

## RAPING INDIAN COUNTRY

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### INTRODUCTION

This article examines issues going to the heart of tribal self-determination—extractive industries operating within and near Indian country<sup>1</sup> and how they are impacting tribal communities through climate change and the safety of Native people, especially women and children.<sup>2</sup> Given the importance of the topic, the title of this article is deliberately provoking. Using “rape” as a metaphor for any other human experience is

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1 The term “Indian country” is a legal term of art that refers to 18 U.S.C. § 1151, which states: “Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country,’ as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

2 While we deliberately use gendered language in our analysis, it is important to remember that persons of all genders experience sexual violence. This article focuses largely on the experience of Native women.

mired in controversy.<sup>3</sup> Some activists within the anti-rape movement have raised significant concerns that the use of the language of “rape” outside the context of criminal law only serves to minimize the experience of individual sexual assault victims.<sup>4</sup> While we are sympathetic to this perspective, we also strongly believe that an expansive definition of the term “rape” can and should be understood to mean a serious harm to both the climate and Indian nations, and what will happen to tribal cultures and the lands that have been exploited. Thus, in this Article, we deliberately deploy the language of “rape”—despite its controversy—to tell the legal story of how violence against Native women is directly linked to the fossil fuel industry and, by extension, climate change.

There are two reasons to use the language of sexual violence in our examination. First, many tribal cultures understand the unchecked exploitation of the earth to be a violent attack on the land, which itself carries feminine qualities. Because many tribal cultures ascribe important feminine qualities to the land, the mistreatment of “mother earth” carries important gendered consequences. As an example, Native scholar Donald Fixico explains the gendered nature of the land which is embedded within many tribal epistemologies:

The traditional Indian woman represented the heart of her people. Her role was often mixed with the symbolism of the earth in the philosophies of many tribes. In the oral tradition of many tribes, the earth is a mother nourishing her human children and animal children alike . . . In this light, earth and the mother are the same.<sup>5</sup>

Thus, while other mainstream movements in the United States may object to the use of “rape” as a descriptor for environmental degradation, it has particularly salient relevance in the unique context of Native communities who are seeking to protect their land and water. Typically, traditional epistemologies understand Native people as being

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3 Donald Trump, for example, has used the term “rape” to talk about foreign trade, which seems an inappropriate deployment of the metaphor. See Josh Voorhees, *Oh Great, Now Donald Trump Is Using the Word Rape to Talk About Foreign Trade*, Slate (May 2, 2016), [http://www.slate.com/blogs/the\\_slatest/2016/05/02/donald\\_trump\\_says\\_us\\_is\\_letting\\_china\\_rape\\_it\\_on\\_trade.html](http://www.slate.com/blogs/the_slatest/2016/05/02/donald_trump_says_us_is_letting_china_rape_it_on_trade.html) [<https://perma.cc/4e5g-avsa>].

4 See, e.g., Sigridur Gudmarsdottir, *Rapes of Earth and Grapes of Wrath: Steinbeck, Ecofeminism and the Metaphor of Rape*, 18 *Feminist Theology* 206, 208 (2010) (commenting “critical[ly on] essentialist alignments between earth mothers and mother earth” and “observ[ing] that when the metaphor of rape is used loosely, the violence against women somehow becomes the ‘absent referent’”).

5 Donald L. Fixico, “That’s What They Used to Say”: Reflections on American Indian Oral Traditions 54 (2017).

inextricably linked to land—completely dependent on the land for subsistence. In addition, many tribal spiritual beliefs are tied to the land.<sup>6</sup>

Second, because the crime of sexual violence has exponentially increased in communities where extractive industry activities have been established,<sup>7</sup> we can understand how the rape of the bodies of Native women and children is directly linked to extractive industries. These dynamics are explored below.<sup>8</sup>

We deliberately deploy the controversial language of rape to discuss the concrete impacts of climate change and environmental degradation *and* the connection to the widespread rate of violence and sexual assault that women and children experience. Indeed, the tactics of both exploitative energy companies and sexual predators share many of the same qualities, tactics, and motivations.<sup>9</sup> While we do not mean to suggest that these companies themselves are “rapists” in the criminal sense, the exploration of these shared tactics helps us better understand the linkages between harm to the earth (through energy extraction and climate change) and harm to Native women. Indeed, understanding rape by gendering land allows us to articulate the connections between exploitation of the land and exploitations of the female body. “Rape” is more than mere metaphor in the context of tribal lives—the rape of mother earth and the rape of women and children are part of the same colonial power dynamics. Our use of the term “rape” is not intended to be a mere metaphor when we talk about the types of environmental harm

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6 Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. Rev. 246, 250 (1989). The authors recognize that each indigenous community has a different relationship with its environment and are hesitant to stereotype a common “indigenous experience,” recognizing that there is a broad diversity of thought and experience related to one’s relationship with land and the environment. In particular, as Professor Tsosie warns, the authors would like to avoid traditional stereotypes of American Indians as “Noble Savages” or “Bloodthirsty Savages.” Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 Vt. L. Rev. 225, 227–28 (1996).

7 Joel Berger & Jon P. Beckmann, *Sexual Predators, Energy Development, and Conservation in Greater Yellowstone*, 24 Conservation Biology 891, 894 (2010) (determining that the number of Registered Sex Offenders “grew about two to three times faster in counties dependent on oil and gas extraction relative to those dependent on recreation or agriculture.”).

8 See *infra* Part II.C.

9 Inmaculada Barcia, Women Human Rights Defs., *Confronting Extractive Industries* 11 (Tracy Doig et al. eds., 2017), [https://www.awid.org/sites/default/files/atoms/files/whrds-confronting\\_extractive\\_industries\\_report-eng.pdf](https://www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf) [<https://perma.cc/8qh2-y2kh>] (“[W]omen . . . claim the sovereignty over their territories as inherently linked to the sovereignty of their bodies. Their struggle to free their bodies from oppression and violence resonates with the struggle to resist the exploitation of their lands and resources.”)

that can be conceived as a type of sexual violence being perpetrated against the “mother earth.”

The imposition by predatory extractive industries carries some of the same motivations of a sexual predator. Sexual predation and unchecked exploration of the land are achieved through the misuse of power.<sup>10</sup> If we consider common tactics used by sexual predators, we can quickly understand the parallel motivations of predatory energy companies, which often use similar tactics. For example, sexual predators use a variety of techniques to isolate and silence their victims, such as failing to respect her bodily integrity and ignoring the victim’s refusal.<sup>11</sup> In the context of a sexual assault, survivors experience a complete loss of control during the assault, as their bodies experience painful intrusion and invasion, which victims experience as a form of ultimate violence (short of murder). Survivors of sexual assault often suffer for years or even decades while recovering from the assault,<sup>12</sup> and are often not able to obtain the kinds of advocacy and support that is needed to make a full recovery. Much of rape law today is predicated on the concept of “consent,” wherein rape constitutes a perpetrator forcing sexual intercourse without the full consent of the victim.<sup>13</sup> Typically, a sexual predator seeks to control his victim and isolate her, without regard to her humanity and dignity. Sharon Marcus argues that “[t]he horror of rape is not that it steals something from us but that it makes us into things to be taken.”<sup>14</sup>

In the context of abusive exploitation of energy resources in Indian country, we see some of the same tactics on a meta-level. The horror of excessive fossil fuel extraction is not just its contribution to climate change or the stealing of valuable resources, but also about making tribal nations into things to be taken. Indeed, as we explore in this Article, many tribal nations are finding that the impacts of climate change pose significant existential problems that could render some tribal nations at risk of disappearing in the

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10 Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, 3, U.N. Doc. A/73/176 (July 17, 2018) [hereinafter Tauli-Corpuz, A/73/176].

11 Cathy Winkler, *One Night: Realities of Rape* 38 (2002) (“The rapist isolates and silences the victim.”).

12 See generally Diane K. Bohn, *Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts Among Native American Women*, 24 *Issues Mental Health Nursing* 333 (2003).

13 Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 *Law & Ineq.* 335, 342–43 (2017). In a majority of states, it is finally true that non-consent alone suffices.

14 Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 389 (Judith Butler & Joan Wallach Scott eds., 1992).

long-run, and some communities, such as those in Alaska and Louisiana, have already lost their territories.<sup>15</sup>

In 2015, for example, as conflicts percolated between the federal government and the tribal nations of North Dakota and South Dakota during the NO DAPL (Dakota Access Pipe Line) encampment in North Dakota, tribal leaders often complained that the industry was seeking to exploit mother earth without considering the feminine qualities of the land or the necessity of preserving sacred sites and the water that provides nourishment to entire community.<sup>16</sup> Indeed, many of the most devastating extractive projects that have damaged mother earth are couched in the same tactics used by sexual predators. Some extractive industries, for example, have been able to side-step the requirement that tribal nations should be consulted before major projects are initiated that will have a negative impact on the tribal nation.<sup>17</sup>

Because the industries are effectively ignoring these requirements, there is simply no way to ensure that tribal leaders have a meaningful opportunity to give informed consent to the extractive industries. These energy companies ignore the wishes and needs of particular communities just as a rapist does to his victims, and this failure to respect the integrity of tribal land bases is akin to non-consent in the sexual assault context. Extractive industries also have a history of using violence to intimidate and control the lives of water protectors. At Standing Rock, the pipeline construction company hired a security team that brought trained attack dogs to the site of the stand-off.<sup>18</sup> These tactics were deliberately designed to terrorize the protectors in much the same way that a rapist terrorizes his victim.

We cannot forget that many tribal nations are facing long-term existential challenges as a result of environmental devastation. Even after the extractive industry finishes its

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15 See *infra* Parts II.A & II.B.

16 For a discussion of the controversy at Standing Rock, see Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 *Transnat'l L. & Contemp. Probs.* 343 (2017).

17 Tauli-Corpuz, A/73/176, *supra* note 10.

18 John Hageman, *Dakota Access Security Firm Operated in North Dakota without License, Board Says*, Bismarck Tribune (June 27, 2017), [http://bismarcktribune.com/news/state-and-regional/dakota-access-security-firm-operated-in-nd-without-license-board/article\\_71b32e07-0b58-54f6-a6e1-e60c085051db.html](http://bismarcktribune.com/news/state-and-regional/dakota-access-security-firm-operated-in-nd-without-license-board/article_71b32e07-0b58-54f6-a6e1-e60c085051db.html) [<https://perma.cc/8r9b-tb4r>]; *Guards Accused of Unleashing Dogs, Pepper-Spraying Oil Pipeline Protesters*, CBS News (Sept. 5, 2016), <https://www.cbsnews.com/news/dakota-access-pipeline-protest-turns-violent-in-north-dakota/> [<https://perma.cc/6ul7-gp99>].

work, long-term damage to the earth will remain. Thus, Native rape survivors find themselves sharing a painful experience with their homelands, who were also harmed or destroyed by the predators of the extractive industries. Even though the rape is over, the harm continues.

Accordingly, this Article seeks to shed light on rape such as it affects mother earth, tribal communities, and Native people. To accomplish this, the Article begins with a discussion of the Trump administration's policies, which affect energy and natural resource development within and near Indian country. This first Part continues on to examine how the policies of both the Obama and Trump administrations have and have not helped to protect Native people. The next Part examines how these policies have the very real potential of increasing the vulnerability of Native people through the creation of climate refugees and by increasing the susceptibility of Native people to rape and sexual assault. The last Part offers ways forward to improve upon the status quo. This final Part examines the capacity of tribal governments to effectively address the problems identified in the Article. This Part also considers how modifications to federal law, such as a large scale "*Oliphant* fix,"<sup>19</sup> might improve upon the existing vulnerability of many Native people. Ultimately, the article concludes that the Trump administration's policies will likely lead to amplified exposure of Native peoples to detrimental environmental and sexual exploitation—indeed, the rape of Indian country.

### **I. The Status Quo: Energy Development and the Vulnerability of Indigenous Women and Children**

Part I introduces the status quo by examining the current administration's efforts to develop energy resources and protect Native people, especially women and children. This Part begins with a description of the current administration's policies relating to energy development generally and within Indian country specifically. This Part then examines the current administration's position with regard to policy recommendations and existing statutes designed to increase protection of Native people, with a special focus on women and children. With this baseline in place, subsequent Parts examine the impact of such policies on tribes and indigenous peoples through the lens of climate change and gender violence.

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<sup>19</sup> See *infra* Part I.B. for an explanation of the *Oliphant* case.

### A. The Trump Administration's Efforts to Increase Energy and Natural Resource Development

This subpart details the Trump administration's efforts to increase domestic energy production. Before delving into the administration's activities, however, it is helpful to first understand how federal law interacts with tribal law within Indian country.<sup>20</sup> As an initial starting point, tribes may enact laws as a result of their inherent tribal sovereignty.<sup>21</sup> Prior to colonization, most tribes existed as independent, self-governing communities.<sup>22</sup> Contact with foreign sovereign nations certainly influenced tribal governments.<sup>23</sup> Despite this contact, however, tribal governments retain the status of independent, sovereign governments. As the United States Supreme Court acknowledged starting in the early nineteenth century, tribes are "distinct, independent political communities."<sup>24</sup> The federal government recognized tribal sovereignty through the Indian Commerce Clause of the U.S. Constitution,<sup>25</sup> which acknowledges that Indian tribes are legally distinct from federal or state governments.

Today, inherent tribal sovereignty persists. "Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice."<sup>26</sup> Unless federal law divests a tribe of its inherent sovereignty, the tribe's

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20 With some exceptions that are beyond the scope of this article, state law typically does not play a significant role within Indian country since the U.S. Supreme Court's holding in *Worcester v. Georgia* that the laws of Georgia did not apply to the Cherokee Nation. 31 U.S. 515, 559 (1832). Notable exceptions do exist, however, for states and tribes where Public Law 280 applies, as state criminal and limited civil law applies in such situations. Public Law 280 § 2, 18 U.S.C. § 1162 (2010); Public Law 280 § 4, 28 U.S.C. § 1360 (1984); 25 U.S.C. §§ 1321–1326 (2010).

21 Cohen's Handbook of Federal Indian Law ch. 10 (Nell Jessup Newton et al. eds., 2012) [hereinafter Cohen's Handbook 2012].

22 *Id.* at § 4.01[1][a] (citing Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* 72–76 (1988)) ("Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them.").

23 For example, the Anglo court systems of the federal government and state governments influenced the development of tribal courts following first contact. *See generally* Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* (1983).

24 *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

25 Cohen's Handbook of Federal Indian Law § 4.01[1][a] (Nell Jessup Newton et al. eds., 2005) [hereinafter Cohen's Handbook 2005].

26 Cohen's Handbook 2012, *supra* note 21, at § 4.01[1][a].

sovereignty remains intact.<sup>27</sup> Tribes maintain sovereign authority over their members and territory to an extent not limited by federal law.<sup>28</sup> “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.”<sup>29</sup>

Tribes are generally free to constitute their own governments.<sup>30</sup> Tribes are not required to comply with the U.S. Constitution in structuring their tribal governments or laws, as tribes are extra-constitutional.<sup>31</sup> Tribes generally have the authority to enact legislation affecting their citizens within their territories.<sup>32</sup> “In fact, tribal governments are the only nonfederal entities that have plenary jurisdiction over Indians on Indian reservations.”<sup>33</sup> Tribes also generally have the authority to adjudicate criminal and civil

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27 *Id.*

28 Cohen’s Handbook 2005, *supra* note 25, at § 4.01[1][b] (citing *Worcester v. Georgia*, 31 U.S. 515 (1832)) (noting that, absent tribal or federal approval, “[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have not force”); 25 U.S.C. § 1911(a) (1978) (reinforcing the *Fisher* holding by declaring exclusive tribal jurisdiction over certain child custody matters involving children who are tribal members or eligible to be tribal members, so long as the children are domiciled or residing on the reservation, or wards of a tribal court); *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382 (1976) (upholding exclusive tribal jurisdiction over an adoption proceeding in which all parties were tribal members and reservation residents); *Ex parte Crow Dog*, 109 U.S. 556 (1883) (affirming exclusive tribal authority to impose criminal punishment on tribal members absent federal law to the contrary).

29 *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1151–52 (10th Cir. 2011) (quoting *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc)).

30 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978); *cf.* Act of Apr. 26, 1906 § 6, 34 Stat. 137 (1906) (explaining that the President may fill the office of Principal Chief of Five Tribes under certain circumstances) and Act of June 28, 1906 § 9, 34 Stat. 539 (1906) (explaining that the Secretary of Interior may remove Osage council members under certain circumstances).

31 *Talton v. Mayes*, 163 U.S. 376, 382–84 (1896). Although the United States Constitution does not apply to tribal nations, a majority of the protections of the Bill of Rights apply through the Indian Civil Rights Act of 1968. 25 U.S.C. §§ 1301–03 (2010). Accordingly, although tribal governments are not limited by the federal Constitution, they may be limited by the Indian Civil Rights Act. For a discussion of the application of the Indian Civil Rights Act in Indian country, see Cohen’s Handbook 2012, *supra* note 21, at § 14.04[2].

32 Cohen’s Handbook 2005, *supra* note 25, at § 4.02. As discussed more fully below, tribes’ general authority to legislate and tax may be limited by the federal government.

33 Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 Nat. Resources & Env’t 35 (1996).



matters involving their citizens and arising in Indian country. Accordingly, tribes are free to develop their own laws related to environmental and energy regulation.

Nonetheless, the nature of tribal sovereignty has changed over time, largely as a result of tribes' interactions with the federal government. Today, tribes maintain those aspects of sovereignty which have not been removed by virtue of treaty, statute, or "by implication as a necessary result of their dependent status."<sup>34</sup> Accordingly, any examination of tribal authority should start with the presumption that the tribe in question possesses sovereignty, unless the tribe has been divested of its sovereignty by the federal government.<sup>35</sup>

In addition to inherent tribal sovereignty, Congress may also delegate federal authority to tribes through either a treaty or statute.<sup>36</sup> The ability of Congress to delegate authority to tribes is especially important in the context of regulatory law. Because many federal environmental and energy laws are usually considered to be laws of general application, they apply in Indian country, unless their application would directly interfere with tribal sovereignty.<sup>37</sup> As a result, the federal Environmental Protection Agency (EPA) has the authority to implement federal environmental laws in Indian country.<sup>38</sup> However, the EPA has interpreted some federal environmental statutes, such as the Clean Water Act, "not as delegating or conferring federal power on tribes, but as authorizing tribes to implement federal programs within the scope of their inherent [tribal] powers."<sup>39</sup> Conversely, under the Clean Air Act, the EPA interprets the Act as a delegation of

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34 *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

35 Cohen's Handbook 2005, *supra* note 25, at § 4.01[1][a].

36 *Id.* ("Whether such statutes actually delegate federal power, as opposed to affirming or recognizing inherent power, is a matter of congressional intent.")

37 *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (explaining that federal laws of general application apply to Indian country); Cohen's Handbook 2012, *supra* note 21, at § 10.01[2][a]. However, the application of federal environmental laws does not displace the ability of tribes to enact environmental laws. *Id.* at § 10.01[2][b].

38 Cohen's Handbook 2012, *supra* note 21, at § 10.01[2][a].

39 *Id.* (citing Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131)). Moreover, tribal inherent sovereignty to enact environmental laws is not displaced by federal environmental law. For example, the Safe Drinking Water Act states that nothing in the Act's 1977 Amendments "shall be construed to alter or affect the state of American Indian lands or water rights nor to waive any sovereignty over Indian land guaranteed by treaty or statute." Safe Drinking Water Act, 42 U.S.C. § 300j-6(c)(1) (2012).

authority to tribes.<sup>40</sup> Therefore, under several federal environmental statutes, tribes may choose to administer the federal environmental programs and standards through tribes-as-states (TAS) mechanisms.<sup>41</sup> The TAS provisions of major federal environmental statutes, such as the Clean Air Act,<sup>42</sup> Clean Water Act,<sup>43</sup> and Safe Drinking Water Act,<sup>44</sup> allow tribes to act as states for purposes of implementing the statute under the cooperative federalism scheme.<sup>45</sup>

In spite of inherent tribal sovereignty, jurisdictional uncertainty sometimes arises in relation to a tribe's authority over the actions of non-members and non-Indians acting within the tribe's territory. In the civil context, this is because tribes have been divested of their inherent sovereignty over non-citizens on non-Indian land unless certain conditions exist.<sup>46</sup> In *Montana v. United States*, the U.S. Supreme Court considered the extent of the Crow Nation's inherent sovereignty over non-Indians.<sup>47</sup> Specifically, the Crow Nation wished to regulate the hunting and fishing by non-Indians on non-Indian land located within the Nation's territory.<sup>48</sup> Ultimately, because of implicit divestiture of the Tribe's inherent sovereignty,<sup>49</sup> the Court determined that tribes do not have the

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40 See, e.g., Wayne Nastri, U.S. Evtl. Prot. Agency, Eligibility Determination for the Navajo Nation for Treatment in the Same Manner as a State for Purposes of the Clean Air Act Title V, 40 CFR Part 71 Program (2006), <https://www.epa.gov/sites/production/files/2015-07/documents/navajotas.pdf> [<https://perma.cc/ST4N-GDDK>].

41 Judith V. Royster et al., *Native American Natural Resources Law* 227 (3d ed. 2013).

42 42 U.S.C. § 7601 (d)(2) (2012).

43 33 U.S.C. § 1377(e) (2012).

44 42 U.S.C. § 300j-11(b)(1) (2012).

45 *Id.*

46 *Montana v. United States*, 450 U.S. 544 (1981). Tribes' criminal jurisdiction is generally limited to Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

47 *Montana v. United States*, 450 U.S. 544 (1981).

48 *Id.*

49 *Id.* See also N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Indian L. Rev. 353 (1994). "According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, tribes also may have been divested of aspects of sovereignty by implication of their dependent status." Gover & Cooney, *supra* note 33, at 35.

authority to regulate the hunting and fishing by non-Indians owning fee land<sup>50</sup> within the Crow Nation's reservation boundaries.<sup>51</sup>

However, despite the implicit divestiture of tribal inherent sovereignty over non-Indians on non-Indian fee land within reservation boundaries, the Court acknowledged that tribes may regulate the activities of such individuals under two circumstances. First, tribes may regulate the activities of individuals who have entered into "consensual relationships with the tribe or its members."<sup>52</sup> Second, a tribe retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>53</sup>

Notably, the *Montana* decision involved the actions of non-Indians living on non-Indian owned land within the Nation's territory. It may therefore be argued that tribes have more authority to regulate the activities of non-members and non-Indians on tribally controlled land within the tribe's territory. However, the United States Supreme Court's decision in *Nevada v. Hicks* casts doubt on this assumption.<sup>54</sup> In *Hicks*, the Court considered whether the Fallon Paiute-Shoshone Tribes had jurisdiction over Mr. Hicks' civil claim against Nevada game wardens in their individual capacities.<sup>55</sup> Hicks, a tribal citizen, alleged that when searching his on-reservation property, the Nevada game wardens violated certain tribal civil provisions (in addition to violating federal law). In

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50 Since *Montana*, the Supreme Court has also considered the ability of tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court held that the Indian tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the tribe's reservation boundaries. The *Strate* Court explained that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453.

51 *Montana v. United States*, 450 U.S. at 564–65 (holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

52 *Id.* at 565.

53 *Id.* at 566.

54 *Nevada v. Hicks*, 533 U.S. 353 (2001).

55 *Id.*

concluding that the tribal court did not have jurisdiction to hear the tribal-law based claims, the Court found that the *Montana* exceptions did not apply.<sup>56</sup>

Because of their inherent sovereignty, tribes generally have regulatory authority over their citizens within their physical territory. Tribes generally do not have inherent sovereignty over and therefore lack jurisdiction over non-Indians acting on non-Indian land within tribal territory,<sup>57</sup> unless one of the two *Montana* exceptions applies. Tribes may have regulatory authority in such circumstances if the non-Indians or non-members in question have consented to tribal jurisdiction or if the non-Indian conduct “threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.”<sup>58</sup> However, through delegated authority, such as the TAS provisions of many federal environmental statutes, tribes may have jurisdictional authority over non-members and non-Indians.

In addition to the role played by tribes within Indian country, for historical reasons, the federal government plays a significant role within Indian country as well. The significant presence of the federal government in Indian country is based in part on the federal government’s property interest in tribal and individual Indian trust lands. In *Johnson v. M’Intosh*, in 1823, the U.S. Supreme Court held that while tribes retained the beneficial use of lands they traditionally occupied, the federal government owned the naked fee title to such lands by virtue of the Doctrine of Discovery.<sup>59</sup> The federal role was expanded, when, in *Worcester v. Georgia*, the Court determined that a “wardship” existed between tribes and the federal government.<sup>60</sup> Based in part on this determination, the Court later held that Congress therefore had plenary power over Indian country in *United States v. Kagama*.<sup>61</sup>

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<sup>56</sup> *Id.* at 355–69, 374–75.

<sup>57</sup> Although *Montana* involved the activities of non-Indians on non-Indian fee land, suggesting that the status of the land plays a role in the determination of jurisdiction, *Nevada v. Hicks* muddies the analysis of tribal jurisdiction. This is because the *Hicks* Court applied the *Montana* exceptions to a situation in which the alleged wrongful activity occurred on property owned by a tribal member.

<sup>58</sup> *Montana*, 450 U.S. at 566.

<sup>59</sup> *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

<sup>60</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>61</sup> *United States v. Kagama*, 118 U.S. 375 (1886).

Specifically, the federal government plays a significant role related to energy development within Indian country. As indicated above, federal regulatory statutes tend to be statutes of general applicability, and, therefore, several federal statutes directly apply to such development, including the Indian Mineral Leasing Act,<sup>62</sup> Indian Mineral Development Act,<sup>63</sup> Energy Policy Act of 2005,<sup>64</sup> Rights of Way Act,<sup>65</sup> and Long-Term Leasing Act,<sup>66</sup> to name a few. Under the Indian Mineral Leasing and Indian Mineral Development Acts, the Secretary of the Interior is required to approve all oil, gas, and geothermal leases.<sup>67</sup> Leases for renewable energy projects must typically be approved under the Long-Term Leasing Act.<sup>68</sup> Further, if transmission lines or pipelines are included in the project, then the Secretary must approve the rights-of-way for those projects.<sup>69</sup> Under the Energy Policy Act of 2005 and the HEARTH Act, if tribes have the necessary agreement in place, they may approve certain agreements related to energy development.<sup>70</sup> However, for a variety of reasons, few tribes have taken advantage of these provisions.<sup>71</sup> Finally, the federal government regulates energy services within Indian country under the Federal Power Act,<sup>72</sup> the Public Utility Regulatory Practices

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62 Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396(a)–396(f) (2012).

63 Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–08 (2012).

64 25 U.S.C. § 3502 (2012).

65 25 U.S.C. §§ 311–28 (2012). The Rights of Way Act is relevant to energy development in Indian country, as many energy projects will span land that exists within rights of way.

66 25 U.S.C. § 415 (2012).

67 25 U.S.C. §§ 398, 2103 (2012).

68 25 U.S.C. § 415(a) (2012).

69 25 U.S.C. §§ 321, 323 (2012).

70 25 U.S.C. §§ 3504, 415(h) (2012).

71 Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 Ariz. L. Rev. 1031 (2013); Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended “Great Mischief for Indian Energy Development” and the Resulting Need for Reform*, 29 Pace Envtl. L. Rev. 811 (2012).

72 16 U.S.C. § 791 *et seq.* (2012).

Act,<sup>73</sup> and the Natural Gas Act.<sup>74</sup> Under the Natural Gas Act, the Federal Energy Regulatory Commission has the sole jurisdiction to approve the siting, permitting, and operation of interstate natural gas pipelines.

In addition to statutes specific to energy development within Indian country, more general federal environmental statutes also impact the development of energy resources within Indian country. It is therefore notable that several federal environmental statutes also apply to Indian country, as statutes of general applicability. Relevant federal environmental statutes include the National Environmental Policy Act,<sup>75</sup> National Historic Preservation Act,<sup>76</sup> Clean Water Act,<sup>77</sup> Clean Air Act,<sup>78</sup> and Endangered Species Act.<sup>79</sup>

With this understanding of how civil regulatory authority applies in Indian country as between the federal government and tribes, it is now helpful to turn to the actions of the Trump Administration related to energy development that have potential implications for Indian country. The Trump Administration is likely interested in energy development within Indian country given the significant potential there.

Based on Department of the Interior statistics, the Government Accountability Office (GAO) reported in November 2016 that tribes and their members—collectively—are the third largest owner of mineral resources, including oil, gas, and coal in the United States. Similarly, the Department of Energy estimates that Indians lands in the Lower 48 states have the potential to produce 1.1 billion megawatt hours of electricity from wind—3.4 percent of the potential in the United States.<sup>80</sup>

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73 16 U.S.C. § 2601 *et seq.* (2012).

74 15 U.S.C. § 717 *et seq.* (2012).

75 42 U.S.C. § 4321 *et seq.* (2012).

76 16 U.S.C. § 470 *et seq.* (2012).

77 33 U.S.C. § 1251 *et seq.* (2012).

78 42 U.S.C. § 7401 *et seq.* (2012).

79 16 U.S.C. § 1531 *et seq.* (2012).

80 Paul Moorehead, Address at the Rocky Mountain Mineral Law Foundation Special Institute on Indian Law and Natural Resources: Outlook for the Trump Administration (Sept. 26, 2017).

Overall, in the first year or so of the Trump Administration, the “Administration has begun a considerable regulatory effort to roll-back the signature efforts of President Obama to combat climate change, increase clean energy deployment, and protect public health and the environment through fossil fuel emissions regulations.”<sup>81</sup> Toward this end, President Trump has taken several steps to try to increase domestic energy production. Before even becoming President, members of the Trump Administration advocated taking tribal lands out of public treatment and into private control.<sup>82</sup> Once president, one of the first actions of President Trump was to issue presidential memoranda designed to expedite approval of the Keystone XL and Dakota Access pipelines. On January 24, 2017, President Trump issued the *Presidential Memorandum Regarding Construction of the Keystone XL Pipeline*,<sup>83</sup> and, on the same day, he issued *Construction of the Dakota Access Pipeline*.<sup>84</sup> Although neither memorandum approved the construction of the pipelines, the call for the expedited review did help to guarantee their approvals. Both pipelines have profound impact for Indian country, as they traverse lands of great significance to several tribal communities.<sup>85</sup>

Also on January 24, 2017, he signed Executive Order 13766, *Expediting Environmental Reviews*.<sup>86</sup> The purpose of this Executive Order was to streamline the process of executive environmental review of infrastructure projects. Under the Order, a process is set up whereby state governors can designate a project as “high priority,” and,

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81 Pilar Thomas, Address at the Rocky Mountain Mineral Law Foundation Special Institute on Indian Law and Natural Resources: Will Sovereignty Really Mean Something: Tribal Energy Development in the Current Administration (Sept. 26, 2017); see also Paul Moorehead, *supra* note 80 (“[T]he incoming President and his team would promote the development of American energy resources unashamedly. The first nine months of the Trump Administration have borne this out, with the President issuing eight energy-related executive orders, and . . . [former Secretary of the Interior] Zinke issuing four energy-related secretarial orders.”).

82 Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-rich Indian Reservations*, Reuters (Dec. 5, 2016), <https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1> [<https://perma.cc/LQH8-H8CM>].

83 Memorandum on Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663, § 2 (Jan. 24, 2017).

84 Memorandum on Construction of the Dakota Access Pipeline, 82 Fed. Reg. 11,129 (Jan. 24, 2017).

85 See, e.g., Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 *Transnat’l L. & Contemp. Probs.* 343 (2017).

86 Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 30, 2017).

once a project is so designated, federal agencies are to expedite environmental reviews and approvals.<sup>87</sup> To help further the expediting of such projects, the President issued an Executive Order, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, on August 15, 2017, that sought to hold executive agencies accountable for expediting infrastructure permitting and established a goal of permitting projects within two years.<sup>88</sup> This Order applies to energy generation, transmission, and pipeline projects.<sup>89</sup>

Next, the President issued Executive Order 13783, *Promoting Energy Independence and Economic Growth*, which is designed to promote the development of “affordable, reliable, safe, secure and clean” forms of energy.<sup>90</sup> The Order demands all executive agencies to “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources.”<sup>91</sup> Furthermore, the Order rescinds several previous presidential actions related to climate change, carbon pollution standards, and natural gas mitigation from energy development.<sup>92</sup> Finally, specifically related to Indian country, the Order requires the Environmental Protection Agency (EPA) and Department of Interior to review rules and guidance related to oil and gas development on federal and tribal lands.<sup>93</sup>

On June 1, 2017, President Trump announced that he was withdrawing the United States from the Paris Climate Accord.<sup>94</sup> The Paris Climate Accord was negotiated in large part to help reduce greenhouse gas emissions, which are leading to global climate

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87 *Id.* at § 3.

88 Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

89 *Id.*

90 Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

91 *Id.* at § 1(c).

92 *Id.* at § 3.

93 *Id.* at § 7.

94 Donald J. Trump, President of the United States, Statement by President Trump on the Paris Climate Accord (Jun. 1, 2017).



change.<sup>95</sup> President Trump removed the United States from the Accord, arguing that the Accord would negatively impact the American economy and businesses.<sup>96</sup> Further, President Trump expressed concern that staying a member of the Paris Climate Accord would unnecessarily restrict the development of American energy resources.<sup>97</sup> In June 2017, President Trump also met with tribal leaders to discuss energy development in Indian country.

President Trump stated his Administration's intent to roll back harmful regulations that prevent State, local, and tribal communities from accessing vital energy resources. These regulations hinder economic growth that would create jobs and could be used to fund roads, schools, and infrastructure. It is President Trump's hope that the roundtable will allow for more cooperation between local governments and the Trump Administration in order to unleash America's energy potential.<sup>98</sup>

On December 4, 2017, President Trump issued *Presidential Proclamation Modifying the Bears Ears National Monument* which had the result of dividing the Bears Ears National Monument established by President Obama into two national monuments and returning a vast area to the public domain, which is land available to the public at large, meaning that the returned area no longer has the protections of a National Monument.<sup>99</sup>

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95 Mark Tercek, *Why the Paris Agreement is in the U.S.'s Best Interest*, Nature Conservancy (March 9, 2017), <https://www.nature.org/en-us/about-us/who-we-are/our-people/mark-tercek/why-the-paris-agreement-is-in-the-u-s-s-best-interest/> [<https://perma.cc/3NUR-F9T6>].

96 President Donald J. Trump, *supra* note 94 (“Compliance with the terms of the Paris Accord and the onerous energy restrictions it has placed on the United States could cost America as much as 2.7 million lost jobs by 2025 according to the National Economic Research Associates. This includes 440,000 fewer manufacturing jobs—not what we need—believe me, this is not what we need—including automobile jobs, and the further decimation of vital American industries on which countless communities rely. They rely for so much, and we would be giving them so little.”).

97 *Id.* (“We have among the most abundant energy reserves on the planet, sufficient to lift millions of America's poorest workers out of poverty. Yes, under [the Paris Climate Accord], we are effectively putting these reserves under lock and key, taking away the great wealth of our nation—it's great wealth, it's phenomenal wealth; not so long ago, we had no idea we had such wealth—and leaving millions and millions of families trapped in poverty and joblessness.”).

98 *President Trump Hosts Tribal, State, and Local Energy Roundtable*, White House: Energy & Environment (June 28, 2017), <https://www.whitehouse.gov/articles/president-trump-hosts-tribal-state-local-energy-roundtable/> [<https://perma.cc/K2E3-BLT2>].

99 Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

In response, five tribes filed suit in the U.S. District Court for the District of Columbia, arguing that the President exceeded his authority under the Antiquities Act as the Act does not allow Presidents to abolish, revoke, replace, or diminish monuments once designated.<sup>100</sup> “In reality, this drastic change is a revocation of Bears Ears and a replacement of it with two new monuments,” the tribes say in their complaint.<sup>101</sup> Some fear that the land removed from the Bears Ears National Monument was removed so that energy and natural resource development could occur on those lands.<sup>102</sup>

Federal agencies have followed in President Trump’s footsteps, working to help facilitate energy development. In concert with President Trump’s actions, former Secretary of the Interior Ryan Zinke released two Secretarial Orders impacting energy development, which both have potential impacts on Indian country. The first, Secretarial Order No. 3348, *Concerning the Federal Coal Moratorium*, recognizes the critical importance of the federal coal program for a variety of reasons, and, as a result it revokes the order issued by then-Secretary Jewell that put into place a moratorium on federal coal leasing.<sup>103</sup> The second Order, Secretarial Order 3349, requires the agency to review existing Department of Interior procedures related to mitigation and climate change. The Order also calls on the agency to identify regulations “that potentially burden the development or utilization of domestically produced energy resources.”<sup>104</sup> Similarly, the EPA has also taken action to ease the regulation of domestic energy production. The EPA took administrative action to review the Clean Power Plan final rule.<sup>105</sup> Further, the EPA has begun work to repeal the rule that regulates carbon emission from new power plants, and to stay compliance of a rule that regulates methane emissions from oil and gas production.<sup>106</sup>

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100 Complaint at ¶ 222, *Hopi Tribe v. Trump*, No. 17-cv-2590, 2017 WL 6033876 (D.D.C. Dec. 4, 2017).

101 *Id.* at ¶ 7.

102 Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument*, *Emails Show*, N.Y. Times (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html> [<https://perma.cc/SSJ7-5GGG>].

103 Sec’y of Interior, Order No. 3348, *Concerning the Federal Coal Moratorium* (Mar. 29, 2017).

104 Sec’y of Interior, Order No. 3349, *American Energy Independence* (Mar. 29, 2017).

105 Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

106 Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017); *cf.* Clean Air Council, Inc. v.

Some commentators have noted that the existing regulations applicable to energy development in Indian country have hindered the ability of tribes to develop energy resources within their tribal lands. Further, “[g]etting all the required approvals and permits is not merely an inconvenient exercise: inordinate delays also mean potential investors and their capital move on and away from opportunities on Indian lands to more hospitable regulatory regimes.”<sup>107</sup> Accordingly, some believe that President Trump’s actions could have the impact of increasing energy-related development within Indian country.<sup>108</sup>

In addition to policies designed to increase natural resource and energy production, another policy of the Trump Administration that has increased the vulnerability of Native communities is its failure to implement policies designed to assist communities that need to relocate due to the impacts of climate change within the United States. At the end of the Obama Administration, eleven agencies and departments came together to discuss climate migration within the United States.<sup>109</sup> The agencies drafted a memorandum of understanding indicating that they planned to work together to support communities’ migration away from areas vulnerable to the negative impacts of climate change.<sup>110</sup> The memorandum “laid out a plan for the interagency working group to meet every other month. Within nine months, the group was supposed to have developed a multiyear strategy to achieve its goals.”<sup>111</sup> Since President Trump took office, the memorandum has not gone into effect and the working group has not met.<sup>112</sup> As discussed below,<sup>113</sup> the negative impacts of climate change within the United States is creating climate

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Pruitt, No. 17-1145 (D.C. Cir. 2017) (holding that the EPA lacks authority under the Clean Air Act to stay the methane rules).

107 Moorehead, *supra* note 80.

108 *Id.*; Thomas, *supra* note 81.

109 Kyla Mandel, *America’s Climate Refugees Have Been Abandoned by Trump*, Mother Jones (Oct. 17, 2017), <https://www.motherjones.com/environment/2017/10/climate-refugees-trump-hud/> [<https://perma.cc/2JW6-QDWU>].

110 *Id.*

111 *Id.*

112 *Id.*

113 See discussion *infra* Part II.B.

“refugees.” The Trump Administration’s failure to implement the memorandum (or develop an alternative strategy to address the problem) increases the vulnerability of these individuals.

Between February 22 and March 2, 2017, the United Nations Special Rapporteur on the rights of indigenous peoples visited the United States.<sup>114</sup> The purpose of her visit was to examine the human rights situation of indigenous peoples within the United States. During her visit, she paid particular attention to extractive industries operating within and near Indian country. With regard to efforts of the Trump Administration, she concluded that “[i]n the current political context, with increased incentives for fossil fuel energy development and decreased budgets for environmental and indigenous peoples’ protection agencies, the threats facing indigenous peoples may be further exacerbated.”<sup>115</sup> In other words, further rape of Indian country is a real possibility under the Trump Administration.

### **B. The Trump Administration’s Efforts to Protect Native People**

While the Trump administration has been clear about its intentions to open Indian country to more natural resource development, it is less clear how the Administration plans to protect the lives of Native people from criminal behavior that is often associated with natural resource development in Indian country. Native people suffer from the highest rates of violent crime in the nation.<sup>116</sup> There are a variety of reasons for this disparity, but much of the blame lands at the feet of a broken criminal justice system that fails to effectively intervene when Native people are victims of violence.<sup>117</sup> As we will establish, the push toward resource development is associated with higher rates of crime—particularly gendered violence committed against Native women.<sup>118</sup>

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114 Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, U.N. Doc. A/72/186 (July 21, 2017).

115 *Id.* at 1.

116 *See generally* Andre Rosay, *Violence Against American Indian and Alaska Native Women and Men* (2016).

117 *See generally* Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779 (2006).

118 *See discussion infra* Part II.C.

Because of the unique characteristics of federal Indian law, criminal jurisdiction on reservation lands is incredibly complicated.<sup>119</sup> In short, only the federal government has authority over some of the most egregious forms of gendered violence experienced by Native people today.<sup>120</sup> Federal Indian law denies to tribal governments a core component of sovereignty—that is, the expansive ability to protect their own people from harm. Instead, the federal government (and sometimes state governments) have more control over criminal justice on reservations than do the tribal nations themselves.<sup>121</sup>

Exclusive tribal criminal authority began to fray in 1817, when Congress passed the General Crimes Act, which unilaterally imposed federal criminal jurisdiction on crimes committed by non-Indians against Indians in Indian country.<sup>122</sup> Before that time, tribal nations retained exclusive criminal authority over their lands. The intrusion continued with the passage of the Major Crimes Act (MCA) in 1885.<sup>123</sup> Congress enacted the MCA at the behest of federal Indian agents, who were seeking ways to exert more control over Indians, particularly those that the agents saw as barriers to “civilization” policies.<sup>124</sup> In short, the law unilaterally imposes federal criminal jurisdiction on crimes committed by Indians who are accused of felony-level crimes. While tribal nations retain concurrent authority over such Indians, the imposition of the federal system has served to complicate and confuse the direct application of justice to those who commit violent acts.<sup>125</sup>

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119 See, e.g., Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. Rev. 1564, 1575 (2016) (“[C]riminal jurisdiction over Indian country crimes is governed by shifting and sometimes contradictory variables.”).

120 *Id.* at 1568 (noting that the federal government has exclusive jurisdiction over most crimes committed by non-Indians against Indians).

121 *Id.*

122 18 U.S.C. § 1152 (2012).

123 18 U.S.C. § 1153 (2012).

124 See generally Sidney L. Harring, *Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 134–41 (1994) (exploring the role of federal agents in lobbying for the Major Crimes Act).

125 Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 Harv. L. Rev. 200, 229 (2017) (noting that the blurred lines between tribal and federal authority produce complex questions).

To further complicate matters, the federal government delegated its criminal authority to certain states with the passage of Public Law 280 in 1953, which transferred federal criminal jurisdiction to several states, including California, Wisconsin, Minnesota, Nebraska, Oregon, and Alaska.<sup>126</sup> Other states, such as Kansas, also have special federal laws that grant state authority over crimes committed on Indian reservations to states.<sup>127</sup> Thus, the question of which government has authority to respond to crimes in Indian country differs from state to state and tribe to tribe.

Tribal governments themselves are limited in the application of tribal criminal law. There are two major restrictions on tribal criminal authority pertinent to the discussion of the extractive industries. First, tribal governments are limited in the length of incarceration and the imposition of fines as a result of the Indian Civil Rights Act of 1968.<sup>128</sup> Until the passage of the Tribal Law and Order Act (discussed below), the maximum penalties that could be imposed by a tribal court were one year and/or a \$5,000 fine for any crime, including sexual assault and sex trafficking.<sup>129</sup>

Perhaps more pertinent to the question of energy extraction is a prohibition on the application of tribal criminal jurisdiction over non-Indians. In the 1978 case *Oliphant v. Suquamish Indian Tribe*, the Supreme Court stripped the authority of tribal nations to prosecute non-Indians for any crime.<sup>130</sup> The *Oliphant* case involved the criminal actions of two non-Indians on the Suquamish Indian reservation.<sup>131</sup> When the Suquamish tribe sought to prosecute the two non-Indians, they protested tribal jurisdiction, arguing that, as non-Indians, they should not be subject to tribal jurisdiction (despite the fact that the crimes had been committed on the reservation).<sup>132</sup> In *Oliphant*, the Supreme Court ruled that tribal governments, by virtue of their dependence on the federal government, had lost certain attributes of inherent sovereignty, including the authority to prosecute non-

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126 Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953).

127 Kansas Act, 18 U.S.C. § 3243 (1948).

128 Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304 (2012).

129 *Id.*

130 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

131 *Id.* at 194.

132 *Id.*

Indians.<sup>133</sup> As a result, only the federal government (or a state government pursuant to special delegation) can prosecute non-Indians accused of a violent crime.

Tribal leaders and victim advocates expressed concern about the high crime rates in Indian country for decades, but it was not until 1999 that any concrete evidence of this crime rate was published. The federal government released its first *American Indians and Crime* report in 1999, which pulled data from a wide variety of sources and ultimately concluded that Native people experience the highest crime rate in the United States.<sup>134</sup> In particular, the report concluded Native women are at especially high risk for experiencing domestic and sexual violence. And, as many people had forecasted, Native people are more likely to experience violence at the hands of a non-Indian than an Indian.<sup>135</sup> With the release of the 1999 report, tribal leaders and their allies finally were able to objectively establish that the *Oliphant* decision had a particularly devastating effect on the lives of tribal citizens.

Since 1999, the federal government has released a variety of different crime reports that universally come to the same conclusion: Native people experience some of the highest rates of crime in the Nation, and most of that crime is being committed by non-Indians.<sup>136</sup> The most recent federal report, released in May of 2016, concluded that over 80% of Native women will experience some form of violent crime in their lives, and that over 56% of Native women will experience some form of sexual violence in their lifetimes.<sup>137</sup> The 2016 report also concluded that over 90% of Native people report that they have been the victims of inter-racial violence—that is, a victim of a non-Indian perpetrator.<sup>138</sup>

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133 *Id.* at 199.

134 Lawrence A. Greenfeld & Steven K. Smith, Bureau of Justice Statistics, *American Indians and Crime* (1999).

135 *Id.* at 7.

136 *See, e.g.*, Rosay, *supra* note 116; Steven W. Perry, A BJS Statistical Profile, 1992–2002 American Indians and Crime, 4 (2004); Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women (2000).

137 Rosay, *supra* note 116, at 43.

138 *Id.* at 46.

These numbers can only lead to one conclusion—the criminal justice scheme in Indian country has been largely ineffective in addressing crime on Indian reservations. And while efforts were made during the Obama administration to improve the federal relationship with tribal nations,<sup>139</sup> evidence suggests that such efforts have not yet achieved the success promised.<sup>140</sup> Thus far, the Trump administration has not provided any formal indication that it will prioritize crime control in Indian country.

Energy extraction requires that significant numbers of non-Native people move (at least temporarily) to the lands in or near reservations to effectuate energy development through the development of a pipeline or the industry of fracking.<sup>141</sup> Violence against Native women and children increases when the exploitation of land brings large numbers of non-Native men to tribal jurisdictions.<sup>142</sup> Currently, tribal governments cannot prosecute these non-Native workers, and so are dependent on federal or state governments to take action.

Adequately addressing crime in Indian country, then, requires a two-prong approach. First, restrictions on tribal criminal authority must be lifted, allowing tribal nations to take action when crime occurs in Indian country. Second, the federal government must improve its response to Indian country crime (at least until such time as full criminal authority is restored to tribal governments).<sup>143</sup> The next section considers the progress on both prongs.

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139 Exec. Office of the President, 2016 White House Tribal Nations Conference Progress Report: A Renewed Era of Federal-Tribal Relations Executive (2017), [https://www.doi.gov/sites/doi.gov/files/uploads/whcnaa\\_report\\_1.2.2017.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/whcnaa_report_1.2.2017.pdf). [<https://perma.cc/38SN-YMZE>].

140 Office of the Inspector Gen., Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010 141 (2017).

141 See Sari Horwitz, *Dark Side of The Boom*, Wash. Post (Sept. 28, 2014), [http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm\\_term=.142685688eee](http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm_term=.142685688eee) [<https://perma.cc/D2P7-R4T5>]; Aura Bogado, *Fracking, Tribal Lands, and The Bureau of Land Management: What Happens Next?*, Grist (Mar. 2, 2016), <https://grist.org/climate-energy/fracking-tribal-lands-and-the-bureau-of-land-management-what-happens-next/> [<https://perma.cc/9R4R-5R4F>].

142 Horwitz, *supra* note 141.

143 “So long as the federal government refuses to allow tribes to govern themselves completely and independently, it is imperative that the federal government enact policies empowering Native survivors of sexual assault.” Sarah Deer, *Bystander No More? Improving the Federal Response to Sexual Violence in Indian Country*, 2017 Utah L. Rev. 771, 799 (2017).



## 1. The Obama-Era Legislation

Two major pieces of legislation were championed by the Obama Administration—the Tribal Law and Order Act (TLOA) of 2010<sup>144</sup> and the 2013 reauthorization of the Violence Against Women Act (VAWA).<sup>145</sup> Both laws were intended to improve the response to violent crime in Indian country by enhancing the federal response to crime while also lifting some of the restrictions on tribal authority. For example, TLOA mandated that federal prosecutors publish annual reports that indicate how many cases they prosecuted, with the hopes that increased transparency would encourage federal prosecutors to take on more cases.<sup>146</sup> TLOA also mandated that Indian Health Service improve its response to rape victims, particularly by providing forensic exams that are designed to collect evidence to use in prosecuting sex crimes.<sup>147</sup>

VAWA 2013 was even more groundbreaking. For the first time since *Oliphant*, the federal government authorized tribal nations to exercise jurisdiction over non-Indians, but only in cases of domestic violence.<sup>148</sup> While spouses and dating partners can be prosecuted, non-Indians who have *not* been in a relationship with their victims are still exempt from tribal criminal jurisdiction—a category of people that would include those employed by energy companies that seek to exploit tribal lands for oil and gas.

Unfortunately, it appears that TLOA and VAWA have not had their intended effect of improving prosecution rates in Indian country. In December 2017, the Department of Justice Office of the Inspector General (OIG) issued a scathing report concluding that the federal government was not in full compliance with the Tribal Law and Order Act—in part due to the abject failure of some federal officials to faithfully implement the various components in TLOA.<sup>149</sup> The report found that some of the officials most important to the implementation were not even familiar with the Act.<sup>150</sup> Because the report covers

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144 25 U.S.C. § 1302 (2012).

145 Pub. L. No. 113-4, 127 Stat. 54 (2013).

146 25 U.S.C. § 212(a)(4) (2017).

147 25 U.S.C. § 17 (2017).

148 25 U.S.C. § 1304 (2017).

149 Office of the Inspector Gen., *supra* note 140, at 48.

150 *Id.* at 40.

activities between FY2011 through November of 2016, the report is actually an indictment on the Obama Justice Department. And while the Obama Administration did a great deal to celebrate its efforts in Indian country, the IG report concluded that “the Department has not prioritized assistance to Indian country at the level consistent with its public statements or annual reports to Congress.”<sup>151</sup> The report includes fourteen specific recommendations for improvement.<sup>152</sup>

## 2. The Trump Administration

We are now at a cross-roads, as it is not clear whether the Trump Administration will implement these OIG recommendations or otherwise act proactively to prosecute more violent crimes in Indian country. It is possible the Trump administration will not announce any major policy changes since the concerns in the report were specific to the Obama administration. Our only potential clue to the position of the Trump DOJ is the official response to the OIG report, which was written on December 8, 2017 and published along with the report.<sup>153</sup> Unfortunately, the letter gives little indication of how the current Department views its responsibilities under TLOA and is carefully crafted to be minimally responsive to the recommendations. In fact, after reviewing the DOJ response, the OIG noted that it still considered four of the fourteen recommendations “unresolved” because the DOJ response was not satisfactory.<sup>154</sup>

The Justice Department is often called upon to support tribal governments whose jurisdiction is challenged in federal court.<sup>155</sup> Now that several tribal nations are actively prosecuting non-Indians pursuant to VAWA, there will likely be a test case in the federal courts within the next few years. It is unclear whether a Trump Justice Department will support the VAWA provisions that restored criminal authority over non-Indians. As a Senator, Trump’s first Attorney General Jeff Sessions did not vote in favor of the 2013 VAWA reauthorization because he objected to some of the “new” provisions (including

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151 *Id.* at i.

152 *Id.* at ii.

153 *See id.*

154 *Id.* at 74–84.

155 *See generally* Thad Blank, *Time to Recommit: The Department of Justice’s Indian Resources Section, the Trust Duty, and Affirmative Litigation*, 48 Idaho L. Rev. 391 (2012).

the partial *Oliphant* fix).<sup>156</sup> It is unclear whether the current Justice Department will support the VAWA provisions that restored criminal authority over non-Indians. During his confirmation hearing, Sessions was explicitly asked about enforcing VAWA despite his “no” vote on the legislation.<sup>157</sup> His short response: “I will defend the statute if it’s reasonably defensible.”<sup>158</sup>

The foregoing discussions demonstrate that the Administration’s policies related to Indian country are either not yet fully developed or are being developed in a way that has the capacity to be injurious to tribes and individual Indians. These policies therefore have the potential to endanger Native communities, as discussed more fully below.

## II. Increased Natural Resource Development Leads to Increased Vulnerability of Indigenous People in General, and Women in Particular

They treat Mother Earth like they treat women . . . they think they can own us, buy us, sell us, trade us, rent us, poison us, rape us, destroy us, use us as entertainment and kill us. I’m happy to see that we are talking about the level of violence that is occurring against Mother Earth because it equates to us [women]. What happens to her happens to us . . . We are the creators of life. We carry that water that creates life just as Mother Earth carries the water that maintains our life. – Lisa Brunner<sup>159</sup>

The previous section detailed how the current Administration is encouraging natural resource and energy development throughout the nation, and within Indian country in particular. Having demonstrated the likelihood for such increased development, this Part of the article considers how such development will impact Indian country. The first subpart details the connection between increased development of this sort and climate change. It also explains how climate change negatively impacts many in Indian country.

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156 *Nomination of Jeff Sessions to be Attorney General of the United States: Questions for the Record Submitted January 17, 2017: Questions from Senator Leahy Before the S. Comm. on the Judiciary*, 115th Cong. 34 (2017) (Sessions responses to Leahy Questions for the Record), [https://www.judiciary.senate.gov/imo/media/doc/Sessions Responses to Leahy QFRs.pdf](https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Leahy%20QFRs.pdf). [<https://perma.cc/48TY-EXFD>].

157 *Id.* at 1.

158 *Id.*

159 Honor the Earth: Man Camps Fact Sheet, Chasing Out the Specter of Man Camps, [http://www.honorearth.org/man\\_camps\\_fact\\_sheet](http://www.honorearth.org/man_camps_fact_sheet) [<https://perma.cc/6ZXQ-F8TD>].

The impacts of climate change on Indian country are particularly unjust given that indigenous people have contributed little, if anything, to climate change. The second subpart demonstrates that the impacts of climate change within the United States are resulting in climate refugees within the country, and indigenous populations in particular have been the first to experience such phenomena. Finally, the last subpart explains the devastating impacts of “man camps,” temporary settlements that tend to “pop up” where increased natural resource development occurs. In particular, the subpart focuses on man camps that emerged in North Dakota following development of the Bakken oil field there. The presence of such camps puts Native women in the region at extreme risk of exploitation by the men present in the camps. In sum, this Part demonstrates that the negative impacts of climate change combine to make indigenous peoples in the United States, and Native women in particular, more vulnerable to exploitation and abuse.

#### **A. A Brief Overview of the Negative Impacts of Climate Change on Indian Country**

This subpart briefly explains the connection between increased natural resource and energy development and climate change. The subpart then considers how climate change is impacting Indian country throughout the United States. Overall, the subpart demonstrates that climate change generally increases the vulnerability of indigenous peoples within the United States; climate change is the continuing trauma following the rape of Indian country.

First, climate change has been largely caused by the tremendous increase in greenhouse gases that have been released into the atmosphere over the past century or so. Changes in the climate occur when certain types of gases (a.k.a. greenhouse gases) trap radiant heat into the Earth’s atmosphere.<sup>160</sup> As human activities continue to add greenhouse gases such as carbon dioxide into the atmosphere, the naturally occurring greenhouse effect intensifies.<sup>161</sup> The intensification of this effect by the addition of greenhouse gases into the earth’s atmosphere has resulted in the steady increase of average global temperatures. The Intergovernmental Panel on Climate Change (IPCC)

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160 NASA: Global Climate Change, <https://climate.nasa.gov/causes/> [<https://perma.cc/7PJ3-USN5>].

161 The greenhouse effect is the process by which the earth’s atmosphere moderates the surface temperature of the earth by trapping greenhouse gases and then radiating them back to the earth’s surface. Jeremy P. Greenhouse, *Climate Change and the Common Law: Who’s to Pay for Global Warming?* 68 *Bench & B. Minn.* 16 (2011); James Salzman & Barton H. Thompson, Jr., *Envtl. Law & Pol’y* 123 (3d ed. 2010).

has concluded that human activity is largely to blame for this continued increase in global average temperatures.<sup>162</sup>

Related to the type of natural resource development discussed above, carbon dioxide is produced both from the burning and the extraction of coal.<sup>163</sup> The clearing of vegetation and trees from areas in preparation for natural resource extraction can also contribute to the proliferation of carbon dioxide, as vegetation and trees serve as natural “sinks” for carbon dioxide, removing it from the atmosphere.<sup>164</sup> In other words, without vegetation and trees to help remove carbon dioxide from the atmosphere, its presence intensifies. Furthermore, the actual extraction of natural resources, such as coal, can lead to the emission of other greenhouse gases trapped in the surrounding coalbed, such as methane.<sup>165</sup> Accordingly, natural resource development, such as the type promoted by the Trump Administration and discussed in Part I,<sup>166</sup> increases the release of greenhouse gases by: 1) decreasing the presence of natural “sinks” for carbon dioxide; 2) releasing increased amounts of greenhouse gases, such as carbon dioxide and methane, during extraction; and 3) releasing even more greenhouse gases when the resource is processed for the production of energy.

Having explained the connection between natural resource development and climate change, it is helpful to now broadly consider the impacts of climate change on Indian country. Climate change threatens the very territorial existence of tribes in the United States.<sup>167</sup> Tribes, who often rely closely on their environments for legal, spiritual, cultural, and subsistence reasons, have been particularly hard hit by the negative impacts

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162 Intergovernmental Panel on Climate Change, *Climate Change 2007 Synthesis Report* 36–37 (Lenny Bernstein et al. eds. 2008).

163 *Id.* at 37.

164 *Id.*; Urban Forestry Network: Trees Improve Our Air Quality, <http://urbanforestrynetwork.org/benefits/air%20quality.htm> [<https://perma.cc/2B6L-UMLC>].

165 Global Mitigation of Non-CO2 Greenhouse Gases: Coal Mining, <https://www.epa.gov/global-mitigation-non-co2-greenhouse-gases/global-mitigation-non-co2-greenhouse-gases-coal-mining> [<https://perma.cc/J32D-8JFM>].

166 *See* discussion *supra* Part I.

167 T.M. Bull Bennett et al., *Ch. 12: Indigenous Peoples, Lands, and Resources, in Climate Change Impacts in the United States: The Third National Climate Assessment* (J. M. Melillo et al. eds., 2014), <http://nca2014.globalchange.gov/report/sectors/indigenous-peoples> [<https://perma.cc/JQM4-GD68>] (detailing the impacts of climate change on indigenous peoples in the United States).

of climate change.<sup>168</sup> Tribes across the country have felt the impacts of climate change, as many tribes are some of the most vulnerable communities in the United States, given their unique relationship to the environment as well as the extreme geographical locations of many of these communities.<sup>169</sup> Further, “[c]hronic stresses such as extreme poverty are being exacerbated by climate change impacts: these impacts include reduced access to traditional foods, decreased water quality, and increasing exposure to health and safety hazards.”<sup>170</sup> These communities contribute little, if at all, to the problem of climate change and yet bear a disproportionately large adverse impact from climate change given their unique vulnerability.<sup>171</sup> Ultimately, the impacts of climate change “pose a particular

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168 Itzhak Kornfeld, *The Impact of Climate Change on American and Canadian Indigenous Peoples and Their Water Resources*, 47 *Envtl. L. Rep.* 10245, 10246 (2017) (“Lack of precipitation, attributed to climate change, has proven to be disastrous to indigenous peoples’ subsistence cultures.”); Kathryn Norton-Smith et al., *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences* 3 (USDA ed., 2016) (“Indigenous vulnerability and resilience to climate change cannot be detached from the context of colonialism, which created both the economic conditions for anthropogenic climate change and the social conditions that limit indigenous resistance and resilience capacity . . . [T]he influx of invasive species and prolonged drought are disrupting subsistence practices.”).

169 Peggy M. Shepard & Cecil Corbin-Mark, *Climate Justice*, 2 *Envtl. Just.* 1, 1 (2009) (“[V]ulnerable communities, even in the most prosperous nations, will be the first and worst hit [by climate change]. In this country, the most impacted areas will be communities-of-color, Indigenous Peoples, and low-income communities that are socio-economically disadvantaged, disproportionately burdened by poor environmental quality, and least able to adapt.”); U.S. Climate Resilience Toolkit: Tribal Nations, <https://toolkit.climate.gov/topics/tribal-nations> [<https://perma.cc/X4XN-JQGA>] (“Native communities’ vulnerabilities and lack of capacity to adapt to climate change are exacerbated by historical and contemporary federal and state land use policies and practices, political marginalization, legal issues associated with tribal water rights, water infrastructure deficiencies, and poor socioeconomic conditions.”).

170 Kornfeld, *supra* note 168 (“Numerous indigenous communities lack access to fresh and potable water and sanitation, and climate change will impact these peoples’ continued access to this resource . . . Dramatic increases in the costs of energy have led to decreased domestic water access, with adverse effects on household hygiene practices.”); U.S. Climate Resilience Toolkit, *supra* note 169; Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Research?*, 29 *Soc. Nat. Resources* 36 (2016) (noting the connection between climate change and increases in food-related illnesses, obesity, diabetes, and cancer in Native communities); Joseph P. Dudley et al., *Climate Change in the North American Arctic: A One Health Perspective*, 12 *EcoHealth* 713, 717 (2015) (noting the connection between climate change and the increase of tapeworm and pathogens in Alaska Native and Inuit communities).

171 Norton-Smith et al., *supra* note 168, at 4 (“Recent science, media, and academic literature illustrate the severe and disproportionate impacts of climate change on indigenous peoples.”); Vickery & Hunter, *supra* note 170, at 45 (“[T]hose experiencing the most harmful effects of a changing climate are typically those who have contributed the least emissions . . . Native Alaskans are perhaps some of the most affected groups.”); Jamie Kay Ford & Erick Giles, *Climate Change Adaption in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 *WM. MITCHELL L. REV.* 519, 525 (2015) (“Federal officials recognize that Indian communities are more severely impacted by climate change than are other areas of the

threat to indigenous communities, many of which are highly dependent on natural resources vulnerable to climate change, and few of which have the financial resources to adapt to loss of these resources and other perils.<sup>172</sup>

Tribes have observed anomalies in nature that have caused alarm among Native people during the recent decades of climate change. “Events such as droughts, floods, wildfires, and pest outbreaks associated with climate change (for example, bark beetles in the West and Alaska) are already disrupting ecosystems.”<sup>173</sup> For example, as early as in 1998, tribes in the Pacific Coast and Rocky Mountain regions reported the following:

- Increased winds that tended to be constant;
- Violent weather changes where storms wiped out intertidal shellfish;
- Declining salmon runs;
- Deformed fish;
- Significant decreases in the life spans of individual Natives due to the unavailability of traditional foods;
- Air pollution due to burning forests;
- Minimum river flows necessary for native fish species; and
- Erosion due to rising sea levels.<sup>174</sup>

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country.”); Nat’l Tribal Air Ass’n, *Impacts of Climate Change on Tribes in the United States*, 12–13 (2009) <http://epa.gov/air/tribal/pdfs/Impacts%20of%20Climate%20Change%20on%20Tribes%20in%20the%20United%20States.pdf> [<https://perma.cc/K68H-2MDL>] (“Any impact to tribal resources due to climate change is largely the result of decades of emissions from sources outside of Indian Country . . . Although Tribal sources are not a significant cause of climate change, they are the ones most keenly feeling the effects.”); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1628 (2007).

172 Martin Wagner & Donald M. Goldberg, *An Inuit Petition to the Inter-American Commission of Human Rights for Dangerous Impacts of Climate Change 2* (2004) [https://www.ciel.org/wp-content/uploads/2015/03/COP10\\_Handout\\_EJCIEL.pdf](https://www.ciel.org/wp-content/uploads/2015/03/COP10_Handout_EJCIEL.pdf) [<https://perma.cc/3YZ6-G6XQ>].

173 U.S. Climate Resilience Toolkit, *supra* note 169.

174 Vickery & Hunter, *supra* note 170, at 46 (“[B]roader ecosystem shifts have complex impacts: . . . ‘tribal harvesters have noticed shifts in harvest times for traditional foods; if the timing of flowering plants and the presence of pollinators, such as birds and insects, become less synchronized, impacts can ripple throughout the food webs.’”) (internal citations omitted); Native Peoples—Native Homelands Climate Change Workshop: Final Report 43–44 (Nancy G. Maynard ed., 1998) [hereinafter *Native Peoples—Native Homelands*].

Furthermore, many tribes are facing major economic, spiritual and cultural impacts also related to climate change.<sup>175</sup> As climate change forces many migratory species to leave their traditional ranges, tribes, who may only have rights to hunt or fish in certain defined areas or times of the year, may find it difficult if not impossible to survive in their traditional manner.<sup>176</sup> Climate change poses a threat to Native energy and economic security. Severe and unpredictable weather may cause increasing electricity expenses, power outages, disruptions in fuel supply, and electricity generation capacity.<sup>177</sup> Additionally, tribes that rely on tourism may face the negative economic effects of a decline in tourism, as the changing environment decreases the desirability of tourism enterprises. Tribes may also face increased adverse health effects related to climate change, including emerging mental health problems resulting from the loss of homes and cultural resources.<sup>178</sup>

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175 Norton-Smith et al., *supra* note 168, at 2 (“The vulnerability of some indigenous communities to climate change is based on cultural, social, and economic dependence on local species, habitats, and ecosystems, as well as legal, social, and political contexts of colonialism, institutionalized racism, and forced relocation.”); Vickery & Hunter, *supra* note 170, at 46 (“[L]oss of first foods negatively effects spiritual health through lessened ability to pass down traditional ecological knowledge.”); Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 *Nat. Resources & Env’t* 45, 45 (2008) (“Climate change will affect American Indian tribes differently than the larger American society. Tribal cultures are integrated into the ecosystems of North America, and many tribal economies are heavily dependent on the use of fish, wildlife, and native plants.”).

176 “Native peoples today feel increasingly vulnerable to significant environmental changes because they are no longer able to cope easily with changes by relocating. Few contemporary tribes can afford the purchase of large tracts of new land, and federal laws hinder the transfer or expansion of Tribal jurisdiction.” *Native Peoples—Native Homelands*, *supra* note 174, at 10. *See also* Vickery & Hunter, *supra* note 170, at 47 (“Regulations that . . . limit the times of year tribes can fish or hunt (despite seasonal changes) further exacerbates Native American struggles to fully practice and achieve self-determination and sovereignty.”); Norton-Smith et al., *supra* note 168, at 2 (“Tribes across the United States are experiencing reductions in access to culturally important habitats and species. In Alaska, permafrost melting is making it more difficult for hunters to access traditional hunting grounds and is changing the migration patterns of certain species.”); Reed Karaim, *Arctic Development*, 26 *C.Q. Researcher* ,(2016) 1002 989 <http://library.cqpress.com/cqresearcher/cqresrre2016120200> [<https://perma.cc/7FX7-TD32>] (“[E]nvironmental changes already have seriously disrupted hunting and fishing.”).

177 *Energy Department Issues Tribal Energy System Vulnerabilities to Climate Change and Extreme Weather Report, \$6M for Native American Clean Energy Projects*, Dep’t of Energy (Sept. 2, 2015), <https://www.energy.gov/articles/energy-department-issues-tribal-energy-system-vulnerabilities-climate-change-and-extreme> [<https://perma.cc/C3FF-ZW8D>].

178 *See generally* Nat’l Tribal Air Ass’n, *supra* note 171.



Looking at specific tribes, in its Climate Adaptation Action Plan, the Swinomish Indian Tribal Community<sup>179</sup> details the projected impacts of climate change on its reservation community, explaining that upwards of 15% of its river uplands are subject to potential flooding, 160 residential and eighteen non-residential/commercial structures could be inundated, 2,218 acres and over 1,500 properties are at risk for wildfires, vital transportation links are at risk for inundation, significant seafood and shellfish areas are at risk of loss, the Tribe's elders face significant risk of heat-related illnesses, and the Tribe may lose sensitive cultural sites and traditional native species.<sup>180</sup> Ultimately, the Tribe concludes that “[t]he principle areas and resources within the Swinomish Indian reservation vulnerable to climate change impacts are shorelines, beaches, low-lying terrain, and forests, along with the assets within those areas.”<sup>181</sup>

Similarly, the Nez Perce Tribe is also facing profound impacts from climate change:

Air temperatures in the region have increased about 1.5° F during the 20th century and models predict a future increase of +2.0° F by 2020, +3.2° F by 2040, and +5.3° F by 2080 . . . April 1st snowpack has decreased overall in the Pacific Northwest, with losses earlier in the spring throughout the western United States, leading to reduced summer streamflows, increased competition for water, vulnerability to drought, increases in summer water temperatures and a higher risk of winter flooding. The changes already being seen are substantial, and by the end of the century [the Nez Perce Tribe] will likely be facing unprecedented changes to [its] natural environment and the economies that depend on it.<sup>182</sup>

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179 “The Swinomish Indian Reservation is located on the southeastern peninsula of Fidalgo Island, west of the Swinomish Channel and adjacent to low-lying mainland areas of western Skagit County, in western Washington . . . The Reservation encompasses approximately 2,900 acres of tidelands for a total of 10,350 acres. Roughly 4,700 acres are forested uplands with interspersed rural development and surrounding urban development. Approximately 7,675 acres are held by the Tribe or Tribal members, with the remaining 2,675 acres held in private non-tribal ownership . . . There are upwards of 1,300 homes on the Reservation, and total Reservation population is estimated at somewhat over 3,000 (approximately 2,600 as of 2000 census).” Swinomish Indian Tribal Cmty., Swinomish Climate Change Initiative Climate Adaptation Action Plan 7 (2010), [http://www.swinomish.org/climate\\_change/Docs/SITC\\_CC\\_AdaptationActionPlan\\_complete.pdf](http://www.swinomish.org/climate_change/Docs/SITC_CC_AdaptationActionPlan_complete.pdf) [<https://perma.cc/US69-7UDE>].

180 *Id.* at 26.

181 *Id.*

Unfortunately, climate change exacerbates the environmental degradation already facing many tribes as a result of environmental pollution, natural resource development, and sacred site destruction.<sup>183</sup> For many tribes, land constitutes more than dirt and plants, as “[f]or Native people, land is often constitutive of cultural identity. Many Indian tribes, for example, identify their origin as a distinct people with a particular geographic site.”<sup>184</sup> For many tribes, cultural and spiritual identity can be connected to a specific area or piece of land. In some parts of the country, climate change threatens the very land upon which Natives and tribes are located.<sup>185</sup> In this way, climate change threatens not only the territorial sovereignty of Indians and tribes, but also tribal cultural sovereignty as well. Many Native communities are being forced to leave their land as a result of climate change.<sup>186</sup> Climate change also negatively affects ranching and agricultural practices on tribal lands.<sup>187</sup> There may be increased environmental threats to Native communities as a result of “expanded mineral extraction, shipping and industrial development that a warmer climate will enable.”<sup>188</sup> Accordingly, the negative impacts of climate change

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182 Nez Perce Tribe Water Res. Div., Clearwater River Subbasin (ID) Climate Change Adaptation Plan 9 (2011), [http://www.mfpp.org/wp-content/uploads/2012/03/ClearwaterRiver-Subbasin\\_ID\\_Forest-and-Water-Climate-Adaptation-Plan\\_2011.pdf](http://www.mfpp.org/wp-content/uploads/2012/03/ClearwaterRiver-Subbasin_ID_Forest-and-Water-Climate-Adaptation-Plan_2011.pdf) [<https://perma.cc/76ZB-57BX>].

183 Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 *Tulsa L. Rev.* 355, 355–56 (2003).

184 Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 *UCLA L. Rev.* 1615, 1640 (2000).

185 Chris Mooney, *The Remote Alaskan Village That Needs to Be Relocated Due to Climate Change*, *Wash. Post* (Feb. 24, 2015), <http://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/> [<https://perma.cc/QDA5-UV4G>].

186 Norton-Smith et al., *supra* note 168, at 2 (“For tribes in coastal areas, erosion and sea-level rise threaten vital community infrastructure and are leading to forced displacement and relocation.”); Karaim, *supra* note 176, at 1002 (“Faced with rising seas and a crumbling shoreline, villagers voted in August to abandon their traditional home on a barrier island north of the Bering Strait and relocate about five miles inland on the mainland. At least 30 other Native Alaskan villages likely face a similar fate.”); Ford & Giles, *supra* note 171, at 526 (2015) (“Indigenous communities across the country have already been forced to relocate entire village populations, dismantle existing infrastructure, seek out new hunting and fishing areas, and rebuild community-gathering spaces as traditional villages are overcome by flooding as a result of rising sea levels.”).

187 Norton-Smith et al., *supra* note 168, at 2 (“[R]eductions in rainfall and the continued experiences of prolonged drought affect soil quality and ranching and agricultural practices.”).

188 Karaim, *supra* note 176.

threatening the very land underlying some Native communities may be particularly hard on Native communities, where land is the “linchpin” for survival.<sup>189</sup> Land is also of great importance to many tribes because “reservations are sanctuaries where land is not subject to taxation; where individual Indians are free of most taxes; where many state laws do not apply; and where Indian customs and traditions are supreme.”<sup>190</sup> Ultimately, land may play a more important role in the lives of individual Indians and tribes than it does for most non-Indians.<sup>191</sup>

### B. Climate Refugees within the United States

Having demonstrated broadly the profound impact that climate change is having on tribes and individual Indians, this Subpart takes a deeper look at one impact of climate change on Native people and tribes—the creation of “climate refugees.” Although not refugees under the legal meaning of the term,<sup>192</sup> the term “climate refugees” refers to individuals who have been displaced from their homes due to the negative impacts of climate change.<sup>193</sup>

Since 2009, an estimated one person every second has been displaced by a disaster, with an average of 22.5 million people displaced by climate- or weather-related events since 2008 . . . Disasters and slow onsets, such as droughts in Somalia in 2011 and 2012, floods in Pakistan between 2010 and 2012, and the earthquake in Nepal in 2015, can leave huge

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189 Mary C. Wood, Professor, University of Oregon School of Law, Address at the Federal Bar Association 28th Annual Indian Law Conference: Origins and Development of the Trust Responsibility—Paternalism or Protection? (April 10, 2003) (“While environmental disease may sooner or later affect everyone in the United States, the impacts on Indian country are magnified, because the land base is the linchpin for tribal survival.”).

190 Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time is That?*, 63 Calif. L. Rev. 601, 604–05 (1975).

191 *Id.* at 605.

192 “A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.” What is a Refugee?, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> [<https://perma.cc/TRE3-6ZEQ>].

193 Climate Change and Disasters, <http://www.unhcr.org/en-us/climate-change-and-disasters.html> [<https://perma.cc/D38P-PKLM>].

numbers of people traumatized without shelter, clean water and basic supplies.<sup>194</sup>

But the reality of climate refugees forced to flee climate change-induced disasters is not a phenomenon external to the United States. Americans, and specifically Native peoples within the United States, are in danger of becoming climate refugees.<sup>195</sup> Coastal communities are particularly hard hit,<sup>196</sup> and both of the communities discussed below are coastal communities. Looking first to Alaska, indigenous peoples<sup>197</sup> in the Arctic are being particularly hard hit today by the impacts of climate change.<sup>198</sup> “The impact of

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194 *Id.*

195 Nationwide, by 2100, it is expected that there will be significant climate-related migration within the United States. Dominique Mosbergen, *Climate Change May Force Millions of Americans to Move Inland*, Huffington Post (May 22, 2017), [https://www.huffingtonpost.com/entry/sea-level-climate-migrants-united-states\\_us\\_591a9e93e4b0809be157a253](https://www.huffingtonpost.com/entry/sea-level-climate-migrants-united-states_us_591a9e93e4b0809be157a253) [<https://perma.cc/8QCX-R74L>] (“[NOAA] upped its worst-case scenario for global sea rise to 8.2 feet by the year 2100—an increase of about 1.5 feet from its last worst-case estimate issued in 2012 . . . Sea-level rise could actually reach up to 10 to 12 feet for all coastal U.S. states except Alaska.”). See also Dudley L. Poston, Jr. et al., *The Effect of Climate on Migration: United States, 1995–2000*, 38 Soc. Sci. Res. 752 (“Our analyses indicate that the effects of climate on migration are real, and not spurious.”).

196 Mosbergen, *supra* note 195 (“[R]eefs worldwide are collapsing from the damage of human activity and climate change . . . ‘This creates a cascading effect . . . loss of coral reefs and seafloor increases water depth, which allows bigger waves to reach coastal areas, which causes more erosion both of the seafloor and along the coastline.”); U.S. Climate Resilience Toolkit, *supra* note 169 (“Some native coastal communities are being forced to relocate to higher ground after experiencing more extreme storm surges, flooding, and sea level rise, which can impact cultural integrity and access to vital resources.”).

197 The term “indigenous people” refers to a broad group of people. Professor S. James Anaya explains that:

[t]he rubric of indigenous peoples includes the diverse Indian and aboriginal societies of the Western Hemisphere, the Inuit and Aleut of the Arctic, the aboriginal peoples of Australia, the Maori of Aotearoa (New Zealand), Native Hawaiians and other Pacific Islanders, the Sami of the European far North, and at least many of the tribal or culturally distinctive non-dominant people of Asia and Africa. They are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past. S. James Anaya, *International Human Rights and Indigenous Peoples*, 21 *Ariz. J. Int’l & Comp. L.* 13 (2004).

198 Markedly, however, some scholars have noted that what is currently occurring in the Arctic merely foreshadows what may happen to indigenous peoples of the Lower 48 States. Tsosie, *supra* note 171, at 1646

climate change, while problematic for all peoples, falls disproportionately on Native peoples in regions such as the Arctic and Pacific, where the environment is closely tied to indigenous lifeways. Indigenous communities whose members predominantly practice traditional lifeways are particularly vulnerable to climate change.”<sup>199</sup> Notably, approximately 40% (229) of the 573 federally recognized tribes located within the United States are within Alaska, and climate change is having a “significant negative impact on critical infrastructure and traditional livelihoods in the state.”<sup>200</sup> In fact, the impacts of climate change are so dramatic in Alaska, that, in April of 2015, it was estimated that at least thirty Native villages in Alaska either needed to or were in the process of relocating.<sup>201</sup>

In the Arctic, climate change is causing indigenous peoples to lose land and natural resources that are crucial to their subsistence lifestyle. Increasing temperatures related to climate change have caused melting of sea ice and permafrost,<sup>202</sup> resulting in both global and local climate change impacts. Additionally, some of the changes being experienced by Alaskan indigenous groups include: (1) changing ocean pH levels that negatively impact species of fish and crustaceans that are relied upon by animals higher up the food chain (such as bowhead whales) that are in turn relied upon by subsistence communities; (2) thawing permafrost due to increased overall temperatures; (3) a reduction in sea ice that is relied upon by animals and communities for survival; (4) an increased abundance of water due to flooding that in turn causes erosion; (5) decreased water quality; and (6) changes in weather patterns.<sup>203</sup> Climate change has caused hunting, fishing, and travel in

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(“Thus, the impacts in Alaska merely foreshadow what will happen in the ‘lower 48 states,’ states Robert Corell, a scientist and senior fellow at the American Meteorological Society.”).

199 *Id.* at 1628.

200 U.S. Climate Resilience Toolkit, *supra* note 169.

201 *Id.*

202 Cordalis & Suagee, *supra* note 175, at 47 (“Alaska may be experiencing the impacts of global warming more than any other place on Earth, and Alaska Native tribes are among the first American populations to feel the effects of global climate change. Erosion and flooding affect 86 percent of Alaska Native villages to some extent, with the greatest effects felt along the coast.”) (citing U.S. Gov’t Accountability Office, GAO-04-142, Alaska Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance (2003)); U.S. Climate Resilience Toolkit, *supra* note 169 (“The increased thawing of permafrost (permanently frozen soil) along the coasts and rivers is an especially potent threat to Alaska Native villages because it causes serious erosion, flooding, and destruction of homes, buildings, and roads from differential settlement, slumping, and/or collapse of the underlying base.”).

the Arctic to become more difficult, forcing some members to relocate after flooding.<sup>204</sup> Reindeer herders report declining populations because the animals find it increasingly difficult to access food and are more likely to fall through melting ice.<sup>205</sup> Some Arctic species, such as caribou, upon which indigenous peoples rely heavily for their survival, have migrated away from their traditional habitats and ranges due to shifts in weather patterns. These impacts limit Arctic indigenous peoples' ability to rely upon these species because the indigenous peoples may be tied to specific areas for legal, cultural, and spiritual reasons, as explained more fully below.<sup>206</sup>

Because climate change is dramatically affecting the Arctic environment, those indigenous peoples who are reliant on subsistence foods are particularly hard hit.<sup>207</sup> Not only are the animals subsistence hunters rely on more difficult to find because of climate changes,<sup>208</sup> but also subsistence hunting is much more dangerous given the changing environment. For example, because of melting permafrost, it may be much more treacherous for hunters to travel previously relied-upon routes.<sup>209</sup> In Alaska, many indigenous communities rely on subsistence sources to some degree.<sup>210</sup> A reduction or even a perceived reduction in the availability of subsistence foods may also have a

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203 Elizabeth Barrett Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 Ariz. J. Envtl. L. & Pol'y 47, 51–58 (2010).

204 *Id.* at 55; Azadeh Ansari, 'Climate Change' Forces Eskimos to Abandon Village, CNN (Apr. 28, 2009), <http://www.cnn.com/2009/TECH/science/04/24/climate.change.eskimos/> [<https://perma.cc/Z2DH-YMN5>].

205 Tero Mustonen et al., *Observations of Change in Lovozero*, in Arctic Climate Impact Assessment 87–88 (Arctic Council & International Arctic Science Committee ed., 2010).

206 43 U.S.C. § 1603 (2006); Cordalis & Suagee, *supra* note 175, at 47 (citing U.S. Gov't Accountability Office, GAO-04-142, Alaska Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance (2003)).

207 "Climate change impacts the availability and safety of subsistence foods, the costs and risks of subsistence activities, and the very knowledge on which subsistence depends." Ristroph, *supra* note 203, at 47–48 (internal citations omitted).

208 "During the winter, Alaska's caribou herds must dig through snow to find lichens to eat. When there is rain instead of snow, it can freeze into a nearly impenetrable sheet of ice, and caribou may starve." *Id.* at 59 (internal citations omitted).

209 "North Slope whalers have reported that they must now travel farther . . . Less sea ice cover and more broken ice have made spring whaling more difficult for North Slope residents, as the water is rougher and more perilous to navigate." *Id.* at 60 (internal citations omitted).

210 *Id.* at 50–51.

substantial impact on the mental health of reliant indigenous communities, given that subsistence foods play such an important role in the community.<sup>211</sup> Threats to traditional indigenous ways of life as a result of climate change may also endanger the indigenous knowledge of such communities given “[s]ubsistence activities require traditional knowledge based on the synthesis of observations and interpretations made over the past generations.”<sup>212</sup>

Indigenous communities along the coast of Alaska are particularly hard hit by the negative impacts of climate change. The Native Village of Kivalina (“Kivalina”) serves as a helpful case study to understand the creation of climate refugees in Alaska. Kivalina, a self-governing, federally recognized tribe of Inupiat Native Alaskans, sits precariously at the top of a six-mile long barrier reef on the northwest coast of Alaska. Located approximately seventy miles north of the Arctic Circle, it is a tiny island on a thin strip of land, nestled between a sea and a lagoon.<sup>213</sup> The Kivalina coast is comprised of sea ice, which acts as a barrier for the small village against coastal storms and waves.<sup>214</sup> The sea ice surrounding this environmentally vulnerable island is critical to its survival. Citizens of Kivalina practice “a subsistence lifestyle like their ancestors, with bowhead whales, seals, caribous, reindeer, and fish playing a particularly important role.”<sup>215</sup>

Over the past decade, storms have caused the loss of approximately 100 feet from the Kivalina coastline.<sup>216</sup> In 2006, the United States Army Corps of Engineers released a report on the erosion suffered by Kivalina, concluding that climate change has affected

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211 *Id.* at 64 (noting that, in general, vulnerable income groups and minorities may suffer greater psychological impacts when disasters, such as those related to climate change in the Arctic, occur); Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 *Envtl. L. Rep. News & Analysis* 11125, 11133 (2012) (“While disaster is not easy for anyone, there is evidence that lower income groups and minorities suffer disproportionately greater psychological impacts, likely associated with serious disasters. Lower income groups are also less likely to have access to mental health resources.”) (internal citations omitted).

212 Ristroph, *supra* note 203, at 64.

213 *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

214 *Id.* at 868.

215 Madeline Stano, *Fighting for Home in the Melting Arctic*, 15 *Vt. J. Env'tl. L.* 744, 745 (2014) (internal citations omitted).

216 Christine Shearer, *Kivalina: A Climate Change Story* 15 (2011).

the extent of sea ice surrounding the island's coastline.<sup>217</sup> Since 2006, climate change has continued to exact its toll on the island of Kivalina. Homes and buildings are in imminent danger of falling into the sea and critical infrastructure is threatened with permanent destruction.<sup>218</sup> "Scientists estimate the Alaska Native Village of Kivalina will become uninhabitable by 2025, making its current residents the first climate refugees in the United States and making the future of their unique way of life uncertain."<sup>219</sup>

The reduction and near destruction of the protective sea ice has rendered the island uninhabitable and has triggered a need for relocation in the immediate future. In 2003, the Corps and the United States General Accounting Office predicted that a dangerous combination of storm activity "could flood the entire village at any time."<sup>220</sup> As a result, Kivalina, and its residents, may be properly deemed among the first climate refugees in the United States.

With no available options to ensure the safety of their future, Kivalina and the City of Kivalina ("plaintiffs") decided to take this matter to court to seek damages for the costs of relocating their community of approximately 400 residents. The plaintiffs filed a federal common law claim of public nuisance against twenty-two major oil, energy, and utility companies.<sup>221</sup> The plaintiffs alleged that these defendants were "substantial

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217 See U.S. Army Corps of Engineers, Alaska District, Alaska Village Erosion Technical Assistance Program: An Examination of Erosion Issues in the Communities of Bethel, Dillingham, Kaktovik, Kivalina, Newtok, Shishmaref, and Unalakleet 4 (April 2006).

218 Brief for Plaintiffs-Appellants at 8, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (No. 09-17490).

219 Stano, *supra* note 215, at 744.

220 U.S. Gov't Accountability Office, GAO-04-142, *Alaska Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance* 30 (2003).

221 Complaint, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (listing the defendants as: (1) ExxonMobil Corporation; (2) BP P.L.C.; (3) BP America, Inc.; (4) BP Products North America, Inc.; (5) Chevron Corporation; (6) Chevron U.S.A., Inc.; (7) ConocoPhillips Company; (8) Royal Dutch Shell PLC; (9) Shell Oil Company; (10) Peabody Energy Corporation; (11) The AES Corporation; (12) American Electric Power Company, Inc.; (13) American Electric Power Services Corporation; (14) Duke Energy Corporation; (15) DTE Energy Company; (16) Edison International; (17) Midamerican Energy Holdings Company; (18) Pinnacle West Capital Corporation; (19) The Southern Company; (20) Dynegy Holdings, Inc.; (21) Xcel Energy, Inc.; and (22) Genon Energy, Inc.)



contributors to global warming,”<sup>222</sup> and that the greenhouse gas emissions from these companies exacerbated sea level rise and ultimately contributed to increased coastal erosion that destroyed part of their village and will require relocation of Kivalina’s residents.<sup>223</sup> In a unanimous panel decision, the United States Court of Appeals for the Ninth Circuit relied on federal displacement reasoning to affirm the district court’s dismissal of the plaintiffs’ claims.<sup>224</sup> Undaunted by this unwelcoming reception, the plaintiffs in the *Kivalina* case filed a petition for rehearing en banc with the Ninth Circuit. On November 22, 2012, the Ninth Circuit denied the petition in a two sentence decision.<sup>225</sup> On May 20, 2013, the United States Supreme Court also denied Kivalina’s petition for a writ of certiorari.<sup>226</sup> As a result of the Supreme Court’s denial, Kivalina’s claim in the United States federal courts to have major emitters of greenhouse gases pay for the cost of their relocation failed.

Kivalina is not the only Native community within the United States facing migration because the negative impacts of climate change have destroyed the land upon which it is located; native communities within Louisiana are also suffering in a similar manner. “During the past 100 years, Louisiana has lost more than one million acres of coastal land and wetlands[] and is losing approximately [twenty-five to forty] square miles per year. [90%] of the coastal wetlands loss in the United States is in Louisiana.”<sup>227</sup> This reality is caused, in part, by natural resource exploitation and climate change, as the sea level rise triggered by climate change has led to erosion, flooding, and salt water intrusion.<sup>228</sup> As to the first point, “oil and gas companies have engaged in aggressive resource exploration, haphazardly cutting canals through the land, which has led to erosion and increased salt

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222 *Id.* at 853–54.

223 *Id.*

224 *Id.* at 853.

225 Order on Petition for Rehearing, *Native Village of Kivalina*, 663 F. Supp. 2d. 863.

226 Petition for Writ of Certiorari Denied, *Native Village of Kivalina*, 663 F. Supp. 2d. 863.

227 Patty Ferguson-Bohnee, *The Impacts of Coastal Erosion on Tribal Cultural Heritage*, 29 F.J. 58, 58 (2015).

228 *Id.* at 60.

water intrusion.”<sup>229</sup> Further, with each hurricane, there is more erosion,<sup>230</sup> and, as mentioned above, hurricanes are intensified by climate change.

Native communities of Louisiana’s Isle de Jean Charles have been wrestling with the negative impacts of climate change. On August 30, 2017, the Isle was hit by Hurricane Harvey, a storm whose intensity increased as a result of climate change,<sup>231</sup> and the indigenous communities that live there were cut off from the mainland when the road connecting them was flooded.<sup>232</sup> The Biloxi-Chitimacha-Choctaw Tribe has been trying to relocate from the Isle for over twenty years now, as “[a] mere 320 acres are all that remain of the island, down 98% since 1955, thanks to a combination of erosion and sinking land, rising seas, and more intense storms.”<sup>233</sup> Salt water intrusion limits the Tribes’ ability to engage in large-scale agriculture, and hunting and fishing is similarly limited.<sup>234</sup> Climate change not only threatens indigenous land but also the Tribes’ heritage and culture, which are closely connected to the land.<sup>235</sup> One author has concluded that “[t]he tribe [Pointe-au-Chien Indian Tribe] is at a crossroads of adaptation or extinction.”<sup>236</sup>

For over a century, the American Indians on the island fished, hunted, trapped and farmed among the lush banana and pecan trees that once spread out for acres. But since 1955, more than 90 percent of the island’s

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229 *Id.*

230 *Id.* at 61.

231 Ctr. for Climate & Energy Solutions: Hurricanes and Climate Change, <https://www.c2es.org/content/hurricanes-and-climate-change/> [<https://perma.cc/S3KU-YVVN>] (explaining that climate change increases the intensity of hurricanes due to warmer ocean temperatures and higher water levels).

232 Mandel, *supra* note 109.

233 *Id.* Notably, unlike Kivalina, however, this Tribe has received a \$48 million award from HUD to help relocate the community.

234 Ferguson-Bohnee, *supra* note 227, at 62.

235 Coral Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees,’* N.Y. Times (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html> [<https://perma.cc/KU8J-MHBN>]; Ferguson-Bohnee, *supra* note 227, at 63 (explaining that the State of Louisiana failed to take into consider the Tribes’ sacred sites and traditional territory when developing its plan for climate change adaptation).

236 Ferguson-Bohnee, *supra* note 227, at 62.

original land mass has washed away. Channels cut by loggers and oil companies eroded much of the land, and decades of flood control efforts have kept once free-flowing rivers from replenishing the wetlands' sediments. Some of the island was swept away by hurricanes. What little remains will eventually be inundated as burning fossil fuels melt polar ice sheets and drive up sea levels, projected the National Climate Assessment, a report of 13 federal agencies that highlighted the Isle de Jean Charles and its tribal residents as among the nation's most vulnerable.<sup>237</sup>

The island was protected from floods for centuries by barrier islands, but those islands have disappeared and, as a result, "saltwater intrusion has ended most farming and cattle grazing."<sup>238</sup> In addition to the challenges facing the Native communities described above, such communities also face additional legal challenges that arise because of their status as indigenous communities. Professor Kaswan points out:

Even community relocation is no panacea, however; it requires substantial resources, identifying an appropriate relocation site, and, for communities [such as many indigenous communities] whose cultural identities are tied to a geographical place, the risk of cultural disruption . . . The political decision over whether to protect or retreat has significant social justice implications. How will adaptation planners choose which areas to protect and which to abandon? . . . Differences in political power are also likely to determine who receives protection and who must leave.<sup>239</sup>

Further, relocation is very expensive. For example, it is estimated that it will cost between \$95 and \$400 million to relocate Kivalina.<sup>240</sup> "If you add up the estimates that exist for how much it would cost to move just five small villages that are currently

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237 Davenport & Robertson, *supra* note 235.

238 Ferguson-Bohnee, *supra* note 227, at 58.

239 Kaswan, *supra* note 211, at 11134.

240 *Id.* at 11138 (citing Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197, 207 (2010)).

seeking relocation [in the United States]—about 2,185 people in three states, the price tag comes to roughly \$500 million.”<sup>241</sup>

### C. Man Camps

Environmental degradation and climate change also present unique threats to the physical safety of Native women and children. Because tribal nations are unable to prosecute non-Indians who commit crimes in Indian country,<sup>242</sup> any energy development projects that require large numbers of non-Indians to facilitate extraction present significant dangers to Native women. As noted earlier, tribal nations were totally stripped of criminal authority over non-Indians in 1978.<sup>243</sup>

Starting with the Gold Rush in California in the 1840s,<sup>244</sup> actions to exploit the land have almost always been correlated with an increase in violent crime, much of which is perpetrated by non-Indian men against Native women. Similar dynamics have played out in other massive extractive industries across the world.<sup>245</sup> During the past fifteen years, Native women in the United States have found themselves in significant physical danger, which is correlated with an increase in contemporary extractive industries.<sup>246</sup> For example, since the onset of the Bakken oil boom, the number of assault cases in North

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241 Mandel, *supra* note 109.

242 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

243 *Id.* See also *supra* notes 131–34 and accompanying text.

244 During the California Gold Rush, for example, “[m]any newspaper accounts of gold rushes emphasize drugs, prostitution and violence.” Rick Ruddell, *Oil, Gas, and Crime: The Dark Side of the Boomtown* 22 (2017).

245 Rebecca Adamson, *Vulnerabilities of Women in Extractive Industries*, 2 *Indian J. Women & Soc. Change* 24, 24 (2017) (noting that “sex crimes, the sex trade and anti-woman violence, have become major and predictable by-products of oil, gas and mining extraction operations”); Gretchen Ennis et al., *A Boom for Whom? Exploring the Impacts of a Rapid Increase in the Male Population Upon Women’s Services in Darwin, Northern Territory*, 23 *Violence Against Women* 535–58 (2017) (exploring this dynamic in Australia); Andrew J. Taylor & Dean B. Carson, *It’s Raining Men in Darwin: Gendered Effects from the Construction of Major Oil and Gas Projects*, 9 *J. Rural Community Dev.* 24 (2014) (exploring this dynamic in Australia).

246 Victoria Sweet, *Extracting More Than Resources: Human Security and Arctic Indigenous Women*, 37 *Seattle Univ. L. Rev.* 1157, 1162 (2014) (“While extractive industry development projects are not created to victimize women, violence against women has been the by-product of numerous development projects.”).

Dakota increased by over 82%.<sup>247</sup> The resulting gendered crime rate can be thought of as a form of “social pollution”—which is “as toxic—and potentially as risky—as any chemical released into the environment.”<sup>248</sup>

Energy companies seeking to engage in natural resource extraction in or near tribal nations must attract large numbers of temporary workers.<sup>249</sup> Typically, this large, transient work force is made up almost exclusively of non-Indian men.<sup>250</sup> The increasing number of men “disrupts the normal ratio of men to women” in these communities.<sup>251</sup> For housing temporary workers, energy companies set up so-called “man camps” which become small, temporary “towns,” dotting the landscape with tents, mobile homes, or recreational vehicles as temporary residences.<sup>252</sup> Life in these “man camps” is often centered around “sexism, hypermasculinity, and a disconnection from the local community.”<sup>253</sup>

The proximity of these camps to tribal nations has resulted in high rates of crime committed against Native women.<sup>254</sup> While there is no comprehensive data collection

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247 Ruddell, *supra* note 244, at 49.

248 Adamson, *supra* note 245, at 27.

249 Sarah Deer & Mary Kathryn Nagle, *The Rapidly Increasing Extraction of Oil, and Native Women, in North Dakota*, Fed. L. 34, 35–36 (2017).

250 In recent years, well over 80% of the transient workers are men. Angela C. Angel, *Beyond the “Roughneck” Stereotype: Revealing the Actual Face of Mobile Workers in the Alberta Oil Sands and North Dakota’s Bakken Oil Region and Why It Matters to Health* 6 (2014).

251 Ruddell, *supra* note 244, at 69.

252 Adamson, *supra* note 245; Deer & Nagle, *supra* note 249, at 35.

253 Jemma Tosh & Maya Gislason, *Fracking is a Feminist Issue: An Intersectional Ecofeminist Commentary on Natural Resource Extraction and Rape*, 18 *Psychol. Women Section Rev.* 54, 56 (2014).

254 “Rapid oil and gas development have brought an unprecedented rise of violent crime on and near the Fort Berthold reservation . . . Specifically, the influx of well-paid male oil and gas workers, living in temporary housing often referred to as ‘man camps,’ has coincided with a disturbing increase in sex trafficking of Native women.” Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 *Harv. J.L. Gender* 1, 2 (2017); see also Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples) *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Mission to the United States of America*, 12–13, U.N. Doc. A/HRC/36/46/Add.1 (Aug. 9, 2017) (“Rapid development of the Bakken Formation since 2011 has attracted thousands of oil workers to North Dakota. One of the effects of the influx of oil and gas workers to the area has been a dramatic increase in violent crime, generally, and a notable increase in trafficking of Native women and children.”) [hereinafter Tauli-Corpuz, A/HRC/36/46/Add.1].

system that allows us to quantify the increased rates of violence associated with man camps,<sup>255</sup> there is ample anecdotal evidence to establish a significant problem. Anecdotal reports (often collected by investigative journalists) suggest that Native women experience a marked change in their comfort level in public places.<sup>256</sup> One journalist talked to several women who described their fear and anxiety about being out in public: “Many said they felt unsafe. Several said they could not even shop at the local Walmart without men following them through the store. Girls’ night out usually becomes an exercise in fending off obnoxious, overzealous suitors who often flaunt their newfound wealth.”<sup>257</sup>

Advocates for Native women and children have reported a marked increase in the rates of sexual assault in their communities since the arrival of hundreds of non-Native men.<sup>258</sup> Anecdotal stories from law enforcement officers describe brutal conditions, with victims being bought and sold within camps. In one interview, a tribal police officer describes some of the child victims:

One of the things we ran into while working up there was a 15-year-old boy had gone missing. He was found in one of the Man Camps with one of the oil workers. They were passing him around from trailer to trailer.

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The United States Department of State has also acknowledged the problem, noting that “[s]ervice providers in areas near camps surrounding large-scale oil extraction facilities, such as the Bakken oil fields in North Dakota in the United States, have reported that sex traffickers have exploited women in the area, including Native American women.” U.S. Dep’t of State, *The Link Between Extractive Industries and Sex Trafficking* (2017), <https://www.state.gov/documents/organization/272964.pdf> [<https://perma.cc/TJ84-2FK8>].

255 Because most victims of violent crime do not report their crime to the authorities, it is often very difficult to determine exactly how elevated a crime rate has become. See Ruddell, *supra* note 244, at 70.

256 See, e.g., John Eligon, *An Oil Town Where Men Are Many, and Women Are Hounded*, N.Y. Times (Jan. 15, 2013), <https://www.nytimes.com/2013/01/16/us/16women.html> [<https://perma.cc/C275-KBB9>].

257 *Id.*

258 See, e.g., Mary Annette Pember, *Brave Heart Women Fight to Ban Man-Camps, Which Bring Rape and Abuse*, Indian Country Today (Aug. 28, 2013), <https://newsmaven.io/indiancountrytoday/archive/brave-heart-women-fight-to-ban-man-camps-which-bring-rape-and-abuse--TVT3WEO-kaOL2wFSW0e1w/> [<https://perma.cc/7K64-PPMP>] (“Advocates Melissa Merrick from Spirit Lake and Sadie Young Bird from Ft. Berthold described the unprecedented rise in domestic violence, sexual assaults, and sex trafficking in their communities since hydraulic fracturing or fracking technology brought about the oil boom of 2008 in the Bakken formation. They said there has been a doubling or tripling number of sexual assaults, domestic violence and sex trafficking incidents in North Dakota since 2008.”).

He went there looking for a job and was hired by individuals within the Man Camp to do light cleaning in and around their personal areas. The young teenager was forced into sex slavery . . . We [also] found a crying, naked, 4-year-old girl running down one of the roads right outside of the Man Camp. She had been sexually assaulted.<sup>259</sup>

One of the more alarming trends correlated with energy development in rural areas is the large numbers of registered sex offenders who are attracted to work in oil fields. One study of counties affected by the extractive industry, for example, determined that the number of “registered sex offenders grew approximately two to three times in areas reliant on energy extraction.”<sup>260</sup> In 2015, the United States Marshall’s Service and the tribal law enforcement agency at Fort Berthold determined that, after the oil boom, almost twenty percent of the sex offenders on the reservation had failed to register with authorities (in violation of tribal and federal law)—compared to a rate of only 4–5% for the rest of North Dakota.<sup>261</sup> It is possible that registered sex offenders are particularly attracted to transient work in remote oil fields because of difficulty finding housing and employment in mainstream society. Regardless of the reason, this dynamic presents potential high risk for increased sexual violence, particularly in the context of lax law enforcement and poor security in general.

Moreover, Native women and children are already at high risk for becoming victims of human trafficking.<sup>262</sup> Add in the dynamics of man camps, and the risk factors increase

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259 Damon Buckley, *Firsthand Account of Man Camp in North Dakota From Local Tribal Cop*, Lakota Country Times (May 22, 2014), <https://www.lakotacountrytimes.com/articles/firsthand-account-of-man-camp-in-north-dakota-from-local-tribal-cop/> [<https://perma.cc/HVM2-X2KJ>].

260 Joel Berger & Jon P. Beckman, *Sexual Predators, Energy Development, and Conservation in Greater Yellowstone*, 24 *Conservation Biology* 891, 891 (2010).

261 Amy Dalrymple, *Federal, Tribal Officers Check on Sex Offenders at Fort Berthold*, Bismarck Trib. (Apr. 19, 2015), [https://bismarcktribune.com/news/state-and-regional/federal-tribal-officers-check-on-sex-offenders-at-fort-berthold/article\\_6d23ab8e-2ea8-55af-b63f-e662dfae9eff.html](https://bismarcktribune.com/news/state-and-regional/federal-tribal-officers-check-on-sex-offenders-at-fort-berthold/article_6d23ab8e-2ea8-55af-b63f-e662dfae9eff.html) [<https://perma.cc/XT9W-DDN9>].

262 Mary Annette Pember, *Living the Life: Sex Abuse Leads to Trafficking*, Indian Country Today (Mar. 9, 2016), <https://indiancountrymedianetwork.com/news/native-news/living-the-life-sex-abuse-leads-to-sex-trafficking/> [<https://perma.cc/7VY7-WKWX>] (explaining that Native women and girls with their high rates of sexual assault are particularly vulnerable to sex traffickers); see also U.S. Gov’t Accountability Office, GAO-17-762T, *Human Trafficking: Investigations in Indian Country or Involving Native Americans and Actions Needed to Better Report on Victims Served 1* (2017) [hereinafter U.S. Gov’t Accountability Office, *Human Trafficking*].

substantially.<sup>263</sup> Horror stories involving women and children being bought and sold in man camps have begun to emerge in recent years. Ruddell argues, “[b]oomtowns . . . are lucrative environments for pimps supplying sex workers to a large male population earning high salaries.”<sup>264</sup> Prostitution is often understood to be part and parcel of the man camp experience, where local women (including Native women) turn to selling sex because of poverty, addiction, and/or homelessness.<sup>265</sup> Local authorities have seen the rates of prostitution significantly increase over prior years.<sup>266</sup> The higher rates of prostitution can be linked directly to the boomtown expansion. One reporter discovered that “for the past 10 years . . . there were almost no prostitution or sex trafficking-related cases in far western North Dakota until 2011, when there were a dozen.”<sup>267</sup> Women and children being used in prostitution are also at high risk for kidnapping and homicide. The emerging Missing, Murdered and Indigenous Women (MMIW) crisis can be traced, in part, to linkages between human trafficking in the fracking regions and missing women.<sup>268</sup> Prostitution itself can be a lethal experience, since prostitutes are much at a much higher risk for homicide.<sup>269</sup>

The federal government itself has acknowledged the danger presented by these man camps. In 2013, the Department of Justice acknowledged the relationship between energy extraction in the Bakken and high rates of crime targeting Native women and children:

Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement

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263 Pam Louwagie, *Sex Trade Follows Oil Boom Into North Dakota*, Star Trib. (Sept. 21, 2014), <http://www.startribune.com/aug-30-sex-trade-from-oil-boom-mostly-unchecked/273268991/> [<https://perma.cc/9JMS-SZD4>]; Finn et al., *supra* note 254, at 6.

264 Ruddell, *supra* note 244, at 79.

265 *Id.* at 80–81.

266 Blake Ellis, *Crime Turns Oil Boomtown into Wild West*, CNN Money (Oct. 26, 2011) [https://money.cnn.com/2011/10/26/pf/America\\_boomtown\\_crime/index.htm](https://money.cnn.com/2011/10/26/pf/America_boomtown_crime/index.htm) [<https://perma.cc/ANW2-37QL>]; *see also* Finn et al., *supra* note 254.

267 Louwagie, *supra* note 263.

268 Zoe Sullivan, *Crimes Against Native American Women Raise Questions About Police Response*, The Guardian (Jan. 19, 2016), <https://www.theguardian.com/us-news/2016/jan/19/minnesota-native-american-women-trafficking-police> [<https://perma.cc/9YJK-C9FR>].

269 “A Canadian commission found that the death rate of women in prostitution was 40 times higher than that of the general population.” Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 *Transcultural Psychiatry* 242, 244 (2005).



and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped “man camps” of workers.<sup>270</sup>

United States Attorneys, federal prosecutors that are co-responsible for crime control on most reservations in the lower forty-eight, have also noted this phenomenon:

In the course of approximately the last five years, [extractive industries have] cause[d] a social eruption—in population, jobs, and money. It has exposed, predictably, the seedy underbelly of these promising advances: resource shortages, young men with money to burn, and a veritable buffet of vices to spend it on.<sup>271</sup>

The high rate of crime associated with the influx of non-Native men in boomtowns has overwhelmed law enforcement agencies in terms of staffing and resources.<sup>272</sup> Federal, state, local, and tribal law enforcement agencies have all experienced significant challenges in trying to address the high crime rates associated with man camps, often leaving victims without access to justice and protection.

Tribal law enforcement agencies, in particular, have struggled to protect Native women and children from crime associated with the extractive industries due to jurisdictional limitations.<sup>273</sup> Most of the transient workers in these camps are non-

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270 U.S. Dep’t of Just. Office on Violence Against Women, 2013 Tribal Consultation Report 3 n.2 (2013).

271 Laura Weiss, *The New Wild West: Justice in the Bakken*, 62 U.S. Atty’s Bull. 49, 49 (2014); see also Leslie A. Hagen & Benjamin L. Whitemore, *Combating Trafficking of Native Americans and Alaska Natives*, 65 U.S. Atty’s Bull. 149 (2017).

272 Tauli-Corpuz, A/HRC/36/46/Add.1, *supra* note 254, at 13 (“[T]he rapid pace of development quickly and critically overwhelmed the tribe’s existing infrastructure, which was unable to provide law enforcement, victim support and social services to keep pace with the increase in crime on the almost one-million acre reservation.”); Finn et al., *supra* note 254, at 8 (“Most rural communities do not have the infrastructure, leadership capacity, or expertise to respond to the rapid social changes and population growth.”); Louwagie, *supra* note 263 (noting that “with the oil boom overwhelming everything here for the past few years, understaffed local law enforcement has let much of the sex-trade go unchecked, unwilling to pour time into what some view as low-level victimless offenses . . . The region has been unprepared for the results, with no safe houses specifically to help victims, no service geared toward them and no advocacy groups.”).

273 Finn et al., *supra* note 254, at 9–10 (“While the MHA Nation desires to protect its community by preventing trafficking and holding offenders accountable, the limits imposed by federal Indian law restrain its ability to act decisively and effectively.”).

Indians.<sup>274</sup> As noted earlier, tribal governments are forbidden from prosecuting non-Indians pursuant to the *Oliphant* case.<sup>275</sup> When non-Indians commit crimes in Indian country, the tribal government must depend upon state or federal officials to work the case. Moreover, many of the man camps are not located in Indian country, but rather neighboring off-reservation jurisdictions. To the extent that crime is happening within these off-reservation camps, tribal authority typically will not be able to investigate those crimes since they fall outside of Indian country. Without a federal crime, the responsibility for investigating off-reservation crimes falls under the auspices of the state. However, some advocates for Native women in extraction regions report that local law enforcement agencies often do not prioritize the trafficking and disappearances of Native women.<sup>276</sup> Such lax enforcement often serves to embolden sex offenders.<sup>277</sup>

The federal government has also struggled to keep up with the burgeoning crime rates associated with extractive industries.<sup>278</sup> While the federal government has criminal authority on most Indian reservations in the lower forty-eight states, the lack of collaboration with tribal authorities can present significant barriers to prosecuting offenders.

For example, the Federal Bureau of Investigation (FBI) is often the lead investigatory agency for cases involving kidnapping, rape, and trafficking in Indian country.<sup>279</sup> Even if the tribal government wants to go forward with a concurrent prosecution, the FBI often has custody of any forensic evidence, making it difficult for tribal prosecutors to make a case.<sup>280</sup> This essentially ties a tribal prosecutor's hands in terms of addressing the harm

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274 See Horwitz, *supra* note 141; Bogado, *supra* note 141.

275 See *supra* notes 130–133 and accompanying text.

276 Sullivan, *supra* note 268.

277 Catherine M. Redlingshafer, *An Avoidable Conundrum: How America Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Vindication*, 93 *Notre Dame L. Rev.* 393, 394–95 (2017).

278 See Horwitz, *supra* note 141.

279 U.S. Gov't Accountability Office, *Human Trafficking*, *supra* note 262, at 4 (“The Federal Bureau of Investigation (FBI), within DOJ, has investigative responsibilities in Indian country where the federal government has criminal jurisdiction.”).

280 See U.S. Gov't Accountability Office, *GAO-11-252, Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts* 17 (2011),

done to the community. Meanwhile, there are long standing allegations that federal prosecutors have failed to prioritize Indian country crimes, which are buttressed by the federal government's own statistics showing high rates of declination for violent crimes in Indian country.<sup>281</sup> In one recent study of tribal law enforcement officers, for example, some officers complained that the federal government does not treat reservation crimes with urgency.<sup>282</sup>

The United Nations Special Rapporteur on the rights of indigenous peoples recently noted the connection between gendered violence and sovereignty, explaining that “[i]ndigenous communities are at their strongest when women and girls have full and free access to social, cultural, spiritual and political institutions.”<sup>283</sup> The harm done by sexual violence cannot be overstated. The aftermath of such trauma presents long-term challenges. Studies on the aftermath of rape for Native women and children has identified a correlation between abuse and addiction, mental health problems, and high suicide attempts.<sup>284</sup> At the same time Native people are suffering from the effects of environmental degradation and climate change, they are also seeing a dramatic increase of physical violence being perpetrated against the most vulnerable. The long-term effects of trauma present at the intersection of environmental violence and physical violence establish that climate change and fossil fuel extraction in Indian country are gendered.

This Part demonstrates the harm being caused by energy and natural resource development within and near Indian country—from the negative impacts of climate

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<https://www.gao.gov/assets/320/315698.pdf> [<https://perma.cc/82AA-A8KC>] (noting that some tribes “oftentimes did not know whether criminal investigators—most commonly, BIA or FBI—had referred the criminal investigation to the USAO for prosecution”).

281 “For decades, tribal communities had felt entirely stymied by the current political system and lack of response to the criminal justice crises on reservations. Tribal members expressed deep frustration and a sense of hopelessness around federal prosecutors’ decisions to decline to prosecute the most serious crimes—even rape and murder—on the reservation.” Angela R. Riley, *Crime and Governance in Indian Country*, 63 *UCLA L. Rev.* 1564, 1584 (2016); *see also* Deer, *supra* note 143, at 772 (characterizing the failure of federal prosecutors to prosecute rape cases as that of a “culpable bystander”).

282 Tribal officers “felt frustrated that serious reservation crimes are not treated with the same urgency as those occurring outside of Indian country. In fact, one of the tribal officers suggested that the federal government has adopted a casual attitude about prosecuting serious crimes involving American Indians in the federal court system.” Favian Alejandro Martin & Mona J.E. Danner, *Elusive Justice: Tribal Police Officers’ Perception of Justice in an American Indian Community*, 20 *Contemp. Just. Rev.* 175, 185 (2017).

283 Tauli-Corpuz, A/HRC/36/46/Add.1, *supra* note 254, at 12.

284 *See generally* Bohn, *supra* note 12.

change to violence perpetrated by individuals coming to work for extractive industries. With this understanding in place, the next Part explores ways forward that would improve upon the status quo.

### III. Options to Improve Upon the Status Quo

As the foregoing demonstrates, the status quo fails indigenous people, and women in particular. Tribes suffer the negative impacts of climate change while doing little to contribute to the problem. Indigenous women suffer as a result of increased energy and natural resources development. Given the failings of the status quo, change must occur. This Part therefore presents some options moving forward that are likely to improve upon the status quo. The first proposal approaches the federal trust responsibility from the perspective that it is the federal government's duty to protect tribes' right of self-governance and autonomy:<sup>285</sup> Indian country must be empowered to take the lead in energy and natural resource development as well as in climate change adaptation planning. This recommendation is made with an awareness that the role of the federal government in tribal decision making is a hotly contested issue.<sup>286</sup> The second option focuses on advocacy, examining how lessons learned from the Idle No More and No DAPL movements might be applied to the challenges identified above.

#### A. One Potential Avenue for Effective Reform: Tribal Empowerment

To maximize energy development within Indian country, truly promote tribal self-determination, and potentially reduce the assault and rape of Indian country discussed above, the federal government should remove any federal "conditions" on such development. This appears to be consistent with the desires of the current Administration, as President Trump has indicated a desire to reduce regulation so as to promote energy and natural resource development in Indian country.<sup>287</sup> Accordingly, the federal government should continue to act to empower tribal governments and reduce federal oversight. There are several benefits to this recommendation. First, "[t]ribes exercising

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285 Kathleen R. Unger, *Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 Loy. L.A. L. Rev. 329, 340–41 (2009).

286 "Perhaps more problematic are conflicting sentiments within tribes over distancing tribal energy development from federal government protection, an issue strongly debated among Indian law practitioners and scholars." Bethany C. Sullivan, *Changing Winds: Reconfiguring the Legal Framework for Renewable-Energy Development in Indian Country*, 52 Ariz. L. Rev. 823, 831 (2010) (internal citations omitted).

287 *President Trump Hosts Tribal, State, and Local Energy Roundtable*, *supra* note 98.

actual decision-making powers ‘consistently out-perform outside decision-makers.’”<sup>288</sup> Tribes acting as decision makers are exercising their sovereignty, which is tied to the overall likelihood of tribal economic success. In order for a tribe to exercise its sovereignty as a “true” decision maker, the federal government must take a reduced role in making decisions affecting development within Indian country.<sup>289</sup> In fact, scholars have deduced that “federal control over economic decision-making [i]s ‘the core problem in the standard approach to development and a primary hindrance to reservation prosperity.’”<sup>290</sup>

Moreover, tribes who have undertaken increased decision-making roles have a demonstrated record of success, as exemplified by the example of tribal forest management under Public Law 638.

Under P.L. 638, tribes may enter into contracts and self-governance compacts to assume administration of federal Indian programs, and may use the 638 program to gain significant control over natural resources development. For example, a statistical analysis of seventy-five forestry tribes showed that in the 1980s, forty-nine of the tribes used the 638 program to take some degree of management over their forest resources. The study concluded that ‘tribal control of forestry under PL 638 results in significantly better timber management.’ When tribes took complete management over their forest resources under 638, output rose as much as forty percent with no increase in the number of workers, and the tribes received prices as much as six percent higher than they had when the forest resources were managed by the Bureau of Indian Affairs.<sup>291</sup>

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288 Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065, 1068 (2008) (internal citations omitted). Professor Royster goes even further in her article to point out successful tribal economic development without meaningful practical sovereignty (i.e., the ability to act as a sovereign within one’s territory) is rare. *Id.* at 1069.

289 “Practical sovereignty, no less than political sovereignty, requires reducing the role of the federal government.” *Id.*

290 *Id.* (citing Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn’t*, in *Rebuilding Native Nations: Strategies for Governance and Development* (Miriam Jorgensen ed., 2007)).

291 *Id.* at 1069–70 (internal citations omitted). Professor Royster goes on to hypothesize that the general lack of litigation surrounding mineral leases under the Indian Mineral Development Act suggests that tribes

There is therefore empirical proof that at least in the context of forest management, which is analogous to energy development given both involve the development of natural resources, tribes have demonstrated the ability to excel when allowed to exercise increased decision-making authority. As Professor Royster concludes, “[t]ribal control of federal programs is thus better than federal control, but a clear second-best to tribal choices of what programs and development opportunities.”<sup>292</sup>

Moreover, reduction of the federal government’s role in energy and natural resource development within Indian country is consistent with the federal government’s goal to promote tribal self-determination.<sup>293</sup> Although some tribes may not be in a position to take an increased role in decision making within their respective territories, those that are in the position should be encouraged to take an increasingly active role, thereby empowering the appropriate tribes to self-determine.<sup>294</sup> The failure of the federal government to recognize that many tribes are capable of independent decision making would see tribal nations “frozen in a perpetual state of tutelage.”<sup>295</sup> Furthermore, “though ownership of most tribal lands is held by the federal government, the exclusive beneficiary of that ownership is intended to be the applicable tribe.”<sup>296</sup>

Further, within the climate change context, several tribes have demonstrated the capacity to develop mitigation and adaptation strategies, an area in which the federal government has failed to demonstrate leadership. To fill the void left by the federal

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are doing a good job of managing mineral resources under this Act, which gives tribes increased access to practical sovereignty as well. *Id.* at 1077.

292 Royster, *supra* note 288, at 1070.

293 The federal government arguably has had a policy in place to promote tribal self-determination since President Nixon first issued a statement to Congress addressing tribal self-determination. President Nixon, Special Message on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970) (“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).

294 Increased decision-making authority leads to increased tribal economic independence and stronger tribal governments. “The doctrine of self-determination, which has guided much of federal policy toward American Indians over the past decades, acknowledges that giving tribes control over how their resources are developed is the best way to improve economic self-sufficiency and to strengthen tribal governmental and economic structures.” Unger, *supra* note 285, at 337 (internal citations omitted).

295 Thomas H. Shipps, *Tribal Energy Resource Agreements: A Step Toward Self-Determination*, 22 Nat. Res. & Env’t 55, 56 (2007).

296 *Id.*

government, several tribes have developed their own strategies for combatting climate change. For example, the Confederated Salish and Kootenai Tribes (CSKT), located within Montana, have adopted an adaptation plan titled the “Climate Change Strategic Plan.”<sup>297</sup> Through Resolution No. 13-52, the CSKT Tribal Council called on the Tribes “[t]o develop appropriate policies and strategies for addressing effects and projected impact of climate change on the Tribe and the Reservation” and “[t]o develop potential programmatic and/or regulatory actions and changes consistent with said policies.”<sup>298</sup> Notably, the Resolution called for the incorporation of Traditional Ecological Knowledge<sup>299</sup> into the Climate Change Strategic Plan, and also recognized that climate change may result in cultural impacts as well as negative social, environmental, and economic consequences.<sup>300</sup> The focus on culture in the Strategic Plan is consistent with the Tribes’ overall use of cultural considerations for natural resources in land use

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297 Confederated Salish and Kootenai Tribes of the Flathead Reservation, Climate Change Strategic Plan 3 (2013), <https://www.cakex.org/sites/default/files/documents/CSKTClimatePlan-2.pdf> [<https://perma.cc/HK5Y-UHZH>] [hereinafter Climate Change Strategic Plan].

298 *Id.* at ii.

299 The Climate Change Strategic Plan defines “Traditional Ecological Knowledge” as:

considerations related to your planning areas (Forestry, Water, Air, etc.) concerning climate change. TEK refers to the evolving knowledge acquired by indigenous and local peoples over hundreds of thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeways, including but not limited to hunting, fishing, trapping, agriculture, and forestry. *Id.* at xi.

The Tribes’ Strategic Plan incorporates Traditional Ecological Knowledge by including elder observations, which “indicate that the climate has noticeably changed within their lifetime and as stated prior, the knowledge they gained from parents, grandparents, and great grandparents goes back at least three generations.” *Id.* at 36.

300 *Id.* at i–ii.

planning.<sup>301</sup> The Strategic Plan later explains that Traditional Environmental Knowledge is uniquely related to cultural resources, and that both must be protected.<sup>302</sup>

As a result of Resolution No. 13-52, the Tribes eventually adopted their Climate Change Strategic Plan in September 2013.<sup>303</sup> The Plan includes a discussion of the characteristics and history of the Tribes, the climate impacts, the planning focus, vulnerability and risk assessment, goals and actions, and an implementation plan. The Strategic Plan focuses on nine sectors that may be affected by climate change: forestry, land, fish, wildlife, water, air, infrastructure,<sup>304</sup> people,<sup>305</sup> and culture.<sup>306</sup> The Plan also provides the priority levels for each of the areas examined, and the Tribes rated the priority for culture as high.<sup>307</sup> In relation to the high priority placed on culture, the Strategic Plan concludes that “[p]rotecting land-based cultural resources is essential if the Tribes are to sustain Tribal cultures.”<sup>308</sup>

Ultimately, the Tribes’ Strategic Plan develops goals and actions related to each of the nine sectors considered.<sup>309</sup> Where possible, the Tribes work to incorporate Traditional Ecological Knowledge into their goals and actions. For example, the forestry goals

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301 *Id.* at 14. The Tribes go on to explain what these cultural considerations refer to:

Cultural traditions rely on abundant populations of native fish and wildlife, healthy plant communities, clean air and water. Undisturbed spiritual sites, prehistoric and historical campsites, dwellings, burial grounds and other cultural sites are important too, because they, in the words of the Flathead Culture Committee, “reaffirm the presence of our ancestors, how we are alive today only because of them. These places are part of the basis of our spiritual life.” They provide young people with a connection to ancestors and native traditions. Climate Change Strategic Plan, *supra* note 297, at 16.

302 *Id.* at 17.

303 *Id.*

304 “The focus of the infrastructure sector is housing and power.” *Id.* at 42.

305 “The focus of the people sector is social services, safety, tribal health, and human resources.” *Id.*

306 *Id.* at 36.

307 Climate Change Strategic Plan, *supra* note 297, at 53.

308 *Id.* at 18.

309 *Id.* at 54–66.



include developing a greenhouse to grow native and cultural plant species.<sup>310</sup> In the Executive Summary of the Strategic Plan, the Tribes acknowledge that the Plan is an “early step” in the Tribes’ efforts to combat the impacts of climate change and much future work will be required.<sup>311</sup> Having taken the initial step of developing the Strategic Plan, the Tribes established several steps of an implementation plan to effectuate the Strategic Plan.<sup>312</sup>

Similarly, the Jamestown S’Klallam tribe (JSK Tribe) developed an adaptation plan. Although the Tribe is facing negative impacts from climate change, “[c]hanging climate and its associated impacts are not entirely new to the Tribe, which has successfully adapted to past climate variations.”<sup>313</sup> In August 2013, the JSK Tribe adopted its Climate Vulnerability Assessment and Adaptation Plan (JSK Adaptation Plan).<sup>314</sup> The JSK Adaptation Plan begins with a discussion of the JSK Tribe and resilience, then explains the impacts of climate change on the Tribe, and concludes by discussing the three key areas of concern: Group 1: high priority areas of concern,<sup>315</sup> Group 2: medium priority areas of concern,<sup>316</sup> and, Group 3: low priority areas of concern.<sup>317</sup>

In its Adaptation Plan, the JSK Tribe identifies several impacts of climate change that are threatening its eco-system homeland. These impacts include: increasing temperatures, changing precipitation patterns, sea level rise and coastal flooding, ocean acidification and temperature increases, forest habitat changes, and negative impacts to human health,

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310 *Id.* at 54.

311 *Id.* at 1.

312 *Id.* at 67.

313 Climate Change Strategic Plan, *supra* note 297, at 67.

314 *Id.*

315 “**High priority areas of concern** are those areas sharing high community value, with a large magnitude of expected impacts, persistence, hazardous timing, and limited potential for adaptation.” *Id.* at 23 (emphasis in original).

316 “**Medium priority areas of concern** include the important economic resources of the Casino and the Longhouse Market, as well as Highway 101, the critical transportation link between the community and surrounding area.” *Id.* (emphasis in original).

317 “**Low priority areas of concern** include very specific impacts with a generally high potential for adaptation.” *Id.* (emphasis in original).

such as shifting tribal demographics, storm events, and air pollution.<sup>318</sup> Furthermore, in relation to human health, the JSK Adaptation Plan concludes that changes to resources as a result of climate change could have the potential to disrupt cultural, spiritual, socioeconomic, and nutritional health.<sup>319</sup>

In developing its Adaptation Plan, the Tribe established vulnerability rankings, which depend on exposure, sensitivity, and adaptive capacity.<sup>320</sup> The vulnerability rankings correspond to the overall group ranking. Once the vulnerability rankings were assessed, the vulnerabilities were ranked so that the JSK Tribe could prioritize based on its limited resources.<sup>321</sup> Following this ranking, the vulnerabilities included in Group 1 are: salmon, clams and oysters, shellfish biotoxins, wildfire, and cedar harvests.<sup>322</sup> Of these vulnerabilities in Group 1, “[m]ost of these areas of concern ranked particularly high in cultural importance.”<sup>323</sup>

At the end of the JSK Adaptation Plan, the Tribe identifies four next steps to help the Tribe increase its preparedness for climate change. The four next steps are:

- 1) Prioritizing adaptation strategies for implementation and identify individuals or departments responsible for implementation;
- 2) building community support for climate preparedness;
- 3) incorporating climate preparedness into the Tribal Government operations and policies and
- 4) collaborating with surrounding communities, the county, and other key stakeholders to monitor key changes to local and regional climate that are likely to affect the Tribe.<sup>324</sup>

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318 *Id.* at 3–19.

319 Climate Change Strategic Plan, *supra* note 297, at 18.

320 *Id.* at 20.

321 *Id.* at 22.

322 *Id.* at 23.

323 *Id.*

324 *Id.* at 46.

The Tribe goes on to explain that these next steps should include consideration of cultural concerns<sup>325</sup> and also work to increase tribal resiliency.<sup>326</sup>

These are merely two examples of tribes working under their inherent tribal sovereignty to address the negative impacts of climate change within their territories. Several other tribes are similarly engaged in such important work.<sup>327</sup> These examples clearly demonstrate that tribes possess the capacity under their inherent sovereignty to work to address such negative impacts. As a result, moving forward, it may be an improvement upon the status quo to encourage tribal, and not federal, leadership on such issues.

Finally, tribal empowerment presents a preferred way forward over the status quo as tribal criminal prosecution is preferential to foreign, non-tribal enforcement. Dean Kevin Washburn has written extensively on the question of effective tribal criminal prosecution. He explains that “a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination.”<sup>328</sup> He therefore concludes that crimes against Native women and children *should* be tried at the local, tribal level whenever possible. When tribal governments lead the response to crime control, it infuses the community with a sense of control over the crisis. “[T]ribal officials have a significant comparative advantage over federal officials in understanding and meeting the needs of Indian country: they are more accountable to tribal constituents, more knowledgeable about tribal problems and culture, and, significantly, can often provide federal services more economically and more efficiently than the federal governments.”<sup>329</sup> Alternatively, when the prosecution of a predator takes place in a federal courthouse, perhaps hundreds of miles from the reservation—in front of a jury that likely has no Native people from the community where the crime happened—even a guilty verdict can ring hollow. The five-year report released by the National Congress of

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325 “Culture” is specifically a value listed that the Tribe should consider when determining value to the Tribe. Climate Change Strategic Plan, *supra* note 297, at 46.

326 The second step is really designed to increase tribal resiliency to climate change. *Id.*

327 For a discussion of other tribes that are engaged in similar work, see Elizabeth Ann Kronk Warner, *Indigenous Adaptation in the Face of Climate Change*, 31 J. Env'tl. & Sustainability L. 129 (2015).

328 Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 779 (2006).

329 Kevin Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*. 130 Harv. L. Rev. F. 200, 207 (2017).

American Indians (NCAI) provides ample evidence that tribes can and should be trusted to do the right thing.<sup>330</sup>

Further, tribal criminal prosecutions help to empower the tribal community. Whether one considers the substantive conduct that a community chooses to punish, the procedures that the community uses to adjudicate offenses, or even the types of punishment that the community authorizes the courts to mete out, such decisions reflect important values that help the community define itself and its moral vision.<sup>331</sup>

Tribal prosecution and enforcement are key to true tribal self-determination. “One might assert that no real measure of tribal self-determination can be achieved if self-determination is absent in the provision of criminal justice for serious offenses. Moreover, federal criminal laws may simply not work well when applied to a community whose values they do not represent.”<sup>332</sup>

There is evidence that such tribal empowerment results in increased safety for tribal communities. This kind of careful intervention can reduce crime. For example, after instituting its own unique set of criminal programs, the Tulalip Tribe reported a steep drop in crime, from 1172 criminal filings in 2003 to just 493 in 2006 and 571 in 2007.<sup>333</sup> Indeed, so striking was Tulalip’s success that the Harvard Project on American Indian Economic Development selected Tulalip’s Alternative Sentencing Program as one of its 2006 “Honoring Nations” honorees, explaining that by helping “offenders to recover rather than just ‘throwing them away,’ the Tulalip Tribal Court Alternative Sentencing Program supports efforts to establish a crime free community.”<sup>334</sup>

The next Subpart builds on this last point, that federal criminal laws are not effective when applied to tribal communities. Overall, the foregoing demonstrates that tribes are

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330 Nat’l Congress of American Indians, VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report (2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) [<https://perma.cc/36D5-THMN>].

331 Washburn, *supra* note 328, at 784.

332 *Id.* at 832.

333 Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. Discourse 88, 107 (2013), <http://www.uclalawreview.org/pdf/discourse/61-7.pdf>. [<https://perma.cc/PFC2-HT7Z>].

334 *Id.*

well-positioned to effectively regulate energy and natural resource development, the negative effects of climate change, and criminal actions taking place within tribal lands.

### **B. Reforming the Criminal Justice System Applicable in Indian Country**

The previous Subpart demonstrated that tribes are capable of undertaking regulations necessary to deal with the challenges identified earlier in this article. This Subpart argues the complementary position—that the federal government is not currently positioned to address effectively the challenges presented above. Under the status quo, tribal governments are limited in their capacity to prevent, protect, and prosecute crimes committed by workers associated with extractive industries.<sup>335</sup> If tribal nations are truly to regain control of their communities, they need to have full authority to protect women and children from crimes committed by these workers. Thus, any comprehensive climate change efforts must be accompanied by a clear strategy to mitigate these types of social harms, as environmental degradation and gendered violence are closely intertwined.

One key way to protect Native women and children from potential harms of the extractive industries is a full repudiation of the *Oliphant v. Suquamish* decision through a comprehensive congressional legislative fix. A comprehensive “fix” would mean that tribal nations would once again be able to enforce their criminal laws against anyone—Indian or non-Indian—who commits crimes on reservations. This would allow tribal law enforcement officers to investigate cases that involve non-Indian workers from energy extraction companies, should they commit crimes in Indian country. If an industry employee attacks a Native woman or child on an Indian reservation, there should be no legal impediments to tribal action. As James Meggesto writes, “[e]xercising criminal jurisdiction is perhaps one of the strongest modes of expressing sovereignty that is available to a modern government.”<sup>336</sup>

A full congressional *Oliphant* fix is long overdue. The reasoning in *Oliphant* runs counter to the current congressional era of self-determination and is simply unworkable and unnecessary. It puts Native people in more unnecessary danger based on a spurious interpretation of inherent sovereignty. It is unnecessary, as many tribal nations have the

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335 *Oliphant* stands as the primary barrier to tribal criminal authority, since most of the temporary workers are non-Indian.

336 James T. Meggesto, *At a Crossroads: Promises and Puzzles for Tribal-State Relations After VAWA 2013*, in *Emerging Issues in Tribal-State Relations: Leading Lawyers on Analyzing the Economic, Cultural, and Political Trends Affecting Tribal State Interactions* 111 (2014).

capacity to investigate and prosecute non-Indians.<sup>337</sup> *Oliphant*'s continued status as binding law is an insult to tribal judicial systems and acts as a legal loophole for predators, who have been attracted to Indian country as a place where they can successfully commit crimes.<sup>338</sup> While federal or state authorities may retain concurrent authority, tribal nations should not have to wait or worry that these crimes will fall through the cracks due to indifference.

*Oliphant* has been widely critiqued ever since its decision in 1978.<sup>339</sup> Several attempts to reverse the decision through federal legislation since 1978 have floundered, and it was not until 2013 that Congress finally partially lifted the ban on tribal jurisdiction over non-Indians as part of the Violence Against Women Act reauthorization.<sup>340</sup> Pursuant to the VAWA 2013 fix, tribal nations that meet certain benchmarks may prosecute non-Indians charged with domestic violence. Tribal criminal jurisdiction under VAWA is limited to non-Indians who are in an intimate partner relationship with a Native person (or former relationship) and does not extend to crimes of violence committed by non-Indians who are not in such an intimate partner relationship.<sup>341</sup>

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337 Nat'l Congress of American Indians, *supra* note 330; see also Kelly Gaines Stoner & Lauren Van Schilfgaarde, *Addressing the Oliphant in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 *Widener L. Rev.* 239, 244 (2016) ("Tribal courts are extremely capable of exercising criminal jurisdiction over all perpetrators, Indian and non-Indian alike.").

338 See Horwitz, *supra* note 141.

339 See Ned Blackhawk, *The Struggle for Justice on Tribal Lands*, *N.Y. Times* (Nov. 25, 2015), <https://www.nytimes.com/2015/11/25/opinion/the-struggle-for-justice-on-tribal-lands.html> [<https://perma.cc/JZM8-F2CF>]; Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 *UCLA L. Rev.* 553 (2009); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decisions in Oliphant, Wheeler, and Martinez*, *Fed. L.*, 36–42 (2008), [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2008/The-Federal-Lawyer-MarchApril-2008/Features/Trapped-in-the-Spring-of-1978-The-Continuing-Impact-of-the-Supreme-Courts-Decisions-in-Oliphant-W.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2008/The-Federal-Lawyer-MarchApril-2008/Features/Trapped-in-the-Spring-of-1978-The-Continuing-Impact-of-the-Supreme-Courts-Decisions-in-Oliphant-W.aspx?FT=.pdf) [<https://perma.cc/M6D5-CWZB>]; G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 *Marq. L. Rev.* 401, 412–38 (1993).

340 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, § 904, 127 Stat. 54, 120–23 (2013) (amending 25 U.S.C. § 1304).

341 25 U.S.C. § 1304 (2017).

Fortunately, the 2013 fix, despite its narrow scope, has resulted in great success for many tribal nations. In March 2018, NCAI released a five-year report on the efficacy of the jurisdictional fix in VAWA 2013.<sup>342</sup> According to NCAI, jurisdiction over non-Indians “has fundamentally changed the landscape of tribal criminal jurisdiction in the modern era.”<sup>343</sup> Even though only eighteen tribal nations are known to be taking advantage of the fix, prosecution of non-Indians is providing a welcome relief from non-Indians who have committed physical violence against their partners or former partners. Since 2013, there have been at least 143 arrests of non-Indians for domestic violence across the eighteen tribal nations, resulting in seventy-four convictions.<sup>344</sup> Contrary to the perception that non-Indians “can’t get a fair trial” in tribal courts, there have been twenty-one dismissals and five acquittals during the same time period.<sup>345</sup> At least seventy-three non-Indian defendants charged in tribal court had prior criminal records.<sup>346</sup>

However, the current VAWA fix does not extend far enough, as it prohibits tribal authorities from exercising criminal jurisdiction over non-Indian employees of extractive industries. It is far past time to reverse the *Oliphant* rule altogether. As of this writing, there have been several bills introduced in Congress to expand the *Oliphant* fix to include non-Indians accused of additional crimes, including sexual assault,<sup>347</sup> child abuse,<sup>348</sup> assault on tribal police officers,<sup>349</sup> and drug trafficking.<sup>350</sup> While these efforts are laudable, the piece-meal approach to achieving safe communities is problematic from a sovereignty perspective. Waiting for permission to protect one’s community runs counter to the understanding of tribal nations as independent, self-governing entities. In addition, the nature of criminal jurisdiction in Indian country is already confusing. While slowly

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342 Nat’l Congress of American Indians, *supra* note 330.

343 *Id.* at 1.

344 *Id.* at 7.

345 *Id.*

346 *Id.* at 8.

347 Justice for Native Survivors of Sexual Violence Act, S. 1986, 115th Congress (2017).

348 Native Youth and Tribal Officer Protection Act, S. 2233, 115th Congress (2017).

349 *Id.*

350 Cross Border Reservation Drug Trafficking Sentence Enhancement Act of 2009, S. 2893, 111th Congress (2009).

adding additional crimes may be a step in the right direction, it is imperative that Congress recognize the crisis for exactly what it is and reverse *Oliphant* once and for all.

Until tribal governments have full jurisdiction to respond to crimes committed in Indian country, however, there is a pressing need to ensure that federal and state governments uphold their obligations to address crimes committed by extractive industry workers. Thus, there should be an increased level of attention paid to addressing these high crime rates by implementing proactive crime control mechanisms at the federal and state level, undertaken with the input of tribal leaders and victim advocates.

Finally, despite the growing widespread understanding of the link between extractive projects and violent crime, there are few opportunities for a tribal nation to weigh-in with its specific concerns regarding gender violence.<sup>351</sup> Tribal governments must be offered an opportunity to consult with governmental and corporate authorities about the criminal justice implications for extractive projects. Recently, the United Nations Special Rapporteur on the rights of indigenous peoples recommended that, “energy developers consider and address the difficulties that may arise in interacting with tribes and work to understand their unique perspective as the permanent inhabitants of their lands and territories.”<sup>352</sup>

A few minimum steps that corporations should take to ensure the safety of communities in which they are operating would be to ensure that all their employees comply with sex offender registration rules, to provide their workers with adequate housing so as not to create “man camps” that are heavily associated with sex trafficking and illegal prostitution, to provide verifiable addresses to law enforcement and emergency services, and to work with the tribes concerned to ensure that local capacity will not be unduly taxed by the short-term influx of workers to the area. Taking these small steps would not only give companies true social license to operate but would ultimately establish their conformity with the Guiding Principles on Business and Human Rights.<sup>353</sup>

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351 Jessica Greer Griffith, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. Pa. J. Int'l L. 787, 798–90 (2015).

352 Tauli-Corpuz, A/HRC/36/46/Add.1, *supra* note 254, at 8.

353 *Id.*



## CONCLUSION

In this Article, we have examined the policies of the Trump Administration as they relate to extractive development on and near Indian country, and policies related to the protection of Native people from rape and sexual assault. As demonstrated above, the Administration's policies are likely to increase both the environmental and physical vulnerabilities of Native people. Native people will not only likely face exacerbated physical insecurity, but their environments will likely be increasingly stripped of natural resources. As a result, the raping of Indian country continues. But this Article is not without hope. At least two ways forward, improvements upon the status quo, exist. Tribal governments possess the requisite capacity to address both the environmental and criminal challenges presented here. Further, changes to federal law, such as the *Oliphant* fix suggested above, provide meaningful opportunities for change. The rape of Indian country envisioned in this article is not a foregone conclusion; together, change can protect our land and bodies.