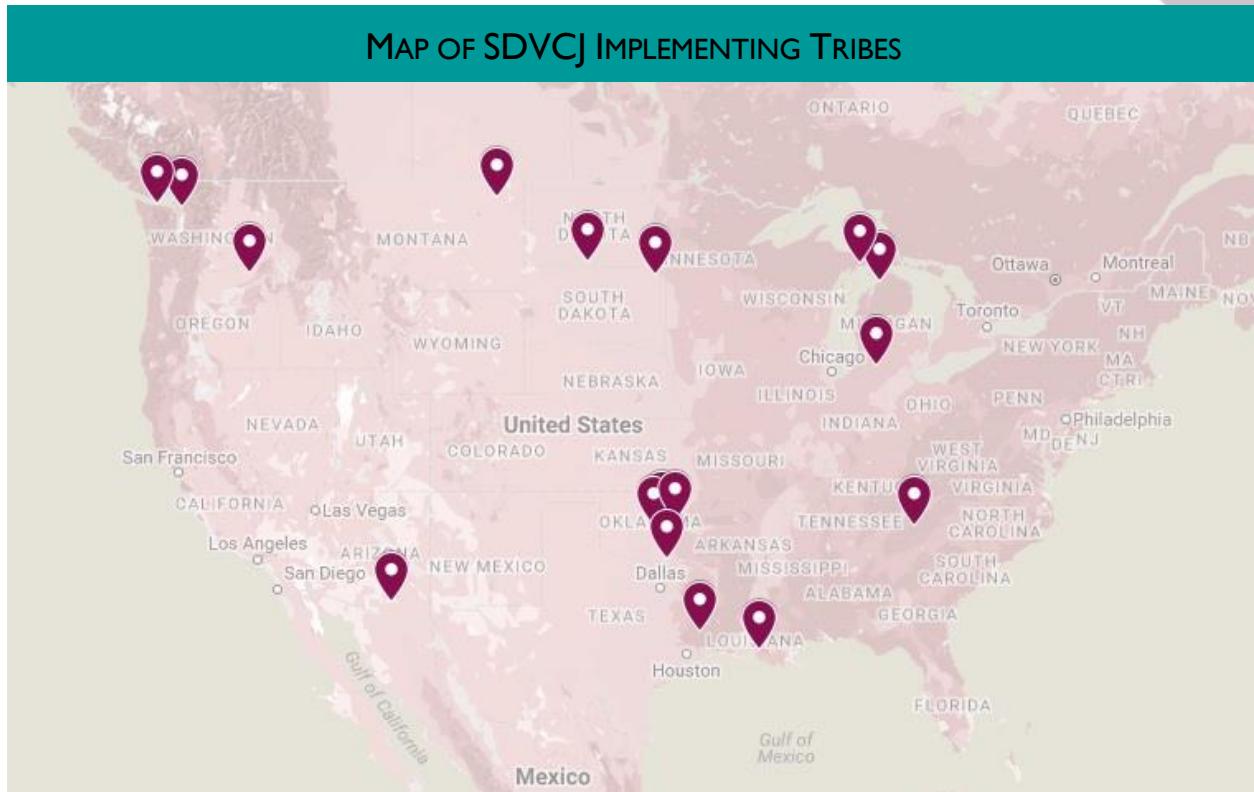
While the defendant was in jail awaiting trial, tribal police were informed that he had an outstanding state warrant for drug trafficking. His state appointed public defender, who was already licensed to practice in tribal court, was able to serve as defense counsel in both cases. The defendant remained in jail awaiting trial until he was released on bond several months later. However, the victim passed away several months after the defendant was released on bond, and the case was dismissed. The prosecution stated that it was impossible to prove the case without the victim's testimony. The defendant currently has additional state warrants for drug trafficking.

1-4. A DIVERSE ARRAY OF TRIBES HAVE SUCCESSFULLY IMPLEMENTED SDVCJ

The 18 tribes who have implemented SDVCJ represent a great diversity of Native nations. Located across the country in 11 different states, each one of these tribes implements SDVCJ in a way designed to suit their communities. The differences and similarities between the tribes are highlighted in depth in Section IV, which includes an individual profile of each tribe and a section contrasting the similarities and differences in their tribal codes.

The implementing tribes have varying sized land bases and populations, and—as detailed in the below chart—the tribes have very different demographics on their tribal lands. The four tribes that have seen the most SDVCJ cases, Pascua Yaqui Tribe, Eastern Band of Cherokee Indians, Tulalip Tribes, and Fort Peck Tribes, represent a diverse range of regions and populations. Each is located in

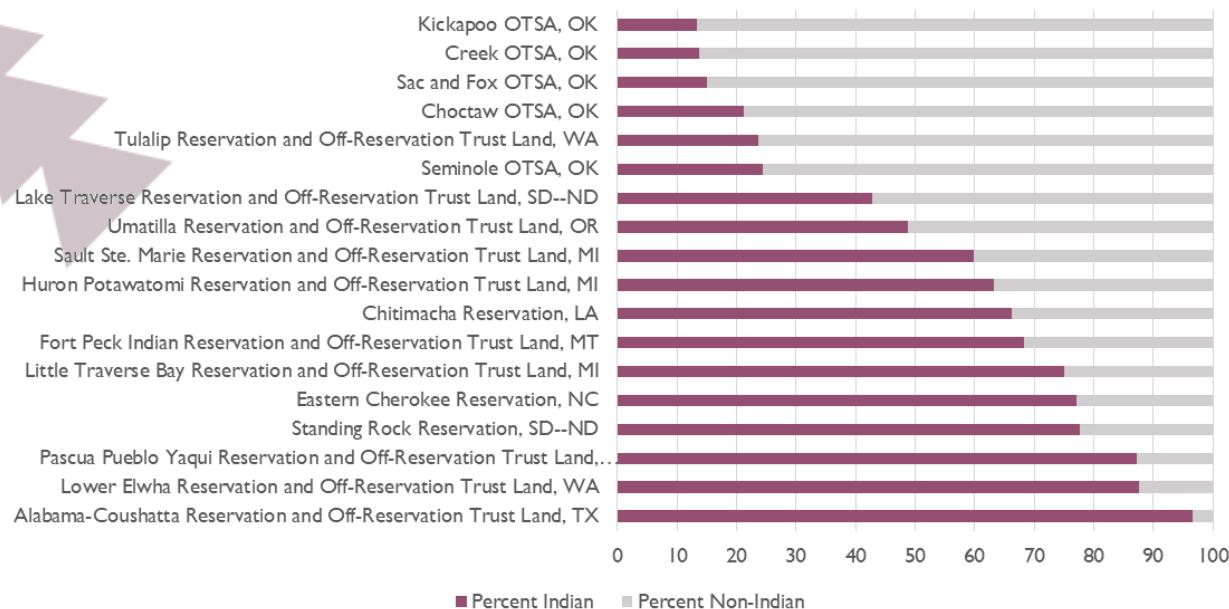
a different geographic region of the United States: the Southeast, the Northwest Coast, the Plains, and the Southwest. Pascua Yaqui's land base is 2,200 acres, while Fort Peck's reservation is over four hundred times that size, totaling just short of one million acres.²⁵ Pascua Yaqui is a relatively urban community, located within the greater metropolitan area of Tucson, Arizona, while Eastern Band of Cherokee is in the mountains, surrounded by forests, and over an hour away from the nearest small city. The population of Pascua Yaqui is only 12 percent non-Native, while Tulalip is just over 75 percent non-Native.



The political structure of the tribes also varies based on their unique histories, cultures, and worldviews. Economic development and employment opportunities also vary considerably. The implementing tribes have generally entered into 638 contract agreements with the BIA to assume control of law enforcement on the reservation.^{xvi} Many have similarly assumed responsibility for detention, although for several of the tribes, detention remains a direct service provided by the BIA. All of the implementing tribes have their own courts. Only one of the implementing tribes, Alabama Coushatta, is in a jurisdiction where Public Law 280 (PL 280) or a similar statute gives the state jurisdiction over a broader group of crimes. Several of the other implementing tribes, including both CTUIR and Tulalip, have undergone either partial or full retrocession, a process by which state jurisdiction under PL 280 is returned to the federal government.

^{xvi} Since the passage of the Indian Self-Determination and Education Assistance Act in 1975, tribal governments have been able to negotiate what are commonly known as '638 contracts' to directly manage a range of services provided by the federal government, including law enforcement and detention.

Indian vs. Non-Indian Population of Implementing Tribes



Source: 2012-2016 American Community Survey 5-Year Estimates—DP05 Demographic and Housing Estimates, U.S. CENSUS BUREAU

2. TRIBAL COURTS UPHOLD THE RIGHTS OF DEFENDANTS AND ARE COMMITTED TO THEIR REHABILITATION

The tribes implementing SDVCJ have made something very clear about the new non-Indian defendants in their courtrooms: they will receive fair treatment. Many of the implementing tribes have long provided all of the due process protections required by the federal statute and describe the exercise of jurisdiction over non-Indians as largely unremarkable.²⁶

2-1. SDVCJ CASE OUTCOMES DEMONSTRATE FAIRNESS

The case statistics from the implementing tribes thus far reveal justice systems not unlike the other criminal justice systems in the United States. Of the 143 arrests for SDVCJ-related crimes, 52 percent have resulted in convictions, while 18 percent have resulted in acquittals or dismissals. Of the cases that were ultimately filed, 21 percent were dismissed or resulted in acquittals. Tribes report that the cases are dismissed, or they are unable to prosecute for a range of reasons including: uncooperative witnesses, insufficient evidence, determination that the tribe lacks jurisdiction, filing errors, plea deals on other cases, or detention by another jurisdiction.

PROSECUTIONS AND OUTCOMES			
143 ARRESTS	74 CONVICTIONS	24 CASES PENDING	5 ACQUITTALS
14 FEDERAL REFERRALS	73 GUILTY PLEAS	21 DISMISSALS	19 DECLINATIONS
6 TRIALS	5 JURY TRIALS	1 BENCH TRIAL	1 JURY TRIAL CONVICTION

The number of dismissals suggest that tribes are committed to getting it right—both making sure that they have jurisdiction and that they have sufficient evidence. Just like across the rest of the U.S. judicial system, most convictions happen through plea bargains. Of the six SDVCJ trials that have occurred—five jury trials and one bench trial—five ended in acquittal. One jury trial at the Pascua Yaqui Tribe resulted in a conviction. While it is not possible to draw definitive conclusions from a small number of trials, this does disprove the notion that a non-Indian could never get a fair trial in front of a tribal jury or tribal judge in tribal courts.

“Although we would have preferred a guilty verdict, this first full jury trial fleshed out many pre-trial arguments, and proved our system works. A non-Indian was arrested and held by Pascua Yaqui law enforcement, he was represented by two attorneys, and a majority Yaqui jury, after hearing evidence presented by a tribal prosecutor, in front of an Indian judge, determined that the Tribe did not have jurisdiction in a fairly serious DV Assault case.”

—Alfred Urbina, Former Attorney General, Pascua Yaqui Tribe²⁷

Offering further support for the fairness of tribal courts, there have also been no petitions for habeas corpus review filed in an SDVCJ case. The VAWA statute requires that defendants are affirmatively notified of their right to petition for habeas review in federal court, and of their right to request that tribal detention be stayed during that review. An attorney for the Confederated Tribes of the Umatilla Indian Reservation has reported that the Tribe actively encouraged their first SDVCJ defendant to file a habeas petition to test the statute, but he was not interested.²⁸ According to Professor Angela Riley, who has written about VAWA implementation, “during the course of the early VAWA prosecutions, tribes and tribal advocacy groups encouraged defendants to file writs of habeas corpus to appeal their convictions to federal court, but the defendants declined. Numerous parties asserted that they preferred tribal court to federal court, stating that the tribal process was less formal, less intimidating, offered more focus on treatment and showed more respect to defendants.”²⁹

0 PETITIONS FOR A FEDERAL WRIT OF HABEAS CORPUS

CASE FROM THE PASCUA YAQUI TRIBE

First SDVCJ trial ended in acquittal for jurisdictional reasons

The first jury trial for a SDVCJ case was a domestic violence assault involving two men allegedly in a same-sex relationship. The defendant was acquitted by the jury. Interviews with the jurors suggest that the jury was not convinced that the two individuals had a relationship that would meet the requirements for tribal jurisdiction under VAWA 2013. There was no question that the assault occurred. In fact, if the defendant had been an Indian, the prosecutor would not have had to prove any particular relationship between the offender and the victim. But SDVCJ is limited to the specific crimes of domestic or dating violence, both of which require a particular relationship. After his acquittal, the non-Indian defendant was subsequently extradited to the State of Oklahoma on an outstanding felony warrant—a warrant that was only uncovered during the course of the investigation and would not have been found if the tribe had not implemented SDVCJ.

2-2. TRIBES ARE INVESTED IN HELPING DEFENDANTS GET THE HELP THEY NEED

Many tribes are committed to ensuring that non-Indian defendants—who are usually partners and parents of tribal members—get help in addition to punishment. Most SDVCJ offenders are well-established in the tribal community. Many SDVCJ offenders live on the reservation in tribal subsidized housing, are married to Indians, or have Indian children. At least two of the SDVCJ arrests involved unenrolled Indians from either the U.S. or Canada.

51% DEFENDANTS SENT TO BATTERER INTERVENTION, OR OTHER REHABILITATION PROGRAM^{xvii}

Many tribal prosecutors expressed the sentiment that these offenders are part of their communities, and therefore the tribe is committed to ensuring that the defendant also heals. Many tribes offer batterer intervention programs. Several tribes require that every defendant convicted of a domestic violence offense completes a treatment program targeted to their abusive behaviors.³⁰

“[SDVCJ] has allowed us to address issues of family/dating violence with an approach much different than that of the state system. Here, the state system is much more punitive in nature, and at the tribal level we have a much greater ability to address the underlying issues that are the causes of this violence. In turn, our hope is to cut down on recidivism by addressing underlying issues such as drugs and alcohol. For us, the individuals we have prosecuted or currently have charges pending are individuals who have—and will continue to have—contact with the tribe and tribal members because they have children who are tribal members. Due to this fact, we want to try to help make sure that we do everything we can to deter them from reoffending.”

—Jennifer Bergman, Tribal prosecutor for the Alabama-Coushatta Tribe of Texas³¹

^{xvii} Tulalip provided an approximate value.

CASE FROM THE ALABAMA-COUSHATTA TRIBE

Tribe ensures that a mother gets the help she needs so she can ultimately get her kids back

The defendant, a non-Indian woman, is married to a member of the Alabama-Coushatta Tribe of Texas and, through that marriage, is the mother of five tribally enrolled children. One evening the defendant used methamphetamine and started hitting her husband. Later she tried to hit him again, and he also became violent. Both parents were arrested on separate counts of assault and possession. The defendant spent three days in jail sobering up, and the children were placed with family members.

The tribe charged her with family violence and she was appointed counsel. If the defendant was prosecuted in state court, she likely would have faced an additional drug possession charge, and been given a longer sentence given her criminal record. However, the tribe was determined to keep the case in tribal court so they could focus on holding her accountable while also getting her the help she needed so she would not reoffend. The defendant is the mother of tribal children, and a member of the community. The tribe was able to use additional resources and work closely with her and her family to get her appropriate mental health services and drug rehabilitation services. She ultimately took a plea deal that required her to attend rehab, and then placed her on probation where she was required to follow her doctor's instructions, and to attend mental health, anger management, and batterer intervention counseling. All of her substance abuse and mental health supports work in conjunction with the work services she completes through child protective services with the goal of getting her children back. The defendant is drug tested every month, and has not failed a single one of her drug tests.

CASE FROM THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Tribe sends Iraq war veteran with PTSD to batterer intervention

On October 21, 2014, during an argument with his girlfriend, a male non-Indian defendant ripped her clothes off, pushed her to the bed, and strangled her while a comforter was over her face, all while repeatedly delivering death threats. All of this occurred in front of their infant child. The police found the victim with scratch marks on her neck and in such fear that she was only partially dressed, hyperventilating, and unable to maintain balance. The defendant is an Iraq war veteran who suffers from PTSD, and he reportedly missed taking his medication immediately preceding the assault. He wished to take responsibility at arraignment; however, the Tribe suggested that they appoint him an attorney. After being appointed an attorney, the defendant ultimately pled guilty to felony DV assault with terms consistent to what he would see if prosecuted by the State. Specific terms include compliance with his VA treatment recommendations and completion of a tribally funded 12-month batterer intervention program.

3. IMPLEMENTATION REVEALED SERIOUS LIMITATIONS IN THE LAW

Though SDVCJ has allowed the implementing tribes some measure of recourse to stop non-Indian violence in their communities and on their lands, the narrowness of SDVCJ is a continual source of frustration for the implementing tribes. SDVCJ was intended to apply only in cases of protection order violations, domestic violence, and dating violence. Other crimes of violence against women, including stalking, sexual assault by a stranger or acquaintance, and sex trafficking, for example, are not included. The omission of other common forms of violence against women is a continuing source of frustration for implementing tribes.

CASE FROM THE PASCUA YAQUI TRIBE

Tribe is unable to charge workplace sexual assault

A female tribal member employed at the tribal casino was working one evening. Part of her duties included fixing slot machines if they jammed or otherwise malfunctioned. A group of non-Indian male patrons were intoxicated and began making harassing and sexual comments to the employee. She ignored the comments and proceeded to fix the slot machines. The male patrons became more disruptive and were about to be removed by casino security. As one of the men was being escorted out of the casino, he grabbed the female employee by her genitals and squeezed. All of this was caught on surveillance video and the employee wanted charges to be filed. According to all accounts, she had never met this man before this instance of sexual assault. Because VAWA is limited to intimate partner violence and there was no prior relationship, the Tribal Court lacks jurisdiction. Pascua Yaqui has a good working relationship with the local U.S. Attorney's Office (USAO) and has referred the case to them. The USAO has a tremendous amount of discretion, however, and should they decide to decline charges, the offender will avoid prosecution.

In addition, the implementing tribes are unable to prosecute non-Indians for many of the crimes that co-occur with domestic violence—thereby limiting how effectively tribes can prosecute non-Indian domestic violence offenders. Tribal prosecutors have described this as being forced to prosecute these crimes with one hand tied behind their backs. Tulalip Tribal Prosecutor Sharon Jones Hayden has explained, “These cases do not happen in isolation. We don’t get a slap and then run away. There are attendant, and related, ancillary—whatever word you would like to use—crimes that occur in almost all of these situations. It is extremely rare for me to charge just one count in a domestic violence related offense.”³² Non-SDVCJ crimes committed by defendants that are tied to their SDVCJ crimes, or that they committed while being arrested or in custody for an SDVCJ crime, remain outside tribal jurisdiction. In many cases, the inability to prosecute other crimes interferes with the tribe’s ability to prosecute their SDVCJ cases effectively, leaves them unable to hold offenders accountable for criminal conduct not covered by SDVCJ, and results in a criminal history that may not accurately reflect the magnitude of the crimes committed.

CRIMES IN SDVCJ CASES THAT TRIBES COULD NOT CHARGE:

- | | |
|--|---|
| <ul style="list-style-type: none">• ASSAULT ON LAW ENFORCEMENT• ASSAULT ON A JAILER• CRIMINAL CONTEMPT• DAMAGE TO GOVERNMENT PROPERTY• SEXUAL CONTACT• MENACING• MALICIOUS MISCHIEF• DRIVING UNDER THE INFLUENCE• STALKING | <ul style="list-style-type: none">• ENDANGERING THE WELFARE OF A MINOR• FALSE IMPRISONMENT• UNLAWFUL USE OF A WEAPON• OBSTRUCTION OF JUSTICE• VIOLENCE AGAINST CHILDREN• VIOLENCE AGAINST VICTIM'S FAMILY• CRIMINAL MISCHIEF• DRUG POSESSION |
|--|---|

In the years since SDVCJ took effect nationwide, there has been increased discussion about amending the law to improve its effectiveness. Several bills have been introduced in Congress that would add additional categories of criminal conduct to the existing framework.³³

“Although tribal efforts to implement [SDVCJ] have been impressive, actual tribal experience prosecuting cases under [SDVCJ] has revealed … significant gaps in the federal law.”

—Tracy Toulou, Director of the Office of Tribal Justice, U.S. Department of Justice
Testimony before the Senate Committee on Indian Affairs³⁴

Additionally, the DOJ supports amendments to address some of the gaps revealed through the experiences of the implementing tribes.³⁵ NCAI has passed a resolution concluding that, to fully protect Native women, full territorial criminal jurisdiction should be restored.³⁶

The implementing tribes have consistently highlighted three kinds of crimes that are currently outside the scope of SDVCJ, but that have caused significant problems for them in exercising SDVCJ: crimes against children, drug and alcohol crimes, and crimes that occur within the criminal justice process. According to the Pascua Yaqui Tribe, which has the highest number of arrests, if they were able to prosecute offenders for these ancillary crimes, they would have an additional one charge per case, at a minimum.

“In reservation attorneys’ offices and tribal court houses throughout the United States when VAWA was passed, there was celebration like you wouldn’t believe…what we didn’t realize then…was how it’s really just a little tiny down payment on a much bigger issue that needs to be addressed.”

—Sharon Jones Hayden, Tulalip Prosecutor & Special Assistant U.S. Attorney³⁷

3-1. THE STATUTE PREVENTS TRIBES FROM PROSECUTING CRIMES AGAINST CHILDREN

Many of the tribes report that children are usually involved as victims or witnesses in SDVCJ cases. These children have been assaulted or have faced physical intimidation and threats, are living in fear, and are at risk for developing school-related problems, medical illnesses, post-traumatic stress disorder, and other impairments.³⁸ However, SDVCJ currently only applies to crimes committed against romantic or intimate partners or persons covered by a qualifying protection order. The common scenario reported by implementing tribes is that they are only able to charge a batterer for the times he hit the mother, and can do nothing about the times he hit the kids. Instead, they are only able to refer these cases to state or federal authorities, who may or may not pursue them.

58% INCIDENTS INVOLVED CHILDREN^{xviii}

The inability to prosecute crimes against children decreases the charging power available to prosecutors, and also decreases the protections available to abused children because they are not considered ‘victims’ in these cases.

CASE FROM SAULT STE. MARIE TRIBE

Child sexual predator evades tribal prosecution and is subsequently arrested by the county for raping a young girl

The defendant had criminal convictions before he moved to the Sault Ste. Marie Reservation. The defendant entered into an intimate relationship with a tribal member. Sometime thereafter, the defendant began making unwanted sexual advances on his girlfriend’s 16-year-old daughter. The defendant sent inappropriate texts to the daughter, would stand outside the windows of their home, and on one occasion groped the daughter and then told her she could not tell anyone about it.

The tribe charged the defendant with domestic abuse, attempting to characterize his actions toward the daughter as tied to the relationship with the mother and thus within SDVCJ, but the tribal judge dismissed the case as beyond the court’s jurisdiction.

Two months after the failed prosecution, the girlfriend filed for a temporary ex parte Protection Order for her and her daughter—a violation of which would protect both under SDVCJ. However, the girlfriend could not meet the burden of proof that she was under a threat of irreparable harm in the time before the court could schedule a hearing. When it came time for a hearing on her petition, the girlfriend failed to appear and so her petition was dismissed. When the court served the defendant with notice of the hearing, he was found to be living in a van parked just next to a tribal neighborhood with a large number of low income families.

Four months later, the defendant was arrested and charged by city police with three counts of criminal sexual conduct, one count of attempted criminal sexual conduct, one count of child sexually abusive activity, one count of using a computer to commit a crime, and one count of using a computer network to commit a crime.

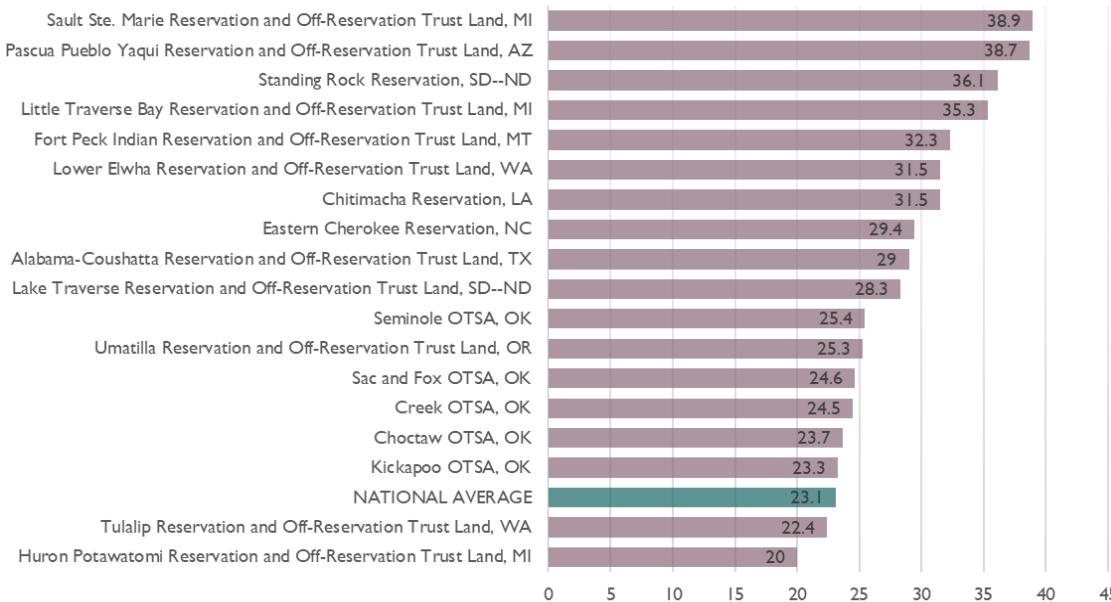
^{xviii} Fort Peck Tribes provided an approximate value.

The alleged incident involves a barely 14-year-old girl who was a tribal member and resided on the Sault Ste. Marie Reservation. Defendant allegedly contacted her online and then kidnapped and held her in an off-reservation motel, repeatedly raping her over the course of 12 hours. Defendant pled not guilty and the case is currently pending in state court.

According to Jami Moran, director of the tribe's Advocacy Resource Center: "Had our tribe had jurisdiction to maintain court authority over the alleged non-Native perpetrator for the first incident, this second act of violence may have been prevented. This child's life will never be the same."

This frustration is further compounded by the prevalence and severity of this problem. According to the DOJ, American Indian and Alaska Native children suffer exposure to violence at rates higher than any other race in the United States.³⁹ Native youth are 2.5 times as likely to experience trauma compared to their non-Native peers.⁴⁰ This violence has immediate and long term effects, including: increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system. Unfortunately, American Indian and Alaska Native Children experience posttraumatic stress disorder at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population.⁴¹ Nationally, almost 1/3 of the American Indian and Alaska Native population is under 18, compared to approximately 1/4 of the total U.S. population.⁴² This trend is reflected by the implementing tribes, where the percent of their residents under 18 is consistently high. Sault Ste. Marie and Pascua Yaqui, two implementing tribes with a high number of SDVCJ cases, have close to 40 percent of their population under the age of 18. Pascua Yaqui alone identified 38 children who have been involved in their cases as either witnesses or victims.

PERCENT OF POPULATION UNDER 18



Source: 2012-2016 American Community Survey 5-Year Estimates—DP05 Demographic and Housing Estimates, U.S. CENSUS BUREAU

3-2. THE STATUTE PREVENTS TRIBES FROM PROSECUTING ALCOHOL AND DRUG CRIMES

Another frequent presence in many of the SDVCJ cases is alcohol or controlled substances. Unfortunately, the tribes are unable to charge the defendants with any co-occurring drug and alcohol crimes. Some tribes reported that this greatly decreases their ability to get appropriate sentences or plea bargains from offenders, because they are unable to include the possession or intoxication charges as a part of negotiations with the defendants and their attorneys. Additionally, the complication of having state or federal jurisdiction crimes intertwined with these cases can interfere with full investigation or prosecution.

51% INCIDENTS INVOLVED DRUGS OR ALCOHOL^{xix}

CASE FROM THE SISSETON-WAHPETON OYATE

Potential State drug case interferes with Tribe's willingness to pursue DV investigation

At 2:00 a.m., the tribal police were called to a domestic violence incident involving a non-Indian man. Methamphetamines were found on the premises, and tribal police requested an oral search warrant from the tribal judge to perform a urine analysis on the non-Indian. While being under the influence could be relevant to a DV investigation, the tribal judge ruled against issuing the search warrant. Some state case law has held that tribal police lack the authority to investigate crimes where they do not have jurisdiction, and the judge did not want to compromise a potential state case for drug possession.

CASE FROM THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Tribe cannot prosecute DUI case, and prosecutor is unable to use DUI charges to leverage plea bargain

The defendant was arrested for domestic assault, and was a repeat offender. When law enforcement arrived, the defendant was intoxicated. He attempted to then run away from the police. Despite his intoxicated state, the defendant got into his car and tried to drive away, but ran into his neighbor's fence. If Umatilla had jurisdiction to charge him for the DUI and destruction of property tied to his DV arrest, they would have been able to charge and convict him quickly and easily given the evidence. They may have also been able to use the additional charges as leverage to secure a plea on the domestic violence crime. However, the tribe was only able to charge him with the domestic assault, which is the charge that put the most pressure on the victim to testify as a witness.

Over the eight months the tribe spent prosecuting him for the assault, the victim went back and forth multiple times about whether to testify. During the incident, the victim suffered a severe concussion, which caused long term side effects she still experiences to this day.

The defendant was eventually sentenced to 24 months, one month in custody, 23 months suspended sentence, and then three years probation.

^{xix} Pascua Yaqui, Fort Peck Tribes, and Tulalip provided approximate values.

3-3. THE STATUTE PREVENTS TRIBES FROM PROSECUTING CRIMES THAT OCCUR WITHIN THE CRIMINAL JUSTICE SYSTEM, THEREBY ENDANGERING LAW ENFORCEMENT AND UNDERMINING THE INTEGRITY OF THE SYSTEM

The narrow scope of criminal conduct that can be charged under SDVCJ not only prevents the tribe from ensuring that defendants are being charged for all of their crimes, but also has created a real safety concern for some tribal law enforcement. Domestic violence calls are the most common type of call that a law enforcement officer responds to, and also the most dangerous.⁴³ If a tribal law enforcement officer is assaulted by an SDVCJ suspect, the tribe has no jurisdiction to charge the suspect for this crime. Instead, the case must be treated as a separate case and referred to another jurisdiction, which may or may not swiftly prosecute the SDVCJ offender for that assault. The same is true if the defendant assaults the bailiff in the courtroom, commits perjury, intimidates a witness, or commits a crime in a tribal detention facility. Rather than a swift additional charge being added to the defendant's case, crimes committed in custody are instead put into a slow referral process that is further complicated by the jurisdictional landscape. Several tribes have described this situation as making them feel like they are unable to protect their law enforcement officers and other criminal justice professionals in the line of duty.

CASE FROM THE EASTERN BAND OF CHEROKEE INDIANS

Serious DV assault leads to threatened mass shooting as well as assault and threats against tribal law enforcement

The defendant assaulted his dating partner, a tribally-enrolled female, by striking and strangling her. When officers arrived he was subdued, but threatened to kill the officers and to come back with a gun and shoot up the reservation. In custody, he struck a jailer (another enrolled tribal member), causing bruising and a split lip. His likely mental health issues, coupled with his assault on enrolled members and his threats against law enforcement officers, which the tribe could not charge, led to the decision to refer the case to federal prosecutors. The defendant pled guilty to assault by strangulation in federal court and received a 37 month sentence. The assault on the jailer and the threats of retaliation against the officer were dismissed.

CASE FROM THE SISSETON-WAHPETON OYATE

Defendant assaults tribal police officers and walks out of tribal court

The defendant was a non-Indian male, married to a tribal member. Law enforcement responded to a call of a domestic disturbance. When law enforcement arrived, they found the defendant reaching into a vehicle to take the keys from his wife as she was attempting to leave. He then reached for his belt and proceeded to have a scuffle with the police. He was originally arrested for domestic violence, after law enforcement was able to subdue him. At the defendant's first mandatory court appearance, he tried to walk out of the court room in the middle of court proceedings, constituting direct contempt of court. There was a second incident of domestic violence, and he was again arrested. The tribal court convicted him of two counts of domestic violence.

He was ultimately charged in federal court for both domestic violence crimes as well as for forcibly assaulting, resisting, opposing, intimidating, and interfering with the tribal police officer. He pled guilty to two counts of domestic abuse and one count of failure to appear.

3-4. THERE WAS INITIAL CONFUSION CONCERNING THE SCOPE OF THE FEDERAL STATUTORY DEFINITION OF “DOMESTIC VIOLENCE”

Special Domestic Violence Criminal Jurisdiction (SDVCJ) under 25 U.S.C. § 1304 for both “dating violence” and “domestic violence” is limited to “violence committed by a person” who has a qualifying relationship with the victim. The implementing tribes have struggled with determining what constitutes sufficient “violence committed” to support tribal jurisdiction. This confusion stems largely from the Supreme Court decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014), which was issued during the Pilot Project Period for tribal SDVCJ. With this timing, it was widely noted that both the majority opinion and Justice Scalia’s concurrence included footnotes referencing the definition of the term “domestic violence” under the new federal law, 25 U.S.C. § 1304.

The *Castleman* decision involved a separate question under 18 U.S.C. § 922(g)(9), a federal law that forbids the possession of firearms by those convicted of “misdemeanor crimes of domestic violence.” The question before the Court in *Castleman* was whether the “physical force” prong of the definition of “misdemeanor crime of domestic violence” under 922(g)(9) is satisfied by offensive touching or if a more substantial degree of “force” is required. The majority held that Congress intended to incorporate common law misdemeanor domestic violence offenses, which include offensive touching.⁴⁴ In a concurrence, Justice Scalia argued that the literal meaning of “violence” should apply, and that a substantial degree of force is needed.⁴⁵ The majority, however, distinguished “domestic violence” as a term of art from “violence” standing alone, which they agreed would “connote a substantial degree of force.” Scalia cited to the definition of “domestic violence” under 25 U.S.C. § 1304 as an example of a statute that defines “domestic violence” as “violence” and does not include offensive touching and other non-violent forms of abuse.⁴⁶ The majority opinion agreed—in *dicta*—that its broader view of “domestic violence” as a term of art likely does not extend to a provision that specifically defines “domestic violence” by reference to generic “violence.”⁴⁷

The discussion of the VAWA statute by the Justices in *dicta* raised questions about the scope and severity of “violence committed” required for crimes that can be charged by tribes who have implemented SDVCJ under VAWA.

The technical assistance team, in consultation with the DOJ, has provided guidance to the ITWG about what type of conduct likely constitutes “violence committed” for SDVCJ purposes. In that guidance, technical assistance providers advised that relying on the common understanding of the term “violence” in ordinary language, and the legal definition of “crime of violence” found at 18 U.S.C. § 16(a), it seems clear that, if the defendant’s conduct involved the reckless or intentional use, threatened use, or attempted use of force capable of doing injury to the victim or the victim’s property, then it constitutes “violence” under § 1304.

However, several of the tribes who have implemented SDVCJ report that the *Castleman* decision had an immediate impact on their charging decisions. There have been several cases where the tribe felt it could not prosecute conduct that clearly fit within the tribe’s domestic violence statutes based on the *dicta* in *Castleman* and dismissed the case only to have the offender subsequently reoffend with a more serious crime. Tulalip Tribal Prosecutor Sharon Jones Hayden has described the issue saying, “At Tulalip, it is against the law to prevent somebody from calling for help in relation to a domestic violence crime. So if he grabs her cell phone and throws it out of her reach, she can’t get the help she needs. But, we can’t prosecute that crime either because it is not a ‘violent’ crime.”⁴⁸ Some other tribes have cautiously chosen to prosecute only those crimes that involve clear physical assaults, even though this would not be required to support a domestic violence charge under tribal law. The Pascua Yaqui Tribe’s public defender has filed several motions to dismiss on the grounds that the tribal lacked jurisdiction because the conduct alleged was not sufficiently violent.

The tribal prosecutors and victim advocates report that SDVCJ would be more effective if it is amended to further clarify that Indian tribes possess the authority to prosecute a non-Indian for the types of offenses that often occur in the cycle of domestic abuse that may or may not involve physical force, but are nonetheless harmful to victims.

CASE FROM THE PASCUA YAQUI TRIBE

Tribe declines to prosecute attempted assault

A woman called the police to remove her highly intoxicated partner from her home. The defendant returned an hour later. He was so intoxicated that when he swung to punch the victim, he missed and fell to the ground. Although the conduct at issue is undoubtedly violence under federal law, in the wake of the *Castleman* decision, the tribal prosecutor declined to prosecute because there was no actual physical contact, and they were concerned the incident did not meet the definition of domestic violence in the federal law. The defendant subsequently assaulted the victim again and was arrested.

3-5. SDVCJ IS PROHIBITIVELY EXPENSIVE FOR SOME TRIBES

While over 50 tribes have been actively participating in the ITWG, as of the date of this report, only 18 tribes have implemented the law. The primary reason tribes report for why SDVCJ has not been more broadly implemented is a focus on other priorities and a lack of resources. During and beyond the implementation phase, tribes need funding, access to resources, and services to support implementation.

A lack of resources is one of the burdens facing many tribes. According to the U.S. Commission on Civil Rights, “[t]ribal justice systems have been underfunded for decades,” and revising tribal codes and then ultimately taking on additional cases comes with a set of both predictable and unforeseen costs for tribes.⁴⁹ The Pascua Yaqui Tribe has described the costs this way:

In addition to the direct costs of complying with the prerequisites (indigent defender systems, jury trials, incarceration, etc.), substantial indirect costs are also likely to be required. For example, who will review and propose changes to your laws and procedures? Who will train law enforcement, prosecutors, judges, court staff and defense counsel on the new laws and procedures and how they work? What funding will be required to make these changes? To pay for any additional prosecutors, judges, defense counsel, and court staff? To pay to publish the laws and regulations? To process the licensing and educational requirements? To implement the jury selection process? To pay for incarceration? Where will these funds come from? Is that source of funding stable and reliable?⁵⁰

Tribes with fewer resources have been able to implement SDVCJ by relying on support from others. Many were able to cut code drafting costs by relying on the codes of the first few implementing tribes as a starting point. Some tribes have also been able to rely on contract attorneys to do the majority of their defense counsel work, thereby minimizing the amount the tribe is required to pay to keep defense counsel on call.

FORSEEABLE COSTS INCLUDE:

Hiring additional law enforcement officers	Incarceration costs	Training costs
Hiring additional personnel to draft codes	Probation costs	Jury costs
Hiring additional prosecutors	Batterer support treatment costs	Costs associated with recording proceedings
Hiring additional defense counsel	Substance abuse treatment costs	Costs associated with publishing tribal codes
Hiring additional judges	Victim support costs	

Incarceration costs alone can be significant for the implementing tribes, many of whom contract with nearby county facilities to house their offenders.

INCARCERATION COSTS RANGE FROM \$32.25-\$150+ PER DAY

\$86 PER DAY
AVERAGE INCARCERATION COST

VAWA 2013 authorized \$5,000,000 for each of fiscal years 2014 through 2018 for SDVCJ implementation.⁵¹ Over the past two years, OVW has awarded \$5,684,939 in competitive grant funds to 14 different tribes to support their implementation of SDVCJ.⁵² Only four implementing tribes—Tulalip, Little Traverse Bay Band, Eastern Band of Cherokee Indians, and Standing Rock—have received any of these grant funds. However, none of them have used any of these funds to prosecute. A full list of these OVW grant awards is included in Appendix B.

3-6. DETENTION ISSUES AND COSTS CREATE IMPLEMENTATION CHALLENGES

Detention is an area where many tribes have encountered significant challenges. There are generally four different ways that a tribe may handle detention for inmates sentenced in their courts. The inmates be housed in facilities: 1) operated and funded by the BIA; 2) wholly funded and operated by the tribe; 3) operated by tribal governments with BIA funds provided through 638 contracts or self-governance compacts; or 4) in contract beds at county or private facilities pursuant to a contract with the tribe and paid for with either BIA or tribal funds. Which of these systems is in place ultimately creates different challenges for tribes implementing SDVCJ.

If a tribe does not rely on a BIA-operated and funded facility for detention, they will likely incur additional costs for the provision of health care and other services to non-Indian inmates. Tribal and BIA detention facilities general rely on the Indian Health Service (IHS) to provide health care to

inmates. This is not usually an option for non-Indian defendants, since they are generally ineligible for care at IHS. Neither the BIA nor the IHS receive appropriated funds for non-Indian correctional health care purposes. Although the federal government provides health care in Bureau of Prisons (BOP) and Immigration and Customs Enforcement (ICE) detention facilities through the use of Public Health Service Commissioned Corps Officers, none of these personnel work in BIA jails. Questions remain about who has the obligation to cover these costs and where health services will be provided. For tribes who have their own corrections facilities, or contract directly with county facilities to arrange for detention, detention-related healthcare costs are a significant challenge.

One of the SDVCJ defendants at Eastern Band of Cherokee Indians, for example, required extensive medical care while in tribal custody, which ended up costing the tribe more than \$60,000. These types of costs are simply prohibitive for many tribes, and several ITWG tribes have reported that the uncertainty about health care for non-Indian inmates is why the tribe is not proceeding with implementation of SDVCJ.

OVW allows a limited amount of inmate health care costs to be included in their grant program to support SDVCJ implementation, but few implementing tribes have received these grants.

ONE TRIBE PAID OVER \$60,000 FOR ONE OFFENDER'S HEALTHCARE

SDVCJ has brought to light confusion regarding whether tribal law enforcement and BIA officers have the authority to arrest and detain non-Indian suspects who commit crimes on the reservation. In response to this uncertainty, the BIA issued clear guidance affirming that BIA officers have the authority to temporarily detain all non-Indian offenders, and that BIA officers operating within a tribe implementing SDVCJ are required to enforce tribal law, including arresting and incarcerating SDVCJ defendants.⁵³

Despite this guidance, several tribes report that their regional BIA officials insist that BIA facilities cannot house non-Indian offenders. For tribes that rely on the BIA for detention, this presents a significant challenge, and the burden often falls on the tribe to explain the law to the local BIA officials. For tribes who operate pursuant to a 638 contract or self-governance compact, there may be contract provisions in place that prohibit them from housing non-Indians that must be renegotiated.

In other places there simply are no detention options available. For a long time the Sisseton-Wahpeton Oyate ran its jail facility pursuant to a 638 contract with BIA. The facility was abruptly shut down in the fall of 2017. As a result, the BIA recommended that the tribe contract with local county facilities for detention bed space. Chairman Dave Flute has testified, however, that the counties "are overrun and have no space." As a result, the tribe has had to release offenders on a no cost bond for the sole reason that they do not have anywhere to house them. Chairman Flute has called this "catch and release" and considers it a serious public safety issue.⁵⁴

These challenges demonstrate the need for increased funding, training, guidance, and to ensure that tribes can protect victims by efficiently detaining and incarcerating SDVCJ offenders.

3-7. SDVCJ IS JURISDICTIONALLY COMPLEX

SDVCJ is a very limited recognition of tribal jurisdiction. Navigating the boundaries of these new limitations has proven challenging and frustrating for many tribes. For tribes exercising SDVCJ, establishing whether the tribe has jurisdiction over the alleged offense involves answering factual questions. Specifically, to exercise SDVCJ, the tribe must demonstrate the Indian status of the victim, the existence of a qualifying relationship between the defendant and the victim, and whether the defendant has sufficient statutorily-enumerated connections to the tribe.

Several tribes stated that many of their decisions not to prosecute, or many of their prosecutor-initiated dismissals, were because the prosecutors were not sure that they could prove jurisdiction. As discussed in greater detail in Section V, for those SDVCJ cases that do go forward, tribes take different approaches to clarifying and asserting their jurisdiction. Many tribes provide a simple statement of jurisdiction early on in the proceedings that clearly includes their expanded authority under SDVCJ, and then resolve any specific challenges to their jurisdiction as they arise. However, other tribes chose to create processes that require dealing with jurisdictional questions as a procedural step for all of their SDVCJ prosecutions. These jurisdictional hearings can be time consuming, require the prosecution to collect and develop a separate set of evidence, and may lead to the odd situation where a judge is making findings of fact relevant to jurisdiction—some of which touch upon the merits—long before reaching the merits of the case.

Alternatively, tribes such as Pascua Yaqui treat the jurisdictional requirements as elements of the crime, and leave those questions for trial. Two of Pascua Yaqui's trials, however, demonstrated that this strategy can result in a significant waste of resources. In both cases, the offender was acquitted by a jury on jurisdictional grounds: in one case, because the jury was not convinced that the two individuals had a relationship that meets the intimate partner requirement of SDVCJ, and, in the second case, because the jury was not convinced that the defendant was a non-Indian. The ITWG has discussed at length the issue of whether the non-Indian status of defendants must be specifically alleged and proved. There is no textual basis in the federal statute to suggest that this is required. In addition, tribal courts are best understood as courts of general jurisdiction whose inherent jurisdiction has been limited in certain ways by federal law. As such, proving non-Indian status is not necessary to establish tribal jurisdiction. The validity of Pascua Yaqui's jury instruction concerning non-Indian status is currently being appealed through the Pascua Yaqui court system.⁵⁵

Ultimately, the narrowness of SDVCJ creates additional questions that implementing tribes have to deal with in addition to proving their merits cases. For domestic violence cases, which are especially difficult to prosecute, these additional statutory requirements are cumbersome and may result in the dismissal of meritorious cases.

4. SDVCJ IMPLEMENTATION PROMOTES POSITIVE CHANGES

In addition to empowering tribes to hold offenders accountable in a manner that fully upholds the rights of the defendants, implementation over the past five years has led to several additional outcomes worth noting. Implementation of SDVCJ has been the catalyst for important discussions and improved relationships at the tribal, inter-tribal, and federal levels

4-1. SDVCJ PROMOTES POSITIVE TRIBAL REFORMS

Experience shows that passing the tribal legislation necessary to implement SDVCJ generates community reflection and commitment to addressing domestic violence for the implementing tribes. Tribes have had to examine their codes closely to ensure that their laws—including their constitutions—comply with the requirements of SDVCJ, and make careful decisions about how best to implement SDVCJ given their community's unique history, needs, and priorities. The variety of different ways tribes have decided to comply with the statute is a testament to the statute's flexibility, the diversity of the Native nations implementing it, and to the creativity and care with which those nations have crafted their codes.

Furthermore, it has led many tribes to consider more broadly the impact of domestic violence on their communities, and take SDVCJ implementation as an opportunity to go beyond the exercise of criminal jurisdiction under VAWA 2013's requirements. The Nottawaseppi Huron Band of

Potawatomi (NHBP), for example, view implementation of SDVCJ as part of a larger commitment to addressing domestic violence:

The leadership across the branches of the NHBP Tribal Government has, collectively and individually, unequivocally and without question, prioritized a comprehensive and holistic approach to addressing domestic violence that includes implementing: 1. Educational programming; 2. Intervention programs and services; 3. Programs and services that support, protect and empower survivors; 4. Systems to hold offenders accountable and protect victims and the community as a whole; and 5. Programs and services that provide offenders with the tools to end their abusive behavior.⁵⁶

As the tribe began transforming these goals into a reality, it formed a team to discuss the need for victim services. These discussions revealed that community members were seeking services from tribal programs not designed for those purposes:

The tribe's Health and Human Services Staff and the Probation Officer both advised that domestic violence was a significant issue for many of their clients. NHBP Staff were providing services where possible and/or connecting Tribal Citizens and community members to outside service providers, but on a case-by-case basis. The implementation team determined that a dedicated victim services program was needed. NHBP applied for and received a grant from the OVW to fund a domestic violence victim advocate position in the tribal court, where she would have the support of the tribal court administrator and tribal court judge, both of whom had previously worked as victim advocates.⁵⁷

Like Nottawaseppi, many other implementing tribes have expanded victims' services, or strengthened victims' rights, as a part of their implementation process. The victim supports at each tribe are discussed at length later in this report.^{xx} Tribes have tailored their approach to combatting domestic violence to the unique needs and values of their communities. Several of the laws enacted by tribes implementing SDVCJ contain findings sections that highlight their individualized approaches.

“[T]he Elwha Klallam Tribe will not tolerate or excuse violent behavior under any circumstances. All people, whether they are elders, male, female, or children of our Elwha Klallam Tribe, or other individuals residing on the Elwha Klallam Reservation, are to be cherished and treated with respect. The Elwha Klallam Tribe has traditionally referred to itself as the “the Strong People” (nəx"sə'yəm) and as such recognizes that strength as a tribal community is directly linked to the health of its families and specifically its children.”

—Lower Elwha Klallam Code⁵⁸

The implementing tribes have all found that involvement of the community in implementation is critical.

“In drafting the Code, NHBP’s goal was to include the Community in the development phase as much as possible, to request their input and participation, keep them informed of the code writing process, and to provide domestic violence awareness information throughout this phase.”

—Nottawaseppi Huron band of Potawatomi⁵⁹

^{xx} See *infra* Section IV, and Section V.

NHBP further described in detail how they obtained community buy-in for implementation. They invited “Tribal member employees from various departments within the Tribe to attend our code drafting, working group, and code review team meetings, among other groups and teams formed during this process.”⁶⁰ Ultimately members of the Tribal Court, Membership Services, Human Resources, and the Police Department attended code drafting meetings, and members of the Culture Department and Culture Committee provided input. By doing this, Nottawaseppi found “Tribal members were involved and their thoughts and guidance was included in the process.”⁶¹ Eventually, “Community Meetings were held with the larger community once a final draft was prepared for presentation.⁶²

While much of the work preparing to implement SDVCJ focuses on revising tribal codes, policies, and procedures, the tribes all devoted considerable resources to training for tribal law enforcement officers, prosecutors, judges, and other key stakeholders. Often the need for training became evident as the tribes encountered an unexpected obstacle of one kind or another. For example, the day after SDVCJ was enacted on one reservation, a non-Indian offender was arrested and delivered to the county authorities where he was promptly released. That incident served as a reminder that tribal and BIA officers needed to be fully trained about the scope of the tribe’s authority and how SDVCJ jurisdiction works. Similarly, Pascua Yaqui’s experience with its first jury trial—which ended in an acquittal for lack of jurisdiction—demonstrated the importance of training law enforcement about how to properly investigate whether there is a qualifying relationship sufficient to trigger SDVCJ in a particular case.

4-2. INTER-TRIBAL COLLABORATION CREATES SUCCESSES BEYOND SDVCJ

In its June 14, 2013 Federal Register Notice, the DOJ asked tribes to indicate interest in joining an Inter-tribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG): a voluntary working group of designated tribal representatives intended to help exchange views, information, and advice about how tribes may best implement SDVCJ, combat domestic violence, recognize victims’ rights and safety needs, and safeguard defendants’ rights.⁶³

This peer-to-peer technical assistance covers a broad set of issues, from drafting stronger domestic violence codes and victim-centered protocols and policies, to improving public defender systems, to analyzing detention and correctional options for non-Indians, to designing more broadly representative jury pools and strategies for increasing juror compliance with a jury summons. The objective of the ITWG is to develop not a single, one-size-fits-all “best practice” for each of these issues, but rather multiple successful examples that can be tailored to each tribe’s particular needs, preferences, and traditions.

To date, the ITWG has met in-person nine times. Each meeting includes working time as well as speakers and other programming to support the work or discussion. In addition, ITWG tribes have also participated in a series of teleconferences and webinars and produced white papers and other resources on a range of topics. Over 50 tribes currently participate in the ITWG.

The ITWG has proven to be a productive and useful mechanism for tribes to share information and best practices among themselves, to discuss challenges, and to jointly strategize about how to overcome obstacles. With the logistical support and substantive expertise of a group of DOJ-funded technical assistance providers, the tribes participating in the ITWG have tackled many difficult questions and have developed a collection of resources that will make it easier for tribes who wish to implement SDVCJ in the future. The ITWG continues to serve as an important resource for the implementing tribes as they encounter new questions and challenges. Tribes consistently say that the ITWG is the single most helpful thing for them concerning implementing SDVCJ. One tribe that regularly attends the ITWG described their experience as follows:

One benefit of immeasurable importance was—and is—the in-person ITWG Meetings. The in-person ITWG Meetings provided a forum for Tribes to collectively: review and analyze VAWA 2013 to identify requirements for exercising criminal jurisdiction over non-Indians in domestic violence cases; critically analyze these requirements in relation to the resources required; create solutions to challenges; share victories; share challenges; share resources; request guidance; anticipate threats to sovereignty; brainstorm responses; and build a united voice in protection of Tribal sovereignty and Tribal Citizens victimized by domestic and sexual violence. The Native Nations that implemented a VAWA 2013-compliant domestic violence code early on in ITWG graciously guided the remaining Nations by openly sharing their experiences at ITWG Meetings. They provided tremendous guidance to the Nations still in the planning stages. These conversations delved deeper into the practical—and often unexpected—challenges as the conversations were no longer hypothetical. Their openness enabled our tribe to be proactive in the planning process.

It is important to note that the problematic provisions in VAWA 2013, as well as the overall political climate, including that we expect continuing challenges to Tribal sovereignty generally and VAWA 2013 specifically, created a commitment among the participating Native Nations to collectively work together to defend both. The shared understanding of the pain and frustration of those VAWA 2013 provisions that reflect ignorance of Tribal Justice Systems was not only comforting, but empowering. These deeply emotional ties will keep the Tribes that participated in ITWG connected.⁶⁴

The success of the ITWG has been driven by the engagement of dedicated and knowledgeable attorneys and tribal representatives from across Indian Country. This engagement has been possible because of the travel support provided by DOJ, which allowed many of the tribes to participate in productive in-person meetings. The engagement and expertise of the technical assistance team has provided important coordination and leadership to the ITWG, while also helping the ITWG to track issues as they arise and to connect with necessary resources.



The ITWG at the ninth in person meeting in November 2017 hosted by the Tulalip Tribes.

4-3. SDVCJ PROMOTES BETTER RELATIONSHIPS WITH OTHER JURISDICTIONS

Tribes participating in the ITWG have also had opportunities to engage with DOJ and the Department of Interior (DOI), both of which have made key staff available to provide technical advice to the working group as a whole and work with individual tribes to address specific issues or concerns as needed.

The implementing tribes have worked closely with BIA and DOJ officials to address challenges that have come up as a result of the complicated and fragmented criminal justice system at work in Indian Country. It has been important, for example, to clarify that BIA detention facilities are permitted to house non-Indian SDVCJ offenders and that tribes can use their 638 contract funds to pay for costs associated with housing non-Indian SDVCJ offenders.⁶⁵ Likewise, the implementing tribes have all worked closely with their local U.S. Attorney's Offices to make decisions about which jurisdiction is most appropriate to prosecute a particular case. Many of the implementing tribes report that their decision to implement SDVCJ has led to improved communication with the local U.S. Attorney's Office that is leading to greater accountability in non-SDVCJ cases.

CASE FROM THE TULALIP TRIBES

Serious offense prosecuted in federal court with the assistance of tribal prosecutor

A non-Indian boyfriend, engaged in a three day methamphetamine bender, refused to let his Indian girlfriend and her children leave the home or use the phone. Over the course of several days, the man repeatedly assaulted and threatened his girlfriend, including strangling her with a pipe, throwing knives at her, and threatening to burn down the house with her children inside. Because of the severity of the violence, and because SDVCJ does not provide accountability for the crimes committed against the children, the case was referred to the U.S. Attorney for prosecution. The Tulalip Tribal Prosecutor, who is also designated as a Special Assistant U.S. Attorney, was able to assist with the prosecution. The judge in the case noted that the victim suffered "an extended period of hell on earth" and sentenced the defendant to nearly 6 years in prison.⁶⁶

Lastly, federal officials have consistently attended and presented at ITWG meetings, offering not only advice and valuable expertise, but also presentations that help tribes take advantage of various federal programs that could support their SDVCJ work or increase their access to other law enforcement data networks and/or resources.

Beginning with the very first ITWG meeting in August 2013, tribes voiced their concerns about their ability to get protection orders and criminal history into the NCIC (National Criminal Information Center). It is a re-occurring issue that has been addressed at nearly every ITWG meeting. Tribal prosecutors need to be able to access the criminal histories of defendants in order to properly charge them. Tribes can use such information for law enforcement purposes to create safer communities for their citizens.

In response to tribes' complaints regarding criminal database access, the DOJ launched the Tribal Access Program (TAP) in August 2015 to provide tribes access to national crime information systems for both criminal and civil purposes. TAP ensures the exchange of critical data across the Criminal Justice Information Services (CJIS) systems and other national crime information systems. As of 2018, 47 tribes are participating in TAP, with additional expansion expected.⁶⁷

Tribes have also begun working with National Instant Criminal Background Check System (NICS) representatives from the Federal Bureau of Investigation to ensure that tribes are also able to enter their domestic violence convictions into the system so that offenders are no longer able to illegally purchase firearms. It is clear that tribes need to be fully integrated into national networks of data, database, and resource sharing.



Ultimately, the four core findings of this report demonstrate that implementing VAWA 2013's SDVCJ has presented a variety of challenges for tribes, but that they have risen to the occasion. Though not a separate finding in its own right, a common thread throughout each of these findings is how committed each tribe has been—at each level of the process and across all personnel—to successfully implementing the statute and ensuring effective justice in their communities.

III. OVERVIEW OF SDVCJ

The tribal provisions of VAWA 2013 were codified into 25 U.S.C. § 1304, “Tribal jurisdiction over crimes of domestic violence.” The full text of the statute is included as Appendix A to this report; however, below is a brief overview of the law.

RECOGNIZING SOVEREIGNTY

Section 1304 “recognize[s] and affirm[s]” that a participating Indian tribe’s powers of self-government” include the “inherent power” to exercise “special domestic violence criminal jurisdiction over all persons,”⁶⁸ including non-Indians, so long as certain statutory requirements are met.⁶⁹ SDVCJ recognizes concurrent jurisdiction along with the federal government, a state, or both,⁷⁰ and does not change existing federal or state jurisdiction in Indian Country.⁷¹

Exercising SDVCJ is **entirely voluntary**. While tribes with jurisdiction over Indian Country potentially may prosecute non-Indians under SDVCJ, it is up to each individual tribe to decide whether or not they would like meet the specific statutory requirements discussed below.^{xxi}

CRIMINAL CONDUCT COVERED

SDVCJ includes criminal conduct that falls into one of three categories as defined by the federal statute:

1. **Domestic violence**,
2. **Dating violence**, and
3. Violations of certain **protection orders**.⁷²

Domestic violence and dating violence are defined as follows:

- **Dating violence**: “violence 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.”⁷³
- **Domestic violence**: “violence 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 occurs.”⁷⁴

Protection orders must be **enforceable by the tribe**, issued **against the defendant**,⁷⁵ and provide sufficient **notice** and an **opportunity to be heard**.

Otherwise, eligible protection orders include:

- “any injunction, restraining order, or other order issued by a civil or criminal court for the purpose

^{xxi} VAWA 2013 contained a “Special Rule for the State of Alaska” in Section 910 which thereby applied sections 904 and 905 of VAWA only to the Metlakatla Indian Community, Annette Island Reserve. That special rule was repealed in 2014 by Public Law 113–275. That repeal, however, does not affect the 1998 Supreme Court decision in *Alaska v. Native Village of Venetie*, which held that most tribal lands in Alaska are not considered “Indian Country” for jurisdictional purposes. As a result, at present, almost all tribes in Alaska cannot exercise SDVCJ. Similarly, some tribes located in states with restrictive settlement acts, like Maine, are also unable to exercise SDVCJ. See <https://www.pressherald.com/2015/02/23/maine-tribes-seek-authority-to-try-domestic-violence-cases/>.

- of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and”⁷⁶
- “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.”⁷⁷

LIMITS ON SDVCJ ELIGIBLE CRIMES

For a tribe to exercise jurisdiction over a non-Indian offender:

- the victim must be Indian;⁷⁸ and
- the crime must take place in the **Indian Country** of the participating tribe⁷⁹

The tribe cannot exercise jurisdiction over a non-Indian if the offender lacks “**ties to the Indian tribe**,” which means the defendant:

- resides in the Indian Country of the participating tribe;
- is employed in the Indian Country of the participating tribe; or
- is a current or former spouse, intimate partner, or dating partner of a member of the participating tribe, or an Indian who resides in the Indian Country of the participating tribe.⁸⁰

DUE PROCESS REQUIREMENTS

VAWA 2013 requires that any tribe exercising SDVCJ must provide due process protections to SDVCJ defendants. First, the tribe must provide all of the protections specified in the Indian Civil Rights Act,^{xxii} which mirror almost every civil right that would be available in state court.^{xxiii} Second, SDVCJ defendants have the right to a jury trial drawn from a jury pool that does not systematically exclude non-Indians, as well as any other rights necessary under the Constitution. Finally, for any SDVCJ defendant who faces a term of imprisonment, VAWA 2013 requires implementing tribes to provide all those rights required for enhanced sentencing under the Tribal Law and Order Act of 2010.^{xxiv}

TLOA and VAWA 2013 require tribes to:

- “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution”;⁸¹

^{xxii} The United States Supreme Court recently upheld the validity and sufficiency of these due process protections in *United States v. Bryant*. 136 S.Ct. 1954 (2016). The Court explained that, “proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions.” *Id.* at 1966.

^{xxiii} 25 U.S.C. § 1304(a)’s protections include: freedom of speech and religion; freedom from illegal or warrantless search or seizure; a prohibition on double jeopardy; the right not to be compelled to be a witness against oneself; the right to a speedy trial and to confront witnesses; the right to a jury trial; and the right not to be subjected to cruel or unusual punishment, excessive fines, or excessive bail.

^{xxiv} In 2010, Congress passed the Tribal Law and Order Act (TLOA) which—among other things—allowed tribal governments to sentence offenders in tribal court for up to three years per charge and nine years total if the tribe provided a certain set of due process protections to defendants.

- “at the expense of the tribal government, provide **an indigent defendant the assistance of a defense attorney** licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys”;⁸²
- “require that the **judge** presiding over the criminal proceeding **has sufficient legal training** to preside over the criminal proceedings and is licensed to practice law in any jurisdiction in the United States”;⁸³
- make **publicly available** the tribe’s “**criminal laws** (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)”,⁸⁴ and
- “**maintain a record of the criminal proceeding**, including an audio or other recording of the trial proceeding.”⁸⁵

VAWA 2013 also guarantees a defendant in a SDVCJ case:

- “the right to a trial by an **impartial jury** that is drawn from sources that reflect a **fair cross section** of the community and do not systematically exclude any distinctive group in the community, including non-Indians”;⁸⁶ and
- “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 SDVCJ over the defendant.”⁸⁷

PILOT PROJECT

Although the tribal criminal jurisdiction provision of VAWA 2013 was generally not effective until March 7, 2015,⁸⁸ tribes could implement SDVCJ on an accelerated basis before that date with approval from the Attorney General during a “Pilot Project” period.⁸⁹ The DOJ developed a Pilot Project Application Questionnaire, which interested tribes used to request that the Attorney General designate them as “participating tribes” and approve their accelerated implementation of SDVCJ.⁹⁰ This Application Questionnaire was DOJ’s final notice and solicitation of applications for the pilot project, which was published in the Federal Register on November 29, 2013.⁹¹

Three tribes received approval to implement SDVCJ on an accelerated basis in February 2014—the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes. These tribes exercised SDVCJ for a little more than a year during the Pilot Project period before the law took general effect on March 7, 2015, and, as DOJ has testified, “the three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period.”⁹² Two additional tribes’ applications were approved on March 6, 2015 during the Pilot Project period—the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.

The five pilot project tribes remain some of the leaders in both the number of prosecutions and in assisting other tribes with implementation. Representatives from the pilot project tribes consistently attend meetings on SDVCJ implementation and



Pascua Yaqui Judge Melvin Stoof conferring with attorneys at the first SDVCJ trial during the Pilot Project Period.

^{xxv} Although completing the Application Questionnaire is no longer required for a tribe who wants to implement SDVCJ, it is a useful guide for a tribe to conduct a self-assessment prior to implementing SDVCJ. In addition, the completed Application Questionnaires from the Pilot Project tribes provide helpful information about options for meeting the requirements of the statute. The completed questionnaires can be found at www.ncai.org/tribal-vawa.

are willing to work closely with their peers at other tribes who are considering implementation and need guidance. The codes developed by the pilot project tribes and reviewed by the DOJ are often used as models for tribes who have subsequently implemented SDVCJ.

At the end of the pilot project period, NCAI released a Pilot Project Report summarizing the first years of implementation. That report similarly provided detail on prosecution statistics, and a profile of each of the implementing tribes at the time. The Pilot Project Report also highlighted a series of “lessons learned,” many of which are now further affirmed and expanded within the findings of this report. Those nine lessons were: (1) non-Indian domestic violence is a significant problem in tribal communities, (2) most SDVCJ defendants have significant ties to the tribal communities, (3) children are impacted by non-Indian domestic violence at high rates, (4) training is critical for success, (5) federal partners have an important role, (6) peer-to-peer learning is important, (7) SDVCJ is too narrow, (8) there is confusion about the statutory definition of “domestic violence”, and (9) tribes need resources for SDVCJ implementation.⁹²

IV. PROFILES OF THE 18 TRIBES EXERCISING SDVCJ

PASCUA YAQUI TRIBE



Located in Arizona

Pilot Project Tribe

Exercising SDVCJ since February 20, 2014

Tribal Code available at:

http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/

The Pascua Yaqui Tribe is located on a 2,200-acre reservation in southwest Arizona near Tucson, approximately 60 miles north of the U.S.-Mexico border. The Tribe has approximately 19,000 members, with 4-5,000 members living on the reservation. The most common household demographic on the reservation is single-mother households, which account for nearly 43 percent of all Pascua Yaqui households.⁹³ According to the U.S. Census,^{xxvii} the population of the Tribe's reservation



Pascua Pueblo Yaqui Reservation and Off-Reservation Trust Land, U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?aianni=2680>

and off-reservation trust land is approximately 12.7 percent non-Indian.⁹⁴ The Pascua Yaqui Tribe submitted its final Pilot Project Application Questionnaire to DOJ on December 30, 2013. The Tribe received approval to begin exercising SDVCJ on February 6, 2014, and jurisdiction went into effect on February 20, 2014. The Tribe immediately issued a press release and formal notice to the community regarding implementation of the new law. After the Pilot Project concluded, the Tribe released an Implementation Timeline⁹⁵ and comprehensive Pilot Project Summary of SDVCJ implementation at Pascua Yaqui.⁹⁶

The vast majority of criminal cases filed in the Pascua Yaqui Tribal Court are domestic-violence related offenses. Several of the Pascua Yaqui prosecutors are designated as Special Assistant

^{xxvi} Pascua Yaqui does not have access to information about criminal convictions from other jurisdictions for all of their defendants.

^{xxvii} Where the tribe provided a population estimate directly, we provided those numbers instead of the U.S. Census's population estimates, since tribal numbers are often more accurate. See *Census*, <http://www.ncai.org/policy-issues/economic-development-commerce/censusNCAI>, (last visited March 9, 2016). However, the racial demographic number here and elsewhere throughout the report relies on those Census numbers, which are provided to give the reader a rough approximation of the demographic breakdown of these communities.

United States Attorneys (SAUSAs), which allows them to also serve as prosecutors in federal court. The Tribe funds a full-fledged Public Defenders Office (originally opened in 1995) with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. The Tribe has employed law-trained judges and recorded its court proceedings since long before VAWA 2013. Pascua Yaqui has the highest number of SDVCJ cases, and was the first tribe to have a jury trial.

The Pascua Yaqui Tribe has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Located in Washington State
 Pilot Project Tribe
Exercising SDVCJ since February 20, 2014
 Tribal Code available at:
<http://www.codepublishing.com/WA/Tulalip/>

The Tulalip Tribes are located on a 22,000-acre reservation in western Washington State, approximately 30 miles north of Seattle. The Tribes have over 4,600 members, about 2,600 of whom live on the reservation.⁹⁷ According to the U.S. Census, the population of the tribe's reservation and off-reservation trust land is approximately 76 percent non-Indian. ⁹⁸

The Tulalip Tribal Court operates a separate Domestic Violence Court docket and SDVCJ cases are handled there. The Tribe also employs a specialized domestic violence and sexual assault prosecutor, who was approved as a Special Assistant United States Attorney (SAUSA) at the beginning of the Pilot Project. Washington State partially retroceded PL 280 jurisdiction to the federal governments in 2001 and the tribe established a police department and criminal court shortly thereafter.

The Tulalip Tribes submitted their final Pilot Project Application Questionnaire to the DOJ on December 19, 2013. The Tribes received approval to implement SDVCJ on February 6, 2014, and jurisdiction took effect on February 20, 2014.



Tulalip Reservation and Off-Reservation Trust Land, U.S.
 CENSUS BUREAU,
<https://www.census.gov/tribal/?aiannihh=4290>

PROSECUTION DATA	
Arrests	25
Convictions	16
Cases Pending	4
Acquittals	1
Arrests Not Prosecuted	0
Trials	1
Dismissals	0
Federal Referrals	1
Guilty Pleas	16
DV Arrests	20
PO Arrests	16
Incidents Involving Drugs or Alcohol	~20
Incidents Involving Children	18
Defendants	18
Male Defendants	17
Female Defendants	1
Non-Citizen Defendants	1
Defendants with a Criminal Record	17
Defendant Prior Police Contacts	171
Defendants Sentenced to Incarceration	12
Defendants in Support Programs	16
Victims	19
Victims whose Injuries Required Medical Care	9
Female Victims	18
Male Victims	1

The Tribes implemented TLOA enhanced sentencing provisions prior to the passage of VAWA 2013 and have provided indigent defense, included non-Indians in the jury pool, recorded court proceedings, and employed law-trained judges in the criminal court since 2002. All of the SDVCJ convicted offenders are ordered to undergo tribally-certified batterer intervention programs.

The Tulalip Tribes received a \$419,792 grant from OVW in 2016 to support the exercise of SDVCJ.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION



Located in Oregon

Pilot Project Tribe

Exercising SDVCJ since February 20, 2014

Tribal Code available at: <http://ctuir.org/criminal-code>

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) are located on a land base of 173,470 acres in southeast Oregon. CTUIR has 2,956 tribal members, 30 percent of whom are under the age of 18.⁹⁹ According to the U.S. Census, the tribe's reservation and off-reservation trust land have a total population of approximately 2,800, 51.2 percent of whom are non-Indians.¹⁰⁰

The Confederated Tribes have exercised expansive criminal jurisdiction since the State of Oregon retroceded Public Law 280 criminal jurisdiction in 1981. CTUIR implemented felony sentencing under TLOA in 2011, and the tribal prosecutor serves as a SAUSA. CTUIR has provided indigent counsel, recorded tribal judicial proceedings, employed law-trained judges, and included non-Indians on tribal juries since long before VAWA 2013 was enacted. The Tribes report that in 2011, over 60 percent of the cases seen by the Umatilla Family Violence Program involved non-Indians.

CTUIR submitted their final Pilot Project Application Questionnaire to the DOJ on December 19, 2013. The Tribes received approval to implement SDVCJ on February 6, 2014, and jurisdiction went into effect on February 20, 2014. In conjunction with the U.S. Attorney's Office for the District of Oregon, the Tribes issued a press release regarding implementation of the new jurisdiction on February 6, 2014.

PROSECUTION DATA	
Arrests	13
Convictions	8
Cases Pending	2
Acquittals	0
Arrests Not Prosecuted	-
Trials	0
Dismissals	1
Federal Referrals	4
Guilty Pleas	8
DV Arrests	9
PO Arrests	4
Incidents Involving Drugs or Alcohol	5
Incidents Involving Children	6
Defendants	10
Male Defendants	9
Female Defendants	1
Non-Citizen Defendants	0
Defendants with a Criminal Record	7
Defendant Prior Police Contacts	6
Defendants Sentenced to Incarceration	8
Defendants in Support Programs	6
Victims	9
Victims whose Injuries Required Medical Care	2
Female Victims	8
Male Victims	1



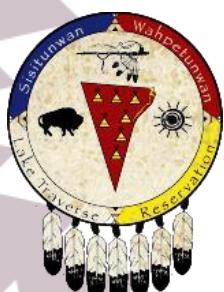
Umatilla Reservation and Off-Reservation Trust Land, U.S.
CENSUS BUREAU,
<https://www.census.gov/tribal/?ainih=4405>

CTUIR's courts provide additional mandatory supports for both batterers and victims. As part of CTUIR probation, they require defendants to undergo batterer intervention treatment, which the CTUIR provide free of charge. Additionally, to protect victim safety the CTUIR Court issues an automatic protection order in every pending domestic violence criminal case. The Umatilla Family Violence Program provides community-based advocacy to domestic violence victims. This program offers a court advocate, housing, counseling, and other support services for any victim.¹⁰¹

Implementing SDVCJ has dramatically increased accountability for non-Indian DV offenders. The Tribes report that prior to implementation, the U.S. Attorney's Office had only prosecuted two cases of domestic violence committed by non-Indians.

CTUIR has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION



Located in North and South Dakota
Pilot Project Tribe
Exercising SDVCJ since March 6, 2015
Tribal Code available at: http://www.swo-nsn.gov/?page_id=851

The Sisseton-Wahpeton Oyate is comprised of two subdivisions of Dakota Indians that reside on the Lake Traverse Reservation, established by treaty in 1867. This reservation extends into five counties in northeast South Dakota and two counties in southeast North Dakota. The Tribe has 13,873 enrolled members¹⁰² with approximately 9,894 members living on the Reservation.¹⁰³ According to the U.S. Census, the tribe's reservation and off-reservation trust land population is approximately 57.1 percent non-Indian.¹⁰⁴

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation submitted its final Pilot Project Application Questionnaire to DOJ on March 4, 2015. The Tribe received approval to implement SDVCJ on March 6, 2015.

The Sisseton-Wahpeton Oyate court was created by the Oyate's Constitution to resolve disputes involving Tribal members and non-members and to provide a forum for the prosecution of those persons who commit crimes on the Lake Traverse Indian reservation. The Court describes its goal as to "provide due process to all persons that come before it and to resolve disputes as efficiently as possible using Tribal laws, customs and traditions."¹⁰⁵



Lake Traverse Reservation and Off-Reservation Trust Land, U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?ainhh=1860>

The Sisseton-Wahpeton Oyate has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.

PROSECUTION DATA	
Arrests	8
Convictions	7
Cases Pending	0
Acquittals	0
Arrests Not Prosecuted	0
Trials	0
Dismissals	0
Federal Referrals	2
Guilty Pleas	7
DV Arrests	8
PO Arrests	0
Incidents Involving Drugs or Alcohol	2
Incidents Involving Children	3
Defendants	8
Male Defendants	7
Female Defendants	1
Non-Citizen Defendants	1
Defendants with a Criminal Record	5
Defendant Prior Police Contacts	1
Defendants Sentenced to Incarceration	7
Defendants in Support Programs	2
Victims	7
Victims whose Injuries Required Medical Care	1
Female Victims	6
Male Victims	1

FORT PECK ASSINIBOINE AND SIOUX TRIBES



Located in Montana

Pilot Project Tribe

Exercising SDVCJ since March 6, 2015

Tribal Code available at: <https://fptc.org/comprehensive-code-of-justice-ccoj/>

The Fort Peck Indian Reservation is home to the Assiniboine and Sioux Tribes, which are two separate Nations comprised of numerous bands and divisions. Located in northeast Montana, the Reservation extends over four counties and is the 9th largest Indian reservation in the United States. The Assiniboine and Sioux Tribes of Fort Peck have an estimated 10,000 enrolled members with approximately 6,000 members living on the Reservation. According to the U.S. Census, the tribe's reservation and off-reservation trust land have a population of approximately 10,400, 31.6 percent of whom are non-Indians.¹⁰⁶

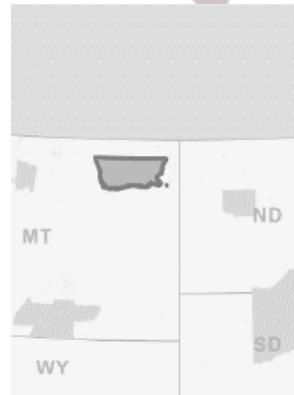
The Fort Peck Tribal Court operates a domestic violence docket. The Tribes implemented felony sentencing under TLOA in 2012.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation submitted their initial Pilot Project Application Questionnaire to the DOJ on December 26, 2013. After amending their application, the Fort Peck Tribes received approval to implement SDVCJ on March 6, 2015. The Fort

Peck Tribes also have a well-established Family Violence Resource Center that provides comprehensive services to domestic violence and sexual assault victims. The Fort Peck Tribal Court issues a "Hope Card" in conjunction with any orders of protection it grants. This card is wallet-sized and allows the person who has been granted an order of protection to easily prove this in other jurisdictions.¹⁰⁷

The Fort Peck Tribes has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.

PROSECUTION DATA	
Arrests	18
Convictions	6
Cases Pending	5
Acquittals	1
Arrests Not Prosecuted	-
Trials	1
Dismissals	6
Federal Referrals	0
Guilty Pleas	6
DV Arrests	21
PO Arrests	1
Incidents Involving Drugs or Alcohol	~15
Incidents Involving Children	~15
Defendants	18
Male Defendants	18
Female Defendants	0
Non-Citizen Defendants	1
Defendants with a Criminal Record	~9
Defendant Prior Police Contacts	-
Defendants Sentenced to Incarceration	1
Defendants in Support Programs	1
Victims	19
Victims whose Injuries Required Medical Care	2
Female Victims	19
Male Victims	0



Fort Peck Indian Reservation and Off-Reservation Trust Land, U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?aiannih=1250>

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS



Located in Michigan
Exercising SDVCJ since March 7, 2015
Tribal Code available at: <http://www.ltbbodawa-nsn.gov/TribalCode.pdf>

The Little Traverse Bay Bands of Odawa Indians is located across 336 square miles^{xxviii} of land on the northwestern shores of Michigan's Lower Peninsula.¹⁰⁸ The tribe has over 4,500 enrolled members with just under 1,200 living within neighboring Charlevoix, Emmet, and Cheboygan Counties. The tribe's reservation and off-reservation trust land have a population of approximately 712. The population is 95 percent Indian and 5 percent non-Indian.

Little Traverse has developed and maintained a specialized domestic violence court docket since 2013 that ensures they are providing best practices and policies to maintain victim safety along with offender accountability. Previous to VAWA implementation, LTBB has provided defendants many of the due process requirements in their Trial Court such as the right to effective assistance of counsel, the right to a law trained judge, and trials by judge or jury. The tribe has a Survivor Outreach Services Program within the Tribe's Department of Human Services, which provides a variety of services to both Native and non-Native intimate partners such as safety planning, cultural advocacy, non-emergency transportation, emergency food vouchers, assistance with personal protection orders, and court accompaniment.¹⁰⁹

The Little Traverse Bay Band received a \$450,000 grant from OVW in 2016 to support the exercise of SDVCJ.



Little Traverse Bay Reservation and Off-Reservation Trust Land,
U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?ai=anihh=1963>

PROSECUTION DATA
No Arrests

^{xxviii} Currently pending in federal court, LTBB has challenged whether Congress properly diminished their Reservation. If the tribe wins the case, its reservation boundaries would potentially be as large as 337 square miles, which would increase the number of members and non-member-Indians who may be protected by SDVCJ. *See Little Traverse Bay Bands of Odawa Indians v. Rick Snyder, et al.*, No. 1:15-cv-850 (W.D. Mich).

ALABAMA-COUSHATTA TRIBE OF TEXAS



Located in Texas
Exercising SDVCJ since March 7, 2015

The Alabama-Coushatta Tribe of Texas is located on 4,593 square acres of land in southeast Texas, approximately 90 miles north of Houston. The tribe has over 1,000 enrolled members, about 500 of whom live on the reservation.¹¹⁰ According to the U.S. Census, the tribe's reservation and off-reservation trust land population is 96 percent Indian and 4 percent non-Indian.¹¹¹

The Alabama-Coushatta Tribal Court is established pursuant to Article XIII of the Constitution of the Alabama-Coushatta Tribe of Texas.¹¹² The Court consists of a Trial Division, which is presided over by a Chief Judge, and as many additional Associate Judges as the Tribal Council appoints.¹¹³ The Alabama-Coushatta Court of Appeals hears appeals as needed.¹¹⁴

The Alabama-Coushatta Tribe has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Alabama-Coushatta Reservation and Off-Reservation Trust Land, U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?aianni=0050>

PROSECUTION DATA	
Arrests	2
Convictions	1
Cases Pending	1
Acquittals	0
Arrests Not Prosecuted	0
Trials	0
Dismissals	0
Federal Referrals	0
Guilty Pleas	1
DV Arrests	2
PO Arrests	0
Incidents Involving Drugs or Alcohol	2
Incidents Involving Children	0
Defendants	2
Male Defendants	0
Female Defendants	2
Non-Citizen Defendants	0
Defendants with a Criminal Record	2
Defendant Prior Police Contacts	2
Defendants Sentenced to Incarceration	0
Defendants in Support Programs	1
Victims	3
Victims whose Injuries Required Medical Care	1
Female Victims	1
Male Victims	2

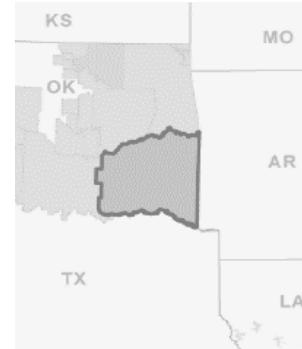


Located in Oklahoma
 Exercising SDVCJ since May 9, 2015
 Tribal Code available at:
<https://www.choctawnation.com/government/tribal-court/tribal-codes>

The Choctaw Nation spans 11 counties in Oklahoma.^{xxix} The Choctaw Nation has a total of 223,279 registered members, 84,670 of whom live in Oklahoma.¹¹⁵ The Tribal area tracked by the U.S. Census has a population of approximately 231,000. The population of that area is 21 percent Indian and 79 percent non-Indian.¹¹⁶

Choctaw Nation maintains both a Constitutional Court, and a Court of General Jurisdiction, which includes both an Appellate and District Court. Domestic Violence cases are heard in the District Courts which incorporate traditional values into the system to provide more tailored solutions to their cases.¹¹⁷ The Tribe's Children and Family Services Department provides Domestic Violence Support.¹¹⁸

The Choctaw Nation has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Choctaw Oklahoma Tribal Statistical Area, U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?ainihh=5590>

PROSECUTION DATA	
Arrests	3
Convictions	3
Cases Pending	0
Acquittals	0
Arrests Not Prosecuted	0
Trials	0
Dismissals	0
Federal Referrals	0
Guilty Pleas	3
DV Arrests	3
PO Arrests	0
Incidents Involving Drugs or Alcohol	1
Incidents Involving Children	2
Defendants	3
Male Defendants	2
Female Defendants	1
Non-Citizen Defendants	0
Defendants with a Criminal Record	2
Defendant Prior Police Contacts	-
Defendants Sentenced to Incarceration	0
Defendants in Support Programs	3
Victims	3
Victims whose Injuries Required Medical Care	1
Female Victims	3
Male Victims	0

^{xxix} See *infra* n. xxxi for a discussion of *Murphy v. Royal*'s potential impact on the tribe's land base.

EASTERN BAND OF CHEROKEE INDIANS



Located in North Carolina

Exercising SDVCJ since June 8, 2015

Tribal Code available at:

https://library.municode.com/nc/cherokee_indians_eastern_band/code_of_ordinances

The Eastern Band of Cherokee Indians is located in western North Carolina, adjacent to the Great Smoky Mountains. The Reservation is composed of 57,000 acres known as the Qualla Boundary. The Eastern Band of Cherokee Indians has a total of 14,000 tribal members.¹¹⁹ According to the U.S. Census, the population of the reservation is approximately 9,600 people, and is 77 percent Indian and 23 percent non-Indian.¹²⁰

The Eastern Band of Cherokee Indians maintains a court system comprised of trial courts and a Supreme Court.¹²¹ The tribe has a Domestic Violence Program, including the Ernestine Walkingstick Domestic Violence Shelter, which provides the following services: victim advocacy, legal assistance, court accompaniment, transportation assistance, emergency shelter services 24/7, relocation services, crisis counseling, prevention education, and outreach activities.¹²²



Eastern Cherokee Reservation,
U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?ai=anihh=0990>

The Eastern Band of Cherokee Indians received a \$495,000 grant from OVW in 2017 to support the exercise of SDVCJ.

PROSECUTION DATA	
Arrests	25
Convictions	12
Cases Pending	3
Acquittals	0
Arrests Not Prosecuted	6
Trials	0
Dismissals	0
Federal Referrals	3
Guilty Pleas	12
DV Arrests	18
PO Arrests	7
Incidents Involving Drugs or Alcohol	6
Incidents Involving Children	2
Defendants	21
Male Defendants	19
Female Defendants	2
Non-Citizen Defendants	3
Defendants with a Criminal Record	7
Defendant Prior Police Contacts	
Defendants Sentenced to Incarceration	3
Defendants in Support Programs	3
Victims	20
Victims whose Injuries Required Medical Care	0
Female Victims	18
Male Victims	2

SEMINOLE NATION OF OKLAHOMA



Located in Oklahoma
Exercising SDVCJ since July 6, 2015
Tribal Code available at: <http://www.sno-nsn.gov/government/codeoflaws>

The Seminole Nation is located in south-central Oklahoma, approximately 45 miles east of Oklahoma City, and it includes most of Seminole County. The tribe owns 372 acres of federal trust land and approximately 53 acres of fee simple land.^{xxx} An additional 35,443 allotted acres supplement the tribal land base which is checker-boarded throughout Seminole County. The Seminole Nation has a total of 17,000 tribal citizens, 5,315 of whom live in Seminole County.¹²³ The Tribal area tracked by the U.S. Census has a population of approximately 23,500. The population of that area is 25 percent Indian and 75 percent non-Indian.¹²⁴

The Seminole Nation reinstated judicial powers in October 2011, and is composed of a District Court and a Supreme Court.¹²⁵ Seminole tribal government includes a Domestic Violence Department, which provides services to both Native and non-Indian victims of domestic violence, sexual assault, stalking, and/or dating violence. These services include victim advocacy, housing assistance, crisis intervention, transitional living assistance, court advocacy assistance, referral assistance, and shelter placement assistance.¹²⁶

The Seminole Nation has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Seminole Nation Oklahoma
Tribal Statistical Area, U.S.
CENSUS BUREAU,
<https://www.census.gov/tribal/?ainihh=5830>

PROSECUTION DATA
No Arrests

^{xxx} See *infra* n. xxxi for a discussion of *Murphy v. Royal*'s potential impact on the tribe's land base.

SAC AND FOX NATION



Located in Oklahoma

Exercising SDVCJ since March 1, 2016

Tribal Code available at: <http://sacandfoxnation-nsn.gov/government/judicial/code-of-laws/>

The Sac and Fox Nation is located in central Oklahoma, between Tulsa and Oklahoma City. The Nation has a total of 3,794 tribal members, 2,557 of whom live in Oklahoma.¹²⁷ The Tribal area tracked by the U.S. Census has a population of approximately 59,000. The population of that area is 15 percent Indian and 85 percent non-Indian.¹²⁸

The Sac and Fox Nation's court system was reestablished in 1985 and is composed of a District Court and a Supreme Court.¹²⁹ The tribe maintains a Family Violence Prevention Program, which provides legal advocates as well as emergency shelter, necessities, utility, and clothing. The program also has referral services for counseling, substance abuse, nutrition, disease prevention, exercise, parenting skills, educational services, and employment training.¹³⁰

The Sac and Fox Nation has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.

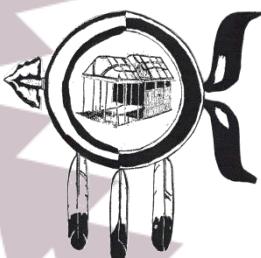


Sac and Fox Oklahoma Tribal
Statistical Area, U.S. CENSUS
BUREAU,
<https://www.census.gov/tribal/?ainihh=5820>

PROSECUTION DATA

No Arrests

KICKAPOO TRIBE OF OKLAHOMA



Located in Oklahoma
Exercising SDVCJ since March 15, 2016
Tribal Code available at:
<http://kickapootribeofoklahoma.com/forms.html>

The Kickapoo Tribe of Oklahoma is located in central Oklahoma, 3 miles east of Oklahoma City. The Nation has a total of 2,630 tribal members, 1,856 of whom live in Oklahoma.¹³¹ The Tribal area tracked by the U.S. Census has a population of approximately 20,000. The population of that area is 13 percent Indian and 87 percent non-Indian.¹³²

The Kickapoo court system was reestablished in 1991 and is composed of a District Court and a Supreme Court.¹³³ The tribe maintains a Family Violence Program, which provides services for domestic violence, including court advocacy, emergency shelter assistance, utility assistance, transportation assistance, crisis intervention, transportation assistance, as well as referrals for additional services.¹³⁴

The Kickapoo Tribe has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Kickapoo Oklahoma Tribal
Statistical Area, U.S. CENSUS
BUREAU,
<https://www.census.gov/tribal/?ainihh=5700>

PROSECUTION DATA

No Arrests

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI



Located in Michigan
Exercising SDVCJ since March 18, 2016
Tribal Code available at: <http://nhbpi.com/sovereignty/constitution/>

The Nottawaseppi Huron Band of the Potawatomi is headquartered in the southwestern region of Michigan's Lower Peninsula. They also maintain satellite offices in Grand Rapids. Their service area includes reservation boundaries and surrounding counties including Kalamazoo, Calhoun, Ottawa, Kent Barry, Branch and Allegan Counties.¹³⁵ The Tribe has 1,445 members, 795 of whom live in the service area.¹³⁶ The reservation and off reservation rental housing units located on tribally owned land has a population of approximately 92. The population is 82 percent Indian and 18 percent non-Indian.

The Nottawaseppi Tribal Court system includes a Tribal Court, and a Supreme Court,¹³⁷ and employs a Domestic Violence Victim Advocate.¹³⁸ The tribe's Social Services department provides support specific to domestic violence victims.¹³⁹

The Nottawaseppi Huron Band of the Potawatomi has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Huron Potawatomi Reservation
and Off-Reservation Trust Land,
U.S. CENSUS BUREAU,
<https://www.census.gov/tribal/?ai=anihh=1550>

PROSECUTION DATA
No Arrests

MUSCOGEE (CREEK) NATION



Located in Oklahoma

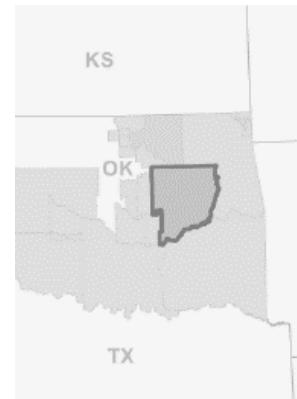
Exercising SDVCJ since March 28, 2016

Tribal Code available at: <http://www.creeksupremecourt.com/mcn-code/>

The Muscogee (Creek) Nation is located in central east Oklahoma. The Nation has a total of 69,162 tribal members, 55,991 of whom live in Oklahoma.¹⁴⁰ The Tribal area tracked by the U.S. Census has a population of approximately 782,000.^{xxxii} The population of that area is 14 percent Indian and 86 percent non-Indian.¹⁴¹

The Muscogee court system was reestablished in 1991 and is composed of a District Court and a Supreme Court.¹⁴² The tribe maintains a Family Violence Prevention Program, which provides services for domestic violence, provides advocacy and supportive services to victims of domestic violence, sexual assault, dating violence, and stalking. Specific services include: assistance in locating emergency shelter, assistance with filing protective orders, court advocacy, crisis intervention, assistance in locating medical services, accompaniment to sexual assault nurse exam, legal advocacy, safety planning, emergency transportation, child sexual assault advocacy and family support, sexual assault exams, counseling referrals, limited financial assistance, and referrals for additional services depending on an individual's needs.¹⁴³

The Muscogee (Creek) Nation has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



Creek Oklahoma Tribal
Statistical Area, U.S. CENSUS
BUREAU,
<https://www.census.gov/tribal/?ainihh=5620>

PROSECUTION DATA
No Arrests

^{xxxii} A recent 10th Circuit case, *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) held that that Congress did not properly disestablish the boundaries of the Muscogee (Creek) Reservation. Although the decision is stayed while the case is appealed to the U.S. Supreme Court, if the 10th Circuit's decision stands the jurisdiction of the Muscogee (Creek) Nation—and likely several other tribes in Oklahoma, including the Choctaw Nation and Seminole Nation, who have similar diminishment language—will significantly increase.

STANDING ROCK SIOUX TRIBE



Located in North and South Dakota

Exercising SDVCJ since May 1, 2016

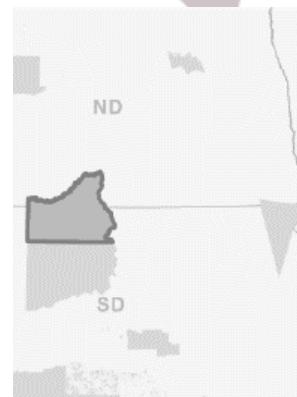
Tribal Code available at: <https://www.standingrock.org/content/titles>

The Standing Rock Sioux Tribe straddles the North Dakota and South Dakota border on the western portion of both states. Currently the reservation is about 1,000,000 total acres.¹⁴⁴ According to the U.S. Census, the reservation has a population of approximately 8,600, and the population is 78 percent Indian and 22 percent non-Indian.¹⁴⁵

The Standing Rock court system is composed of a Tribal Court and a Supreme Court.¹⁴⁶ The Tribal Court is presided over by a Chief Judge and an Associate Chief Judge.¹⁴⁷ The Supreme Court meets up to four times a year, and is presided over by a Chief Justice and two Associate Justices, none of whom can also serve as Judges in Standing Rock Sioux Tribal Court.¹⁴⁸

The tribe's Human Resource Department has created the position of a Victim Assistant/Advocate to work specifically with SDVCJ victims and serve as a liaison between tribal court prosecution and victims.¹⁴⁹

The Standing Rock Sioux Tribe received a \$495,000 grant from OVW in 2017 to support the exercise of SDVCJ.



Standing Rock Reservation, U.S.
CENSUS BUREAU,
<https://www.census.gov/tribal/?aianihh=3970>

PROSECUTION DATA	
Arrests	1
Convictions	1
Cases Pending	0
Acquittals	0
Arrests Not Prosecuted	0
Trials	0
Dismissals	0
Federal Referrals	0
Guilty Pleas	1
DV Arrests	1
PO Arrests	1
Incidents Involving Drugs or Alcohol	0
Incidents Involving Children	0
Defendants	1
Male Defendants	1
Female Defendants	0
Non-Citizen Defendants	0
Defendants with a Criminal Record	0
Defendant Prior Police Contacts	0
Defendants Sentenced to Incarceration	1
Defendants in Support Programs	1
Victims	1
Victims whose Injuries Required Medical Care	0
Female Victims	1
Male Victims	0

SAULT SAINTE MARIE TRIBE OF CHIPPEWA INDIANS



Located in Michigan

Exercising SDVCJ since December 13, 2016

Tribal Code available at:

<http://www.saulttribe.com/government/tribal-code>

The Sault Ste. Marie Tribe has a federally designated service area of 8,572 square miles across the 7 eastern counties of Michigan's Upper Peninsula. It is a rural area with an average population of 20.6 persons (Native and non-Native) per square mile. The Tribe has 9 reservations/trust land sites in the service area.¹⁵⁰ Currently there are 44,000 tribal members.¹⁵¹ According to the U.S. Census, the reservation has a population of approximately 2,400, and is 60 percent Indian and 40 percent non-Indian.¹⁵²

The tribe's court system has a two-tiered framework, with a trial-level court and an appellate court.¹⁵³ The tribe's Advocacy Resource Center (ARC) is a direct service program that provides voluntary assistance and support to victims/survivors, family members, and friends. The Center maintains a 16-bed shelter called Aakdehewin Gaamig-Lodge of Bravery. Additionally, the ARC provides core services which include: crisis intervention, safety plan development, transportation assistance, domestic violence education, and referral services to community services for financial assistance, housing



Sault Ste. Marie Reservation and
Off-Reservation Trust Land, U.S.
CENSUS BUREAU,
https://www.census.gov/tribal/?ai_anihh=3635

PROSECUTION DATA	
Arrests	8
Convictions	2
Cases Pending	2
Acquittals	1
Arrests Not Prosecuted	-
Trials	1
Dismissals	1
Federal Referrals	1
Guilty Pleas	2
DV Arrests	5
PO Arrests	2
Incidents Involving Drugs or Alcohol	3
Incidents Involving Children	4
Defendants	7
Male Defendants	7
Female Defendants	0
Non-Citizen Defendants	0
Defendants with a Criminal Record	6
Defendant Prior Police Contacts	6
Defendants Sentenced to Incarceration	0
Defendants in Support Programs	2
Victims	7
Victims whose Injuries Required Medical Care	2
Female Victims	7
Male Victims	0

assistance, behavioral health, medical services, traditional medicine services, substance abuse, child care assistance, and legal aid assistance. The ARC provides emergency legal advocacy by helping victims apply for Personal Protection Orders (PPO) and attending PPO hearings. ARC also provides criminal justice advocacy, which includes working with victims to provide support around victims' rights, notification when an offender is released from jail, working with law enforcement and/or prosecutors, crime victim impact statements, court criminal processes, hearing dates and times, court hearing safety plans, transportation assistance, accompanying victims to hearings, and informing victims about victim compensation programs.¹⁵⁴

The Sault Ste. Marie Tribe has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.

CHITIMACHA TRIBE OF LOUISIANA



Located in Louisiana

Exercising SDVCJ since February 1, 2017

Tribal Code available at: <http://www.chitimacha.gov/tribal-government/constitution-and-comprehensive-codes-justice>

The Chitimacha Tribe of Louisiana is located near the town of Charenton, Louisiana, off of Highway 90 between Lafayette and New Orleans. The current enrollment of Chitimacha is approximately 1,300.¹⁵⁵ According to the U.S. Census, the reservation has a population of approximately 660, and is 66 percent Indian and 34 percent non-Indian.¹⁵⁶

The Judicial Branch of the tribal government has both a Trial and Appellate Court.¹⁵⁷ The tribe's Human Services department provides support to domestic violence victims.¹⁵⁸

The Chitimacha Tribe has not received grant funding from the program authorized in VAWA 2013 to support the exercise of SDVCJ.



PROSECUTION DATA
No Arrests

Chitimacha Reservation, U.S.
CENSUS BUREAU,
<https://www.census.gov/tribal/?ainihh=0635>

LOWER ELWHA KLALLAM TRIBE



Located in Washington
Exercising SDVCJ since June 5, 2017

The Lower Elwha Klallam Tribe is located on the Elwha River, along the north and northeast portion of the Olympic Peninsula in Washington. The reservation includes 1,014 acres, and there are currently 882 enrolled tribal members.¹⁵⁹ According to the U.S. Census, the reservation and off-reservation trust land has a population of approximately 758, and is 88 percent Indian and 12 percent non-Indian.¹⁶⁰

Lower Elwha has both a trial and appellate court. The Court seeks to integrate Western approaches to justice with cultural and customary paths. The Court maintains a successful adult and family Healing and Wellness Court that addresses substance abuse issues.¹⁶¹ The tribe's Family Advocacy Department promotes victim safety and autonomy through advocacy and community awareness, providing both direct and referral services 24 hours a day, 7 days a week.¹⁶²

The Lower Elwha Klallam Tribe has not received grant funding from the VAWA 2013 to support the exercise of SDVCJ.



Lower Elwha Reservation and
Off-Reservation Trust Land, U.S.
CENSUS BUREAU,
<https://www.census.gov/tribal/?ainihh=2040>

PROSECUTION DATA
No Arrests

V. LABORATORIES OF JUSTICE: CONTRASTING TRIBAL CODES AND IMPLEMENTATION CHOICES

The statutory requirements of VAWA 2013 discussed earlier in this report ensure that all tribes implementing SDVCJ provide a uniform set of protections to SDVCJ defendants. However, VAWA 2013 was drafted to ensure that implementing tribes would also have some flexibility and freedom to determine how best to implement the statute.¹⁶³ The 18 implementing tribes have made use of VAWA 2013's flexibility and chosen to comply with the requirements of SDVCJ in ways that best fit each of their communities. This portion of the report highlights the diversity in the 18 implementing tribes' methods of satisfying VAWA 2013's statutory requirements.

Each of the five Pilot Project tribes—Pascua Yaqui, Tulalip, CTUIR, Sisseton-Wahpeton Oyate, and the Fort Peck Tribes—submitted an application to the DOJ demonstrating how they met the statutory requirements of VAWA 2013 and subsequently received approval from the Attorney General to implement SDVCJ. Because the tribal codes, policies, and procedures from the Pilot Project tribes had the benefit of review by DOJ, they provide particularly instructive examples of how other Indian tribes can implement the statutory requirements in VAWA 2013 and have been replicated by other tribes.

Of the 13 tribes who began exercising SDVCJ after the Pilot Project period and thus did not undergo DOJ review—Little Traverse Bay Band, Alabama-Coushatta, Choctaw, Seminole, Eastern Band of Cherokee Indians, Sac and Fox, Kickapoo, Nottawaseppi, Muscogee (Creek) Nation, Standing Rock, Sault Ste. Marie, Chitimacha, and Lower Elwha Klallam—none has faced serious criticism or a legal challenge concerning whether or not they satisfy VAWA 2013's statutory requirements. While some tribes had the benefit of participating in the ITWG and advisory review from technical assistance providers such as NCAI, TLPI, and NCJFCJ, others revised their codes and updated their courts independently.

The ability of tribes to decide for themselves how to implement VAWA 2013 in a manner that is best for their community has resulted in a great deal of creativity, increased community buy-in, and more sustainable court systems that are a better match for the priorities, history, culture, and values of their communities. The implementing tribes have served as laboratories of justice, testing different solutions and then reflecting on their success or failure. Good practices, once discovered, are adopted by other tribes that believe a practice would also be a good match for their community. The ITWG is a vital hub for exchanging this information, and representatives from the implementing tribes are eager to speak with and learn from each other.

RIGHT TO COUNSEL

VAWA 2013 requires that tribes exercising SDVCJ ensure that SDVCJ defendants facing any term of imprisonment receive effective assistance of counsel at least equal to that guaranteed to them by the United States Constitution.¹⁶⁴ The tribe is required to pay for licensed defense counsel for indigent offenders.¹⁶⁵ Such counsel must be “licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”¹⁶⁶ Pascua Yaqui, Tulalip, Eastern Band of Cherokee Indians, and Sault Ste. Marie also require that their defense counsel are members of the tribal court’s bar.¹⁶⁷

Some tribes were providing indigent counsel before they implemented VAWA 2013, particularly as indigent defense is also required by the TLOA for any defendant who is facing more than one year of imprisonment.¹⁶⁸ Other tribes did not previously provide indigent defendants with counsel, or else used a team of lay advocates rather than licensed attorneys and therefore had to establish a new

system or modify their existing system to meet this requirement of VAWA 2013.^{xxxii} Some tribes hired a licensed attorney full time to serve as tribal public defender, while others contracted with outside attorneys to represent their defendants as needed. The volume of cases is not always an indicator of whether a tribe will hire a full time defense counsel or not. Fort Peck,¹⁶⁹ Pascua Yaqui,^{xxxiii} Sisseton,¹⁷⁰ EBCI,¹⁷¹ and Chitimacha¹⁷² have hired full-time tribal public defenders, while CTUIR,¹⁷³ Tulalip,¹⁷⁴ Muscogee,¹⁷⁵ and Sac and Fox¹⁷⁶ rely on contract arrangements with licensed attorneys.

Many tribes have gone above the minimum requirement of VAWA 2013 and provide counsel to more than just SDVCJ and TLOA enhanced sentencing defendants. Some tribes choose to provide counsel to all indigent defendants, while others provide all domestic violence offenders, or another subset of defendants, with counsel. The tribes also employ different standards to determine indigency, with some tribes providing counsel to anyone who asks for it.

Provide Indigent Defense Counsel ^{xxxiv}			
All Defendants	All Domestic Violence Defendants plus Tribal Member Defendants	All Domestic Violence Defendants	Only SDVCJ Defendants
Pascua Yaqui ^{177xxxv}	Standing Rock ^{xxxvi}	Fort Peck ¹⁷⁸	Chitimacha ¹⁷⁹
CTUIR ¹⁸⁰		LTBB ¹⁸¹	
Tulalip ¹⁸²		Lower Elwha ¹⁸³	
Sisseton ^{184xxxvii}			
EBCI ¹⁸⁵			
Nottawaseppi ¹⁸⁶			
Seminole ¹⁸⁷			
Muscogee ¹⁸⁸			
Sac and Fox ¹⁸⁹			
Kickapoo ¹⁹⁰			
AL-Coushatta ¹⁹¹			
Choctaw ¹⁹²			
Sault Ste. Marie ¹⁹³			

^{xxxii} For example, at Fort Peck Tribes, the tribal public defender office was staffed by experienced lay advocates and a licensed attorney was hired to comply with VAWA 2013's requirements.

^{xxxiii} The tribe also employs contract defense counsel if the public defender has a conflict of interest. PASCUA YAQUI TRIBAL CODE, tit. 3, §§ 2-2-310.

^{xxxiv} This table does not further delineate whether tribes chose to exercise enhanced sentencing under TLOA, and therefore must provide an attorney to indigent defendants facing at least one year imprisonment.

^{xxxv} Pascua Yaqui provides an attorney or tribal court advocate to all indigent defendants who face a loss of liberty. For SDVCJ defendants or defendants facing more than one year of imprisonment and over \$5,000 fines, the tribe provides an attorney licensed by Pascua Yaqui Court and another jurisdiction in the U.S. that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. PASCUA YAQUI TRIBAL CODE, tit. 3, §§ 2-2-310.

^{xxxvi} Tribal Council is permitted to provide indigent counsel to all tribal members regardless of income "conditional upon the Tribe having sufficient funds" to hire a full-time public defender. However, all indigent domestic violence defendants are given an attorney, even if the tribe does not currently employ one full time. STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. I, ch. 5, § 1-508(a); tit. III ch. 17, §4-1715.

^{xxxvii} Sisseton provides indigent defense counsel to SDVCJ defendants and defendants facing enhanced sentencing. However, the tribe also provides assistance of counsel "if requested" and "if available" for any sentence that includes jail time. SISSETON-WAHPETON OYATE CODES OF LAW, ch. 23, §§ 23-08-02—04.

Indigence Standards

Pascua Yaqui:	Presumed indigent if below 125% of federal poverty guidelines. ¹⁹⁴
CTUIR:	Indigence standard 150% of federal poverty guidelines, but in practice the tribe provides counsel to anyone who requests it, regardless of income. ¹⁹⁵
Fort Peck:	Presumed indigent if below 125% of federal poverty guidelines. ¹⁹⁶
Tulalip:	Presumed indigent if below 200% of federal poverty guidelines. ¹⁹⁷
EBCI:	The Judge determines if a defendant qualifies for court-appointed counsel, although defendants are required to complete an “affidavit of indigency.” ¹⁹⁸ Convicted defendants are required to pay the costs of their court-appointed counsel as part of their court costs. ¹⁹⁹
LTBB:	The tribal judiciary is empowered to set standards for indigency in appointing counsel for defendants. ²⁰⁰
Nottawaseppi:	The Court determines whether a defendant is indigent based on a notarized affidavit from the defendant confirming that he or she is indigent. ²⁰¹ The Tribal Court may require partial or full reimbursement of the costs of providing counsel. ²⁰²
Seminole:	The presiding judge is empowered to appoint counsel upon a finding of indigence. ²⁰³
Muscogee:	The Court determines whether a defendant is indigent pursuant to court rules setting standards for indigence. ²⁰⁴
Choctaw:	The District Judge makes holistic determination of indigency based on defendant’s application—including a “Pauper’s Affidavit”—and other relevant information including, but not limited to: availability of personal or real property, debts, financial history, earning capacity and living expenses, credit standing in the community, family member’s ability and willingness to assist, and litigation expenses. ²⁰⁵

Less Common Defense Counsel Arrangements

Fort Peck:	For non-SDVCJ defendants, the tribe also uses experienced lay advocates. All SDVCJ defendants are represented by a licensed attorney. The tribe also uses contract defense counsel if their public defender is not available. ²⁰⁶
Tulalip:	Defense services are primarily provided by the Tribal Court Public Defense Clinic at the University of Washington (UW) Native American Law Center. The clinic has handled over 3,000 cases in Tulalip Tribal Court since 2002 and now serves as the primary public defender for all criminal cases filed in Tribal Court. All clinic advocates must pass the Tulalip Court Bar Exam and be admitted to practice by the Tribal Court. In addition to the attorneys, selected second and third year UW law students who take the Tribal Clinic class provide assistance to clients by working on cases under direct and close Clinic supervision. The Clinic represents non-Indian defendants being prosecuted under SDVCJ; however, students do not participate in those cases. The Tribes also hire attorneys on contract when the Clinic is not available because of a conflict. Such attorneys must also be barred in the Tulalip Tribal Court. ²⁰⁷

JURISDICTIONAL AND PROCEDURAL FACTS

In most state and local courts, establishing jurisdiction in a criminal case is a straightforward question of whether the crime occurred within the territory of that government. Federal courts must additionally confirm that the alleged crime is federal and thus sufficient to satisfy the statutory limits on the jurisdiction of federal courts.

By contrast, establishing jurisdiction in a tribal criminal court is more complex, since tribal courts are courts of general jurisdiction that are nonetheless limited by federal statute or federal court precedent. Like many courts, tribal courts generally determine whether the crime occurred in the tribe's territory before confirming that they have jurisdiction. However, tribal courts must then determine whether their inherent jurisdiction has been limited in some way by federal law. In most cases, that requires determining the Indian status of the defendant.

For tribes exercising SDVCJ, it is even more complicated. For SDVCJ implementing tribes, establishing whether the tribe has jurisdiction over an alleged offense, or whether additional SDVCJ requirements—such as providing a defense attorney—apply to the defendant can be tricky and involve answering factual questions.

As discussed above, SDVCJ is narrow—limited to a set of factual circumstances involving only certain defendants, certain relationships, and certain crimes. The tribes must assess: the Indian status of the victim, the existence of a qualifying relationship between the defendant and a qualifying Indian, and the defendant's residence or employment in the Indian Country of the prosecuting tribe.

The complexity of the jurisdictional and statutory scheme in SDVCJ has led to discussion among the ITWG tribes about how and when to make these findings of fact, and how to develop the necessary charging instruments, jury instructions, and court procedures. Relevant to these questions are the nature of the facts themselves—specifically, how to differentiate between which facts are relevant to jurisdiction, which facts merely trigger additional due process requirements, and which facts are elements of the crime.

Many tribes simply provide a statement of jurisdiction—in charging documents, for example, that clearly includes their expanded authority under SDVCJ—and resolve challenges to their jurisdiction as they arise. However, some tribes developed mandatory processes to determine whether or not they have jurisdiction. These processes vary, and different tribes have decided to place them at different stages in their judicial proceedings.

Standing Rock requires that the complaint allege and the prosecution must make a motion concerning the relevant jurisdictional facts of victim Indian status, the location of the offense, and the defendant's ties to the tribe.²⁰⁸ Similarly, the **Chitimacha** Tribal Court Judge is required at arraignment to make findings of fact and law that clearly state if the Tribal Court has jurisdiction. The Court is required to determine residency, employment, spouse or intimate partner status, and Indian or member status.²⁰⁹ To make these findings, the “judge may receive any evidence relevant to the issue of whether the Chitimacha Tribal Court has jurisdiction over the defendant from any reliable sources as may be available.”²¹⁰ If the Tribal Court determines it does have jurisdiction, it is also required to explicitly state whether it is exercising special domestic violence criminal jurisdiction.²¹¹

Eastern Band of Cherokee Indians has a similar initial hearing procedure to Chitimacha, wherein at the defendant's initial appearance, a Magistrate judge holds a jurisdiction hearing. At the hearing the judge asks the defendant direct questions concerning residency, employment, and intimate partner status, and Indian status. “In addition to the defendant's answers to the above inquiries the Magistrate may also receive evidence relevant to the above inquiries from any other reliable sources as may be available.”²¹² At the conclusion of the hearing, the judge makes findings concerning those inquiries and thus determines whether the Tribal Court has jurisdiction.²¹³ Both Chitimacha and Eastern Band also allow the defendant to exercise their right to remain silent without prejudicing

their right to challenge jurisdiction at a later date, and give the judge the right to detain defendants who are too intoxicated or otherwise impaired until they are able to appear.²¹⁴

At **Alabama Coushatta**, lack of jurisdiction may be noticed by the judge at any time prior to the final disposition of the case,²¹⁵ however a defendant's motion to dismiss for lack of jurisdiction is treated as a pretrial motion that must be filed at least 15 days prior to trial.²¹⁶

Pascua Yaqui currently has a case pending before their Supreme Court concerning their system for handling jurisdictional facts. The defendant was not a tribal member, and was charged under the provisions of Pascua Yaqui's code that covers SDVCJ. However, the defendant asserted that the tribe had failed to prove beyond a reasonable doubt that he was a non-Indian. The trial court allowed "jury instructions permitting the jury to consider whether Petitioner has proven that Defendant is a non-Indian beyond a reasonable doubt." The defendant was acquitted on the grounds that the court did not, because the jury was unconvinced that the prosecution had met their burden concerning non-Indian status. The validity of the decision to allow the non-Indian question to go to the jury is currently being appealed through the Pascua Yaqui court system.²¹⁷

DEFINITION OF OFFENSES

VAWA 2013 specifies three broad categories of criminal conduct over which tribes can exercise SDVCJ: domestic violence, dating violence, and violations of certain protection orders. However, SDVCJ defendants are not prosecuted under the terms of federal law; they must be prosecuted as a matter of tribal law. Thus, it is up to the implementing tribe to write its code to define these categories of offenses and use them to prosecute non-Indians. It is also up to the tribe to decide which crimes they want to include within these three categories, and how to define each of those individual offenses.^{xxxviii}

Tribes took different approaches to their criminal code drafting. First, tribes differed in how they defined these categories of crimes. **EBCI** simply refers to the federal law in their code.²¹⁸ Some Tribes, such as **CTUIR**²¹⁹ and **Chitimacha**,²²⁰ used the exact same language from VAWA 2013 to define the three broad categories directly in their code. Other tribes, such as **Pascua Yaqui**,²²¹ **Standing Rock**,²²² and **Sisseton**,^{xxxix²²³ wrote their own definitions for domestic violence, dating violence, and eligible protection orders. Still others chose to use the language from VAWA 2013 as a base, but added additional language to the definitions that spotlighted certain crimes within the broad categories. For example, **Fort Peck** additionally defines domestic and dating violence as "emotional abuse, controlling or domineering, intimidation, stalking, neglect or economic deprivation."²²⁴}

Second, tribes differed in how and which crimes they chose to specify as part of these categories. Some tribes, such as **Nottawaseppi**,²²⁵ defined the categories but didn't specifically indicate which crimes fall clearly within them. Other tribes, such as **Lower Elwha**²²⁶ and **Muscogee**,²²⁷ chose to spotlight certain offenses that are a priority in their communities. **Tulalip**'s code is structured so that any offense in the code can be charged as domestic violence based on the relationship of the victim and defendant. Tulalip's code acknowledges that domestic violence can take "many forms" and provides many examples of what constitutes domestic violence under tribal law.²²⁸ These unique examples include using demeaning language, harming household pets, and preventing someone from accessing services.²²⁹ **Sac and Fox**'s code provides for enhancements to their basic Domestic

^{xxxviii} Not all of the definitions of domestic violence or violence under tribal law fall under the federal definition of violence. *See supra* Section II, Finding 3-4.

^{xxxix} Sisseton's definitions also explicitly omit acts of self-defense. SISSETON-WAHPETON OYATE CODES OF LAW, ch. 52, § 52-04-01.

Abuse offense when it is committed against a pregnant victim, in the presence of children, by strangulation, or is “aggravated” in that it causes severe injury.²³⁰ Additionally, banishment is specifically authorized as a punishment for many of Sac and Fox’s domestic violence offenses.²³¹

The diversity in defining SDVCJ eligible offenses demonstrates that tribes write their laws in their own way. They will compose the terms of their statutes in their own voices and they will incorporate the context and values of their communities in how they declare what constitutes a crime against that community.

JURY COMPOSITION

In order to exercise SDVCJ, a tribe must ensure that non-Indian defendants have the right to a trial by an impartial jury that is drawn from sources that—

1. “reflect a fair cross section of the community”; and
2. “do not systematically exclude any distinctive group in the community, including non-Indians.”²³²

Some tribes included non-Indians in their jury pools prior to the passage of VAWA 2013. For the other tribes, implementation of VAWA 2013 required them to change their tribal codes and procedures to include non-Indians in their jury pools for SDVCJ trials.

In redesigning jury pools, there are two major points on which tribes differ. First, tribes differ on *when* they choose to include non-Indians in their jury pools. Some tribes chose to include non-Indians in their jury pool for *all cases*, while others created a bifurcated system. The tribes using bifurcated systems include non-Indians, or certain larger populations of non-Indians, *only for SDVCJ cases*. Second, tribes differ in how they determine what constitutes their “community” and which categories of non-Indians they include as eligible jurors.

For some tribes, including non-Indians for the first time presented a logistical challenge, since a list of non-Indian tribal residents may be difficult to obtain. The Fort Peck Tribes were able to obtain a list through the 15th Judicial District of Montana, which luckily comprises 98 percent of the Reservation. However, for some tribes, including non-Indian employees or tribal housing residents was the more efficient course of action given the availability of that information. Including non-Indian employees often required tribes to rewrite provisions of their corporation’s employee handbooks or revisit tribal employee leave policies.

Tribes who are thinking about implementing SDVCJ have routinely asked how they can ensure non-Indians comply with a jury summons given their limited authority over non-Indians. A number of best practices have been shared with the tribes by the National Center for State Courts. In practice, this has not been a problem. Tribes who have called a SDVCJ jury have anecdotally reported that non-Indians report for jury duty at higher rates than Indians. In one recent jury trial at Fort Peck, the entire jury was composed of non-Indians.

Single or Bifurcated Jury Pools

Non-Indians in Jury Pool <i>only</i> for SDVCJ cases	Additional Population of Non-Indians in Jury Pool any Non-Indian Cases (including civil)	Same Jury Pool for <i>all</i> cases
Sisseton ²³³	Nottawaseppi ²³⁴ (Tribal Government Employees)	Pascua Yaqui ²³⁵
Fort Peck ²³⁶	Kickapoo ²³⁷ (Casino Employees)	Tulalip ²³⁸
Muscogee ²³⁹		CTUIR ²⁴⁰
Standing Rock ²⁴¹		LTBB ²⁴² ^{xl}
Sault Ste. Marie ²⁴³		AL Coushatta ²⁴⁴
Chitimacha ²⁴⁵		Choctaw ²⁴⁶
		EBCI ²⁴⁷
		Lower Elwha ²⁴⁸
		Seminole ²⁴⁹
		Sac and Fox ²⁵⁰

^{xl} This jury pool is used only for Domestic Violence cases, Indians and non-Indians.

Non-Indians Included in Jury Pool							
	Tribe	Reservation Residents	Tribal Employees	Tribal Member Spouses or Family	Taxpayers	Tribal Land Lessees or Housing Recipients	Voluntary Registrants
Same Jury Pool for all cases	Pascua Yaqui ²⁵¹	x	x	x			
	Tulalip ²⁵²	x	x ^{xli}				
	CTUIR ²⁵³	x					
	LTBB ²⁵⁴		x	x ^{xlii}			
	AL Coushatta ²⁵⁵		x				
	Choctaw ²⁵⁶	x					
	EBCI ²⁵⁷	x					
	Seminole ²⁵⁸		x ^{xliii}		x ^{xxiv}	x	x
	Sac & Fox ²⁵⁹		x ^{xlv}		x ^{xxvi}	x	x
Additional Population of Non-Indians in Jury Pool for SDVCJ or Non-Indian Cases	Kickapoo ²⁶⁰		x ^{xlvii}		x ^{xxviii}	x	x
	Nottawase Ppi ²⁶¹	x	x			x	
Non-Indians in Jury Pool only for SDVCJ cases	Fort Peck ²⁶²	x					
	Sisseton ²⁶³	x	x			x	
	Muscogee ²⁶⁴		x				
	Standing Rock ²⁶⁵	x					
	Sault Ste. Marie ²⁶⁶	x	x			x	
	Chitimacha ²⁶⁷	x	x				

^{xli} Employees must have been employed by the Tribe for at least one continuous year prior to being called as juror.

^{xlii} Eligible jurors must also live within the tribe's territorial jurisdiction.

^{xliii} Employees must have been employed by the Tribe for at least one continuous year prior to being called as juror.

^{xxiv} Taxpayers must also be residents of the tribal jurisdiction.

^{xxv} The tribe only includes Casino employees for non-tribal member trials. SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.

^{xxvi} Taxpayers must also be residents of the tribal jurisdiction.

^{xxvii} The tribe only includes Casino employees for non-tribal member trials. SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.

^{xxviii} Taxpayers must also be residents of the tribal jurisdiction.

LAW-TRAINED JUDGES

VAWA 2013 requires that a tribal judge overseeing a SDVCJ case has:

1. “sufficient legal training to preside over criminal proceedings”; and be
2. “licensed to practice law by any jurisdiction in the United States.”²⁶⁸

However, the broad language of these requirements leaves much still undefined. It is clear that a license to practice in *any* jurisdiction in the United States includes tribal jurisdictions,^{xlix} and so a tribe could license their own judges as long as they also have sufficient legal training.¹ However, there is no federal guidance as to what constitutes “sufficient legal training.” It is not even clear whether license from a state jurisdiction implies sufficient legal training or whether additional training could be required beyond state bar membership.

Without further federal guidance, most tribes have drafted their codes to require their judges have “sufficient legal training” and that their judges are state-court barred. Some tribes have just imposed a state or tribal bar membership requirement, assuming that membership is also sufficient to meet the training requirement. A few tribes have added further requirements to their judicial qualifications, such as age minimums or experience working in criminal justice.

All five of the Pilot Project tribes have at least one state-barred judge.²⁶⁹ Although the Fort Peck Tribes hired a state-barred judge to meet this requirement, the long-time chief judge of the Fort Peck Tribal Court is not state-barred. Instead, this judge has an undergraduate degree, is licensed in tribal court, and has two certificates from judicial college for “Tribal Judicial Skills” and “Special Court Trial Skills.” This judge also completes 40 hours of annual training and presides over criminal trials on a weekly basis.²⁷⁰ Another of the current judges at the Fort Peck Tribes is not state-barred. However, he completed the same judicial college courses as the other non-state barred judge. This judge just presided over the Fort Peck Tribes’ first SDVCJ trial in early 2018.

The tribes that implemented SDVCJ after the law took general effect took a more diverse approach to their judicial qualifications, as summarized below.

Judicial Qualifications

EBCI:	Member of the North Carolina bar. ²⁷¹
Kickapoo:	Judges presiding over criminal proceedings involving a non-Indian must be state-barred. ²⁷²
Little Traverse:	Judges presiding over domestic violence criminal proceedings must be admitted to a state or federal bar and have “sufficient legal training to preside over criminal trials.” ²⁷³
Nottawaseppi:	Judges must be a member of any bar. ²⁷⁴
Seminole:	Judges must be a member of any bar, including tribes. ²⁷⁵
Standing Rock:	Judges must be a member of any bar, including tribes. ²⁷⁶
Muscogee:	Trial judges must be state-barred, eligible or admitted to practice before federal courts in Oklahoma, have a minimum of four years of active trial

^{xlix} In considering the Tribal Law and Order Act of 2010, the Senate Committee on Indian Affairs received comments that tribal court judges should be required to graduate from an accredited law school and be state court barred; however, noting that this requirement was not even a part of all state judicial qualifications, they declined to recommend state bar membership as the requirement. 1 S. REP. NO. 111-93, at 17 n.57 (2009).

¹ For an in-depth discussion of the lack of guidance in this provision, see Jilly Tompkins, *Defining the Indian Civil Rights Act*, 4 AM. INDIAN LAW JOURNAL 53, 65-74 (2015).

	experience, be a member of the Muscogee Bar, and maintain continuing legal education each year. ²⁷⁷
AL Coushatta:	Judges must have “graduated from an accredited law school” and be a member of any state bar. ²⁷⁸
Choctaw:	Judges must have at least 5 years of experience as a practicing attorney or judge and be at least 30 years old, licensed by a state or federal court, and a member of the Choctaw Nation Bar. ²⁷⁹
Sault Ste. Marie:	Judges who preside over criminal cases must have sufficient legal training and be a state licensed attorney. ²⁸⁰
Chitimacha:	Judges who preside over SDVCJ cases must have sufficient legal training and be licensed to practice law by any jurisdiction in the United States. ²⁸¹
Lower Elwha:	Judges presiding over any criminal proceeding must have sufficient legal training and be licensed to practice in any jurisdiction in the United States, including Lower Elwha Klallam Tribe. ²⁸²
Sac and Fox:	Judges presiding over any criminal matter with a potential sentence of more than one year must be barred in Oklahoma. ²⁸³ Trial judges are not otherwise required to be a member of any state bar. ²⁸⁴

VICTIMS' RIGHTS AND SAFETY

Although VAWA 2013 focuses heavily on the rights of defendants in tribal courts, it does not require implementing tribes to do anything specific to support victims. Many tribes have, however, chosen to actively promote victims' rights and safety. As highlighted in the profiles of the implementing tribes, almost all of them have robust programs that support domestic violence victims. In addition to programmatic support, many tribes have comprehensive codes that account for victims' rights and safety. Some tribes who did not previously have victim centered provisions in their codes, took the opportunity when re-writing their codes to enact victims' rights provisions to comply with VAWA 2013. Here is a brief overview of how some of the tribes chose to legislate victims' rights. Since some tribes had extensive victims' rights provisions, the list below includes illustrative examples from each tribe rather than an exhaustive list of the victims' rights defined by each code.

The Pascua Yaqui, CTUIR, and Tulalip have comprehensive codes that account for victims' rights and promote victims' safety. The CTUIR Court issues automatic protection orders in all pending criminal domestic violence cases. The Tulalip and **Fort Peck Tribes** have instituted a domestic violence docket to handle all cases involving domestic violence, dating violence, or violation of protection orders. This domestic violence docket is separate from the existing criminal docket and allows the court to have an increased focus on victim safety and offender accountability.²⁸⁵ Tulalip's victims' rights code also is rooted in the unique context of Tulalip culture and includes that law enforcement officers must help victims get back “essential personal effects” which includes “regalia or any cultural or ceremonial items.”²⁸⁶

EBCI police are specifically mandated to respond to domestic violence calls immediately,²⁸⁷ make arrests without unnecessary delay,²⁸⁸ and report the incident to EBCI's Domestic Violence Program within 48 hours.²⁸⁹ Tribal prosecutors are also encouraged to consult domestic violence victim advocates²⁹⁰ and to expedite prosecutions with “a minimum of continuances.”²⁹¹ Victims are given the right to provide the court with a victim-impact statement, to address the court during sentencing, and to ask the court to order restitution for damage to or loss of property through the defendant's actions.²⁹²

At **Sisseton**, law enforcement arriving on the scene are required to use “all reasonable means to protect the victim and others present from further violence.” They are also required to confiscate weapons, help the victim get medical treatment, and provide the victim with a notice of all of her rights and “the remedies and services available to victims of domestic violence”²⁹³ The statement of victim’s rights is detailed in the tribal code and not only includes how law enforcement can help, but a detailed list of 10 different protection orders that the victim could file a petition for and where to obtain the necessary forms.²⁹⁴

Little Traverse police must assist victims in retrieving belongings, obtaining medical treatment, and moving to a safe location, such as a shelter.²⁹⁵ They are also responsible for providing information to the victim about his or her rights and any services available to victims.²⁹⁶ Prosecutors must “maintain contact with the victim throughout the criminal proceedings,” update the victim about major decisions in the case, provide the victim an opportunity to present an impact statement to the court, and allow the victim to seek restitution for property damage.²⁹⁷

Nottawaseppi guarantees victims the right to reasonable protection from the accused, the right to notice of any judicial proceedings dealing with the domestic violence case, the right to confer with the prosecutor, the right to restitution, and the right to provide the court with a victim’s impact statement.²⁹⁸ NHBP police officers are required to protect victims from abuse, transport victims to a domestic violence shelter, assist victims in obtaining needed medical care, and provide victims with written notice of their rights.²⁹⁹

In addition to a dedicated Victim’s Rights section of their code,³⁰⁰ **Chitimacha**’s code contains two sections specifying duties to victims. The first section, “Duties of the Tribe to the Victim” requires that prosecutors keep parts of the victim’s background from entering into the case, “respectfully” dissuade victims from withdrawing charges, keep continuances to a minimum, track victim’s financial costs, and utilize victim advocates during every phase of the proceedings.³⁰¹ The second section requires law enforcement to ensure victim safety by, among other things, helping the victim obtain medical treatment, removing personal effects, advising the victim of services, and helping them obtain temporary protection orders.³⁰² The tribal code also has clear provisions which protect victim safety through privacy. Alleged perpetrators may not obtain any records of police contact alleging incidents of domestic violence without first going through a hearing with notice to the prosecutor. Even if the Chitimacha Tribal Court eventually orders disclosure, information identifying the victim may be redacted to protect the confidentiality of their identity. Victims may also receive status reports on their offender’s case.³⁰³

Seminole Nation guarantees to domestic violence victims the right to judicial orders protecting him or her from further abuse.³⁰⁴ Seminole Nation law enforcement, the Lighthorse Police, is directed to inform victims of these legal rights.³⁰⁵ They are also directed to protect the victim from further immediate abuse, transport the victim and any children to a shelter, and assist the victim in obtaining medical care.³⁰⁶ The Seminole Nation’s Attorney General has a policy to cooperate with victims’ advocates as well.³⁰⁷

Muscogee (Creek) Nation’s law enforcement, also known as the Lighthorse Police, are directed by statute to protect domestic violence victims from immediate harm, assist them in obtaining any needed medical care, and transport them to a shelter, if needed.³⁰⁸ Lighthorse Police are required to give victims written notice of their rights to protective orders and instructions on how to file for such orders.³⁰⁹ The MCN District Court evaluating the arrest of a domestic violence offender is required to consider the safety of the victim when deciding whether to keep the offender in pretrial detention, and consider imposing protective orders for the victim’s safety before releasing the offender.³¹⁰

The first power or duty discussed in the Law Enforcement portion of **Lower Elwha**’s code is law enforcement’s duty to use all reasonable means to protect a domestic violence victim or any other household members when they are responding to a domestic violence call.³¹¹ The duty to protect includes, among other things, transporting the victim to safety, collecting their belongings, and confiscating prohibited weapons from the alleged abuser. Lower Elwha police are required to

provide every victim with a paragraph statement of their rights, which is provided for in the code.³¹² Lower Elwha's code also contains a victims' rights section, which includes the right to privacy, the right to dignity, the right to be heard, and the right to notice concerning the accused's case.³¹³

Sac and Fox law provides a comprehensive scheme to ensure that domestic violence victims have access to protective orders.³¹⁴ The tribe is also required to maintain access to shelters and "other such services as are needed" for domestic violence and sexual abuse victims.³¹⁵ Sac and Fox police and prosecutors are also required to inform victims of the above described rights and services, as well as others detailed in its Domestic Abuse Act.³¹⁶

Kickapoo has an extensive and comprehensive Domestic Violence Protection Ordinance that protects victims' rights. The first police officer to respond to a domestic violence incident is responsible for informing the victim of his or her rights, including the right to file for protective orders and the right to be informed about social services and financial assistance.³¹⁷ The Ordinance designates Kickapoo Mental Health and Substance Abuse Services as the agency to provide services, including shelters, to domestic violence victims.³¹⁸ The Ordinance also creates an extensive protection order system.³¹⁹

At **Standing Rock**, victims of domestic violence are guaranteed a number of rights related to criminal proceedings against the offender, including the right to be heard by the court during plea and sentencing proceedings and the right to restitution for "loss or injury" caused by a convicted offender.³²⁰

The Choctaw Nation has a comprehensive Victim's Rights Act. The Act is codified into twelve separate subsections which provide for a wide range of protections for all crime victims, some of the more uncommon of which include the right to support from your employer and the right to be informed of certain witnesses who may be called to testify. Additionally, the first peace officer who interviews a domestic abuse victim is required to inform them of their rights, including the right to request protection arising out of cooperation with law enforcement, the right to be informed of support services and how to apply, and the right to file for a permanent or temporary protective order.³²¹

Finally, **Sault Ste. Marie** dedicated an entire chapter of their code to Victim's Rights. The fifteen pages that outline these rights include: the right to employment protection, the right to a separate waiting area outside the courtroom, the right to confer with the prosecutor concerning jury selection, and an extensive section outlining the many kinds of restitution that the victim may be eligible for.³²²

APPENDICES

APPENDIX A: 25 U.S.C. §§ 1301-1304

Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, as amended by VAWA 2013:

§ 1301. Definitions: For purposes of this subchapter, the term

- (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.
- (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) "Indian court" means any Indian tribal court or court of Indian offense, and
- (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 19, United States Code, if that person were to commit an offense listed in that section in Indian Country to which that section applies.

§ 1302. Constitutional Rights

(a) In general No Indian tribe in exercising powers of self-government shall—

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7)
 - (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
 - (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
 - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
 - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000 A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

- (1) Has been previously convicted of the same or a comparable offense by any jurisdiction in the United

States; or

- (2) Is being prosecuted for any offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
- (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

- (1) to serve the sentence—
 - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
 - (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)(1) of the Tribal Law and Order Act of 2010
 - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
 - (D) in an alternative rehabilitation center of an Indian tribe; or
- (2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian Country.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction over Crimes of Domestic Violence

(a) Definitions.—In this section:

(1) Dating Violence

The term ‘dating violence’ means violence 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.

(2) Domestic Violence

The term ‘domestic violence’ means violence 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 occurs.

(3) Indian Country

The term ‘Indian Country’ has the meaning given the term in section 1151 of title 18, United States Code.

(4) Participating tribe

The term ‘participating tribe’ means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian Country of that Indian tribe.

(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 Pendente 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 the person seeking protection.

(6) Special domestic violence criminal jurisdiction

The term ‘special domestic violence criminal jurisdiction’ means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) Spouse or intimate partner

The term ‘spouse or intimate partner’ has the meaning given the term in section 226 of title 18, United States Code.

(b) Nature of Criminal Jurisdiction.—

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203 [25 U.S.C. §§ 1301 and 1303, respectively], 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 criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special domestic violence 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.

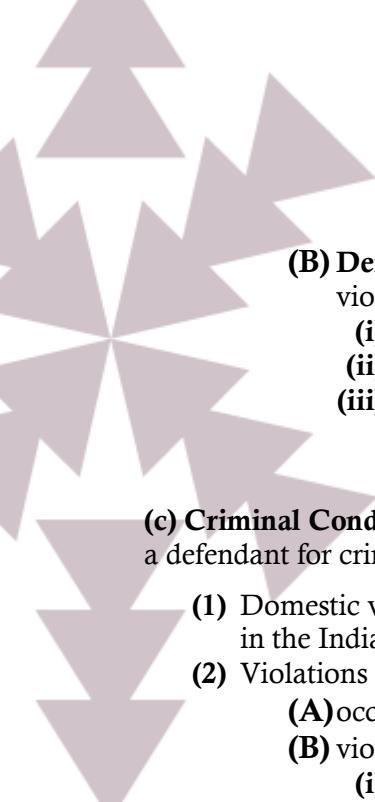
(A) Victim and defendant are both non-Indians

(i) In general

A participating tribe may not exercise special domestic violence 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 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 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 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 criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) Domestic violence and dating violence.—An act of domestic violence or dating 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, United States Code.

(d) Rights of Defendants In a criminal proceeding in which a participating tribe exercises special domestic violence 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 202(c) [25 U.S.C. § 1302(c)];

(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 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 203 [25 U.S.C. § 1303] 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 203 [25 U.S.C. § 1303].

APPENDIX B: OVW SDVCJ GRANTS

DOJ Office on Violence Against Women

Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction

FY 2017 Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction	Award Amount
Gila River Indian Community	\$495,000
Los Coyotes Band of Cahuilla and Cupeno Indians	\$495,000
Sac and Fox Tribe of the Mississippi in Iowa	\$495,000
Eastern Band of Cherokee Indians	\$495,000
Standing Rock Sioux Tribe	\$495,000
Comanche Nation	\$495,000
Swinomish Indian Tribal Community	\$495,000
Total Award Amount	\$3,465,000
Total Number of Awards	7

FY 2016 Grants to Tribal Governments to Exercise Special Domestic Violence Criminal Jurisdiction	Award Amount
Yurok Tribe of the Yurok Reservation, California	\$184,371
Grand Traverse Band of Ottawa and Chippewa Indians	\$448,511
Little Traverse Bay Bands of Odawa Indians	\$450,000
Santa Clara Pueblo	\$239,074
Confederated Tribes of the Chehalis Reservation	\$293,820
Port Gamble S'Klallam Tribe	\$184,371
Tulalip Tribes of Washington	\$419,792
Total Award Amount	\$2,219,939
Total Number of Awards	7

APPENDIX C: ADDITIONAL RESOURCES

SDVCJ Specific Resources

NCAI's Resource Center for Implementing Tribal Provisions of VAWA 2013. NCAI developed and maintains a website that provides information, news, resources, webinars, memoranda, notices of events, and funding opportunities on the implementation of tribal provisions of VAWA 2013. It also contains information on the Inter-tribal Technical-Assistance Working Group (ITWG). See: www.ncai.org/tribal-vawa

Specific Resources Pages on NCAI's Website:

- Webinars. See: <http://www.ncai.org/tribal-vawa/resources/webinars>
- Code Development. See: <http://www.ncai.org/tribal-vawa/resources/code-development>
- Jury Pool Selection. See: <http://www.ncai.org/tribal-vawa/resources/jury-pool-selection>
- Defendants' Rights & Criminal Defense. See: <http://www.ncai.org/tribal-vawa/resources/defendants-rights-criminal-defense>
- Notice. See: <http://www.ncai.org/tribal-vawa/resources/notice>
- Victims' Rights & Safety. See: <http://www.ncai.org/tribal-vawa/resources/victims-rights-safety>
- Court/Judicial Requirements. See: <http://www.ncai.org/tribal-vawa/resources/courtjudicial-requirements>
- Law Enforcement. See: <http://www.ncai.org/tribal-vawa/resources/law-enforcement>
- Tribal Law & Order Act. See: <http://www.ncai.org/tribal-vawa/resources/tribal-law-order-act>

ITWG Code Development Checklist for implementing VAWA 2013. This checklist is designed as a tool to assist tribal governments seeking to develop tribal codes that comply with VAWA 2013's statutory requirements. It includes citations to existing tribal codes implementing the new law. See:<http://www.ncai.org/tribal-vawa/getting-started/tribal-code-development-checklist-for-implementation-aug-20142.pdf>

Simple checklist for Law Enforcement Officers. Implementation of VAWA 2013 may require changes in law enforcement policies and procedures. Training for law enforcement officers will be an important part of implementation.

See:<http://www.ncai.org/tribal-vawa/resources/Law Enforcement investigation - simple list.pdf>

The ITWG has also facilitated ongoing webinar series on key areas of SDVCJ implementation, including defendants' rights issues; VAWA 2013's fair cross-section requirement and jury pool selection; and victims' rights. The full webinar series can be found on the NCAI website. See: <http://www.ncai.org/tribal-vawa/resources/webinars>

Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction. TLPI, one of the technical assistance providers supporting the work of the

ITWG, has also developed this comprehensive resource which includes a model code that the ITWG tribes developed.

See: http://www.tribal-institute.org/download/codes/TLOA_VAWA_3-9-15.pdf

Tribal VAWA Resource Page is housed on the Tribal Court Clearinghouse website. This page contains the language of VAWA, videos from the VAWA signing ceremony, publications, reports, articles and other important resources on VAWA's SDVCJ, as well as relevant upcoming and past events focusing on SDVCJ.

See: http://www.tribal-institute.org/lists/vawa_2013.htm

The five Pilot Project Tribes' codes.

See: <http://www.ncai.org/tribal-vawa/pilot-project-itwg/pilot-project>

The five tribes' applications to participate in the Pilot Project permitting early use of jurisdiction over non-Indians may also be helpful, as the applications look for compliance with the VAWA 2013 requirements and provide the tribes examples of their compliance. The applications are publicly available: Confederated Tribes of the Umatilla Indian Reservation application, Pascua Yaqui Tribe application, Tulalip Tribes application, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation application and Sisseton-Wahpeton Oyate of the Lake Traverse Reservation application.

See: www.justice.gov/tribal/vawa-2013-pilot-project

"Considerations in Implementing VAWA's Special Domestic Violence Criminal Jurisdiction and TLOA's Enhanced Sentencing Authority - A Look at the Experience of the Pascua Yaqui Tribe," compiled by Alfred Urbina, Attorney General, Pascua Yaqui Tribe and Melissa Tatum, Research Professor of Law, The University of Arizona James E. Rogers College of Law.

See: indianlaw.org/safewomen/resources

Two articles by M. Brent Leonhard, Attorney in the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation, on implementing VAWA 2013. The Federal Lawyer, October/November 2015 and ABA Human Rights Magazine Volume 40 Number 4.

Article by Professor Angela Riley, Crime and Governance in Indian Country, which provides an analysis of how TLOA and VAWA have worked on the ground and relate to tribal sovereignty.

Other Relevant Resources

Tribal Protection Order website was developed and is maintained by TLPI. It is a clearinghouse of information and resources on tribal protection orders and tribal enforcement.

See: www.TribalProtectionOrder.org

Tribal Law and Order Act Resource Center is a website specifically developed by NCAI to share information and resources relative to TLOA. It contains many of the resources described in this resource sections and many more, as well as news, events, webinars, and other helpful information.

See: tloa.ncai.org

The final report of the [Attorney General's Task Force on American Indian and Alaska Native Children Exposed to Violence - "Ending Violence So Children Can Thrive."](#) US Senator Byron Dorgan et al. The task force is part of Attorney General's Defending Childhood Initiative, a project that addresses the epidemic levels of exposure to violence faced by our nation's children. The task force was created in response to a recommendation in the [Attorney General's National Task Force on Children Exposed to Violence December 2012 final report](#). The report noted that American Indian and Alaska Native children have an exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience.

See: www.justice.gov/defendingchildhood

Federal Laws, Decisions, and Administrative Notices

[Public Law 113-4, 127 Stat. 54 \(2013\) The Violence Against Women Reauthorization Act of 2013](#) (VAWA 2013), recognized and reaffirmed the inherent sovereign authority of Indian tribes to exercise criminal jurisdiction over certain non-Indians who violate protection orders or commit dating violence or domestic violence against Indian victims on tribal lands.

[The Tribal Law and Order Act](#) (Public Law 111-211) is legislation passed by Congress as part of another bill regarding Indian Arts and Crafts. (See Title II.) It enhanced tribal authority to prosecute and punish criminals. However, tribes are required to provide certain due process requirements.

The requirements are listed in the amended [Indian Civil Rights Act \(25 U.S.C. §§ 1301-1304\)](#).

[28 U.S.C. § 543\(a\)](#) Special Assistant United States Attorneys (SAUSAs), appointed by the Attorney General, who assist in prosecuting Federal offenses committed in Indian Country.

[Federal Register, vol. 78, no. 115, p. 35961, June 14, 2013.](#) This notice proposes procedures for an Indian tribe to request designation as a participating tribe under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, pursuant to the voluntary Pilot Project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 ("the Pilot Project"), and also proposes procedures for the Attorney General to act on such a request. This notice also invites public comment on the proposed procedures and solicits preliminary expressions of interest from tribes that may wish to participate in the Pilot Project.

[Federal Register, vol. 78, no. 230, p. 71645, Nov. 29, 2013.](#) This final notice establishes procedures for Indian tribes to request designation as participating tribes under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, under the voluntary pilot project described in the Violence Against Women Reauthorization Act; establishes procedures for the Attorney General to act on such requests; and solicits such requests from Indian tribes.

The U.S. Supreme Court in [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978), held that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed in Indian Country.

NOTES

¹ Brittney Bennett, *Law was meant to let American Indians prosecute violence; is it working?* USA TODAY, (March 25, 2017, 8:01am) <https://www.usatoday.com/story/news/2017/03/25/american-indian-women-violence/99538182/>.

² Pub. L. No. 113-4, 127 Stat. 54 (2013).

³ 25 U.S.C. §1304.

⁴ 435 U.S. 191 (1978).

⁵ Tracy Toulou, Director Tracy Toulou of the Office of Tribal Justice Testifies Before the Senate Committee on Indian Affairs Oversight Hearing on Draft Legislation to Protect Native Children and Promote Public Safety in Indian Country, (May 18. 2016), <https://www.justice.gov/opa/speech/director-tracy-toulou-office-tribal-justice-testifies-senate-committee-indian-affairs-0>.

⁶ 25 U.S.C. § 1304; Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence Notice; solicitation of comments and preliminary expressions of interest, 78 Fed. Reg. 35,961 (June 14, 2013); Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence Final Notice; solicitation of applications for pilot project, 78 Fed. Reg. 71,645 (Nov. 29, 2013).

⁷ See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1572 (2016) (“[I]mplementation has been a success in several respects. Tribes have provided defendants with the requisite procedural protections, and the preliminary data reveal that the laws are improving the safety and security of reservation residents.”); see also Tracy Toulou, Director Tracy Toulou of the Office of Tribal Justice Testifies Before the Senate Committee on Indian Affairs Oversight Hearing on Draft Legislation to Protect Native Children and Promote Public Safety in Indian Country, (May 18. 2016), <https://www.justice.gov/opa/speech/director-tracy-toulou-office-tribal-justice-testifies-senate-committee-indian-affairs-0> (“The three original Pilot Project tribes achieved notable success implementing SDVCJ during the Pilot Project period from February 2014 through March 2015.”).

⁸ S. Rep. No. 112-265, at 5 (2012); S. Rep. No. 112-153, at 3-11 (2011); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 iii (Dec. 2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf>.

⁹ See, e.g., S. Rep. No. 112-265, at 1 (2012) (stating that the main purposes of restoring criminal jurisdiction to tribes is to “decrease the incidence of violent crimes against Indian women”).

¹⁰ DEPARTMENT OF JUSTICE, NAT’L INST. OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 26 (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

¹¹ See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 508-13 (1976).

¹² *Tribal Justice: Prosecuting non-Natives for sexual assault on reservations*, PBS NEWS HOUR (Sept. 5, 2015), <https://www.pbs.org/newshour/show/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations>.

¹³ See, e.g., Riley, *supra* note 29, at 1567 (discussing the history of criminal justice in Indian Country, the resulting “jurisdictional maze,” and the impacts of this maze on Native women).

¹⁴ *Oliphan v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁵ S. Rep. No. 112-265, at 7 (2012).

¹⁶ John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 906 (1994).

¹⁷ See, e.g., Joe Garcia, *Garcia: It’s time for action*, INDIAN COUNTRY TODAY, Sept. 27, 2007, <https://indiancountrymedianetwork.com/news/garcia-its-time-for-action/>.

¹⁸ Letter from U.S. Department of Justice, Office of Legislative Affairs, to Joseph R. Biden, Jr., President, United States Senate, (July 21, 2011) <https://turtletalk.files.wordpress.com/2013/02/justice-department-legislativeproposal-on-violence-against-native-women.pdf>.

¹⁹ National Congress of American Indians, *VAWA: A Call to Action*, YOUTUBE (Mar. 10, 2015), <https://www.youtube.com/watch?v=urPZyc-qACY>.

²⁰ *Id.*

²¹ Interview with Kay Rhoads (Winter 2017) (on file with NCAI).

²² Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence 78 Fed. Reg. 35963 (June 14, 2013).

²³ Pascua Yaqui and Tulalip—the two tribes with the longest history of implementation and the most arrests—report this result, among other tribes. See, e.g., *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on*

Reservations, PBS NEWSHOUR, (Sept. 5, 2015), <http://www.pbs.org/newshour/bb/tribal-justice-prosecuting-nonnatives-sexual-assault-indian-reservations/> [https://perma.cc/AKK4-DGWY] (quoting Theresa Pouley, then chief judge on the Tulalip Tribal Court, saying that reporting has gone up at Tulalip “for the last three years steadily as victims know that perpetrators will be held accountable”).

²⁴ NCAI Video Recording: Interview with Deborah Parker (on file with author).

²⁵ TILLER'S GUIDE TO INDIAN COUNTRY 483 (Veronica E. Velarde Tiller ed., 3rd ed. 2015).

²⁶ See e.g., Brent Leonhard, *Implementing VAWA 2013*, 40 ABA HUMAN RIGHTS 4, (“Implementation at the CTUIR has been nonexceptional. Cases proceed in the same way as all other cases. The only difference is that the community member who stands accused happens to be non-Indian.”).

²⁷ Legislative Hearing On “S. 2785, A Bill to Protect Native Children and Promote Public Safety In Indian Country;” S. 2916, “A Bill To Provide That The Pueblo of Santa Clara May Lease For 99 Years Certain Restricted Land and For Other Purposes;” and S. 2920, “The Tribal Law And Order Reauthorization Act Of 2016,” Before the S. Comm. On Indian Affairs, 114th Cong. (May 18, 2016) (written testimony of the Honorable Alfred L. Urbina, Attorney General, Pascua Yaqui Tribe of Arizona), <https://www.indian.senate.gov/sites/default/files/upload/files/Alfred%20Urbina1.pdf>.

²⁸ Lorelei Laird, *Indian tribes are retaking jurisdiction over domestic violence on their own land*, ABA JOURNAL, (April 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own.

²⁹ Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1617 (2016).

³⁰ See e.g., LOWER ELWHA KLALLAM CODE, art. III, § 16.03.03(4); CHOCTAW NATION CRIMINAL CODE, pt. 1, ch. 18, § 644.

³¹ Interview with Jennifer Bergman (Winter 2017) (on file with NCAI).

³² U.S. Department of Justice, *Domestic Violence Awareness Month Program*, YOUTUBE (Oct. 6, 2015), <https://www.youtube.com/watch?v=X3hheyd8s3U&>.

³³ Tribal Youth and Community Protection Act of 2016, S. 2785, 114th Cong (2016); Native Youth and Tribal Officer Protection Act, S. 2233, 115th Cong. (2017); Justice for Native Survivors of Sexual Violence Act, S. 1986, 115th Cong. (2017).

³⁴ Toulou, *supra* note 5.

³⁵ *Id.*

³⁶ Combatting Non-Indian Domestic Violence and Sexual Assault: A Call for a Full Oliphant Fix, The National Congress of American Indians Resolution #SPO-16-037, (June 2016) http://www.ncai.org/attachments/Resolution_orykZwEdbgGeAHMvJqyzAWvdDwRXtpGCTmoRcxCS_tvLSHnXNGv_SPO-16-037%20final.pdf.

³⁷ National Congress of American Indians, *Tribal VAWA Much Remains Undone*, YOUTUBE (June 10, 2015), <https://www.youtube.com/watch?v=xydojLiNoTU&>.

³⁸ See U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, REPORT OF THE ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE (Nov. 2014).

³⁹ *Id.*

⁴⁰ *Id.* at 38.

⁴¹ *Id.*

⁴² NCAI, TRIBAL NATIONS AND THE UNITED STATES 13,

http://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-pdf (last visited Mar. 3, 2018).

⁴³ U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, DEADLY CALLS AND FATAL ENCOUNTERS: ANALYSIS OF U.S. LAW ENFORCEMENT LINE OF DUTY DEATHS WHEN OFFICERS RESPOND TO DISPATCHED CALLS FOR SERVICE AND CONDUCTED ENFORCEMENT (2010-2014) (Aug. 3 2016), <http://www.nleomf.org/programs/cops/cops-report.html?referrer=http://www.nytimes.com/2016/07/30/us/politics/study-proposes-steps-to-better-ensure-police-officers-safety.html>; U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, DANGER TO POLICE IN DOMESTIC DISTURBANCES: A NEW LOOK (1986).

⁴⁴ 134 S.Ct. at 1410.

⁴⁵ 134 S.Ct. at 1416–17.

⁴⁶ 134 S.Ct. at 1420 n.7.

⁴⁷ 134 S. Ct. at 1411 n. 4.

⁴⁸ U.S. Department of Justice, *supra* note 32.

⁴⁹ UNITED STATES COMMISSION ON CIVIL RIGHTS, A QUITE CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 22 (2013); *see also* OFFICE OF THE INSPECTOR GENERAL U.S. DEPARTMENT OF JUSTICE-EVALUATION AND INSPECTIONS DIVISION 18-01, REVIEW OF THE DEPARTMENT'S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE TRIBAL LAW AND ORDER ACT OF 2010 1 (2017)

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- ²⁰⁰ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 7, §9.705(B)(3)(c).
- ²⁰¹ NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL COURT RULES OF CRIMINAL PROCEDURE, ch. 12, § 3(C).
- ²⁰² NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL COURT RULES FOR DOMESTIC VIOLENCE PROCEEDINGS, ch. 15, § 6(C)(2).
- ²⁰³ SEMINOLE NATION CODE OF LAWS, tit. 7, ch. 2, §204(b)(4).
- ²⁰⁴ MUSCOGEE CODE, tit. 14, ch. 1, sub. 2, §1-204.
- ²⁰⁵ CODE OF CRIMINAL PROCEDURE OF THE CHOCTAW NATION OF OKLAHOMA, app. 1, § I, Rule 1.14(A)(1).
- ²⁰⁶ VAWA Project on Tribal Criminal Jurisdiction, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, Dec. 26, 2013, <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2015/03/13/fortpeckapp322015.pdf>.
- ²⁰⁷ Defense Counsel, TULALIP TRIBES, <https://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/Attorneys/DefenseCounsel.aspx> (last visited Dec. 18, 2017).
- ²⁰⁸ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. III, ch. 2, § 3-201.1.
- ²⁰⁹ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. III, § 623(a).
- ²¹⁰ *Id.* § 623(b).
- ²¹¹ *Id.* § 623(c).
- ²¹² Eastern Band of Cherokee Indians, Ordinance No. 526 (2015), § 14-40.1(n).
- ²¹³ *Id.*; *id* at § 15-8. Rule 6.
- ²¹⁴ *Id.* CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. III, § 623(e).
- ²¹⁵ ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1, §120(E).
- ²¹⁶ *Id.* §122(B)(2).
- ²¹⁷ In Re Pascua Yaqui Tribe, No. CA-17-003, Pascua Yaqui Court of Appeals (May 8, 2017).
- ²¹⁸ The Cherokee Code of the Eastern Band of Cherokee, ch. 14, § 14-40.1(c). § 14-40.1, which deals with domestic violence, has been heavily amended by Ordinance 526.
- ²¹⁹ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE, § 1.01 (W-Z).
- ²²⁰ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. III, § 603(a).
- ²²¹ PASCUA YAQUI TRIBAL CODE, Tit. III, Part I, Ch. 1-1, Sec. 20.
- ²²² STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. IV, ch. 17, §§ 4-1703(c), 4-1703(i)(1);
- ²²³ SISSETON-WAHPETON OYATE CODES OF LAW, ch. 52, § 52-04-01.
- ²²⁴ FORT PECK TRIBAL CODE, tit.7, Sec. 249(c).
- ²²⁵ NOTTAWASEPPI HURON BAND OF POTAWATOMI TRIBAL CODE, tit. VII-04 § 7.4-35(A)
- ²²⁶ LOWER ELWHA KLALLAM CODE, ch. 16, art 1, §16.01.13.
- ²²⁷ Muscogee designated a list of crimes considered as domestic or dating violence offenses. The list includes, *inter alia*, assault and battery, sexual assault offenses, stalking, trespass, and vandalism. MUSCOGEE CODE tit. 6 § 3-301(A).
- ²²⁸ TULALIP TRIBAL CODE, tit. 4, Sec. 4.25.050-100.
- ²²⁹ *Id.* at 4.25.100(11).
- ²³⁰ *Id.* at tit. 10, § 207.1-207.5.

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- ²³¹ *Id.* at § 207.4.
- ²³² 25 U.S.C. § 1304(d)(3).
- ²³³ SISSETON-WAHPETON OYATE CODES OF LAW, ch. 23, §§ 23-08-02, 23-10-2, 23-10-03.
- ²³⁴ 8 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE § 8.20
- ²³⁵ PASCUA YAQUI TRIBAL CODE, tit. 3, §§ 2-1-160, 2-2-440.
- ²³⁶ FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, tit. 6, § 507.
- ²³⁷ KICKAPOO TRIBE OF OKLAHOMA CRIMINAL PROCEDURE, ch. 3, § 301; KICKAPOO TRIBE OF OKLAHOMA CIVIL PROCEDURE, ch. 6, § 601.
- ²³⁸ TULALIP TRIBAL CODES, tit. 2, ch. 2.05, § 2.05.110.
- ²³⁹ MUSCOGEE CODE, tit. 14, ch. 1, § 1-501, tit. 27, ch. 2, § 2-111, tit. 27, app. 1, Rule 13.
- ²⁴⁰ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE, ch. 3, pt. V, § 3.19.
- ²⁴¹ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. III, ch. 5, § 3-507.
- ²⁴² WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 1, § 9.706.
- ²⁴³ SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.126.
- ²⁴⁴ ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1, § 125.
- ²⁴⁵ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. II, § 509.
- ²⁴⁶ CHOCTAW NATION JUROR CODE, §§ 3, 11.
- ²⁴⁷ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, pt. II, ch. 1, art. IV, § 1-31.
- ²⁴⁸ LOWER ELWHA KLALLAM CODE, art. III, § 16.03.08(6).
- ²⁴⁹ SEMINOLE NATION CODE OF LAWS, tit. 3, ch. 6, tit. 7, ch. 1, § 102, ch. 3, § 302.
- ²⁵⁰ SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.
- ²⁵¹ PASCUA YAQUI TRIBAL CODE, tit. 3, § 2-1-160(B).
- ²⁵² TULALIP TRIBAL CODES, tit. 2, ch. 2.05, § 2.05.110.
- ²⁵³ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE, ch. 3, pt. V, § 3.19.
- ²⁵⁴ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 1, § 9.706(B).
- ²⁵⁵ ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1, § 125
- ²⁵⁶ CHOCTAW NATION JUROR CODE, §§ 3, 11.
- ²⁵⁷ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, pt. II, ch. 1, art. IV, § 1-31.
- ²⁵⁸ SEMINOLE NATION CODE OF LAWS, tit. 3, ch. 6, tit. 7, ch. 1, § 102, ch. 3, § 302.
- ²⁵⁹ SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.
- ²⁶⁰ KICKAPOO TRIBE OF OKLAHOMA CRIMINAL PROCEDURE, ch. 3, § 301; KICKAPOO TRIBE OF OKLAHOMA CIVIL PROCEDURE, ch. 6, § 601.
- ²⁶¹ 8 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE § 8.20
- ²⁶² FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, tit. 6, § 507.
- ²⁶³ SISSETON-WAHPETON OYATE CODES OF LAW, ch. 23, §§ 23-10-02—23-10-4.
- ²⁶⁴ MUSCOGEE CODE, tit. 14, ch. 1, § 1-501, tit. 27, ch. 2, § 2-111, tit. 27, app. 1, Rule 13.
- ²⁶⁵ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. III, ch. 5, § 3-507.
- ²⁶⁶ SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.126.
- ²⁶⁷ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. II, §§ 509-510.
- ²⁶⁸ 25 U.S.C. § 1302(c)(3).
- ²⁶⁹ NCAI, *supra* note 92 at 19.
- ²⁷⁰ *Id.*
- ²⁷¹ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, pt. II, ch. 7, 7-8(a)-(b).
- ²⁷² KICKAPOO TRIBE OF OKLAHOMA JUDICIAL SYSTEM ORDINANCE, ch. 1, § 6(B).
- ²⁷³ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 7, § 9.705(B)(3),
- ²⁷⁴ NOTTAWASEPPI HURON BAND OF POTAWATOMI CONSTITUTION, art. XI, § 5(a)(2).
- ²⁷⁵ SEMINOLE NATION CODE OF LAWS, tit. VII, § 102(c).
- ²⁷⁶ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. IV, ch. 17, § 4-1715(b)(1).
- ²⁷⁷ MUSCOGEE CODE, tit. 26, ch. 2, sub. 2, § 2-201(B).
- ²⁷⁸ ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1 §104.
- ²⁷⁹ AN ACT ESTABLISHING A COURT OF GENERAL JURISDICTION FOR THE CHOCTAW NATION OF OKLAHOMA, art. 1, § 1.103.
- ²⁸⁰ SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.135.
- ²⁸¹ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. III, ch. 6, § 605(b)(2), ch. 8, § 803(b).
- ²⁸² LOWER ELWHA KLALLAM CODE, art. III, § 16.03.08(4).
- ²⁸³ SAC AND FOX NATION CODE OF LAWS, tit. 9, § 102(h).
- ²⁸⁴ See *id.* § 102(a) (allowing Sac and Fox judges to be tribal members without formal legal education).

²⁸⁵ NCAI, *supra* note 92 at 19.

²⁸⁶ TULALIP TRIBAL CODE, tit. 4, ch. 4.24 §§ 4.25.100(16), 4.25.130(3).

²⁸⁷ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, ch.14, § 14-40.1(l)(1). § 14-40.1, which deals with domestic violence, has been heavily amended by Ordinance 526.

²⁸⁸ *Id.* at Sections 14-40.1(l)(2)(a)-(b).

²⁸⁹ *Id.* at Section 14-40.1(l)(5).

²⁹⁰ *Id.* at Section 14-40.1(m)(1)(c).

²⁹¹ *Id.* at Section 14-40.1(m)(1)(e).

²⁹² *Id.* at Section 14-40.1(m)(2).

²⁹³ SISSETON-WAHPETON OYATE CODES OF LAW, ch. 52, § 52-02-06.

²⁹⁴ *Id.*

²⁹⁵ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 7, § 9.709(A).

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 9.710.

²⁹⁸ NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE, tit. VII-04, § 7.4-44.

²⁹⁹ *Id.* § 7.4-17.

³⁰⁰ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. III, § 629.

³⁰¹ *Id.* § 628.

³⁰² *Id.* § 613.

³⁰³ *Id.* § 621.

³⁰⁴ SEMINOLE NATION CODE OF LAWS, tit. 6A, § 406(B).

³⁰⁵ *Id.* § 406(A).

³⁰⁶ *Id.* § 403(A).

³⁰⁷ *Id.* § 602.

³⁰⁸ MUSCOGEE CODE, tit. 6, § 3-303.

³⁰⁹ *Id.* § 3-306(A).

³¹⁰ *Id.* §§ 3-307(A)-(B).

³¹¹ LOWER ELWHA KLALLAM CODE, art. II, § 16.02.01.

³¹² *Id.*

³¹³ *Id.* art. IV, § 16.04.10.

³¹⁴ See SAC AND FOX NATION CODE OF LAWS, tit. 13, § 9-204.

³¹⁵ *Id.* § 9-101.

³¹⁶ *Id.* § 9-05, 9-06.

³¹⁷ KICKAPOO TRIBE OF OKLAHOMA DOMESTIC VIOLENCE PROTECTION ORDINANCE, ch. 5, § 501.

³¹⁸ *Id.* § 200.

³¹⁹ See *id.* ch. 3.

³²⁰ *Id.* at § 4-1712(a).

³²¹ CHOCTAW NATION CRIMINAL CODE, pt. 1, ch.2, § 142A.

³²² SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 75.



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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477

May 11, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for e-mail communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."¹

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.²

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.³

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c)

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

3. See JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the Internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."⁴ Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.⁵

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers' face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁶ The scope of this requirement was clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)⁷

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/cybersecurity> (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

7. *Id.* at 43.

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.⁸

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.⁹ The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."¹⁰

Amended Comment [18] explains:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.¹¹

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

. . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.¹²

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).¹³

11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2013). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.¹⁴ Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.¹⁵ "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

14. See item 3 below.

15. See, e.g., Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), <http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/>.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider

whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,¹⁶ and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.¹⁷ If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived, and the lawyer must determine whether it is prudent to warn a client of the dangers associated with such a method of communication.¹⁸

16. See Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

17. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011) (discussing the duty to protect the confidentiality of e-mail communications with one's client); Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which e-mail communications should be afforded special security protections, See, e.g., Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer...;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as “privileged and confidential” in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or “disclaimer” to client emails, where such a disclaimer is accurate and appropriate for the communication.¹⁹

Model Rule 4.4(b) obligates a lawyer who “knows or reasonably should know” that he has received an inadvertently sent “document or electronically stored information relating to the representation of the lawyer’s client” to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer’s duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being

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- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
 - sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer’s email communication, with or without a warrant.

19. See *Veteran Med. Prods. v. Bionix Dev. Corp.*, Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read “this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed” with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make “reasonable efforts to ensure that” the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer.”

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer’s obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer’s due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor’s security policies and protocols;
- vendor’s hiring practices;
- the use of confidentiality agreements;
- vendor’s conflicts check system to screen for adversity; and
- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.²⁰

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including “using an Internet-based service to store client information.” Comment [3] provides that the “reasonable efforts” required by Model Rule 5.3 to ensure that the nonlawyer’s services are provided in a manner that is compatible with the lawyer’s professional obligations “will depend upon the circumstances.” Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

20. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate “directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.”²¹ If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.²²

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer’s actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.²³ The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [18] to Model Rule 1.6, “A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.”

21. The ABA’s catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at:
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, “the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.” MODEL RULES OF PROF’L CONDUCT R. 5.3 cmt. [4] (2017). The concept of monitoring recognizes that although it may not be possible to “directly supervise” a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012),
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.auth_checkdam.pdf.

23. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(1) & (4) (2016).

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make “reasonable efforts” to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Formal Opinion 2017-300 (11/16/17) E-mail; Internet; Computers; Electronic surveillance; Communication with adverse persons; Opposing counsel; Dishonesty; Lawyer-client relationship; Confidentiality.

Summarized Document

A lawyer may not use a “web bug” in an email communication with opposing counsel. A web bug, also known as “web beacon,” “pixel tag,” “clear GIF,” or “invisible GIF,” is a software surveillance tool that discloses to the sender potentially confidential information such as whether and when an e-mail or attached document has been opened or forwarded and by whom, or who clicks on a link in the communication. It may not be possible or practical for a recipient to detect or reject the bug before opening the communication. Tracking electronic communications with opposing counsel interferes with the lawyer-client relationship. A lawyer may use email “read receipts” or “delivery receipts” that are visible to the recipient and enable the recipient to accept or reject them. A lawyer may also use an email service such as MailChimp or Constant Contact for mass mailings in which web links are openly displayed and recipients are explicitly encouraged to click on them. The use of web bugs differs from metadata tracking; a lawyer need not assume that opposing counsel is using web bugs, and therefore has no duty to take precautions to detect and disable them. Formal Opinion 2009-100; 18 U.S.C. §§ 2510 et seq.; Rules 1.6, 4.4, 8.4.

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Opinion 18-04 (undated) Communication with represented persons; Communication with adverse persons; Opposing counsel; E-mail.

Summarized Document

The mere fact that a lawyer has copied a client on an email sent to opposing counsel does not itself constitute implied consent for opposing counsel to "reply all." Particular circumstances may imply consent; whether the matter is adversarial is an important factor. The receiving lawyer might reasonably understand that consent is implied if the email is about scheduling under circumstances in which the client's and counsel's availability is at issue or if email conversations among lawyers and sophisticated clients are the normal course of dealing. Opinions 91-02, 93-16; Rule 4.2.

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-184**

ISSUE: May an attorney maintain a virtual law office practice (“VLO”) and still comply with her ethical obligations, if the communications with the client, and storage of and access to all information about the client’s matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., “cloud computing”)?

DIGEST: As it pertains to the use of technology, the Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client’s matter, are conducted solely via the internet using a third-party’s secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to distinct issues raised by the hypothetical VLO and its operation. Failure of Attorney to comply with all ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described herein.

**AUTHORITIES
INTERPRETED:** Rules 1-100, 1-300, 1-310, 3-100, 3-110, 3-310, 3-400, 3-500, 3-700, and 4-200 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code section 6068, subdivisions (e), (m), and (n).

Business and Professions Code sections 6125, 6126, 6127, 6147, and 6148.

California Rules of Court, Rules 3.35-3.37 and 5.70-5.71.^{2/}

STATEMENT OF FACTS

Attorney, a California licensed solo practitioner with a general law practice, wishes to establish a virtual law office (VLO).^{3/} Attorney’s target clients are low and moderate-income individuals who have access to the internet, looking for legal assistance in business transactions, family law, and probate law.

In her VLO, Attorney intends to communicate with her clients through a secure internet portal created on her website, and to both store, and access, all information regarding client matters through that portal. The information on the secure internet portal will be password protected and encrypted. Attorney intends to assign a separate password to each client after that client has registered and signed Attorney’s standard engagement letter so that a particular client can access information relating to his or her matter only. Attorney plans not to communicate with her clients by phone, e-mail or in person, but to limit communications solely to the internet portal through a function that allows attorney and client to send communications directly to each other within the internet portal.

Attorney asks whether her contemplated VLO practice would satisfy all applicable ethics rules.

^{1/} Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} Rules 5.70-5.71 repealed effective January 1, 2013 is revised and renumbered as Rule 5.425 adopted effective January 1, 2013.

^{3/} For a general discussion of virtual law practice, see Stephanie L. Kimbro, ABA Law Practice Management Section, “Virtual Law Practice” (2010) (ISBN 978-1-60442-828-5).

DISCUSSION

As a result of ever increasing innovations in technology, the world has moved significantly toward internet communications – through email, chats, blogs, social networking sites, and message boards. The legal services industry has not been untouched by these innovations and the use of technology, including the internet, is becoming more common, and even necessary, in the provision of legal services. Consistent with this trend, and with the benefits of convenience, flexibility, and cost reduction, the provision of legal services via a VLO has started to emerge as an increasingly viable vehicle in which to deliver accessible and affordable legal services to the general public.

The VLO, also variously known as Digital Law, Online Law, eLawyering and Lawfirm 2.0, may take many different forms. For the purposes of this opinion, “VLO” shall refer to the delivery of, and payment for,^{4/} legal services exclusively, or nearly exclusively, through the law firm’s portal on a website, where all of the processing, communication, software utilization, and computing will be internet-based. In the hypothetical VLO discussed in this opinion, a client’s communication with the law firm, as well as his access to the legal services provided, is supplied by the firm through a secure internet portal provided by a third-party internet-based vendor, accessible by the client with a unique user name and access code specific to the client’s particular matter only. The lawyer and client may not ever physically meet or even speak on a telephone.

The Committee recognizes that although VLOs exist and operate only through the use of relatively new technology, the use of such technology itself is not unique to this VLO; rather, many lawyers operating in traditional non-VLOs utilize some or many aspects of this same technology. The California Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner than they do upon a traditional non-VLO practitioner as it pertains to the use of technology. This opinion focuses on issues that the Committee believes are particularly implicated by the VLO’s cloud-based nature described herein, although many of the same issues may arise in any law practice.^{5/} For a fuller discussion on the analysis that the Committee believes an attorney should undertake when considering use of a particular form of technology, we refer the reader to California State Bar Formal Opinion No. 2010-179.

1. Attorney’s Duty of Confidentiality in Our Hypothetical VLO Is the Same as That of an Attorney in a Traditional Non-VLO, But Requires Some Specific Due Diligence.

A lawyer has a duty to “maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of his or her client.” (Bus. & Prof. Code, § 6068(e)(1)). With certain limited exceptions, the client’s confidential information may not be revealed absent the informed written consent of the client. (Rule 3-100(A); Cal. State Bar Formal Opn. No. 2010-179.)

^{4/} Attorneys accepting credit card payment should consult Cal. State Bar Formal Opn. No. 2007-172.

^{5/} The Committee recognizes that the fact situation presented in this opinion may raise an issue regarding the unauthorized practice of law – particularly where prospective clients from anywhere in the country (or, indeed, the world) easily may contact Attorney through her internet site. Rule 1-300(A) states that “[a] member shall not aid any person or entity in the unauthorized practice of law.” However, this opinion is not intended to address or opine on the issue of the unauthorized practice of law. Regarding activities undertaken by an individual who is not an active member of the California State Bar, members should consider Business and Professions Code sections 6125-6127. Members should also consider rule 1-300 (Unauthorized Practice of Law) and rule 1-310 (Forming a Partnership with a Non-Lawyer). Regarding what constitutes the practice of law in California, members should consider the following cases: *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corporation* (1922) 189 Cal. 531, 535; *Birbrower, Montalbano, Condon & Frank v. Superior Ct.* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 304]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960]. Members of the State Bar of California should also consider how their VLO services might implicate rules and regulations regarding the unauthorized practice of law of other jurisdictions outside of California, if applicable.

In California State Bar Formal Opinion No. 2010-179, this Committee discussed the ethical confidentiality and competency concerns of a practitioner using technology in providing legal services, and the considerations an attorney should take into account when determining what reasonable steps would be necessary to comply with those obligations. While those obligations are the same for attorneys using technology both in a VLO and a traditional non-VLO,^{6/} due to the *wholly outsourced* internet-based nature of our hypothetical VLO, special considerations are implicated which require specific due diligence on the part of our VLO practitioner.

This is because even though Attorney in this hypothetical is choosing an outside vendor, the fact of the outsourcing does not change Attorney's obligation to take reasonable steps to protect and secure the client's information. (Cal. State Bar Formal Opn. No. 2010-179; *see also* American Bar Association (ABA) Formal Opn. No. 08-451).^{7/} Attorney's compliance with her duty of confidentiality requires that she exercise reasonable due diligence both in the selection, and then in the continued use, of the VLO vendor. Attorney should determine that the VLO vendor selected by her employs policies and procedures that at a minimum equal what Attorney herself would do on her own to comply with her duty of confidentiality.^{8/} This Committee has recognized that while Attorney is not required to become a technology expert in order to comply with her duty of confidentiality and competence, Attorney does owe her clients a duty to have a basic understanding of the protections afforded by the technology she uses in her practice. If Attorney lacks the necessary competence to assess the security of the technology, she must seek additional information, or consult with someone who possesses the necessary knowledge, such as an information technology consultant. (Rule 3-110(C); Cal. State Bar Formal Opn. No. 2010-179.) Only after Attorney takes these reasonable steps to understand the basic technology available and how it will work in this hypothetical VLO, and determines that her duty of confidentiality and competence can be met in the contemplated VLO, may Attorney proceed. Factors to consider when selecting a VLO vendor may include:

- A. *Credentials of vendor.* ABA Formal Opn. No. 08-451; New York State Bar Assoc. Opinion 842.
- B. *Data Security.* Cal. State Bar Formal Opn. No. 2010-179; ABA Formal Opn. No. 08-451, ABA Formal Opn. No. 95-398; eLawyering Task Force, Law Practice Management Section, "Suggested Minimum Requirements for Law Firms Delivering Legal Services Online" (2009); New York State Bar Assoc. Opinion 842; Penn. Bar Assoc. Formal Opinions 2010-200 and 2011-200.

^{6/} Similarly, while this opinion addresses a VLO that exists only in a "cloud" setting – that is, on the internet, through a third-party vendor, where the services are provided wholly through and on the internet – the Committee understands that it is possible to have a VLO that can be accessed in a technology-based, but non-"cloud" setting. The special considerations discussed in this section of this opinion may not necessarily apply to such VLOs. A member must consider the specific circumstances of his or her VLO, particularly where information is hosted and by whom, to determine whether these considerations apply.

^{7/} The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852. Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) (ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

^{8/} Even apart from a VLO and the use of technology, attorneys have a duty to take reasonable precautions to protect their client's confidential information. (Rule 3-100(A); Cal. State Bar Formal Opn. No. 2010-179.) For example, an attorney who keeps files both in paper form and on an internet server may employ the most up-to-date security precautions for his server, but then fail to lock the door to his office, thereby allowing anyone to come in and rifle through his clients' paper files. The duties an attorney assumes when he operates exclusively in the cloud are no different than the lawyer who exclusively prefers paper files – both must act competently and take reasonable steps to preserve their client's confidences. All that changes in a VLO is the steps the attorneys must take to meet this competence and confidentiality requirement.

- C. *Vendor's Transmission of the Client's Information in the Cloud Across Jurisdictional Boundaries or Other Third-Party Servers.*^{9/} ABA Formal Opn. No. 08-451; Navetta and Forsheit, Information Law Group, Legal Implications of Cloud Computing (2009) series, parts 1, 2, and 3.
- D. *Attorney's Ability to Supervise Vendor.* ABA Formal Opn. No. 08-451.
- E. *Terms of Service of Contract with Vendor.* Rules Prof. Conduct, rules 3-100 and 3-700.

Even after Attorney satisfies herself that the security of the technology employed by the VLO provider is adequate to comply with her ethical obligations, Attorney should conduct periodic reassessments of all of these factors to confirm that the VLO vendor's services and systems remain at the level for which she initially contracted, and that changes in the vendor's business environment or management have not negatively affected its adequacy.^{10/}

Finally, Attorney should consider whether her ethical obligations require that she make appropriate disclosures and obtain the client's consent to the fact that an outside vendor is providing the technological base of Attorney's law firm, and that, as a result, the outside vendor will be receiving and exclusively storing the client's confidential information. (ABA Formal Opn. No. 08-451; see also Cal. State Bar Formal Opn. No. 2010-179.) In that regard, compare California State Bar Formal Opinion No. 1971-25 (use of outside data processing center without client's consent for bookkeeping, billing, accounting, and statistical purposes, if such information includes client secrets and confidences, would violate section 6068(e)) with Los Angeles County Bar Assn. Formal Opn. No. 374 (1978) (concluding that, in most circumstances, if protective conditions are observed, disclosure of client's secrets and confidences to a central data processor would not violate section 6068(e) and would be the same as disclosures to non-lawyer office employees).

In our hypothetical facts, Attorney's proposed VLO is password protected and encrypted, and each specific client will only be allowed access to his own matter. Assuming attorney has taken reasonable steps to determine that her duty of confidentiality and competence can be met, given the current standards of technology and security, such protections likely are sufficient in today's business environment. As technologies change, however, security standards also may change. Attorney, either directly or with the assistance of consultants, should keep abreast of the most current standards so that she can evaluate whether the measures taken by her firm's VLO provider to protect client confidentiality have not become outdated.

2. The Online-Based Nature of Communication and Delivery of Legal Services Inherent in this VLO Raises Distinct Concerns As It Pertains to Attorney's Fulfillment of Her Duty of Competence.

Just as the duty to maintain a client's confidences is one of the cornerstones of an attorney's duty of competence (rule 3-110), so too is the attorney's ability to effectively communicate with a client a prerequisite to affording competent counsel. (Rule 3-500; see also *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 [1 Cal.Rptr.2d 684] ("Adequate communication with clients is an integral part of competent professional performance as an attorney.")).

^{9/} Data stored and traveling in the cloud potentially travels across numerous jurisdictional boundaries, including international boundaries, as a matter of course. In some instances, the data may be designed from the outset to be stored on servers located outside of the United States. Third-party vendors may also subcontract out their work. When selecting and contracting with her VLO vendor, Attorney should address and minimize exposure of the client to legal issues triggered by both the international movement, and/or storage, of information in the cloud, and the potential subcontracting out of the vendor's services to unknown third-party vendors, which may impact confidentiality, without the prior written consent of Attorney and affected clients.

^{10/} In the event Attorney determines that the third-party vendor fails to meet the confidentiality standards that Attorney believes necessary for her VLO to comply with her ethical responsibilities relating to information storage, Attorney may consider alternative situations to store the client information at issue, in a non-cloud-based setup, as long as the non-cloud based setup, as it relates to information storage and access to that stored information, each independently comply with Attorney's duty of confidentiality as discussed herein, and as set forth in California State Bar Formal Opinion No. 2010-179.

In our VLO, all services and communications are conducted wholly through the VLO portal on the internet, without any physical meeting, and without any one-on-one contact even by phone. While the Committee believes that such an internet-only, attorney-client relationship, under the right circumstances, can meet all of Attorney's ethical obligations, such an internet-only structure does raise distinct ethics issues as it pertains to communications and competency.

First, Attorney must take reasonable steps to set up her client intake system in such a way that she is receiving from the prospective client sufficient information to determine if she can provide the prospective legal services at issue.^{11/} As an initial matter, Attorney should obtain sufficient information to conclude that the client in fact is the actual prospective client, or an authorized representative of the client, as opposed to someone acting without authority. Although an attorney in a non-VLO has this same obligation, the lack of face-to-face or even phone communication with the client in our hypothetical VLO may hinder Attorney's ability to make this determination, thereby potentially necessitating extra measures of assurance. Whether Attorney must take additional steps to confirm the prospective client's identity will depend on the circumstances of the representation and initial communications, and the information Attorney obtains from the prospective client.^{12/}

Second, Attorney's intake procedures also must include her receipt of sufficient information to make the initial determination of whether she can perform the requested legal services competently in a VLO at all,^{13/} or at least receipt of sufficient detailed information to determine whether the circumstances are such that further investigation is needed. *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499].

Third, once Attorney determines that she has sufficient information to determine that she can provide the legal services at issue, on any matter which requires client understanding, Attorney must take reasonable steps to ensure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision. (Cal. State Bar Formal Opn. No. 1984-77.) Attorney is not truly "communicating" with the client if the client does not understand what Attorney is saying – whether because of a language barrier or simply a lack of understanding of the legal concepts being discussed. This would be the case whether Attorney is communicating with the client in person, on the phone, by letter, or over the internet. In this hypothetical VLO, however, it may be more difficult for Attorney to form a reasonable belief that the client understands her, as Attorney will be without nonverbal cues (such as body language, eye contact, etc.) or even verbal clues (such as voice inflections or hesitations). Thus, Attorney may need to take additional reasonable steps to permit her to form a reasonable belief that she truly is "communicating" with her client.

In California State Bar Formal Opinion No. 1984-77, this Committee addressed the issue of client comprehension if an attorney has reason to doubt it, and specific steps that an attorney should take where the client does not speak the same language, or does so in a limited fashion. The opinion advises that an attorney providing services in a traditional law office to a client with little or no ability to communicate in English may need to communicate in the

^{11/} Attorney's obligations on intake are the same as the usual obligations of a non-VLO on intake. See, e.g., Rules Prof. Conduct, rule 3-310 (conflicts of interest); Bus. & Prof. Code, §§ 6147, 6148 (engagement letters).

^{12/} See for example, *Ethics Alert: Internet Scams Targeting Attorneys* (January 2011) The State Bar of California Committee on Professional Responsibility and Conduct <<http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=z8N90vh088%3d&tabcid=834>> (as of May 23, 2012).

^{13/} The Committee recognizes that certain legal practices may be amenable to this type of VLO, while others likely are not. By way of example only, an attorney may be able to competently draft a simple will or provide tax advice over the internet without speaking with the client, but it is less likely that she can defend the client in litigation in this same manner. Still further, even within practice areas, or within specific matters, there are differing levels of complexity that can alter the permissibility of using the VLO for delivery of the services. This opinion does not define specifically what practices can or cannot work under this type of cloud-based VLO. Instead, attorneys are cautioned that they should make an individual matter-by-matter analysis as to whether they can fulfill their duty to act competently in a VLO, first, as to the type of matter involved generally, and, second, as to the specific aspects of that given matter. Only when the answer to both inquiries is affirmative may Attorney proceed under a cloud-based VLO as described herein.

client's particular language or dialect, or use a skilled interpreter. Attorney must likewise confirm that the client has sufficient skills in the language being used by Attorney. Written internet-based communications between Attorney and the client may demonstrate the client's understanding. However, a third party may be communicating on behalf of a client who does not understand the language in question or is not literate in that language. Attorney may wish to take further steps to confirm the client's level of comprehension.

Fourth, once Attorney begins the representation, she must keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents. (Bus. & Prof. Code, § 6068(m) & (n); rule 3-500.) To the extent Attorney's process for informing the client is merely posting the information in the internet portal, Attorney must take reasonable steps to determine that the client in fact is receiving the information in a timely manner. Attorney also may wish to emphasize to the client throughout the representation the importance of checking into the portal regularly to get updates, and to establish an alternative method of communication in the event the portal does not work effectively to reach the client in a timely manner. If Attorney is not reasonably convinced that she is effectively and timely communicating with the client in the hypothetical VLO, and that the client understands what is being communicated, then Attorney may not proceed with the VLO representation as contemplated.

Fifth, given that individuals have varied understanding of technology and how to use it, attorneys using a VLO must have a reasonable basis to believe that the client has sufficient access to technology and the ability necessary to communicate through Attorney's web-based portal, just as the non-VLO attorney must have a reasonable basis to believe that the client can understand her on the phone, read and understand her written correspondence, or otherwise have an ability to communicate with her.

Sixth, if after her initial intake, Attorney concludes that she cannot competently deliver legal services to the client through this VLO, Attorney must decline to undertake that representation within this VLO context. (Rule 3-110.) If legal services already have commenced when Attorney determines she cannot competently continue to deliver legal services to the client through this VLO, Attorney must cease further representation through this VLO. (Rule 3-700.)^{14/} In that circumstance, Attorney may choose instead to undertake or continue the prospective legal services in a traditional non-VLO, if she has the proper traditional non-VLO structure to do so, and if the traditional methods of delivering legal services cure the problems of competency raised by this VLO. At a minimum, even if Attorney determines that she should withdraw, consistent with rule 3-700, she must continue to competently provide legal services to the client until such withdrawal is both ethically permissible and complete. Such continued representation must include non-VLO services, such as telephone or in-person communications, if such services are reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Rule 3-700(A)(2).)

Alternatively, in the situation where competency problems arise due to the complexity of the legal matter at issue, if narrowing the scope of legal services to be provided in the VLO would be permissible and also cure those competency problems, Attorney may do so and proceed through the VLO. In this circumstance, the material change in scope of representation must be communicated to and accepted by the client and Attorney. (See ABA Formal Opn. No. 11-458.)^{15/} Before undertaking a limited scope representation, Attorney should consider the various restrictions on such representations.^{16/} Even under a permissible limited scope representation, Attorney should still

^{14/} Rule 3-700(D) requires that, upon termination of the attorney-client employment, subject to any protective order or nondisclosure agreement, an attorney shall promptly release to the client, at the request of the client, all of the client papers and property. In our VLO, all the data is electronic and should be in a format to which Attorney has, by contract with the third-party vendor, already arranged for access – both for her and for the client – even after Attorney terminates the relationship with the third-party vendor for that particular matter. Upon client request, Attorney must release to the client the electronic versions of *all* papers and property in question, at Attorney's expense, after first stripping each document of any and all metadata that contains confidential information belonging to other clients. (Cal. State Bar Formal Opn. No. 2007-174.)

^{15/} In narrowing the scope of representation, Attorney must satisfy herself that the fee arrangements with the client remains reasonable and continues to comply with Rule 4-200, and if not, make the necessary adjustments with the client.

^{16/} See Cal. Rules of Court, Rules 3.35-3.37 (limited scope representation in general civil cases); ABA Model Rule 1.2(c) and Comments (6)-(8) (lawyer may limit scope of representation provided limitation is reasonable and the

advise the client (a) what services are not being undertaken; (b) what services still will need to be done, including advice that there may be other remedies that Attorney will not investigate or pursue; (c) what risks to the client, if any, could result from the limitation of the scope of representation; and (d) that other counsel should be consulted as to those matters not undertaken by the present counsel. (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684 [19 Cal.Rptr.2d 601] (“even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention”); ABA Model Rule 1.2(c).)

Finally, in all law offices, including this hypothetical VLO, attorneys have a duty to supervise subordinate attorneys, and non-attorney employees or agents. (Rule 3-110 (discussion par. 1); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670] (rejecting contention that attorney’s rules violations were “precipitated by members of his staff”); *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 218 [113 Cal.Rptr.3d 692] (“Although an attorney cannot be held responsible for every detail of office procedure, it is an attorney’s responsibility to supervise the work of his or her staff members.”); see also ABA Model Rule 5.1.) In our hypothetical VLO, supervision can be a challenge if Attorney and her various subordinate attorneys and employees operate out of several different physical locations. Whatever method Attorney chooses to comply with her duty to supervise, Attorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence, notwithstanding any physical separation.

CONCLUSION

The Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon attorneys practicing in a traditional non-VLO. While Attorney may maintain a VLO in the cloud, Attorney may be required to take additional steps to confirm that she is reasonably addressing ethical concerns raised by issues distinct to this type of VLO. Failure by Attorney to comply with her ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher’s Note: Internet resources cited in this opinion were last accessed by staff on May 23, 2012. Copies of these resources are on file with the State Bar’s Office of Professional Competence.]

client gives informed consent); see also *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520 (“limited” appearance of counsel in immigration proceedings prohibited by federal regulations); Cal. Rules of Court, Rules 5.70-5.71 repealed effective January 1, 2013, revised and renumbered as Rule 5.425 adopted effective January 1, 2013 (limited scope representation in family law cases); rule 3-400 (discussion).

Opinion #220. Cyberattack and Data Breach: The Ethics of Prevention and Response

Issued by the Professional Ethics Commission

Date Issued: April 11, 2019

The American Bar Association issued [Formal Opinion No. 483](#) on October 17, 2018, addressing a lawyer's obligations after suffering an electronic data breach or a cyberattack. The Professional Ethics Commission wanted to take this opportunity to recommend the ABA's Opinion to the Maine Bar and to address a Maine lawyer's obligations under the Maine Rules of Professional Conduct both before and after a data breach or cyberattack has occurred.

Question: What are a lawyer's ethical obligations to understand the risks posed by technology, to prevent a cyberattack or data breach, and to respond once one occurs?

Short Answer: A lawyer's professional obligations, of course, are not limited merely to the practice of law. Any lawyer who chooses to use technology in order to provide legal services for clients has an obligation to make sure that technology is serving the clients and not disserving them. That obligation applies both before and after a third party uses the lawyer's technology for their own gains or for other purposes contrary to the interests of the lawyer's clients. The overriding obligation is to know what the technology does, what it does not, and how to use it safely. If, despite the lawyer's reasonable efforts to protect electronic data created and stored in the service of clients, a third party defeats those efforts, the lawyer's obligations are to take reasonable action in order to stop or contain the attack or breach; to investigate and ascertain whether confidential information relating to clients has been, or may have been, compromised; to determine whether the representation of current clients has been, or may have been, significantly impacted or impaired; and to promptly notify current and former clients.

Rules Implicated:

[**M.R. Prof. Conduct 1.1**](#) - Competence

[**M.R. Prof. Conduct 1.3**](#) - Diligence

[**M.R. Prof. Conduct 1.4**](#) - Communications with Clients

[**M.R. Prof. Conduct 1.6**](#) - Confidentiality of Information

[**M.R. Prof. Conduct 1.9**](#) - Duties to Former Clients

[**M.R. Prof. Conduct 1.15**](#) - Safekeeping Property

[**M.R. Prof. Conduct 5.1**](#) - Responsibilities of Partners, Managers, Supervisors

[**M.R. Prof. Conduct 5.3**](#) - Responsibilities regarding Non-Lawyer Assistance

Since this Opinion cannot cover every ethical obligation associated with the expanding role of technology in everyday legal practice, the Commission recommends further reading to include not only the resources cited in this Opinion, but also Commission Opinions No. 207 ("The Ethics of Cloud Computing and Storage"), No. 196 ("The Transmission, Retrieval and Use of Metadata Embedded in Documents"), and No. 195 ("Client Confidences: Communications with clients by unencrypted e-mail").

PROFESSIONAL DUTIES: PREVENTION

Discussion: In the case of a data breach or cyberattack, the standard for measuring ethical conduct is not one of strict liability, but reasonableness. The Commission agrees with the ABA Standing Committee on Ethics and Professional Responsibility that the standard of care "does not require the lawyer to be invulnerable or impenetrable. Rather, the obligation is one of reasonable efforts." ABA Formal Opinion No. 483 at p. 9. Efforts that are deemed to be reasonable, furthermore, do not fit into a neat formula, but are measured based on "a fact-specific approach to business security obligations that requires a 'process' to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in

response to new developments.” JILL D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS, 124 note 11, at p. 73 (2d ed. 2018).

Appropriately, the first Rule of Professional Responsibility is that of competence. “A lawyer shall provide competent representation to a client.” M.R. Prof. Conduct 1.1. While the Rule goes on to talk about “*legal* knowledge, skill, thoroughness, and preparation,” the lawyer’s obligation of competence extends beyond the “*legal*” and into the technological, if the lawyer relies on technology to provide legal services.

The Comments to Rule 1.1 mention that competent handling of a matter involves an analysis not only of the factual and legal elements of the problem, but also of the “methods and procedures meeting the standards of competent practitioners.” M.R. Prof. Conduct 1.1 cmt. (5). Those methods and procedures often include using technology to communicate with clients, to store documents and information, to research the facts, to evaluate documentary evidence, and to produce documents, all of which activities introduce the risk of unauthorized access by third parties. “The required attention and preparation are determined in part by what is at stake....” *Id.*.. The more confidential, sensitive, or valuable the client’s data, the greater the risk of harm to the client if a third party accesses them, and the more attention needs to be paid to the technology employed in representing the client.

Attending to the methods and procedures used to represent a client means that “a lawyer should keep abreast of changes” not only in the law, but also in “its practice.” *Id.*, cmt. (6). Keeping abreast of practice changes means seeking education on evolving technology on a regular basis in order to maintain competence in its use. *Id.* M.R. Prof. Conduct 1.3 similarly requires that a lawyer shall “act with reasonable diligence and promptness in representing a client,” including using technology in the course of representing the client. A lawyer who lacks individual competence to evaluate and employ safeguards to protect client confidences and secrets should seek education from an expert or associate with another lawyer who is competent. See ABA Formal Opinion 477R (May 11, 2017, revised May 22, 2017).

ABA Formal Opinion No. 483 summarizes the lawyer’s responsibility succinctly in noting that the ABA’s counterpart to Maine’s Rule 1.1 requires “lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer’s competency in this regard may be satisfied either through the lawyer’s own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.” ABA Formal Opinion No. 483 at p. 4. However, the Commission does not mean to suggest that it endorses a complete ignorance of technology just because an associated lawyer or staff member knows all about it. A baseline understanding of, and competence in, the technology used in the practice of law must be maintained by every lawyer.

Where the duty competence in technology intersects with the duty to protect the confidentiality of a client’s information, M.R. Prof. Conduct 1.6 becomes relevant to the discussion. “A lawyer shall not reveal a confidence or secret of a client” except under enumerated circumstances typically involving the client’s consent. A “confidence” means information protected by the attorney-client privilege. A “secret” means information, not privileged, that relates to the representation and for which “there is a reasonable prospect that revealing information will adversely affect a material interest of the client” or information that the client has instructed the lawyer not to reveal. There is no client consent to reveal confidences or secrets to a third party who accessed that information without authorization using technology. Consequently, Rule 1.6 may be violated when an electronic data breach or cyberattack occurs and the lawyer did not “act competently to safeguard information relating to the representation against inadvertent unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or are subject to the lawyer’s supervision.” M.R. Prof. Conduct 1.6 cmt. (16).

Of course, the lawyer’s duty to prevent unauthorized access also applies to electronic communications. “When transmitting a communication that includes confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming to the hands of unintended recipients.” *Id.*, cmt. (17). The ABA’s Formal Opinion No. 477R provides a comprehensive discussion of the ethical responsibility incumbent on a lawyer when communicating with a client using the Internet. “A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.” ABA Formal Opinion No. 477R at p. 1. Maine’s Rule 1.6 “does not require that the lawyer use special security measures if the method of communicating affords a reasonable expectation of privacy. Special circumstances, however, warrant special precautions.” M.R. Prof. Conduct 1.6 cmt. (17). The extent to

which a communication is protected by law or by a confidentiality agreement are two factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality and privacy. The sensitivity of the information and its impact on the client, should it fall into wrong hands, is another factor.

Of course, the client's wishes must be followed when it comes to security. "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of the means of communication that would otherwise be prohibited by this Rule." Id. In the case of less protection than Rule 1.6 may require, the informed consent discussion the lawyer has with the client should be thorough and documented. The issue of what constitutes sufficient informed consent is different from client to client and from situation to situation. The Commission recommends that a lawyer who seeks to obtain a client's consent to less protection than the Rules may require consult court and other decisions addressing whether discussions precipitating client consent were sufficient in other instances.

Lawyers should be well-versed in the fact that electronic data can constitute "property" of the client for which Rule 1.15 requires a duty of safekeeping. The duty lawyers owe to protect hardcopy documents and other tangible property given to them by clients applies equally to electronic data. Even when the representation has ended, the lawyer has an obligation to "retain and safeguard such information and data for a minimum of eight (8) years" or longer if the data has intrinsic value. M.R. Prof. Conduct 1.15(f). Generally speaking, "a lawyer should hold property of others with the care required of a professional fiduciary," M.R. Prof. Conduct 1.15 cmt. (1), and that includes electronic data. The Rules extend this fiduciary responsibility beyond the lawyer who is working individually with the client. It includes that lawyer's partners and any attorney who exercises "comparable managerial or authority in the law firm." M.R. Prof. Conduct 5.1(a) & (c)(2). The Rules "impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct." ABA Formal Opinion No. 483 at p. 4. *See, also*, M.R. Prof. Conduct 5.1(a).

A lawyer's responsibility for non-partners who are not diligent in their understanding and use of technology is limited to situations where the lawyer ordered or ratified the conduct with knowledge of it. M.R. Prof. Conduct 5.1(c)(1). When a lawyer has direct supervisory authority over another lawyer, on the other hand, they must "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." M.R. Prof. Conduct 5.1(b). The supervising attorney can be responsible for the other attorney's non-conformance with the Rules if the attorney "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." M.R. Prof. Conduct 5.1(c)(2).

Individual attorneys are not absolved of their ethical duty to abide by the Rules of Professional Conduct by virtue of the fact that another partner, member of management, or other attorney has assumed greater duties with respect to certain requirements of the Rules. It is a violation of Rule 5.1 if an attorney knows precious little about the risk technology poses to a client, uses that technology, and causes the inadvertent revelation of the client's confidences or secrets, even if another attorney in the firm is the foremost expert in the technology. M.R. Prof. Conduct 5.1 cmt. (8); M.R. Prof. Conduct 5.2(a). It is not enough to rely on another attorney in a firm who is fluent in the current state of technology and its risks, limitations, and benefits. All partners, shareholders, and other members of a professional organization of lawyers, in addition to the management designated by those organizations, have an obligation to ensure that there are sufficient internal policies and procedures for conformance with the Rules of Professional Conduct.

Lawyers who are partners, management, and direct supervisors in a law firm have a duty with respect to their non-lawyer staff too. M.R. Prof. Conduct 5.3. Support staff, even if independent contractors, must be given "appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose the information relating to representation of the client, and should be responsible for their work product." M.R. Prof. Conduct 5.3 cmt. (1).

In addition to training lawyers and staff, the Commission agrees with the ABA that "based on lawyers' obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data." ABA Formal Opinion No. 483 at p. 5. The responsibility is two-fold: (1) supervising the use of technology by lawyers and staff to ensure it is consistent with their training and instruction, and (2) monitoring the status of the technology itself in order to reveal attacks and breaches as soon as reasonably detectible.

PROFESSIONAL DUTIES: RESPONSE

In Opinion No. 207, the Commission noted that “[w]hat changes with evolving technology is not the overriding ethical constraints on counsel, but how those constraints are satisfied with respect to new challenges presented by that technology.” The ABA has observed that fulfilling a lawyer’s responsibilities after a data breach or cyberattack requires the lawyer to “understand technologies that are being used to deliver legal services to their clients” in the first place. ABA Formal Opinion No. 483 at p. 4. Once the duty to understand the technology being used has been met, the lawyer’s corollary duty involves how to address a problem with that technology when it arises. The Commission recommends creating a plan to address known or suspected security breaches, including the identification of persons to be notified, in order to assist counsel with their ethical obligations.

If no confidential information relating to a client has been, or may have been, compromised, and the representation of a client has not been significantly impacted or impaired by the cyberattack or data breach, the lawyer’s ethical obligation may be limited to making reasonable efforts to prevent a reoccurrence. For example, the lawyer or the law firm may need to install or update security systems or technology or seek additional training. If the lawyer has an obligation to notify clients at all, it may be limited to the dictates of federal or state law. *See, e.g.,* 10 M.R.S. §§ 1346-1350B (notice of risk to personal data); 45 C.F.R. §§ 164.404-414 (HIPAA breach notification rules); 15 U.S.C. §§ 6801, *et seq.* (disclosure of nonpublic personal information requirements under the Graham-Leach-Bliley Act).

Notification requirements under the Maine Rules of Professional Conduct arise when confidences or secrets are exposed or the breach significantly impairs or impacts the representation of a client. A cyberattack or data breach alone may give rise to a duty to notify clients, depending on the circumstances. Rule 1.3 requires that the lawyer “act with reasonable diligence and promptness in representing a client.” Rule 1.4 provides that the lawyer “keep the client reasonably informed about the status of the matter.” Once the scope of an attack or breach is understood, the lawyer must promptly and accurately make an appropriate disclosure to the client. We agree with the ABA that the Rules “do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means.” ABA Formal Opinion No. 483 at p. 7.

Due to the nature and scope of the cyberattack or data breach, the lawyer may reasonably believe that, in addition to the client, a disclosure should be made to third parties. Disclosure to third parties revealing confidential client information requires an analysis under Rule 1.6 to determine whether informed consent must first be obtained from the client or whether one of the exceptions applies. For example, the lawyer may make a disclosure to law enforcement with or without the informed consent of the client if the lawyer must make the disclosure in order to comply with applicable law. “Although the public interest is usually served by a strict rule requiring lawyers to preserve the confidentiality of confidences and secrets of clients’ information,” M.R. Prof. Conduct 1.6 cmt. (6), that rule is not without its exceptions. It is conceivable that a cyberattack or data breach could expose confidential information that presents a risk to public safety. Under those circumstances, a lawyer may disclose confidential information in order to prevent reasonably certain substantial bodily harm or death.

While the Commission agrees with the analysis contained in ABA Formal Opinion No. 483 concerning notification of a current client, the Commission departs from the ABA with respect to a former client. The ABA reviewed Model Rules 1.9 and 1.16 and concluded that notice to a former client is not required. However, Maine’s Rule 1.9 provides that a “lawyer who has formerly represented a client shall not thereafter: (2) reveal confidences or secrets of a former client except as these Rules would permit or require with respect to a client.” The duty of confidentiality survives the termination of the client-lawyer relationship. M.R. Prof. Conduct 1.6 cmt. (18). Indeed, trust is the “hallmark of the client-lawyer relationship,” *id.*, cmt. (2), whether for a current or a former client. The Commission concludes that a former client is entitled to no less protection and candor than a current client in the case of compromised secrets and confidences. A former client must be timely notified regarding a cyberattack or data breach that has, or may have, exposed the client’s confidences or secrets.

In addition, Rule 1.15(f) requires that “upon termination of representation, a lawyer shall return to the client *or retain and safeguard* in a retrievable format all information and data in the lawyer’s possession to which the client is entitled.” (Emphasis added.) The Commission recently issued an Enduring Ethics Opinion commenting on Commission Opinion No. 187 and clarifying that information and data is entrusted to the attorney for safekeeping for both current and former clients.

Finally, as previously noted in the prevention of cyberattacks or data breaches, M.R. Prof. Conduct Rules 5.1 and 5.3 require a lawyer to take reasonable measures to provide assurance that the conduct of lawyers and non-lawyer assistants in a law firm is compatible with the professional obligations of the lawyer. The ethical obligations of a lawyer that arise

after a cyberattack or data breach, including taking reasonable actions to stop or contain it, investigating the attack or breach, and notifying affected current and former clients are shared by many in the law firm.

Enduring Ethics Opinion

Credits

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#2012-13/04 The Use of Cloud Computing in the Practice of Law

Ethics Committee Advisory Opinion #2012-13/04

By the NHBA Ethics Committee

This opinion was submitted for publication by the NHBA Board of Governors at its February 21, 2013 meeting.

RULE REFERENCES:

Rule 1.8(c)

Rule 1.0(e)

Rule 1.1

Rule 1.6

Rule 1.15

Rule 2.1

Rule 5.3

SUBJECTS:

Informed Consent

Competence

Confidentiality of Information

Safekeeping Property

Responsibilities Regarding Nonlawyer Assistants

ANNOTATION

The internet has changed the practice of law in many ways, including how data is stored and accessed. “Cloud computing” can be an economical and efficient way to store and use data. However, a lawyer who uses cloud computing must be aware of its effect on the lawyer’s professional responsibilities. The NHBA Ethics Committee adopts the consensus among states that a lawyer may use cloud computing consistent with his or her ethical obligations, as long as the lawyer takes reasonable steps to ensure that sensitive client information remains confidential.

INTRODUCTION

As technology becomes more pervasive in the practice of law, lawyers encounter cloud computing. Cloud computing is the storage of data and the ability to run applications on remote servers over the Internet, rather than on a desktop computer or a server in a law office. Cloud computing is already a part of many devices and services which lawyers use, including smart phones, stored emails, and online data storage services such as Google Docs, Microsoft Office 365, and DropBox.¹

Cloud computing offers many benefits. Typically, it is purchased on a subscription basis, usually for a monthly fee, which reduces upfront licensing costs.² The provider takes over the responsibility for keeping up with new technology and software updates, while the lawyer enjoys access to all the data stored in the cloud from any location which has Internet access. Increased mobility and accessibility, however, may come with the loss of immediate control over the stored or transmitted data. Like any middleman, the provider of cloud computing adds a layer of risk between the lawyer and sensitive client information.

A lawyer who uses cloud computing should therefore be aware of its effect on the lawyer's professional responsibilities. The consensus among states is that a lawyer may use cloud computing consistent with his or her ethical obligations. To date, every state bar association that has issued an opinion on using cloud computing has said that it is permissible, as long as the lawyer takes reasonable steps to ensure that sensitive client information remains confidential.³ Several rules are implicated by the use of cloud computing. This opinion discusses cloud computing, but not emails. The two are separate and raise different issues. As explained in the Pennsylvania Bar Association's opinion on cloud computing, email presents unique risks and challenges which must be addressed and mitigated separately: these include "confidentiality, authenticity, integrity, misdirection or forwarding, permanence (wanted e-mail may become lost and unwanted e-mail may remain accessible even if deleted), and malware."⁴

Rule 1.1. Competence

A lawyer must provide competent legal representation, and minimal competence requires a lawyer to perform the techniques of practice with skill. Rule 1.1 (b) (2). Techniques of practice include the way a client's information and the lawyer's work product are maintained, stored, and organized.⁵ As the revised Comment [6] to the ABA Model Rule 1.1 states, a lawyer must "keep abreast of changes in the law and its practice, including the benefits or risks associated with relevant technology."⁶ The comment was revised recently in response to "the sometimes bewildering pace of technological change," including cloud computing.⁷ A competent lawyer using cloud computing must understand and guard against the risks inherent in it.

There is no hard and fast rule as to what a lawyer must do with respect to each client when using cloud computing. The facts and circumstances of each case, including the type and sensitivity of client information, will dictate what reasonable protective measures a lawyer must take when using cloud computing. The same rationale applies to the transmission of metadata, as discussed in NH Bar Ethics Op. 2008-2009/04 on the disclosure, review, and use of metadata in electronic materials.

Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes.⁸

Rule 1.6. Confidentiality of Information and Rule 1.0 (e). Informed Consent

Protecting client confidences is one of the most significant obligations imposed upon lawyers and is the core of the attorney-client relationship. Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to the representation of a client[.]". Confidentiality applies not only to matters communicated in confidence by the client, but also to all information related to the representation, whatever its source. See 2004 ABA Model Rule Comment [3]. A lawyer may reveal such information if the client gives informed consent or if the disclosure is impliedly authorized.⁹

As cloud computing comes into wider use, storing and transmitting information in the cloud may be deemed an impliedly authorized disclosure to the provider, so long as the lawyer takes reasonable steps to ensure that the provider of cloud computing services has adequate safeguards. Recent revisions to Comment [16] to the ABA Model Rule 1.6 note that "if the lawyer has made reasonable efforts to prevent the access or disclosure" of confidential information, then the unauthorized access to, or the inadvertent or unauthorized disclosure of, client information does not constitute a violation of a lawyer's duty of confidentiality.¹⁰

The comment sets forth a number of "[f]actors to be considered in determining the reasonableness of the lawyer's efforts" to prevent such unauthorized access or disclosure. These factors "include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."¹¹

Not all information is alike. For example, where highly sensitive data is involved, it may become necessary to inform the client of the lawyer's use of cloud computing and to obtain the client's informed consent. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0

(e). The material risks and reasonably available alternatives will of course vary by client, scope of representation, the sensitivity of the stored or transmitted information, provider, and other considerations.¹² But if the information is highly sensitive, consent of the client to use cloud computing may be necessary.

Rule 1.15. Safekeeping Property

“Property of clients or third persons which a lawyer is holding in the lawyer’s possession,” other than funds, “shall be identified as property of the client, promptly upon receipt, and safeguarded.” Rule 1.15(a). The New Hampshire Supreme Court has held that the contents of a client’s file belong to the client and that, upon request, an attorney must provide the client with the file. *Averill v. Cox*, 145 N.H. 328, 339 (2000). Electronic communications are also part of the client’s file. NH Bar Ethics Op. 2005-06/3.

Additionally, Rule 1.16(d) of the New Hampshire Rules of Professional Conduct states that, as a condition to termination of representation, a lawyer shall “surrender[] papers and property to which the client is entitled” and only “retain papers relating to the client to the extent permitted by law.” In the context of cloud computing, the lawyer must take steps to safeguard data stored in and transmitted through the cloud. What safeguards are appropriate depends on the nature and sensitivity of the data. More particularly, a lawyer must take reasonable steps to ensure that electronic data stored in the cloud is secure and available while representing a client. The data must be returned to the client and deleted from the cloud after representation is concluded or when the lawyer decides to no longer to preserve the file: in either case, the lawyer must know at all times where sensitive client information is stored, be it in the cloud or elsewhere.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

Cloud computing is a form of outsourcing the storage and transmission of data. What was once a matter of documents and file cabinets is now online.¹³ This means that a provider of cloud computing services is, in effect, a nonlawyer retained by a lawyer. As a result, the lawyer must make reasonable efforts to ensure that the provider understands and is capable of complying with its obligation to act in a manner compatible with the lawyer’s own professional responsibilities. N.H. Rule 5.3 (a).

The same rationale applies when, instead of directly engaging a cloud computing provider, a lawyer hires an intermediary, such as an information technology professional or other support staff, to find and engage a provider. As noted in NH Bar Ethics Op. 2011-12/05, “Lawyers regularly engage companies to provide support services. Banks hold client funds; telephone companies carry privileged communications; credit card companies facilitate the payment of bills; computer consultants maintain necessary technology.” When engaging a cloud computing provider or an intermediary who engages such a provider, the responsibility rests with the lawyer to ensure that the work is performed in a manner consistent with the lawyer’s professional duties. Rule 5.3 (a). Additionally, under Rule 2.1, a lawyer must exercise independent professional judgment in representing a client and cannot hide behind a hired intermediary and ignore how client information is stored in or transmitted through the cloud.

Thus, a lawyer who uses cloud computing must take reasonable steps to ensure that sensitive client information remains confidential and secure.¹⁴ What these steps are depends on the sensitivity of the transmitted information.¹⁵ It bears repeating that a lawyer’s duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology. When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard. As one ethics committee observed, “Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.”¹⁶

Which providers of cloud computing may be used and what security measures the provider must take are beyond the scope of this opinion. This opinion addresses instead what an attorney may consider when storing data on or transmitting data through the cloud. For recommendations on which cloud computing services to use, see American Bar Association, “Delivering Value and Efficiency with Technology: Effectively Collecting and Managing Data in a Virtual World,” p. 12.¹⁷ For more information on which factors to consider when choosing a provider of cloud computing services, see American Bar Association, “Your ABA: Evaluating Cloud-Computing Providers.”¹⁸

Cloud Computing Considerations:

The issues which an attorney must consider before using a cloud computing service include the following:

1. Is the provider of cloud computing services a reputable organization?
2. Does the provider offer robust security measures? Such measures¹⁹ must include at a minimum password protections or other verification procedures limiting access to the data; safeguards such as data back-up and restoration, a

firewall, or encryption; periodic audits by third parties of the provider's security; and notification procedures in case of a breach.²⁰

3. Is the data stored in a format that renders it retrievable as well as secure? Is it stored in a proprietary format²¹ and is it promptly and reasonably retrievable by the lawyer in a format acceptable to the client? See also PA Bar Ethics Op. 2011-200, p. 9. It bears repeating that, if a client requests a copy of her file, the lawyer has an obligation to provide all files pertinent to representation of that client. NH Bar Ethics Op. 2005-06/03; Averill, 145 N.H. at 339-40.
4. Does the provider commingle data belonging to different clients and/or different practitioners such that retrieval may result in inadvertent disclosure?²²
5. Do the terms of service state that the provider merely holds a license to the stored data, as for example Google's do?²³ Some providers routinely inform those accessing their service that it is the provider—not the user—that “owns” the data.²⁴ If the provider owns the stored data, the lawyer may run afoul of Rule 1.15, which requires that the client's property “be identified as property of the client.” To comply with Rule 1.15, the provider may not “own” the data stored in the cloud.
6. Does the provider have an enforceable obligation to keep the data confidential?
7. Where are the provider's servers located and what are the privacy laws in effect at that location regarding unauthorized access, retrieval, and destruction of compromised data?²⁵ If the servers are located in a foreign country, do the privacy laws of that country reasonably mirror those of the United States? If the servers are relocated, will the provider notify the lawyer in advance?
8. Will the provider retain the data – and, if so, for how long – when the representation ends or the agreement between the lawyer and provider is terminated for another reason? The data must not be destroyed immediately and without notice or compromised in case of nonpayment.²⁶
9. Do the terms of service obligate the provider to warn the lawyer if information is being subpoenaed by a third party, where the law permits such notice? Such a provision may be especially timely given that the Senate Judiciary Committee recently considered, but rejected legislation which would have expanded law enforcement agencies' access to privately stored data.²⁷
10. What is the provider's disaster recovery plan with respect stored data? Is a copy of the digital data stored on-site?²⁸

The New Hampshire Ethics Committee concurs with the consensus among states that a lawyer may use cloud computing in a manner consistent with his or her ethical duties by taking reasonable steps to protect client data. Granted, a lawyer may not find a provider of cloud computing services whose terms of service address all of the issues addressed above, but it bears repeating, that while a lawyer need not become an expert in data storage, a lawyer must remain aware of how and where data is stored and what the service agreement says.²⁹ Although the New Hampshire Rules of Professional Conduct do not impose a strict liability standard, the duties of confidentiality and competence are ongoing and not delegable. The requirement of competence means that even when storing data in the cloud, a lawyer must take reasonable steps to protect client information and cannot allow the storage and retrieval of data to become nebulous.

ENDNOTES:

[1] American Bar Association, [Cloud Computing/Software as a Service for Lawyers](#) (last accessed on October 23, 2012). See also PA Bar Ethics Op. 2011-200 and Robinson, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 Geo. L.J. 1195, 1199-1200 (2010).

[2] PA Bar Ethics Op. 2011-200, p. 1.

[3] AL Bar Ethics Op. 2010-02; AZ Bar Ethics Op. 09-04 (2009); CA Bar Ethics Op. 2010-179, p. 3; FL Bar Ethics Op. 06-1 (2006); IA Bar Ethics Op. 11-01 (2011), p. 2; IL Bar Ethics Op. 10-01 (2009), p. 3; ME Bar Ethics Op. 194 (2008); MA Bar Ethics Op. 05-04 (2005); NV Bar Ethics Op. 33 (2006); NJ Bar Ethics Op. 107 (2006); NY Bar Ethics Op. 842 (2010); NC Bar Ethics Op. 6 (2011); ND Bar Ethics Op. 99-03 (1999), p. 3; OR Bar Ethics Op. 2011-188; PA Bar Ethics Op. 2011-200, p. 1; VT Bar Ethics Op. 2003-03; VA Bar Ethics Op. 1818 (2005).

[4] PA Bar Ethics Op. 2011-200, p. 12.

[5] PA Bar Ethics Op. 2011-200, p. 4.

[6] In 2012, the ABA revised Comment [6] to Rule 1.1. American Bar Association Commission on Ethics 20/20, Report to the House of Delegates, Resolution, 105A Revised, p. 3 www.americanbar.org (last accessed December 27, 2012). On behalf

of the New Hampshire Supreme Court's Rules Committee, the Bar's Ethics Committee is currently reviewing the revision to Comment [6]. The proposed revision has not yet been recommended to the Rules Committee or adopted by the Supreme Court. [New Hampshire Rules of Professional Conduct](#) (last accessed December 27, 2012).

[7] American Bar Association Commission on Ethics 20/20, Introduction and Overview, p. 8.

[8] For example, recent Senate amendments to H.R. 2471 (2012) would have amended the Electronic Communications Privacy Act to permit warrantless searches of emails by a number of federal agencies. The amendments were introduced and then withdrawn in the face of widespread criticism, but such legislative uncertainties highlight the need to be aware of changes in technology regulation.

[9] See NH Bar Ethics Op. 2008-2009/04.

[10] American Bar Association Commission on Ethics 20/20, Report to the House of Delegates, Resolution, 105A Revised, p. 5. On behalf of the New Hampshire Supreme Court's Rules Committee, the Bar's Ethics Committee is currently reviewing the revision to Comment [16]. The proposed revision has not yet been recommended to the Rules Committee or adopted by the Supreme Court. [New Hampshire Rules of Professional Conduct](#) (last accessed December 27, 2012).

[11] *Id.*

[12] PA Bar Ethics Op. 2011-200, p. 7; IA Bar Ethics Op. 11-01 (2001), p. 2.

[13] PA Bar Ethics Op. 2011-200, p. 7.

[14] NH Bar Ethics Op. 2008-2009/4.

[15] IA Bar Ethics Op. 11-01 (2001), p. 2.

[16] N.J. Advisory Committee on Professional Ethics Op. No. 701 (electronic filing systems).

[17] [www.americanbar.org](#) (members of the New Hampshire Bar may contact the Ethics Committee regarding access to the article); see also American Bar Association, [eLawyering in an Age of Accelerating Technology](#) (last accessed January 29, 2013).

[18] [www.americanbar.org](#) (last accessed on December 3, 2012).

[19] PA Bar Ethics Op. 2011-200, pp. 8-9.

[20] NH law, RSA 359-C:20 (2009), already requires any person doing business in New Hampshire to notify (or cooperate in notifying) those individuals who are affected by any security breach of unencrypted computerized data that contains personal information. *See, generally*, Gallagher, Callahan & Gartrell, [New Hampshire Mandates Data Breach Notification](#), August 2006, (last accessed on October 23, 2012).

[21] Proprietary formats can only be opened by certain programs or applications. For example, Microsoft Word, which used to save word processing documents in the proprietary .DOC format now saves documents in the .DOCX format, which is supported by multiple applications. See also PA Bar Ethics Op. 2011-200, p. 9.

[22] American Bar Association, "Cloud Computin': A Storm is A-brewin'," p. 26 (members of the New Hampshire Bar may contact the Ethics Committee regarding access to the article).

[23] [Google Terms of Service](#) (last modified March 1, 2012) (last accessed on December 4, 2012); see also MA Bar Ethics Op. 2012-03.

[24] IA Bar Ethics Op. 11-01 (2001), p. 3.

[25] PA Bar Ethics Op. 2011-200, p. 6.

[26] IA Bar Ethics Op. 11-01 (2001), p. 3.

[27] CNet, "[Leahy scuttles his warrantless e-mail surveillance bill](#)," November 20, 2012, (last accessed December 27, 2012); see also CNet, "[Senate bill rewrite lets feds read your e-mail without warrants](#)," November 20, 2012, (last accessed

December 27, 2012).

[28] PA Bar Ethics Op. 2011-200, p. 10.

[29] PA Bar Ethics Op. 2011-200, p. 13.

A Note About Ethics Materials from the NH Bar Association Ethics Committee

Care should be exercised in determining which version of a given Rule applies as of a given date, and the extent to which the interpretation of a given opinion or article will apply to such version. Many interpretations of New Hampshire ethics law (including many ethics opinions, practical ethics articles, and ethics corner articles issued by the NHBA Ethics Committee) have been published under the prior version of the Rules of Professional Conduct or predecessor rules. [Read more.](#)

General Ethics Guidance

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The Rules of Professional Conduct constitute the disciplinary standard for New Hampshire lawyers. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct. [View the rules.](#)



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FORMAL OPINION NO 2011-188
[REVISED 2015]

**Information Relating to the Representation of a Client:
Third-Party Electronic Storage of Client Materials**

Facts:

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

Question:

May Lawyer do so?

Conclusion:

Yes, qualified.

Discussion:

With certain limited exceptions, the Oregon Rules of Professional Conduct require a lawyer to keep client information confidential. *See* Oregon RPC 1.6.¹ In addition, Oregon RPC 5.3 provides:

¹ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

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With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a nonlawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyer may store client materials on a third-party server as long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation.² To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.³ See Oregon RPC 1.6(c). Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry

² Some call the factual scenario presented above "cloud computing." See Richard Acello, *Get Your Head in the Cloud*, 96-Apr ABA Journal 28, 28–29 (April 2010) (providing that "cloud computing" is a "sophisticated form of remote electronic data storage on the Internet" and "[u]nlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor").

³ In 2014, leaked documents indicated that several intelligence agencies had the capability of obtaining electronic data and monitoring electronic communications between, among others, attorneys and clients through highly sophisticated methods beyond the capabilities of the general public. Oregon RPC 1.6(c) would not require an attorney to protect a client's data against this type of advanced interception, as it only requires an attorney to take reasonable steps to secure client data. Nevertheless, an attorney may want to take additional security precautions if he or she handles clients or matters that involve national security interests.

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standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon Rules of Professional Conduct. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties.⁴

Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology "available at the time to secure data against unintentional disclosure."⁵ As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time.⁶ Accordingly, Lawyer may be required to

⁴ See OSB Formal Ethics Op No 2005-141 (rev 2015), which provides:

As long as Law Firm makes reasonable efforts to ensure that the recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed conduct is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately.

See also OSB Formal Ethics Op No 2005-129 (rev 2014); OSB Formal Ethics Op No 2005-44.

⁵ See New Jersey Ethics Op No 701 (discussing electronic storage and access to files).

⁶ See Arizona Ethics Op No 09-04 (discussing confidentiality, maintaining client files, electronic storage, and the Internet).

reevaluate the protective measures used by the third-party vendor to safeguard the client materials.⁷

Approved by Board of Governors, April 2015.

⁷ A lawyer's obligation in the event of a breach of security of confidential materials is outside the scope of this opinion.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 (confidentiality), § 13.3-3 (employment of nonlawyers), § 16.4-5(c) (third-party electronic storage of client materials) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 59–60 (2000) (supplemented periodically).

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2014-3**

CLOUD COMPUTING & THE PRACTICE OF LAW

QUESTION PRESENTED

Is it ethically permissible for a lawyer to store files in a cloud-based system and, if so, under what circumstances?

CONCLUSION

A lawyer may use cloud computing for file storage as long as he or she takes reasonable steps to ensure that sensitive client information remains confidential and safeguarded. With the issuance of this opinion, Alaska joins the community of bar associations concluding that cloud computing is permissible so long as reasonable steps to protect the client are taken.¹

INTRODUCTION

Cloud computing is the practice of using a network of remote servers to store, manage, and process data, rather than a server in a law office or a personal computer. Typically it is purchased on a subscription basis, usually for a monthly fee. The provider takes over the responsibility for keeping up with new technology and software updates, while the lawyer enjoys access to all the data stored in the cloud from any location with Internet access. The delegation of this file storage service to the provider of cloud computing, however, adds a layer of risk between the lawyer and sensitive client information. Because the lawyer's duties of confidentiality and competence are ongoing and not delegable, a lawyer must take reasonable steps to protect client information when storing data in the cloud.

RELEVANT AUTHORITIES

Numerous provisions from the Alaska Rules of Professional Conduct are

¹ This Ethics Opinion draws heavily from a comprehensive ethics opinion on the matter issued by the New Hampshire Bar Association. See NH Bar Ethics Op. 2012-13/4. See also AL Bar Ethics Op. 2010-02; CA Bar Ethics Op. 2010-179, p.3; FL Bar Ethics Op. 06-1 (2006); IA Bar Ethics Op. 11-01 (2011), p.2; IL Bar Ethics Op. 10-01 (2009), p.3; ME Bar Ethics Op. 194 (2008); MA Bar Ethics Op. 05-04 (2005); NV Bar Ethics Op. 33 (2006); NJ Bar Ethics Op. 107 (2006); NY Bar Ethics Op. 842 (2010); NC Bar Ethics Op. 6 (2011); ND Bar Ethics Op. 99-03 (1999), p.3; OR Bar Ethics Op. 2011-188; PA Bar Ethics Op. 2011-200, p.1; VT Bar Ethics Op. 2003-03; VA Bar Ethics Op. 1818 (2005).

relevant to the analysis of whether cloud computing is ethical in the practice of law.

Rule 1.1 mandates a lawyer provide competent representation, which requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Comment 6 requires lawyers to keep abreast of changes in the law and its practice.

Rule 1.6 addresses confidentiality of information. It requires that a “lawyer shall not reveal a client’s confidence or secret[.]”² This provision is of paramount importance in the attorney-client relationship. The Rule further specifies that a “lawyer must act competently to safeguard a client’s confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer’s supervision.”³

Rule 1.15 requires a lawyer hold property of others with the care required of a professional fiduciary. The Rule provides that “property of clients or third persons that is in a lawyer’s possession,” other than funds, “shall be identified as the client’s or the third person’s and appropriately safeguarded.”⁴ Additionally, Rule 1.16(d) requires that upon termination of representation a lawyer must take steps to the extent reasonably practicable to protect a client’s interest, including returning papers and property and also retaining certain papers relating to the client and the representation.

Finally, Rule 5.3 addresses the lawyer’s responsibilities with respect to nonlawyer assistants. Cloud computing is a form of outsourcing that falls within the parameters of Rule 5.3. A lawyer must therefore make reasonable efforts to ensure that the provider will act in a manner compatible with the lawyer’s own professional responsibilities.⁵

ANALYSIS

A lawyer engaged in cloud computing must have a basic understanding of the technology used and must keep abreast of changes in the technology.⁶ A

² Rule 1.6(a).

³ Rule 1.6(c).

⁴ Rule 1.15(a).

⁵ Rule 5.3(a) (requiring the lawyer to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer).

⁶ Commentary to Rule 1.1 (Competence) of the Model Rules of Professional Conduct was recently amended to state: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the

competent lawyer must guard against risks inherent in the practice of cloud computing. Technological changes, the regulatory framework, and privacy laws are all matters requiring the lawyer's attention.

A lawyer must take reasonable steps to ensure that the provider of cloud computing services has adequate safeguards to protect client confidences. Prior to engaging a cloud computing service, a lawyer should determine whether the provider of the services is a reputable organization. The lawyer should specifically consider whether the provider offers robust security measures. Appropriate security measures could include password protections or other verification procedures limiting access to the data, safeguards such as data backup and restoration, a firewall or encryption, periodic audits by third parties of the provider's security, and notification procedures in case of a breach.⁷

Reasonable steps must be taken to safeguard data stored in and transmitted through the cloud. What safeguards are appropriate depends upon the nature and sensitivity of the data. During the course of representation, a lawyer must take reasonable steps to ensure that the electronic data stored in the cloud are secure and available while maintaining that information on the client's behalf. If, after the representation is concluded and the decision is made not to preserve the file, then all reasonable efforts should be made to have the data deleted from the cloud as well. Otherwise, the lawyer's duty to take reasonable steps to protect the security and confidentiality of that data is ongoing. The lawyer must know at all times where sensitive client information is stored, be it in the cloud or elsewhere.

We concur with the consensus among states' ethics committees that a lawyer may use cloud computing in a manner consistent with his or her ethical duties by taking reasonable steps to protect client data. While a lawyer need not become an expert in data storage, a lawyer must remain aware of how and where data are stored and what the service agreement says. Duties of confidentiality and competence are ongoing and not delegable. A lawyer must therefore take reasonable steps to protect client information when storing data in the cloud. The requirement of competence means that even when storing data in the cloud, a lawyer must take reasonable steps to protect client information and cannot allow the storage and retrieval of data to become nebulous.

lawyer is subject." See Model Rules of Professional Conduct 1.1, Comment 8 (emphasis added).

⁷ Where highly sensitive data are involved, it may behoove a lawyer to inform the client of the lawyer's use of cloud computing and to obtain the client's informed consent. Note that the lawyer must notify the impacted client if the lawyer learns that the provider's security was breached and the client's confidence or secret was revealed. See Rule 5.3(d).

Approved by the Alaska Bar Association Ethics Committee on April 3, 2014.

Adopted by the Board of Governors on May 5, 2014.

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Opinion #207. The Ethics of Cloud Computing and Storage

Issued by the Professional Ethics Commission

Date Issued: January 8, 2013

Question

Is it ethical for Maine attorneys to use cloud computing and storage for client matters?

Answer

Yes, assuming safeguards are in place to ensure that the attorney's use of this technology does not result in the violation of any of the attorney's obligations under the various Maine Rules of Professional Conduct. While the technology is perpetually renewing and reinventing itself, cloud computing triggers the same ethical obligations that lawyers always have owed to their clients. With the expansion of remote data storage and processing services comes the need to observe the same, previously established ethical obligations attorneys always have followed in caring for client information.

So-called "cloud computing" includes any software and/or hardware package that allows a lawyer to transmit, manipulate, store, and retrieve data off the lawyer's premises – in the proverbial clouds – rather than on the hard drive seated at the lawyer's office. It includes platforms like web-based e-mail, online data storage, software-as-a-service ("SaaS"), platform-as-a-service ("PaaS"), infrastructure-as-a-service ("IaaS"), Amazon Elastic Cloud Compute ("Amazon EC2"), and Google Docs, to name but a few examples.

The American Bar Association ("ABA") canvassed the decisions of state ethics bodies across the nation and listed Maine as one of 13 states to have considered and formally approved attorney use of cloud computing and storage.

<http://www.americanbar.org/groups/departmentoffices/legaltechnologyresources/resources/chartsfyis/cloud-ethics-chart.html> December 21, 2012. The ABA cited Opinion #194 and noted that the Maine Professional Ethics Commission did not squarely address the cloud in that Opinion, but addressed issues similar enough to cover the ethical implications of using cloud computing and storage too. In a recent "Enduring Ethics Opinion" email, the Commission noted that Opinion #194 remained a proper opinion under the Maine Rules of Professional Conduct, even though it was rendered under the former Bar Rules. The Commission further observed that the conclusion reached in Opinion #194 translates to cloud computing and storage, just as the ABA had suggested. However, at the request of Maine attorneys, the Commission has now elected to remove any uncertainty at this point by squarely and formally addressing the issue.

There is another Opinion of the Maine Professional Ethics Commission that should be considered as a precursor to Opinion #194 and this Opinion. Prompted by the increasing shift from paper hardcopies to electronic data, the Commission issued Opinion #183 on January 28, 2004. The Opinion answered the question whether an attorney is obligated to keep a paper copy of correspondence if that correspondence is converted to an electronic format and stored on a computer. Analyzing then applicable Maine Bar Rules 3.5(a) and 3.6(a) & (e) and Opinions #74 & #120, the Commission concluded that the ethics rules did not require the attorney to retain a paper copy in addition to the electronic one, but only if certain conditions are met. Those conditions generally ensure that the electronic format does not make the correspondence any less accessible to the client than a paper document. Note, however, that M. R. Prof. Conduct 1.15(f) states that there is an obligation now to retain and safeguard client records that have "intrinsic value in the particular version, such as original signed documents," rather than destroy them after conversion to an electronic format.

Four years later, in 2008, the Commission addressed in Opinion #194 the ethics of transmitting electronic recordings – presumably the lawyer's dictated correspondence, briefs and the like about the client's confidential information – for off-site transcription and transferring client files in the form of the electronic data off-site for backup storage. The Commission relied on then applicable Maine Bar Rules 3.6(a) & (h) and 3.13(c), as well as Opinions #74 & #134, to conclude that "with appropriate safeguards, an attorney may utilize transcription and computer server backup services

remote from both the attorney's direct control or supervision without violating the attorney's ethical obligation to maintain client confidentiality." The 2008 version of Maine Bar Rule 3.6(a) & (h) can be found in current Maine Professional Conduct Rules 1.1 and 1.6, and former Maine Bar Rule 3.13(c) translates to current Maine Professional Conduct Rule 5.3.

What changes with evolving technology like cloud computing is not the overriding ethical constraints on counsel, but how those constraints are satisfied with respect to new challenges presented by that technology. Commentators on the ethics implications of cloud computing and the Maine Rules of Professional Conduct themselves reveal several rules implicated by the use of this technology:

- Rule 1.1 (competence)
- Rule 1.3 (diligence)
- Rule 1.4 (communications with client)
- Rule 1.6 (confidentiality)
- Rule 1.15 (safeguarding client property)
- Rule 1.16 (terminating representation)
- Rule 1.17 (sale of practice)
- Rule 5.3 (supervision of third parties)

Ethics commissions in other jurisdictions and legal scholars have written extensively on the nuts and bolts of acting ethically with cloud computing, including providing checklists for practitioners. *See, e.g.*, Pennsylvania Formal Opinion 2011-200; North Carolina 2011 Formal Opinion #6 (January 27, 2012); The American Bar Association, "Ethical Challenges on the Horizon: Confidentiality, Competence, and Cloud Computing," 2012. For the purposes of this Opinion, some of the more salient safeguards Maine counsel should adopt in an effort to satisfy the Maine Rules of Professional Conduct in connection with cloud usage include several internal policies and procedures:

1. Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;
2. Installing a firewall to limit access to the firm's network;
3. Limiting information that is provided to others to what is required, needed, or requested;
4. Avoiding inadvertent disclosure of information;
5. Verifying the identity of individuals to whom the attorney provides confidential information;
6. Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;
7. Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;
8. Implementing electronic audit trail procedures to monitor who is accessing the data;
9. Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data; and
10. Educating and training employees of the firm who use cloud computing to abide by all end-user security measures, including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

See Pennsylvania Formal Opinion 2011-200.

In dealing with third-party vendors of cloud computing services or hardware, additional safeguards Maine counsel should adopt include the following considerations made relevant by the Maine Rules of Professional Conduct.

1. Inclusion in the [cloud computing] . . . vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the [cloud computing] . . . vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer's professional responsibilities.
2. If the lawyer terminates use of the [cloud computing] . . . product, the [cloud computing] . . . vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code.
3. The [cloud computing] . . . vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.
4. Careful review of the terms of the law firm's user or license agreement with the [cloud computing] . . . vendor including the security policy.
5. Evaluation of the [cloud computing] . . . vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.
6. Evaluation of the extent to which the [cloud computing] . . . vendor backs up hosted data.

North Carolina 2011 Formal Opinion #6 (January 27, 2012)(internal citations omitted).

More specifically, the attorney should ensure that the vendor of cloud computing services or hardware

1. Explicitly agrees that it has no ownership or security interest in the data;
2. Has an enforceable obligation to preserve security;
3. Will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
4. Has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing;
5. Provides the firm with the right to audit the provider's security procedures and to obtain copies of any security audits performed;
6. Will host the firm's data only within a specified geographic area. If the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Maine;
7. Provides the ability for the law firm, on demand, to get data from the vendor's or third-party data hosting company's servers for the firm's own use or for in-house backup.

See Pennsylvania Formal Opinion 2011-200.

These lists are not intended to be exhaustive or to convey a "safe harbor" for counsel in all instances of cloud computing. The proprietary cloud options available and the dynamic nature of the technology make it impossible to list criteria that apply to all situations for all time. The North Carolina Ethics Committee aptly articulated the measure of an attorney's appropriately discharging all professional ethical duties owed to the client while using cloud technologies:

[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality.

In light of the above, the Ethics Committee concludes that a law firm may use [cloud computing] . . . if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [cloud computing] . . . that the lawyer is required to apply when representing clients.

North Carolina 2011 Formal Opinion #6 (January 27, 2012).

Furthermore, the reasonable care standard for ethical conduct requires attorneys' periodic education on computer technology as it changes and as it is challenged by and reacts to additional indirect factors such as third party hackers or technical failures.

Enduring Ethics Opinion

Credits

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GALLAHER v. COLVILLE CONFEDERATED TRIBE, 14 CCAR 11 (Colville Confederated 11/09/2018)

[1] Colville Confederated Tribes Court of Appeals

[2] Case No. AP18-005, 7 CTCR 23

[3] 14 CCAR 11, 2018.NACC.000003< <http://www.versuslaw.com>>

[4] November 9, 2018

[5] **MARIAH GALLAHER, APPELLANT,
VS.
COLVILLE CONFEDERATED TRIBES, APPELLEE.**

[6] Trial Court Case No. CR-2017-40039

[7] J. Manon, Attorney, for the Appellant.

[8] W. Meyring, Office of Prosecuting Attorney, for the Appellee.

[9] The opinion of the court was delivered by: Taylor, J.

[10] Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Michael Taylor

[11] FACTS

[12] Appellant was charged and went to trial on three counts of prohibited acts – one count of possession of methamphetamine and two counts of possession of drug paraphernalia. The charges were the result of two separate incidents which Appellant's location and person were searched.

[13] The Colville Tribal Office of Public Defense was appointed to represent the Appellant. Appellant was tried by a jury and convicted on all three counts. Prior to trial Appellant, for various reasons, was incarcerated for a total of eighty days. Appellant was sentenced to jail for the time already served and a year probation with one year of jail time suspended on compliance with probation conditions set by the Court.

[14] Prior to trial, defense counsel filed a petition for a writ of Habeas Corpus and an interlocutory appeal and motions attempting, on several grounds, to obtain dismissal of all the charges against Appellant. The Court denied all the motions and the Appeal was dismissed by agreement. Shortly before sentencing, the prosecution informed the Court that prior to trial the public defender representing Appellant had been employed as an associate judge of the Colville Tribal Court. During a term as associate judge, defense counsel presided over Appellant's case, reviewing the complaint and issuing a summons. After being informed of this circumstance, the Trial Court made no inquiry into the effect of a conflict, granted the Prosecution motion to disqualify defense, and submitted the sentencing order to defense counsel for signature.

[15] Shortly thereafter new counsel was appointed for Appellant who filed this Appeal presenting the following grounds for reversing the convictions and/or requesting a new trial.

[16] 1. The Trial Court erred by failing to grant Appellant's motion for judgment of acquittal (or directed verdict) challenging the definition of the items seized from on or near Appellant as drug paraphernalia and holding that the methamphetamine found in the home in which Appellant was found as a guest was in her actual or constructive possession.

- [17] 2. The appointed defense counsel was ineffective and Appellant was prejudiced.
 - [18] 3. Appellant was denied her right to be represented by conflict free defense counsel under the Colville Civil Rights Act, CTC § 1-5 and the Indian Civil Rights Act § 25 U.S.C. 1302 because defense counsel acted in this case as both trial judge and defense counsel without the informed consent of Appellant in violation of Washington Rules of Professional Conduct 1.12.
- [19] STANDARD OF REVIEW
- [20] Application of the Rules of Professional Conduct is a question of law. Questions of law are reviewed de novo. CCT v. Naff, 2 CTCR 08, 2 CCAR 50 (1995).
- [21] HOLDING
- [22] We find that the argument regarding conflicted counsel presented by Appellant has merit and is sufficient for us to reverse the conviction of Appellant and return this matter to the Trial Court for a new trial. In doing so we are well apprised of the reluctance of this Court to interfere with the deliberations of a jury. However, in circumstances like this one where the law and the rights of a defendant have not been properly protected, we find it necessary to do so.
- [23] Conflicted Defense Counsel
- [24] It is uncontested that defense counsel in this case acted both as the trial judge and defense counsel. The issue is whether the circumstances in this case require reversal of the convictions, or allow them to stand. We recite a list of potential reasons for each direction.
- [25] 1. Circumstances Allowing the Convictions to Stand
- [26] a. It is argued that the Colville Tribes has no rule prohibiting the trial judge in a criminal case from becoming a defense counsel in the same case.
- [27] b. It is argued that defense counsel in this case acted diligently to provide a defense to Appellant.
- [28] c. It is argued that evidence of an actual conflict must be provided.
- [29] d. It is argued that Appellant cannot provide evidence of prejudice to her by the judge/counsel circumstance.
- [30] 2. Circumstances Requiring Reversal of the Convictions
- [31] a. It is argued that Washington and all neighboring states have Rules of Professional Conduct (RPC) that specifically prohibit the judge/counsel in the same case arrangement1.
- [32] b. It is argued that where the Tribes have no law on an issue, state law can be looked to for resolution of the issue.
- [33] c. It is argued that the Colville Tribal Civil Rights Act provides for the right to counsel at the expense of a defendant – as does the Indian Civil Rights Act. Both are applied to actions in the Colville courts. Stoneroad-Wolf v. CCT, 4 CTCR 32, 8 CCAR 83 (2006). This right to counsel requires an unconflicted counsel and tribal case law has interpreted due process protections consistent with state/federal interpretations. Davisson v. CCT, 6 CTCCR 04, 11 CCAR 13 (2012).
- [34] d. It is argued that the judge/counsel circumstance is construed as an actual conflict and prejudice is presumed and does not have to be proved.

- [35] The circumstance that occurred in this case, with the trial judge moving from the bench to the defense counsel chair in the same case, is considered so odious to the concept of fairness and due process of law, to which every criminal defendant is entitled; that every state supreme court in our region has adopted a stringent rule against it. Criminal defendants in the Colville courts are entitled to protections of their rights to fairness, equal protection, and due process as strong, if not stronger, than in the state and federal systems. *Davis v. CCT*, 6 CTCR 04, 11 CCAR 13 (2012).
- [36] Even the appearance of bias or unfairness is reason to return a decision to the Trial Court for rehearing. *Mueri v. Carden*, 6 CTCR 17, 11 CCAR 75 (2014).
- [37] The presumptively prejudicial standard in this circumstance requires us to return this matter to the Trial Court for proceedings consistent with this opinion²
- [38] Under most circumstances allegations of conflicted or ineffective counsel require criminal appellants to show actual prejudice in order to obtain relief from an appellant panel. *State v. Johnson*, 143 Wn. App. 2, 177 P.3rd 1127 (Wn. App. 2007). Thus, for example, where trial counsel fails to object to admission of evidence or a specific jury instruction there is a presumption that the omission is a trial tactic and does not show prejudice or incompetence. Prejudice, however, can be shown where trial counsel failed to provide a jury instruction to which a defendant is clearly entitled. The Supreme Court of Washington has followed the Supreme Court of the United States in holding that only where an actual conflict exists for defense counsel will conflict or prejudice be presumed and a new trial with unconflicted counsel be required. *In Re Davis*, 152 Wash.2d 647, 673-674, 101 P.3d 1 (2004); *State v. Johnson*, 143 Wn. App. 1 (2007); *State v. Dhaliwal*, 113 Wash. App. 226, 53 P.3d 65 (2002).
- [39] Here, in the preliminary stages of this case, the individual who became defense counsel was a full time, associate trial judge for the Colville Tribal Court. In that judicial capacity the defense counsel was assigned and managed this case. Defense counsel in this case is an active member of the bar of Washington State and, therefore, bound by the Rules of Professional Conduct for the Washington Bar, including RPC 1.12, which specifically prohibits any bar member, and any members of the law firm or legal association of which they are a member, from acting to represent any criminal defendant whose case that bar member dealt with in any judicial capacity.
- [40] Under these particular circumstances we find that an actual conflict existed and conflicted counsel and prejudice to Appellant are to be presumed. The Appellant's right to unconflicted counsel under the Tribal and federal civil rights acts were compromised in this case.
- [41] The Colville judiciary has never adopted rules of professional conduct for spokespersons (a/k/a legal ethics), however, the Colville Tribal Code at CTC § 1-2-11 allows this Court to look to state common law when there exists a circumstance where tribal law is lacking regarding a subject this Court is obligated to determine. We have set out in this Opinion rules of professional conduct for state bar members which have been adopted by the Supreme Courts of more than forty-eight states. In each instance those rules strictly prohibit a bar member, and his or her associates in a law firm or legal organization, from representing a defendant when the counsel has dealt with the defendant's case as a judge or judicial officer.
- [42] Moreover, the Washington State Bar and the Washington State Supreme Court have both interpreted the RPC's of Washington State to apply to the activities of Washington bar members when the activities take place in the tribal courts. We return this matter to the Colville Tribal Trial Court for proceedings consistent with this opinion.

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Date and Time: Wednesday, August 14, 2019 2:12:00 PM PDT

Job Number: 95032580

Document (1)

1. [In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile](#)

Client/Matter: -None-

Search Terms: "legal ethics" or "professional responsibility" or "legal malpractice" or (attorney or lawyer /5 malpractice or ethic!)

Search Type: Terms and Connectors

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Content Type

Cases

Narrowed by

Sources: All Tribal Courts; Timeline: Jan 01, 2017 to Dec 31, 2019

In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile

Navajo Nation Supreme Court

July 3, 2019, Decided

No. SC-NB-05-18

Reporter

2019 Navajo Sup. LEXIS 2

In the Matter of Admission to Practice Law on the Navajo Nation and Admission to the Navajo Nation Bar Association, Inc. of: ROBERT FRANK GENTILE

Core Terms

practice of law, Courts, profession, appearance, bar association, district court, pro hac vice, certificate

Judges: Before JAYNE, J., Chief Justice; and SHIRLEY, E., Associate Justice.

Opinion

OPINION

The Court has received a Petition for Admission to Practice Law on the Navajo Nation and Admission to the Navajo Nation Bar Association, Inc. of the above named applicant. The Court denies admission based on the reports that this applicant was engaged in the unauthorized practice of law in the Navajo Courts while this petition was still pending.

I

This matter first came before this Court by Petition for Admission to Practice Law on the Navajo Nation and Admission to the Navajo Nation Bar Association, Inc. on June 4, 2018. The petition stated that Applicant, Robert Gentile ("Gentile"), had complied with the requirements for admission.

By order of this Court, a hearing was set for June 11, 2018. Gentile did not appear.

Subsequently, a Motion to Withdraw the Petition for Admission was filed on August 10, 2018. This motion stated that Gentile had not completed the requirement for a Navajo Nation Bar Association ("NNBA") approved course in Navajo law, culture, traditions, and history.

On January 23, 2019, the NNBA again urged this Court to grant admission through a Motion to Grant the Petition For Admission to Practice Law on the Navajo Nation and Admission to the Navajo Nation Bar Association, Inc..

The Chief Justice appointed a district court judge as Associate Justice by designation as the third member of the panel to hear the petition. Subsequent to the appointment, the Associate Justice was forced to withdraw, as she was presiding over a case in which the applicant for admission was appearing as counsel of record in a lower court proceeding.¹ This Court then stayed this admission matter while the District Court held a hearing and made its findings related to an Order to Show Cause hearing in which Gentile was responsible for establishing good cause that he was permitted to practice law before the Navajo Courts. The district court provided the order to the Supreme Court.

¹ This Court may decide matters by a two Justice Panel in cases where three justices are assigned and one becomes unavailable. *Benally v. Mobil Oil*, 8 Nay. R. 365, 369 (Nay. Sup. Ct. 2003).

In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile

From the Order of that hearing, Gentile made an appearance, filed motions, and acted as legal counsel some months before he was issued *a pro hac vice* certificate. Per the District Court's findings, Gentile began filing motions on May 23, 2018. Gentile received *a pro hac vice* certificate from the NNBA Admission Committee in July 2018. This *pro hac vice* admission certificate was submitted to the district court at the order to show cause hearing.

The district court found Gentile in civil contempt for practice without admission to practice law in this jurisdiction, and for his failure to motion the district court for his appearance once he received a *pro hac vice* certificate.

II

The question presented is whether, after a finding of civil contempt for the unauthorized practice of law, an applicant for admission to practice before the Navajo Courts can meet the high standards of the profession required to protect Navajo people who seek legal representation.

III

We have previously determined that allowing the bar association to set admission standards is proper. *In re Practice of Law in the Courts of the Navajo Nation*, 4 Nay. R. 75 (Nay. Ct. App. 1983). The NNBA is a partner in the process of regulating the practice of law. *Id.*

This Court recognizes the difficult and time consuming work done by the members of the NNBA. The difficulty of these tasks is related to the exceptional opportunity of self-regulation of the practice of attorneys and advocates on the Navajo Nation.

The Supreme Court relies on the partnership with the NNBA for admissions, however, the Supreme Court of the Navajo Nation has the ultimate authority to regulate court processes and conduct of attorneys. *Corporation of the President of the Church of Jesus Christ of Latter Day Saints v.*

Window Rock District Court and Concerning BN, Real Party in Interest, SC-CV-42-18, slip op at 5 (Nav. Sup. Ct. December 28, 2018) [hereinafter *LDS*]; *In re Seanez*, 9 Nav. R. 416, 416 (Nav. Sup. Ct. 2010), *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 598 (Nay. Sup. Ct. 2004); *Navajo Nation v. MacDonald*, 6 Nav. R. 222 (Nav. Sup. Ct. 1990); *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990); *In re Practice of Law in the Courts of the Navajo Nation by Avalos*, 6 Nav. R. 191 (Nav. Sup. Ct. 1990); *In re Practice of Law in the Courts of the Navajo Nation*, *supra*; *In re Practice of Battles*, 3 Nav. R. 92 (Nav. Ct. App. 1982).

IV

Despite the limited delegation of authority to the NNBA for the screening of applicants, the Court is still the ultimate source of authority to admit applicants to the practice of law before the Navajo Courts.

Admission to practice law before the Navajo Courts is a privilege not a right. *LDS, supra* at 6 (citing *In re the Admission to Practice of Wilson*, 4 Nav. R. 137 (Nav. Ct. App. 1983); *Boos v. Yazzie*, 6 Nav. R. at 214 (an individual does not have an absolute right to practice law within Navajo jurisdiction)).

When this Court receives a petition from the Navajo Nation Bar Association it is more than a ministerial matter. The Supreme Court has delegated the responsibility of screening applicants to the NNBA. *In re Practice of Law in the Courts of the Navajo Nation by Avalos*, 6 Nav. R. at 193; *Alderman v. NNBA*, 6 Nav. R. 188 (Nav. Sup. Ct. 1990); *Tafoya v. NNBA*, 6 Nav. R. 141 (Nav. Sup. Ct. 1989). This delegation means that the Court relies on the information contained in the NNBA petition when determining whether to admit an applicant or to deny the application.

The Navajo Nation Supreme Court has ultimate authority to grant or deny a person the privilege to practice law within the Navajo Nation. *LDS, supra*. We take this responsibility seriously and act, in admissions and discipline matters, to uphold the

In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile

high standards of the profession and protect Navajo people who seek out legal representation. *See In re Practice of Law in the Courts of the Navajo Nation*, 4 Nav. R. at 76. The regulation of attorney practice is essential to maintain professional and ethical practice before the Court and to protect the litigants who participate in the process. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. at 602.

V

The purposes of court regulation of attorney admissions and the practice of law are to guarantee that the public will have their cases presented properly and that it will receive adequate and accurate legal advice. *In re Practice of Law in the Courts of the Navajo Nation*, 4 Nav. R. at 76. When evaluating Bar applicants, the interest of the public is always paramount. *Tafoya v. NNBA*, 6 Nav. R. at 146. "An attorney is engaged in a highly specialized profession in which he is entrusted with the livelihood of a client." *Id.* The Supreme Court has an obligation to the public to ensure that those certified to practice law within the Navajo Nation have met the standards for admission. *Id.*

NNBA members are held to very high standards of professional conduct. *In re Bowman v. MacDonald*, 6 Nav. R. 101, 103 (Nay. Sup. Ct. 1989). Attorneys and advocates are officers of the court, who have a special responsibility to ensure the integrity of the Navajo legal system. *Perry v. Navajo Nation Labor Commission*, 9 Nay. R. 55, 57 (Nav. Sup. Ct. 2006). This maintains the integrity and competence of the legal profession, which improves the legal system. *See, Bowman, supra* at 103.

VI

This case is particularly troubling because it appears that an applicant who was otherwise qualified appears to have elected to enter an appearance before the Navajo Courts prior to the issuance of the *pro hac vice* certificate, and certainly before he was admitted to practice law in this jurisdiction. The NNBA stated that Gentile had complied with the Requirements for Admission to

the NNBA as provided NNBA Bylaws, section VI.

On any appearance by any attorney in Navajo courts (including those permitted to appear *pro hac vice*), the attorney is responsible to the Court for his actions. *Navajo Nation v. MacDonald*, 6 Nay. R. at 228. These actions include the applicant making inquiry to assure his or her eligibility to practice law. *In re Practice of Law in the Courts of the Navajo Nation by Avalos*, 6 Nav. R. at 192.

Here, there is a significant question as to the ability of an applicant to uphold the high standards required for admission to practice before the Navajo Courts. This court has previously determined that:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Bowman, supra at 104 (internal citation omitted).

As we previously found by the Navajo Nation Council through the provision of civil and criminal sanctions, the unauthorized practice of law undermines the integrity of our legal system. *Perry*, 9 Nav. R. at 57.

It is clear that the purpose of the admission's requirements is to ensure that the People receive competent legal representation. When an applicant for admission acts without regard to the customs

In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank
Gentile

and laws of this jurisdiction it raises significant questions as to his or her fitness to practice law. Moreover, it damages the integrity of the profession and the Navajo Court system.

The practice of law in the Navajo Nation is a privilege granted to individuals who comply with the standards imposed by the Supreme Court. An individual's failure to meet those standards will result in denial of the privilege to practice law. *Boos v. Yazzie*, 6 Nav. R. at 214 (citing *Tafoya, supra*; and *Bowman, supra*.) In this case, we see no alternative to the denial of this applicant.

VII

This Court recognizes the need for high quality practitioners for the Navajo People. The need for attorneys does not create an exception to rule or law. We cannot approve admission of an applicant who acts without regard for the rules and customs of the Navajo Nation Courts. For the foregoing reasons, we DENY the Petition for Admission. This case is CLOSED.

Ordered, this 3rd day of July, 2019.

/s/ JoAnn Jayne

Chief Justice

/s/ Eleanor Shirley

Associate Justice

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Date and Time: Wednesday, August 14, 2019 2:14:00 PM PDT

Job Number: 95032788

Document (1)

1. [Kang v. Chinle Family Court](#)

Client/Matter: -None-

Search Terms: "legal ethics" or "professional responsibility" or "legal malpractice" or (attorney or lawyer /5 malpractice or ethic!)

Search Type: Terms and Connectors

Narrowed by:

Content Type

Cases

Narrowed by

Sources: All Tribal Courts; Timeline: Jan 01, 2017 to Dec 31, 2019

Kang v. Chinle Family Court

Navajo Nation Supreme Court

September 21, 2018, Decided

No. SC-CV-37-18

Reporter

2018 Navajo Sup. LEXIS 2

Mun Kang, Petitioner, v. Chinle Family Court, Respondent, And Concerning: Chastity Kang, Real Party in Interest.

Prior History: Original action against the Chinle Family Court concerning Cause No. CH-FC-292-17, the Honorable Rudy I. Bedonie, presiding.

Core Terms

parties', divorce, service by publication, requirements, service of process, custody, newspapers, resides, petition for divorce, default judgment, due process, Decree

Counsel: James Nez, Kayenta, Navajo Nation, for Petitioner.

Chris P. Benally, Chinle, Navajo Nation, for Respondent.

David R. Jordan and Sandra Taylor, Gallup, New Mexico, for Real Party in Interest.

Judges: Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and TUNI, R., Associate Justice by Designation.

Opinion by: Rhonda Tuni

Opinion

Opinion delivered by TUNI, Associate Justice.

This is an original action concerning divorce actions in the state of Virginia and the Navajo Nation. The Court clarifies service by publication

requirements under the Navajo Rules of Civil Procedure.

I

Petitioner Mun Kang (Petitioner) and Real Party In Interest Chastity Kang (RPI) were married in the state of Virginia on December 27, 2006. The parties and their two daughters all lived in Virginia until March 18, 2017, when RPI left Virginia with the parties' children. On May 10, 2017, after a hearing concerning the removal of the parties' children, Virginia entered an Order For Custody/Visitation awarding sole legal and physical custody of the parties' children to Petitioner pending further order.

On May 15, 2017, RPI with the assistance of legal counsel filed a petition for divorce with the Chinle Family Court in CH-FC-233-17. Petitioner through an entry of limited appearance moved to dismiss the action contending that the Chinle Family Court lacked jurisdiction because RPI failed to meet the 90-day residency requirement. Petitioner voluntarily withdrew her petition on June 19, 2017 and the action was dismissed.

On June 7, 2017, Petitioner filed a petition for divorce in Virginia. A copy of the petition was served on RPI's counsel and RPI appeared by telephone in that proceeding seeking a continuance. Thereafter, RPI did not participate any further and a Final Decree of Divorce was later entered, as discussed below.

On June 20, 2017, RPI re-filed her petition for divorce with the Chinle Family Court. RPI sought a dissolution of marriage, division of community

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property (including property located in Virginia), and sole custody of the parties' children. RPI's petition did not state that Petitioner filed an earlier-action for divorce in Virginia. RPI attempted but was unable to serve Petitioner by personal service and by certified mail. RPI then informed the court it served Petitioner by publication in the *Navajo Times*.

On November 2, 2017, Virginia entered a Final Decree of Divorce in favor of Petitioner. On November 3, 2017, RPI moved for entry of default judgment in the Chinle Family Court for Petitioner's failure to plead or otherwise defend against the action. On November 28, 2017, the Chinle Family Court issued an Entry of Default against Petitioner followed by a Default Judgment on February 6, 2018, dissolving the marriage, dividing property as proposed by RPI, and awarding legal and physical custody of the parties' children to RPI with visitation to Petitioner.

On May 4, 2018, Petitioner filed a motion to set aside the default judgment claiming fraud and misrepresentation under Rule 60(c)(3) of the Navajo Rules of Civil Procedure. Petitioner also filed a motion for new trial under Rule 59(g). The Chinle Family Court summarily denied the motion for new trial on May 29, 2018, finding that Petitioner was served in CH-FC-233-17. No ruling was entered on the motion to set aside the default judgment. Meanwhile, RPI was arrested on a federal warrant on violations of Flight to Avoid Prosecution under [18 U.S.C. § 1073](#) concerning custody of the parties' children. On August 3, 2018, Petitioner through counsel filed an emergency motion for immediate temporary guardianship of the minor children to the maternal grandmother.

On August 17, 2018, Petitioner filed this action asserting the Chinle Family Court refuses to rule on the motion to set aside the default judgment leaving him with no plain, speedy and adequate remedy at law to address his jurisdictional arguments. This Court issued an Alternative Writ and set this matter for a hearing on September 12, 2018. This decision now follows.

II

The Court issued an Alternative Writ requiring Respondent to show cause why the writ should not be made permanent. The dispute concerns service of process requirements essential to the trial court's jurisdiction. Respondent must show it complied with service of process requirements under the Navajo Rules of Civil Procedure to substantiate its jurisdiction.

III

This Court has the authority to issue writs pursuant to 7 N.N.C. § 303. "Specifically, the Court's power to issue writs of prohibition, mandamus, and superintending control against a lower court is based upon its supervisory authority over inferior courts." *Yellowhorse, Inc. v. Window Rock Dist. Ct.*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986). In cases where the trial court is proceeding without or in excess of its jurisdiction, it is possible to obtain a writ of prohibition based upon the sound discretion of the Court. *Id.* In certain cases, "[t]his Court will grant a writ of prohibition as a matter of right if the lower court clearly has no jurisdiction of the action originally and the petitioner has no other remedy available." *Id.* at 87.

The Court concludes that the Chinle Family Court failed to show it had jurisdiction over RPI's divorce action. RPI re-filed her petition for divorce with the Chinle Family Court on June 20, 2017. Prior to that date, RPI did not reside in the Navajo Nation for at least 90 days to meet the statutory residency requirement. See 9 N.N.C. § 402. On the other hand, on June 7, 2017, when Petitioner filed for divorce in Virginia, Petitioner was a resident of Virginia, where the parties previously resided. Petitioner in that action also served RPI, who afterwards voluntarily appeared and participated in the Virginia proceedings.

The Chinle Family Court attempts to justify its jurisdiction in CH-FC-292-17 by finding Petitioner was served in CH-FC-233-17, which was dismissed for lack of subject matter jurisdiction. Service in a previously-filed action, has no bearing on service of

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process requirements in a later-filed action. Here, service in CH-FC-233-17 has no bearing on service of process in CH-FC-292-17, which is now before the Court.

The Chinle Family Court also attempts to justify its jurisdiction by arguing it complied with [Rule 4\(e\)\(3\)](#) of the Navajo [Rules of Civil Procedure](#). [Rule 4\(e\)\(3\)](#) states, "Service by publication shall be made by publication of the summons in the *Navajo Times* or in the newspapers where the person resides, or in the newspapers of the person's last known residence for at least once a week for four successive weeks." The Chinle Family Court interprets the use of "shall" to mean service by publication in the *Navajo Times* is mandatory and that the use of "or" means service by publication by the other two means is optional. We disagree. [Rule 4\(e\)\(3\)](#) means service by publication shall be made in one of three ways: 1) by publication of the summons in the *Navajo Times*, or (2) in the newspapers where the person resides, or 3) in the newspapers of the person's last known residence for at least once a week for four successive weeks. Before service by publication is ordered by the trial court, a motion for publication is required. Nav. [R. Civ. P. 4\(e\)\(3\)\(A\)](#).

In the re-filed divorce action now before the Court (CH-FC-292-17), the Chinle Family Court failed to show it complied with the service of process requirements of [Rule 4\(e\)](#) of the Navajo Rules of Civil Procedure. Based on the supporting documents and arguments of the parties, RPI was unable to serve Petitioner by personal service. RPI was also unable to serve Petitioner by certified mail. Although RPI asserts she accomplished service by publication in the *Navajo Times*, RPI did not file a motion for publication as required by [Rule 4\(e\)\(3\)\(A\)](#), and the Chinle Family Court failed to show it ordered service by publication upon due consideration of the required motion.

Furthermore, despite facts of Petitioner's residence in Virginia, the Chinle Family Court failed to show how service by publication in the *Navajo Times*

rather than in a newspaper where Petitioner resides was adequate to meet procedural due process requirements. We are mindful that the concept of due process was not brought to the Navajo Nation by federal law or codified-Navajo law for "the Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions." See *Begay v. Navajo Nation*, 6 Nav. R. 20, 24 (Nav. Sup. Ct. 1988). "This is Navajo customary due process and it is carried out with fairness and respect." *Id.* "The heart of Navajo due process, thus, is notice and an opportunity to present and defend a position." *Id.* at 24-25. A court of the Navajo Nation must implement service of process requirements in light of these concepts. This Court has also recognized the primary principle that informs this Court's interpretation of procedural due process is *k'e*, which fosters fairness through mutual respect. See *Shirley v. Morgan*, June 2, 2010). In this case, fairness required publication in the newspaper where Petitioner resides, not in the *Navajo Times* where it is highly unlikely that Petitioner would ever see the publication. *K'e* also required Petitioner as a *hadane* (in-law to the *Dine*) to be treated with fairness and respect to ensure notice and an opportunity to defend.

"Our courts, like other courts, must have both subject matter jurisdiction and personal jurisdiction to properly hear a case." *Nelson v. Pfizer*, 8 Nav. R. 369, 377 (Nav. Sup. Ct. 2003). Because the Chinle Family Court failed to show it complied with service of process requirements and Navajo concepts of due process, we find that service of process was insufficient to establish personal jurisdiction over Petitioner. In the absence of personal jurisdiction, the Chinle Family Court is proceeding without jurisdiction and Petitioner has no plain, speedy and adequate remedy at law. *Yellowhorse*, 5 Nav. R. at 87 (requirements for writ of prohibition). Moreover, while child custody has not been raised by either of the parties in this action, an appeal is not suitable remedy in light of competing child custody decisions, RPI's

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incarceration, and the uncertainty surrounding the care of the parties' children.

The Chinle Family Court is not solely in error in this action. RPI was represented by legal counsel since its onset. Despite service of Petitioner's petition for divorce on RPI's counsel, RPI did not disclose the earlier-filed Virginia action in her petition for divorce. RPI also failed to inform the Chinle Family Court that Virginia issued a Final Divorce Decree on November 2, 2017. As a matter of fact, when questioned, counsel for RPI stated she did not disclose the entry of the Virginia decree because she was unaware of the action. Supporting documentation from the record, however, confirms by affidavit that RPI's counsel was served with Petitioner's petition for divorce by mail on November 2, 2018, and by fax (with a confirmation page) on November 3, 2018. Petitioner's Ex. J. The Court finds RPI's counsel was less than truthful to the direct inquiry. Under the Rules of Professional Responsibility, counsel has a duty of candor and this Court will not condone any conduct unbecoming of an officer of the court.

Based on decisions above, we take judicial notice of Virginia's award of sole legal and physical custody to Petitioner dated on May 10, 2017 and Virginia's Final Divorce Decree of November 2, 2017.

IV

Rather than issue a permanent writ of mandamus or writ of superintending control as though the Chinle Family Court has jurisdiction, pursuant to this Court's discretionary authority, we hereby issue a Writ of Prohibition against the Chinle Family Court. The Default Judgment entered by the Chinle Family on February 6, 2018 is *void ab initio*. The Chinle Family Court is ORDERED to dismiss CH-FC-292-17 for lack of jurisdiction.

Dated this 21st day of September, 2018.

Chief Justice

/s/ JoAnn Jayne

Associate Justice

/s/ Eleanor Shirley

Associate Justice

/s/ Rhonda Tuni

Associate Justice

End of Document

Trusting Technological Security: Ethical Quicksand for the Unsuspecting Lawyer

Indian law Symposium
September 5, 2019

Brenda Williams, Senior Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, WA

Stacey Lara, Lecturer, Tribal Public Defense Clinic, University of Washington School of Law, Seattle, WA

- I. ABA Model Rules of Professional Conduct – (select small arrow to reveal rules, select rule number control + click for hyperlink with internet connection)

Client-Lawyer Relationship

- I. Rule 1.1 Competence
Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.3 Diligence
Rule 1.4 Communications
Rule 1.5 Fees
Rule 1.6 Confidentiality of Information
Rule 1.7 Conflict of Interest: Current Clients
Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
Rule 1.9 Duties to Former Clients
Rule 1.10 Imputation of Conflicts of Interest: General Rule
Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13 Organization as Client
Rule 1.14 Client with Diminished Capacity
Rule 1.15 Safekeeping Property
Rule 1.16 Declining or Terminating Representation
Rule 1.17 Sale of Law Practice
Rule 1.18 Duties to Prospective Client

Counselor

- II. Rule 2.1 Advisor
Rule 2.2 (Deleted)
Rule 2.3 Evaluation for Use by Third Persons
Rule 2.4 Lawyer Serving as Third-Party Neutral

Advocate

- III. Rule 3.1 Meritorious Claims and Contentions
- Rule 3.2 Expediting Litigation
- Rule 3.3 Candor toward the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 3.5 Impartiality and Decorum of the Tribunal
- Rule 3.6 Trial Publicity
- Rule 3.7 Lawyer as Witness
- Rule 3.8 Special Responsibilities of a Prosecutor
- Rule 3.9 Advocate in Nonadjudicative Proceedings

Transactions with Persons Other Than Clients

- IV. Rule 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communication with Person Represented by Counsel
- Rule 4.3 Dealing with Unrepresented Person
- Rule 4.4 Respect for Rights of Third Persons

Law Firms and Associations

- V. Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer
- Rule 5.2 Responsibilities of a Subordinate Lawyer
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
- Rule 5.4 Professional Independence of a Lawyer
- Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
- Rule 5.6 Restrictions on Rights to Practice
- Rule 5.7 Responsibilities Regarding Law-related Services

Public Service

- VI. Rule 6.1 Voluntary Pro Bono Publico Service
- Rule 6.2 Accepting Appointments
- Rule 6.3 Membership in Legal Services Organization
- Rule 6.4 Law Reform Activities Affecting Client Interests
- Rule 6.5 Nonprofit and Court Annexed Limited Legal Services Programs

Information About Legal Services

- VII. Rule 7.1 Communication Concerning a Lawyer's Services
- Rule 7.2 Communications Concerning a Lawyer's Services: Specific Rules
- Rule 7.3 Solicitation of Clients
- Rule 7.4 (Deleted)
- Rule 7.5 (Deleted)
- Rule 7.6 Political Contributions to Obtain Legal Engagements or Appointments by Judges

Maintaining the Integrity of the Profession

- VIII. [Rule 8.1](#) Bar Admission and Disciplinary Matters
 - [Rule 8.2](#) Judicial and Legal Officials
 - [Rule 8.3](#) Reporting Professional Misconduct
 - [Rule 8.4](#) Misconduct
 - [Rule 8.5](#) Disciplinary Authority; Choice of Law
- IX.
- X.

II. Ethical Obligations to Know Technology

A. ALASKA BAR ASSOCIATION ETHICS OPINION 2014-3 CLOUD COMPUTING & THE PRACTICE OF LAW

A lawyer may use cloud computing for file storage as long as he or she takes reasonable steps to ensure that sensitive client information remains confidential and safeguarded. With the issuance of this opinion, Alaska joins the community of bar associations concluding that cloud computing is permissible so long as reasonable steps to protect the client are taken.



1 -Alaska Bar
Association Ethics O

B. Board of Overseers of the Bar_ Attorney Services - Ethics Opinions - Opinion 207

Is it ethical for Maine attorneys to use cloud computing and storage for client matters?



2 - Board of
Overseers of the Bar

III. Cybersecurity and Data Management

A. State Bar of California CAL 2012-184-ADA

ISSUE:

May an attorney maintain a virtual law office practice ("VLO") and still comply with her ethical obligations, if the communications with the client, and storage of and access to all information about the client's matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., "cloud computing")?



1 - State Bar of California CAL 2012-

B. Board of Overseers of the Bar _ Attorney Services – Professional Ethics Opinion 220 – Opinion

Question: What are a lawyer's ethical obligations to understand the risks posed by technology, to prevent a cyberattack or data breach, and to respond once one occurs?



2 - Board of Overseers of the Bar

C. New Hampshire Bar opinion 2012-13_04 The Use of Cloud Computing in the Practice of Law

The internet has changed the practice of law in many ways, including how data is stored and accessed. "Cloud computing" can be an economical and efficient way to store and use data. However, a lawyer who uses cloud computing must be aware of its effect on the lawyer's professional responsibilities. The NHBA Ethics Committee adopts the consensus among states that a lawyer may use cloud computing consistent with his or her ethical obligations, as long as the lawyer takes reasonable steps to ensure that sensitive client information remains confidential.



3 - New Hampshire Bar opinion 2012-13.

D. Oregon ethics opinion 2011-188

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

May Lawyer do so?



4 - Oregon ethics
opinion 2011-188.pdf

IV. Communicating via the Internet

A. ABA Formal Opinion 477

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.



ABA Formal
Opinion 477.pdf

B. Pennsylvania Opinion 2017-300

A lawyer may not use a “web bug” in an email communication with opposing counsel. A web bug, also known as “web beacon,” “pixel tag,” “clear GIF,” or “invisible GIF,” is a software surveillance tool that discloses to the sender potentially confidential information such as whether and when an e-mail or attached document has been opened or forwarded and by whom, or who clicks on a link in the communication.



Pennsylvania
Opinion 2017-300.p

C. SC Opinion 18-04

The mere fact that a lawyer has copied a client on an email sent to opposing counsel does not itself constitute implied consent for opposing counsel to “reply all.”



SC Opinion
18-04.pdf

V. Recent Indian Country Cases

A. Gallaher v. Colville Confederated Tribes, 14 CCAR 11 (Colville Confederated 11/09/2018)



Gallaher v Colville
Confederated Tribes

- B. In re Admission to Practice Law on the Navajo Nation & Admission to the Navajo Nation Bar Ass'n Of: Robert Frank Gentile Navajo Nation Supreme Court July 3, 2019, Decided No. SC-NB-05-18



In re Gentile.PDF

- C. Kang v. Chinle, Kang v. Chinle Family Court, Navajo Nation Supreme Court, September 21, 2018, Decided, No. SC-CV-37-18



Kang v. Chinle
Family Court.PDF

AUTHORITY OF THE STATE TO REGULATE TRIBAL FISHERS

John Hollowed

Fisheries Co-Management Issues in Western Washington: The North of Falcon Process

State Authority and Federal Preemption

Under our federal system the states, not the federal government, have the primary authority to protect, preserve, and regulate the use of fish and wildlife. Protection of wildlife and the regulation of its taking are within the policy power of the states.¹ However, the courts have held that the effective tribal self-regulation of treaty fishing precludes state regulation.² Tribal rights pursuant to the Stevens Treaties are federal laws that preempt any state laws that might be in conflict.

Tribal Authority to Regulate Fishing

Indian aboriginal claims to fish and manage their resources are founded on time immemorial custom and practice. Tribes possess the sovereign right to regulate and manage treaty fishing. Regarding off-reservation fishing, the tribes retain extra-territorial jurisdiction to manage their fishers and fisheries. The court reasoned that it would be “unreasonable to conclude that in reserving these vital [fishing] rights, the Indians intended to divest themselves of all control over the exercise of those rights.”³ Tribal regulation is an internal affair of the tribe, and is a natural attribute of the tribe’s sovereignty.⁴

Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. These authorities of the tribes are protected by the federal government. The recognition of tribal self-government serves to preempt competing assertions of state authority. Tribal governments have inherent powers of a limited sovereignty which has never been extinguished.⁵ In general, Indian tribes retain powers of self-government on their reservations except where limited in treaties, by acts of Congress, or where inconsistent with their dependent relationship to the United States. Tribal governments have the authority to determine their own form of government and who is a member of their tribe.⁶ Tribes have the power to legislate both substantive criminal and civil laws in internal matters.⁷ Tribes have governmental authority to administer justice within their reservations to maintain peace and order among their members.⁸ The tribes have the power to exclude persons from tribal territory.⁹

¹ *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 391 (1978).

² *United States v. Washington*, 530 F.2d 676, 685-86, 693 (9th Cir. 1975).

³ *Settler v. Lameer* 507 F.2d 231, 236 (9th Cir. 1974).

⁴ See *Fisher v. District Court*, 424 U.S. 382 (1976).

⁵ *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). See also, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), *Worcester v. Georgia*, 31 U.S. (Pet.) 515, 559 (1832), *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-88 (1823).

⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁷ See e.g. 25 U.S.C. §§ 1321-1326, *Washington v Confederate Bands of Yakima Indian Nation*, 439 U.S. 463, 488 n. 32 (1979); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

⁸ *Ex parte Crow Dog*, 109 U.S. 566, 568 (1883).

The tribes also have civil regulatory¹⁰ and judicial jurisdiction over non-Indians.¹¹

Clearly, Indian tribes retain power of self-government on their reservations and have jurisdiction to regulate treaty fishing of their members on the reservations.¹² To protect their resources within their territory also involves the authority to regulate nonmember fishing within reservations.¹³ In contrast, the states cannot regulate Indian on-reservation fishing¹⁴ but for conservation reasons,¹⁵ that is, to perpetuate the fisheries species.¹⁶

In general, Indians cannot be barred from their usual and accustomed fishing places;¹⁷ they have an easement over private as well as public land to gain access to and fish in these areas;¹⁸ their usual and accustomed fishing places may be either on or beyond the territory ceded by that tribe in its treaty with the United States;¹⁹ their right to fish at those locations is a non-exclusive one that must be shared with non-Indians;²⁰ they do not need to purchase state fishing licenses when exercising their fishing rights;²¹ they are entitled to an opportunity to catch a fair share of the fish in water where this treaty right applies;²² they can only be regulated by the state when necessary for conservation;²³ they are entitled to appropriate notice and the right to participate in the state regulatory process for managing the fishery where their treaty rights exist;²⁴ and they have the right to have fish habitat protected.²⁵

It was common for Indians to exploit all types of resources available to them. Therefore, the courts have interpreted treaties to allow Indians to fish for all resources now available,²⁶ unless a species was specially excluded in the treaties. For example, the courts have recognize the treaty right to fish includes the right of taking shellfish²⁷ and groundfish.²⁸ Courts have also

⁹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹⁰ *Washington v. Confederated Colville Tribes*, 100 S.Ct. 2069, 2080-81 (1980).

¹¹ *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Montana v. United States*, 101 S.Ct. 1245, 1254 (1981).

¹² *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D. MN 1971).

¹³ *United States v. Montana*, 604 F.2d 1162, 1165 (CA9 1979), rev'd on other grounds, 101 S.Ct. 1245 (1981).

¹⁴ *Tulee v. Washington*, 315 U.S. 681 (1942); *United States v. Washington*, 520 F.2d 676 (CA9 1975).

¹⁵ *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (Puyallup III).

¹⁶ *United States v. Washington*, 384 F.Supp. 312 (WD WA 1974).

¹⁷ *United States v. Winans*, 198 U.S. 371, 384 (1905).

¹⁸ *Id.* at 381.

¹⁹ *Seufert Bros. Co. v. United States ex rel. Confederated Tribes of Yakima Indian Nation*, 249 U.S. 194, 198-99 (1919).

²⁰ *Puyallup v. Department of Game*, 391 U.S. 392, 398 (1969).

²¹ *Tulee v. Washington*, 315 U.S. 681 685 (1942).

²² *Washington, v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

²³ *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

²⁴ *United States v. Washington*, 520 F.2d 676, 686 (CA 9 1975).

²⁵ *United States v Washington*, 9213, Subproceeding No. 01-01, Culverts, Order on Cross-Motions for Summary Judgment, August 22, 2007.

²⁶ *United States v. Washington*, 384 F.Supp. 312 (WD WA 1974).

²⁷ *United States v. Washington*, 873 F.Supp. 1422 (1994) (Rafeedie or Shellfish Decision) and 898 F.Supp. 1453 (1995) (Shellfish Implementation Order) and as amended, 909 F.Supp. 787 (1995) (Amended Shellfish Order).

²⁸ *Washington v. Daly*, 173 F.3d 1158 (1999) (Whiting Case).

recognized the treaty right to fish impliedly includes a right to the water for the fish and a duty on the part of the State and Federal governments to protect the habitat for the fish.²⁹

The tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites.³⁰ The tribe possesses a power of enforcement inferable from its power to regulate.³¹ This power does not displace that of the state; ordinarily the state and the tribe possess concurrent power to regulate Indian fishing at usual and accustomed sites so far as necessary to preserve the run. However, the district court has enjoined the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy.³²

The court has stated that regulation of off-reservation Indian treaty fishing by the United States, the State, or the Plaintiff tribes does not preempt the regulation by any of the other two. Jurisdiction of each entity to regulate is unimpaired by the exercise of another entity's regulatory jurisdiction.

The state and treaty tribes have concurrent jurisdiction with regard to regulation of the fishery resource. If, however, the treaty tribe is self-regulating, the state has only limited jurisdiction with regard to such tribe. The court has enjoined the state's authority to advance the congressional policy of promoting tribal autonomy. The state can adopt regulations of a self-regulating tribe, but only if state promulgation is consistent with requisite administrative procedures. Furthermore, before any particular state regulations can be enforced against any treaty right fisherman, the state must additionally satisfy the requirement of showing the specific regulation is reasonable and necessary for conservation.³³ If the State proposes regulations, which would affect fishing by Indians in areas reserved to them by treaty, they must be submitted to the court for approval before being enforced as to treaty Indians.³⁴

A self-regulating tribe has authority only over its own members. However, the tribes should report apparent misuse of the fishery to the state if a non-Indian is involved or to the tribe of a treaty right fisherman, and if appropriate action is not taken, such report should be brought to the court for such action as the court finds appropriate.³⁵

To manage the fisheries, the court has stated the tribes must:

²⁹ Though subsequently vacated, the district and appellate courts have all held the State and Federal governments have a duty to protect the fish habitat. *United States v. Washington*, (Phase II), 506 F.Supp. 187, 208 (WD WA 1980); *United States v. Washington Phase II*, 694 F.2d 1374 (CA9 1982); *United States v. Washington Phase II*, 759 F.2d 1353, 1354 (9th CA. 1985). The issue of the state's duty to protect habitat for the treaty-reserved fishing right is currently being addressed in *United States v. Washington*, 70-9213, Subproceeding No. 01-1 (Culverts).

³⁰ *Settler v. Lameer*, 507 F.2d 231 (9th Cir., 1974).

³¹ *Id.*, at 238.

³² *United States v. Washington*, 520 F.2d 676, 687 (CA 9 1975).

³³ *Id.* at 410.

³⁴ *United States v. Washington*, 520 F.2d 676, 688-89 (CA 9 1975).

³⁵ *Id.* at 410-11.

- Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with the State;
- Provide fish catch reports, as to both on and off reservation treaty right fishing for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes;
- Exchange all available data concerning size, timing and condition of fish runs in the case area and the current level of harvest and escapement in response to reasonable requests for the same to assist the parties in carrying out their responsibilities; and
- Provide certification and identification of its tribal fishermen.³⁶

In addition, the courts have stated, “only by affording the Indians an opportunity to fully participate in the process can the State begin to fulfill its obligations under the treaty.”³⁷ The tribes must have the means to participate in all Federal, State, and local governmental processes that could affect the treaty-reserved resources of the tribes.

The State’s power to regulate, affect, or qualify tribal rights, which are made the supreme law of the land under the United States Constitution, must be narrowly and sparingly applied.³⁸ The state has the police power to regulate off-reservation fishing only to the extent reasonable and necessary for conservation of the resource, that is, to perpetuate the fisheries species.³⁹ The state’s power to regulate off-reservation treaty fishing does not include the power to determine for Indian tribes what is the wisest and best use of the tribe’s share of the common resource.⁴⁰ For the state to regulate or affect tribal treaty-reserved rights, the state must demonstrate a “compelling interest” (e.g. conservation as defined as perpetuation of the resources) and must use the “least burdensome” alternative in affecting tribal treaty rights. The “conservation necessity” exception is “interpreted narrowly and sparingly applied” to ensure the exception does not eviscerate Indian treaty rights.⁴¹ For the governments to regulate treaty-reserved rights of the Tribes, the following legal test must be met⁴² and the State has the burden of proving:⁴³

After years of substantial litigation concerning the nature and extent of treaty rights to fish,⁴⁴ the courts finally addressed the issue of conservation. Treaty right activities affecting resources held

³⁶ *United States v. Washington*, 384 F.Supp. 312 (WD WA 1974).

³⁷ *United States v. Washington Phase II*, 694 F.2d 1374, 1374 (CA9 1982).

³⁸ *United States v. Washington*, 384 F.Supp. 312, 342 (W.D. WA 1974).

³⁹ *Id.*

⁴⁰ *United States v. Washington*, 626 F.Supp. 1405, 1426 (1985) and *United States v. Washington*, *supra*, at 401.

⁴¹ *United States v. Washington*, 384 F.Supp. 312, 342 (WD WA 1974), aff’d 520 F.2d 676 (CA9 1975), *cert. denied*, 423 U.S. 1086 (1976).

⁴² See *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *United States v. Washington*, 384 F.Supp. 312, 342 (W.D. WA 1974); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823, 9 Envtl. L. Rep. 20,517 (U.S.Wash. Jul 02, 1979) (NO. 77-983, 78-119, 78-139), and numerous other federal court cases.

⁴³ 384 F.Supp. at 342.

⁴⁴ E.g., *Puyallup I*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968); *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973); *Puyallup Tribe v. Washington Game*

in common by treaty Indians and non-Indians are not wholly immune from state and federal regulation. However, the State's power to regulate, affect, or qualify tribal rights, which are made the supreme law of the land under the United States Constitution, must be narrowly and sparingly applied.⁴⁵

Government regulation of treaty rights has been held permissible where it is demonstrated that the regulation "is a reasonable and necessary conservation measure ... and that its application to the Indians is necessary in the interests of conservation."⁴⁶ The regulation must not discriminate against Indians exercising treaty rights, either on its face or as applied.⁴⁷ And, all reasonable measures must be taken to restrict non-Indian activities before treaty rights may be regulated.⁴⁸

Conservation in the context of natural resource management often includes "wise use" considerations. However, in the context of regulation of treaty right activities, conservation is a term of art whose meaning is limited to maintenance of a reasonable margin of safety against extinction.⁴⁹ For a regulation to be found reasonable and necessary for conservation, the particular regulation at issue must shown to be essential to the perpetuation of a particular species, and it must be demonstrated that the required conservation cannot be achieved by restrictions on non-treaty citizens, or other less restrictive methods.⁵⁰

Another way to articulate the conservation test is the Tribes have a "fundamental" right to fish, which is "not much less necessary to the existence of the Indians than the atmosphere they breathed."⁵¹ For the State to interfere with the Tribes fundamental right to fish they must have a "compelling" interest, that is, conservation which means to ensure the "perpetuation" of the resource. If the State is to regulate treaty fishing, they must use the "least burdensome means" and only after all other non-Indian "take" of the resource is addressed, and all other voluntary measures of the Tribes exercising their sovereign authorities is inadequate.

A series of Supreme Court decisions in the 1960's and 1970's established a 5-prong test that needed to be satisfied before state conservation measures could be applied to restrict treaty hunting and fishing rights. Eventually known as the "5 conservation necessity principles", this 5-prong test was adopted as Federal policy for applying incidental take restrictions under the ESA

⁴⁵ *Dept.*, 433 U.S. 165, 53 L. Ed. 2d 667, 97 S. Ct. 2616 (1977); *Fishing Vessel*, 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979); *Boldt I*, 384 F. Supp. 312 (W.D.Wash. 1974).

⁴⁶ *United States v. Washington*, 384 F.Supp. 312, 342 (W.D. WA 1974).

⁴⁷ *Antoine v. Washington*, 420 U.S. 194, 207 (1975); see also, *Puyallup Tribe v. Department of Game*, 414 U.S. 44, 49 (1973); *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980).

⁴⁸ *See e.g., United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); *Lac Courte Oreilles Band of Indians v. Wisconsin*, 668 F.Supp. 1233, 1237 (W.D.Wis. 1987).

⁴⁹ *See e.g., United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); *Lac Courte Oreilles Band of Indians v. Wisconsin*, supra at 1235-36.

⁵⁰ *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983). See also, *United States v. Washington*, 384 F.Supp. 312, 342 (W.D.Wash. 1974); *Sohappy v. Smith*, 302 F.Supp. 899, 908 (D.Or. 1969).

⁵¹ An important aspect of conservation necessity is the adequacy of tribal regulation. *United States v. Washington*, 384 F.Supp. 312, 415 (W.D. Wash. 1984). So long as tribes responsibly manage their activities to insure the preservation of a species there is no conservation necessity for outside regulation. See, *United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975). See also, *Lac Courte Oreilles Band of Indians*, supra *United States v. Winans*, 198 U.S. 371, 381 (1905).

to tribal treaty rights and was cited in the settlement of *United States v. Oregon*.⁵² The Secretarial Order restates this Federal enforcement policy as applied to incidental take of listed species. Accordingly, an analysis and determination must be made that all the following standards have been met:⁵³

- (i) the restriction is reasonable⁵⁴ and necessary⁵⁵ for conservation of the species⁵⁶ at issue;
- (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities⁵⁷;
- (iii) the measure is the least restrictive alternative⁵⁸ available to achieve the required conservation purpose;
- (iv) the restriction does not discriminate against Indian activities,⁵⁹ either as stated or applied; and,
- (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

⁵² 699 F.Supp. 1456 (1988).

⁵³ See *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *United States v. Washington*, 384 F.Supp. 312, 342 (W.D. WA 1974); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823, 9 Envtl. L. Rep. 20,517 (U.S.Wash. Jul 02, 1979) (NO. 77-983, 78-119, 78-139), and numerous other federal court cases.

⁵⁴ The Supreme Court seems to use the word "necessary" (borrowed from Tulee, 315 U.S. at 684), as opposed to "indispensable" (borrowed from Maisom) as a measure of the conservation powers of the state over off-reservation fishing, although the differences in meaning between "necessary," "indispensable" and for that matter "essential" are fine enough to escape the notice of a conventional dictionary. See Oxford English Dictionary 1905 (1971). The important message of footnote 14 of Puyallup I is that the Supreme Court saw the "necessary" standard for measuring the legal propriety of state conservation measures as being "distinct from" (and obviously much more strict) than "the federal constitutional standard concerning the scope of the police power of a State." This latter standard was explained by *Williamson v. Lee Optical*, 348 U.S. 482 (1955), which is a well known example of the minimal judicial scrutiny historically applied in the area of substantive due process.

⁵⁵ In this context, as well as by dictionary definition, 'reasonable' means that a specifically identified conservation measure is 'appropriate' in its purpose; and 'necessary' means that such purpose in addition to being reasonable must be 'essential' to conservation.

⁵⁶ For this purpose, conservation is defined to mean perpetuation of the fisheries species. *United States v. Washington*, 384 F.Supp. 312, 334 (WD WA 1974).

⁵⁷ It should be noted that non-Indian "activities" should include all actions that affect fish harvest, that includes hatchery production and habitat impacts. Failure to read "activities" broadly would negate the meaning of the right to "take fish" and is consistent with the recent decision in the culvert case.

⁵⁸ The "conservation necessity" exception is "interpreted narrowly and sparingly applied" to ensure the exception does not eviscerate Indian treaty rights. *United States v. Washington*, 384 F.Supp. 312, 342 (WD WA 1974), aff'd 520 F.2d 676 (CA9 1975), cert. Denied, 423 U.S. 1086 (1976).

⁵⁹ Taken in the context of ESA and the definition of "take," all "activities" that "take" the resource by all non-Indians must be addressed before regulation of Indians." salmon includes the need to address those impacts of the salmon habitat by all non-Indian activities.

Therefore, conservation restrictions may be imposed on Indian tribes only when all 5 standards have been met.

North of Falcon Process

John Hollowed

Fisheries Co-Management Issues in Western Washington: The North of Falcon Process

Both the Tribes and States, as separate sovereigns, have mutually exclusive jurisdiction over a common property resource. As such, a process was needed to integrate the differing sovereign authorities over the management of these common property fisheries. To help implement the Boldt decision, the State of Washington and Treaty Tribes party of *United States v. Washington*, initiated the North of Falcon¹ (NOF) Process.

The current co-management relationship began in 1984 when the then director of WDF, Bill Wilkerson, and Billy Frank and other tribal leaders decided to work cooperatively together to manage salmon rather than manage them through the court as we had for the decade following Judge Boldt's decision. Instrumental to this way of doing business was embodied in the North of Falcon (NOF) pre-season fishery planning process in which the objective was to seek to accommodate each party's fishery needs to the extent possible within the agreed conservation constraints. It was agreed that the 50:50 allocation was not necessarily the goal if another arrangement better fit the parties' needs. The NOF process was designed to provide a forum for the tribes and state to work out the details of when, where and by whom fishing will occur such that each party's needs can best be accommodated.

For the NOF to function both the Tribes and WDFW need to come to the table with the authority and commitment to negotiate agreed fishing plans. There must be a commitment to achieve an agreed LOAF (List of Agreed Fisheries) by the end of the process that meaningfully addresses each party's needs. It is a needs-based negotiation that reflects flexibility for accommodating those needs. Although it is not intended to be focused on achieving a particular allocation balance, the parties are obviously aware of the resulting allocation of the conservation burden as they discuss fishery accommodations. However, the test of whether a particular package of fisheries is satisfactory is not the achievement of a particular allocation result but rather whether each party is satisfied with the resulting fisheries. No party gets everything they want but the outcome must be seen as a fair distribution of the conservation burden across all fisheries.

Unfortunately, this agreement to co-manage fisheries in this manner is largely not documented in court proceedings or other reports as far as I know. A link below is provided is to a video recording of the tribal/state co-management conference we held at Tulalip in October, 2013 in which there was a panel of attorneys (Mason, Alan Stay and Grossman) providing the legal foundation and another panel (Dr. Dick Whitney, Rollie

¹ North of Falcon is the area north of Cape Falcon in northern Oregon and encompasses Oregon and Washington (Columbia River, Coast, and Puget Sound).

Schmitt, Lorraine Loomis and Bill Wilkerson) that provided a history of co-management. It is a lengthy recording but the first half of it provides a good foundation. <https://archive.org/details/CoManagement2013>

Each year (February-April) State, federal, and Tribal fishery managers plan recreational and commercial fisheries for each of the sovereigns. North of Falcon addresses the allocation, pre-season planning, in-season management, conservation, and monitoring issues associated with the annual salmon fishery planning process. In developing the fishing season, the parties ensure their decisions are consistent with the court orders in *United States v. Washington* and *United States v. Oregon*, the Endangered Species Act, Puget Sound Salmon Management Plan, the Pacific Salmon Treaty, the Pacific Fishery Management Council's Framework Salmon Management Plan; and relevant state/tribal agreements.

Since the mid-1980s, States and Tribes have participated in the "North of Falcon" process, in which they coordinate the planning of ocean and "inside" salmon fisheries. In the "North of Falcon" process, the parties develop recommendations to be presented to the Pacific Fishery Management Council, which the Secretary of Commerce may ultimately adopt for ocean fisheries. The Secretary of Commerce must comply with Section 7 of the ESA when they authorize ocean salmon harvests. The federal government has taken the position that, where planning of in-river harvests is intertwined with planning of ocean harvests, Section 7 consultation is available for in-river fisheries "as part of ocean harvest Management."²

The NOF Process:

- Estimate the forecasted returns of individual hatchery and wild stocks of salmon;
- Determine if escape goals are going to be met;
- Predict harvest for tribal and state recreational and commercial fisheries for Oregon and Washington, including the northern fisheries in Alaska and Canada;
- Analysis forecast and harvest scenarios using the Fisheries Regulations Assessment Model (FRAM) to determine whether proposed fishing plans meet management objectives (e.g. ESA impact limits);
- Negotiate with the recreational anglers, commercial fishers, and Tribes to allow a fair sharing of catch and ensure conservation objectives are met, and
- Combine all Puget Sound and ocean fisheries into the "Agree-to-Fisheries Document" that the recreational fishing rules pamphlet is based upon.

In recent years, the State and Tribes have broadened the involvement of the fishing community and public in the process. NOF participants are included as observers during appropriate state/tribal discussions of fishery issue, all decisions made during the Process are recorded in writing, and WDFW employs additional tools (advisory groups, public

² *Ramsey v. National Marine Fisheries Serv.*, Civil No. 94-761-MA, Opinion & Order at 13-14 n.8 (D. Or. Apr. 4, 1995), aft'd, 96 F.3d 434 (9th Cir. 1996).

workshops, a WDFW NOF Web site, and in-season tele-conferences) to inform the public and seek input on pre-season planning or in-season fishery issues.

Fisheries Co-Management Issues in Western Washington: The North of Falcon Process

Thursday, September 5, 2019

1:30 PM-3:00 PM

**William H. Gates Hall
4293 Memorial Way NE
Seattle, WA 98195**

- John Hollowed, Legal/Policy Advisor, Northwest Indian Fisheries Commission
- Lorraine Loomis, Fisheries Manager, Swinomish Indian Community
- Ron Warren, Director of Fish Policy, State of Washington

1:30-1:55 PM (25 min) John Hollowed-Background-Pre North of Falcon

- I. What is the North of Falcon Process-a state-tribal fisheries management planning process to develop fishery recommendations to the PFMC and Puget Sound Management
- II. Pre-North of Falcon
 - a. State was the primary authority to regulate fisheries
 - b. Years of Conflict and denial of tribal treaty rights
 - c. Court's reaffirmed tribal sovereignty to self-regulate their fishers
 - d. From single sovereign to co-sovereign management-concurrent management
 - e. Co-management
 - i. Each co-manager regulates and controls their fishers within their jurisdiction
 - ii. Each co-managers operates within a management framework that meets:
 - iii. Resource conservation
 - iv. Sustainable fisheries
 - v. Assures all parties are afforded the opportunity to harvest their share
 - f. Evolution to “co-management” in the form of the Puget Sound Salmon Management Plan, Hood Canal Management Plan, and Hoh v. Baldridge Plan

1:55 PM-2:20 PM (25 min) Lorraine Loomis-From Co-Management Plans to North of Falcon Process

- III. Evolution of the North of Falcon Process
 - a. From Co-Management “Plans” to Cooperative Management “Process”-North of Falcon
 - b. North of Falcon Forum

- i. Ancillary forum within the Pacific Council's annual salmon pre-season planning process
 - ii. It represents cooperative stewardship between the federal government, two states and 24 tribes
 - iii. It's been a 30-year commitment between independent sovereigns to co-manage salmon in the Northwest
- c. Rationale for North of Falcon
- i. Regional fishing areas subject to the same legal obligations and biological considerations
 - ii. Need to accommodate direct representation from each of the 26 sovereigns involved
 - iii. The forum allows participants to evaluate the biological consequences of options for the outside, ocean, and inside, Puget Sound and in-river, fisheries and strive for consensus on the final management plan.
 - iv. The goal is Fair and equitable sharing of the burden of the conservation. There is no court order and therefore nothing to enforce.

2:20 PM-2:45 PM (25 min) Ron Warren-How the North of Falcon Works and Today's Issues

IV. Current Issues with NOF

- a. NOF is constrained by limited time for preseason planning
 - i. March PFMC meeting occur after the NW stock forecasts are available and establish range of options for the ocean fisheries
 - ii. North of Falcon process is bracketed by the March and April Pacific Council meetings
 - iii. Alaska and Canadian forecasts and associated harvest levels are not available until late March/Early April
 - iv. April PMC meeting is timed so state and federal regulations are completed by May 1.
 - v. Difficult to begin early due the schedule for stock forecasts, policy participation is critical, bring your issues early
 - vi. We need to be all in the same room to talk the issues with the state.
 - vii. Start early to make sure all the issues are on the table before we start the process.
- b. We need to do a better job of making sure inside fisheries do not disproportionately bear the burden of conservation
- c. The problem now is everyone has weak stocks to manage.
- d. We need to deal with the ongoing loss of salmon habitat.

- e. We need for more hatchery fish to make up for lost natural salmon production.
- f. We need for effective management of harbor seals and California sea lions.
- g. List of Agreed to Fisheries (LOAF) and what is it
 - i. Like the NoF process itself, the LOAF has evolved over time.
 - ii. Final package in 1993 was 4 pages with 6 attachments. Focused primarily on Coho and Chinook salmon fisheries.
 - iii. Final package in 2015 was 46 pages. It contains a detailed description of all treaty and nontreaty salmon fisheries from the ocean to in-river for all Puget Sound salmon species.
- h. Bracketed Language
 - i. There is no consensus on the use or intent of bracketed language within the LOAF
 - ii. In the LOAF, bracketed language usage was to denote issues that the parties would strive to resolve prior to the management season

V. A Successful North of Falcon Process Requirements

- a. Commitment by all parties to reach a final agreement
- b. Significant and focused effort
- c. Joint planning and regular consultation
- d. Reliance upon jointly developed goals and objectives, as well as agreed upon data
- e. Adaptable and flexible process structure

2:45 PM-3:00 PM Questions

No. 17-532

In the
Supreme Court of the United States

CLAYVIN B. HERRERA,
Petitioner,
v.
STATE OF WYOMING,
Respondent.

**On Writ of Certiorari to the District
Court of Wyoming, Sheridan County**

**BRIEF OF PACIFIC AND INLAND NORTHWEST
TREATY TRIBES AS AMICI CURIAE IN SUPPORT
OF PETITIONER**

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I. INTEREST OF THE AMICI¹

Amici are Indian tribes in the Pacific and Inland Northwest, each of which is a signatory or political successor in interest to those tribes and bands that entered into one of several distinct treaties with the United States in 1854 and 1856, commonly referred to as the “Stevens Treaties”.² These tribes ceded vast amounts of their territories to the United States, while reserving their rights to hunt and gather outside their Treaty-created reservations on “unclaimed” or “open and unclaimed lands.”³ Today,

¹ Pursuant to Supreme Court Rule 37.2, Petitioner and Respondent have granted blanket consent to amicus briefs. None of the parties or their counsel authored any part of this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief, and no person or entity other than Amici and their counsel made such a monetary contribution to the preparation or submission of this brief.

² A full list of Amici appears at Appendix A.1.

³ Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, art. I, 12 Stat. 945, 946 (June 9, 1855); Treaty with Nisqualli, &c, art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854); Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, art. V, 12 Stat. 927, 928 (Jan. 22, 1855); Treaty between the United States of America and the S’Klallam, Skokomish, Toanhooch, and Chimakum Indians, art. IV, 12 Stat. 933, 934 (Jan. 26, 1855); Treaty between the United States and the Yakama Nation of Indians, art. III, 12 Stat. 951, 952 (1855); Treaty between the United States of America and the Nez Percé Indians, art. III, 12 Stat. 957, 958 (June 11, 1855); Treaty between the United States and the Flathead, Kootenay, and Upper Pend d’Oreilles Indians, art. III, 12 Stat. 975, 976 (July 16, 1855); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, art. III, 12 Stat. 971, 972 (Jan. 25, 1856); and, Treaty with the Tribes of

Amici Tribes continue to exercise their Treaty-reserved hunting and gathering rights, as the Indian signatories at the time of the Treaties understood them, on such lands, including National Forest lands located in (and, in some cases, spanning more than one of) the present-day states of Idaho, Montana, Oregon and Washington.

II. SUMMARY OF THE ARGUMENT

On the narrow question presented in this case concerning only the Crow Treaty of 1868, Amici Tribes write separately to emphasize: (1) the continuing significance of Treaty-reserved hunting and gathering rights; (2) that every state and federal court construing the Stevens Treaties based on the Indians' understanding has confirmed that National Forest land is "unclaimed" or "open and unclaimed land" within the meaning of these treaties; and (3) that early American hunting law, with which the United States' negotiators would have been familiar at the time of the Treaties, is consistent with the Indians' understanding that the Treaty right to hunt on "unoccupied lands" would include lands that are today National Forests.

Amici Tribes support the positions of Petitioner Herrera, the United States, and the Crow Tribe that this Court's ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) forecloses the Wyoming lower court's reliance on *Ward v. Race Horse*, 163 U.S. 504 (1896) and *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), to preclude inquiry into the Indian signatories' understanding of the Crow

Middle Oregon, art. I, 12 Stat. 963 (June 25, 1855) (negotiated by Superintendent of Indian Affairs Joel Palmer).

Treaty's reserved right to hunt on "unoccupied lands of the United States." Amici Tribes also support Petitioner, the United States, and the Crow Tribe's position that *Crow Tribe of Indians v. Repsis* is a poorly reasoned outlier and further note that it is the only instance in which a court has concluded that mere designation of a National Forest by the United States could operate to "occupy" land, thus extinguishing the Treaty rights on the federal public lands at issue here.

III. ARGUMENT

A. Tribal Treaty Hunting, Deeply Rooted in Culture, Religion and Tradition, Is Vital

Since time immemorial, and continuing to this day, hunting, fishing and gathering have been central to Amici Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Through treaties, tribes reserved these usufructuary property rights in perpetuity.

Amici have maintained their traditional culture, which depends heavily on the traditional use of natural resources. Amici Tribes' ability to subsist and thrive continues to require the ability to freely go beyond reservation boundaries to fish, hunt, and gather food when it is available. For millennia, Amici have hunted game and gathered botanicals to feed their families. These food sources remain vitally important to this day not only for traditional and ceremonial purposes, but also for tribal members' health and well-being.

Historically, Amici hunted all available wildlife and gathered all harvestable botanicals. These included big and small game animals, fur-bearing animals, birds and waterfowl; and, ferns, grasses, rushes and tails, root vegetables, fruits, nuts, seeds, herbs, mosses and fungi. Today, Tribal members continue to hunt and gather to supply foods for ceremonial and religious purposes such as the canoe journey, tribal weddings, funerals, name-giving, religious observance and potlatches.

Tribal hunters often hunt for others who cannot hunt for themselves, including Tribal elders. Tribal culture is based on extended family relationships of parents, grandparents, aunts, uncles, cousins and other relatives. A tribal hunter or gatherer typically shares the harvest with several families and, because the harvest is widely shared, it is used quickly, benefiting the whole community. The entire animal is used to the greatest extent possible, to minimize waste.

Today, consistent with their historical practices, Amici manage and co-manage resources with their federal and state counterparts, and assume the responsibilities that accompany their treaty-reserved rights through tribal hunting regulations and other mechanisms. Amici's co-management with their federal and state counterparts in Idaho, Montana, Oregon and Washington includes wildlife management, harvest allocation, and regulatory enforcement.

Tribal hunters and gatherers harvest a small fraction of the wildlife and botanical resources taken annually throughout the West. For example, in recent years in Washington State, tribal members have harvested between two and five percent of the state-

wide non-tribal elk and deer harvest, and tribal deer harvest remains lower than the yearly state roadkill rate. <https://nwifc.org/about-us/wildlife/>.

The continued exercise of Amici's hunting and gathering rights, including the exercise of those rights on National Forest lands, remains of critical and enduring importance. These rights were expressly reserved by the tribes in exchange for ceding vast amounts of their homelands to the United States. As the other party to the Treaties, the United States secured these rights to the Crow Tribe and to the Amici Tribes in their Treaties.

B. Treaty-Reserved Hunting in National Forests is Consistent with the Understanding of the Indian Parties to the Treaties as Confirmed by Every Court, State or Federal, Construing these Treaties

Construing Indian treaties involves an inquiry into the intent of the parties; the history of the negotiations, their purpose, and the context in which they occurred; and the practical construction adopted by the parties. See *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-79 (1979). Indian Treaty language must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 (1899)); see also *United States v. Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

On the narrow issue before this Court of whether mere designation of a National Forest can serve to extinguish the Crow Tribe's 1868 Treaty-reserved right to hunt on "unoccupied lands of the United States," it is informative that every state and federal court construing the right to hunt on "unclaimed" or "open and unclaimed" land has held that the Indian parties to the Stevens Treaties would have understood the concept of a National Forest as consistent with "unclaimed" or "open and unclaimed" land to which the reserved hunting right would apply.

Courts, both state and federal, in Idaho, Montana, Oregon and Washington have long recognized National Forests as subject to reserved Indian treaty hunting rights. The Idaho Supreme Court, in *State v. Arthur*, interpreted treaty language reserving the Nez Perce Tribe's right to hunt on "open and unclaimed land" as expressly encompassing National Forest land. *State v. Arthur* construed this Treaty language by examining the understanding of the Treaty Indians, as reflected in the minutes of the Treaty negotiations kept by the United States,⁴

⁴ *State v. Arthur* recites Governor Stevens' promises at the treaty negotiations that "You will be allowed . . . to kill game on land not occupied by the whites" and Looking Glass would be able to "kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers." 261 P.2d at 140-41. Governor Stevens made similar assurances in other treaty negotiations. See *United States v. Washington*, 853 F.3d 946, 964 (9th Cir. 2017), aff'd, *Washington v. United States*, 584 U. S. ___, 138 S. Ct. 1832 (2018) (*per curiam*) (noting that Governor Stevens told the Indians during negotiations for the Point Elliott Treaty, "I want that you shall not have simply food and drink now but that you may have them forever"); see also Point No Point Treaty Council Minutes ("Mr. F. Shaw, the Interpreter, explained to them that they

which document Indian leaders emphasizing that “our rights shall be protected forever” and receiving assurances from Governor Stevens that they would continue to be able to hunt and gather on “lands not occupied by settlers”. 261 P.2d 135, 140-41 (1953), *cert. denied*, 347 U.S. 937 (1954). The Idaho Supreme Court held that the term “open and unclaimed land” as employed in the treaty “[w]as intended to include and embrace such lands as were not settled and occupied by the whites...and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was ‘open and unclaimed land.’” *Id.* at 141. *State v. Arthur* also rejected Idaho’s argument that these Treaty-reserved rights were altered by statehood. *Id.* at 140.

In a case affirmed by the Ninth Circuit in which the Confederated Tribes of the Umatilla Indian Reservation sued to enforce their right to hunt in the Umatilla and Whitman National Forests, the federal District Court of Oregon held that “unclaimed” lands within the meaning of the treaty included National Forest lands. *Confederated Tribes of Umatilla Indian Res. v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff’d. sub nom, Holcomb v. Confederated Tribes of Umatilla Indian Res.*, 382 F.2d 1013 (9th Cir. 1967). The Court examined the understanding of the Indians and the treaty minutes, and emphasized

were not called upon to give up their old modes of living and places of seeking food.”; “Chits-a-Mah-han or the Duke of York...My heart is good. I am happy since I heard the paper read and since I have understood Gov. Stevens, particularly, since I have been told I could look for food where I pleased, and not in one place only.”

the hunting right's application to lands "not actually occupied by white settlers"; the court elaborated that, "[t]o construe 'unclaimed lands' to exclude land not occupied by white settlers would violate the solemn promise made to Indians more than a century ago." 262 F. Supp. at 872. Both courts rejected Oregon's statehood arguments, independently examining the understanding of the Indians. 262 F. Supp. at 872; 382 F.2d at 1014.

The Montana Supreme Court in *State v. Stasso*, a case involving a member of the Confederated Salish and Kootenai Tribes hunting on National Forest land, examined the understanding of the Indian parties to the 1855 Treaty of Hell Gate, rejected Montana's statehood arguments, and held that "the National Forest lands involved here are open and unclaimed lands" within the meaning of the Treaty. 172 Mont. 242, 245, 248 (1977).

Washington State courts have concurred that "open and unclaimed lands" within the meaning of the Stevens Treaties encompass National Forest land. *State v. Miller*, 102 Wash.2d 678, 680 n.2 (1984) (noting that "[s]everal courts have determined that [National Forest] land is 'open and unclaimed' within the meaning of the treaty"); *State of Washington v. Young*, 97 Wash. App. 1043 (unpublished) (1999) (reversing conviction of Yakama Indian for hunting during state's closed season in a National Forest, based on treaty right to hunt).⁵

⁵ While only the issue of National Forest land is before this Court, courts have also upheld the right to hunt on other types of forest lands and in similar areas. See, e.g., *State v. Buchanan*, 138 Wash.2d 186, 211-12 (1999), cert. denied, 528 U.S. 1154 (2000) (rejecting Washington's statehood arguments and hold-

All of these cases, reviewing the understanding of the Indians at the time of the Stevens Treaties,⁶ come to the same conclusion: the mere designation of a National Forest does not extinguish Treaty-reserved rights to hunt on those lands. The evidence pointed to by Petitioner, the Crow Tribe, and the United States demonstrates that it is inconceivable that the Crow negotiators would have understood that a National Forest designation would extinguish their hunting rights on those lands under the Crow Treaty.

C. Nineteenth Century American Hunting Law Principles Provide Additional Interpretative Context and Support The “Unoccupied” Status of Subsequent National Forests

An understanding of the nineteenth century American legal landscape provides additional support for the conclusion that the Big Horn National Forest should be treated as “unoccupied” for purposes of the Crow Treaty hunting right. While the primary interpretive inquiry is the understanding of the Treaty Indians, who were required to negotiate critical protections for themselves in a foreign language, contemporary American legal principles make plain that the United States would have understood subsequently created National Forests as “unoccu-

ing that publicly owned wildlife area constitutes “open and unclaimed land” within the meaning of the treaty).

⁶ Amici note that some of the dicta in these cases and some of the forums in which these issues were litigated (e.g., state criminal prosecutions) are imperfect or incomplete with respect to a full and proper understanding and application of their Treaty-reserved rights. This does not detract from the unanimous, correct conclusions these courts have reached that Amici Tribes’ reserved treaty hunting rights encompass National Forest land.

pied” land where hunting, including Treaty-reserved hunting, could occur. Understanding the common law landscape helps deduce the intent of the United States, which, although entitled to less weight than the Indian signatories’ understanding, is part of the context of the treaty negotiations. *Mille Lacs*, 526 U.S. at 196 (stating that courts must “look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties”); *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the Court regularly considers the context of a treaty’s negotiation and adoption to promote interpretations “consistent with the shared expectations of the contracting parties”).

When the Indian Treaties were negotiated, there were no hunting laws in effect in the Western United States territories. Instead, lands free from settlement were open to hunting for all. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 Law & Hist. Rev. 351, 351 (2015) (noting that, in 1860, “most unfenced land in the United States was open to the wanderer”); accord Eric T. Freyfogle, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 33 (2007) (noting that, historically in America, “[h]unting and fishing were rather freely allowed except in cultivated fields and around houses”). This was a result of the United States’ rejection, at the time of the American Revolution, of English laws restricting the majority of English citizens from hunting. In England, the King claimed ownership over all fisheries and wild animals, and, by creating Royal Forests and establishing qualification statutes, favored the landed gentry’s right to hunt over that of the common citi-

zen. Thomas A. Lund, AMERICAN WILDLIFE LAW at 8-10 (1980). The American colonies rejected this aristocratic concept and instead chose the free taking of animals on all unsettled land. *Id.* at 24.

The right to access lands for hunting was not necessarily limited by ownership; rather, active settlement was required to bar access. For example, in a private lands context that predates the creation of National Forests, the South Carolina Constitutional Court of Appeals recognized a presumption that “the forests and unenclosed lands of this country” were open to hunters. *McConico v. Singleton*, 2 Mill Const. 244, 246 (1818). Two years after *McConico*, the same South Carolina court held that a hunter who entered a parcel of land enclosed by a dilapidated fence did not commit trespass. *Broughton v. Singleton*, 5 S.C.L. (2 Nott & McC.) 338, 340 (1820).

This common principle of nineteenth century American law was borne out by the laws of the United States existing at the time the Crow Treaty was negotiated. For example, under the Homestead Act of 1862, the only way any person could lawfully “occupy” public land in the West was “for the purpose of actual settlement and cultivation.” Act of May 20, 1862, Pub. L. 37-64 12 Stat. 392.

American law at time of the Crow Treaty, even from a non-Indian perspective, plainly required more for land to be considered “occupied” than just title ownership. The subsequently-created Big Horn National Forest would have been considered “unoccupied” for hunting purposes not only by the Treaty Indians – for them unquestionably so – but also by the United States negotiators and ratifiers of the Treaty. The vast woodland and prairie would have

been and, in many ways is still, considered the commons. It is federal public land that to this day is open to all hunting, including non-Indian recreational hunting.

In the Pacific and Inland Northwest, some feared that adverse consequences would result from courts upholding the Amici's reserved hunting rights on National Forest land. These fears have not come to pass. Instead, these court decisions have resulted in increased acceptance of the tribes as wildlife and natural resource co-managers with their United States, Idaho, Montana, Oregon, and Washington counterparts.

In this case, considering the Crow Tribe's understanding of its Treaty-reserved hunting right and the evidence presented by Petitioner, the Crow Tribe and the United States, it is inconceivable that the Crow Treaty negotiators would have understood that the mere designation of lands as a National Forest would extinguish reserved hunting rights on those lands.

CONCLUSION

Amici Tribes respectfully urge the Court to reverse the judgment of the Wyoming district court.

Respectfully submitted,

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APPENDIX

APPENDIX A

This Appendix provides the names of federally-recognized sovereign Indian tribes which appear as Amici Curiae.

**The Confederated Salish and Kootenai Tribes
of the Flathead Reservation**

The Confederated Tribes of the Umatilla Indian Reservation

The Confederated Tribes of the Warm Springs Reservation of Oregon

The Confederated Tribes and Bands of the Yakama Nation

The Hoh Tribe

The Jamestown S'Klallam Tribe

The Lower Elwha Klallam Tribe

The Muckleshoot Indian Tribe

The Nez Perce Tribe

The Nisqually Indian Tribe

The Nooksack Indian Tribe

The Port Gamble S'Klallam Tribe

The Puyallup Tribe of Indians

The Quileute Tribe

The Skokomish Indian Tribe

The Squaxin Island Tribe

App-2

The Stillaguamish Tribe of Indians

The Suquamish Tribe

The Swinomish Indian Tribal Community

The Tulalip Tribes of Washington

No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Crow Tribe of Indians' right under the Second Treaty of Fort Laramie of 1868 to hunt on "unoccupied lands of the United States" survived Wyoming's admission to the Union.
2. Whether the establishment of a National Forest, in and of itself, renders lands within that forest "[]occupied" under the 1868 Treaty.

(I)

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus****HERRERA v. WYOMING****CERTIORARI TO THE DISTRICT COURT OF WYOMING,
SHERIDAN COUNTY**

No. 17–532. Argued January 8, 2019—Decided May 20, 2019

An 1868 treaty between the United States and the Crow Tribe promised that in exchange for most of the Tribe’s territory in modern-day Montana and Wyoming, its members would “have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts.” 15 Stat. 650. In 2014, Wyoming charged petitioner Clayvin Herrera with off-season hunting in Bighorn National Forest and being an accessory to the same. The state trial court rejected Herrera’s argument that he had a protected right to hunt in the forest pursuant to the 1868 Treaty, and a jury convicted him. On appeal, the state appellate court relied on the reasoning of the Tenth Circuit’s decision in *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982—which in turn relied upon this Court’s decision in *Ward v. Race Horse*, 163 U. S. 504—and held that the treaty right expired upon Wyoming’s statehood. The court rejected Herrera’s argument that this Court’s subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, repudiated *Race Horse* and therefore undercut the logic of *Repsis*. In any event, the court concluded, Herrera was precluded from arguing that the treaty right survived Wyoming’s statehood because the Crow Tribe had litigated *Repsis* on behalf of itself and its members. Even if the 1868 Treaty right survived Wyoming’s statehood, the court added, it did not permit Herrera to hunt in Bighorn National Forest because the treaty right applies only on unoccupied lands and the national forest became categorically occupied when it was created.

Held:

1. The Crow Tribe’s hunting rights under the 1868 Treaty did not expire upon Wyoming’s statehood. Pp. 6–17.

Syllabus

(a) This case is controlled by *Mille Lacs*, not *Race Horse*. *Race Horse* concerned a hunting right guaranteed in an 1868 treaty with the Shoshone and Bannock Tribes containing language identical to that at issue here. Relying on two lines of reasoning, the *Race Horse* Court held that Wyoming's admission to the United States in 1890 extinguished the Shoshone-Bannock Treaty right. First, the doctrine that new States are admitted to the Union on an "equal footing" with existing States led the Court to conclude that affording the Tribes a protected hunting right lasting after statehood would conflict with the power vested in those States—and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 514. Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* established that the crucial inquiry for treaty termination analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right, 526 U. S., at 202, or whether a termination point identified in the treaty itself has been satisfied, *id.*, at 207. Thus, while *Race Horse* "was not expressly overruled" in *Mille Lacs*, it "retain[s] no vitality," *Limbach v. Hooven & Allison Co.*, 466 U. S. 353, 361, and is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. Pp. 6–11.

(b) *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood. Even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U. S. 825, 834. Here, *Mille Lacs*' repudiation of *Race Horse*'s reasoning—on which *Repsis* relied—justifies such an exception. Pp. 11–13.

(c) Applying *Mille Lacs*, Wyoming's admission into the Union did not abrogate the Crow Tribe's off-reservation treaty hunting right. First, the Wyoming Statehood Act does not show that Congress "clearly expressed" an intent to end the 1868 Treaty hunting right. See 526 U. S., at 202. There is also no evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. Nor does the historical record support such a reading of the treaty. The State counters that statehood, as a practical matter, rendered all the lands in the State occupied. Even assuming that Wyoming presents an accurate historical picture, the State, by using statehood as a proxy for occupation, subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Id.*, at 207. To the extent that the State seeks to rely on historical evi-

Syllabus

dence to establish that all land in Wyoming was functionally “occupied” by 1890, its arguments fall outside the question presented and are unpersuasive in any event. Pp. 13–17.

2. Bighorn National Forest did not become categorically “occupied” within the meaning of the 1868 Treaty when the national forest was created. Construing the treaty’s terms as “they would naturally be understood by the Indians,” *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, it is clear that the Tribe would have understood the word “unoccupied” to denote an area free of residence or settlement by non-Indians. That interpretation follows from several cues in the treaty’s text. For example, the treaty made the hunting right contingent on peace “among the whites and Indians on the borders of the hunting districts,” 15 Stat. 650, thus contrasting the unoccupied hunting districts with areas of white settlement. Historical evidence confirms this reading of “unoccupied.” Wyoming’s counterarguments are unavailing. The Federal Government’s exercise of control and withdrawing of the forest lands from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would mining and logging of the forest lands prior to 1897 have caused the Tribe to view the Bighorn Mountains as occupied. Pp. 17–21.

3. This decision is limited in two ways. First, the Court holds that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right “in the interest of conservation,” an issue not reached by the appellate court. The Court also does not address the viability of the State’s arguments on this issue. Pp. 21–22.

Vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and KAVANAUGH, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–532

CLAYVIN HERRERA, PETITIONER *v.* WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF
WYOMING, SHERIDAN COUNTY

[May 20, 2019]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon” and “peace subsists . . . on the borders of the hunting districts.” Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not “unoccupied.” We disagree. The Crow Tribe’s hunting right survived Wyoming’s statehood, and the lands within Bighorn National Forest did not become categorically “occupied” when set aside as a national reserve.

Opinion of the Court

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana v. United States*, 450 U. S. 544, 547 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, *From the Heart of the Crow Country* 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming “historically made up both the geographic and the spiritual heart” of the Tribe’s territory. Brief for Crow Tribe of Indians as *Amicus Curiae* 5.

The westward migration of non-Indians began a new chapter in the Tribe’s history. In 1825, the Tribe signed a treaty of friendship with the United States. *Treaty With the Crow Tribe*, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the *Treaty of Fort Laramie*, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U. S., at 547–548. The *Treaty of Fort Laramie* specified that “the tribes did not ‘surrender the privilege of hunting, fishing, or passing over’ any of the lands in dispute” by entering the treaty. *Id.*, at 548.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, *Parading Through History* 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that “settlements ha[d] been made” upon the Crow Tribe’s lands and that their “game [was] being driven away.” Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867–1868*, p. 86 (1975) (hereinafter *Proceedings*). He told the assembled tribal leaders that the United States wished to “set apart a tract of [Crow Tribe] country as a home” for the Tribe “forever” and to buy the rest of

Opinion of the Court

the Tribe's land. *Ibid.* Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); *id.*, at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. *Id.*, at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U. S., at 547–548; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, *id.*, at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

"The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game

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may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” *Id.*, at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not “impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty.” An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming “into the Union on an equal footing with the original States in all respects,” in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land “reserved from entry or settlement.” Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 985 (CA10 1995).

B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014, Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license

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and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss. See Nos. CT-2015-2687, CT-2015-2688 (4th Jud. Dist. C. C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U. S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians v. Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d, at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward v. Race Horse*, 163 U. S. 504, 516 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that *Mille Lacs* had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon Wyoming's statehood. No. 2016-242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against

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Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming’s entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on “unoccupied” lands and that the national forest became categorically “occupied” when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d, at 994. The state appellate court affirmed the trial court’s judgment and sentence.

The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U. S. ___ (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe’s hunting rights under the 1868 Treaty remain valid. Relying on this Court’s decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court’s decision in *Race Horse* establishes that the Crow Tribe’s 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting

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right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [*sic*] and the Bannack [*sic*] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 (“[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts”). The *Race Horse* Court concluded that Wyoming’s admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U. S., at 505, 514–515.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an “equal footing” with existing States. *Id.*, at 511–514 (citing, e.g., *Lessee of Pollard v. Hagan*, 3 How. 212 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes’ hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be “irreconcilably in conflict” with the power—“vested in all other States of the Union” and newly shared by Wyoming—to regulate the killing of game within their borders.” 163 U. S., at 509, 514.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in “perpetuity.” *Id.*, at 514–515. To the contrary, the Court emphasized that Congress “clearly contemplated the disappearance of the conditions” specified in the treaty. *Id.*, at 509. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were “essentially perishable” and afforded the Tribes only a “temporary and precarious” privilege. *Id.*, at 515.

More than a century after *Race Horse* and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut both pillars of *Race Horse*’s reasoning. *Mille Lacs* considered an 1837 Treaty that guaranteed to several

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bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands “during the pleasure of the President.” 526 U. S., at 177 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U. S., at 202–208.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquiries roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota’s invitation to rely on *Race Horse*, explaining that the case had “been qualified by later decisions.” 526 U. S., at 203. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision’s logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the “equal footing” reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing “repeal[ed]” the Shoshone-Bannock Treaty right because the treaty right was “irreconcilable” with state sovereignty over natural resources. *Race Horse*, 163 U. S., at 514. But *Mille Lacs* explained that this conclusion “rested on a false premise.” 526 U. S., at 204. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe’s treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. *Id.*, at 204–205 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel*

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Assn., 443 U. S. 658, 682 (1979); *Antoine v. Washington*, 420 U. S. 194, 207–208 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U. S. 392, 398 (1968)). “[B]ecause treaty rights are reconcilable with state sovereignty over natural resources,” the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient “to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.” 526 U. S., at 205.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress “must clearly express” any intent to abrogate Indian treaty rights. 526 U. S., at 202 (citing *United States v. Dion*, 476 U. S. 734, 738–740 (1986); *Fishing Vessel Assn.*, 443 U. S., at 690; *Menominee Tribe v. United States*, 391 U. S. 404, 413 (1968)). The Court found no such “‘clear evidence’” in the Act admitting Minnesota to the Union, which was “silent” with regard to Indian treaty rights. 526 U. S., at 203.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*’s “alternative holding” that the rights in the Shoshone-Bannock Treaty “were not intended to survive Wyoming’s statehood.” 526 U. S., at 206. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are “‘of such a nature as to imply their perpetuity,’” rather than “‘temporary and precarious.’” 526 U. S., at 206. The Court rejected such an approach. The Court found the “‘temporary and precarious’” language “too broad to be useful,” given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U. S., at 738—could be described in those terms. 526 U. S., at 206–207. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate “intended the rights secured by the . . . Treaty to survive statehood.” 526 U. S., at 207. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the Chippewa bands’ treaty rights. The

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Chippewa Treaty itself defined the specific “circumstances under which the rights would terminate,” and there was no suggestion that statehood would satisfy those circumstances. *Ibid.*

Maintaining its focus on the treaty’s language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse*. Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, “tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]”—*i.e.*, to whenever the hunting grounds would cease to “remai[n] unoccupied and owned by the United States.” 526 U.S., at 207. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the “Treaty itself.” *Ibid.* Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was “impliedly repealed,” *Mille Lacs* disavowed that earlier holding. 526 U.S., at 207. “Treaty rights,” the Court clarified, “are not impliedly terminated upon statehood.” *Ibid.* The Court further explained that “[t]he *Race Horse* Court’s decision to the contrary”—that Wyoming’s statehood did imply repeal of Indian treaty rights—“was informed by” that Court’s erroneous conclusion “that the Indian treaty rights were inconsistent with state sovereignty over natural resources.” *Id.*, at 207–208.

In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress’ clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U.S., at 207. “[T]here is nothing inherent in the nature of reserved

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treaty rights to suggest that they can be extinguished by *implication* at statehood.” *Ibid.*

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*’ analysis with the Court’s prior reasoning in *Race Horse*.¹

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* “was not expressly overruled” in *Mille Lacs*, “it must be regarded as retaining no vitality” after that decision. *Limbach v. Hooven & Allison Co.*, 466 U. S. 353, 361 (1984). To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

B

Because this Court’s intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis*, *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming’s statehood.

Under the doctrine of issue preclusion, “a prior judgment . . . foreclos[es] successive litigation of an issue of

¹Notably, the four Justices who dissented in *Mille Lacs* protested that the Court “effectively overrule[d] *Race Horse* *sub silentio*.” 526 U. S., at 219 (Rehnquist, C. J., dissenting). Others have agreed with this assessment. See, e.g., *State v. Buchanan*, 138 Wash. 2d 186, 211–212, 978 P. 2d 1070, 1083 (1999) (“[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota v. Mille Lacs*”).

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fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.” *New Hampshire v. Maine*, 532 U. S. 742, 748–749 (2001). Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening “change in [the] applicable legal context.” *Bobby v. Bies*, 556 U. S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28, Comment c (1980)); see *Limbach*, 466 U. S., at 363 (refusing to find a party bound by “an early decision based upon a now repudiated legal doctrine”); see also *Montana v. United States*, 440 U. S. 147, 155 (1979) (asking “whether controlling facts or legal principles ha[d] changed significantly” since a judgment before giving it preclusive effect); *id.*, at 157–158 (explaining that a prior judgment was conclusive “[a]bsent significant changes in controlling facts or legal principles” since the judgment); *Commissioner v. Sunnen*, 333 U. S. 591, 599 (1948) (issue preclusion “is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally”). The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not “advance the equitable administration of the law.” *Bobby*, 556 U. S., at 836–837.²

²The dissent does not disagree outright with this conclusion, noting only that “there is a respectable argument on the other side,” *post*, at 12. The dissent argues that the cases cited above are distinguishable, but we do not read them as narrowly as does the dissent. We note, too, that the lower federal courts have long applied the change-in-law exception in a variety of contexts. See, e.g., *Dow Chemical Co. v. Nova Chemicals Corp. (Canada)*, 803 F. 3d 620, 627–630 (CA Fed. 2015), cert. denied, 578 U. S. ___ (2016); *Coors Brewing Co. v. Mendez-Torres*, 562 F. 3d 3, 11 (CA1 2009), abrogated on other grounds by *Levin v. Commerce Energy, Inc.*, 560 U. S. 413 (2010); *Ginters v. Frazier*, 614 F. 3d 822, 826–827 (CA8 2010); *Faulkner v. National Geographic Enterprises Inc.*, 409 F. 3d 26, 37–38 (CA2 2005); *Chippewa & Flambeau Improvement Co. v. FERC*, 325 F. 3d 353, 356–357 (CA DC 2003); *Spradling v.*

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We conclude that a change in law justifies an exception to preclusion in this case. There is no question that the Tenth Circuit in *Repsis* relied on this Court's binding decision in *Race Horse* to conclude that the 1868 Treaty right terminated upon Wyoming's statehood. See 73 F. 3d, at 994. When the Tenth Circuit reached its decision in *Repsis*, it had no authority to disregard this Court's holding in *Race Horse* and no ability to predict the analysis this Court would adopt in *Mille Lacs*. *Mille Lacs* repudiated *Race Horse*'s reasoning. Although we recognize that it may be difficult at the margins to discern whether a particular legal shift warrants an exception to issue preclusion, this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force. See *Limbach*, 466 U. S., at 363.³

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly

Tulsa, 198 F. 3d 1219, 1222–1223 (CA10 2000); *Mendelovitz v. Adolph Coors Co.*, 693 F. 2d 570, 579 (CA5 1982).

³We do not address whether a different outcome would be justified if the State had identified "compelling concerns of repose or reliance." See 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4425, p. 726 (3d ed. 2016). Wyoming here has not done so. The State suggests that public support for its conservation efforts may be jeopardized if it no longer has "unquestioned" authority over wildlife management in the Bighorn Mountains. Brief for Respondent 54. Wyoming does not explain why its authority to regulate Indians exercising their treaty rights when necessary for conservation is not sufficient to preserve that public support, see *infra*, at 22. The State's passing reference to upsetting the settled expectations of private property owners is unconvincing because the 1868 Treaty right applies only to "unoccupied lands of the United States."

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express its intent to do so.” *Mille Lacs*, 526 U. S., at 202. “There must be ‘clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.’” *Id.*, at 202–203 (quoting *Dion*, 476 U. S., at 740); see *Menominee Tribe*, 391 U. S., at 412. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act “makes no mention of Indian treaty rights” and “provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act.” Cf. *Mille Lacs*, 526 U. S., at 203; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the “‘clear evidence’” this Court’s precedent requires. *Mille Lacs*, 526 U. S., at 203.⁴

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is “essentially a contract between two sovereign nations.” *Fishing Vessel Assn.*, 443 U. S., at 675. Indian treaties “must be interpreted in light of the parties’ intentions, with any ambiguities resolved in favor of the Indians,” *Mille Lacs*, 526 U. S., at 206, and the words of a treaty must be construed “in the sense in which they would naturally be understood by the Indians,” *Fishing Vessel Assn.*, 443 U. S., at 676. If a treaty “itself defines the circumstances under which the rights would terminate,” it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille*

⁴Recall also that the Act establishing the Wyoming Territory declared that the creation of the Territory would not “impair the rights of person or property now pertaining to the Indians in said Territory” unless a treaty extinguished those rights. Wyoming Territory Act, 15 Stat. 178.

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Lacs, 526 U. S., at 207.

Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer “unoccupied”; (2) the lands no longer belong to the United States; (3) game can no longer “be found thereon”; and (4) the Tribe and non-Indians are no longer at “peace . . . on the borders of the hunting districts.” Art. IV, 15 Stat. 650. Wyoming’s statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U. S., at 207.

The historical record likewise does not support the State’s position. See *Choctaw Nation v. United States*, 318 U. S. 423, 431–432 (1943) (explaining that courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties” to determine a treaty’s meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, e.g., Proceedings 88, and Commissioner Taylor assured them that the Tribe would have “the right to hunt upon [the ceded land] as long as the game lasts,” *id.*, at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota,

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May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe’s hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming’s statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical matter, marked the arrival of “civilization” in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming’s arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members “wholly within the limits of their respective reservations”; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting §237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. §492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm’r of Indian Affairs 495 (1873) (Black Foot: “On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain”). As for the Indian Department

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Regulations, there are reports that a group of Crow Tribe members “regularly hunted along the Little Bighorn River” even after the regulation the State cites was in effect. Hoxie, Parading Through History, at 26. In 1889, the Office of Indian Affairs wrote to U. S. Indian Agents in the Northwest that “[f]requent complaints have been made to this Department that Indians are in the habit of leaving their reservations for the purpose of hunting.” 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State’s mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming subverts this Court’s clear instruction that treaty-protected rights “are not impliedly terminated upon statehood.” *Mille Lacs*, 526 U. S., at 207.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally “occupied” by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 19–20. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case’s reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U. S., at 514; *Mille Lacs*, 526 U. S., at 207–208.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe’s hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

III

We turn next to the question whether the 1868 Treaty

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right, even if still valid after Wyoming’s statehood, does not protect hunting in Bighorn National Forest because the forest lands are “occupied.” We agree with Herrera and the United States that Bighorn National Forest did not become categorically “occupied” within the meaning of the 1868 Treaty when the national forest was created.⁵

⁵ Wyoming argues that the judgment below should be affirmed because the Tenth Circuit held in *Repsis* that the creation of the forest rendered the land “occupied,” see 73 F. 3d, at 994, and thus Herrera is precluded from raising this issue. We did not grant certiorari on the question of how preclusion principles would apply to the alternative judgment in *Repsis*, and—although our dissenting colleagues disagree, see *post*, at 13, and n. 6—the decision below did not address that issue.

The Wyoming appellate court agreed with the State that “the primary issue in [Herrera’s] case is identical to the *primary issue* in the *Repsis* case.” No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 13 (emphasis added). That “primary issue” was the *Race Horse* ground of decision, not the “occupation” ground, which *Repsis* referred to as “an alternative basis for affirmance,” *Repsis*, 73 F. 3d, at 993, and which the Wyoming court itself described as an “alternativ[e]” holding, No. 2016–242, App. to Pet. for Cert. 33. Reading the state court’s decision to give preclusive effect to the occupation ground as well would not fit with the Wyoming court’s preclusion analysis, which, among other things, relied on a decision of the Federal District Court in *Repsis* that did not address the occupation issue. See No. 2016–242, App. to Pet. for Cert. 14, 18; see also *Repsis*, 73 F. 3d, at 993 (explaining that “the district court did not reach [the occupation] issue”). Context thus makes clear that the state court gave issue-preclusive effect only to *Repsis’* holding that the 1868 Treaty was no longer valid, not to *Repsis’* independent, narrower holding that Bighorn National Forest in particular was “occupied” land. The court may not have addressed the issue-preclusive effect of the latter holding because of ambiguity in the State’s briefing. See Appellee’s Supplemental Brief in No. 2016–242, pp. 4, 11–12.

While the dissent questions whether forfeiture could have played a part in the state court’s analysis given that the court invited the parties to submit supplemental briefs on preclusion, *post*, at 13, n. 6, the parties suggest that Wyoming failed adequately to raise the claim even in its supplemental brief. See Brief for Petitioner 49 (“the state made no such argument before” the state court); Brief for United States as *Amicus Curiae* 31 (noting ambiguity in the State’s supplemental brief).

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Treaty analysis begins with the text, and treaty terms are construed as “they would naturally be understood by the Indians.” *Fishing Vessel Assn.*, 443 U. S., at 676. Here it is clear that the Crow Tribe would have understood the word “unoccupied” to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty’s text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace “among the whites and Indians on the borders of the hunting districts,” thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word “occupation” to refer to the Tribe’s residence inside the reservation boundaries, and referred to the Tribe members as “settlers” on the new reservation. Arts. II, VI, *id.*, at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make “no permanent settlement” other than on the new reservation, but could hunt on the “unoccupied lands” of the United States. Art. IV, *id.*, at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, *A Diction-*

It can be “appropriate in special circumstances” for a court to address a preclusion argument *sua sponte*. *Arizona v. California*, 530 U. S. 392, 412 (2000). But because the Wyoming District Court “did not address” this contention, “we decline to address it here.” *County of Los Angeles v. Mendez*, 581 U. S. ___, ___, n. (2017) (slip op., at 8, n.); see *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005); *Archer v. Warner*, 538 U. S. 314, 322–323 (2003). Resolution of this question would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in this litigation, among other matters. These gateway issues should be decided before this Court addresses them, especially given that even the dissent acknowledges that one of the preclusion issues raised by the parties is important and undecided, *post*, at 14, and some of the parties’ other arguments are equally weighty. Unlike the dissent, we do not address these issues in the first instance.

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ary of Law 725 (1889) (defining “occupy” as “[t]o hold in possession; to hold or keep for use” and noting that the word “[i]mplies actual use, possession or cultivation by a particular person”); *id.*, at 944 (defining “settle” as “[t]o establish one’s self upon; to occupy, reside upon”).

Historical evidence confirms this reading of the word “unoccupied.” At the treaty negotiations, Commissioner Taylor commented that “settlements ha[d] been made upon [Crow Tribe] lands” and that “white people [were] rapidly increasing and . . . occupying all the valuable lands.” Proceedings 86. It was against this backdrop of white settlement that the United States proposed to buy “the right to use and settle” the ceded lands, retaining for the Tribe the right to hunt. *Ibid.* A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area “as long as there are any buffalo, and as long as the white men are not [in that area] with farms.” Dept. of Interior, Ann. Rep. of the Comm’r of Indian Affairs 500.

Given the tie between the term “unoccupied” and a lack of non-Indian settlement, it is clear that President Cleveland’s proclamation creating Bighorn National Forest did not “occupy” that area within the treaty’s meaning. To the contrary, the President “reserved” the lands “from entry or settlement.” Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave “[w]arning . . . to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation.” *Id.*, at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe’s exercise of the 1868 Treaty right.

Wyoming’s counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government’s “exercise of dominion and control”

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over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty’s text and the historical record suggest that the phrase “unoccupied lands” had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§241.2, 241.3 (Supp. 1941); §261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was “very little” settlement of Bighorn National Forest around the time the forest was created. Dept. of Interior, Nineteenth Ann. Rep. of the U. S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

IV

Finally, we note two ways in which our decision is limited. First, we hold that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was “occupied” within the meaning of the 1868 Treaty. See *State v. Cutler*, 109 Idaho 448, 451, 708 P. 2d

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853, 856 (1985) (stating that the Federal Government may not be foreclosed from using land in such a way that the Indians would have considered it occupied).

Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right “in the interest of conservation.” Nos. CT-2015-2687, CT-2015-2688, App. to Pet. for Cert. 39–41; see *Antoine*, 420 U. S., at 207. The appellate court did not reach this issue. No. 2016-242, App. to Pet. for Cert. 14, n. 3. On remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation. We do not pass on the viability of those arguments today.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 17–532

CLAYVIN HERRERA, PETITIONER *v.* WYOMING

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF
WYOMING, SHERIDAN COUNTY

[May 20, 2019]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE KAVANAUGH join, dissenting.

The Court’s opinion in this case takes a puzzling course. The Court holds that members of the Crow Tribe retain a virtually unqualified right under the Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty) to hunt on land that is now part of the Bighorn National Forest. This interpretation of the treaty is debatable and is plainly contrary to the decision in *Ward v. Race Horse*, 163 U. S. 504 (1896), which construed identical language in a closely related treaty. But even if the Court’s interpretation of the treaty is correct, its decision will have no effect if the members of the Crow Tribe are bound under the doctrine of issue preclusion by the judgment in *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 992–993 (CA10 1995) (holding that the hunting right conferred by that treaty is no longer in force).

That judgment was based on two independent grounds, and the Court deals with only one of them. The Court holds that the first ground no longer provides an adequate reason to give the judgment preclusive effect due to an intervening change in the legal context. But the Court sidesteps the second ground and thus leaves it up to the state courts to decide whether the *Repsis* judgment continues to have binding effect. If it is still binding—and I think it is—then no member of the Tribe will be able

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to assert the hunting right that the Court addresses. Thus, the Court's decision to plow ahead on the treaty-interpretation issue is hard to understand, and its discourse on that issue is likely, in the end, to be so much wasted ink.

I
A

As the Court notes, the Crow Indians eventually settled in what is now Montana, where they subsequently came into contact with early white explorers and trappers. F. Hoxie, *The Crow* 26–28, 33 (1989). In an effort to promote peace between Indians and white settlers and to mitigate conflicts between different tribes, the United States negotiated treaties that marked out a territory for each tribe to use as a hunting district. See 2 C. Kappler, *Indian Affairs: Laws and Treaties* 594 (2d ed. 1904) (Kappler). The Treaty of Fort Laramie of 1851 (1851 Treaty), 11 Stat. 749, created such a hunting district for the Crow.

As white settlement increased, the United States entered into a series of treaties establishing reservations for the Crow and neighboring tribes, and the 1868 Treaty was one such treaty. 15 Stat. 649; Kappler 1008. It set out an 8-million-acre reservation for the Crow Tribe but required the Tribe to cede ownership of all land outside this reservation, including 30 million acres that lay within the hunting district defined by the 1851 Treaty. Under this treaty, however, the Crow kept certain enumerated rights with respect to the use of those lands, and among these was “the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” 1868 Treaty, Art. IV, 15 Stat. 650.

Shortly after the signing of the 1868 Treaty, Congress created the Wyoming Territory, which was adjacent to and

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immediately south of the Crow Tribe’s reservation. The Act creating the Territory provided that “nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.” Act of July 25, 1868, ch. 235, 15 Stat. 178. Twenty-two years later, Congress admitted Wyoming as a State “on an equal footing with the original States in all respects whatever.” Act of July 10, 1890, ch. 664, 26 Stat. 222. The following year, Congress passed an Act empowering the President to “set apart and reserve” tracts of public lands owned by the United States as forest reservations. Act of Mar. 3, 1891, ch. 561, §24, 26 Stat. 1103. Exercising that authority, President Cleveland designated some lands in Wyoming that remained under federal ownership as a forest reservation. Presidential Proclamation No. 30, 29 Stat. 909. Today, those lands make up the Bighorn National Forest. Bighorn abuts the Crow Reservation along the border between Wyoming and Montana and includes land that was previously part of the Crow Tribe’s hunting district.

These enactments did not end legal conflicts between the white settlers and Indians. Almost immediately after Wyoming’s admission to the Union, this Court had to determine the extent of the State’s regulatory power in light of a tribe’s reserved hunting rights. A member of the Shoshone-Bannock Tribes named Race Horse had been arrested by Wyoming officials for taking elk in violation of state hunting laws. *Race Horse*, *supra*, at 506. The Shoshone-Bannock Tribes, like the Crow, had accepted a reservation while retaining the right to hunt in the lands previously within their hunting district. Their treaty reserves the same right, using the same language, as the Crow Tribe’s treaty.¹ Race Horse argued that he had the

¹The Shoshone-Bannock Treaty reserved “the right to hunt on the

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right to hunt at the spot of his alleged offense, as the nearest settlement lay more than 60-miles distant, making the land where he was hunting “unoccupied lands of the United States.” *In re Race Horse*, 70 F. 598, 599–600 (Wyo. 1895).

This Court rejected Race Horse’s argument, holding that the admission of Wyoming to the Union terminated the hunting right. 163 U. S., at 514. Although the opinion of the Court is not a model of clarity, this conclusion appears to rest on two grounds.

First, the Court held that Wyoming’s admission necessarily ended the Tribe’s hunting right because otherwise the State would lack the power, possessed by every other State, “to regulate the killing of game within [its] borders.” *Ibid.* Limiting Wyoming’s power in this way, the Court reasoned, would contravene the equal-footing doctrine, which dictates that all States enter the Union with the full panoply of powers enjoyed by the original 13 States at the adoption of the Constitution. *Ibid.* Under this rationale, the Act of Congress admitting Wyoming could not have preserved the hunting right even if that had been Congress’s wish.

After providing this basis for its holding, however, the Court quickly turned to a second ground, namely, that even if Congress could have limited Wyoming’s authority in this way, it had not attempted to do so. *Id.*, at 515. The Court thought that Congress’s intention not to impose such a restriction on the State was “conveyed by the express terms of the act of admission,” but the Court did not identify the terms to which it was referring. *Ibid.* It did, however, see support for its decision in the nature of the

unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.” *Race Horse*, 163 U. S., at 507; Kappler 1020, 1021.

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hunting right reserved under the treaty. This right, the Court observed, was not “of such a nature as to imply [its] perpetuity” but was instead “temporary and precarious,” since it depended on the continuation of several conditions, including at least one condition wholly within the control of the Government—continued federal ownership of the land. *Ibid.*

Race Horse did not mark a final resolution of the conflict between Wyoming’s regulatory power and tribal hunting rights. Nearly a century later, Thomas Ten Bear, a member of the Crow Tribe, crossed into Wyoming to hunt elk in the Bighorn National Forest, just as Herrera did in this case. Wyoming game officials cited Ten Bear, and he was ultimately convicted of hunting elk without the requisite license.² Ten Bear, like Race Horse before him, filed a lawsuit in federal court disputing Wyoming’s authority to regulate hunting by members of his Tribe. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520, 521 (Wyo. 1994). Joined by the Crow Tribe, he argued that the 1868 Treaty—the same treaty at issue here—gave him the right to take elk in the national forest.

The District Court found that challenge indistinguishable from the one addressed in *Race Horse*. The District Court noted that Race Horse had pointed to “identical treaty language” and had “advanced the identical contention now made by” Ten Bear and the Tribe. *Repsis*, 866 F. Supp., at 522. Because *Race Horse* “remain[ed] controlling,” the District Court granted summary judgment to the State. 866 F. Supp., at 524.

The Tenth Circuit affirmed that judgment on two independent grounds. First, the Tenth Circuit agreed with the

²Wyoming officials enforce the State’s hunting laws on national forest lands pursuant to a memorandum of understanding between the State and Federal Governments. *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520, 521, n. 1 (Wyo. 1994).

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District Court that, under *Race Horse*, “[t]he Tribe’s right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union.” *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 992 (1995). Second, as an independent alternative ground for affirmance, the Tenth Circuit held that the Tribe’s hunting right had expired because “the treaty reserved an off-reservation hunting right on ‘unoccupied’ lands and the lands of the Big Horn National Forest are ‘occupied.’” *Id.*, at 993. The Tenth Circuit reasoned that “unoccupied” land within the meaning of the treaty meant land that was open for commercial or residential use, and since the creation of the national forest precluded those activities, it followed that the land was no longer “unoccupied” in the relevant sense. *Ibid.*

B

The events giving rise to the present case are essentially the same as those in *Race Horse* and *Repsis*. During the winter of 2013, Herrera, who was an officer in the Crow Tribe’s fish and game department, contacted Wyoming game officials to offer assistance investigating a number of poaching incidents along the border between Bighorn and the Crow Reservation.³ After a lengthy discussion in which Herrera asked detailed questions about the State’s investigative capabilities, the Wyoming officials became suspicious of Herrera’s motives. The officials conducted a web search for Herrera’s name and found photographs posted on trophy-hunting and social media websites that showed him posing with bull elk. The officers recognized from the scenery in the pictures that the elk had been

³Such cooperative law enforcement is valuable because the Crow Reservation and Bighorn National Forest face one another along the border between Montana, where the Crow Reservation is located, and Wyoming, where Bighorn is located. *Supra*, at 3. The border is delineated by a high fence intermittently posted with markers.

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killed in Bighorn and were able to locate the sites where the pictures had been taken. At those sites, about a mile south of the fence running along the Bighorn National Forest boundary, state officials discovered elk carcasses. The heads had been taken from the carcasses but much of the meat was abandoned in the field. State officials confronted Herrera, who confessed to the shootings and turned over the heads that he and his companions had taken as trophies. The Wyoming officials cited Herrera for hunting out of season.

Herrera moved to dismiss the citations, arguing that he had a treaty right to hunt in Bighorn. The trial court rejected this argument, concluding that it was foreclosed by the Tenth Circuit's analysis in *Repsis*, and the jury found Herrera guilty. On appeal, Herrera continued to argue that he had a treaty right to hunt in Bighorn. The appellate court held that the judgment in *Repsis* precluded him from asserting a treaty hunting right, and it also held, in the alternative, that Herrera's treaty rights did not allow him to hunt in Bighorn. This Court granted certiorari.

II

In seeking review in this Court, Herrera framed this case as implicating only a question of treaty interpretation. But unless the state court was wrong in holding that Herrera is bound by the judgment in *Repsis*, there is no reason to reach the treaty-interpretation question. For this reason, I would begin with the question of issue preclusion, and because I believe that Herrera is bound by the adverse decision on that issue in *Repsis*, I would not reach the treaty-interpretation issue.

A

It is "a fundamental precept of common-law adjudication" that "an issue once determined by a competent court

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is conclusive.” *Arizona v. California*, 460 U. S. 605, 619 (1983). “The idea is straightforward: Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts.” *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U. S. 138, ___ (2015) (slip op., at 8) (internal quotation marks, citation, and alterations omitted). Succinctly put, “a losing litigant deserves no rematch after a defeat fairly suffered.” *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U. S. 104, 107 (1991).

Under federal issue-preclusion principles,⁴ “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U. S. 147, 153 (1979). That standard for issue preclusion is met here.

In *Repsis*, the central issue—and the question on which the Crow Tribe sought a declaratory judgment—was whether members of the Tribe “have an unrestricted right to hunt and fish on Big Horn National Forest lands.” 866 F. Supp., at 521. The Tenth Circuit’s judgment settled that question by holding that “the Tribe and its members are subject to the game laws of Wyoming.” 73 F. 3d, at 994. In this case, Herrera asserts the same hunting right that was actually litigated and decided against his Tribe in *Repsis*. He does not suggest that either the Federal District Court or the Tenth Circuit lacked jurisdiction to

⁴The preclusive effect of the judgment of a federal court is governed by federal law, regardless of whether that judgment’s preclusive effect is later asserted in a state or federal forum. *Taylor v. Sturgell*, 553 U. S. 880, 892 (2008). This means that the preclusive effect of *Repsis*, decided by a federal court, is governed by federal law, not Wyoming law, even though preclusion was asserted in a Wyoming court.

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decide *Repsis*. And, because Herrera’s asserted right is based on his membership in the Tribe, a judgment binding on the Tribe is also binding on him. As a result, the Wyoming appellate court held that *Repsis* bound Herrera and precluded him from asserting a treaty-rights defense. That holding was correct.

B

The majority concludes otherwise based on an exception to issue preclusion that applies when there has been an intervening “change in the applicable legal context.” *Ante*, at 12 (internal quotation marks and alteration omitted). Specifically, the majority reasons that the *Repsis* judgment was based on *Race Horse* and that our subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), represents a change in the applicable law that is sufficient to abrogate the *Repsis* judgment’s preclusive effect. There is support in the Restatement (Second) of Judgments for the general proposition that a change in law may alter a judgment’s preclusive effect, §28, Comment c, p. 276 (1980), and in a prior case, *Bobby v. Bies*, 556 U. S. 825, 834 (2009), we invoked that provision. But we have never actually held that a prior judgment lacked preclusive effect on this ground. Nor have we ever defined how much the relevant “legal context” must change in order for the exception to apply. If the exception is applied too aggressively, it could dangerously undermine the important interests served by issue preclusion. So caution is in order in relying on that exception here.

The majority thinks that the exception applies because *Mille Lacs* effectively overruled *Race Horse*, even though it did not say that in so many words. But that is a questionable interpretation. The fact of the matter is that the *Mille Lacs* majority held back from actually overruling *Race Horse*, even though the dissent claimed that it had

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effectively done so. See *Mille Lacs*, 526 U. S., at 207 (applying the “*Race Horse* inquiry” but factually distinguishing that case from the facts present in *Mille Lacs*); *id.*, at 219 (Rehnquist, C. J., dissenting) (noting the Court’s “apparent overruling *sub silentio*” of *Race Horse*). And while the opinion of the Court repudiated one of the two grounds that the *Race Horse* Court gave for its decision (the equal-footing doctrine), it is by no means clear that *Mille Lacs* also rejected the second ground (the conclusion that the terms of the Act admitting Wyoming to the Union manifested a congressional intent not to burden the State with the right created by the 1868 Treaty). With respect to this latter ground, the *Mille Lacs* Court characterized the proper inquiry as follows: “whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood.” 526 U. S., at 207. And the Court then went on to analyze the terms of the particular treaty at issue in that case and to contrast those terms with those of the treaty in *Race Horse*. *Mille Lacs, supra*, at 207.

On this reading, it appears that *Mille Lacs* did not reject the second ground for the decision in *Race Horse* but simply found it inapplicable to the facts of the case at hand. I do not claim that this reading of *Mille Lacs* is indisputable, but it is certainly reasonable, and if it is correct, *Mille Lacs* did not change the legal context as much as the majority suggests. It knocked out some of *Race Horse*’s reasoning but did not effectively overrule the decision. Is that enough to eliminate the preclusive effect of the first ground for the *Repsis* judgment?

The majority cites no authority holding that a decision like *Mille Lacs* is sufficient to deprive a prior judgment of its issue-preclusive effect. Certainly, *Bies, supra*, upon which the majority relies, is not such authority. In that case, Bies had been convicted of murder and sentenced to death at a time when what was then termed “mental

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retardation” did not render a defendant ineligible for a death sentence but was treated as simply a mitigating factor to be taken into account in weighing whether such a sentence should be imposed. When Bies contested his death sentence on appeal, the state appellate court observed that he suffered from a mild form of intellectual disability, but it nevertheless affirmed his sentence. Years later, in *Atkins v. Virginia*, 536 U. S. 304 (2002), this Court ruled that an intellectually disabled individual cannot be executed, and the Sixth Circuit then held that the state court’s prior statements about Bies’s condition barred his execution under issue-preclusion principles.

This Court reversed, and its primary reason for doing so has no relation to the question presented here. We found that issue preclusion was not available to Bies because he had not prevailed in the first action; despite the state court’s recognition of mild intellectual disability as a mitigating factor, it had affirmed his sentence. As we put it, “[i]ssue preclusion . . . does not transform final judgment losers . . . into partially prevailing parties.” *Bies*, 556 U. S., at 829; see also *id.*, at 835.

Only after providing this dispositive reason for rejecting the Sixth Circuit’s invocation of issue preclusion did we go on to cite the Restatement’s discussion of the change-in-law exception. And we then quickly noted that the issue addressed by the state appellate courts prior to *Atkins* (“[m]ental retardation as a mitigator”) was not even the same issue as the issue later addressed after *Atkins*. *Bies, supra*, at 836 (the two “are discrete legal issues”). So *Bies* is very far afield.⁵

⁵ Nor are the other cases cited by the majority more helpful to the Court’s position. *Commissioner v. Sunnen*, 333 U. S. 591 (1948), and *Limbach v. Hooven & Allison Co.*, 466 U. S. 353 (1984)—and, indeed, *Montana v. United States*, 440 U. S. 147 (1979)—are tax cases that hold, consistent with the general policy against “discriminatory distinctions in tax liability,” *Sunnen*, 333 U. S., at 599, that issue preclusion

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Although the majority in the present case believes that *Mille Lacs* unquestionably constitutes a sufficient change in the legal context, see *ante*, at 13, there is a respectable argument on the other side. I would not decide that question because Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies.

C

That is so because the *Repsis* judgment was based on a second, independently sufficient ground that has nothing to do with *Race Horse*, namely, that the Bighorn National Forest is not “unoccupied.” Herrera and the United States, appearing as an *amicus* in his support, try to escape the effect of this alternative ground based on other exceptions to the general rule of issue preclusion. But accepting any of those exceptions would work a substantial change in established principles, and it is fortunate that the majority has not taken that route.

Unfortunately, the track that the majority has chosen is no solution because today’s decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judgment binds all members of the Crow Tribe who hunt within the Bighorn National Forest. And for the reasons I will explain, such a holding would be correct.

1

Attempting to justify its approach, the majority claims that the decision below gave preclusive effect to only the

has limited application when the conduct in the second litigation occurred in a different tax year than the conduct that was the subject of the earlier judgment. We have not, prior to today, applied *Sunnen*’s tax-specific policy in cases that do not involve tax liability and do not create a possibility of “inequalities in the administration of the revenue laws.” *Ibid.*

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first ground adopted by the Tenth Circuit in *Repsis*—that is, the ground that relied on *Race Horse*. *Ante*, at 18, n. 5. But nowhere in the decision below can any such limitation be found. The Wyoming appellate court discussed the second ground for the *Repsis* judgment, see App. to Pet. for Cert. 22 (“[T]he creation of the Big Horn National Forest resulted in the ‘occupation’ of the land, extinguishing the off-reservation hunting right”), and it concluded that *the judgment* in *Repsis*, not just one of the grounds for that judgment, “preclude[s] Herrera from attempting to relitigate the validity of the off-reservation hunting right that was previously held to be invalid,” App. to Pet. for Cert. 31.⁶

2

Herrera takes a different approach in attempting to circumvent the effect of the alternative *Repsis* ground. When a judgment rests on two independently sufficient

⁶The decision below, in other words, held that the issue that was precluded was whether members of the Crow Tribe have a treaty right to hunt in Bighorn. The majority rejects this definition of the issue, and instead asks only whether the first line of reasoning in *Repsis* retains preclusive effect. Such hairsplitting conflicts with the fundamental purpose of issue preclusion—laying legal disputes at rest. If courts allow a party to escape preclusion whenever a decision on one legal question can be divided into multiple or alternate parts, the doctrine of preclusion would lose its value. The majority’s “[n]arrower definition of the issues resolved augments the risk of apparently inconsistent results” and undermines the objectives of finality and economy served by preclusion. 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4417, p. 470 (3d ed. 2016).

The Court also hints that the state court might have thought that Wyoming forfeited reliance on issue preclusion, *ante*, at 18, n. 5, but there is no basis for that suggestion. The Wyoming appellate court invited the parties to submit supplemental briefs on issue preclusion and specifically held that “it [was] proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues.” App. to Pet. for Cert. 10, n. 2.

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grounds, he contends, neither ground should be regarded as having an issue-preclusive effect. This argument raises an important question that this Court has never decided and one on which the First and Second Restatements of Judgments take differing views. According to the First Restatement, a judgment based on alternative grounds “is determinative on both grounds, although either alone would have been sufficient to support the judgment.” Restatement of Judgments §68, Comment *n* (1942). Other authorities agree. See 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4421, p. 613 (3d ed. 2016) (noting “substantial support in federal decisions” for this approach).⁷ But the Second Restatement reversed this view, recommending that a judgment based on the determination of two independent issues “is not conclusive with respect to either issue standing alone.” §27, Comment *i*, at 259.

There is scant explanation for this change in position beyond a reference in the Reporter’s Note to a single decision of the United States Court of Appeals for the Second Circuit. *Id.*, Reporter’s Note, Comment *i*, at 270 (discussing *Halpern v. Schwartz*, 426 F. 2d 102 (1970)). But even that court has subsequently explained that *Halpern* was “not intended to have . . . broad impact outside the [bankruptcy] context,” and it continues to follow the rule of the First Restatement “in circumstances divergent from those in *Halpern*.” *Winters v. Lavine*, 574 F. 2d 46, 67 (1978). It thus appears that in this portion of the Second Restatement, the Reporters adopted a prescriptive rather than a descriptive approach. In such situations, the Restatement loses much of its value. See *Kansas v. Nebraska*, 574 U. S.

⁷See, e.g., *Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc.*, 458 F. 3d 244, 251–257 (CA3 2006) (collecting cases); *In re Westgate-California Corp.*, 642 F. 2d 1174, 1176–1177 (CA9 1981); *Winters v. Lavine*, 574 F. 2d 46, 66–67 (CA2 1978); *Irving Nat'l Bank v. Law*, 10 F. 2d 721, 724 (CA2 1926) (Hand, J.).

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445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

The First Restatement has the more compelling position. There appear to be two principal objections to giving alternative grounds preclusive effect. The first is that the court rendering the judgment may not have given each of the grounds “the careful deliberation and analysis normally applied to essential issues.” *Halpern, supra*, at 105. This argument is based on an unjustified assessment of the way in which courts do their work. Even when a court bases its decision on multiple grounds, “it is reasonable to expect that such a finding is the product of careful judicial reasoning.” *Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc.*, 458 F. 3d 244, 254 (CA3 2006).

The other argument cited for the Second Restatement’s rule is that the losing party may decline to appeal if one of the two bases for a judgment is strong and the other is weak. §27, Comment *i*, at 259. There are reasons to be skeptical of this argument as well. While there may be cases in which the presence of multiple grounds causes the losing party to forgo an appeal, that is likely to be true in only a small subset of cases involving such judgments.

Moreover, other aspects of issue-preclusion doctrine protect against giving binding effect to decisions that result from unreliable litigation. Issue preclusion applies only to questions “actually and necessarily determined,” *Montana*, 440 U. S., at 153, and a party may be able to avoid preclusion by showing that it “did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.” Restatement (Second) of Judgments §28(5)(c). To be sure, this exception should not be applied “without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous.” *Id.*, §28, Comment *j*, at 284. This exception provides an important safety valve, but it is narrow and clearly does not apply

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here. Not only did the Tribe have an opportunity in *Repsis* to litigate the subject of the alternative ground, it actually did so.⁸

Finally, regardless of whether alternative grounds *always* have preclusive effect, it is sufficient to say that, at least in a declaratory judgment action, each conclusion provides an independent basis for preclusion. “Since the very purpose of declaratory relief is to achieve a final and reliable determination of legal issues, there should be no quibbling about the necessity principle. Every issue that the parties have litigated and that the court has undertaken to resolve is necessary to the judgment, and should be precluded.” 18 Wright, Federal Practice and Procedure §4421, at 630; see *Henglein v. Colt Industries Operating Corp.*, 260 F. 3d 201, 212 (CA3 2001). Because *Repsis* was a declaratory judgment action aimed at settling the Tribe’s hunting rights, that principle suffices to bind Herrera to *Repsis*’s resolution of the occupied-land issue.

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Herrera and the United States offer a variety of other arguments to avoid the preclusive effect of *Repsis*, but all

⁸From the beginning of the *Repsis* litigation, Wyoming argued that Bighorn was occupied land, and the Tribe argued that it was not. Wyoming pressed this argument in its answer to the Tribe’s declaratory judgment complaint. Record in No. 92-cv-1002, Doc. 29, p. 4. Wyoming reiterated that argument in its motion for summary judgment and repeated it in its reply. *Id.*, Doc. 34, pp. 1, 6; *id.*, Doc. 54, pp. 7–8. The Tribe dedicated a full 10 pages of its summary judgment brief to the argument that “[t]he Big Horn National Forest [l]ands [are] ‘[u]noccupied [l]ands’” of the United States. *Id.*, Doc. 52, pp. 6–15. Both parties repeated these arguments in their briefs before the Tenth Circuit. Brief for Appellees 20–29 and Reply Brief for Appellants 2–3, and n. 6, in No. 94-8097 (1995). And the Tribe pressed this argument as an independent basis for this Court’s review in its petition for certiorari, which this Court denied. Pet. for Cert. in *Crow Tribe of Indians v. Repsis*, O.T. 1995, No. 95-1560, pp. i, 22–24, cert. denied, 517 U. S. 1221 (1996).

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are unavailing.

Herrera contends that he is not bound by the *Repsis* judgment because he was not a party, but this argument is clearly wrong. Indian hunting rights, like most Indian treaty rights, are reserved to the Tribe as a whole. Herrera's entitlement derives solely from his membership in the Tribe; it is not personal to him. As a result, a judgment determining the rights of the Tribe has preclusive effect in subsequent litigation involving an individual member of the Tribe. Cf. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 106–108 (1938) (judgment as to water rights of a State is binding on individual residents of State). That rule applies equally to binding judgments finding in favor of and against asserted tribal rights.

Herrera also argues that a judgment in a civil action should not have preclusive effect in a subsequent criminal prosecution, but this argument would unjustifiably prevent the use of the declaratory judgment device to determine potential criminal exposure. The Declaratory Judgment Act provides an equitable remedy allowing a party to ask a federal court to “declare [the party’s] rights” through an order with “the force and effect of a final judgment.” 28 U. S. C. §2201(a). The Act thus allows a person to obtain a definitive *ex ante* determination of his or her right to engage in conduct that might otherwise be criminally punishable. It thereby avoids “putting the challenger to the choice between abandoning his rights or risking prosecution.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 129 (2007). If the Tribe had prevailed in *Repsis*, surely Herrera would expect that Wyoming could not attempt to relitigate the question in this case and in prosecutions of other members of the Tribe. A declaratory judgment “is conclusive . . . as to the matters declared” when the State prevails just as it would be when the party challenging the State is the winning party. Restatement

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(Second) of Judgments §33, at 332.

It is true that we have been cautious about applying the doctrine of issue preclusion in criminal proceedings. See e.g., *Currier v. Virginia*, 585 U. S. ___, ___ (2018) (slip op., at 9); *Bravo-Fernandez v. United States*, 580 U. S. ___, ___ (2016) (slip op., at 4). But we have never adopted the blanket prohibition that Herrera advances. Instead, we have said that preclusion doctrines should have “guarded application.” *Id.*, at ___ (slip op., at 4).

We employ such caution because preclusion rests on “an underlying confidence that the result achieved in the initial litigation was substantially correct,” and that confidence, in turn, is bolstered by the availability of appellate review. *Standefer v. United States*, 447 U. S. 10, 23, n. 18 (1980); see also Restatement (Second) of Judgments §28, Comment *a*, at 274. In *Currier* and *Bravo-Fernandez*, we were reluctant to apply issue preclusion, not because the *subsequent* trial was criminal, but because the *initial* trial was. While a defense verdict in a criminal trial is generally not subject to testing on appeal, summary judgment in a civil declaratory judgment action can be appealed. Indeed, the Crow Tribe did appeal the District Court’s decision to the Tenth Circuit and petitioned for our review of the Tenth Circuit’s decision. The concerns that we articulated in *Currier* and *Bravo-Fernandez* have no bearing here.⁹

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For these reasons, Herrera is precluded by the judgment

⁹ Nor is that the only distinction between those cases and this one. In both *Currier* and *Bravo-Fernandez* a party sought preclusion as to an element of the charged offense. The elements of the charged offense are not disputed here—Herrera’s asserted treaty right is an affirmative defense. And while the State bears the burden of proof as to elements of the offense, under Wyoming law, the defendant asserting an affirmative defense must state a *prima facie* case before any burden shifts to the State. See *Duckett v. State*, 966 P. 2d 941, 948 (Wyo. 1998).

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in *Repsis* from relitigating the continuing validity of the hunting right conferred by the 1868 Treaty. Because the majority has chosen to disregard this threshold problem and issue a potentially pointless disquisition on the proper interpretation of the 1868 Treaty, I respectfully dissent.