JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

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TRIBAL COURT–STATE COURT FORUM

NOTICE AND AGENDA OF OPEN MEETING

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1) and (e)(1))

THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS

THIS MEETING IS BEING RECORDED

Date:	June 9, 2022
Time:	12:15 - 1:15 p.m.
Public Call-in Number:	833 568 8864 Meeting ID: 160 964 5541 (Listen Only)

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Members of the public seeking to make an audio recording of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to forum@jud.ca.gov.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Approval of Minutes

Approve minutes of the April 14, 2022, Tribal Court–State Court Forum meeting.

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting only in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov. Only comments received by 12:15 p.m. on June 8, 2022 will be provided to advisory body members prior to the start of the meeting.

III. Information Only Items (No Action Required)

Item 1

Cochairs Report

Item 2

Review of the New Amnesty International Report: "The Never-Ending Maze: Continued Failure to Protect Indigenous Women from Sexual Violence in the USA" & Discussion on Education and Prevention Efforts in California.
Presenter: Vida Castaneda, Senior Analyst, Center for Families, Children and the Courts, Judicial Council of California

Item 2

Federal Indian Boarding School Initiative Investigative Report: Relevance for Child Welfare and Courts
Presenter: Ann Gilmour, Attorney, Center for Families, Children and the Courts, Judicial Council of California

IV. Action Items

Item 3

Rules and Forms: Family Law: Recognition of Tribal Court Orders Relating to Division of Marital Assets

Presenter: Ann Gilmour, Attorney, Center for Families, Children and the Courts, Judicial Council of California

V. Adjourn

Adjourn

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

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TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

April 14, 2022
12:15-1:15 p.m.

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair,* Hon. Erin Alexander, Hon. April Attebury, Hon. Richard Blake, Hon. Gregory Elvine-Kreis, Hon. Ana España, Mr. Christopher Haug, Hon. Joni Hiramoto, Hon. Lawrence King, Hon. Patricia Lenzi, Hon. Devon Lomayesva, Hon. Nicholas Mazanec, Hon. Victorio Shaw, Ms. Christina Snider, Hon. Dean Stout, Hon. Allen Sumner, Hon. Sunshine Sykes, Hon. Mark Vezzola Hon. Christine Williams, Ms. Stephanie Weldon.
Advisory Body Members Absent:	*Hon. Suzanne Kingsbury, Cochair,* Hon. Leona Colegrove, Hon. Gail Dekreon, Hon. Leonard Edwards (Ret.), Hon. Patricia Guerrero, Ms. Merri Lopez-Keifer, Hon. Gilbert Ochoa, Hon. Michael Sachs, Hon. Delia Sharpe, Hon. Juan Ulloa, Hon. Joseph Wiseman.
Others Present:	Ms. Vida Castaneda, Mr. Marshall Galvan, Ms. Ann Gilmour, Ms. Anne Hadreas, Ms. Andi Liebenbaum, Ms. Amanda Morris.

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:19 p.m.

Approval of Minutes
The Forum approved the February 10, 2022, meeting minutes with the correction that Judge Mark Vezzola was present. Minutes approved by consensus.

DISCUSSION AND ACTION ITEMS (ITEMS 1-5)

Item 1

Cochairs Report

Judge Abinanti congratulates Justice Patricia Guerrero.

The in person Tribal Court – State Court Forum meeting is on October 19, 2022. Further information about travel arrangements will be forthcoming.

The Chief Justice is reviewing the submitted nominations and the co-chairs are awaiting further communication.

Item 2

Report of the Ad Hoc Working Group on Options For Recognition and Enforcement of Tribal Court Child Custody Orders
Presenters: Judge Gregory J. Elvine-Kreis, Judge of the Superior Court of California, County of Humboldt; Judge Victorio L. Shaw Chief Judge of the Shingle Springs Band of Miwok Indians Tribal Court

Forum members were briefed on progress made towards law enforcement recognizing tribal court orders. It was discussed that this may be a training and funding issue. Some forms revisions have been identified that could help. However further legislation and meetings directly with law enforcement are required to move forward.

Item 3

Report of the Ad Hoc Working Group on Options to Create Uniform Standards for Discretionary Tribal Participation in Cases not Governed by the Indian Child Welfare Act
Presenters: Judge Ana L. España, Judge of the Superior Court of California, County of San Diego; Judge Dean T. Stout, Chief Judge of the Bishop Paiute Tribal Court

Judge Ana España informed Forum members of the working group's proposal to modify Rule of Court 5.482 to add tribal participation.

Ann Gilmour added that the next step for this proposed modification will is to go before the Family and Juvenile Law Advisory Committee.

Item 4

Report of the Ad Hoc Working Group On Options to Provide for Recognition and Enforcement of Tribal Court Orders Excluding Individuals from Tribal Lands
Presenters: Judge Lawrence C. King, Chief Judge of the Morongo Band of Mission Indians Tribal Court; Judge Allen H. Sumner, Judge of the Superior Court of California, County of Sacramento

The Forum discussed solutions to the issue of law enforcement recognizing and enforcing exclusion orders on tribal land. One issue identified was a disconnect between state and tribal courts in recognizing tribal court orders without needing to co-sign them. Also, members decided law enforcement training and coordination would be useful. Members reviewed the updated guidance form the Attorney General's Office on this issue.

Item 5

Options to improve ICWA Inquiry Procedures

Presenter: Ann Gilmour, Attorney, Center for Families, Children and the Courts, Judicial Council of California

Ann Gilmour spoke to the committee about recent appellate decisions regarding ICWA inquiry and notice. Several years ago there were revisions to the Welfare and Institutions Code regarding this issue. The decisions indicate that agency and court practice did not immediately change notwithstanding changes to the rules and forms. Discussion about whether this is a training and best practices issue or whether additional rules and forms guidance would be helpful.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:17 p.m.

Pending approval by the advisory body on June 9, 2022.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.:

For business meeting on: September 19-20, 2022

Title

Family Law: Recognition of Tribal Court Orders Relating to Division of Marital Assets

Rules, Forms, Standards, or Statutes Affected

Adopt forms FL-540 and FL-541

Recommended by

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair

Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type

Action

Effective Date

January 1, 2023

Date of Report

June 3, 2022

Contact

Ann Gilmour, 415-865-4207,
ann.gilmour@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee and the Tribal Court-State Court Forum recommend that the Judicial Council adopt effective January 1, 2023, two new forms to implement Assembly Bill 627 (Stats. 2021, ch. 58). This was Judicial Council–sponsored legislation that added section 2611 to the Family Code and revised various provisions of the Tribal Court Civil Money Judgment Act found in the Code of Civil Procedure. The provisions ensure that divorce or dissolution judgments issued by tribal courts that include division of pension assets are effective and, in particular, are recognized as meeting the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). AB 627 mandated that the Judicial Council adopt forms to implement the legislation.

Recommendation

The Family and Juvenile Law Advisory Committee and the Tribal Court-State Court Forum recommend that the Judicial Council adopt two new forms: the *Joint Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-540) and the *Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-541), effective January 1, 2023.

The proposed new forms are attached at pages 6–9.

Relevant Previous Council Action

In 2010 the Judicial Council established the Tribal Court-State Court Forum bringing together tribal court and state court judges to address areas of mutual concern. In October of 2013 the Judicial Council adopted rule 10.60 of the California Rules of Court establishing the forum as a formal advisory committee to the Council. Part of the forum's charge is to make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines in order to improve efficiencies. In 2012, the Judicial Council proposed legislation that eventually became the Tribal Court Civil Money Judgment Act (Sen. Bill 406 (Evans); Stats. 2014, ch. 243). This legislation added sections 1730–1741 to the Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil money judgments. Notwithstanding the provisions of the Tribal Court Civil Money Judgement Act, tribal courts reported that they were having issues with recognition of domestic relations orders that included division of pension benefits and other deferred compensation benefits governed by ERISA or a similar statute, interpretations of the law may require that the order be recognized by a state court in order to be fully effective. In 2011, the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a " 'judgment, decree or order … made pursuant to a State domestic relations law within the meaning of federal law.' "[1] That guidance concluded that a tribal court order could only meet the standard for a "qualified domestic relations order" under ERISA if it was treated or recognized as such by the law of a state that could issue such an order.

The result of the guidance issued by the U.S. Department of Labor is that, for a tribal court divorce or dissolution order to effectively distribute pension or other deferred compensation benefits governed by ERISA, state law must recognize the order as a judgment, decree, or order made under state domestic relations law.

Prior to the passage of AB 627, California law did not explicitly recognize judgments or orders from tribal courts that divide pension assets as judgments or orders made under state domestic relations law as mandated by ERISA. Further, current California law had no mechanism to

[1] Advisory Opn. 2011-03A (Feb. 2, 2011), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2011-03a.

"recognize" a tribal court order. Therefore, in order for a party in tribal court to have an ERISA domestic relations order accepted, that party would have to "register" the order.

The result of the guidance issued by the U.S. Department of Labor is that, for a tribal court divorce or dissolution order to effectively distribute pension or other deferred compensation benefits governed by ERISA, state law must recognize the order as a judgment, decree, or order made under state domestic relations law.

To remedy this problem, the Judicial Council sponsored and the Legislature enacted AB 627. AB 627 creates a simplified process for California courts to recognize domestic relations orders from tribal courts that would meet the definition of a "qualified domestic relations order" under ERISA and other similar statutes if they were issued by a state court. AB 627 mandates that the Judicial Council create a form or forms to implement the statute.

Analysis/Rationale

Section 1733.1(a) of the Code of Civil Procedure, added by AB 627, creates a process where the parties to the underlying tribal court proceeding, when they both agree, may file a joint application for recognition of a tribal court order, and section 1733.1(b) mandates that the application be on a form adopted by the Judicial Council. Proposed new form FL-540 fulfills that mandate, for a joint application. Section 1733.1(e) contemplates the situation where one of the parties to the tribal court order does not agree to join in the application and states that the other party may proceed by having the tribal court execute a certificate in lieu of the signature of the other party. Section 1733.1(e) mandates that the Judicial Council adopt a format for that certificate. The committees concluded that it would be clearest to create a separate form for the situation where one party is not joining in the application and to include the certificate required to be executed by the tribal court in that form. Proposed new form FL-541 is for this situation.

Policy implications

AB 627 required that any application made under these provisions be on a form developed by the Judicial Council and also requires development of a format of tribal court certificate when one party to the Tribal Court action does not join in the application. The committees considered whether it would be better to develop one form for both types of application or separate forms and asked for comment on this issue. The majority of commenters thought that it was better to have two forms. The committee also considered whether it would be helpful to develop state-wide rules on how to process these applications, or whether this should be left to each local court to develop their own process. Again, the committees sought comment on this issue and the majority of commenters indicated that state-wide rules would be helpful. The committees will consider developing such rules during a future cycle.

Comments

The proposal circulated for public comment during the Spring 2022 invitation-to comment cycle. It was sent to the standard mailing list for family and juvenile law proposals that includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court

executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. It was also sent to tribal leaders, tribal advocates, and tribal attorneys, included in the monthly newsletter distributed by the Tribal Court–State Court Forum and sent to the listserv of the California Department of Social Services Office of Tribal Affairs to reach those with an interest in the Indian Child Welfare Act and tribal issues.

The proposal received four comments. The comments were from the California Tribal Families Coalition, the Orange County Bar Association, the Superior Court of California, County of Orange and the Superior Court of California, County of San Diego. Neither the California Tribal Families Coalition nor the Superior Court of California, County of Orange indicated whether or not they agreed with the proposal. The Orange County Bar Association and the Superior Court of California, County of San Diego. Both indicated they approved if modified.

The comments mainly suggested clarifications or corrections to language in the proposed forms. The forms were revised in response to those comments.

The invitation-to-comment had specifically asked whether there should be one form for both a joint application and an application made by only one of the parties to the underlying tribal court action. Three of the four commenters felt that two forms were preferable to one. The committees therefore decided to proceed with two forms which is also consistent with the way the proposal and circulated for comment.

The invitation-to-comment also specifically asked whether state-wide rules for processing these applications would be helpful. All four commenters indicated that state-wide rules would be helpful. The committees will consider developing such rules in a future cycle.

Alternatives considered

This subsection is mandatory. All reports except those presenting technical corrections to rules and forms must present more than one realistic option (e.g., the recommended action, an option to make no change, and one other option that, although realistic, may be less attractive than the recommendation). Develop all these options or alternatives, briefly comparing and contrasting their pros and cons and their implications.

When discussing alternatives, explain why the committee made the choices it did in considering alternatives proposed by the commenters and generated during the committee's deliberations. If a proposal that circulated for comment differed significantly from the recommendation presented in your report, say so and explain why. Identify any issues that generated controversy and on which the committee's deliberations were resolved by a close vote of the membership.

Fiscal and Operational Impacts

Both of the Superior Court commenters indicated that there would be some costs associated with implementation including updating internal procedures, creating event codes, case management

entries, and training staff. These costs are one time and unavoidable given the legislative mandate to implement AB 627.

Attachments and Links

1. Forms FL-540 and FL-541, at pages 6–9
2. Chart of comments, at pages 10–14

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
APPLICANT 1:		
APPLICANT 2:		
OTHER APPLICANT (if any):		

DRAFT
Not approved by the Judicial Council

JOINT APPLICATION FOR RECOGNITION OF TRIBAL COURT ORDER DIVIDING RETIREMENT PLAN OR OTHER DEFERRED COMPENSATION	CASE NUMBER:

Use this form to ask the court to recognize a tribal court order that assigns all or part of the following types of benefits to an alternative payee: child support payments; spousal support payments; or marital property rights for a spouse, former spouse, child, or other dependent of a participant in a retirement plan or other plan of deferred compensation. You can make this application in the superior court of the county in which any applicant resides. **You must attach a certified copy of the tribal court order.**

If one party to the tribal court action has not agreed to or is unable to proceed with the filing of a joint application for recognition, use *Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-541)

Note: Recognition of this tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

1. Applicant One (Petitioner in the Tribal Court Action) *(name):*
   Mailing Address:

   Telephone Number:
   Email Address:

2. Applicant Two (Respondent in the Tribal Court Action) *(name):*
   Mailing Address:

   Telephone Number:
   Email Address:

3. Other Applicant (if any) *(name):*
   Relationship to parties in tribal court action:
   Mailing Address:

   Telephone Number:
   Email Address:

4. Tribal court that issued the order *(name):*
   Mailing Address:

   Telephone Number:
   Email Address:

Form Adopted for Mandatory Use
Judicial Council of California
FL-540 [New January 1, 2023]

Code of Civil Procedure, §1733.1
Family Code, § 2611
www.courts.ca.gov

APPLICANT 1: APPLICANT 2:	CASE NUMBER:

5. The applicants are parties to the underlying action, or in the case of another applicant a beneficiary of the order, in tribal court, ask the court to recognize the order from the tribal court *(name of court)* issued on *(date filed with tribal court)* _____ under Code of Civil Procedure section 1733.1.

6. A certified copy of the tribal court order to be recognized is attached to this form.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPLICANT 1)

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPLICANT 2)

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF OTHER APPLICANT (if any))

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
APPLICANT:		
RESPONDENT:		

DRAFT
Not approved by the Judicial Council

APPLICATION FOR RECOGNITION OF TRIBAL COURT ORDER DIVIDING RETIREMENT PLAN OR OTHER DEFERRED COMPENSATION

CASE NUMBER:

This form is for use by an applicant when the other party to the tribal court action has not agreed to or is unable to proceed with the filing of a joint application for recognition. If both parties to the tribal court action agree to the application, use the Joint Application for Recognition of a Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation (form FL-540).

Use this form to ask the court to recognize a tribal court order that establishes a right to child support payments, spousal support payments, or marital property rights for a spouse, former spouse, child, or other dependent of a participant in a retirement plan or other plan of deferred compensation, and assigns all or part of the benefits to an alternative payee.

You can make this application in the superior court of the county in which either party to the tribal court action resides. (Code Civ. Proc., § 1733.1(c).) **You must attach a certified copy of the tribal court order.**

Note: Recognition of this tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

1. Applicant *(name)*:
   Mailing Address:
   Telephone Number:
   Email Address:

2. Respondent (Non-Applicant) *(name)*:
   Mailing Address:
   Telephone Number:
   Email Address:

3. Tribal court that issued the order *(name)*:
   Mailing Address:
   Telephone Number:
   Email Address:

4. Applicant states that

   a. ☐ ☐ applicant and respondent are parties to the underlying action or ☐ applicant is a beneficiary of the order made against the respondent by the tribal court on(*date*) .

   b. ☐ applicant has tried to have the respondent to agree to the filing of a joint application under Code of Civil Procedure section 1733.1(a), but the respondent has not agreed or is unwilling or unable to proceed.

   c. A certified copy of the tribal court order to be recognized is attached to this form.

APPLICANT: RESPONDENT:	CASE NUMBER:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF APPLICANT)

Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY FOR APPLICANT (if any))

CERTIFICATION OF TRIBAL COURT

5. I am a representative of the *(name of tribal court)* and hold the position of (*insert title of position*) . In that capacity I am authorized to and hereby certify that the attached is a copy of the order issued by the (*name of tribal court*) on (*date*) . The order was made in compliance with the court's rules and procedures. The order is final.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: _____

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF AUTHORIZED TRIBAL COURT REPRESENTATIVE)

	Commenter	Position	Comment	Committee Response
1.	California Tribal Families Coalition by Mica Llerandi, Senior Attorney, Legal and Program Services	N/I	*Does the proposal adequately address the stated purpose?* Yes, the proposal is clearly and adequately addressed.	No response required.
			Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application? After reviewing the proposed form, it seems that having a single form for either joint or solo application will be easier to use. When using two forms, parties may become confused about which form to use.	The majority of commenters felt that two forms were preferable to one. The committees have decided to proceed with two forms as circulated.
			Do commenters suggest any additions or changes to the proposed tribal certificate in the proposed form FL-541? The Coalition makes the following recommendations (see screenshot below): - Removing "Representative" and leaving it as "Certification of Tribal Court." - Removing "tribal court" as the name may be in the title of the Tribe's court name.	The form has been revised in response to these suggestions.
			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? Yes. Providing rules on how the recognition process works would provide practitioners greater clarity of the court's process. Additionally, it might be beneficial to have a form for the order	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle. Under section 2611 of the Family Code, no order issues from the state court following recognition

			recognizing the tribal court order.	of the tribal court order. The tribal court order is recognized upon filing.
2.	Orange County Bar Association by Daniel S. Robinson, President	AM	There is an extra word on page two, item 5 of FL-540. The applicants are parties to the underlying action, or in the case of another applicant a beneficiary of the order, in tribal court, (date filed with tribal court) ask the court to recognize **of** the order from the tribal court (name of court) issued on (date filed with tribal court) under Code of Civil Procedure section 1733.1.	The form has been revised in response to this comment.
			Does the proposal appropriately address the stated purpose? **Yes.**	No response required.
			Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application? **Two forms are clearer.**	No response required.
			Do commenters suggest any additions or changes to the proposed tribal certificate in proposed form FL-541? **No.**	No response required.
			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? **Yes.**	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.
3.	Superior Court of California, County of Orange by Vivian Tran, Operations Analyst	N/I	*Does the proposal appropriately address the stated purpose?* Yes, the proposal appropriately addresses the stated purpose.	No response required.
			Is it clearer to have two application forms, one for joint applications and one for single-party	No response required.

			applications, or should there be a single application form that could be used for either a joint or solo application? It is clearer to have two application forms. It would be too confusing to have both options on one form, and it would also make the form longer than it should be.	
			Do commenters suggest any additions or changes to the proposed tribal certificate in n proposed form FL-541? In item number 4(a), the recommendation is to remove the word "in," and the space between "tribal court" and "on (date)."	The form was revised in response to this comment.
			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? Yes, the rules would be useful to the courts and justice partners.	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.
			Would the proposal provide cost savings? If so, please quantify. The proposal does not appear to provide cost savings.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Creating or revising case processing and courtroom procedures.	No response required.

			Training case processing clerks and courtroom clerks (approximately 1-2 hours). Creating event codes for case management systems.	
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months will be sufficient time for implementation.	No response required.
			How well would this proposal work in courts of different sizes? This proposal would work for Orange County.	No response required.
4.	Superior Court of California, County of San Diego by Mike Roddy, Executive Officer	AM	Does the proposal appropriately address the stated purpose? **Yes.**	No response required.
			Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application? **Yes. It is clearer to have two separate forms.**	No response required.
			Do commenters suggest any additions or changes to the proposed tribal certificate in n proposed form FL-541? **No. The certificate appears to be sufficient.**	No response required.
			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? **Yes.**	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.
			Would the proposal provide cost savings? If so, please quantify. **No.**	No response required.

			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Updating internal procedures, case management entries, and training staff.**	No response required.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	No response required.
			How well would this proposal work in courts of different sizes? **It appears that the proposal would work for courts of all sizes.**	No response required.
			FL-540: Propose deleting "the" from the following sentence in the information box "If the one party to the tribal court action…"	The form was revised in response to this comment.

THE NEVER-ENDING MAZE

CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA

AMNESTY INTERNATIONAL

Amnesty International is a movement of 10 million people which mobilizes the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. We believe that acting in solidarity and compassion with people everywhere can change our societies for the better.

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AMNESTY INTERNATIONAL

TABLE OF CONTENTS

ACKNOWLEDGMENTS

Amnesty International is grateful to the American Indian and Alaska Native organizations, experts and individuals who provided guidance on research methodology and the report itself and who have generously shared information. The scope and depth of the work led by Native women in support of the rights and safety of their communities is immense. Amnesty International hopes that this update can contribute to and support the work of the many American Indian and Alaska Native women's organizations and activists who have been at the forefront of efforts to ensure that the rights of Indigenous women are respected, protected and fulfilled.

EXECUTIVE SUMMARY

“WHILE THERE ARE OVER 560 FEDERALLY RECOGNIZED TRIBES IN THIS COUNTRY, EACH WITH A UNIQUE HISTORY, CULTURE, AND LANGUAGE, THE CONSTANT FOR ALL NATIVE PEOPLE IS THE INEVITABILITY OF RAPE.”

Dr. Sarah Deer, “How do Race, Ethnicity, and Religion Intersect with Sexual Violence?”, public event held at Brandeis University, 3 November 2017

Sexual violence against American Indian and Alaska Native (AI/AN) women is at epidemic proportions in the USA and survivors are frequently denied justice. Despite piecemeal efforts to address this, the USA is failing in its obligation to protect AI/AN women from sexual violence and is actively restricting tribal governments from doing so. The high rates of violence faced by AI/AN women have been compounded by the USA’s steady erosion of tribal government authority and refusal to untangle

the complex jurisdictional maze that survivors face. Further, the federal government has exacerbated matters by chronically under-resourcing law enforcement agencies and Indigenous health service providers.

The USA's failure to fulfill its human rights obligations towards Indigenous women is informed and conditioned by a legacy of widespread and egregious human rights violations and abuses against Indigenous peoples, who face deeply entrenched marginalization as a result of a long history of systemic and pervasive abuse and persecution.

Available data shows a stark picture: more than half (56.1%) of AI/AN women have experienced sexual violence. Nearly 1 in 3 AI/AN women (29.5%) have experienced rape in their lifetime; they are over twice as likely to be raped than non-Hispanic white women in the USA. Yet rates of sexual violence are likely even higher as the USA fails to collect adequate and consistent data on violence against AI/AN women, which is intimately tied to the failed response of authorities to prevent and respond to such violence.

Amnesty International first reported on the crisis of sexual violence against AI/AN women in 2007, with the publication of a report entitled *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*. Nearly 15 years later, there has been no significant decrease in sexual violence against AI/AN women.

THE JURISDICTIONAL MAZE

The USA has formed a complex interrelation between federal, state and tribal jurisdictions that undermines tribal authority and allows perpetrators of violence against AI/AN women to evade justice. Tribal governments are hampered by a complex set of laws and regulations that undermine their authority and make it difficult, if not impossible, to respond to sexual violence in an effective manner. Women who come forward to report sexual violence are caught in a jurisdictional maze that often results in significant delays while police, lawyers and courts establish if jurisdiction is tribal, state or federal, sometimes resulting in such confusion and uncertainty that no one intervenes and survivors of sexual violence are denied access to justice.

With the passage of the 2010 Tribal Law and Order Act (TLOA) and the 2013 reauthorization of the Violence Against Women Act (VAWA), certain tribal governments have been able to restore limited criminal jurisdiction and punishment authority in specific circumstances and this has resulted in some improvement in women's safety. However, the requirements to implement either TLOA or VAWA are onerous, and there are still severe limitations on tribal authority. Moreover, under the 2013 reauthorization of VAWA, tribes were not able to respond to sexual violence committed by non-Native perpetrators. These limitations have meant progress represented in this legislation has not resulted in any significant decrease in rates of sexual violence against AI/AN women. The 2022 reauthorization of VAWA, which was signed into law March 2022, addresses some of these limitations, but major barriers remain for tribes whose authority and ability to prevent and respond to sexual violence is still severely curtailed.

POLICING

Police response to sexual violence against AI/AN women is inadequate and serves as a major barrier to justice for survivors. A lack of resources for tribal police, poor interagency coordination and insufficient investigative responses have all had negative impacts on police response to sexual violence against AI/AN women.

Law enforcement presence in Native communities is significantly lower than in non-Native communities; survivors in rural areas in particular are far less likely to have access to timely law enforcement response. Coordination between federal, state and tribal law enforcement remains inadequate; levels of cooperation vary and survivors of sexual violence are frequently passed off to different agencies. Many tribal law enforcement agencies, like other services for Indigenous peoples, continue to be underfunded and at the mercy of annual or other short-term funding.

HEALTHCARE AND SUPPORT SERVICES

AI/AN women who survive sexual violence are not guaranteed to receive adequate and timely sexual assault forensic examinations (including a rape kit), which are vital for a successful prosecution. This failure is caused in part by the federal government's severe underfunding of the Indian Health Service (IHS), IHS understaffing, a lack of clarity within the IHS on the availability of rape kits or trained professionals who can administer the exam, and policies resulting in major geographical gaps in post-rape care.

For survivors, the nearest IHS facility may be closed when they need care, it may not have a rape kit, or it may not have a qualified staff present to administer the exam. Additionally, IHS policy on sexual assault response protocols means survivors may be forced to travel long distances. These barriers result in many survivors being overwhelmed by the emotional and logistical difficulties involved in accessing post-rape care, often giving up when faced with needing to go to a second hospital or clinic after being unable to access care at the closest IHS facility. Survivors who must seek treatment at non-Native health facilities also face non-culturally sensitive care and, at times, discriminatory treatment.

PROSECUTIONS

The federal, state and tribal justice systems in the USA are not responding adequately to AI/AN survivors of sexual violence. US tribal justice systems are unable to effectively respond to crimes on their own as they have been underfunded and restricted in their capacity by federal limitations on tribal authority.

The restricted nature of a tribal nation's ability to prosecute a crime means there is a need for heightened response from federal and state prosecutors for crimes of sexual violence against AI/AN women. Yet, while the federal government continues to restrict tribal authority except for narrow exceptions, it simultaneously declines to prosecute a high number of cases and underfunds federal prosecutorial efforts, creating a scenario where tribes are often left so that they cannot prosecute cases, while the federal government will not prosecute them.

Since 2013, both the total funding for US Attorney's Offices in Indian country and the number of attorneys responsible for Indian country prosecutions has decreased by 40%. Additionally, the most recent available data shows US Attorney's Offices declined to prosecute 46% of sexual assaults and 67% of sexual abuse cases in Indian country. When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is often no further recourse for Indigenous survivors under criminal law within the USA and perpetrators can continue to perpetrate crimes with impunity.

RECOMMENDATIONS

The crisis of sexual violence against AI/AN women and the failure of the US government to adequately prevent or respond to this violence is not simply a public health or criminal justice issue but a serious human rights issue that the US government has an obligation to address under international human rights law and standards.

Governments have a responsibility to ensure that women are able to enjoy their right to freedom from sexual violence. As citizens of particular tribal nations, the welfare and safety of AI/AN women are directly linked to the authority and capacity of their nations to address such violence.

The US federal government has an obligation under binding international treaties and the trust responsibility between tribal nations and the federal government to ensure the rights and well-being of AI/AN peoples are protected. Amnesty International is calling on the US government to take the following steps to end sexual violence against AI/AN women.

- The US Congress should recognize the inherent concurrent jurisdiction of tribal authorities over all crimes committed on tribal land, regardless of the tribal citizenship of the accused, including by legislatively overriding the US Supreme Court's decision in *Oliphant v Suquamish*.
- All law enforcement officials should ensure that reports of sexual violence are responded to promptly, that effective steps are taken to protect survivors from further violence and that impartial and thorough investigations are undertaken.
- The IHS and other health service providers should ensure that all AI/AN survivors of sexual violence have access to adequate, timely and comprehensive sexual and reproductive health care, including sexual assault forensic examinations, without charge to the survivor and at a facility within a reasonable distance.
- Prosecutors should thoroughly and impartially prosecute cases of sexual violence against Indigenous women and should be sufficiently resourced to ensure that the cases are treated with urgency and processed without undue delay.
- Congress and federal and state authorities must make available long-term, predictable and adequate funding for tribal law enforcement and justice services, for IHS and tribes that administer their own health services and for culturally appropriate support services.
- Congress should fund data collection, analysis and research on crimes of sexual violence against AI/AN women.

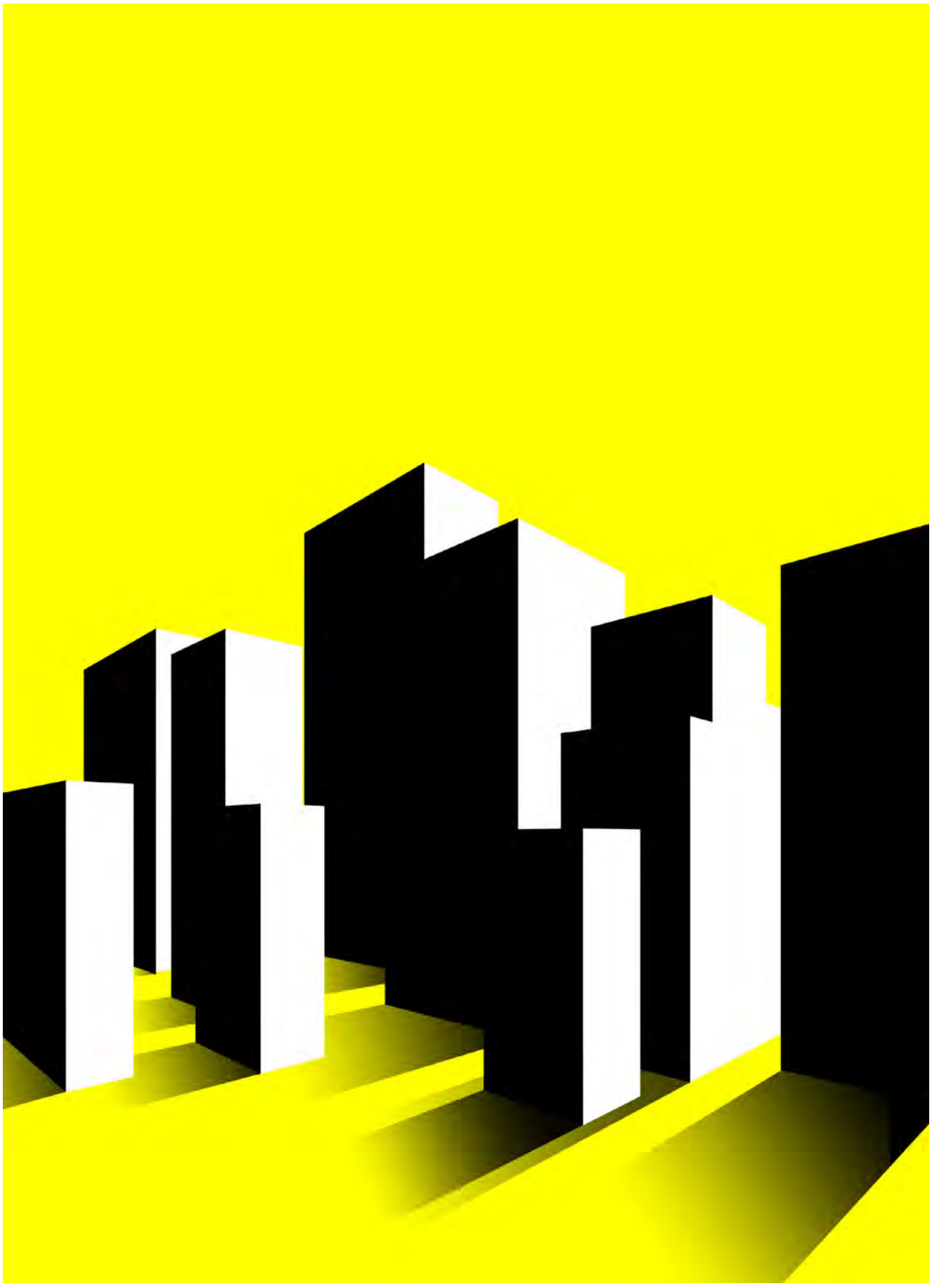
A full list of recommendations can be found at the end of this report.

TERMINOLOGY

Amnesty International strives to use terminology that respects the wishes of the peoples concerned. It recognizes that this report cannot portray the experiences and diversity of Indigenous peoples in the USA. There are more than 570 federally recognized American Indian and Alaska Native tribes in the USA; however, not all Indigenous peoples within the USA and its overseas territories have been accorded this status, including the Indigenous peoples of Hawaii, Puerto Rico, Guam, America Samoa and the Mariana Islands. Some peoples are recognized by states but not the federal government. Individuals may identify as Indigenous even if they are not recognized as tribal members by federal or state authorities.

It is important to note that no single term is universally accepted by all Indigenous peoples in the USA. Various terms are used throughout the report where they seem most suited to the context. However, these choices are in no way intended to minimize or ignore the great diversity of Indigenous cultures, languages and nationalities that exist within the USA, nor to generalize their experiences. The decisions on terminology in this report have been guided by a number of factors, including the need to ensure that the report is as accessible as possible to diverse audiences both within the USA and around the world.

The terms American Indian, Native American and Alaska Native are widely used within the USA itself, as are the terms tribe, tribal, tribal nation and Alaska Native village. These have been retained in this report to refer to Indigenous peoples and institutions. Certain terms such as Indian, Indian country and tribal member are used in legal and other discourses in the USA and have been retained in this report where this seems most appropriate. The term Native should be read as referring to American Indian and Alaska Native unless the legal context or parameters of a particular study indicate otherwise. While some terms may have specific legal meanings, it must also be acknowledged that many may be used in a broader political or cultural context.



LIST OF TERMS/ ABBREVIATIONS

AI/AN	American Indian and Alaska Native
ANCSA	Alaska Native Claims Settlement Act
AUSA	Assistant United States Attorney
BIA	The Bureau of Indian Affairs, federal government agency charged with implementing federal laws related to American Indians and Alaska Natives, managing land held in trust for Indian tribes, and providing services on tribal lands including supporting tribal police forces, courts and governments
District Attorney	A state prosecutor
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
GAO	Government Accountability Office
ILOC	Indian Law and Order Commission
Indian country	Federal law defines Indian country as: "All land within the limits of any Indian reservation", "all dependent Indian communities within the borders of the United States" and "all Indian allotments, the titles to which have not been extinguished."
IHS	Indian Health Service, part of the US Department of Health and Human Services, operates health facilities for American Indian and Alaska Native peoples

MMIWG	Missing and murdered Indigenous women and girls
OVW	Office on Violence Against Women
Public Law 280	Transferred legal authority (jurisdiction) from the federal government to certain state governments
SANE	Sexual assault nurse examiner
SAUSA	Special Assistant United States Attorney
SDVCJ	Special Domestic Violence Criminal Jurisdiction, provision included in the Violence Against Women Reauthorization Act of 2013 that affirms sovereign authority of tribal courts to exercise criminal jurisdiction over certain cases involving non-Native perpetrators who commit acts of domestic violence or dating violence within Indian country
State police	Used to include state, city and local law enforcement agencies
TLOA	Tribal Law and Order Act, includes provisions meant to improve criminal justice in Indian country
Trust responsibility	The legal relationship that exists between the US federal government and tribes that places a unique legal obligation on the US government to ensure the protection of the rights and wellbeing of American Indian and Alaska Native peoples.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USAO	US Attorney's Offices
VAWA	Violence Against Women Act; collection of funding programs, initiatives and actions designed to improve criminal justice and community-based responses to violence against women; VAWA must be reauthorized every five years

LIMITATIONS

There are over 570 federally recognized unique and self-governing tribal nations.[1] It would be inaccurate to speak as if each story and statistic resonates equally with each nation or survivor. However, the federal trust responsibility of the US government to tribes is shared across nations and often the federal government's failure to uphold that trust responsibility has created barriers to accessing justice for American Indian and Alaska Native (AI/AN) survivors of sexual violence. Amnesty International focused on this trust responsibility in drawing up the recommendations for this report, but the applicability of each recommendation will not look the same for all tribes or survivors. Further, each tribe has the right to decide its relationship with federal, state and other tribal governments.

Amnesty International has focused its research on the response to crimes of sexual violence against AI/AN women on tribal lands and in neighboring areas; the experiences of other survivors, including AI/AN women living outside of tribal lands are not reflected in this report. Nearly 70% of AI/AN peoples live outside tribal lands.[2] The available information points to high rates of sexual violence and a lack of culturally appropriate services in towns and cities. This is of sufficient concern to merit urgent further research. The US federal government's trust responsibilities extend beyond reservation boundaries and Amnesty International calls on the USA to protect all AI/AN women from violence and to ensure justice for and provide culturally appropriate services to those who have been victimized.[3]

METHODOLOGY

This update is based on research carried out in 2021 by Amnesty International in consultation with American Indian and Alaska Native (AI/AN) organizations and individuals to document what progress has been made in reducing rates of sexual violence against Indigenous women. Amnesty International conducted a review of existing government and non-governmental reports, including studies conducted by Native-led organizations, the US Department of Justice, and the US Government Accountability Office, as well as law review articles and media reports of sexual violence against AI/AN women. It also reviewed federal and state case law and legislation. Additionally, Amnesty International spoke to activists, support workers, service providers and healthcare workers in addition to officials across the USA, including tribal, state and federal law enforcement officials as well as tribal judges.

Despite historic and continued oppression, AI/AN women shared stories with Amnesty International that highlighted Indigenous strength and resilience. The long history of abuse cannot be erased, but Indigenous women all over the USA are working with determination and hope for a future where their right to dignity and security is respected. Drawing on their work and experience, this report concludes with a series of recommendations calling on the authorities to fulfill their obligation to investigate, prosecute and punish those responsible for sexual violence and to promote the rights of Indigenous women.

LACK OF RELIABLE DATA

The US federal government does not consistently collect data on sexual violence against American Indian and Alaska Native (AI/AN) women or the services available to survivors. Government reports on crime in Indian country often rely on decades-old data. Fragments of information are scattered across reports compiled by different agencies with very little consistency in reporting, making it difficult to determine the full extent of violence against AI/AN women.

"We know that GBV [gender-based violence] affects Native communities at staggeringly high rates… serious gaps in data collection systems impede the ability of government agencies at all levels to adequately support Native communities."

National Indigenous Women's Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, Volume 18, Issue 1, February 2021

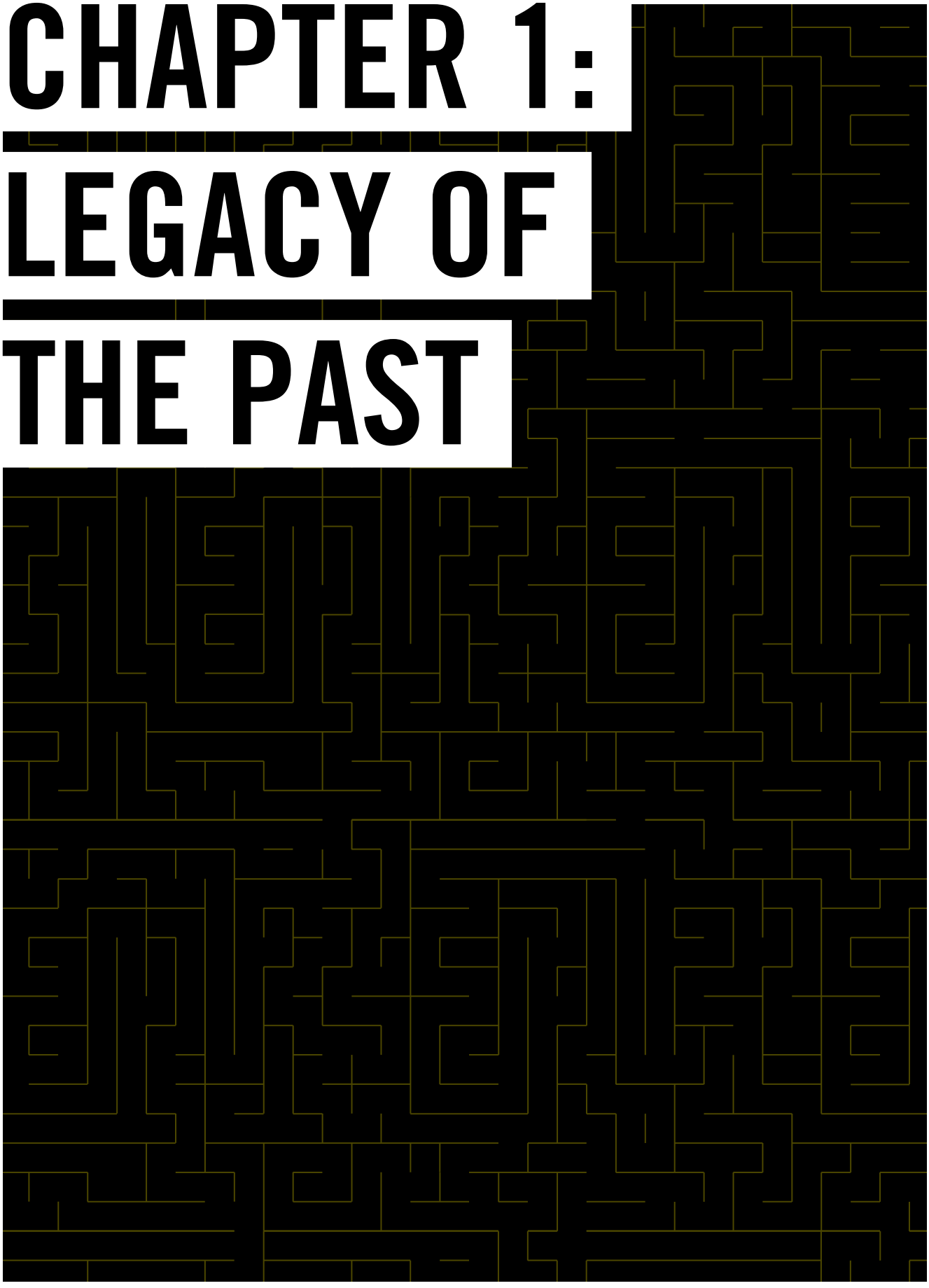
Research and data collection efforts by government agencies charged with documenting the crisis of sexual violence in Indian country are delayed and uncoordinated. The 2005 reauthorization of the Violence Against Women Act included a directive[4] for the National Institute of Justice, within the Department of Justice (DOJ), to conduct a national baseline study on the prevalence of violence against women in Indian country; as of 2022, no results have been published.

Non-governmental organizations and researchers have sought to fill the gaps left by government agencies, but they face barriers in ensuring comprehensive data collection and analysis. While the available data does not comprehensively portray the extent of sexual violence against AI/AN women, it does indicate that AI/AN women are particularly at risk of sexual violence and experience the highest rates of sexual assault in the country.

The Tribal Law and Order Act (TLOA), requires the Bureau of Justice Statistics (BJS) to establish a tribal crime data collection system, consult with tribes to implement this system, and report annually to Congress on the data collected and analyzed in accordance with TLOA.[5] However, most BJS data collection projects have been pending since TLOA was passed in 2010 and a 2017 DOJ report found that "crime data in Indian country remains unreliable and incomplete, limiting the Department's ability to engage in performance-based management of its efforts to implement its TLOA responsibilities."[6]

Without accurate and consistently updated data it is impossible to understand the full extent to which AI/AN women have been impacted by sexual violence. Progress cannot be properly measured without an accurate baseline. It is vital that the US government regularly update data on sexual violence again AI/AN women to address the severity of this human rights crisis.

CHAPTER 1: LEGACY OF THE PAST



“Any work on this topic must acknowledge that the problem of sexual violence is part of a history and continued reality of systemic violence against Indigenous Peoples.”

Interview with Yolanda Francisco-Nez, Executive Director, Restoring Ancestral Winds, May 2021

Sexual violence against American Indian and Alaska Native (AI/AN) women is at epidemic proportions in the USA. Available data shows that 56.1% of AI/AN women have experienced sexual violence in their lifetime. Approximately 1 in 3 AI/AN women (29.5%) have experienced rape in their lifetime, meaning AI/AN women are 2.2 times more likely to be raped than non-Hispanic white women in the USA.[7] In some states, the disproportionate rate of violence is even higher:[8] in Alaska, Alaska Native women are 3.2 times more likely to experience sexual violence than non-Native women;[9] in South Dakota, Native Americans are 3.6 times more likely to be victims of rape than non-Natives.[10] As shocking as these figures are, it is widely believed that available data does not accurately portray the extent of sexual violence against AI/AN women in the USA.

Amnesty International first reported on this issue in 2007, with the publication of a report entitled *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*,[11] but sexual violence against Native women is not a new phenomenon. From European colonization to the present day, Native women have experienced high rates of violence.

“SETTLER-COLONIAL PRACTICES AND POLICIES STILL IMPACT US NOW. I ALWAYS THINK ABOUT HOW MUCH HURT WE ENDURE, HOW MUCH PAIN WE ENDURE, AND HOW MUCH WE BOUNCE BACK THROUGH OUR RESILIENCE, OUR STRENGTH. WE CONTINUE TO THINK ABOUT THE PEOPLE IN OUR COMMUNITIES, THE CHILDREN, THE FUTURE GENERATIONS – BUT ALSO ABOUT ALL LIFE OUT THERE IN THE WORLD, BECAUSE THAT’S WHO WE ARE.”

Interview with Dr Peggy Bird, Co-founder of the Coalition to Stop Violence Against Native Women & Indigenous Women’s Human Rights Collective, Tribal Court Judge, April 2021

European/US colonizers forcibly relocated many Indigenous peoples from their land, committing widespread atrocities in the process. Killings on a massive scale, as well as disease and starvation, devastated the Indigenous peoples of North America. Gender-based violence against women by settlers was used as part of conquest and colonization. It is widely held by Indigenous people in the USA, supported by many scholars, that these and other historical acts amount to genocide. Historically, the US federal government has made a series of attempts to compel Indigenous peoples to assimilate into non-Indigenous society. In the late 19th and early 20th centuries, several policies designed to promote assimilation contributed to the breaking up of tribal societies.

This violence is not confined to distant history. The US policy of forced boarding schools, for example, removed children as young as five from

their families and compelled them to attend these schools,[12] where the US government has admitted to "brutalizing them emotionally, psychologically, physically, and spiritually."[13] Some survivors of boarding schools are themselves now advocates for ending further violence against Native women:

"When I first came to my senses [when I was born], I lived in a fish camp, and we had to move into a large village where they were establishing BIA [Bureau of Indian Affairs] schools, and we had to go to a school, or they would take us away from our families. So, my family moved us to the village of Emmonak. When I came to school, English was my second language. Yu'pik, my Native language, is my first language. It was hard to understand what was happening in school. The BIA teachers were really mean to students; they used to pull hair and slap us with rulers. One time, a teacher pulled me by my hair because I wasn't pronouncing the English word properly. So I stayed silent for a long time, because that was the safest way to be in school. We weren't taught anything about sovereignty, about our inherent rights, or jurisdiction. We had to learn about the 50 states, about the state capitals, but not about our people. From the books, we learned that the Indians were bad people, and the cowboys were good people, like in the movies."

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

Additionally, survivors of mass forced and coerced sterilization performed through the Indian Health Service (IHS)[14] spoke to Amnesty International about the continued impact of that violence in their communities. As in the case of forced sterilization and boarding schools, violence was oftentimes carried out with explicit intent by the US government.[15] Other times, such violence was allowed to happen because of gross neglect by the US government. One such example is the case of a former IHS physician who sexually abused minors at IHS facilities where he was "allowed... to treat and victimize children for more than two decades" from 1992 to 2016.[16] Failures of protection and accountability fuel a continued general distrust of US interventions and services for many Indigenous advocates who spoke to Amnesty International.

MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS AND EXTRACTIVE INDUSTRIES

"The murder rate of Native women is more than ten times the national average on some reservations. These disappearances or murders are often connected to domestic violence, dating violence, sexual assault, stalking, and sex trafficking. The intersection of gender-based violence and MMIWG [missing and murdered Indigenous women and girls] is heavily intertwined."

National Indigenous Women's Resource Center, Missing and Murdered Indigenous Women and Girls[17]

High rates of violence against Indigenous women fueled by settler-colonialism persist. On some reservations, the rate of killings of AI/AN women is more than 10 times the national average.[18] In 2017, the Centers for Disease Control reported homicide as one of the leading causes of death among AI/AN women and girls.[19]

These statistics likely understate the scale of violence against AI/AN women given that Native victims are often classified as Hispanic or "other" in reporting data, depending on the responding law enforcement agency.

> **“WE HAVE FOUND AGENCIES EITHER DON’T RECORD RACE AND ETHNICITY AT ALL OR LUMP NATIVE-IDENTIFIED INDIVIDUALS INTO AN ‘OTHER’ CATEGORY WITH OTHER RACES MAKING IT DIFFICULT TO DISAGGREGATE THE DATA. BECAUSE OF THESE ISSUES, THE CRISES OF GBV [GENDER-BASED VIOLENCE] AND MMIWG AFFECTING NATIVE PEOPLE ‘DISAPPEAR’ INTO THE DATA. THE COMMUNITIES KNOW WHAT IS HAPPENING TO THEM – THEY ARE LIVING IT – BUT THEY CAN’T ‘PROVE IT’ TO DECISION-MAKERS OR AGENCIES.”**

National Indigenous Women’s Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, Volume 18, Issue 1, February 2021

Continued violence has also been fueled by workers from extractive industries living near reservations. Extractive industries often bring an influx of transient male workers to rural areas bordering reservations and house them in “man camps”.[20] Numerous UN agencies, offices and programs, along with the Special Rapporteur on the Rights of Indigenous Peoples, have found that extractive industries pose substantial health and safety risks to populations living in nearby areas. Risks include an increase in gender-based violence, sexually transmitted infections and human trafficking.[21] The UN Special Rapporteur on the Rights of Indigenous Peoples noted in 2011 that extractive industries operating in or near Indigenous communities can have a negative “even catastrophic” impact on Indigenous peoples’ social, cultural, and political rights.[22]

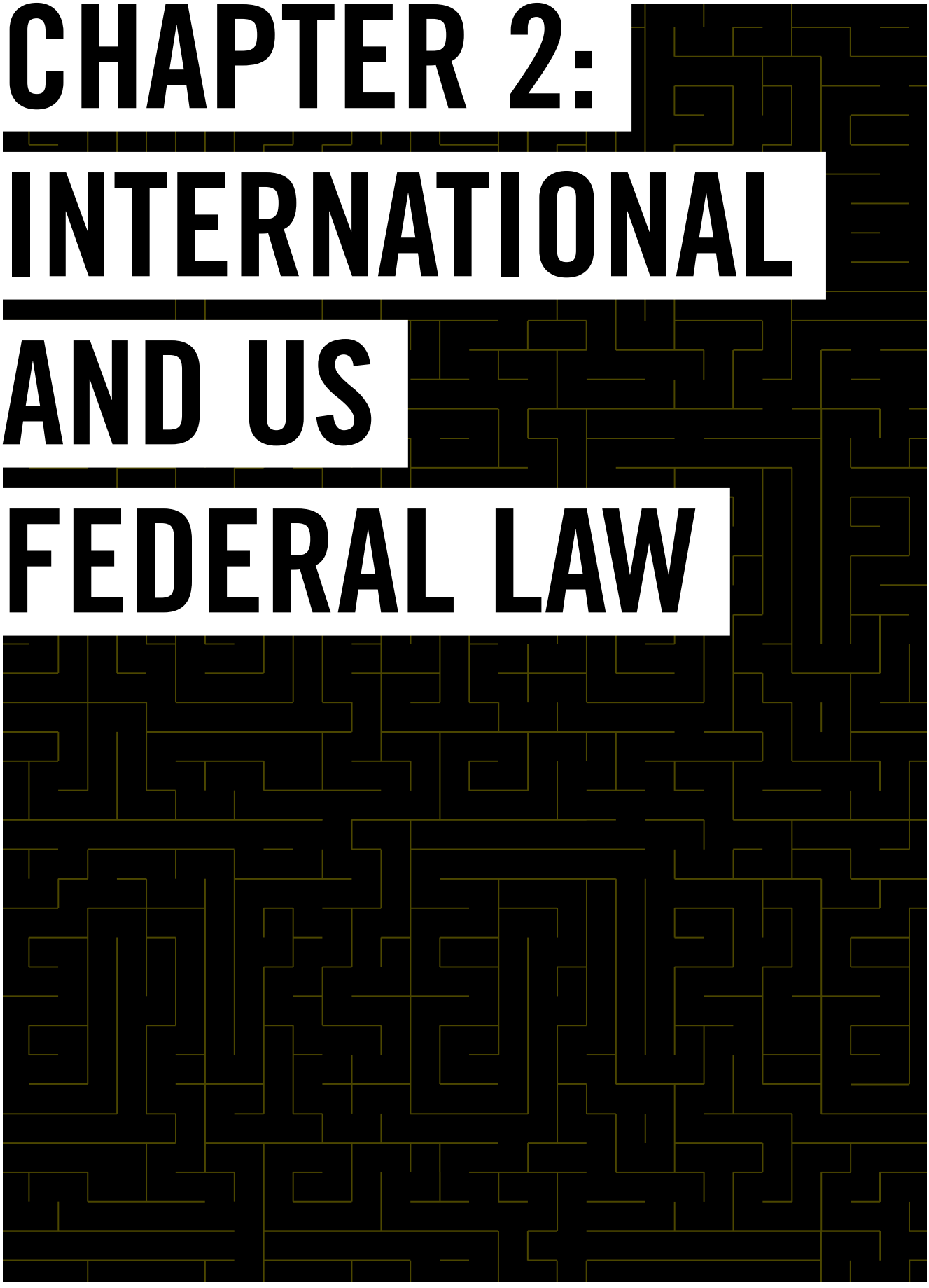
“When you bring in large groups of men working away from home with money in their pockets and time on their hands you are going to see an increase in sexual assault, sex trafficking, domestic violence, and drug use… Standing Rock wasn’t just about water; it was about the true exploitation of Native people. 200 rape kits went missing, so it didn’t do any good to file the report when the evidence goes missing. There are still 26 women missing from Standing Rock. Women would go to the store and not come back.”

Sheila Lamb, MN350 co-chair and Minnesota MMIW Task Force and Steering Committee member, Extractive Industries and Sex Trafficking of Native Women and Youth Webinar, April 2021[23]

These and other historic and continued injustices committed against Indigenous peoples help fuel the high rates of sexual violence perpetrated against Native women and the high levels of impunity enjoyed by their attackers. Discrimination and racist attitudes toward Indigenous peoples inherent in such violence, including language discrimination and negative and dehumanizing stereotypes, contribute to ongoing levels of violence against Native women and to the lackluster response by the US government to prevent or respond to such violence. Any study of sexual violence against AI/AN women must be understood against the backdrop of this historical and present-day violence against Native peoples.

NATIVE WOMEN ARE 2.2 TIMES MORE LIKELY TO BE RAPED THAN NON-HISPANIC WHITE WOMEN

CHAPTER 2: INTERNATIONAL AND US FEDERAL LAW



INTERNATIONAL LAW

"As indigenous peoples have become actively engaged in the human rights movement around the world, the sphere of international law, once deployed as a tool of imperial power and conquest, has begun to change shape. International human rights law now serves as a basis for indigenous peoples' claims against states and even influences indigenous groups' internal processes of revitalization. Empowered by a growing body of human rights instruments, some as embryonic as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), indigenous peoples are increasingly recognized in international human rights law as possessing the 'right to have rights'."

Angela Riley and Kristen Carpenter, Indigenous Peoples and the Jurisgenerative Moment in Human Rights, 2014 [24]

International law obliges governments to use their power to respect, protect and fulfill human rights. This includes not only ensuring that their own officials comply with human rights law and standards but also acting with due diligence to address abuses committed by private individuals (non-state actors). When states know, or ought to know, about violations of human rights and fail to take appropriate steps to prevent or address them, they, as well as the perpetrators, bear responsibility. The principle of due diligence includes obligations to prevent human rights violations, investigate and punish perpetrators when violations occur, and provide compensation and support services for victims.[25] This report demonstrates that US authorities continue to fail in exercising due diligence when it comes to sexual violence against American Indian and Alaska Native (AI/AN) women.

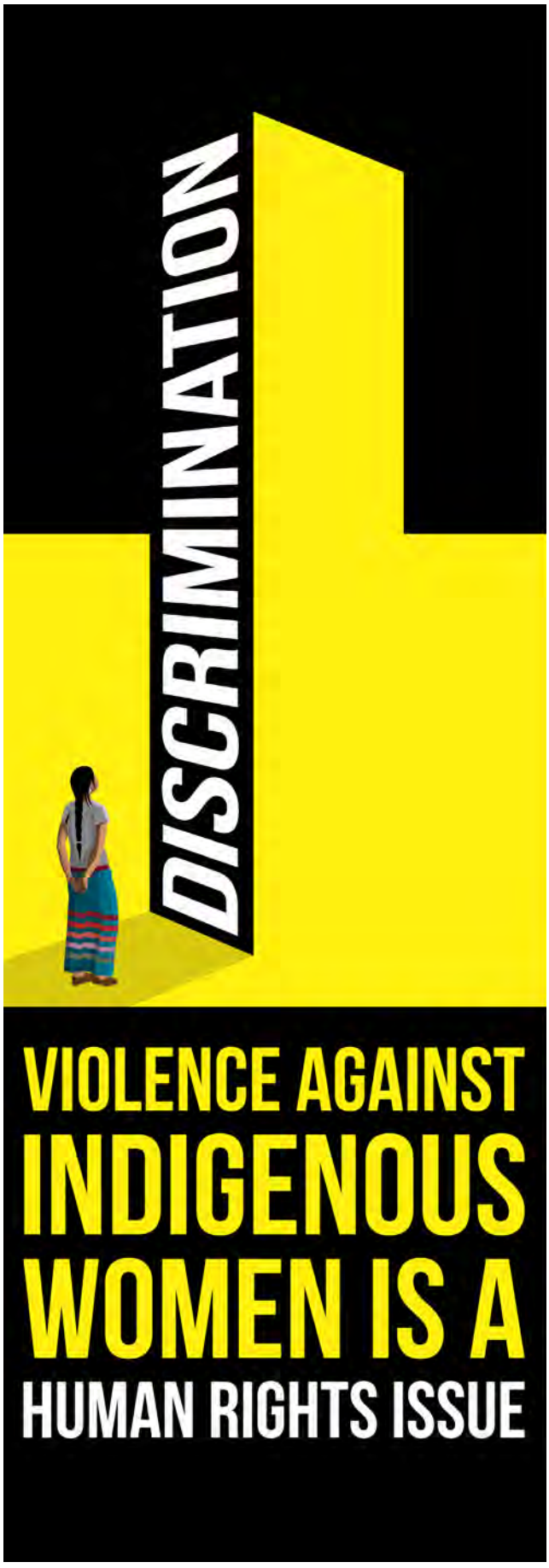
Violence against Indigenous women is a human rights issue. The concept of human rights is based on the recognition of the inherent dignity and worth of every human being. Through ratification of binding international human rights treaties, and through the adoption of declarations by intergovernmental bodies such as the UN and the Organization of American States (OAS), governments have committed themselves to ensuring that all people can enjoy certain universal rights and freedoms.

Besides being a human rights violation itself, sexual violence against women also results in violations of a variety of human rights.[26] These include: the right not to be subjected to torture or other ill-treatment;[27] the right to liberty and security of the person;[28] and the right to the highest attainable standard of physical and mental health.[29] Additionally, the erosion of tribal governmental authority and resources to protect Indigenous women from crimes of sexual violence is inconsistent with international human rights standards, including international standards on the rights of Indigenous peoples.

HUMAN RIGHTS OF WOMEN

The human rights of women are an inalienable, integral and indivisible part of universal human rights. These rights specifically acknowledge that the human experience of women is different from that of men due to their perceived sex and gender and that a woman's experience of human rights violations is unique. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women… on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[30]

Sexual and gender-based violence is a form of discrimination against women[31] and, in the case of AI/AN women, who are disproportionately victims of sexual violence, it is also a form



of discrimination on the basis of Indigenous identity.[32] When a state fails to act with due diligence in responding to sexual violence against women – by using the criminal justice system and providing reparation – this often violates women's right to non-discrimination and equality before the law.[33] The USA has ratified several of the key human rights treaties that guarantee these human rights, including the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination.

"Indigenous women experience a broad, multifaceted and complex spectrum of mutually reinforcing human rights abuses. That spectrum is influenced by multiple and intersecting forms of vulnerability, including patriarchal power structures; multiple forms of discrimination and marginalization, based on gender, class, ethnic origin and socioeconomic circumstances; and historical and current violations of the right to self-determination and control of resources."

Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples, Rights of Indigenous Women and Girls, August 2015 [34]

HUMAN RIGHTS OF INDIGENOUS PEOPLES

Over the past few decades, international human rights law has become more responsive to the values, needs and aspirations of Indigenous peoples as distinct and often persecuted cultures. Human rights standards specific to Indigenous peoples include the 1989 International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Specific rights of Indigenous peoples have also been

affirmed by the expert bodies charged with the interpretation of state obligations under key human rights treaties in the UN and OAS. These evolving norms and standards are consistent in recognizing that Indigenous peoples have the right to maintain their distinct collective identities and, towards that end, must determine their own lives and futures.

UNDRIP, adopted by the UN General Assembly in 2007, recognizes the right of Indigenous peoples "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, where they exist, juridical systems or customs, in accordance with international human rights standards." (Article 34)

Provisions of the Declaration include:

- Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 3)
- Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (Article 4)
- Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. (Article 5)
- States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women... enjoy the full protection and guarantees against all forms of violence and discrimination. (Article 22(2))
- Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. (Article 24(2))

In 2010, the USA declared its support for UNDRIP and the then president, Barack Obama, stated that the "aspirations" affirmed in UNDRIP were ones that the US must "always seek to fulfill".[35] While not legally binding, the USA has noted that UNDRIP has both "moral and political force".[36]

In 2010, the USA declared its support for UNDRIP; then president Barak Obama stated that: "Indigenous law and legal systems shall be recognized and respected by national, regional and international legal systems." (Article XXII)

Similarly, ILO Convention 169 calls for the recognition and maintenance of tribal justice systems "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." The USA has not ratified ILO Convention 169, although the Committee on the Elimination of Racial Discrimination has encouraged the USA to abide by the Convention's terms.

HUMAN RIGHTS TO NON-DISCRIMINATION AND HEALTH

The UN Committee on the Elimination of Racial Discrimination monitors states' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, which the USA ratified in 1994. In its General Recommendation 23, the Committee calls on states to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent." The Committee has raised specific concerns with the USA regarding "the denial of Indigenous women to access justice and to obtain adequate reparation or satisfaction for damages suffered" has called on the USA to "intensify its efforts to prevent and combat violence against women, particularly against American Indian and Alaska Native women."[37]

The right to the highest attainable standard of physical and mental health, including sexual and reproductive health, is relevant both to protecting women's right to be free from violence and to responding to violence against women. These rights are found in a number of international human rights treaties and standards, most explicitly in the International Covenant on Economic, Social and Cultural Rights, which the USA has signed but not ratified. In addition, the UN Committee on the Elimination of Discrimination against Women has recognized that intersecting forms of discrimination can adversely affect access to health services and it has urged that special attention be given to the health needs and rights of Indigenous women.[38]

TRIBAL SELF-DETERMINATION AND FEDERAL TRUST RESPONSIBILITY IN US FEDERAL LAW

"[T]he infrastructure to really develop a comprehensive anti-rape strategy for tribal nations has to be paired with the power to actually exercise authority in the cases of rape. Tribal sovereignty is integral to ending rape and at the same time, ending rape is integral to tribal sovereignty."

Dr. Sarah Deer, Professor of Women, Gender and Sexuality Studies at the University of Kansas[39]

Historic treaties, the US Constitution and federal law affirm a unique political and legal relationship between federally recognized tribal nations and the USA. The US federal government's policy toward Indigenous peoples has changed often and dramatically. Nevertheless, it remains the US federal government's responsibility to recognize, affirm and protect tribal sovereignty.

Tribal governments exercise their political and legal sovereignty by making and enforcing their own laws on tribal land through tribal law enforcement agencies and courts. In carrying out these functions, tribal governments play an essential role in ensuring that their citizens can enjoy their human rights. They also assume a responsibility for ensuring that these rights are protected. However, the capacity of tribal governments to uphold the rights of their citizens is constrained by legal limitations on their jurisdiction imposed by federal law and, in many cases, by the fact that the funds for the services they deliver are controlled by federal agencies.

“THE FEDERAL GOVERNMENT SEEMS TO THINK THAT THIS [FEDERAL TRUST] RESPONSIBILITY IS VOLUNTARY. THIS RESPONSIBILITY IS OBLIGATORY, AND THE FEDERAL GOVERNMENT MIGHT NEED A REMINDER. THE TRUST RESPONSIBILITY IS WHAT TRIBES DECIDED IN EXCHANGE FOR LAND. THE DEPARTMENT OF JUSTICE DOES NOT TAKE THIS DUTY OF PROTECTION SERIOUSLY.”

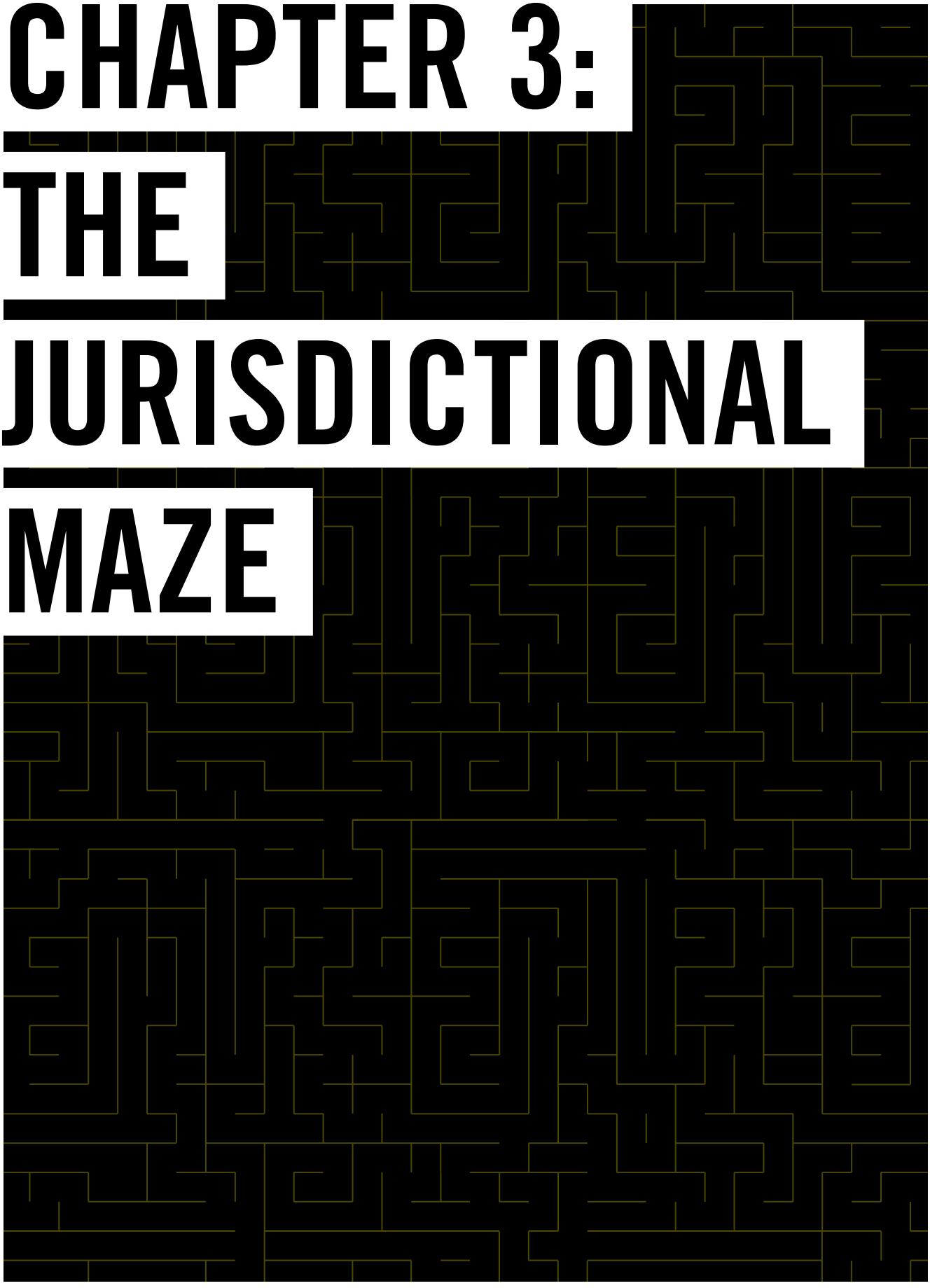
Interview with Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University, March 2021

The legal relationship that exists between the US federal government and tribes, the trust responsibility, places on the US government a unique legal obligation to ensure the protection of the rights and well-being of AI/AN peoples. This federal trust responsibility is set out in treaties between tribal nations and the federal government, further solidified in federal law, federal court decisions and policy, and it includes the protection of the sovereignty of each tribal government.[40] All federal agencies are required to fulfill this trust responsibility. However, the federal government does not fully honor this trust responsibility as tribes continue to have limited tribal criminal jurisdiction and tribal law enforcement agencies, healthcare systems and justice systems remain chronically underfunded.

In its 2018 report, the US Commission on Civil Rights found federal funding for tribal programs to be “grossly inadequate to meet the most basic needs the federal government is obligated to provide.” The Commission also noted that tribal program budgets remain a “barely perceptible and decreasing percentage of agency budgets.”[41]

Recent US Supreme Court decisions have also embraced the concept of tribal self-determination regarding policing and criminal jurisdiction. In the 2021 *US v. Cooley* Supreme Court ruling, the court reaffirmed the authority of tribal police officers to search and temporarily detain non-Indians suspected of breaking federal or state laws within reservations. Earlier, in the 2004 *US v. Lara* ruling, the Supreme Court held that Congress can “recognize and affirm” an inherent tribal power over criminal matters within Indian country and acknowledged the existence of tribal sovereignty but left the logistical matters up to Congress.[43]

CHAPTER 3: THE JURISDICTIONAL MAZE



“When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless... The Commission has concluded that criminal jurisdiction in Indian country is an indefensible morass of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions and without the consent of Tribal nations.”

Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, November 2013

Complicated jurisdictional issues can significantly delay the process of investigating and prosecuting crimes of sexual violence. Three main factors determine where jurisdictional authority lies when prosecuting these crimes: whether the victim is recognized as an Indian under federal law; whether the accused is recognized as an Indian under federal law; and whether the alleged offense took place in Indian country. These factors determine whether a crime should be investigated by tribal, federal or state police; whether it should be prosecuted by a tribal prosecutor, a state prosecutor (District Attorney) or a federal prosecutor (US Attorney); and whether it should be tried at the tribal, state or federal level. Lastly, this determination dictates the body of law to be applied to the case: tribal, state and/or federal.

Congress has produced centuries of contradictory laws and policies that are in dire need of complete reform. The USA has continually failed to respect federal policies on tribal self-governance and consequently failed to meet its federal trust responsibility.[45] Solutions based on minor legislative amendments with complex caveats do not fix the drastic rates of violence against American Indian and Alaska Native (AI/AN) women in Indian country. Instead of untangling the jurisdictional maze that federal Indian law has created, the USA has only incrementally chipped away at this issue. Piecemeal legislation, even with good intentions, cannot begin to protect AI/AN women from violence until the jurisdictional complexities within Indian country are resolved.

CONGRESS HAS PRODUCED CENTURIES OF CONTRADICTORY LAWS AND POLICIES THAT ARE IN DIRE NEED OF COMPLETE REFORM

LEGAL BACKGROUND AND GOVERNMENT INITIATIVES SINCE 2007

There are approximately 400 tribal justice systems recognized by the federal government across the USA.[46] However, crime involving violence against AI/AN women can fall within the jurisdiction of tribal, state and/or federal courts depending on several factors, creating a complex jurisdictional maze.[47]

"I had a case where a woman called the police because her partner was beating her up and assaulting her, and as an advocate I was called along. When we got outside the door, all the various agencies were standing outside arguing about whose jurisdiction it wasn't. They didn't even want to take her in for a rape kit because it was her boyfriend. What? Because it's his right? And that was their attitude. We did get her a rape kit, but she didn't want to pursue the case, and I don't blame her."

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

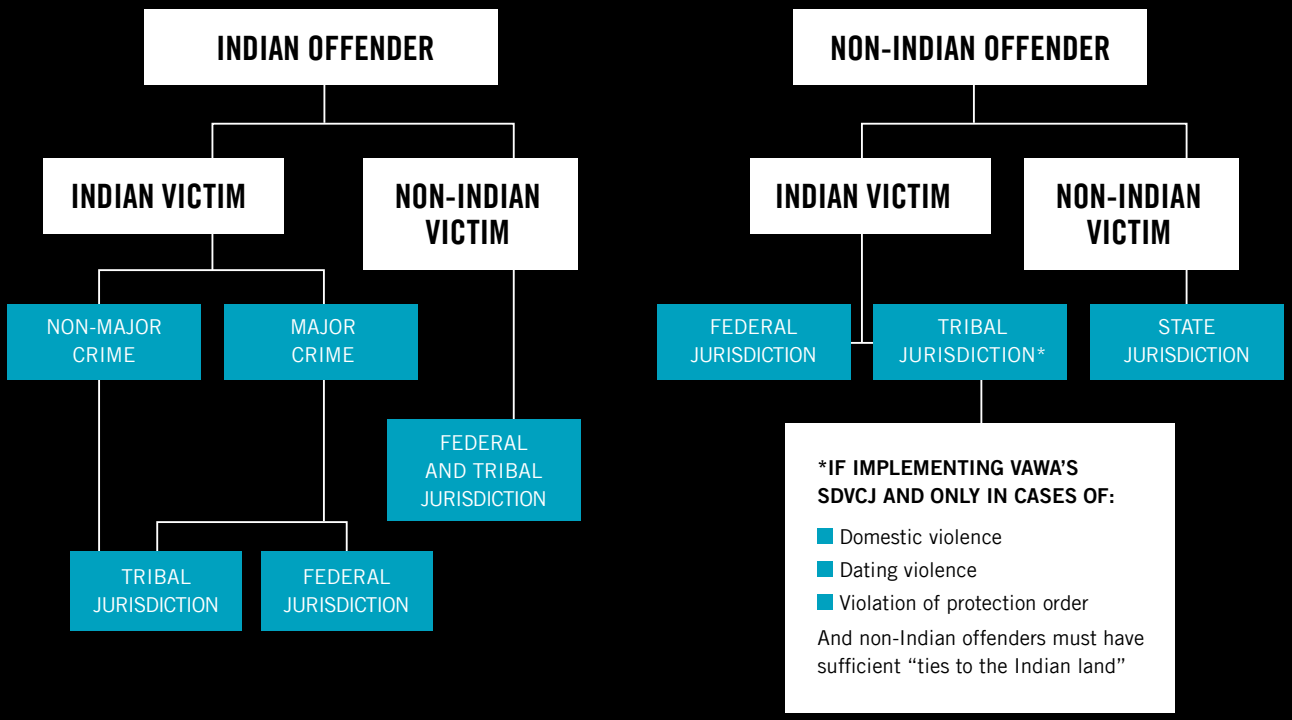
As with most courts, tribal courts initially determine whether the crime occurred in the tribe's territory before confirming that they have jurisdiction. However, even if the crime scene is on tribal land, tribal courts must then decipher US statutory requirements to ensure that this jurisdiction is not limited by federal law. In most cases, that requires determining the tribal citizenship of the defendant and victim. For tribes implementing Special Domestic Violence Criminal Jurisdiction (SDVCJ), the tribe must also examine the relationship between the victim and defendant as well as the nature of the crime committed. Further, tribal, state and federal jurisdiction often overlap, resulting in confusion and uncertainty. The more complex and confusing a case becomes, the more likely it is that no authority intervenes, leaving survivors without legal protection or redress and creating impunity for perpetrators of sexual violence.

"AMERICAN INDIAN AND ALASKA NATIVE WOMEN ARE DENIED MEANINGFUL ACCESS TO JUSTICE AND ARE LESS PROTECTED FROM VIOLENCE THAN OTHER WOMEN IN THE UNITED STATES JUST BECAUSE THEY ARE INDIGENOUS AND ARE ASSAULTED IN INDIAN COUNTRY OR ON ALASKA NATIVE LANDS."

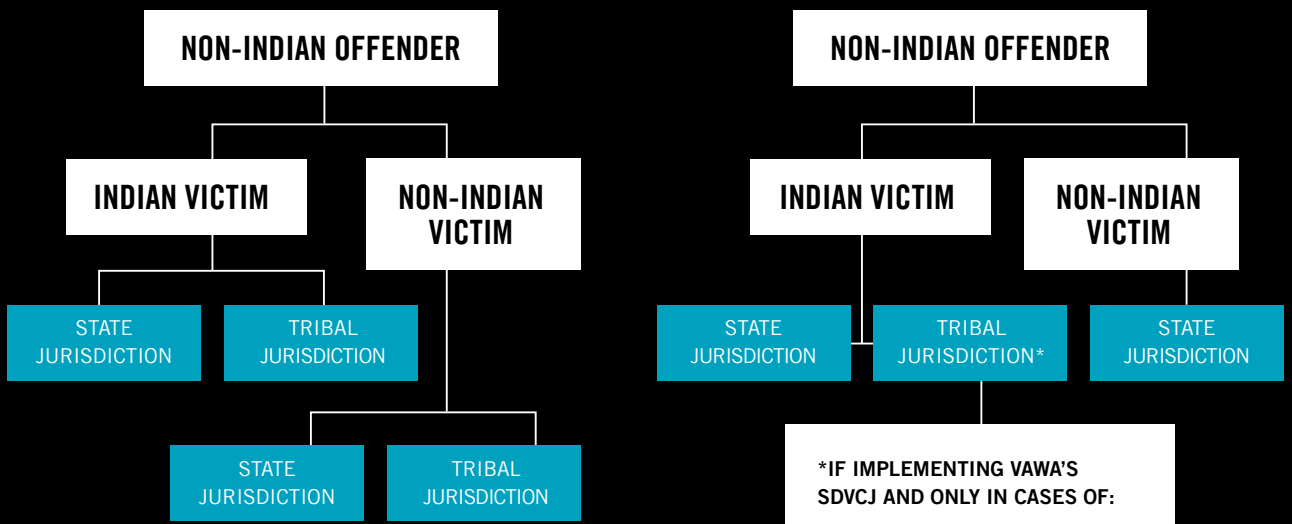
Jana L. Walker, Senior Attorney, Indian Law Resource Center[48]

The below figures display the complexity of the determination of jurisdiction, but only after a determination of whether the alleged offense took place in Indian country is made:

NON-PUBLIC LAW 83-280 STATES



PUBLIC LAW 83-280 STATES



*Starting October 2022, this determination will change with the implementation of "special Tribal criminal jurisdiction" under VAWA 2022. See Violence Against Women Act section on page 42.

“Who can respond to what crime? Tribal communities are a checkerboard with our state communities – in some places you can run across the street and be in a different jurisdiction.”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

With dual jurisdiction, there is a constant need for interagency cooperation; however, the Department of Justice has itself admitted to lacking a “coordinated approach” to overseeing crime within Indian country.[49] Additionally, a series of federal laws and US Supreme Court decisions, detailed below, restrict tribal jurisdiction over crimes committed on tribal land, undermining tribal authority by requiring federal authority to address serious crimes.[50]

- **The Major Crimes Act:**
  The Major Crimes Act (1885) granted federal authorities jurisdiction over certain serious crimes, including rape and murder, committed in Indian country. There is a widespread misconception that under the Act only federal officials have the authority to prosecute major crimes. In fact, tribal authorities retain concurrent jurisdiction over Indigenous perpetrators, although their sentencing authority has been limited under the Indian Civil rights Act since 1968 (see below). Although the Act did not technically bar tribal courts from prosecuting offenses within Indian country, the sentencing limitations effectively made these major crimes misdemeanors. It also added several considerations that ultimately complicated the process and sparked confusion among the federal and tribal prosecutors. The impact of the Act in practice is that victims of major crimes in Indian country are largely reliant on the federal government for justice.

- **Public Law 280:**
  Public Law 280 (1953) transferred federal criminal jurisdiction over all offenses involving American Indians (and later Alaska Natives) in Indian country to state governments in some states. The US Congress gave these states – California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska upon statehood – extensive criminal and civil jurisdiction over Indian country. Public Law 280 also permitted certain additional states – Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington – to acquire jurisdiction if they wished and, while a number of states originally opted to do so, most have retroceded jurisdiction back to the federal government. Where Public Law 280 is applied, both tribal and state authorities have concurrent jurisdiction over many crimes committed on tribal land by AI/AN individuals. Public Law 280 is seen by many Indigenous peoples as an affront to tribal sovereignty, not least because states have the option to assume and to relinquish jurisdiction, a power not extended to the tribes affected.

  In addition to disregarding tribal sovereignty, Congress has failed to provide additional funds to Public Law 280 states that assumed jurisdiction. These actions have led to a situation where the US federal government devolved its jurisdictional responsibilities onto tribal and state authorities who lack sufficient funds to adequately assume these new obligations.[51] In 2013, the Indian Law and Order Commission (a federal commission charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities) found jurisdictional problems to be even more prevalent where tribes are subject to Public Law 280. The Commission also found that

some state and local governments failed to provide public safety services (such as policing and emergency response) and actively prevented tribal nations from advancing their own capabilities.[52]

- **The Indian Civil Rights Act:**
  The Indian Civil Rights Act (1968) limits the penalty that can be imposed by tribal courts for any offense – including murder and rape — to a maximum of one year's imprisonment and a fine of US$5,000. The Tribal Law and Order Act of 2010 amended the Indian Civil Rights Act to allow for a sentence of up to three years' imprisonment and a US$15,000 fine if the tribe meets certain requirements related to due process.[53] As a result of this limitation on their custodial sentencing powers, some tribal courts are less likely to prosecute serious crimes, such as sexual violence, leaving victims to seek recourse through federal or state prosecution, both of which generally lack the resources or motivation to try such crimes in Indian country.

- ***Oliphant v. Suquamish*:**
  In 1978, the US Supreme Court ruled that tribal courts could not exercise criminal jurisdiction over "non-Indian" US citizens. This ruling in the case of *Oliphant v. Suquamish* effectively strips tribal authorities of the power to prosecute crimes of sexual violence committed by non-Native perpetrators on tribal land. It also denies victims due process and the equal protection of the law. Jurisdictional distinctions based on the tribal citizenship of the accused, such as the jurisdictional limitation here, have the effect in many cases of depriving victims of access to justice, in violation of international law and US constitutional guarantees.

  This ruling is particularly concerning given the number of reported crimes of sexual violence against Native survivors involving non-Native perpetrators. According to a National Institute of Justice survey, of the AI/AN women who have experienced sexual violence in their lifetime, 96% have experienced sexual violence by at least one non-Native perpetrator.[54] State and federal authorities often do not prosecute those cases of sexual violence that arise on tribal land and fall within their exclusive jurisdiction.

- ***McGirt v. Oklahoma*:**
  In McGirt v. Oklahoma (2020), the Supreme Court held that the Muscogee Reservation in eastern Oklahoma remains in existence today. The ruling means that prosecution of crimes by Native Americans on these lands falls under the jurisdiction of the tribal courts and federal judiciary under the Major Crimes Act, rather than Oklahoma's courts, and that most crimes of sexual violence by non-Indian perpetrators against AI/AN women spanning reservation land will be left to the federal government's exclusive jurisdiction.[55] The ruling was seen as a victory for tribal nations in eastern Oklahoma, but with *Oliphant v. Suquamish* still in place, tribes are still restricted jurisdictionally.

Since the publication of Amnesty International's *Maze of Injustice* report in 2007, the US federal government has slightly expanded its recognition of criminal jurisdiction in limited circumstances to tribes that meet specific criteria. The two major legislative vehicles that have been implemented that address this affirmation of tribal authority are the Tribal Law and Order Act (TLOA) of 2010 and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). The limited data provided by the US government shows that the victimization rates against AI/AN women have not significantly changed despite these efforts.[56] In the weeks before this report went to press, the next reauthorization of the Violence Against Women Act (VAWA 2022) was signed into law after the legislation had been allowed to lapse in 2018. VAWA 2022 has yet to be implemented.

TRIBAL LAW AND ORDER ACT

"[W]hen Indian tribes prosecute major crimes, such as murder, but are only allowed to sentence the defendant to one year in prison… tribal members lose faith in criminal justice at the tribal as well as the federal level. As a result, victims stop reporting crimes, refuse to participate in the criminal justice system, and opt out of community policing or local control altogether. This, in turn, means that more perpetrators commit repeat offenses that are never reported, thus starting the cycle over again."

Angela Riley, Director, Native Nations Law and Policy Center, UCLA [57]

The Tribal Law and Order Act (TLOA) of 2010 contains several provisions meant to improve criminal justice in Indian country and ultimately protect AI/AN women from sexual violence. Some of TLOA's essential contributions include the enhancement of tribal sentencing authority, a transparency requirement from the Department of Justice (DOJ) regarding declination rates (the rate at which federal prosecutors decline to take up a case), and the creation of the Indian Law and Order Commission (ILOC), whose report was presented to Congress in November 2013.

TLOA's amendment to the Indian Civil Rights Act allows tribal nations to impose sentences of up to three years' imprisonment and/or a US $15,000 fine per offense, or a maximum sentence of nine years imprisonment per criminal proceeding.[58] The implementation of TLOA is financially burdensome for many tribes, who are not adequately resourced to do so.

"The majority of tribes are very poor and don't have the resources to support the implementation of the laws. They don't have enough law enforcement. They don't have enough jail space. They don't have enough court personnel. They don't have enough probation offices. They may not even have a probation officer. Tribes need resources to make this happen."

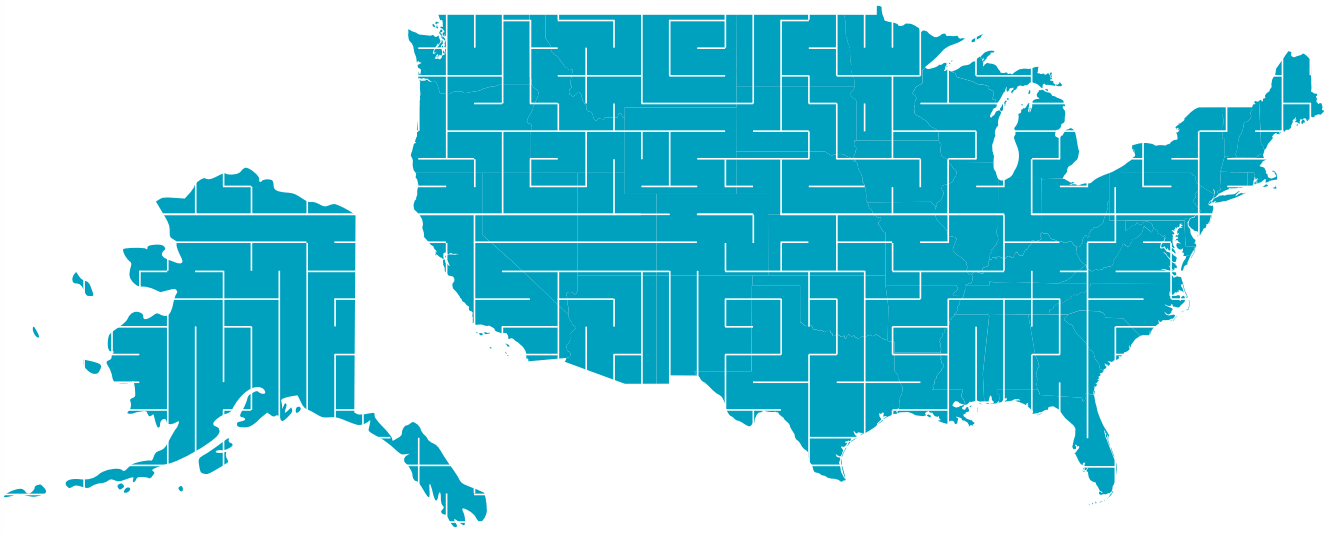
Interview with Bonnie Clairmont, Victim Advocacy Specialist, Tribal Law and Policy Institute, April 2021

Additionally, TLOA placed several mandates on the DOJ in the areas of legal assistance, investigative training and data collection to enhance law enforcement within Indian country. For example, the DOJ is required to release its own data on declination rates. However, the DOJ Office of Inspector General found in 2017 that the DOJ and its components: "still lack a coordinated approach to overseeing the assistance it provides in Indian country… has not prioritized [legal and investigative] assistance to Indian country at the level consistent with its public statements or annual reports to Congress…[and] needs to do more to ensure it provides all of the training TLOA requires" and continues to use crime data that is "unreliable and incomplete."[59]

“IT IS THE DEPARTMENT’S POSITION THAT PRIORITIZATION OF INITIATIVES IN INDIAN COUNTRY, INCLUDING THE EFFORT TO BUILD CAPACITY IN TRIBAL COURTS, WILL LEAD TO ENHANCED PUBLIC SAFETY FOR NATIVE AMERICANS.”

Department of Justice, Indian Country Investigations and Prosecutions, 2018

Despite the promise to prioritize crime within Indian country, DOJ funding and resources dedicated to Indian country have decreased since TLOA’s implementation. Since 2013, both total funding for the US Attorney’s Office resources in Indian country and the number of attorneys responsible for Indian country prosecutions decreased by 40%.[60]



VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 AND SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

“THE RESTORATION OF TRIBAL JURISDICTION HAS SAVED LIVES.”

Interview with Mary Kathryn Nagle, Partner at Pipestem and Nagle, March 2021

The Violence Against Women Act (VAWA), originally passed by Congress in 1994, is a collection of funding programs, initiatives and actions designed to improve criminal justice and community-based responses to violence against women in the USA; it must be reauthorized every five years. The most recent reauthorization of VAWA was signed into law 16 March 2022, but at publication of this report, it has not yet been implemented. Detailed below is the current implementation of VAWA from 2013. In the “Impact and Remaining Challenges” section, we note where the 2022 reauthorization may address some of the deficits in VAWA and where challenges will remain.

VAWA 2013 affirms the inherent sovereign authority of tribal courts to exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ) over cases involving non-Indian perpetrators who commit acts of domestic violence or dating violence in Indian country. It also provides an expansion of grants to tribal governments and coalitions to enhance best practices for responding to crimes against AI/AN women.[61]

To comply with VAWA 2013, tribes must, among other things, provide many of the same rights required for enhanced sentencing under TLOA. This often requires amending tribal laws and, in some cases, constitutions. It also imposes a requirement that non-Indians must be included in tribal jury pools, the reverse of which is not required when Native defendants are prosecuted in a US federal court.[62]

Despite an extensive list of requirements, the scope of the SDVCJ is limited. It applies only in cases of protection order violations, domestic violence and dating violence (violence, including sexual violence, committed by someone in an intimate or romantic partnership or relationship).[63] It does not apply to other crimes of violence against women, including sexual assault by a stranger or acquaintance, stalking, or sex trafficking. Further, SDVCJ does not currently cover crimes against children, drug and alcohol crimes, or crimes that occur within the criminal justice process. Thus, if a defendant has a combination of charges that do not all fall within the scope of SDVCJ, the tribal court is unable to prosecute those crimes that co-occur with domestic violence, which “interferes with the tribe’s ability to prosecute their SDVCJ cases effectively [and] leaves them unable to hold offenders accountable for criminal conduct not covered by SDVCJ.”[64] Additionally, the defendant must have “ties to the Indian tribe” by either residence or employment in the Indian country of the participating tribe or through an intimate relationship with a member of the tribe, thus excluding sexual assault by a stranger.[65]

“Not including all crimes of sexual violence is a significant shortcoming of [2013 reauthorization] VAWA legislation. It makes it extremely difficult for Native victims to receive justice for some of the most horrific acts that occur in Indian country.”

Interview with Angela Riley, Director, Native Nations Law and Policy Center, UCLA, May 2021

Additionally, VAWA 2013 excluded Native survivors in Maine and all but one tribe in Alaska.[66]

IMPACT AND REMAINING CHALLENGES

With TLOA and VAWA 2013, certain tribal governments have been able to restore limited criminal jurisdiction and punishment authority in specific circumstances and have seen an improvement in safety and security because of it.[67] However, TLOA’s limited sentencing enhancements and the restricted scope of VAWA 2013 have undermined the legislation’s potential to alleviate the sexual violence epidemic in Indian country. While tribes that have enacted VAWA 2013 have been able to prosecute repeat offenders that threatened the safety of tribal communities, multiple barriers remain for tribes to be able to adequately protect Indigenous women from sexual violence.

“THE INABILITY OF TRIBES TO PROSECUTE SEXUAL ASSAULTS COMMITTED BY NON-INTIMATE PARTNERS WHO ARE NOT INDIAN LEAVES TRIBES UNABLE TO KEEP THEIR COMMUNITIES SAFE.”

Letter to Amnesty International, US Department of Justice, 17 June 2021

Both VAWA 2013 and TLOA allow for only a limited restoration of jurisdiction for tribes, and there are numerous requirements imposed on tribes to be eligible for such restored jurisdiction. The 2022 reauthorization of VAWA included a partial fix for one the main barriers facing tribes in preventing and responding to sexual violence against Indigenous women: the inability of tribes to prosecute non-Indian perpetrators of such violence. VAWA 2022 will allow for tribes participating in “special Tribal criminal jurisdiction” to prosecute non-Indian offenders for sexual violence; this also applies to tribes in Maine and a pilot project for a limited number of tribal communities in Alaska. This is a critical step forward in ending impunity for perpetrators of sexual violence against Indigenous women.

Despite the progress VAWA 2022 signifies in restored jurisdiction, major barriers remain, including that many tribes lack adequate funding to meet the requirements of TLOA and VAWA.

“So many of these communities have so little; there’s no real capacity to implement laws like that [TLOA/VAWA 2013]. Small tribes don’t have the capacity to meet those regulatory requirements. Without resources, without helping to build capacity and without sustained, noncompetitive funding, it’s going to be hard to make any real sustainable change.”

Interview with Michelle Demmert, former Chief Justice for the Central Council Tlingit and Haida Indian Tribes of Alaska, September 2021

Despite the option for increased sentencing authority, few tribes have opted into TLOA. As of October of 2021, only 16 tribes were exercising TLOA’s enhanced sentencing authority.[68] Amnesty International heard from several tribal judges and attorneys that TLOA requirements were too financially burdensome. A 2016 law review article noted of TLOA that “the poorest, most vulnerable tribes will largely go unprotected by these statutory changes.”[69] It is an exhaustive and expensive process that, for some, may not be worth the limited increase in sentencing authority from one to three years.

“TLOA PASSED AS PART OF AN ADMINISTRATION THAT WAS REALLY OPEN TO HELPING TRIBAL COMMUNITIES BECOME MORE ABLE TO HANDLE THE NEEDS OF THEIR COMMUNITY. WE WANT TO SOLVE THE PROBLEMS OURSELVES, BUT WE HAVE TO HAVE THE RESOURCES THAT HAVE NOT BEEN MADE AVAILABLE TO DO THAT. YOU CANNOT EXPECT US TO SOLVE THE PROBLEM WITHOUT HAVING THE RESOURCES.”

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women’s Resource Center, March 2021

Similarly, the cost of SDVCJ implementation under VAWA 2013 is also burdensome, and the 2022 reauthorization of VAWA does not alleviate this burden. The funding has a fixed cap regardless of the size of the tribe, and after the initial three-year grant, tribes must re-apply for funding every two years—and it is not guaranteed.[70] Thus, a tribal government can invest in the implementation of the SDVCJ by amending tribal codes and hiring court staff, judges and prosecutors, but it has no guarantee of future funding. Without a reliable source of funding, most tribes have been unwilling to take the risk.[71]

"When Congress identifies a problem, it tells state and local governments to cooperate with tribes without explaining how, and it funnels money into competitive grant programs which is not the appropriate way to run a government. You don't run governments through grants."

Interview with Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University, March 2021

Additionally, the grant-making process itself is complicated and confusing and many tribal governments do not have grant writers or the staff to navigate the complex federal process. Under VAWA 2013, the federal government must consult annually with tribal governments on how best to assist them with this process and in combating crimes of sexual violence.[72] These consultations have generally been conducted by the Office on Violence Against Women (OVW). Tribal advocates Amnesty International interviewed raised concerns that OVW reporting during this annual consultation documented tribes' concerns but did not provide coordinated analysis that would help direct tribes to meaningful solutions.[73] Some Native advocates have proposed moving to block funding for tribal nations; this would allow the federal government to provide a set amount of money to tribes without requiring complex proposal processes and could allow more tribal control over which programs are implemented and funded.[74]

"The grant process is unbelievably confusing. I've never seen anyone in 21 years of working with state courts have to jump through all these hoops [applied to tribal governments]."

Interview with Patti McClure, Domestic Violence Victim Advocate, Nottawaseppi Huron Band of the Potawatomi Tribes, April 2021

Following the 2013 VAWA reauthorization, a pilot project commenced in 2014 including five tribes that were certified to implement the SDVCJ. Even with the extensive restrictions imposed on tribes and minimal funding, data from the pilot project showed improvement in criminal justice within Indian country for the selected tribes.[75] These tribes were able to effectively prosecute defendants who had committed domestic violence crimes for years with impunity.[76]

"The VAWA (2013) pilot project data shows us that tribal courts are not only capable of handling cases brought against non-Native defendants; they are incredibly successful in doing so."

Interview with Angela Riley, Director, Native Nations Law and Policy Center, UCLA, May 2021

Data collected on 25 SDVCJ implementing tribes as of June 2019 showed arrests of 237 non-Native abusers, which led to 95 convictions.[77]

"Many of the implementing tribes have reported that the decision to implement SDVCJ has led to improved communication with the local U.S. Attorney's office [USAO], leading to greater accountability in non-SDVCJ cases. [...] Some of the SDVCJ exercising tribes also have Tribal SAUSAs [Special Assistant U.S. Attorneys], which has resulted in improved communication and coordination as well."

Letter to Amnesty International, US Department of Justice, 17 June 2021.

There was also a sharp increase in reports of domestic violence for tribes implementing the SDVCJ, which may suggest an increase in trust in the tribal criminal justice system.[78] A 2019 study following the Tulalip Tribe's implementation (in Washington state) of the SDVCJ showed increased tribal leadership, protection from domestic violence, healing and accountability.[79]

"As tribal governmental powers have increased and tribes have entered contracts to perform more federal functions, tribal governments have proven more institutionally competent than the federal government in serving Indian people."

Kevin Washburn, Professor of Law, University of Iowa College of Law[80]

Despite the success of the program, major barriers such as the immense cost of implementation mean that as of February of 2021, only 27 of the 574 federally recognized tribes had implemented this special jurisdiction.[81]

"DOJ supports expansion of SDVCJ to include additional crimes, which would increase offender accountability and enhance tribal sovereignty, both of which are critical to responding to violence against women in tribal communities. The inability of tribes to prosecute crimes related to the SDVCJ crimes, such as when a child is a victim or when law enforcement officers or tribal employees are assaulted as a result of responding to the incident, leaves Tribes unable to fully hold offenders accountable."

Letter to Amnesty International, US Department of Justice, 17 June 2021

It is noteworthy that there was US Congressional opposition to the VAWA 2013 tribal provisions and that the reauthorization of VAWA was delayed for over two years. Arguments against VAWA 2013 were often explicitly based on racist assumptions about the competency of tribal courts, despite the fact that "there's no reason to believe that tribal courts are any less fair or competent than their federal and state counterparts."[82] VAWA was then allowed to lapse in 2018 until its most recent reauthorization in 2022, stalled in part by similarly unsubstantiated arguments rooted in the country's colonial history.

The USA has created a complex interrelation between tribal, state and federal jurisdictions that undermines equality before the law and allows perpetrators to evade justice. Non-Native perpetrators often know of these jurisdictional complexities and openly flaunt the law without fear of criminal prosecution. In one example, a non-Native man reported himself to tribal police after beating his Native girlfriend and taunted tribal authorities, stating "[you] can't do anything to me anyway."[83]

“THEY [NON-NATIVES] COME ON HERE AND THEY LOOK FOR US AND THEY TAKE US OFF THE RESERVATION, WHETHER THEIR INTENT IS TO TRAFFIC, OR SEXUALLY ASSAULT, OR DITCH THE BODY – THAT WHOLE SITUATION HAS REALLY ESCALATED.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Regardless of the tribal citizenship of the perpetrator, tribal courts can only sentence them to a maximum of three years’ imprisonment for serious crimes of sexual violence, compared to the average maximum prison sentence for sexual assault handed down by state courts (eight years) or federal courts (14 years).[84]

Tribal nations are sovereign nation states, and they have the authority under US law to establish their own tribal justice systems. Many tribes are unable to implement these justice systems because of poor funding and lack of the infrastructure needed to provide justice to AI/AN survivors of sexual assault. The jurisdictional complexities that exist within the USA further impede tribes’ ability to address sexual violence and the USA has repeatedly failed to untangle the maze that survivors of sexual violence must navigate.

ALASKA JURISDICTION

Alaska is excluded from most federal policymaking focused on ending violence against Native women. There are 229 federally recognized tribes in Alaska, roughly 40% of all federally recognized tribes in the USA.[85] Alaska Natives make up less than 16% of the population of Alaska, but Alaska Native women experience the highest sexual violence rates of any gender or racial group and made up 42% of all reported victims in 2017.[86] The SDVCJ provision of VAWA (2013) is limited to just one Alaskan tribe and TLOA explicitly excludes Alaskan tribes from the limited jurisdictional restoration it introduces. Given the drastic rates of violence against Alaska Native women, the ILOC described this provision in VAWA (2013) as "add[ing] insult to injury."[87]

"I remember when VAWA first passed in 2013, we were at a conference out in the lower 48 [states], and everyone was really excited, but I was really confused. Folks in the lower 48 were celebrating but we weren't included."

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

Upon statehood, Alaska was included as one of the original Public Law 280 states, giving the state (in place of federal authorities) concurrent criminal jurisdiction with tribes to prosecute crimes committed by and against Alaska Natives on tribal land throughout much of Alaska. However, Alaska took the position that statehood extinguished the Alaska Native villages' criminal law enforcement authority and reportedly threatened village councils with criminal prosecution "should they attempt to enforce their village laws."[88]

The situation in Alaska is further complicated because of issues around how tribal lands are designated. A combination of federal

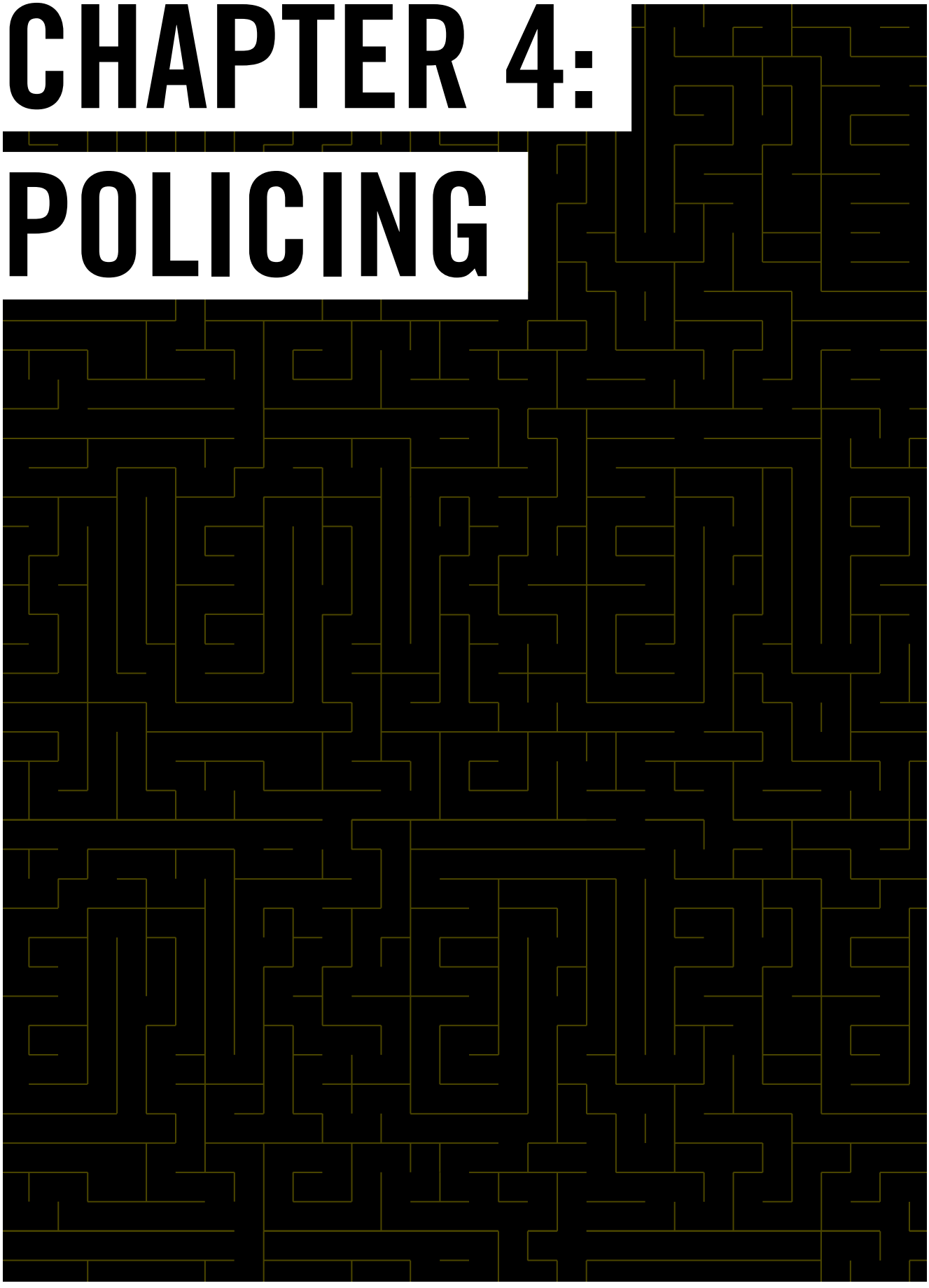
legislation along with state and US Supreme Court decisions about the definition and status of tribal lands has resulted in considerable confusion and debate over the right of Alaska Native peoples to maintain tribal police and court systems. While the State of Alaska recognizes that tribal authorities have some concurrent jurisdiction in civil cases, it has been reluctant to acknowledge that tribes have criminal jurisdiction. The rationale given for this position is that tribes have no land base that would provide the physical limits of criminal jurisdiction. This debate arises from the unique way in which Indigenous land claims in Alaska were settled.

Under the terms of the Alaska Native Claims Settlement Act (ANCSA),[89] passed by the US Congress in 1971, Indigenous claims to much of Alaska were extinguished in exchange for Indigenous title to approximately 11% of the land in Alaska as well as financial compensation. ANCSA land is not held in trust or under federal protection (ANCSA revoked all but one of the existing Native reserves).[90] It is held by Alaska Native corporations created by the ANCSA. In 1998, the US Supreme Court ruled in *Alaska v. Native Village of Venetie Tribal Government (Venetie)* that ANCSA lands were not Indian country. However, it is important to note that the Court also found that ANCSA did not intend to terminate tribal sovereignty but that it left Alaska tribes "sovereigns without territorial reach."[91]

In addition to the jurisdictional confusion, ANCSA effectively means that law and policy applied to Indian country does not apply to Alaska, save for one tribe, leaving Alaska Native communities excluded from most federal policymaking focused on ending violence against Native women. The 2022 reauthorization of VAWA addresses some of these jurisdictional issues in a limited way by including a pilot project for up to five Alaska Native communities per year to exercise special Tribal criminal jurisdiction.

To address the full crisis of jurisdiction caused by ANCSA, the ILOC recommended in 2013 that the US Congress overturn the Venetie decision and amend ANCSA to allow transferred lands to be put into trust and included within the definition of Indian country; to date, no action has been taken.[92]

CHAPTER 4: POLICING



“Someone goes missing, you go to the BIA, but they say ‘oh she was living down in town, you have to go to the city police’. So you go to the city police and they say ‘oh she is actually living out at her cousin’s in another county, you have to go there.’ And you go there, but she’s tribally enrolled, and the town says ‘oh she’s tribally enrolled, that’s a tribe issue.’ So now you have three half-finished reports on a missing girl, when every minute counts.”

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

A number of factors have a significant impact on police responses to sexual violence against American Indian and Alaska Native (AI/AN) women. These include a lack of resources for policing on tribal lands, poor interagency coordination and inappropriate investigative responses to crimes due to a lack of training for officials at the federal, state and tribal levels. These issues were discussed in the original *Maze of Injustice* report; 15 years later these problems persist. Tribal law enforcement agencies in many areas still do not have adequate training to be effective and there are jurisdictional and systemic policing issues that impede AI/AN survivors of sexual violence from obtaining justice.

Many tribal law enforcement agencies, like other services for Indigenous peoples, continue to be at the mercy of annual or other short-term funding. This has a negative impact on the provision of essential law enforcement services and on long-term strategic planning to address basic needs. A 2013 report found that with Bureau of Indians Affairs (BIA) and tribal police combined, the ratio for Indian country law enforcement is approximately 1.91 officers per 1,000 residents, whereas the national average is 3.5 officers per 1,000 residents.[93] A lack of adequate funding means that many Indigenous communities are without the law enforcement presence they may require. Because of these deficits, law enforcement and public safety departments in Indigenous communities often do not have the capacity and flexibility needed to implement the strategies that will ultimately protect AI/AN women from violence.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The Tribal Law and Order Act (TLOA) requires improved federal data collection on crime in Indian country and better coordination and sharing with tribal authorities. Unfortunately, some federal agencies have yet to adjust to these requirements. The Indian Law and Order Commission (ILOC) "repeatedly received detailed reports that the FBI [Federal Bureau of Investigation], OJS [Office of Justice Services, within the BIA], and US Attorney's Offices are either reluctant to provide federal criminal investigative information to appropriately certified tribal prosecutors or refuse to do so entirely."[94] FBI cooperation with tribal prosecutors' offices is often non-existent.

The Violence Against Women Act (2005, 2013) requires improved tribal access to crime data, but programs created to help with tribal access to crime information face their own challenges. The Tribal Access Program for National Crime Information, launched in 2015, is meant to increase cooperation by providing federally recognized tribes access to national crime information databases for both civil and criminal purposes. However, the program lacks permanent funding.

Also, under TLOA, the US Drug Enforcement Administration (DEA) and FBI must coordinate with the BIA to establish new training programs to ensure that BIA and tribal law enforcement have access to training. Neither the FBI nor DEA consistently track, administer or report on this training. This is also true for federal agents working in Indian country. DEA and FBI agents receive little to no training in the cultural, jurisdictional or geographical complexities within Indian country.[96]

Instead of coordinating with each other, the BIA and Department of Justice (DOJ) support tribal initiatives in a fragmented and ineffective manner.[97] In other instances, the BIA and DOJ inadvertently duplicate training or support for tribes which ultimately results in a waste of funds and time.[98]

IMPACT AND REMAINING CHALLENGES

INTERAGENCY COOPERATION

According to the ILOC, "great promise has been shown in those States where intergovernmental recognition of arrest authority occurs… and wherever intergovernmental cooperation has become the rule, not the exception, that arrests get made, interdiction of crime occurs, and confidence in public safety improves."[99] But the level of cooperation varies and survivors of sexual violence are frequently passed on to different agencies. Amnesty International heard multiple reports of a continuing attitude of "passing the buck" between law enforcement agencies that meant victims did not receive timely or adequate support and that cases were not fully investigated, adding to victims' lack of confidence that their reports would be taken seriously or addressed.

A 2011 Government Accountability Office (GAO) report stated that six of the 12 tribes it studied indicated: "[W]hen criminal matters are declined, federal entities generally do not share evidence and other pertinent information that will allow the tribe to build its case for prosecution in tribal court. This can be especially challenging for prosecuting offenses such as sexual assault where rape kits cannot be replicated should the tribe conduct its own investigation following [the US Attorney's Office's declination]."[100]

Many tribal nations do not have formal agreements with federal law enforcement entities regarding who is responsible for investigating crimes involving sexual violence.[101] When law enforcement reporting structures are not clear, federal and tribal law enforcement responders

may not properly respond to the scene, investigate the crime or share information with their law enforcement counterparts.[102]

“Control and accountability directed by local Tribes is critical for improving public safety.”

Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, November 2013

Cross-deputization agreements that allow tribal officers to enforce state or federal law or that allow tribal or state officers to cross jurisdictional borders are the most common coordination agreements, where such agreements exist. Amnesty International found that for some communities, cross-deputization has built stronger working relationships between tribal and state law enforcement and some communities welcome these arrangements, particularly in areas where tribal law enforcement is sparse or lacks adequate training. However, cross-deputization agreements may bring heavily armed and militarized police[103] and western-style policing does not include culturally appropriate practices that encourage healing for both the victims and perpetrators of crimes, which can be a priority for many tribal communities.

“WHEN PROPERLY RESOURCED, TRIBAL SYSTEMS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE WORK THE BEST.”

Interview with Carole Goldberg, Professor of Law, UCLA, March 2021

Additionally, severe mistrust between tribes and non-tribal law enforcement exists in many communities, often a result of racism by non-Indigenous local law enforcement, which makes these agreements all but impossible in some communities.

“From the perspective of many tribal nations, policing in the United States has always been problematic… Federal policy created a system that served the interest of the U.S. government and non-tribal citizens and failed to promote the ability of Indian nations to design and exert meaningful control over their own policing institutions… Militarized policing of Indian nations includes a long history of brutality, rape, and killing of Native people.”

National Indigenous Women’s Resource Center, Restoration of Native Sovereignty and Safety for Native Women Magazine, February 2021[104]

Law enforcement officers working in tribal communities must work within a human rights framework and militarized police forces entrenched in historical racism that lack culturally sensitive protocols cannot work within such a framework.

LAW ENFORCEMENT IN ALASKA

“The majority of [Alaska] villages don’t have law enforcement or if they do, they don’t get adequate training”

Interview with Lenora "Lynn" Hootch, Executive Director, Yup'ik Women's Coalition, May 2021

The State of Alaska is the largest state in the USA, covering over 586,000 square miles. In rural areas, there is a great disparity between the police protection afforded in villages accessible by road and that afforded in villages that are not. The majority of Alaska’s federally recognized tribes are villages off the road system and are only accessible by plane or boat.[105] At least 75 Native Alaska villages have no law enforcement presence.[106]

“If an Alaska Native girl is murdered in one of these rural villages, the body can sometimes be there for hours or days before any authority arrives, leaving the family so traumatized. Police say they can’t get there because of the weather. But we hear time and time again, if someone kills a moose or other wildlife out of season, somehow despite the resource challenges, officials are there immediately.”

Interview with Michelle Demmert, former Chief Justice for the Central Council Tlingit and Haida Indian Tribes of Alaska, September 2021

For the Alaskan communities that do have law enforcement, there are potentially several forms of personnel. State troopers are charged with enforcing all criminal laws and investigating crimes within urban and rural posts across the state. Law enforcement efforts can rely heavily on air travel to reach isolated villages, which is both costly and at times difficult to coordinate.

There are also village public safety officers, village police officers and tribal police officers, who have basic law enforcement duties throughout rural villages and tribes.[107] A study released in 2018 found that these paraprofessionals "contribute to enhancing the criminal justice response to sexual violence."[108] However, there are still several issues when it comes to maintaining dependable law enforcement in rural areas. For example, village public safety officers may serve multiple communities and alternate between locations. Additionally, while they are paid by Alaska Native Corporations and work under Alaska State Trooper oversight, they are not directly accountable to Alaska Native communities.[109] Village public safety officers, village police officers and tribal police officers also often lack adequate support and can face high burnout rates and funding for positions may be inconsistent or quickly expended. Many tribes lack the resources to support paraprofessional officers and, ultimately, many villages still lack reliable and consistent law enforcement.

"Tribal police officers could be effective but it's one of those programs that hasn't been supported in Alaska, but if BIA was backing it in terms of the training, background checks, support and things like that, the officers could be an effective method of law enforcement of the community. It goes back to the question of capacity and infrastructure."

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women's Resources Center, March 2021

In June of 2019, the then Attorney General, William Barr, declared a law enforcement emergency in rural Alaska under the Emergency Federal Law Enforcement Assistance Program. This program promised to fund 20 officer positions from the Office of Community Oriented Policing Services, along with equipment and training, to Alaska Native grantees.[110] The program includes US$6 million in funding for rural public safety facility projects.[111] Additionally, the Attorney General announced the Rural Alaska Anti-Violence Enforcement Working Group, which was created in July of 2020. The impact of these programs or funding is yet unclear.

“VERY RARELY DO THEY REPORT IT TO THE POLICE BECAUSE OF THE APATHY [THEY EXPERIENCE FROM LAW ENFORCEMENT] AND THE LACK OF JUSTICE.”

Interview with Abigail Echo-Hawk, Urban Indian Health Institute, May 2021

One fundamental challenge for AI/AN survivors of sexual violence in pursuing justice and safety is a widespread lack of trust in the criminal justice system. Across all sectors of society in the USA, just 41% of all violent crimes are reported to the police, along with only 34% of rapes and sexual assaults.[112] The percentage of unreported assaults is likely higher for AI/AN survivors. Advocates point to survivors’ fear of lack of confidentiality, lack of confidence in the justice system and negative experiences with police. AI/AN populations are disproportionately affected by police violence: AI/AN men and women are significantly more likely to be killed by police than their white counterparts.[113]

Of additional concern are reports of discriminatory treatment of survivors who are suspected of drinking alcohol before they were attacked. This is particularly worrying because of the prevalent negative stereotypes that link Indigenous people with excessive drinking. A 2018 study showed that when an Alaska Native survivor of sexual assault is documented with alcohol or drugs in her system, her case is two times less likely to be referred for prosecution by Alaska State Troopers.[114] An Alaska Native advocate reported to the DOJ that in 2016, 60% of the victims of reported sexual assaults in Fairbanks were Native women and were referred to as “frequent flyers” and mocked by police officers who implied they are at fault for the assault because they had been drinking.[115]

“I CANNOT STRESS THAT ENOUGH: IT MAKES A DIFFERENCE ON THE QUALITY AND DEPTH OF AN INVESTIGATION BASED ON THE COLOR OF YOUR SKIN.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Lack of training in cultural competence can also be an obstacle to officers communicating effectively and appropriately with Indigenous peoples. There is a need for all officers to receive training that enables them to ensure that their responses consider differences between tribes, which may have implications for how police approach and speak to victims, witnesses and suspects.

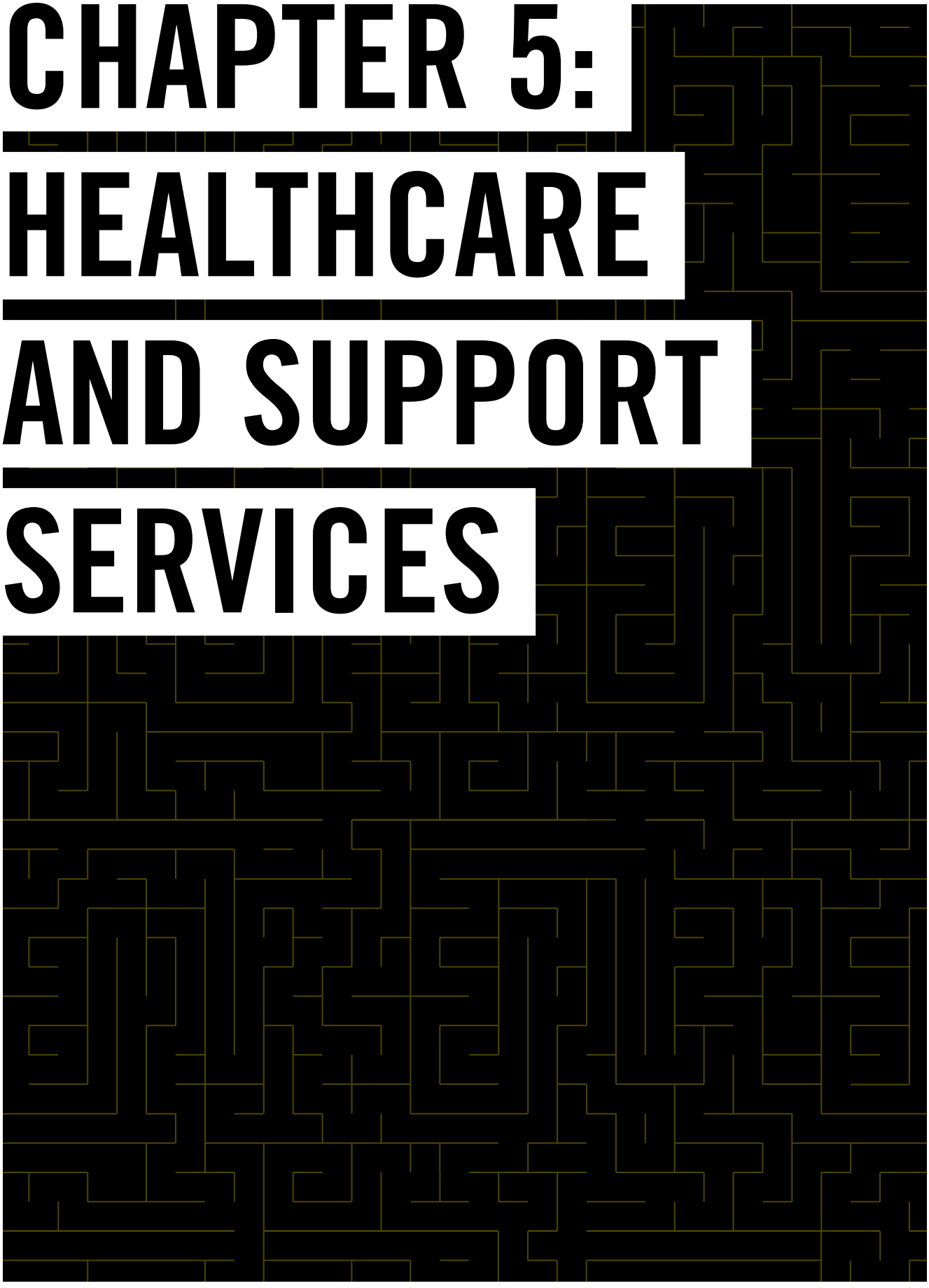
"[A]N UNDERSTANDING OF CULTURAL ASPECTS OF INDIVIDUAL TRIBES AND THE NEED FOR COOPERATION BETWEEN FEDERAL, TRIBAL, AND STATE LAW ENFORCEMENT IS KEY TO ENSURING PUBLIC SAFETY AND THE SUCCESSFUL PROSECUTION OF VIOLATIONS OCCURRING WITHIN INDIAN COUNTRY."

Letter to Amnesty International, US Department of Justice, 17 June 2021

Dysfunctional policing and lack of interagency coordination impede the effective protection of tribal communities. Native women who survive sexual violence continue to face systemic hurdles when they seek justice, including obstacles resulting from jurisdictional challenges, difficulties in the hiring and retention of tribal and state law enforcement and law enforcement officials who do not pursue their cases. Underpinning all these obstacles is the degradation of tribal sovereignty, which has led to ineffective policing in tribal communities as tribes often lack the jurisdiction to effectively protect their citizens. Federal policies that regulate policing on tribal lands reduce tribal control of their own affairs, while also diffusing accountability when issues arise.[116]

Systemic bias on the part of law enforcement officials can have a considerable impact on the fate of sexual assault investigations. One illustrative example is from a case filed by the American Civil Liberties Union against the City of Nome, Alaska, and former law enforcement officials who "displayed a systemic bias against Alaska Native women by failing to investigate hundreds of sexual assaults reported to the Nome Police Department."[117] The lawsuit details how in 2017, an Alaska Native female police dispatcher was drugged and raped while unconscious in her home. She submitted a written report and was told for months that the case was under investigation. She later discovered it was never actually initiated and she had to file a new report. She learned the following year that the second report never made it to the Alaska State Troopers and she was eventually turned away because of the staleness of the case. Through an internal audit, the Nome Police Department found that a large number of its reports between 2015 to 2018 were inadequately investigated; over 90% of the cases not pursued involved Alaska Native women.[118]

CHAPTER 5: HEALTHCARE AND SUPPORT SERVICES



“Through communication with our tribal advocacy and law enforcement partners, we learned that often American Indian/Alaska Native [AI/AN] victims first call the local IHS [Indian Health Service] clinic in search of post sexual assault care. IHS would refer them to urban locations sometimes two or more hours away. Referral facilities would commonly report being unable to conduct the exam and send the victim on to yet another facility. A lot of victims just give up. Despite being in locations with a high percentage of AI/AN populations or areas in close proximity to reservations, many facilities both on and off reservation report that AI/AN victims don’t come in for care despite the population’s alarming rate of sexual violence.”

Interview with Kim Day, Forensic Nursing Director, International Association of Forensic Nurses, April 2021

An important part of any police investigation of sexual violence involves the collection of forensic evidence, which can be vital for a successful prosecution. The evidence is gathered through a sexual assault medical-forensic examination, sometimes using tools known as a sexual assault evidence kit or a rape kit. The examination is performed by a health professional and involves examination and treatment for injury and disease, including prevention of sexually transmitted infections and pregnancy, and the collection of forensic evidence from a victim.

Evidence from sexual assault forensic examinations is crucial if a survivor wishes to pursue a criminal case against the perpetrator. The odds of a sexual assault case being accepted for prosecution increases significantly with each additional item of evidence collected[119] and “the effective collection of evidence is of paramount importance to successfully prosecuting sex offenders.”[120] All victims of sexual violence should be offered a forensic examination regardless of whether they decide to report the case to the police.

While some progress has been made to ensure access to forensic examinations for AI/AN women, there are ongoing challenges related to healthcare services for survivors and an unacceptable number of survivors still lack access to a forensic exam. Many healthcare facilities are too far away or closed when the

survivor needs care and, even if a woman can get to a facility, a rape kit may not be available or there may not be qualified staff available to administer it.[121] Of the 650 census-designated Native American lands analyzed in 2014, only 30.7% of the land was within an hour's drive of a facility offering sexual assault examination services.[122]

Additionally, there is a chronic lack of funding for IHS facilities, along with poor pay and incentives for employees, which has led to major staffing shortages. Finally, while the IHS has developed sexual assault response protocols, required by the Tribal Law and Order Act (TLOA), these protocols have not been fully implemented, and current policy leaves major geographical coverage gaps for survivors.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The federal trust relationship establishes a responsibility to provide healthcare to AI/AN people. The IHS is part of the US Department of Health and Human Services and is the principal, and in some areas sole, provider of health services for AI/AN people. US federal law provides tribes the option of assuming from the IHS the administration and operation of health services in their communities; over 60% of the IHS appropriation is administered by tribes. The IHS system is comprised of 46 hospitals (24 IHS federal and 22 tribal) and 522 outpatient facilities (93 IHS federal and 429 tribal).[123]

Pursuant to TLOA, the US government issued a report from the Government Accountability Office (GAO) in 2011 concerning the IHS and tribal healthcare facilities' response to sexual assaults and domestic violence. When the GAO surveyed IHS and tribal hospitals, it found that the ability of these hospitals to collect and store medical forensic evidence in cases of sexual assault and domestic violence varied greatly.

> **"GAO's survey of IHS and tribally operated hospitals showed that the ability of these hospitals to collect and preserve medical forensic evidence in cases of sexual assault and domestic violence –that is, to offer medical forensic services – varies from hospital to hospital. Of the 45 hospitals, 26 reported that they are typically able to perform medical forensic exams on site for victims of sexual assault on site, while 19 reported that they choose to refer sexual assault victims to other facilities. The hospitals that provided services began to do so generally in response to an unmet need, not because of direction from IHS headquarters, according to hospital officials. Partly as a result, levels of available services have fluctuated over time."**
>
> *US Government Accountability Office, Continued Efforts Needed to Help Strengthen Response to Sexual Assaults and Domestic Violence, 2011*[124]

The report recommended that the IHS improve forensic exam accessibility and create sexual assault policies for both adults and children. Within these policies, the GAO also recommended that the IHS clearly outline the approval process for subpoenas and requests for IHS employees to provide testimony in federal, state and tribal courts for sexual assault cases.

TLOA also requires that the IHS develop policies and protocols for responding to a survivor of sexual assault. The resulting IHS sexual assault guidelines were issued in March 2011 and a revised policy was issued in 2013.[125] The IHS did revise its subpoena request and testimony policies.[126] However, the IHS does not oversee policy implementation in its facilities, and the self-determination contracts and self-governance compacts under which tribes operate hospitals do not generally require compliance with IHS policy.[128]

It remains unclear which staff are being trained on IHS updated policies and protocols regarding sexual assault response and whether post-rape

services are available to and reaching AI/AN survivors across the IHS. The IHS has developed an "implementation and monitoring plan" (in response to the 2011 GAO report), which was shared with Amnesty International following a 2017 Freedom of Information Act request. The monitoring plan showed that the IHS has made several efforts to improve the quality of care and trainings available to patients and medical staff, including the provision of technical assistance to IHS, tribal and urban sites on forensic healthcare, and trainings on domestic violence awareness. But the plan does not state if training on the new sexual assault policy is required for all staff or simply made available and it remains unclear how many IHS or tribal facilities have fully implemented these updated sexual assault protocols.

In 2019, the Office of Inspector General recommended that the IHS "designate a central owner in IHS headquarters to ensure clear roles and responsibilities for shared ownership in implementing patient protection policies."[129] While some oversight functions are performed at IHS headquarters, the agency continues to delegate primary responsibility for the oversight of healthcare facilities to its 12 area offices. A 2020 GAO report found that oversight of expenditures and scope of services was limited and inconsistent across these area offices, in part, due to a lack of consistent agency-wide processes.

"The limitations and inconsistencies that GAO found in IHS's oversight are driven by the lack of consistent oversight processes across the area offices. Without establishing a systematic oversight process to compare federally operated facilities' current services to population needs, and to guide the review of facilities' proposed expenditures, IHS cannot ensure that its facilities are identifying and investing in projects to meet the greatest community needs, and therefore that federal resources are being maximized to best serve the AI/AN population."

US Government Accountability Office, Actions Needed to Improve Oversight of Federal Facilities' Decision-Making About the Use of Funds, November 2020

Additionally, the IHS does not have a process to guide its oversight of key proposed expenditures, such as the purchase of medical equipment, the hiring of providers or the expansion of services. The GAO also interviewed officials from nine area offices who stated that the area offices coordinated with tribal governments when reviewing its services. However, none reported systematically reviewing the extent to which the services provided were meeting local healthcare needs.[130] Essentially, the IHS is not adequately keeping track of each facility's spending, decision making or self-assessment and it does not have data on tribal facilities, suggesting that even if there was a severe shortage of rape kits, the IHS itself might not be aware of this.

IMPACT AND REMAINING CHALLENGES

RAPE KIT ACCESS

What little government data is available, though dated, shows large gaps in the availability of rape kits for AI/AN survivors. AI/AN survivors of sexual violence have reported being turned away from IHS and tribal facilities because a rape kit was not available, no staff member trained to administer the rape kit was available or the assault took place outside the medical center's opening hours and the survivor had to decide whether they would (or could) travel to the closest non-IHS facility.

> **"IF IHS HAS THEM [RAPE KITS], THEY'RE USELESS TO US, BECAUSE MOST OF THE TIME IT'S WEEKENDS WHEN YOU NEED THEM, AND IF YOU CAN'T ACCESS THEM BECAUSE THEY'RE BEHIND LOCKED DOORS [WHEN THE FACILITIES ARE CLOSED]. SO, THEN WHAT?"**
>
> *Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021*

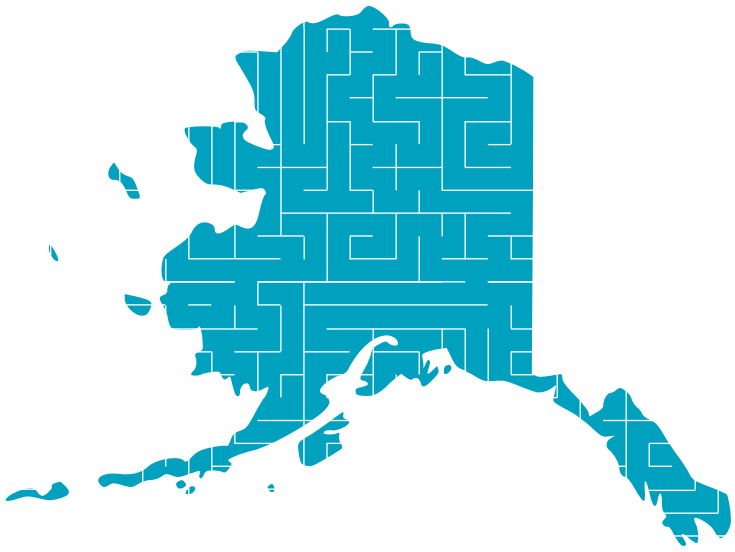
The IHS is unable to account for how many rape kits are available to survivors in IHS or tribal facilities across regions, how many forensic exams are completed (or declined by survivors), or how many survivors are turned away from a facility and referred to another facility for a forensic exam. The IHS reported to Amnesty International that they were unable to provide such data since: "The rape kits are obtained from many different vendors. Rape kits are often provided to IHS facilities by the state where they are located. This can be done by any number of vendors or companies that provide the kit to the state. All contracts of this type would fall under a contract between the vendor and the state. IHS would not be party to these contracts and could not identify any measure to these variables."[131] A former IHS official noted that the inability of the IHS to report the availability and service provision of rape kits was "not a surprise" and stemmed from a decentralized way of recording or evaluating the provision of care; the IHS "don't think of themselves as one system. There's so much autonomy within each hospital; they often don't share information or best practices."[132]

ALASKA: RAPE KITS

A 2018 Alaska-specific study showed that less than half (40.7%) of Alaska Native survivors of sexual assault and less than a 10th (9.9%) of survivors of sexual abuse of a minor were documented in case records as undergoing a forensic medical exam.[133]

For Alaska Native survivors, distance is especially acute obstacle to accessing a forensic exam as for many the closest health facility may require air travel. In response to Attorney General Barr's 2019 emergency declaration in rural Alaska,[134] the Office on Violence Against Women awarded funds to train community health aides in Alaska Native villages to perform sexual assault forensic exams and to recruit victim advocates to accompany victims throughout the process. It is unclear if these funds have changed the rate of Alaska Native survivors able to access forensic exams.

For victims who can obtain a forensic exam, receiving updated information about their exam remains a challenge. The State of Alaska is planning to launch new rape kit tracking software in the latter part of 2022.[135]



The IHS remains underfunded and understaffed, exacerbating the problem of sexual assault nurse examiners (SANE) and sexual assault response team[136] coverage, the availability of rape kits for survivors, as well as other medical care needs for AI/AN women. AI/AN women victims of physical violence by intimate partners and sexual violence are 1.5 times as likely to be physically injured and 2.3 times as likely to require medical care compared to non-Hispanic white-only women victims of physical violence by intimate partners and sexual violence. Yet more than one in three female AI/AN victims are unable to access the medical care they need after surviving such acts of violence.[137]

In 2011, the International Association of Forensic Nurses developed the Tribal Forensic Healthcare Program for the IHS to educate providers in sexual assault medical-forensic examination and treatment. This has increased the availability of forensic exams in certain areas.[138] However, there is no available data to track these providers after they are trained to know what communities have access to a trained sexual assault examiner and high staff turnover remains an issue across IHS and tribal facilities.[139]

“WE’RE TRAINING MORE SANE NURSES, AND THERE ARE MORE MEETINGS AND MORE PEOPLE PROVIDING THE SERVICE, BUT WE ARE CONTINUOUSLY HEARING THAT IN THE RURAL AREAS THAT THERE AREN’T SANE NURSES READILY AVAILABLE TO PROVIDE THIS SERVICE.”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

FUNDING AND STAFFING

The overall IHS budget granted by Congress meets just over half of the healthcare needs of the AI/AN population.[140] Federal funding for the IHS remains static and low while the AI/AN population is steadily increasing.[141] In 2018, the US Commission on Civil Rights found that funding for the IHS is “inequitable and unequal” and that “IHS expenditures per capita remain well below other federal healthcare programs, and overall IHS funding covers only a fraction of Native American health care needs.”[142] The gap in funding has widened since that report: in 2019, IHS healthcare expenditures were US$4,078 per person compared to US$11,582 per person for federal healthcare nationwide.[143]

IN 2019, IHS HEALTH CARE EXPENDITURES WERE US$4,078 PER PERSON COMPARED TO US$11,582 FOR FEDERAL HEALTHCARE NATIONWIDE

"The fact that Congress funds IHS at a shortfall of $30 billion a year really hampers the entire system's ability to provide services and attract professionals to our communities."

Interview with Natasha Singh, Vice President of Legal, Alaska Native Tribal Health Consortium, May 2021

Staffing in IHS facilities is another central challenge to ensuring the highest quality of care for AI/AN survivors. Staff turnover is high and there is a lack of consistent staffing, particularly in rural areas. In a 2018 GAO report, data showed that there were large percentages of vacancies in eight areas where the IHS provides a substantial number of medical services.[144] As of November 2017, there was an average vacancy rate of 25% for medical care workers in these eight areas.[145] One of the root causes for this staffing issue is inadequate pay for medical staff stemming from the chronic underfunding of the IHS. Medical workers often do not want to take jobs at IHS facilities because of their remote location, limited incentives and noncompetitive pay.[146]

"We have no ingrained response to sexual assault at an institutional level; there needs to be the expectation that there will be services for sexual assault survivors as a necessary and central part of IHS care. It's not an optional 'extra'."

Interview with Katy Eagle, Executive Director, Mending the Sacred Hoop, April 2021

These challenges faced by the IHS exacerbate the problem of inadequate care for survivors of sexual violence. International law requires that healthcare services be available and affordable and it is the obligation of the US government to ensure this care is accessible and culturally appropriate.

“THE MORE ISOLATED PEOPLE ARE, THE MORE LIKELY THEY DON’T HAVE THE SERVICES THEY NEED.”

Interview with Ashley “AJ” Juraska, Co-Author of Sexual Assault Services Coverage on Native American Land, April 2021

FACILITY ACCESSIBILITY

The IHS manual states: “All facilities shall provide patients 18 and older who present with a report of sexual assault with access to a sexual assault medical forensic examination, either onsite or by referral (within a two-hour drive time, when feasible).”[147] For survivors without transportation or means to travel, this effectively means no rape kits are available to them.

Advocates spoke, too, of the discomfort Native survivors often felt with non-Native service providers, citing examples where non-Native service providers assumed the survivor was drunk because they were Native or made comments based on other racist stereotypes. The mistreatment of Native survivors by non-Native service providers can create a ripple effect of distrust in the community: “As soon as one person is mistreated, the word gets out.”[148]

“THE IHS FACILITY ISN’T OPEN 24-7, BUT NON-INDIAN HOSPITALS NEAR RESERVATIONS DON’T WANT TO BE BOTHERED; THEY ARE WORRIED ABOUT BILLING AND WHO IS GOING TO PAY FOR THE RAPE EXAM.”

Interview with Charon Asetoyer, Executive Director, Native American Women’s Health Education Resource Center, February 2021

Many survivors become overwhelmed by the emotional and logistical difficulties involved in accessing post-rape care. Advocates spoke of survivors “giving up” if they had to go to a non-Native hospital or clinic and emphasized the logistical hurdle for a survivor heading to the second hospital or clinic.[149] Further, poor internet and cellphone coverage on tribal land can create additional barriers for survivors seeking information about services.[150]

With non-IHS facilities, post-rape care costs are yet another concern for survivors. National guidelines state that survivors should not have to pay for sexual assault forensic examinations, yet for survivors living in rural areas, accessing an exam may still mean paying for transportation to the nearest facility. In Alaska, Native women may need to cover the cost of traveling by plane to reach the hospital or clinic. Although IHS services are free, if an AI/AN victim has to go to a non-IHS hospital for an examination, she may be charged by that facility. The IHS has a reimbursement policy, but it is complex and survivors may not be aware of it, meaning the financial burden falls on the AI/AN survivor.

“THERE WAS A WOMAN WHO WAS RAPED AND THOUGHT SHE WAS INJURED BUT DIDN’T WANT TO GO TO THE DOCTOR BECAUSE SHE WAS AFRAID THAT SHE COULDN’T AFFORD IT.”

Interview with Juskwa Burnett, Advocacy for Tribal Families, March 2021

Even in IHS facilities where a rape kit is available, the conditions in which the exam is carried out may be inadequate. Advocates reported an unevenness not only of availability but also quality of post-rape care, emphasizing that, despite improvements in the IHS, oftentimes survivors do not know what quality of care, if any, they can expect from IHS or tribal facilities.

“I was at an IHS hospital, and they were going to show us the room for post-rape care. We had to go all the way to the back, through this storage room with open storage shelving and they showed us the room they were going to use for SANE exams, and it wasn’t a room – there wasn’t a door, not even a curtain. There was an exam table and some chairs, and they would wheel the equipment in on a tray, but no privacy. As we were sitting there talking, two guys came into the supply room to grab supplies and said ‘oh sorry, we didn’t know anyone was in here’ as they got their supplies, because everyone had access to that space. If a survivor was on the exam table, their legs would be up in the stirrups looking right at where those two guys had just come in. They just said they had no space. This just isn’t acceptable.”

Interview with Bonnie Clairmont, Victim Advocacy Specialist, Tribal Law and Policy Institute, April 2021

INDIGENOUS SUPPORT SERVICES

“THERE IS AN ONGOING NEED FOR CULTURALLY SENSITIVE TRAINING FOR PROVIDERS WHO ARE NOT TRIBAL BUT ARE SEEING NATIVE SURVIVORS”

Interview with Krista Heeren-Graber, Executive Director, South Dakota Network Against Family Violence and Sexual Assault, May 2021

Survivors should have available to them a variety of timely culturally appropriate services, which could include holistic, victim-led and non-criminal justice avenues for healing for survivors and perpetrators. Collaboration between state and tribal victim service programs can help improve service delivery for Native survivors, particularly where there is a lack of Native-led services available. However, at present if a survivor does manage to access a forensic exam and other support services in non-IHS facilities, those services are often not culturally appropriate. The US Department of Justice reported in 2013 that the support services based on Western cultural practices were often ineffective for AI/AN survivors.[151] Culturally sensitive training for non-Native service providers is needed across service provision to ensure that Native survivors receive the care they need.

While Native-led victim support services are often preferred by victims of sexual assault, the lack of funding and complex grant application process make access to Native-led services extremely limited. If non-Native services are the only ones available, Native survivors can feel uncomfortable or unsafe accessing them as many of those services do not have culturally appropriate training or focus.

“What is most commonly recorded as what victims need from us is peer support. That’s a really telling piece for us. We have heard stories like when someone went to non-Native services and then being told ‘don’t you get your help from the reservation?’ as they were basically encouraged to leave.”

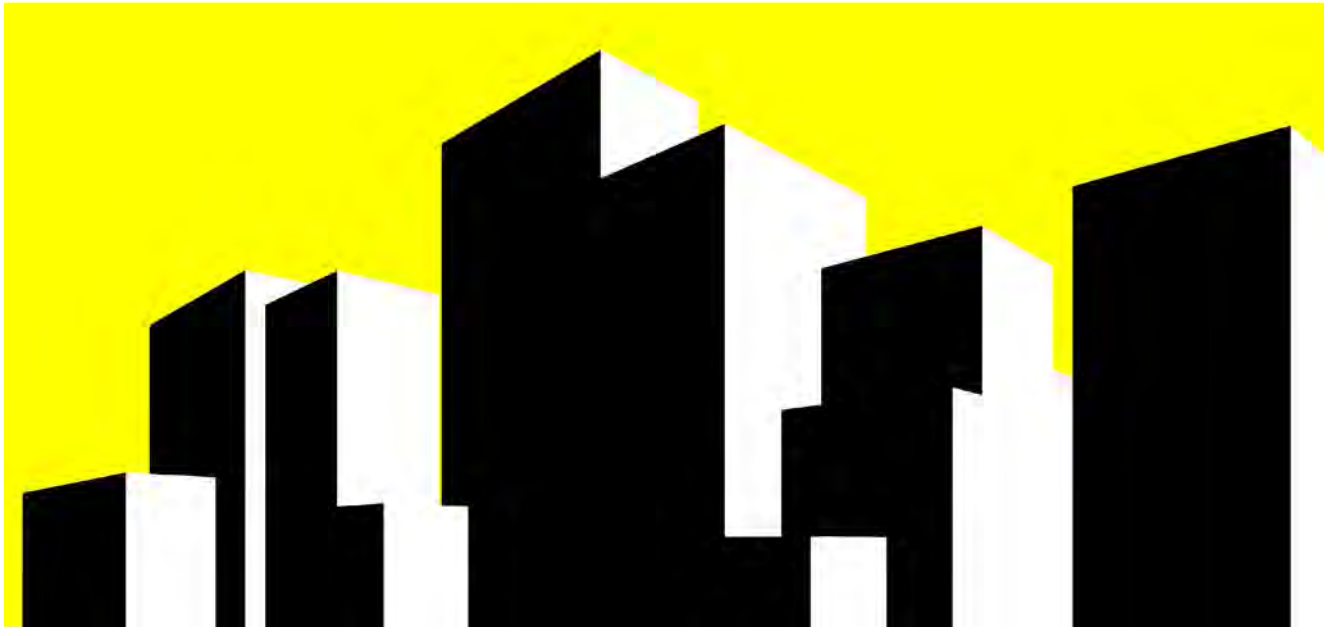
Interview with StrongHearts Native Helpline, May 2021

Native-led service providers have found that AI/AN women clearly prefer Native-centered support services. StrongHearts Native Hotline, a Native-led support hotline for Indigenous survivors of domestic and sexual violence, found that out of the 3,074 calls received in 2020, not one of the callers chose to transfer to a non-Native hotline for support during non-staffed hours and that “Native callers prefer to work with a Native-centered organization.”[152]

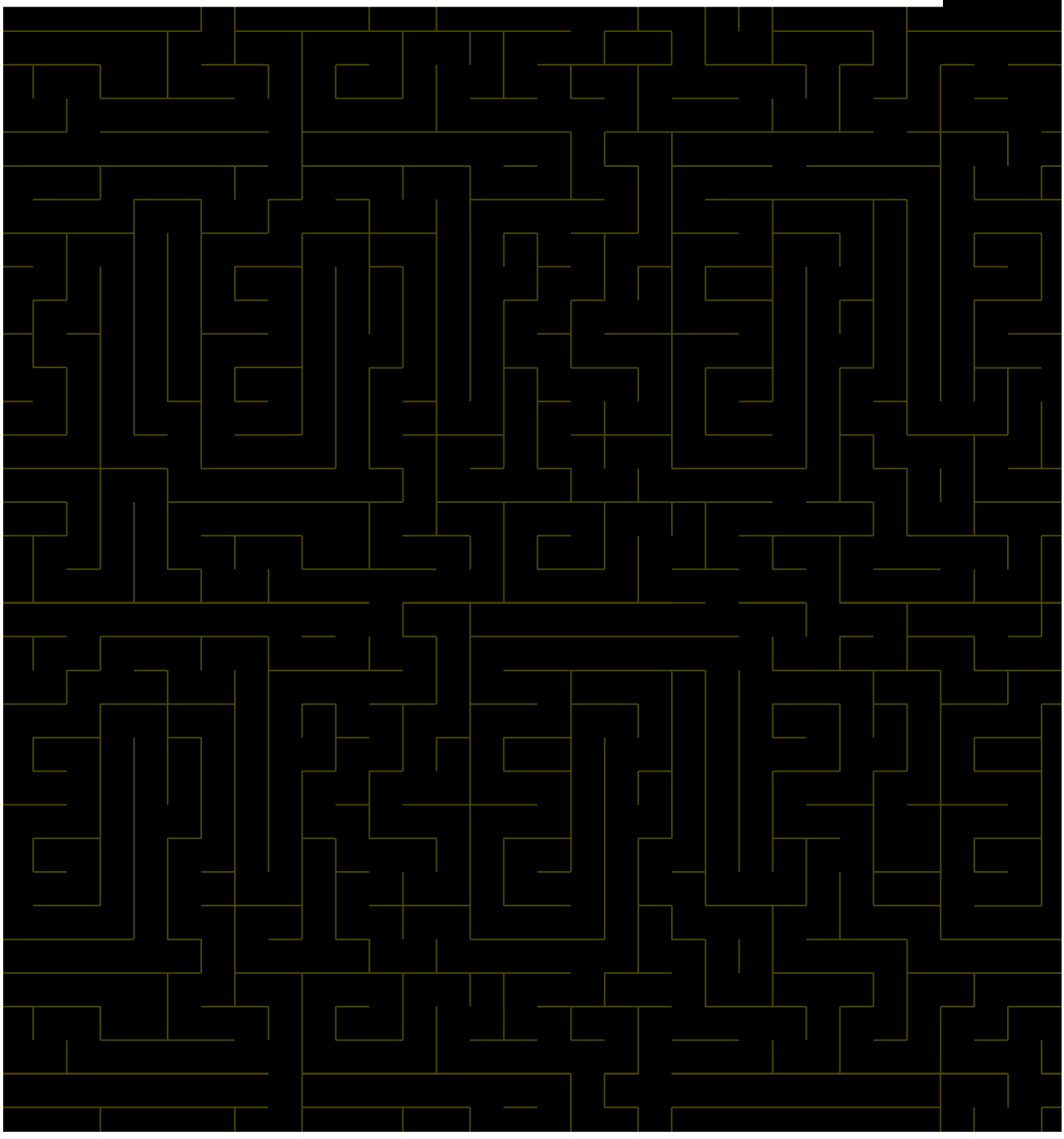
The impact of losing Native-centered services can be devastating for a community and can mean Native survivors ultimately do not get the services they need. The closure of Native-centered services can mean the next "nearest" services are functionally inaccessible for Indigenous survivors, particularly in rural communities, leaving survivors with no services for care or healing.

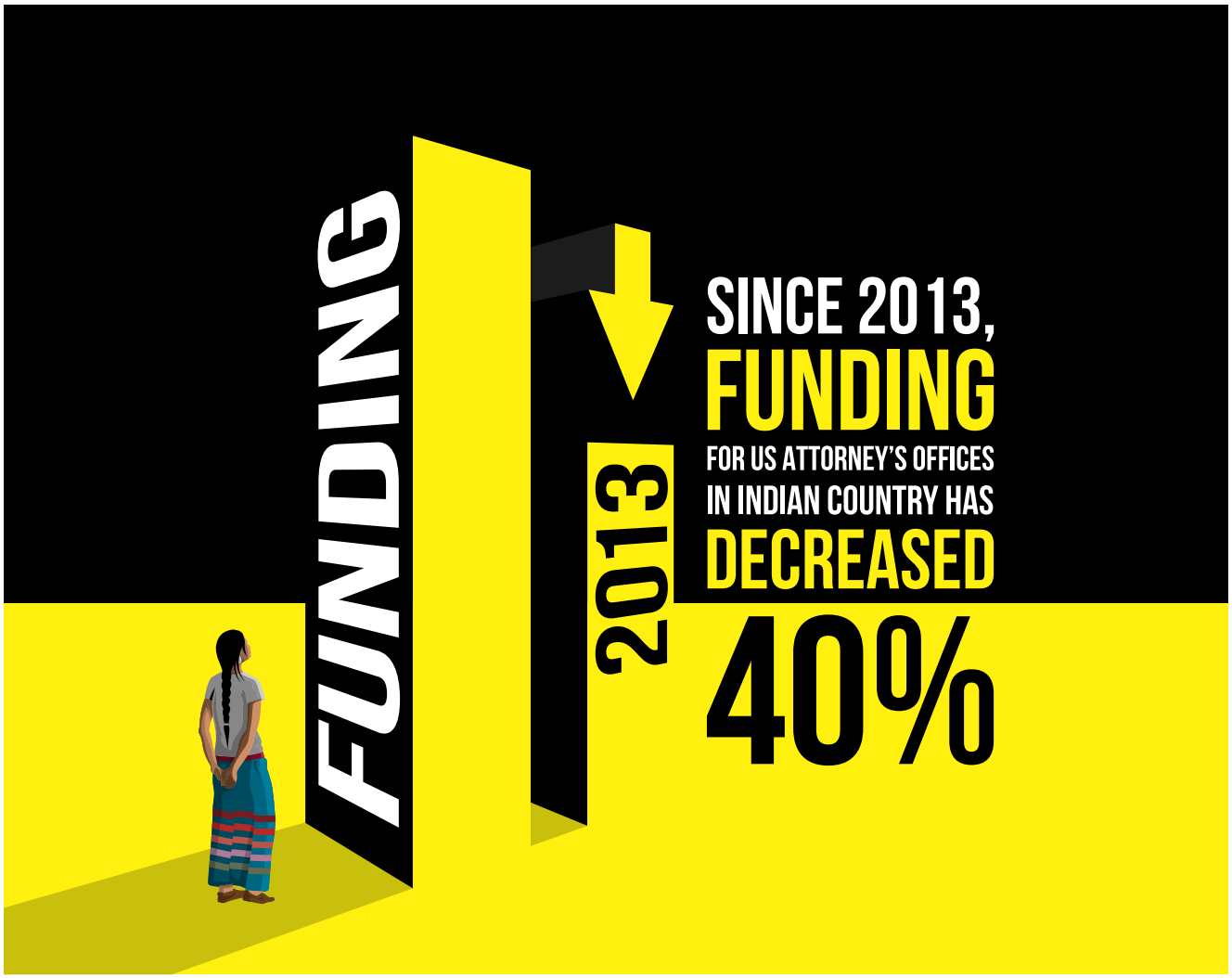
"IT WAS DEVASTATING WHEN THEY WERE DEFUNDING OUR PROGRAMS, I FELT LIKE WE GOT SHOT. WOMEN AND CHILDREN WERE SITTING OUTSIDE OUR SHELTER, WITH A PADLOCK ON THE DOOR BECAUSE WE HAD NO MONEY TO RUN IT, BUT THEY WOULD SIT AT THE BUILDING, BECAUSE THEY KNEW THAT THE SHELTER WAS A SAFETY NET. I WILL NEVER FORGET."

Interview (identity withheld), May 2021



CHAPTER 6: PROSECUTIONS





For different reasons and in different ways, none of the three justice systems – federal, state and tribal – is responding adequately to Indigenous survivors of sexual violence. The US government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence through underfunding, prohibiting tribal courts from trying non-Indian suspects for most crimes of sexual violence and limiting the custodial sentences which tribal courts can impose for any one offense. This, in turn, places prosecution responsibility onto federal and state (Public Law 280) attorneys, investigators and courthouses that are often hundreds of miles from Indian country.[153]

When jurisdiction falls to federal or state authorities and cases are pursued through the federal or state court system, Amnesty International's research found that American Indian and Alaska Native (AI/AN) women are often denied access to justice. Many tribes do not have the necessary financial resources to deliver justice to sexual assault survivors. Since 2013, both the total funding for US Attorney's Offices (USAOs) in Indian country and the number of attorneys responsible for Indian country prosecutions has decreased by 40%.[154]

Additionally, US authorities have consistently declined to prosecute a considerable amount of crime within Indian country. Between 2005 and 2009, USAOs declined to prosecute 46% of sexual assaults and 67% of sexual abuse cases in Indian country.[155] When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is often no further recourse for Indigenous survivors under criminal law within the USA and perpetrators can continue to perpetrate crimes with impunity.

GOVERNMENT RESPONSE AND INITIATIVES SINCE 2007

The Tribal Law and Order Act (TLOA) requires USAOs to designate an Assistant United States Attorney (AUSA) as a "tribal liaison" to facilitate communication and oversee response to crimes of sexual violence in Indian country. As of March 2016, there were 98 tribal liaisons working in 49 districts with Indian country jurisdiction to establish relationships with tribal communities.[156]

However, this new designation as a tribal liaison does not allow AUSAs to move other priorities aside to make room for the work needed to adequately fill this role. Many carry full-time caseloads outside of their work with tribes, meaning that they have to maintain communication with tribal officials, often involving significant travel time, while continuing to fulfill their original responsibilities for the US district that they serve. Unsurprisingly, many AUSAs do not adequately communicate with tribal prosecutors, authorities or victims and victims' families.

"IN OUR REVIEW OF DECLINATION LETTERS, WE FOUND TWO CASES IN WHICH BOTH THE INVESTIGATOR AND THE AUSA HAD LEFT THEIR ASSIGNMENTS BEFORE THE INVESTIGATION WAS COMPLETE. IN BOTH CASES, WE FOUND NO RECORD OF THE USAO HAVING DECLINED THE CASE OR HAVING NOTIFIED THE TRIBES THAT THE INVESTIGATOR AND AUSA HAD LEFT."

US Department of Justice, Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017

Some USAOs – with consent of the tribal nation – have implemented the Department's Special Assistant US Attorney (SAUSA) program. This program allows tribal prosecutors to serve as co-counsel with federal prosecutors on felony investigations and prosecutions. TLOA "authorized and encouraged" each USAO with Indian country jurisdiction to appoint a SAUSA to prosecute crimes in Indian country.

The SAUSA program is meant to enhance communication between tribal and federal authorities as well as provide tribal prosecutors with a greater understanding of federal prosecutorial procedures. As of September 2016, there were 22 SAUSAs working in Indian country serving nine of 49 USAO districts with Indian country jurisdiction.[157] Currently, the Office on Violence Against Women (OVW) and the Bureau of Justice Assistance (BJA) are only funding 15 tribes to partner with local USAOs on SAUSA projects.[158]

"Generally, the SAUSA program has strengthened the relationship between Federal and Tribal partners by creating an opportunity for tribal prosecutors to actively engage with AUSAs in the federal prosecutions arising from their respective Tribes. Likewise, SAUSAs assist AUSAs in understanding the unique challenges facing Tribes, while identifying areas of concern that require additional attention. Tribes that currently have an OVW or BJA-funded Tribal SAUSA on board indicate that it has improved the relationship and communication between the tribe and the USAO."

Letter to Amnesty International, US Department of Justice, 17 June 2021

The Department of Justice (DOJ) reports that tribes working with SAUSAs have indicated that these partnerships have improved the relationship between their tribe and the USAO.[159] While a small number of tribes can reap the benefits of this program, SAUSA program participation will likely remain low without broader awareness, uniform guidelines and adequate funding.[160]

IMPACT AND REMAINING CHALLENGES

AI/AN women face many obstacles when seeking justice for crimes committed against them and data shows that a substantial number of sexual assault cases in Indian country are not prosecuted. While there was a 10% decrease in declination rates following the passage of TLOA,[161] several factors still hinder efforts to improve prosecution rates.

In 2019, the most common reason why the DOJ declined to prosecute criminal cases in Indian country was "insufficient evidence" (79% of cases declined),[162] which includes "circumstances involving lack of evidence of criminal intent, weak or insufficient evidence, or witness issues."[163]

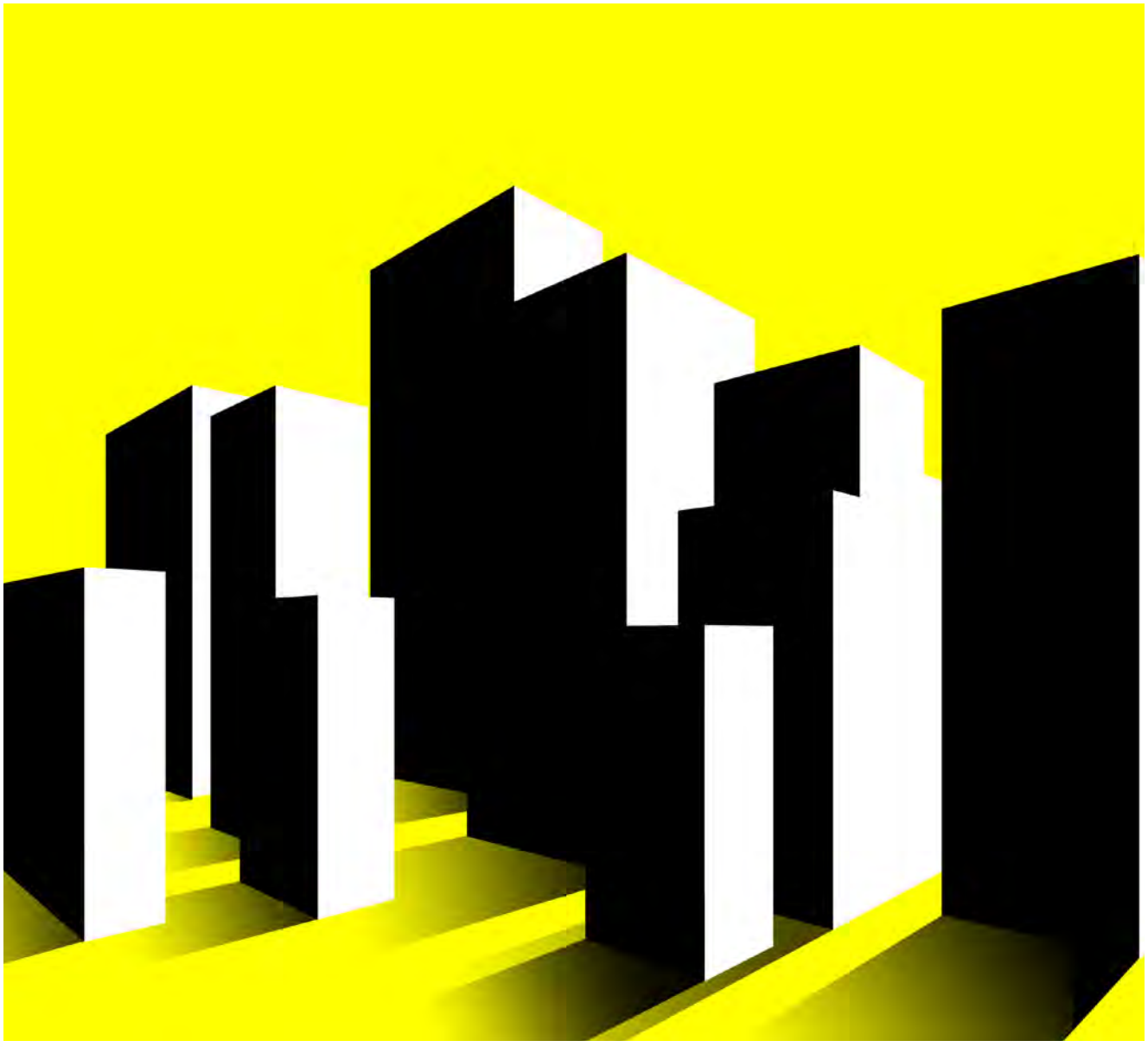
> **"UNLESS IT'S A WINNABLE CASE, PROSECUTORS ARE JUST DECLINING THEM. WHAT MESSAGE DOES THAT SEND TO A COMMUNITY THAT WANTS TO MAKE A CHANGE? [IT SAYS] YOU CAN DO THIS TO ME AND THERE WILL BE NO CONSEQUENCES. WE TELL OUR CHILDREN: JUST AVOID THAT HOUSE. WE TELL OUR WOMEN: DON'T GO OUT AFTER DARK."**

Interview with Tami Truett Jerue, Executive Director, Alaska Native Women's Resources Center, March 2021

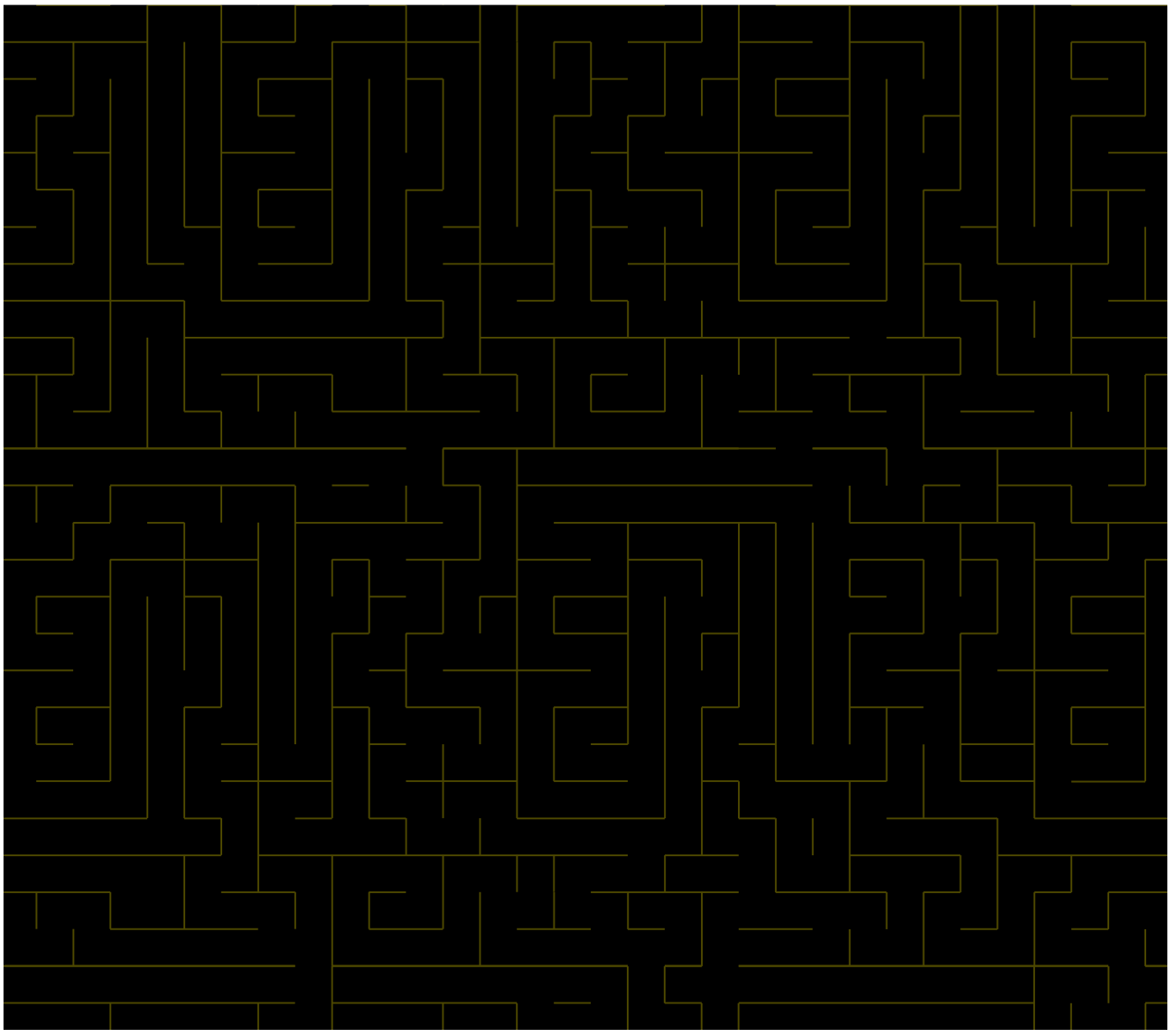
Confusion around jurisdictional boundaries means it is not always immediately clear whether a case should be prosecuted by a tribal prosecutor, a federal prosecutor or a state prosecutor. Federal trials for crimes occurring on tribal land reportedly often begin with a "mini-trial" on jurisdiction. To further confuse and delay matters, courts may take years to determine whether the land in question is tribal or not.

The restrictive nature of a tribal nation's ability to prosecute a crime under TLOA and the Violence Against Women Act (VAWA, 2013) results in a need for heightened response from federal and state prosecutors for crimes of sexual violence against AI/AN women. Yet, while the federal government continues to restrict tribal authority, save for in the narrow exceptions provided for in TLOA and VAWA (2013), it simultaneously declines a high number of sexual assault cases that are restricted to federal jurisdiction. This creates a scenario where tribes are often left unable to prosecute cases that the federal government will not prosecute.

Federal and state authorities continue to decline cases of sexual violence in Indian country, leaving survivors with no other option for redress. Instead of prioritizing Indian country cases, the DOJ continues to fall short of its promise to protect AI/AN women from violence. While, for those programs that do seem beneficial, like the SAUSA program, funding and participation remain low.



CHAPTER 7: CONCLUSION AND RECOMMENDATIONS



“TOGETHER, WE CALL FOR PRAYER AND HEALING FOR THE FAMILIES IN RESPONSE TO THIS VIOLENCE. BUT WE ALSO DEMAND MEANINGFUL LEGISLATIVE REFORMS THAT REMOVE BARRIERS TO SAFETY FOR INDIAN WOMEN BY RECOGNIZING AND STRENGTHENING THE SOVEREIGN ABILITY OF ALL TRIBAL NATIONS TO PROTECT INDIAN WOMEN AND THEIR CHILDREN.”

Lucy Simpson, Executive Director, National Indigenous Women’s Resource Center, 2021[164]

The high rates of sexual violence against Indigenous women in the USA is directly linked to the failure of authorities to bring those responsible for these crimes to justice. The erosion of tribal authority and chronic under-resourcing of tribal justice systems, law enforcement agencies and healthcare systems has perpetuated this injustice. Piecemeal attempts by authorities to address this crisis of sexual violence fall short of making meaningful changes to the high rates of sexual violence against Indigenous women.

The legal relationship that exists between the US federal government and tribes (trust responsibility) places on the US government a unique legal obligation to ensure the protection of the rights and wellbeing of American Indian and Alaska Native peoples. The federal government must honor this trust responsibility by removing the barriers to justice created by jurisdictional confusion and complexity and by putting an end to the erosion of tribal authority and the chronic under-resourcing of tribal law enforcement agencies, justice systems and healthcare systems.

Addressing sexual violence against American Indian and Alaska Native women requires a holistic and integrated approach. Amnesty International calls on authorities to recognize and respect tribal sovereignty and to protect the human rights of Indigenous women. In doing so, it draws on the legacy of groundbreaking work by American Indian and Alaska Native women in demanding justice and respect.

SUPPORTING INTERNATIONAL LAW AND US HUMAN RIGHTS LAW

1 The US government should ratify, without delay, the following international human rights treaties:

a. The Convention on the Elimination of All Forms of Discrimination against Women;
b. The International Covenant on Economic, Social and Cultural Rights;
c. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"); and
d. ILO Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries.

2 The US government should include information in its reports to UN treaty bodies on the implementation of US international legal obligations to respect, protect and fulfill the individual and collective rights of Indigenous peoples, including to prevent and provide protection from sexual violence against Indigenous women.

3 Federal, state and tribal authorities should ensure that they advance public policies to eliminate all forms of discrimination and violence against Indigenous women by endorsing and implementing relevant international human rights laws and standards.

4 Federal, state and tribal legislation and judicial systems should uphold international human rights standards at all levels, including: in the definition of crimes; the response to and thorough and impartial investigation of reports of rape or other acts of sexual violence; the prosecution of those suspected of such crimes in trials that conform to international fair trial standards; the appropriate punishment of those found guilty; and the guarantee to survivors of full reparations, including restitution, satisfaction, rehabilitation and guarantees of non-repetition.

UNTANGLING THE JURISDICTIONAL MAZE

5 The US Congress should recognize the inherent concurrent jurisdiction of tribal authorities over all crimes committed on tribal land, regardless of the tribal citizenship of the accused, including by legislatively overriding the US Supreme Court's decision in *Oliphant v. Suquamish*.

IMPROVING POLICING

6 Congress and federal and state authorities must take urgent steps to make available adequate resources to police forces in Indian country and Alaska Native villages. Particular attention should be paid to improving coverage in rural areas with poor transport and communications infrastructures.

7 All law enforcement officials should ensure that reports of sexual violence receive a prompt response, that effective steps are taken to protect survivors from further violence and that impartial and thorough investigations are undertaken.

8 All law enforcement agencies should cooperate with, and expect cooperation from, neighboring law enforcement bodies based on mutual respect and genuine collaboration to ensure the protection of survivors and those at risk of sexual violence and to ensure that perpetrators are brought to justice.

9 All law enforcement agencies should work closely with Indigenous women's organizations to develop and implement appropriate and effective investigation protocols for dealing with cases of sexual violence.

10 Human rights training programs for police and other officials should include training on sexual violence against women from the perspective of Indigenous women. Towards this end, training in cultural norms and practices for police officers should be subject to independent evaluation and devised in collaboration with Indigenous peoples, particularly Indigenous women. Training should also include the role of policing in implementing international human rights standards in practice and there must be robust codes of conduct, monitoring, enforcement, appropriate consequences for violations and accessible and transparent access to justice for victims when violations occur.

11 Federal authorities should end grant-based and competitive Indian country criminal justice funding in the Department of Justice and instead pool these monies to establish a permanent, recurring base funding system for tribal law enforcement and justice services. Procedures for obtaining federal funding must not be unduly complicated.

12 Congress should fund data collection, analysis and research on crimes of violence against American Indian and Alaska Native women. The methodologies applied must be developed in full consultation with affected Indigenous peoples, particularly Indigenous women, obtaining their free, prior and informed consent.

ENSURING PROPER HEALTHCARE AND SUPPORT SERVICES

13 The Indian Health Service (IHS) and other health service providers should ensure that all American Indian and Alaska Native women survivors of sexual violence have access to adequate and timely and comprehensive sexual and reproductive healthcare, including sexual assault forensic examinations, without charge to the survivor and at a facility within a reasonable distance. Transportation should be provided at no cost to the victim.

14 The IHS and other health service providers must provide the staff, resources and expertise to ensure the accurate, sensitive and confidential collection of evidence in cases of sexual violence and the secure storage of this evidence until it is handed over to law enforcement officials.

15 The IHS and other health service providers should ensure that survivors of sexual violence are offered gender-sensitive, culturally appropriate responses, including guaranteed access to sexual and reproductive health services and supplies, planned and administered in cooperation with Indigenous peoples, taking into account Indigenous peoples' social and cultural norms and traditional preventive care, healing practices and medicines and economic and geographic conditions, ensuring the full and effective participation of Indigenous women.

16 The IHS should, in consultation with tribal communities, review current methodologies to obtain data on sexual violence against Indigenous women and the provision of post-rape care, including sexual assault forensic examinations, to ensure that the data collected is comprehensive and accurate across IHS-operated and tribal-operated facilities. Further, the IHS must improve its oversight of its IHS-operated and tribal-operated facilities as set out in the 2020 Government Accountability Office recommendations.

17 The IHS should immediately implement across all IHS-operated and tribal-operated facilities standardized policies and protocols, in consultation with Indigenous women's organizations, for handling cases of sexual violence.

18 The IHS and other health service providers, and specifically all nurses, doctors and support staff, should be trained in sexual assault protocols, including screening for sexual violence, and in culturally appropriate skills to deal sensitively with Indigenous survivors of sexual violence.

19 The federal government should permanently increase funding for the IHS and to tribes that administer their own health services and provide mandatory and advance funding so that healthcare services do not stop when Congress fails to pass a timely budget or when the federal government shuts down.

20 Federal and state authorities must support and ensure adequate funding for support services, which should provide culturally appropriate, sensitive and non-discriminatory support.

21 The IHS should report annually regarding the implementation of sexual assault protocols and oversight of its regional offices and on the provision of care for survivors of sexual violence, including the availability and completion of sexual assault forensic examinations.

DELIVERING JUSTICE THROUGH PROSECUTIONS

22 The US Congress should amend the Indian Civil Rights Act to recognize the authority of tribal courts to impose penalties proportionate to the offenses within the context of a trial and sentencing process that conforms to international fair trial standards.

23 Prosecutors should thoroughly and impartially prosecute cases of sexual violence against Indigenous women and should be sufficiently resourced to ensure that the cases are treated with urgency and processed without undue delay.

24 Prosecutors in the different jurisdictions should provide each other with information on the status of cases of sexual violence against American Indian and Alaska Native women on a regular basis.

25 Any decision not to proceed with a case, together with the rationale for the decision, should be promptly communicated to the survivor of sexual violence and to other courts and prosecutors with jurisdiction.

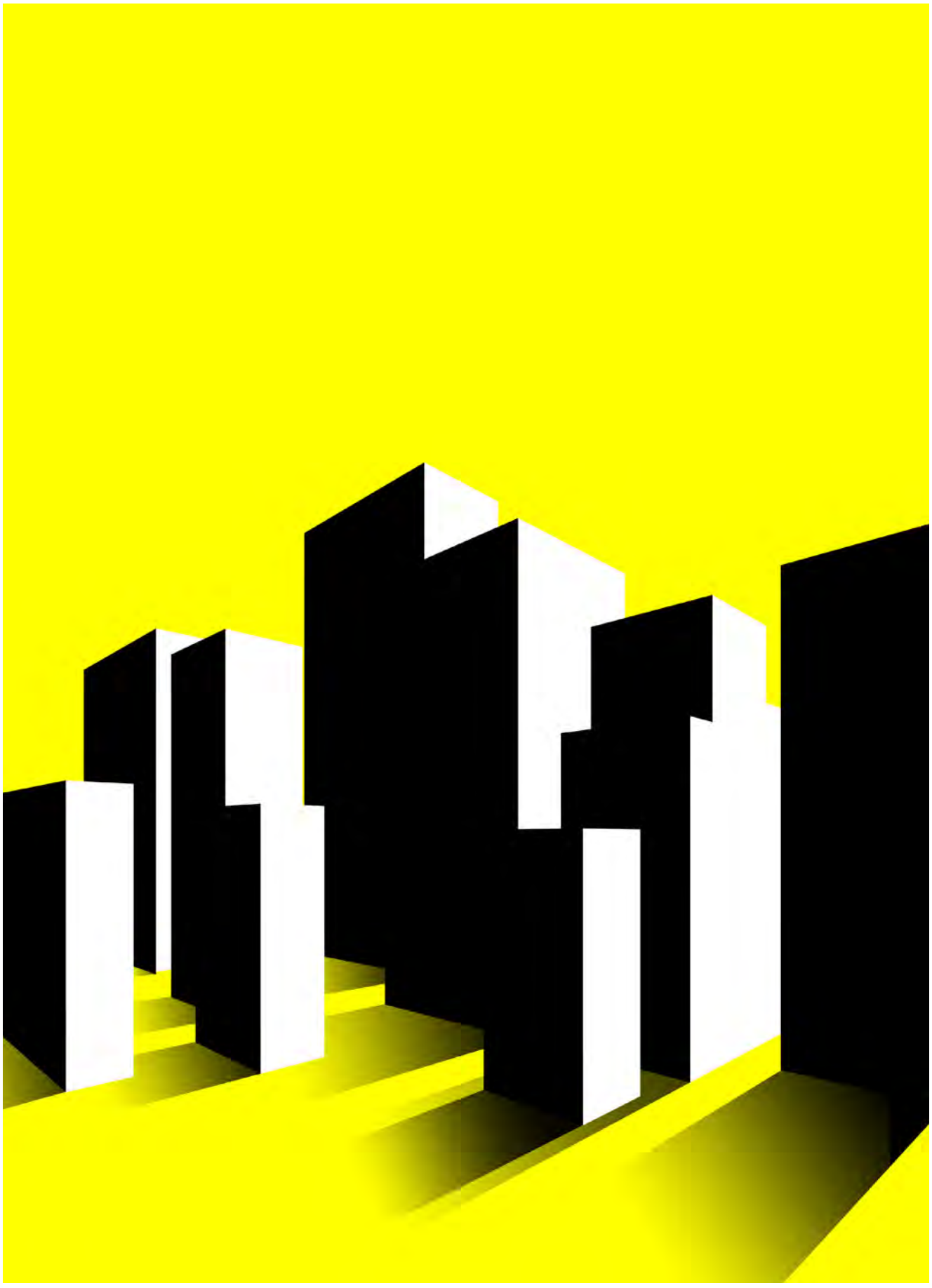
26 Federal authorities should permanently fund Special Assistant United States Attorneys to partner with tribal prosecutors for all interested tribal nations.

27 Federal and state prosecution and judicial authorities should take steps to ensure appropriate representation of Indigenous peoples, in particular women, in agencies responsible for the administration of justice in and around Indian country and Alaska Native villages.

28 Federal authorities should make available the necessary long-term, predictable funding and resources to tribal governments to develop and maintain tribal court and legal systems which comply with international human rights standards, including the right to a remedy, to non-discrimination and to fair trials, while also reflecting the cultural and social norms of their peoples.

29 The Department of Justice should keep data on cases of sexual violence against American Indian and Alaska Native women, including the Indigenous or other status or of victims and suspects and reasons why a case was declined. Tribal nations should be part of meaningful consultations to ensure proper data collection and sustained access to the data and it should be mandated that this data be shared with tribes in a timely manner.

30 The Department of Justice should report annually regarding sexual violence against American Indian and Alaska Native women and criminal justice responses.



ENDNOTES

[1] Federal Register, "Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 29 January 2021, federalregister.gov/documents/2021/01/29/2021-01606/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of

[2] US Census Bureau, The American Indian and Alaska Native Population: 2010, January 2012, census.gov/history/pdf/c2010br-10.pdf.

[3] Culturally appropriate services can include access to traditional healers, support groups or peer support, and counselling. Such longer-term support can be crucial in enabling survivors to navigate the justice system. While culturally appropriate services can take many forms, it is ultimately up to Indigenous people to define what these services look like in practice.

[4] Section 904 "[d]irects the National Institute of Justice to conduct a national baseline study to examine violence against women in Indian country. Requires the study to propose recommendations to improve the effectiveness of federal, state, tribal, and local responses to specified kinds of violence against Indian women", congress.gov/bill/109th-congress/house-bill/3402

[5] See Public Law 111-211, 124 Stat. 2258 § 251(b).

[6] US Department of Justice, Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017, oig.justice.gov/reports/2017/e1801.pdf

[7] National Institute of Justice, Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey, May 2016, ojp.gov/pdffiles1/nij/249736.pdf

[8] Not all states record or report racially disaggregated data on sexual assault victimizations; other states not listed here may also have highly disproportionate rates of sexual violence against AI/AN women.

[9] 2017 data shows Alaska Native women made up 42% of victims of sexual violence incidents. State of Alaska Rape Prevention Education Program, Sexual Violence in Alaska Data Resources, January 2019, mcdowellgroup.net/wp-content/uploads/2019/05/sexual-violence-data.pdf, p. 9. See U.S. Census Bureau, American Community Survey, 2017 American Community Survey 5-Year Estimates, Table B05003C, generated 10 March 2022, data.census.gov/cedsci/. See also U.S. Census Bureau; American Community Survey, 2017 American Community Survey 5-Year Estimates, Table DP05, generated 10 March 2022, data.census.gov/cedsci/

[10] 2019 data shows Native Americans as 9% of the state population, but 32.5% of rape victims. See South Dakota Department of Health, Sexual Violence in South

Dakota 2019 Data Report, March 2021, doh.sd.gov/documents/Prevention/2019_SD_SexualViolenceReport.pdf

[11] Amnesty International, Maze of injustice: The failure to protect Indigenous women from sexual violence in the USA, amnestyusa.org/pdfs/mazeofinjustice.pdf

[12] Boarding schools were part of a colonial policy to eradicate Indigenous cultures, languages and communities. Reports of physical and sexual violence in boarding schools, sometimes covering decades and hundreds of victims, show patterns of abuse long allowed by the US government.

[13] Tribal Court Clearinghouse, "Remarks of Kevin Gover at the Ceremony Acknowledging the 175th Anniversary of the BIA", 8 September 2000, tribal-institute.org/lists/kevin_gover.htm

[14] See Charles R. England, "A Look at the Indian Health Service Policy of Sterilization, 1972- 1976", undated, sdcedsv.org/articles/alookattheindianhealthservicepolicyofsterilization19721976/

[15] Government Accountability Office, Investigation of Allegations Concerning Indian Health Service, 1975, gao.gov/assets/hrd-77-3.pdf

[16] US Department of Health and Human Services, Indian Health Service Has Strengthened Patient Protection Policies but Must Fully Integrate Them Into Practice and Organizational Culture, December 2019, oig.hhs.gov/oei/reports/oei-06-19-00330.pdf

[17] National Indigenous Women's Resource Center, "Action Alert: Sign On to Declare May 5th as the National Day of Awareness for Missing and Murdered Native Women and Girls", 12 March 2021, niwrc.org/news/action-alert-sign-declare-may-5th-national-day-awareness-missing-and-murdered-native-women-and

[18] US Department of Justice, "Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month", 29 November 2019, justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american

[19] Centers for Disease Control and Prevention, "Leading Causes of Death – Females – Non-Hispanic American Indian or Alaska Native - United States 2017", 20 November 2019, cdc.gov/women/lcod/2017/nonhispanic-native/index.htm

[20] For example, projects near the Bakken oil field in North Dakota, or the Enbridge Line 3 Pipeline near the Minnesota Chippewa Tribe's bands have led to the creation of man camps which have been linked to increased rates of sexual violence against Indigenous women, among other violent crimes. See Ana Condes, Man Camps and Bad Men: Litigating Violence Against American Indian Women, 116 Nw. U. L. Rev. 515, 10 October 2021, scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1474&context=nulr and Jihan Dahanayaka, The McGill International Review, "Enbridge's Line 3 Pipeline: Mixing Oil and Sexual Violence", 1 November 2021,

mironline.ca/enbridges-line-3-pipeline-mixing-oil-and-sexual-violence/

[21] See, for example, UN Interagency Framework Team for Preventative Action, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict-Extractive Industries and Conflict, 2012, un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf and UN General Assembly, Report of the Special Rapporteur on the rights of indigenous people, James Anaya: Extractive industries operating within or near indigenous territories, 11 July 2011, ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf

[22] Statement of the Special Rapporteur to the Third Committee at the sixty-sixth session of the General Assembly, 17 October 2011, un.org/press/en/2011/gashc4013.doc.htm

[23] Available at: vimeo.com/537468230

[24] Angela Riley and Kristen Carpenter, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," Colorado Law Scholarly Commons, 2014, scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1065&context=articles

[25] Human Rights Committee, the expert committee that monitors states' implementation of the International Covenant on Civil and Political Rights, General Comment 31, refworld.org/docid/478b26ae2.html and Committee on the Elimination of Discrimination against Women, General Recommendation 19, ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

[26] General Recommendation 19 of the Committee on the Elimination of Discrimination against Women articulates ways in which sexual violence is a violation of rights contained in treaties which have been ratified by the USA.

[27] Article 7 of the International Covenant on Civil and Political Rights. See also Article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[28] Article 9(1) of the International Covenant on Civil and Political Rights and Article 3 of the Universal Declaration of Human Rights.

[29] Article 12 of the International Covenant on Economic, Social and Cultural Rights, which the USA has signed but not ratified.

[30] The USA has signed the Convention on the Elimination of All Forms of Discrimination against Women but not ratified it, meaning that it is obliged to refrain from acts that would defeat the object and purpose of this treaty.

[31] Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. See also General Recommendation 19 of the Committee on the Elimination of Discrimination against Women.

[32] Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[33] While this report applies an international human rights framework, the systemic failure

to respond to gender-based violence has also been found to violate US constitutional and statutory protections. See aclu.org/sites/default/files/field_document/aclu_memo-understanding_gender_biased_policing-2016_0.pdf

[34] See Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, 6 August 2015, refworld.org/pdfid/55f7eb1e4.pdf

[35] White House Office of the Press Secretary, "Remarks by the President at the White House Tribal Nations Conference", 16 December 2010, obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference

[36] US Department of State, "Announcement of U.S. Support for the United Nations Declaration on the rights of Indigenous Peoples", 12 January 2011, 2009-2017.state.gov/documents/organization/184099.pdf

[37] Committee on the Elimination of Racial Discrimination Concluding observations on the combined seventh to ninth periodic reports of the United States of America, 25 September 2014, digitallibrary.un.org/record/786227?ln=en

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THE NEVER-ENDING MAZE

CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA

More than half of all American Indian and Alaska Native women have experienced sexual violence in their lifetime; one in three have experienced rape. Since Amnesty International first reported on this issue in 2007, rates of violence against Indigenous women have not significantly changed, and the US government continues to fail to adequately prevent and respond to such violence.
This report details some of the factors that contribute the high rates of sexual violence against Indigenous women, and the barriers to justice that they continue to face. A complex jurisdictional maze, under-resourcing of law enforcement and medical services, and the inadequate response of justice systems to crimes of sexual violence are the primary obstacles survivors must navigate. This epidemic of sexual violence has been exacerbated by the US government's steady erosion of tribal authority. Sexual violence against Indigenous women violates a multitude of human rights, but it is not inevitable. The voices of Indigenous advocates throughout this report send a message of courage and hope that change can and will happen.

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MEMORANDUM

Date
June 3, 2022

To
Members of the Tribal Court-State Court Forum

From
Ann Gilmour, Attorney

Subject
Federal Indian Boarding School Initiative Investigative Report - May 2022

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour, Attorney
415-865-4207 phone
ann.gilmour@jud.ca.gov

In May the Department of the Interior released its initial Federal Indian Boarding School Initiative Investigative Report documenting the operation of boarding schools across 37 states operated by or financially supported by the United States Government between 1819 and 1969. The report concludes that these boarding schools were used as part of a "… policy of assimilation that coincided with Indian territorial dispossession." Boarding schools were also used for similar purposes in Canada and elsewhere.

At our meeting in August, Judge Lenzi will lead a discussion on the findings of the report. For the meeting on June 9, we will be placing this report in the broader context of various Truth and Reconciliation efforts, and particular the Truth and Reconciliation Commission of Canada which examined the history of Indian boarding schools in Canada and the lasting impacts of those boarding schools on Canada's Indigenous peoples. That report concluded with a number of calls to action including seventeen specifically related to "justice" in areas including child welfare and criminal law. Those justice related calls to action are attached.

Truth and Reconciliation
Commission of Canada

Truth and Reconciliation Commission of Canada: Calls to Action

between Aboriginal and non-Aboriginal communities, and to publish annual progress reports and assess long-term trends. Such efforts would focus on indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.

20. In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.

21. We call upon the federal government to provide sustainable funding for existing and new Aboriginal healing centres to address the physical, mental, emotional, and spiritual harms caused by residential schools, and to ensure that the funding of healing centres in Nunavut and the Northwest Territories is a priority.

22. We call upon those who can effect change within the Canadian health-care system to recognize the value of Aboriginal healing practices and use them in the treatment of Aboriginal patients in collaboration with Aboriginal healers and Elders where requested by Aboriginal patients.

23. We call upon all levels of government to:

    i. Increase the number of Aboriginal professionals working in the health-care field.

    ii. Ensure the retention of Aboriginal health-care providers in Aboriginal communities.

    iii. Provide cultural competency training for all health-care professionals.

24. We call upon medical and nursing schools in Canada to require all students to take a course dealing with Aboriginal health issues, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, and Indigenous teachings and practices. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Justice

25. We call upon the federal government to establish a written policy that reaffirms the independence of the Royal Canadian Mounted Police to investigate crimes in which the government has its own interest as a potential or real party in civil litigation.

26. We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

29. We call upon the parties and, in particular, the federal government, to work collaboratively with plaintiffs not included in the Indian Residential Schools Settlement Agreement to have disputed legal issues determined expeditiously on an agreed set of facts.

30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.

34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

    i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

    ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

    iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

    iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

35. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.

36. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.

37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.

38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

39. We call upon the federal government to develop a national plan to collect and publish data on the criminal victimization of Aboriginal people, including data related to homicide and family violence victimization.

40. We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.

41. We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls. The inquiry's mandate would include:

    i. Investigation into missing and murdered Aboriginal women and girls.

    ii. Links to the intergenerational legacy of residential schools.

42. We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.

Reconciliation

Canadian Governments and the *United Nations Declaration on the Rights of Indigenous People*

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.

Royal Proclamation and Covenant of Reconciliation

45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

Federal Indian Boarding School Initiative Investigative Report

May 2022

Assistant Secretary – Indian Affairs
Bryan Newland

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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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The Honorable Deb Haaland
Secretary of the Interior
Washington, DC 20240

Dear Madam Secretary:

On June 22, 2021, you issued a memorandum directing Department of the Interior (Department) agencies to coordinate an investigation into the Federal Indian boarding school system to examine the scope of the system, with a focus on the location of schools, burial sites, and identification of children who attended the schools. You also directed that I submit a report of our investigation by April 1, 2022.

In accordance with your direction, I am submitting to you the first Federal Indian Boarding School Initiative Investigative Report.

This report shows for the first time that between 1819 and 1969, the United States operated or supported 408 boarding schools across 37 states (or then-territories), including 21 schools in Alaska and 7 schools in Hawaii. This report identifies each of those schools by name and location, some of which operated across multiple sites.

This report confirms that the United States directly targeted American Indian, Alaska Native, and Native Hawaiian children in the pursuit of a policy of cultural assimilation that coincided with Indian territorial dispossession. It identifies the Federal Indian boarding schools that were used as a means for these ends, along with at least 53 burial sites for children across this system—with more site discoveries and data expected as we continue our research.

The report highlights some of the conditions these children endured at these schools and raises important questions about the short-term and long-term consequences of the Federal Indian boarding school system on Indian Tribes, Alaska Natives, and the Native Hawaiian Community. I am recommending further investigation to examine those consequences.

This report places the Federal Indian boarding school system in its historical context, explaining that the United States established this system as part of a broader objective to dispossess Indian Tribes, Alaska Native Villages, and the Native Hawaiian

Community of their territories to support the expansion of the United States. The Federal Indian boarding school policy was intentionally targeted at American Indian, Alaska Native, and Native Hawaiian children to assimilate them and, consequently, take their territories. I believe that this historical context is important to understanding the intent and scale of the Federal Indian boarding school system, and why it persisted for 150 years.

The ongoing COVID-19 pandemic and its resulting closures of Federal facilities hampered our ability to obtain and review a number of documents needed to answer all of the questions you posed to us in your June 22, 2021, memorandum. Our work was also made more difficult by the fact that the Department was operating under a continuing resolution for much of the past year, which limited the funds available to examine some issues. For those reasons, I am recommending further research under the appropriation authority Congress has granted under the fiscal year (FY) 2022 Consolidated Appropriations Act (P.L 117-103).

This report, as I see it, is only a first step to acknowledge the experiences of Federal Indian boarding school children. It notes a desire from people across Indian Country and the Native Hawaiian Community to share their individual and family experiences within the Federal Indian boarding school system and the resulting impacts today. This report also presents an opportunity for us to reorient our Federal policies to support the revitalization of Tribal languages and cultural practices. This reorientation of Federal policy is necessary to counteract nearly two centuries of Federal policies aimed at the destruction of Tribal languages and cultures. In turn, we can help begin a healing process for Indian Country and the Native Hawaiian Community, and the United States, from the Alaskan tundra to the Florida everglades, and everywhere in between.

Thank you, Madam Secretary, for your leadership to look at the legacy of Federal Indian boarding schools and to all who are working hard to complete this needed work.

Sincerely,

Bryan Newland
Assistant Secretary – Indian Affairs

In 1886, the Apache Wars ended when Chiricahua Apache leader Goyaałé (Geronimo) and his band surrendered to the United States.[1] Critical for westward expansion, the U.S. Senate passed the following resolution thereafter: "Resolved, That the Secretary of War be directed to communicate to the Senate all dispatches of General Miles referring to the surrender of Geronimo, and all instructions given to and correspondence with General Miles in reference to the same."[2] Although neither Geronimo nor others in his band were charged with or tried for crimes under U.S. courts, President Cleveland ordered for Geronimo and his band to be removed from present-day Arizona and held captive indefinitely in Florida as U.S. prisoners of war.[3] Under U.S. military control, surviving Apache children were forcibly removed from their families and shipped by train to the Carlisle Indian Industrial School in Pennsylvania.[4] Some children were later returned to their families as confinement of the Chiricahua Apache band extended across U.S. military installations.[5] Demonstrating that all Indians, including Indian children, hold a distinct political status in the United States,[6] some Apache children never returned—comprising one-fourth of Carlisle gravesites.[7]

[1] Annual Report to the Secretary of the Interior XLI (1886), Commissioner of Indian Affairs, [hereinafter ARCIA for [year]].

[2] S. Exec. Doc. No. 49-117 at 1 (1887).

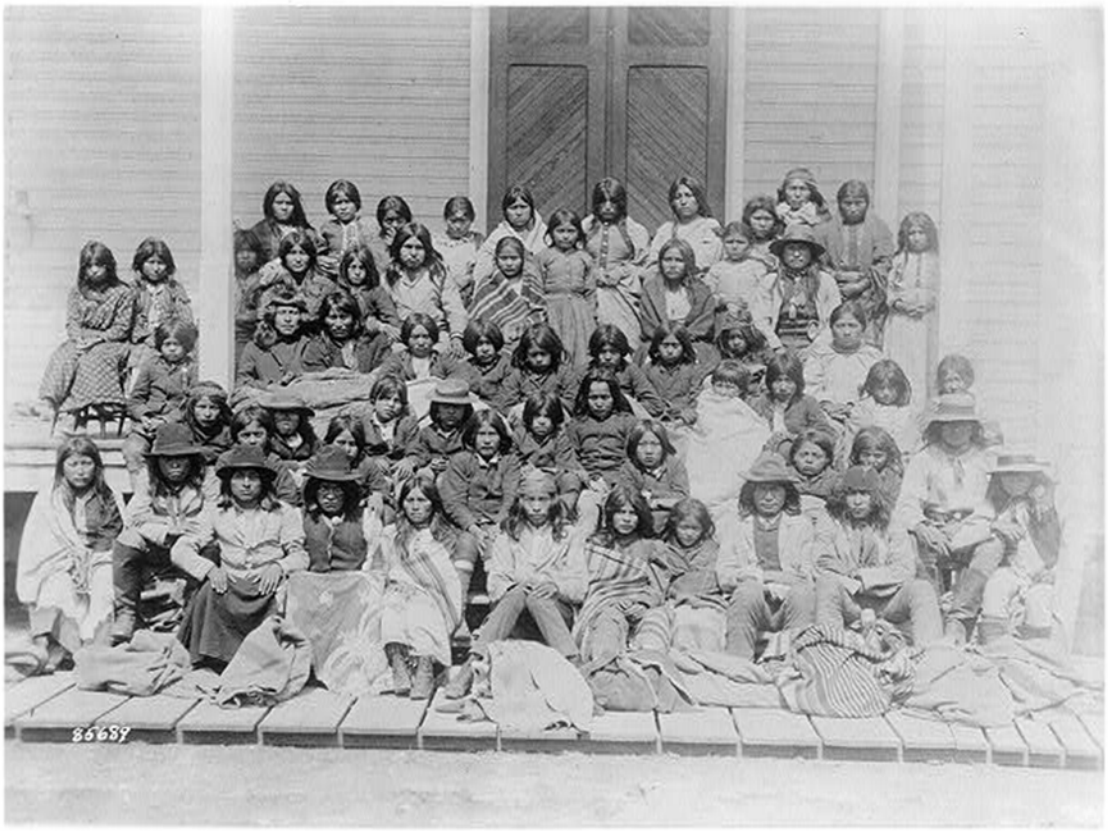
[3] ARCIA for 1886, at XLI.

[4] Letter from the Secretary of the Interior (Feb. 2, 1887), in S. Ex. Doc. No. 49-73, at 1 (1887); ARCIA for 1887, at XVII, 260 (detailing that the Apaches "'now confined at Fort Marion, Saint Augustine, Fla.,' are in the custody of the military branch of the Government").

[5] Act of Feb. 18, 1904, 33 Stat. 26; Act of June 28, 1902, 32 Stat. 467; Act of Mar. 16, 1896, 29 Stat. 64; Act of Feb. 12, 1895, 28 Stat. 658; Act of Aug. 6, 1894, 28 Stat. 238.

[6] Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

[7] Jacqueline Fear-Segal & Susan B. Rose, Carlisle Indian Industrial School, 152–185 (2016).



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[8] *Ciricahua Apaches at the Carlisle Indian School, Penna., 188-?: as they looked upon arrival at the School.* [Photograph]. (1885 or 1886). Library of Congress Prints and Photographs Division Washington, D.C..

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1. Federal Indian Boarding School Initiative

On June 22, 2021, the 54th Secretary of the Interior, Deb Haaland, announced the Federal Indian Boarding School Initiative, directing the Department of the Interior (Department) by Secretarial Memorandum, to undertake an investigation of the loss of human life and lasting consequences of the Federal Indian boarding school system.[9] For nearly two centuries, the Federal Government was responsible for operating or overseeing Indian boarding schools across the United States and its territories. Today, the Department is therefore uniquely positioned to assist in the effort to recover the histories of these institutions.

As described further below, the United States has unique treaty and trust responsibilities to Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community, including to protect Indian treaty rights and land and other assets. To support these political and legal obligations, the Department protects and stores critical archival records and other information relating to Indian Affairs. Important goals of the Federal Indian Boarding School Initiative include:

- Identifying Federal Indian boarding school facilities and sites;
- Identifying names and Tribal identities of Indian children who were placed in Federal Indian boarding schools;
- Identifying locations of marked and unmarked burial sites of remains of Indian children located at or near school facilities; and
- Incorporating Tribal and individual viewpoints, including those of descendants, on the experiences in, and impacts of, the Federal Indian boarding school system.

[9] *See, e.g.*, ARCIA for 1931, at 4 (noting that in Indian education "one kind of a philosophy and one kind of a system have been established a long time"); ARCIA for 1916, at 9, 10 (noting "require[ment] [for] "a system of schools," "a practical system of schools," "uniform course of study for all Indian schools marks a forward step in the educational system," "system of education"); ARCIA for 1899, at 437 (describing "The Development of the Indian School System"); ARCIA for 1886, at LX (documenting "control [of] the Indian school system," "supervision of the Indian school system," "history and development of the Indian school system," and "divisions and operation of the system"); Commissioner of Indian Affairs, Annual Report to the Secretary of War 61 (1846) (documenting the "system of education"); Commissioner of Indian Affairs, Annual Report to the Secretary of War 516 (1839) (noting "manual-labor system"); Report on Indian Affairs to the Secretary of War 61 (1828) (providing a statement showing the "number of Indian schools, where established, by whom, the number of Teachers, &c., the number of Pupils, and the amount annually allowed and paid to each by the Government," that is, documenting a system).

The Department conducted the initial investigative work in several phases. The first phase included the identification and collection of records and information related to the Department's oversight and implementation of the Federal Indian boarding school system. The Assistant Secretary – Indian Affairs Bryan Newland sought input from Tribal leaders on determining the nature and scope of any proposed sitework, addressing cultural concerns and the potential dissemination of sensitive information generated from the existing records or from future sitework activities, and for the future protection of burial sites and potential repatriation or disinterment of remains of children under Federal law, including the Native American Graves Protection and Repatriation Act (NAGPRA), and in coordination with other Federal agencies. Assistant Secretary Newland held formal consultations with Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community on November 17, 18, and 23, 2021. Under the supervision of Assistant Secretary Newland, the Department prepared this report on the initial investigation of the Federal Indian boarding school system.

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[10] *Santa Fe Indian School children on burros* [Photograph]. (ca. 1900). Shades of L.A. Collection, TESSA Digital Collections of the Los Angeles Public Library.

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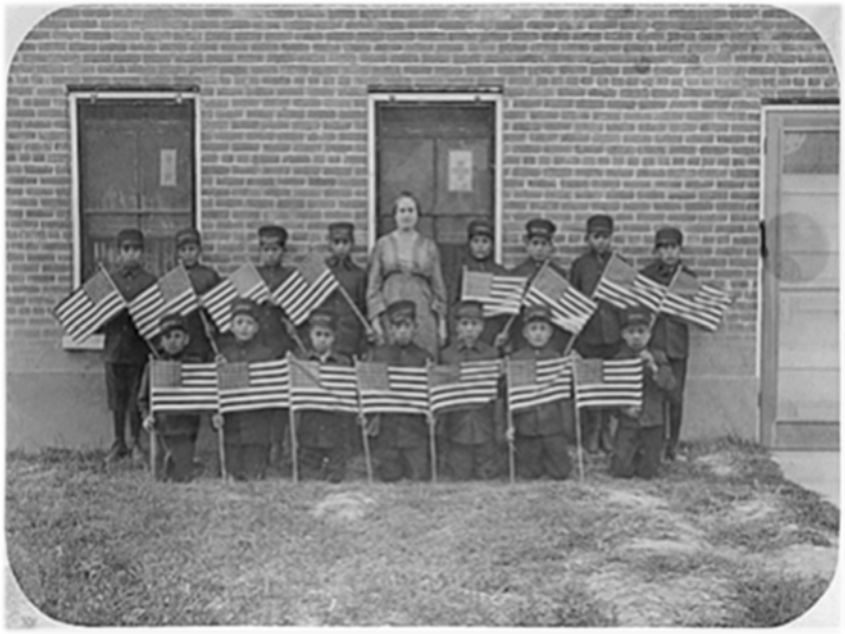
2. Executive Summary

 [11]

Pursuant to the Secretarial Memorandum issued on June 22, 2021, Assistant Secretary Newland is leading the Department's first investigation of the Federal Indian boarding school system. Federal records affirm that the United States targeted Indian and Native Hawaiian children as part of U.S.-Indian relations and U.S.-Native Hawaiian relations to enter the Federal Indian boarding school system, coinciding with Indian and Native Hawaiian territorial dispossession.

In analyzing records under its control, the Department developed an official list of Federal Indian boarding schools for the first time. The National Native American Boarding School Healing Coalition (NABS), in partnership via a Memorandum of Understanding with the Department, was instrumental in the sharing of information and records pertinent to Federal development of the list. [12] The Department has also started to identify locations

[11] *Very early class of young boys with flags at the Albuquerque Indian School* [Photograph]. Department of the Interior, Bureau of Indian Affairs, Albuquerque Indian School, 1947-ca. 1964 (most recent creator). (ca. 1895). National Archives (292873).

[12] Memorandum of Understanding Between the U.S. Department of the Interior and National Native American Boarding School Healing Coalition, Dec 7, 2021.

of marked and unmarked burial sites of remains of American Indian, Alaska Native, and Native Hawaiian children at or near school facilities.

The Department found that between 1819 to 1969, the Federal Indian boarding school system consisted of 408 Federal schools across 37 states or then-territories, including 21 schools in Alaska and 7 schools in Hawaii. Some individual Federal Indian boarding schools accounted for multiple sites. The 408 Federal Indian boarding schools accordingly comprised 431 specific sites. The list of the names and locations of these schools are included in this report at **Appendix A.** Summaries for each school are provided in **Appendix B.** Maps of each current state showing the schools are provided in **Appendix C.**

While Federal Indian boarding schools were as varied as the Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community they impacted and the geographic areas they were built in, the Department identified several common Federal Indian boarding school system features, described below, which remain under investigation.

For a school to qualify as a Federal Indian boarding school, for the purpose of this investigation, the institution must meet four criteria, as described in greater detail below, including whether the institution (1) provided on-site housing or overnight lodging; (2) was described in records as providing formal academic or vocational training and instruction; (3) was described in records as receiving Federal Government funds or other support; and (4) was operational before 1969.

Outside the scope of the Federal Indian Boarding School Initiative, the Department identified over 1,000 other Federal and non-Federal institutions, including Indian day schools, sanitariums, asylums, orphanages, and stand-alone dormitories that may have involved education of American Indian, Alaska Native, and Native Hawaiian people, mainly Indian children.

Initial results show that the earliest opening date of a Federal Indian boarding school in the system was 1801, and the latest opening date was 1969. However, the open date does not necessarily correspond to when the Federal Indian boarding school was first documented as receiving Federal support. The average number of Federal Indian boarding schools in current states with identified Federal Indian boarding schools was 11 schools. The greatest concentration of schools in the Federal Indian boarding school system was in present-day Oklahoma with 76 Federal Indian boarding schools (19 percent of total);

Arizona with 47 schools (12 percent of total); and New Mexico with 43 schools (11 percent of total).

Initial investigation results show that approximately 50 percent of Federal Indian boarding schools may have received support or involvement from a religious institution or organization, including funding, infrastructure, and personnel. As the U.S. Senate has recognized, funds from the 1819 Civilization Fund "were apportioned among those societies and individuals—usually missionary organizations—that had been prominent in the effort to 'civilize' the Indians."[13] The Federal Government at times paid religious institutions and organizations on a per capita basis for Indian children to enter the Federal Indian boarding schools that these institutions and organizations groups operated.

The investigation shows that the United States may have used monies held in Tribal trust accounts, including those based on cessions of Indian territories to the United States, to fund Indian children to attend Federal Indian boarding schools.

Based on initial data, the investigation shows that between 1820–1932 attendance, enrollment, and capacity of Federal institutions used for Indian education, including Federal Indian boarding schools, Federal Indian day schools, sanitariums, asylums, and orphanages was as follows:

- Attendance ranged from one child to over 1,000 children;
- Enrollment ranged from one child to over 1,200 children; and
- Capacity ranged from one child to over 1,700 children.

The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including but not limited to the following: (1) renaming Indian children from Indian to English names; (2) cutting hair of Indian children; (3) discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices; and (4) organizing Indian and Native Hawaiian children into units to perform military drills.

[13] Committee on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge, S. Rep. No. 91-501 at 143 (1969) [hereinafter Kennedy Report].

The Federal Indian boarding school system predominately included manual labor of American Indian, Alaska Native, and Native Hawaiian children as part of school curricula, including but not limited to the following: livestock and poultry raising; dairying; western agriculture production; fertilizing; lumbering; brick-making; cooking; garment-making; irrigation system development; and working on the railroad system.

The Federal Indian boarding school system focused on manual labor and vocational skills that left American Indian, Alaska Native, and Native Hawaiian graduates with employment options often irrelevant to the industrial U.S. economy, further disrupting Tribal economies.

Federal Indian boarding school rules were often enforced through punishment, including corporal punishment such as solitary confinement; flogging; withholding food; whipping; slapping; and cuffing. The Federal Indian boarding school system at times made older Indian children punish younger Indian children.

Of the 408 Federal Indian boarding schools, approximately 90 schools (22 percent) might still operate as educational facilities. However, not all 90 institutions still board children or are federally supported.

The Department's investigation has already identified marked or unmarked burial sites at approximately 53 different schools across the Federal Indian boarding school system. As the investigation continues, the Department expects the number of identified burial sites to increase. The composition of the approximate numbers of identified burial sites to date is as follows:

- Marked burial sites – 33
- Unmarked burial sites – 6
- Both marked and unmarked burial sites present at a school location – 14

The Department will not make public the specific locations of burial sites associated with the Federal Indian boarding school system in order to protect against well-documented grave-robbing, vandalism, and other disturbances to Indian burial sites.[14]

[14] *See, e.g.*, 43 C.F.R. § 10.3 (2022).

Based on the Federal Indian Boarding School Initiative investigation's initial analysis, approximately 19 Federal Indian boarding schools accounted for over 500 American Indian, Alaska Native, and Native Hawaiian child deaths. As the investigation continues, the Department expects the number of recorded deaths to increase.

This report also includes **Appendix D** with a summary of the views that Tribal leaders and representatives expressed during a formal Nation-to-Nation consultation process. During those consultations, Tribal leaders and representatives discussed the importance of protecting burial sites and strengthening protections under NAGPRA. Other consultation participants expressed the importance of accounting for the experiences of individuals and their families within the Federal Indian boarding school system, and advocated for the Federal Government to provide an opportunity for them to share those experiences on the record.

This report does not include an exhaustive list of all burial sites across the Federal Indian boarding school system, nor does this report identify the children who were placed in or attended Federal Indian boarding schools. The ongoing COVID-19 pandemic limited the Department's ability to access facilities containing important records relevant to this investigation. In addition, the Department was operating under a series of continuing resolutions from October 1, 2021, until the FY 2022 Consolidated Appropriations Act (P.L. 117-103) was enacted on March 15, 2022. The absence of specific appropriations limited the scope of the Department's ability to carry out some of the research needed for this investigation. Lastly, this report does not analyze the connection between the Federal Indian boarding school system and present-day experiences of people in Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community across the United States.

Assistant Secretary Newland makes eight recommendations to the Secretary of the Interior to fulfill the Federal Indian Boarding School Initiative, including producing a list of marked and unmarked burial sites at Federal Indian boarding schools and an approximation of the total amount of Federal funding used to support the Federal Indian boarding school system, including any monies that may have come from Tribal and individual Indian trust accounts held in trust by the United States. Assistant Secretary Newland ultimately concludes that further investigation is required to determine the legacy impacts of the Federal Indian boarding school system on American Indians, Alaska Natives, and Native Hawaiians today.

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3. Overarching Instructions

To carry out the Federal Indian Boarding School Initiative and consistent with the Secretarial Memorandum, the Assistant Secretary – Indian Affairs instructed those working on the report to:

Collect Relevant Data and Consult

The proposed scope of work and nature of the investigation include the collection of relevant information and consultations with Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community.

Assistant Secretary Newland led departmental action to survey historical records in Federal repositories, including the Department of the Interior Library and the American Indian Records Repository (AIRR) at the Bureau of Trust Funds Administration (BTFA), an agency within the Department, as described further below.

The objective of this investigation is to identify the Indian boarding schools that were a part of the Federal Indian boarding school system. While the investigation concentrates on records that give insight into residential facilities and plans—including enrollment records and vital statistics, correspondence, maps, photographs, and administrative reports—it gives particular emphasis to records relating to cemeteries or potential burial sites associated with a particular residential facility, which may later be

[15] *Mt Pleasant Indian Industrial Boarding School opening day* [Photograph]. (June 30, 1893). Courtesy of the Alice Littlefield Collection, Saginaw Chippewa Indian Tribe of Michigan, Ziibiwing Center of Anishinabe Culture & Lifeways.

used to assist in locating unidentified remains of American Indian, Alaska Native, and Native Hawaiian children. The comprehensive record assessment is intended to assist in later identifying the number of children that attended each Federal Indian boarding school and, where possible, their names and Tribal identities, and provide a basis for planning future sitework.

The Department's collection of views of Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community in consultations conducted as part of the investigation are included in **Appendix D**.

Following the initial stages of the investigation, the Department will reassess the needs and priorities of the investigation for completion, accounting for, in part (1) the availability of historical records in Federal repositories, authorities, and resources of various agencies in the Department to perform required work, and (2) recommendations of Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community, and Federal and non-Federal partners.

Involve Indian Tribes and other Department Bureaus and Offices

Tribal participation during the first stages of the Federal Indian Boarding School Initiative included obtaining oral and written comments from Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community during formal consultation sessions. The views collected in consultations conducted as part of the investigation are included in **Appendix D**.

Within the Department, the following Bureaus and Offices provide support for the Federal Indian Boarding School Initiative: Bureau of Indian Affairs (BIA); Bureau of Indian Education (BIE); Bureau of Land Management (BLM); BTFA; Department of the Interior Library; National Park Service (NPS); Office of the Assistant Secretary – Land and Minerals Management; Office of Native Hawaiian Relations; Secretary's Immediate Office; Office of the Assistant Secretary – Policy, Management and Budget; Office of the Solicitor; and the U.S. Geological Survey.

Address Tribal Concerns

Throughout the Federal Indian Boarding School Initiative, the Department engaged and consulted with Indian Tribes, Alaska Native Villages, Alaska Native Corporations, and the Native Hawaiian Community to incorporate their concerns in the investigation,

including, but not limited to, (1) the potential dissemination of sensitive information, (2) future protection of burial sites, and (3) the potential repatriation or disinterment of remains of children under applicable Federal law, including NAGPRA, and in coordination with other Federal agencies as relevant.

Handle Sensitive Information with Great Care

Moving into the next stages of the Federal Indian Boarding School Initiative, including future sitework, the Department will protect sensitive information obtained from the investigation including, but not limited to, identities of Federal Indian boarding school attendees, including names and Tribal identities, and locations of marked and unmarked burial sites, to the extent allowable by applicable law.

If the Department is able to disseminate sensitive information to Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community, or to Federal agencies responsible for repatriation or disinterment of remains of Indian children, then it shall address cultural concerns of Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community and ensure marked and unmarked burial sites are secure.

Engage Relevant Federal Agencies

As the Department is not the only Federal agency positioned to examine the Federal Indian boarding school system and its effects on American Indians, Alaska Natives, and Native Hawaiians, the Department is engaging and supporting sister Federal agencies with control of any records that may relate to the Federal Indian boarding school system, including records from the Department of Defense—as the successor agency to the War Department—and the Department of Health and Human Services.

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4. Data Collection Process and Review of Relevant Information

The Office of the Assistant Secretary – Indian Affairs oversees BIA, BIE, and BTFA. The BTFA provides fiduciary trust services for Tribal and individual Indian beneficiaries that earn royalty income and other monies from activities on federally managed lands. The BTFA is also responsible for maintaining Federal Indian records, including those at the AIRR. For the Federal Indian Boarding School Initiative investigation, BTFA established a Project Research Team to review relevant records. The Project Research Team included BTFA staff and volunteers from other Department bureaus, including BIA, NPS, and BLM. The Project Research Team process included identifying, screening, and preparing records from AIRR in Lenexa, Kansas; conducting initial and quality assurance reviews of the criteria research used to identify Federal Indian boarding schools; generating Federal Indian boarding school summaries from collected

[16] Lubken, Walter J. (n.d.). [Photograph of young female students outdoors on swing set at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

criteria data; and working with NABS under a Memorandum of Understanding to assist with criteria research used in the identification of Federal Indian boarding schools.[17]

The Department recognizes that the Federal Government and non-Federal entities operated or supported Indian boarding schools. As the Federal Indian Boarding School Initiative is focused on Indian boarding schools that received Federal oversight or support, the investigation examined records to develop the first official list of Federal Indian boarding schools. The official list may change as the investigation continues to find additional records that detail the Federal Indian boarding school system.

Research Methodology and Scope of Review

For the Federal Indian Boarding School Initiative, the Department, through BTFA, is identifying and examining Federal records in the Department of the Interior Library and AIRR. The AIRR includes retired Indian Affairs records from BIA agencies and BTFA offices across the Nation. Records from as far back as the 1700s include trust, education, and other historic Indian Affairs records.

The American Indian Records Repository (AIRR)

The AIRR is located in Lenexa, Kansas, which has 1.3 million cubic feet of underground storage space available for Federal records. The AIRR is located 80 to 90 feet underground and stores records in National Archives and Records Administration (NARA) archival-quality storage bays that total approximately 350,000 cubic feet. The AIRR contains a total of over 200,000 indexed boxes of Indian Affairs records. Each standard records center box holds one cubic foot of material; one cubic foot holds approximately 2,500 sheets of paper.

For the Federal Indian Boarding School Initiative, records review involves electronic screening of possible source boxes for any information about Federal Indian boarding schools within the AIRR. The research team applied pre-existing search processes and tools to initiate records research at AIRR. Specifically, the Box Index Search System (BISS) was utilized for overall queries and refinement to identify records associated with Federal Indian boarding schools.

[17] Memorandum of Understanding Between the U.S. Department of the Interior and National Native American Boarding School Healing Coalition, Dec 7, 2021.

Investigation Research Process

The general research process was as follows: A BISS query was completed to determine an initial potentially responsive box list that included 39,385 boxes (approximately 98,462,500 sheets of paper).

Continuing investigation actions will include on-site digitization of boxes or targeted files in the potentially responsive boxes. Records will be stored in the Department's Enterprise Records and Document Management System. When digitization is complete, remote review of the identified potentially responsive boxes will occur. As the first review from October 2021 involved keyword searches for known Indian boarding schools, a new search will be conducted following complete AIRR digitization of responsive boxes or files to identify any new Federal Indian boarding schools. Examination of additional responsive boxes and files will continue and follow the same process.

As AIRR digitization advances, BTFA research staff and Department volunteer staff will continue to review records and classify the information about Federal Indian boarding schools, with a focus on documents with responsive information about specific schools, attendees, attendee deaths, graves, and cemeteries. The BTFA is using an eDiscovery program to search and tag all digitized documents. The research process will continue until all boxes identified as having information potentially relevant to Federal Indian boarding schools are fully reviewed.

The Department is evaluating specific records for the Federal Indian Boarding School Initiative including but not limited to the following:

- Department of War Annual Reports of the Commissioner of Indian Affairs;
- Department of the Interior Annual Reports;
- Department of the Interior Routes to Indian Agencies and Schools with their Post Office and Telegraphic Addresses and Nearest Railroad Stations Reports;
- Department of the Interior Appropriations documents;
- Department of the Interior, National Park Service's National Register of Historic Places (school identification, location, and historical justification information);
- Department of the Interior Library records for initial specific school criteria;

- Works Progress Administration (a New Deal Agency) Reports; and
- Report With Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs Pursuant to H. Res. 689 (82nd Cong.) December 15, 1952 (1953).

Pursuant to its Memorandum of Understanding with NABS, the Department compared its Federal Indian boarding school list and materials with a list independently established by NABS to seek official identification of schools in the Federal Indian boarding school system. The BTFA research team and the NABS research team met weekly in working sessions to review and compare findings.

Ongoing investigation actions will include:

- Collaborating with NARA to identify other available records—including their locations, and potential resources required for future Initiative stages;
- Identifying records covering specific Federal Indian boarding schools and overall Indian boarding school system operation, and law and policy framework; and
- Reviewing Department resources, authorities, and specific potential uses for specialized documents or information, including photographs, student roster lists, and total funding expended on Federal Indian boarding schools, as well as creating maps and databases.

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5. Developing the Federal Indian Boarding School List

For the first time, the Department developed a historical official list of Federal Indian boarding schools. The Federal Indian Boarding School Initiative identified Indian boarding schools that received Federal oversight or support. The number and location(s) of Federal Indian boarding schools listed may increase as the investigation continues.

For an institution to classify as a Federal Indian boarding school for the Federal Indian Boarding School Initiative investigation, it must meet each of the following four criteria:

1. **Housing** – The institution has been described as providing on-site housing or overnight lodging. This includes dormitory, orphanage, asylum, residential, boarding, home, jail, and quarters.
2. **Education** – The institution has been described as providing formal academic or vocational training and instruction. This includes mission school, religious training,

[18] Lubken, Walter J. (n.d.). [Photograph of two young male students engaged in woodworking at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

industrial training school, manual labor school, academy, seminary, institute, boarding school, and day school.

3. **Federal Support** – The institution has been described as receiving Federal Government funds or other Federal support. This includes agency, independent, contract, mission, contract with white schools, government, semi-government, under superintendency, and land or buildings or funds or supplies or services provided.
4. **Timeframe** – The institution was operational before 1969 (prior to modern departmental Indian education programming including BIE).

If an institution satisfies all four criteria, it is categorized as a Federal Indian boarding school. As a result, an institution primarily operated or supported by a non-Federal entity could qualify as a Federal Indian boarding school if it met all four required criteria.

Most institutions that did not qualify as a Federal Indian boarding school failed to meet the "Housing" and "Federal Support" criteria. However, it is possible that an institution that does not currently meet the four criteria may do so in the future as additional records are identified, examined, and analyzed, or as the Department receives other information from Federal, non-Federal, or Tribal records.

The Department performed final quality control on the list of Federal Indian boarding schools to ensure each institution met the four criteria and to secure the accuracy of its first-ever list of Federal Indian boarding schools.

Housing Criterion

The Department defined the "housing" criterion as meaning the on-site boarding of any American Indian, Alaska Native, or Native Hawaiian children for education purposes. That is, the classification of a site as a Federal Indian boarding school did not depend on whether the school housed or lodged one child or hundreds.

Federal Support Criterion

The Department defined the "Federal support" criterion broadly, beyond direct Federal funding and building infrastructure. The types of support that may qualify as Federal support include the following:

- **Contractual**
  Securing funds for education and agricultural personnel for Indian boarding schools from the 1819 Civilization Fund.

- **Land**
  Acquisition of lands by congressional appropriation or private donation for the purposes of building and operating Federal Indian boarding schools.

- **Building and Infrastructure**
  Federally funded construction or deconstruction of Indian boarding school sites including new building, dismantling of usable materials, and the moving of used buildings or recycled building materials for Indian boarding school purposes.

  Federal transfer of new or surplus buildings for Federal Indian boarding school operations, including military installations and facilities.

  Federal renovation of Federal Indian boarding schools through the Works Progress Administration program.

- **Equipment and Supplies**
  Purchase of food, clothing, and education supplies—including farming equipment, livestock, and animals—with Federal appropriations.

- **Services**
  Provision of services including medical care or education. For example, the Department determined that the Federal provision of military personnel to teach Native Hawaiian children at select schools in Hawaii following acquisition of the islands as a territory but prior to statehood qualified as Federal support. Also, the Department considered Federal provision of medical personnel to Indian boarding schools operated by non-Federal entities to be Federal support.

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6. U.S. Law and Policy Framework: Indian Territorial Dispossession and Indian Assimilation

 [19]

"Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians … reflects the rise and fall in our democratic faith."[20]

– Felix S. Cohen, 1953.

To examine the Federal Indian boarding school system, the Department spotlights the following aspects of Federal Indian law and policy.

The Continental Congress, Congress of the Confederation, and United States recognized Indian Affairs as a main function of a national government.[21] In engaging Indian Tribes, "separate sovereigns pre-existing the Constitution,"[22] and later Alaska

[19] Choate, J. N., *Carlisle Indian School student body around 1885, with the Superintendent's House in background*. [Photograph]. (1880-1889). Dickinson College Archives & Special Collections.

[20] Felix S. Cohen, The Erosion of Indian Rights, 62 Yale L.J. 348, 390 (1953).

[21] See Journals of the Continental Congress, Vol. 2, 93, 174–76 (1775); National Records and Archives Service, General Services Administration, Ratified Indian Treaties 1722–1869, 1 (1973); U.S. Const. art. I, § 8.

[22] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1977).

Native Villages and the Kingdom of Hawaii, the United States pursued a twin policy: Indian territorial dispossession and Indian assimilation, including through education.

The U.S. Senate later explained that twin policy as follows:

> Beginning with President Washington, the stated policy of the Federal Government was to replace the Indian's culture with our own. This was considered "advisable" as the cheapest and safest way of subduing the Indians, of providing a safe habitat for the country's white inhabitants, of helping the whites acquire desirable land, and of changing the Indian's economy so that he would be content with less land. Education was a weapon by which these goals were to be accomplished.[23]

In 1803, President Thomas Jefferson delivered a Confidential Message to Congress on Indian Policy explaining a strategy to dispossess Indian Tribes of their territories in part by assimilation. According to President Jefferson, a policy of assimilation would make it easier and less costly in lives and funding for the United States to separate Indian Tribes from their territories.[24] President Jefferson described two means "to provide an extension of territory which the rapid increase of our numbers will call for."[25] The first was to advance an assimilation policy directed at Indian children to discourage nomadic practices and adopt sedentary practices dominated by western agriculture development:

> To encourage them to abandon hunting, to apply to the raising stock, to agriculture, and domestic manufacture, and thereby prove to themselves that less land and labor will maintain them in this better than in their former mode of living. The extensive forests necessary in the hunting life will then become useless, and they will see advantage in exchanging them for the means of improving their farms and of increasing their domestic comforts.[26]

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[23] Kennedy Report, at 143.

[24] President Thomas Jefferson, Confidential Message to Congress Concerning Relations with the Indians (Jan. 18, 1803), National Archives and Records Administration, Record Group 233, Records of the U.S. House of Representatives, Presidential Messages, 1791-1861, President's Messages from the 7th Congress [hereinafter Confidential Message].

[25] Confidential Message.

[26] Confidential Message.

The second, to be executed alongside the assimilation policy, was to encourage Indian Tribes to purchase goods on credit so as to likely fall into debt, which would cause Indian Tribes to cede their lands to the United States—with the proceeds of such cessions, as described further below, predominately funding the Federal Indian boarding school system.[27] As President Jefferson said in an "unofficial, & private" capacity in order to "with safety give … a more extensive view of our policy respecting the Indians":

> [W]e wish to draw them to agriculture, to spinning & weaving. … when they withdraw themselves to the culture of a small piece of land, they will perceive [sic] how useless to them are their extensive forests, *and will be willing to pare them off from time to time in exchange for necessaries for their farms & families. to promote this disposition to exchange lands which they have to spare & we want, for necessaries, which we have to spare & they want, we shall push our trading houses, and be glad to see the good & influential individuals among them run in debt,* because we observe that when these debts get beyond what the individuals can pay, they become willing to lop th[em off] by a cession of lands.[28]

As the United States developed, this two-fold approach informed Federal Indian law and policy.

The U.S. Constitution, ratified and adopted in 1788, expressly names "Indian Tribes" and "Indians."[29] The United States has since recognized the sovereign political status of Indian Tribes and Alaska Native Villages and the accompanying Nation-to-Nation relationship with them for centuries.[30]

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[27] Confidential Message.

[28] Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), in The Papers of Thomas Jefferson, Vol. 39, 13 November 1802–3 March 1803 (Barbara B. Oberg ed.) at 589–593 (2012) (emphasis added).

[29] U.S. Const. art. I, §§ 2, 8; see Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014); Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

[30] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("The treaties and laws of the United States contemplate . . . that all intercourse with [Indians] shall be carried on exclusively by the government of the union").

It is well settled that the authority of the United States in regards to Indian Affairs is grounded in the U.S. Constitution. Specifically:

- Article I, Section 8, Clause II, reserving for the Federal Government the power to make war.
- Article II, Section 2, Clause II, reserving for the Federal Government the power to make treaties.
- Article I, Section 8, Clause III, reserving for the Federal Government the power to regulate commerce with the Indian Tribes.

The U.S. Supreme Court has recognized that because Indian Affairs were also traditionally considered aspects of American military and foreign policy, Congress' legislative authority rests in part, not only upon "'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'"[31]

As the Court has said, "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians."[32] The Court has consistently described Congress' powers to legislate in respect to Indian Tribes as "plenary and exclusive."[33] While extending to all legislative measures relating to Indian Tribes and Alaska Native Villages, such powers are not absolute.[34]

Two centuries of Supreme Court case law establish there is an "undisputed existence of a general trust relationship between the United States and the Indian people."[35] The Federal Government, following "a humane and self-imposed policy …, has charged itself with moral obligations of the highest responsibility and trust"[36] obligations "to the fulfillment of which the national honor has been committed."[37] The Court has recognized that "[t]hroughout the history of the Indian trust relationship, … the organization and

[31] United States v. Lara, 541 U.S. 193, 200 (2004).

[32] Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[33] United States v. Lara, 541 U.S. 193, 200 (2004).

[34] United States v. Creek Nation, 295 U.S. 103, 109–110 (1935).

[35] United States v. Mitchell, 463 U.S. 206, 225 (1983).

[36] Seminole Nation v. United States, 316 U.S. 286, 296–297 (1942).

[37] Heckman v. United States, 224 U.S. 413, 437 (1912).

management of the trust is a sovereign function subject to the plenary authority of Congress."[38] "Because the Indian trust relationship represents an exercise of that authority," the Supreme Court has "explained that the Government 'has a real and direct interest' in the guardianship it exercises over the Indian [T]ribes; 'the interest is one which is vested in it as a sovereign.'"[39]

On Indian reservations, outside of Alaska, "the government would provide 'only sufficient land for their actual occupancy … divid[ed] among them in severalty … and *in lieu of money annuities* … stock animals, agricultural implements, mechanic shops, tools and materials, and manual labor schools for the industrial and mental education of their youth.'"[40] The reservations were, "in effect, envisioned as schools for civilization, in which Indians under the control of the agent would be groomed for assimilation."[41]

This report considers the intergenerational impact of the Federal Indian boarding school system in light of the laws and policies that gave that system form, which derived from Constitutional and pre-Constitutional powers establishing the United States' unique political relationships with Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community as distinct and sovereign political entities.

[38] United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011).

[39] Id. (quoting United States v. Minnesota, 270 U.S. 181, 194 (1926)).

[40] ARCIA for 1858, at 7 (emphasis added).

[41] Cohen's Handbook of Federal Indian Law § 1.03 (Nell Jessup Newton ed., 2019) (citing United States v. Clapox, 35 F. 575, 577 (D. Or. 1888)).

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6.1 U.S. War-Making Power: The War Department's Historic Role in Indian Affairs

"And, indeed, if it be the design of Providence to extirpate these savages in order to make room for the cultivators of the earth, it seems not improbable that rum may be the appointed means." – Benjamin Franklin.[43]

Congress acknowledged that from "the beginning, Federal policy toward the Indian was based on the desire to dispossess him of his land. Education policy was a function of our land policy."[44]

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[42] Department of the Interior, Bureau of Indian Affairs, Albuquerque Indian School, 1947-ca. 1964 (most recent creator). (1900). *Early class of younger girls in school uniform at the Albuquerque Indian School* [Photograph]. National Archives (292874).

[43] Benjamin Franklin, Autobiography of Benjamin Franklin 225 (Frank Woodward Pine, ed.) (1916).

[44] Kennedy Report, at 142; see also Northwest Ordinance of 1787, art. III (Jul. 13, 1787) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools, and the means of education, shall be forever encouraged."), re-enacted as Act of Aug. 7, 1789, Ch. 8, 1 Stat. 50 (1789).

Although formal Nation-to-Nation relations between the United States and Indian Tribes predate the Constitution, the provision of education to Indians by the Federal Government begins with the creation of the War Department. The first law of Congress relating to Indians was that of creating the War Department in 1789, which entrusted the Secretary of War with responsibility for such duties relative to Indian Affairs as the President should entrust to him.[45] Congress enacted the first explicit appropriation for Indian Affairs in the Act of December 23, 1791, which appropriated funds for the Department of War "for defraying all expenses incident to the Indian department, and for defraying the expenses incurred in the defensive protection of the frontiers against the Indians … ."[46]

The policy of the Federal Government soon after expressed support for Federal and non-Federal education of Indians. In President Jefferson's first address to Congress in 1801, he described how Indian assimilation policy was central to Federal policy:

> Among our Indian neighbors also, a spirit of peace and friendship generally prevails and I am happy to inform you that the continued efforts to introduce among them the implements and the practice of husbandry, and of the household arts, have not been without success; that they are becoming more and more sensible of the superiority of this dependence for clothing and subsistence over the precarious resources of hunting and fishing… .[47]

Starting in 1802, Congress authorized appropriations of up to $15,000 annually "to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship" by promising funding, goods, livestock and animals, and staffing resources, thus advancing the public responsibility to Indian education.[48]

In 1817, the United States began more clearly developing its policy of assimilation through education. President James Monroe advanced that "[w]ith the Indian tribes it is our duty to cultivate friendly relations and to act with kindness and liberality in all our

[45] Act of Aug. 7, 1789, Ch. 7, 1 Stat. 49 (establishing the Department of War).

[46] Act of Dec. 23, 1791, Ch. 3, Sec. 4, 1 Stat. 226, 228. The amounts so appropriated totaled $76,764.19. Id.

[47] President Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), in A Compilation of the Messages and Papers of the Presidents Prepared under the Direction of the Joint Committee on Printing, of the House and Senate, Pursuant to an Act of the Fifty-Second Congress of the United States, 314 (1897).

[48] Act of Mar. 30, 1802, Ch. 3, Sec. 13, 2 Stat. 139, 143; Kennedy Report, at 143.

transactions. Equally proper is it to persevere in our efforts to extend to them the advantages of civilization."[49]

Congress then laid the groundwork for a general system of Indian education by enacting the Civilization Fund Act in 1819.[50] The purpose of the Act was "providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization."[51]

To accomplish the Act's mission, Congress authorized the President:

> [I]n every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons of good moral character to instruct [such Indians] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before Congress.[52]

To carry the Act's provisions into effect, Congress appropriated an annual sum of $10,000 and further required an annual report of the proceedings adopted to execute the Act.[53] The funds annually appropriated under the Act were often apportioned to various religious institutions and organizations until Congress repealed the annual appropriation in 1873.[54]

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[49] Inaugural Address of James Monroe, President of the United States, March 4, 1817, in American State Papers: Foreign Affairs Vol. 4 at 128.

[50] Act of March 3, 1819, Ch. 85, 3 Stat. 516, codified at 25 U.S.C. § 271 (2020).

[51] 25 U.S.C. § 271 (2020).

[52] Id.

[53] Id.

[54] Act of Feb. 14, 1873, c. 138, 17 Stat. 437, 461.

In 1824, Secretary of War John C. Calhoun established the position of Superintendent of Indian Affairs within the War Department to formalize the administration of Indian Affairs, which had supervisory responsibilities for the Federal Indian boarding school system.[55] The duties of the Superintendent included administering the Civilization Fund.[56] The Superintendent reported annually to the Secretary of War from 1825 to 1832.[57] In 1832, Congress established the office of Commissioner of Indian Affairs under the direction of the Secretary of War and subject to Presidential regulation, with responsibility for the direction and management of all Indian Affairs and all matters arising out of Indian relations.[58] The Commissioner, a precursor role to the Assistant Secretary – Indian Affairs,[59] was appointed by the President with the advice and consent of the Senate.[60] From 1832 to 1849, the Commissioners of Indian Affairs provided annual reports to the Secretary of War.

In 1849, Congress enacted legislation that established the Department and transferred Indian Affairs from military to civil control.[61] The act directed the Secretary of the Interior to "exercise the supervisory and appellate powers now exercised by the Secretary of War Department, in relation to all the acts of the Commissioner of Indian Affairs."[62] Congress routinely debated about the practicality of transferring Indian Affairs back to the War Department. "The question whether the Indian bureau should be placed under the War Department or retained in the Department of the Interior is one of considerable importance and both sides have very warm advocates."[63] The heads of the Commissioners of Indian Affairs reported annually to the Secretary of the Interior from 1849 to 1932.

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[55] See Letter from Secretary of War John C. Calhoun to Thomas L. McKenney (Mar. 11, 1824), in H. Doc. No. 19–146 at 6 (1826); see also Letter from Thomas L. McKenney to James Madison (Mar. 20, 1824) ("I am again entrusted with a Government trust. I have had assigned to me, in subordination to the Secy. of War, the Indian bureau, (a new arrangement) which takes in all that relates to our intercourse with these people."), in The Papers of James Madison, Retirement Series, VOL. 3 (David B. Mattern, et al, ed.).

[56] Act of March 3, 1819, Ch. 85, 3 Stat. 516.

[57] Felix Cohen, Handbook of Federal Indian Law 11 (1941).

[58] Act of July 9, 1832, Ch. 174, § 1, 4 Stat. 564.

[59] The position of the Assistant Secretary – Indian Affairs was established by Secretarial Order No. 3010 (Sept. 26, 1977). 96 Interior Dec. 1, 7 (1988). See also Nomination of the Assistant Secretary of the Interior for Indian Affairs, Hearings before the United States Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977).

[60] Act of July 9, 1832, Ch. 174, § 1, 4 Stat. 564.

[61] Act of March 3, 1849, Ch. 108, 9 Stat. 395.

[62] Act of March 3, 1849, Ch. 108, § 5, 9 Stat. 395.

[63] S. Rep. No. 39-156, at 3–8 (1867).

After responsibility for the administration of Indian Affairs was transferred to the Department, Indian police[64] supported the removal of Indian children and their placement in the Federal Indian boarding school system. In 1886, for example, U.S. Indian Agent Fletcher J. Cowart described the effort by Indian police to forcibly remove Mescalero and Jicarilla Apache children from their homes and furnish them to the Federal Indian boarding school system:

> I found the attendance at the boarding school about half of what it should be, and at once set about increasing it to the full capacity of the accommodation. This I found extremely difficult. When called upon for children, the chiefs, almost without exception, declared there were none suitable for school in their camps. Everything in the way of persuasion and argument having failed, it became necessary to visit the camps unexpectedly with a detachment of Indian police, and seize such children as were proper and take them away to school, willing or unwilling. Some hurried their children off to the mountains or hid them away in camp, and the Indian police had to chase and capture them like so many wild rabbits.[65]

"The hope for the effective work lies with the children … School facilities should be enlarged, the children divorced from [nomadic] camp life, and with a plain English education instructed well in farm or mechanical labor."[66]

Despite the official transfer from military to civil control, Congress continued to empower the President and War Department to continue support for the Federal Indian boarding school system with select jurisdiction, infrastructure, and personnel, including through statutory provisions such as the following:

- The President may detail officers of the United States Army to act as Indian agents at such agencies as in the

[64] See United States v. Mullin, 71 F. 682, 687 (D.C. Neb. 1895) ("The Indian police is a force organized under rules and regulations adopted by the interior department, the agent being commander thereof, and is the ordinary means relied upon by the agent and the department for enforcing the orders of the department, for keeping peace upon the reservation, and otherwise enforcing obedience to the laws of the United States and the regulations of the department of the interior in force upon the reservation.").

[65] ARCIA for 1886, at 199.

[66] ARCIA for 1886, at 202.

opinion of the President may require the presence of any Army officer, and while acting as Indian agents such officers shall be under the orders and direction of the Secretary of the Interior.[67]

- The Secretary of War shall be authorized to detail an officer of the Army, not above the rank of captain, for special duty with reference to Indian education.[68]
- The Secretary of War is authorized to set aside, for use in the establishment of normal and industrial training schools for Indian youth from the *nomadic* tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: *Provided,* That moneys appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous, or as Congress from time to time may authorize and provide.[69]
- The Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: *Provided*, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the

[67] Act of July 1, 1898, Ch. 545, § 1, 30 Stat. 571, 573.

[68] Act of June 23, 1879, Ch. 35, § 7, 21 Stat. 35, codified at 25 U.S.C. § 273 (2020).

[69] Act of July 31, 1882, Ch. 363, 22 Stat. 181, codified at 25 U.S.C. § 276 (2020) (emphasis added).

> Secretary of the Interior so long as they shall be required for Indian school purposes.[70]

The War Department continued to provide support and personnel to further the objectives of the Federal Indian boarding school system even after Congress transferred responsibility for Indian Affairs to the Department.

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[70] Act of January 24, 1923, Ch. 42, 42 Stat. 1187, codified at 25 U.S.C. § 277 (2020).

[71] Lubken, Walter J. (n.d.). [Photograph of young male students in metalworking classroom at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

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6.2 U.S. Treaty-Making Power: Indian Territorial Dispossession and Indian Assimilation

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Through treaties and other agreements, Indian Tribes ceded to the United States approximately 1 billion acres of land.[73] Like Great Britain and the colonial governments before it, the United States negotiated and entered into formal treaties with Indian Tribes as separate and distinct sovereigns.[74] From 1722 to 1869, the British Crown and the United States made at least 374 treaties with Indian Tribes.[75] As non-Indian settlement increased over time, the negotiation power of Indian Tribes diminished. The U.S. Congress has emphasized that "[e]ducation policy … took place in the context of wave after wave of invasion by white settlers reinforced by military conquest. Treaties, although almost always

[72] *Children and employees in front of the Yakima Indian Agency school, Fort Simcoe, Washington, approximately 1888* [Photograph]. (1888). University of Washington Special Collections, Washington State Localities Photographs.
[73] Kennedy Report, at 143.

[74] National Records and Archives Service, General Services Administration, Ratified Indian Treaties 1722–1869, at 1 (1973).

[75] National Records and Archives Service, General Services Administration, Ratified Indian Treaties 1722–1869, at 1 (1973).

signed under duress, were the window dressing whereby we expropriated the Indian's land and pushed him back across the continent."[76]

The Treaty Clause of the Constitution reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[77]

As a result, Indian treaties and successive statutes, including during the Federal Indian boarding school era, originate with the Constitution and involve U.S.-Indian relations;[78] U.S.-Native Hawaiian relations;[79] and political relationships unique to Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community.[80]

More than 150 Indian treaties between Indian Tribes and the United States included education-related provisions, the terms of which often varied.[81] For example, the 1794 Treaty with the Oneida, Tuscarora, and Stockbridge Indians provides that:

> The United States will provide, during three years after the mills shall be completed, for the expense of employing one or two suitable persons to manage the mills, to keep them in repair, to instruct some young men of the

[76] Kennedy Report, at 143.

[77] U.S. Const. Art. VI., Cl. 2.

[78] *See,e.g.,* United States v. Lara, 541 U.S. 193, 201 (2004) ("And for much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes.").

[79] *See, e.g.,* Rice v. Cayetano, 528 U.S. 495, 501 (2000) ("the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first 'articles of arrangement' between the United States and the Kingdom of Hawaii were signed in 1826 … and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887").

[80] See Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2440 (2021); United States v. Cooley, 141 S. Ct. 1638, 1642 (2021); McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020); Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 847 (9th Cir. 2006) (en banc); Worcester v. Georgia, 31 U.S. 515, 557 (1832).

[81] Cohen's Handbook of Federal Indian Law, § 22.03 (1)(a) (Nell Jessup Newton ed., 2019).

> three nations in the arts of the miller and sawyer, and to provide teams and utensils for carrying on the work of the mills.[82]

In contrast, the 1868 Fort Laramie Treaty between the United States and Great Sioux Nation mandated that:

> In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they, therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school, and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with.[83]

The text of many Indian treaties evinces that Indian education was a priority in U.S.-Indian relations.

In 1871, Congress ended treaty-making with Indian Tribes, but existing treaty obligations were expressly validated and affirmed.[84] Thereafter, the Federal Government used only statutes, executive orders, and agreements to regulate Indian Affairs.[85]

[82] Treaty between the United States and the Oneida, Tuscorora [sic] and Stockbridge Indians, dwelling in the Country of the Oneidas, (Dec. 2, 1794), 7 Stat. 47.

[83] Treaty between the United States of American and different Tribes of Sioux Indians, art. 7 (Apr. 29, 1868), 15 Stat. 635, 637 [1868 Fort Laramie Treaty].

[84] An act of Congress of March 3, 1871 (l6 Stat. 566).

[85] Cohen's Handbook of Federal Indian Law § 5.01 (2) (Nell Jessup Newton ed., 2019).

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6.3 Indian Child Removal: A Part of Historical U.S. Policy

"Many Indian families resisted the assault of the Federal Government on their lives by refusing to send their children to school."

– Kennedy Report, U.S. Senate, 1969.[87]

After 1871, Congress enacted laws to compel Indian parents to send their children to school and to authorize the Secretary of the Interior to issue regulations to "secure the enrollment and regular attendance of eligible Indian children who are wards of the Government in schools maintained for their benefit by the United States or in public schools."[88] For example, under the Act of March 3, 1893,[89] Congress authorized the Secretary of the Interior to withhold rations, including those guaranteed by treaties, to Indian families whose children did not attend schools:

> The Secretary of the Interior may in his discretion, establish such regulations as will prevent the issuing of rations or the

[86] Grabill, J.C.H., *U.S. School for Indians at Pine Ridge, S.D.* [Photograph]. (1891). Grabill Collection, Library of Congress Prints and Photographs Division, Washington, D.C.

[87] Kennedy Report, at 12.

[88] *See, e.g.*, Act of February 14, 1920, Ch. 75, § 1, 41 Stat. 410, codified as 25 U.S.C. § 282 (2020).

[89] Act of March 3, 1893, Ch. 209, § 1, 27 Stat. 628, 635, codified as 25 U.S.C. § 283 (2020).

> furnishing of subsistence either in money or in kind to the head of any Indian family for or on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations.[90]

And as the Federal Government has stated, the eventual "abolition of the ration system … which in many instances has had the effect of forcing the children into school, has been made possible through the ameliorating influence of the Government and church schools."[91]

The United States has applied such Federal regulations, including removal of Indian children to off-reservation Federal Indian boarding schools without parental consent. For example, the Department has recognized the Federal effort to transport Indian children from the Navajo Nation to off-reservation Federal Indian boarding schools without parental consent as follows:

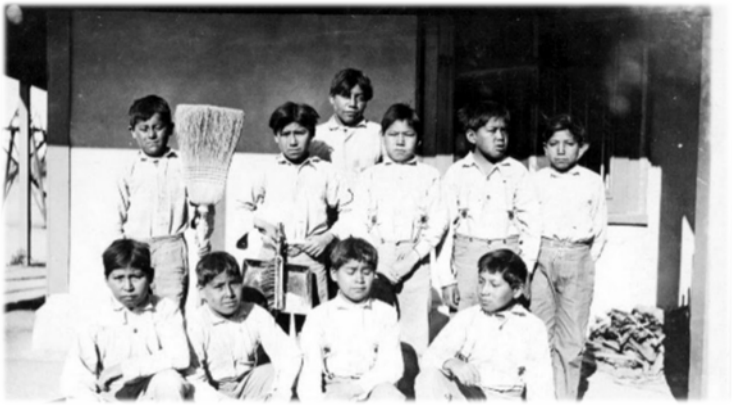
> In 1919 it was discovered that only 2,089 of an estimated 9,613 Navajo children were attending school, and thus the Government initiated a crash program of Navajo education. But because of a lack of schools on the reservation, many Navajo children were transported to boarding schools throughout the West and Southwest, without their parents' consent.[92]

There is ample evidence in Federal records demonstrating that the United States coerced, induced, or compelled Indian children to enter the Federal Indian boarding school system.

[90] Act of March 3, 1893, Ch. 209, § 1, 27 Stat. 628, 635, codified as 25 U.S.C. § 283 (2020); *see, e.g.,* ARCIA for 1906, at 402 ("This good record has been possible thru the granting of authority by the Secretary of the Interior to withhold annuities from parents who refused to place their children in some school.").

[91] ARCIA for 1903, at 376.

[92] Kennedy Report, at 12.

 [93]

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7. Federal Indian Boarding School System Framework

"Past experience goes far to prove that it is cheaper to educate our wards than make war on them, or let them grow up in ignorance, to say nothing of the humanity of the act, or the results attained."[94] Federal records document that the United States considered the Federal Indian boarding school system a central part of its Indian assimilation policy. The Department has described the role of Indian assimilation policy coupled with Indian land dispossession policy as follows:

> The essential feature of the Government's great educational program for the Indians is the abolition of the old tribal relations and the treatment of every Indian as an individual. The basis of this individualization is the breaking up of tribal lands into allotments to the individuals of the tribe. This step is fundamental to the present Indian policy of the Government. Until their lands are allotted, the Government is merely marking time in dealing with any groups of Indians.[95]

The Department has stated it was "indispensably necessary that [the Indians] be placed in positions where they can be controlled, and finally compelled, by stern necessity, to resort

[93] *Male students with broom at the Fort Yuma Indian Boarding School*. [Photograph] (n.d.). Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

[94] ARCIA for 1880, at 89.

[95] ARCIA for 1910, at 28.

to agricultural labor or starve,"[96] later adding that "[i]f it be admitted that education affords the true solution to the Indian problem, then it must be admitted that the boarding school is the very key to the situation."[97] Indeed, the Department early on concluded that Indian boarding schools "go further … towards securing [U.S.] borders from bloodshed, and keeping peace among the Indians themselves, and attaching them to us, then would the physical force of our Army, if employed exclusively towards the accomplishment of those objectives."[98]

Federal records indicate that the United States viewed official disruption to the Indian family unit as part of Federal Indian policy to assimilate Indian children. "The love of home and the warm reciprocal affection existing between parents and children are among the strongest characteristics of the Indian nature."[99] When the Department requested the Brookings Institution[100] to study "the economic and social condition of American Indians,"[101] the resulting Meriam Report found in 1928 that the main disruption to the Indian family and Tribal relations had come from the Federal Indian boarding school system:

> [O]n the whole government practices may be said to have operated against the development of wholesome [Indian] family life.
>
> Chief of these is the long continued policy of educating the [Indian] children in boarding schools far from their homes, taking them from their parents when small and keeping them away until parents and children become strangers to each other. The theory was once held that the problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population. This plan involved the permanent breaking of family ties, but provided for the children a substitute for their

[96] ARCIA for 1850, at 1.

[97] ARCIA for 1886 LXI (1886).

[98] ARCIA for 1826, at 508.

[99] ARCIA for 1904, at 392.

[100] In 1927 the Institute for Government Research (IGR) became the Brookings Institution.

[101] Lewis Meriam, Institute for Government Research, The Problem of Indian Administration, at vii (1928) [hereinafter Meriam Report].

> own family life by placing them in good homes of whites for vacations and sometimes longer, the so-called "outing system." The plan failed, partly because it was weak on the vocational side, but largely by reason of its artificiality. Nevertheless, this worst of its features still persists, and many children today have not seen their parents or brothers and sisters in years.[102]

The Federal Indian Boarding School Initiative sheds a new light on how the Federal Indian boarding school system produced intergenerational trauma by disrupting family ties in Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community.

REHOBOTH SCHOOL.

[103]

A significant outcome of deliberate Federal disruption to the Indian family unit through removal of Indian children from their Indian Tribes and Alaska Native Villages to off-reservation Indian boarding schools, is that, depending on location, Indian children experienced the Federal Indian boarding school system alongside other Indian children from the same *and* different Indian Tribe(s) and Alaska Native Village(s).[104] The Federal Government accordingly devised artificial communities of Indian children throughout the Federal Indian boarding school system, resulting in the creation of other Indian families

[102] Meriam Report, at 573–74.

[103] Hartog, C. (1910). Rehoboth School [Photograph]. *Indian mission sketches: Descriptions and views of Navajo life, the Rehoboth Mission School and the Stations Tohatchi and Zuni*, 22. Gallup, N.M.: The Author. Hathi Trust Digital Library.

[104] Kennedy Report, at 160.

and extended families depending on whether an Indian child returned to the child's own Indian Tribe or Alaska Native Village or located elsewhere after completing education in a Federal Indian boarding school.[105] For example, in 1886, Haskell Institute, Kansas, instituted a "a stricter form of discipline than heretofore prevailed" by establishing a "cadet battalion organization of five companies [to] br[eak] up the tribal associations. Size of cadets, and not their tribal relations, determining now place in dormitory and mess hall, also necessitates a more frequent recourse to the English language as a common medium, by bringing pupils of different tribes into closer contact."[106] In that year alone, the Institute intentionally mixed Indian children from 31 different Indian Tribes to disrupt Tribal relations and discourage or prevent Indian language use across the "Apache, Arapaho, Cheyenne, Cherokee, Chippewa, Comanche, Caddo, Delaware, Iowa, Kiowa, Kickapoo, Kaw, Mojave, Muncie, Modoc, Miami, New York, Omaha, Ottawa, Osage, Pawnee, Pottawatomie, Ponca, Peoria, Quapaw, Seneca, Sac and Fox, Seminole, Shawnee, Sioux, [and] Wyandotte" children.[107] The Department acknowledged that "[i]ntermarriage by the young graduates of different nations would necessitate the use of the English language, which their offspring would learn as their mother tongue."[108] Federal Indian law and policy accounts for Indians that are (1) from a single Indian Tribe or Alaska Native Village; (2) multi-Tribal; (3) Alaska Native Corporation shareholders; (4) reservation-based; (5) urban-based; (6) other Indian families; (7) extended families, (8) terminated; (9) descendant; and (10) otherwise statutorily determined—various political and legal classifications that result in part from the Federal Indian boarding school system.[109]

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[105] *See, e.g.,* Kennedy Report, at 160 (describing that "Navajo children were sent as far away as the Chemawa Boarding School in Oregon, and in turn displaced hundreds of Indian students from the Northwest who were rerouted to boarding schools in Oklahoma" and "hundreds of Alaskan native children without schools [were sent] to the Chemawa School in Oregon and the overflow to boarding schools in Oklahoma. [In 1968], more than 400 Alaskan natives were sent to the Chilocco Boarding School in Oklahoma.").

[106] ARCIA for 1886, at 6; see also Kathryn E. Fort, American Indian Children and the Law 8 (Carolina Academic Press, 2019) ("Even when children were completely separated from their language and culture, they were able to connect with other Native children through the use of their newly learned English language skills.").

[107] ARCIA for 1885, at 5.

[108] ARCIA for 1886, at 61 (emphasis added).

[109] *See, e.g.,* 25 U.S.C. § 1603 (13)(A)–(D) (recognizing "Indians" or "Indian" means any person who is a member of an Indian tribe and irrespective of whether an individual lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or is an Eskimo or Aleut or other Alaska Native, or is considered by the Secretary of the Interior to be an Indian for any purpose, or is determined to be an Indian under regulations promulgated by the Secretary); 25 U.S.C. § 1903 (5) (recognizing "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts"); 25 U.S.C. § 1915 (a) (recognizing "other Indian families") (emphasis added), (b) (recognizing "a member of the Indian child's extended family").

[110]

The United States has for nearly two centuries consistently recognized that Indian boarding schools comprised a system for Indian education: "Indian schools must train the Indian youth of both sexes to take upon themselves the duties and responsibilities of citizenship. To do this requires a system of schools and an organization capable of preparing the Indian young people to earn a living either among their own people or away from the reservation homes and in competition with their white brethren. This contemplates a practical system of schools with an essentially vocational foundation."[111]

[110] *Yakima School girls*, Fort Simcoe, Washington [Photograph]. (n.d.). American Indians of the Pacific Northwest Images Digital Collection, Estelle Reel Collection, Northwest Museum of Arts and Culture.

[111] ARCIA for 1916, at 10 (emphasis added); see also ARCIA for 1931, at 4 (noting that in Indian education "one kind of a philosophy and one kind of a system have been established a long time"); ARCIA for 1916, at 9 (noting "uniform course of study for all Indian schools marks a forward step in the educational system," "system of education"); ARCIA for 1899, at 437 (describing "The Development of the Indian School System"); ARCIA for 1886, at LX (documenting "control [of] the Indian school system," "supervision of the Indian school system," "history and development of the Indian school system," and "divisions and operation of the system"); Commissioner of Indian Affairs, Annual Report to the Secretary of War 61 (1846) (documenting the "system of education"); Commissioner of Indian Affairs, Annual Report to the Secretary of War 516 (1839) (noting "manual-labor system"); Report on Indian Affairs to the Secretary of War 61 (1828) (providing a statement showing the "number of Indian schools, where established, by whom, the number of Teachers, &c., the number of Pupils, and the amount annually allowed and paid to each by the Government," that is, documenting a system).

The Federal Indian Boarding School Initiative investigation at this stage did not examine the Federal Indian day school system, the precursor education system to the Federal Indian boarding school system. To analyze the Federal Indian boarding school system in this report, the Department notes that in the past it has described that "day school instruction is the initial and most important element in the education of the Indian."[112] "To the day school the Indian child comes fresh from the tepee and finds himself at once amid new and strange surroundings."[113] Federal Indian day schools were primarily located on Indian reservations and did not have a housing component for children directly on-site with the education institution. Indian day schools "have, in nearly every instance, preceded the boarding school" and "in many cases been established through the benevolent efforts of missionaries or the wives of Army officers stationed at military reservations in the Indian [C]ountry."[114] Still, the Department has underscored that only "by complete isolation of the Indian child from his savage antecedents can he be satisfactorily educated, and the extra expense attendant thereon is more than compensated by the thoroughness of the work."[115]

To operate the Federal Indian boarding school system, the Federal Government supported schools with a housing component directly on-site with the education institution. The Federal Government applied several approaches of Indian education that differed by Federal resources provided, location type, including on and off Indian reservations, operator type, and education program type. The Department in the past has classified Indian boarding schools that included those that were:

- Located on Indian reservations and controlled by agents.
- Run independently.
    - Supported by general appropriation.
    - Supported by special appropriation.
- Contract schools
    - Supported by general appropriation.
    - Supported by special appropriation.
    - Mission schools established and chiefly supported by religious associations.[116]

[112] ARCIA for 1904, at 394.

[113] ARCIA for 1904, at 392.

[114] ARCIA for 1886, at LXI.

[115] ARCIA for 1886, at LXI.

[116] ARCIA for 1886, at LX.

The Department has documented that off-reservation Federal Indian boarding school representatives were "allowed to select children from those attending reservation schools. The effect has been, in many instances, *to demoralize the latter* by selecting the brightest and best pupils, and in some instances to take children that might have been educated at home with little expense to the Government."[117]

Federal Indian boarding schools were funded by annual appropriations from Congress but also received resources from other sources as well. For the purposes of this report, the Department identified a number of different sources of funding for the operation of Federal Indian boarding schools:

- Appropriations made under the educational provisions of existing Indian treaties.
- Funded investments of bonds and other securities held by the United States.
- Proceeds of the sale of lands of certain Indian Tribes.
- Accumulations of money in the Treasury resulting from the sale of lands.
- Annual appropriations by U.S. Congress for Indian school purposes.[118]

Based upon these sources, it is apparent that proceeds from cessions of Indian territories to the United States through treaties—which were often signed under duress[119]—were used to fund the operation of Federal Indian boarding schools. As a result, the United States' assimilation policy, the Federal Indian boarding school system, and the effort to acquire Indian territories are connected.

[117] ARCIA for 1886, at LXVIII (emphasis added).

[118] ARCIA for 1886, at LX–LXI.

[119] Kennedy Report, at 143.

 [120]

The United States used monies resulting from Indian wealth depletion from cessions of territories, and held in Federal trust accounts for Indian Tribes, to pay for the attempted assimilation process of Indians. As Congress has found, a "large proportion of the expense for the operation of the schools came from Indian treaty funds and not Federal appropriations."[121] For example, between 1845 and 1855, while over $2 million was spent on the Federal Indian boarding school system, Federal appropriations accounted for only 1/20th, or $10,000 per year, of the sum, with Indian trust fund monies supplying the rest.[122] In addition, concerning the Dawes Severalty Act of 1887 alone, which turned territories from collective Indian ownership into individual Indian land allotments, Congress determined, however intended, "the actual results of the law were a diminishing of the Indian tribal economic base from 140 million acres to [approximately] 50 million acres, and severe social disorganization of the Indian family."[123] Congress further concluded that the Dawes Act's "land policy was directly related to the Government's Indian education policy because proceeds from the destruction of the Indian land base were used to pay the costs of taking Indian children from their homes and placing them in Federal boarding

[120] Lubken, Walter J. (n.d.). [Photograph of young male students in printing press shop at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

[121] Kennedy Report, at 146.

[122] Report of the Secretary of the Interior, Sen. Ex. Doc., No. 1, Part 1, 34th Congress, First Session, at 1, 561 (1855).

[123] Kennedy Report, at 12.

schools—a system designed to dissolve the Indian social structure."[124] The total amount of Tribal or individual Indian trust fund account monies, if any, held in trust by the United States and used to directly support the Federal Indian boarding school system is currently unknown.

In 1908, the Supreme Court ruled in *Quick Bear v. Leupp* that the United States could use monies held in treaty and trust fund accounts for Indian territories ceded to the United States to fund children "induced or compelled" to attend Indian boarding schools that were operated by religious institutions or organizations.[125] While payments to religious institutions and organizations depleted funds Indian Tribes were entitled to, the Court held that the prohibition on the Federal Government to spend funds on religious schools did not apply to Indian treaty funds,[126] did not violate Indian appropriations acts,[127] and to forbid such expenditures would violate the free exercise clause of the First Amendment.[128]


129

[124] Kennedy Report, at 12.

[125] Quick Bear v. Leupp, 210 U.S. 50 (1908); see also Kennedy Report at 143 (1969) (describing that as "treaty funds became available, these too were disbursed" "among those societies and individuals—usually missionary organizations—that had been prominent in the effort to 'civilize' the Indians").

[126] Quick Bear v. Leupp, 210 U.S. at 81.

[127] Quick Bear v. Leupp, 210 U.S. at 78.

[128] Quick Bear v. Leupp, 210 U.S. at 81.

[129] U.S. Library of Congress, Harris & Ewing Collection, Untitled (1913). [Photograph showing High Pipe; Charles Tackett; Hollow Horn Bear, Jr.; William Thunderhawk; Senator Sterling Of South Dakota; Eugene Little; Reuben

Although individual Federal Indian boarding schools varied by operation, management, and funding, together they comprised a Federally recognized system.

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8. The Role of Religious Institutions and Organizations in the Federal Indian Boarding School System


130

"It is quite possible for missionaries without the personal qualifications necessary for work with the Indians to maintain themselves indefinitely in isolated locations, obstacles both to the work of the church and to the efforts of the government."

– Meriam Report, made at the request of the Secretary of the Interior, 1928.[131]

The Federal Government and Department also maintained relationships with religious institutions and organizations for the Federal Indian boarding school system. Indian reservations "were distributed among the major religious denominations, which, in

Quick Bear; Henry Horse Looking; and Silas Standing Elk) (showing Reuben Quick Bear, plaintiff in Quick Bear v. Leupp, second row, far right)].

[130] *Female students in front of building at the Fort Yuma Indian Boarding School*. (n.d.). Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

[131] Meriam Report, at 838.

an unprecedented delegation of power by the Federal Government to church bodies, were given the right to nominate new agents, and direct educational and other activities on the reservations."[132] Department records indicate that, in addition to the U.S. Army assigning officers to duty as superintendents of Indian affairs and Indian agents under the direction of the Indian Office, the Executive accepted official recommendations by religious institutions and organizations for presidential appointed posts in states and territories.[133] The Department has described the public-private relationship as follows:

> [T]he [Indian] agencies were, so to speak, apportioned among the prominent denominational associations of the country, or the missionary societies representing such denominational views; … to make nominations to the position of agent … and in and through this extra-official relationship to assume charge of the intellectual and moral education of the Indians thus brought within the reach of their influence.[134]

The U.S. Senate has confirmed, the U.S. "military was frequently called in to reinforce the missionaries' orders."[135]

[132] Kennedy Report, at 147.

[133] ARCIA for 1872, at 72.

[134] ARCIA for 1872, at 72.

[135] Kennedy Report, at 147.

 [136]

Initial examination of Federal records demonstrates that the United States received support from religious institutions and organizations for the Federal Indian boarding school system and directly provided support to religious institutions and organizations for the Federal Indian boarding school system.[137] "Since appropriations for Indian schools have been regularly made, a portion of the funds has been wisely expended in the encouragement of the benevolent work of [missionary] organizations."[138] As the U.S. Senate has recognized, funds from the 1819 Civilization Fund "were apportioned among those societies and individuals—usually missionary organizations—that had been prominent in the effort to 'civilize' the Indians."[139]

The United States at times paid religious institutions and organizations on a per capita basis for Indian children to enter Federal Indian boarding schools operated by religious institutions or organizations. As part of the Federal Indian boarding school system, the Department contracted with several religious institutions and organizations including the American Missionary Association of the Congregational Church, the Board of Foreign Missions of the Presbyterian Church, the Board of Home Missions of the

[136] *Female students standing outside at the Fort Yuma Indian Boarding School*. (n.d.). Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

[137] Some religious and other non-federal entities that participated in these and similar initiatives have since apologized for their roles in them, and pledged to make amends. *See e.g.*, Elisabetta Povoledo and Ian Austen, *"I Feel Shame": Pope Apologizes to Indigenous People of Canada*, New York Times, Apr. 1, 2022.

[138] ARCIA for 1886, at LXV.

[139] Kennedy Report, at 143.

Presbyterian Church, the Bureau of Catholic Indian Missions, and the Protestant Episcopal Church "to pay a certain sum for each pupil … being supplemented by the religious organizations conducting the school."[140] In 1886, Indian School Superintendent John B. Riley reported to the Secretary of the Interior on the importance of using public support for Indian children to enter Indian boarding schools operated by religious institutions or organizations:

> The Government aid furnished enables them to sustain their missions, and renders it possible … to lead these people, whose paganism has been the chief obstacle to their civilization, into the light of Christianity – a work in which the Government cannot actively engage … They should receive the encouragement and co-operation of all Government employés [sic].[141]

The United States also set apart tracts of Indian reservation lands for the use of religious institutions and organizations carrying on educational and missionary work among the Indians.[142] The Department's initial assessment of relevant Federal records shows that the United States directly contributed financially to Indian boarding schools operated by religious institutions and organizations. "The basic approach of subsidizing various religious groups to operate schools for Indians did not come to an end until 1897."[143]

By 1928, the Department observed that the lack of central oversight over Indian boarding schools operated by religious institutions and organizations significantly impaired the Federal Indian boarding school system. "[N]o central interdenominational supervision of mission work exists, and that therefore no standards are set up as a minimum below which the work should not fall."[144] As a result, "a weak denomination with low educational standards for its missionaries may maintain indefinitely a mission station

[140] ARCIA for 1886, at LXV.

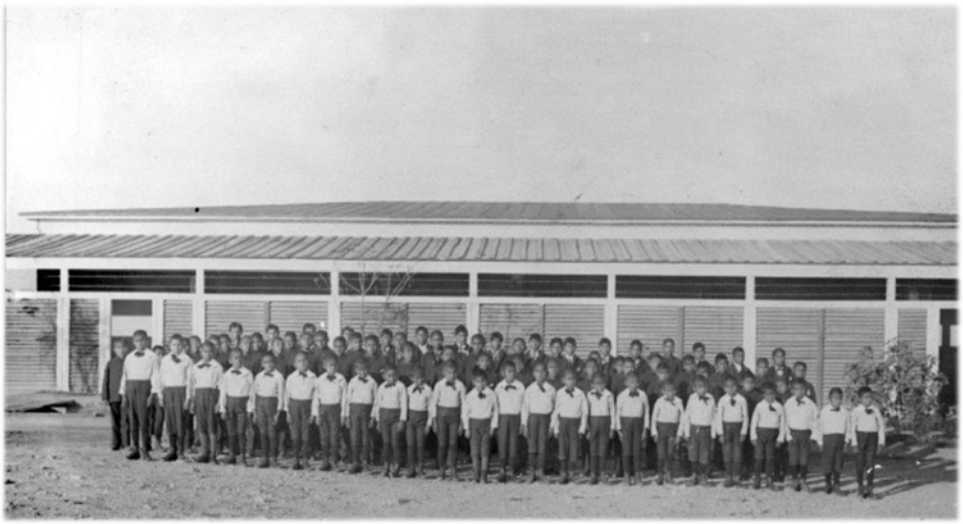
[141] ARCIA for 1886, at LXVI.

[142] Act of Sept. 21, 1922, Ch. 367, § 3, 42 Stat. 995, codified at 25 U.S.C. § 280 (2020) (authorizing and directing the Secretary of the Interior "to issue a patent to the duly authorized missionary board, or other proper authority, of any religious organization engaged in mission or school work on any Indian reservation for such lands thereon as have been heretofore set apart to and are now [Sept. 21, 1922] being actually and beneficially used and occupied by such organization solely for mission *or school* purposes, the area so patented to not exceed one hundred and sixty acres to any one organization at any station: Provided, That such patent shall provide that when no longer used for mission or school purposes said lands shall revert to the Indian owners.") (emphasis added); ARCIA for 1902, at 51.

[143] Kennedy Report, at 147.

[144] Meriam Report, at 838.

manned by people with only the most elementary education and with no training whatever …" and "a strong denomination with high standards of general education … may lend support in isolated spots to work of a specialized nature assumed by missionaries with no technical and little real understanding of the problems involved in their secular activities."[145] "The worst feature of such situations is not that the Indians of the localities are poorly served, but that the governing boards remain ignorant of the real problems of Indian missions."[146]



[147]

[145] Meriam Report, at 838.

[146] Meriam Report, at 838.

[147] *Students in front of building at the Fort Yuma Indian Boarding School* [Photograph]. (n.d.). Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

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9. Federal Indian Boarding School System Conditions



[148]

Despite differences in operation, management, and funding, the United States recognized that the Federal Indian boarding school system was central to Indian territorial dispossession and Indian assimilation. Often using active or decommissioned military sites, Federal Indian boarding schools "were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people."[149] As a result, the United States applied systematic militarized and identity-alteration methodologies[150] in the Federal Indian boarding school system to assimilate American Indian, Alaska Native, and Native Hawaiian children through education.

In 1902, Commissioner of Indian Affairs William A. Jones described the main goal of applying systematic militarized and identity-alteration methodologies in the Federal Indian boarding school system as follows:

> The young of the wild bird, though born in captivity, naturally retains the instincts of freedom so strong in the parent and beats the bars to secure it, while after several generations of captivity the young bird will return to the cage after a brief period of freedom. So with the Indian child. The first wild redskin placed

[148] *Apache youth in traditional clothing* [Photograph]. Apache Incarceration. (n.d.) National Park Service; *Apache youth in military uniforms* [Photograph]. Apache Incarceration. (n.d.) National Park Service.

[149] Kennedy Report, at 12.

[150] Meriam Report, at 379, 382, 394; Maria Yellow Heart Brave Heart et al., The American Indian Holocaust: Healing Historical Unresolved Grief, 8 American Indian & Alaska Native Mental Health Research 56 (1998).

> in the school chafes at the loss of freedom and longs to return to his wildwood home. His offspring retains some of the habits acquired by the parent. These habits receive fresh development in each successive generation, fixing new rules of conduct, different aspirations, and greater desires to be in touch with the dominant race.[151]

Generations of Indian children, separate and together, experienced the Federal Indian boarding school system, which Congress recognized was "run in a rigid military fashion, with heavy emphasis on rustic vocational education."[152]

"The children are improved rather in their habits than in what they learn from books."[153] For example, to teach them "obedience and cleanliness, and give[] them a better carriage," Department records detail examples of organizing Indian male children "into companies as soldiers, and the best material selected for sergeants and corporals."[154] "They have been uniformed and drilled in many of the movements of army tactics."[155] As late as 1917, the Department course of study for Indian schools included "military and gymnastic exercises" for an hour, two or three times per week in grades 4 through 6 (pre-vocational) and in grades 6 through 10 (vocational).[156]

Children in Federal Indian boarding schools had "their twenty-four hours so systematized that there is little opportunity to exercise any power of choice."[157] For example, the curriculum for first grade students across the Federal Indian boarding school system in 1917 included the following:[158]

[151] ARCIA for 1902, at 3.

[152] Kennedy Report, at 12.

[153] Commissioner of Indian Affairs, Annual Report to the Secretary of War 128 (1846).

[154] ARCIA for 1880, at 180.

[155] ARCIA for 1880, at 180.

[156] ARCIA for 1915, at 16–21.

[157] Meriam Report, at 577.

[158] ARCIA for 1916, at 13.

BOARDING SCHOOLS
The time assigned to a subject indicates its relative importance

FIRST GRADE	General Exercises (25 minutes.)	Assembly, once each week. Music, once each week. Manners and right conduct, once each week. Current events, once each week.
	English (110 minutes.)	Conversational and other oral exercises. History. Health. Numbers. Nature Study. Reading and written exercises.
	Writing and Drawing (alternate). (20 minutes.) Breathing Exercises. (10 minutes.)	
	Industrial Work **(240 minutes.)**	**Small and young pupils should not be required to work full time.**
	Physical Training (60 minutes.)	
	Evening hour. (60 minutes.)	Little folks, free play. Adults, miscellaneous exercises.
	Meals, free time, extra detail. (6 hours 15 minutes.)	
	Sleep. (9 hours—10 hours for little folks.)	

Systematic identity-alteration methodologies employed by Federal Indian boarding schools included renaming Indian children from Indian names to different English names;[159] cutting the hair of Indian children;[160] requiring the use of military or other standard uniforms as clothes;[161] and discouraging or forbidding the following in order to compel them to adopt western practices and Christianity: (1) using Indian languages, (2) conducting cultural practices, and (3) exercising their religions.[162] "When first brought in

[159] ARCIA for 1904, at 42–45.

[160] ARCIA for 1886, at 199; ARCIA for 1858, at 50.

[161] ARCIA for 1886, at 199; ARCIA for 1858, at 50.

[162] Kennedy Report, at 10–13; Meriam Report, at 189–195; ARCIA for 1886, at XXIII; Ursula Running Bear et al., Boarding School Attendance and Physical Health Status of Northern Plains Tribes, 13 Applied Res. Qual. Life 633 (2018).

they are a hard-looking set. Their long tangled hair is shorn close, and then they are stripped of their Indian garb thoroughly washed, and clad, in civilized clothing. The metamorphosis is wonderful, and the little savage seems quite proud of his appearance."[163] "Teaching the young Indian child to speak English is essentially the first step in his training, and special attention has been directed to giving him a working knowledge of the language in the shortest possible time."[164]

"No Indian is spoken[:]"[165] "There is not an Indian pupil whose tuition and maintenance is paid for by the United States Government who is permitted to study any other language than our own vernacular – the language of the greatest, most powerful, and enterprising nationalities beneath the sun."[166] For some Indian Tribes and Alaska Native Villages, the Federal Indian boarding school system was not the first systematic language discouragement or prevention experience. For example, the Department has recognized that for the Indian Pueblos in New Mexico, a "large number of them understand and speak the Spanish language, and only the young, now being educated in the industrial schools, understand and speak English."[167]

Indian boarding school rules were often enforced through punishment, including corporal punishment, such as solitary confinement,[168] "flogging, withholding food, … whipping[,]"[169] and "slapping, or cuffing."[170] At times, rule enforcement was a group experience: "for the first offense, unless a serious one, a reprimand before the school is far better than a dozen whippings, because one can teach the whole school that the offender has done something that is wrong, and they all know it and will remember it, while it is humiliating to the offender and answers better than whipping."[171] Federal Indian boarding schools also conducted discipline at times by making older children to punish younger children. "When offenses have been serious enough to demand corporal punishment, the

[163] ARCIA for 1886, at 199.

[164] ARCIA for 1904, at 391.

[165] ARCIA for 1886, at 134.

[166] ARCIA for 1886, at XXIII.

[167] ARCIA for 1886, at 206.

[168] ARCIA for 1896, at 343.

[169] ARCIA for 1899, at 206; Ursula Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Fam. Community Health 1 (2019).

[170] ARCIA for 1886, at 195; see also, ARCIA for 1896, at 107, 123 (describing punishment for failure to speak English).

[171] ARCIA for 1886, at 195.

cases have generally been submitted to a court of the older pupils, and this has proved a most satisfactory method."[172] Describing the practice of "trying boys guilty of any serious offense by a court-martial, using the older and more intelligent as a court," the Department has acknowledged, "the members of the court-martial are detailed from the cadet officers, care being taken to secure an impartial selection from various tribes."[173] "Charges are preferred against the prisoner; the court examines witnesses, hears the defense, fixes the degree of guilt, and recommends a punishment."[174] The Department has later observed Indian school children "live[d] under strict discipline that not only fail[ed] to accomplish its purpose of moral training but in many cases contribute[d] to an attitude of conflict with authority of any sort."[175]

Initial analysis demonstrates a trend of Indian children escaping and running away from Federal Indian boarding schools.[176] "The children who have run away from school have been promptly brought back and punished, and judicious punishment has in all instances proved very salutary."[177] For example, the Department has recognized that at the Kickapoo Boarding School, Kansas, "[r]unaways, both boys and girls, were frequent during the first half of the year. Corporal punishment was resorted to," and the "habit, being of longstanding, was not entirely overcome; but I am convinced that a prompt returning of the runaways and a whipping administered soundly and prayerfully, helps greatly toward bringing about the desired result."[178]

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[172] ARCIA for 1880, at 180.

[173] ARCIA for 1881, at 188.

[174] ARCIA for 1881, at 188.

[175] Meriam Report, at 579.

[176] *See, e.g.,* ARCIA for 1892, at 657 ("[R]unning away of 7 boys whose return I failed to secure, though every effort was made to intercept them by writing and telegraphing civil officials along their line of travel, and a persistent and continued chase after them over mountains. Two of them reached the reservation in safety and reported having seen me hunting them in the mountains."); ARCIA for 1906, at 392, 402; ARCIA for 1905, at 169, 250, 424; ARCIA for 1904, at 224 ("I found the school sadly deficient in discipline; runaways were of frequent occurrence; the boys were in the habit of barricading their doors, painting their faces, and indulging in Indian dances."); ARCIA for 1903, at 121, 182, 194, 275, 363; ARCIA for 1902, at 172, 174, 275, 384; ARCIA for 1895, at 216; ARCIA for 1892, at 647; ARCIA for 1890, at 12; ARCIA for 1885, at 21; ARCIA for 1884, at XIX; ARCIA for 1882, at 60, 61, 164; ARCIA for 1868, at 241.

[177] ARCIA for 1886, at 38.

[178] ARCIA for 1899, at 206.

The Department has acknowledged "frankly and unequivocally that the provisions for the care of the Indian children in boarding schools are grossly inadequate."[179] Rampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care in Indian boarding schools are well-documented.[180] For example, the Department has documented the accommodations in select Federal Indian boarding schools as follows:

- White Earth Boarding School, Minnesota: "one bed to two pupils."[181]
- Kickapoo Boarding School, Kansas: "three children to each bed."[182]
- Rainy Mountain Boarding School, Oklahoma: "single beds pushed so closely together to preclude passage between them, and each bed has two or more occupants."[183]


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[179] Meriam Report, at 11.

[180] Kennedy Report, at 10–13; Meriam Report, 189–195; Ursula Running Bear et al., Boarding School Attendance and Physical Health Status of Northern Plains Tribes, 13 Applied Res. Qual. Life 633 (2018).

[181] ARCIA for 1896, at 170.

[182] ARCIA for 1896, at 167.

[183] ARCIA for 1896, at 256.

[184] Lubken, Walter J. (n.d.). [Photograph of young female students standing next to made beds at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

The Department has recognized infrastructure deficiencies in the Federal Indian boarding school system:

> The boarding schools are crowded materially beyond their capacities. A device frequently resorted to in an effort to increase dormitory capacity without great expense, is the addition of large sleeping porches. They are in themselves reasonably satisfactory, but they shut off light and air from the inside rooms, which are still filled with beds beyond their capacity. The toilet facilities have in many cases not been increased proportionately to the increase in pupils, and they are fairly frequently not properly maintained or conveniently located. The supply of soap and towels has been inadequate.[185]

Poor diets high in starch and sugar and low in fresh fruits and vegetables were common in the Federal Indian boarding school system.[186] "The outstanding deficiency is in the diet furnished the Indian children, many of whom are below normal health."[187] The Department has recognized the poor-quality water supply as well in Federal Indian boarding schools.[188] Still, in some circumstances, the Department has acknowledged that conditions in the Federal Indian boarding school system progressed. For example, in 1897 it recognized that in "the great majority of schools the individual towel, comb, hairbrush, and toothbrush have displaced the social use of these toilet articles."[189] And, Federal Indian boarding schools in 1897 started to transition from coal-oil lamps to electricity for lighting.[190]

[185] Meriam Report, at 12.

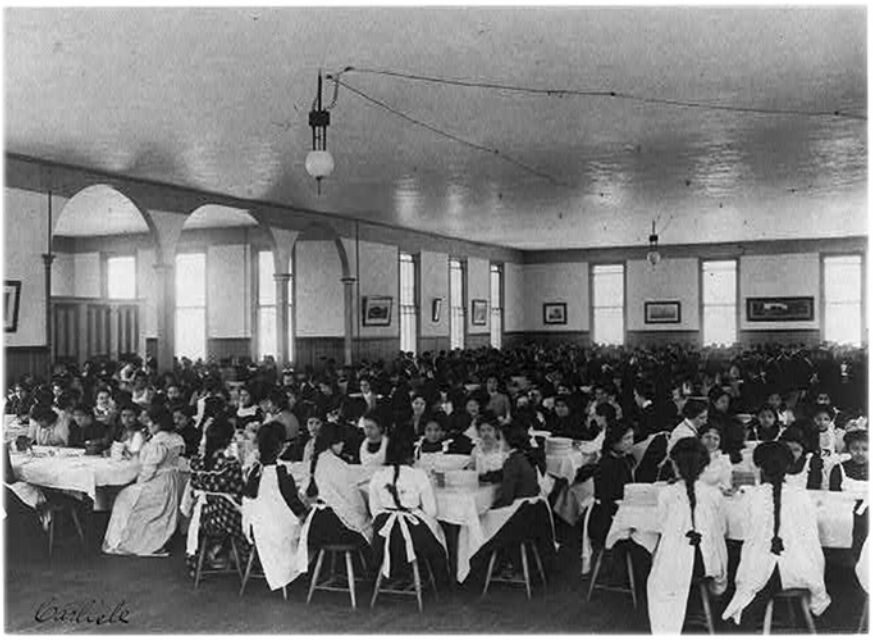
[186] ARCIA for 1896, at 11–12.

[187] Meriam Report, at 11.

[188] *See, e.g.*, ARCIA for 1897, at 173 ("The water supply is totally inadequate, if indeed there can be said to be any."); ARCIA for 1896, at 171.

[189] ARCIA for 1887, at 330.

[190] ARCIA for 1887, at 17.



[191]

The Federal Government has held that the infrastructure deficiencies of the Federal Indian boarding school system in part are characteristic of "turning over for school use abandoned forts and other government property. There is almost never any real economy in this practice."[192] "Military plants … usually date from long before the modern period of lighting, ventilation, and conveniences, and they are often of poor construction, necessitating continued and expensive repair bills."[193] The Department has found in turn that it "may be seriously questioned whether the Indian Service could do very much better than it does without more adequate appropriations."[194] "From the point of view of education the Indian Service is almost literally a 'starved' service."[195]

[191] Johnston, F. B., *Students in dining hall, United States Indian School, Carlisle, Pa.* [Photograph]. (1901). Johnston (Frances Benjamin) Collection, Library of Congress Prints and Photographs Division Washington, D.C..

[192] Meriam Report, at 421.

[193] Meriam Report, at 421–22.

[194] Meriam Report, at 421–22.

[195] Meriam Report, at 348.

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9.1 Use of Child Labor as Curricula, and in Response to Deficient Conditions

"The labor of [Indian] children as carried on in Indian boarding schools would, it is believed, constitute a violation of child labor laws in most states."

– Meriam Report, made at the request of the Secretary of the Interior, 1928.[196]

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The Federal Indian boarding school system focused on vocational training, involving manual labor of Indian children.[198] To "furnish Indian boys and girls with a type of education that would be practical and cost little the government years ago adopted for the boarding schools a half-time plan whereby pupils spend half the school day in 'academic' subjects and the remaining half day in work about the institution."[199] Federal records

[196] Meriam Report, at 376.

[197] Lubken, Walter J. (n.d.). [Photograph of young female students seated with sewing machines in classroom at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

[198] ARCIA for 1852, at 4.

[199] Meriam Report, at 374.

indicate that as "practical education is what [the Indian] most requires" the Federal Indian boarding system limited text-book instruction.[200] In 1902, the Commissioner of Indian Affairs described that to "educate the Indian is to prepare him for the abolishment of tribal relations, to take his land in severalty, and in the sweat of his brow and by the toil of his hands to carve out, as his white brother has done, a home for himself and family."[201]

The Federal Government embraced "the policy of giving to industrial training the foremost place in Indian education."[202] In addition to well-documented livestock[203] and poultry raising,[204] dairying,[205] and western agriculture production,[206] including for sales outside the Federal Indian boarding school system,[207] Indian children at Federal Indian boarding schools engaged in other manual labor practices including, but not limited to the following: lumbering,[208] working on the railroad—including on the road and in car shops,[209] carpentering,[210] blacksmithing,[211] fertilizing,[212] irrigation system development,[213] well-digging,[214] making furniture including mattresses,[215] tables,[216] and

[200] ARCIA for 1902, at 3.

[201] ARCIA for 1902, at 3.

[202] ARCIA for 1904 at 16 (1902); but see ARCIA for 1905, at 12, 26 (recognizing the "Indian is a natural warrior, a natural logician, a natural artist" and that regarding "penmanship or drawing," the "Indian child equals and excels the white child.").

[203] *See, e.g.,* ARCIA for 1903, at 12.

[204] *See, e.g.,* ARCIA for 1884, at 200.

[205] *See, e.g.,* ARCIA for 1904, at 396.

[206] *See, e.g.,* ARCIA for 1904, at 397 ("The *system* of having *individual* garden plots for each pupil has been productive of excellent results, and has infused into the pupils a spirit of emulation and friendly rivalry which has led them to put forth their best efforts.") (emphasis added).

[207] *See, e.g.,* ARCIA for 1906, at 422.

[208] *See, e.g.,* ARCIA for 1906, at 431; ARCIA for 1858, at 64 (describing that Winnebago "boys chopped and cleared the timber off some three acres of woodland").

[209] *See, e.g.,* ARCIA for 1905, at 389.

[210] *See, e.g.,* ARCIA for 1903, at 378–79.

[211] *See, e.g.,* ARCIA for 1903, at 378–79.

[212] *See, e.g.,* ARCIA for 1903, at 378–79.

[213] *See, e.g.,* ARCIA for 1904, at 388; ARCIA for 1903, at 383.

[214] ARCIA for 1904, at 388.

[215] ARCIA for 1904, at 389.

[216] ARCIA for 1903, at 373.

chairs,[217] cooking,[218] laundry[219] and ironing[220] services, and garment-making, including for themselves and other children in Federal Indian boarding schools. For example, the Department has acknowledged that in 1857 at the Winnebago Manual Labor Schools, Nebraska, the Winnebago "girls have made five hundred and fifty garments for themselves and the boys attending the school, and some seven hundred sacks for the use of the farm."[221] The Department later acknowledged that in 1903 at the Mescalero Boarding School, New Mexico, the Mescalero Apache "boys sawed over 70,000 feet of lumber and 40,000 shingles and made upward of 120,000 brick."[222]

SCHOOLBOYS BUTCHERING SHEEP.

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Manual labor provided by Indian children in the Federal Indian boarding school system included provision of education services to other Indian children. Indeed, the Department "found that three the amount of [English language] drill may be secured by

[217] ARCIA for 1903, at 373.

[218] ARCIA for 1906, at 419.

[219] ARCIA for 1906, at 419.

[220] ARCIA for 1896, at 171.

[221] ARCIA for 1858, at 64 (1858).

[222] ARCIA for 1904, at 398.

[223] Hartog, C. (1910). Schoolboys Butchering Sheep [Photograph]. *Indian mission sketches: Descriptions and views of Navajo life, the Rehoboth Mission School and the Stations Tohatchi and Zuni*, 23. Gallup, N.M.: The Author. Hathi Trust Digital Library..

having one or two of the more advanced pupils act as teacher … and at the same time instruction to older pupils can be given in another part of the room."[224] Congress has also codified that the "Commissioner of Indian Affairs shall employ Indian girls as assistant matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so."[225] The manual labor practices employed in the Federal Indian boarding school system varied at end.

At the turn of the 19th century, the Department formed a uniform curriculum for the Federal Indian boarding school system.[226] "The time assigned to a subject indicates its relative importance." The prevocational division of the system refers to Grades 1-6. The vocational division refers to additional 1-4 Grades after 6 (Grades 7-10). The curriculum included that, for the prevocational division, Indian children in Grades 1-6 were assigned 4 hours to "Industrial Work."[227] The curriculum included that, for the vocational division, Indian children in Grades 1-4 (Grades 7-10) were assigned 4 hours to "Industrial Work."[228] "The course has been planned with the vocational aim very clearly, and positively dominant, with especial emphasis on agriculture and home making."[229]

Later in 1928, the Department observed that whatever "may once have been the case, Indian children are now coming into the boarding schools much too young for heavy institutional labor."[230] Concerning on-reservation Federal Indian boarding schools, the Department noted "the children are conspicuously small."[231] For example, the Department documented the intersection between manual labor and younger children at the Leupp Boarding and Day School, Arizona, which primarily served children from the Navajo Nation:

[224] ARCIA for 1904, at 391.

[225] Act of June 7, 1897, Cch. 3, § 1, 30 Stat. 83, codified at 25 U.S.C. § 274 (2020).

[226] ARCIA for 1916, at 9–12.

[227] ARCIA for 1916, at 13–18.

[228] ARCIA for 1916, at 18–21.

[229] ARCIA for 1916, at 22.

[230] Meriam Report, at 375.

[231] Meriam Report, at 375.

> [O]ne hundred of the 191 girls are 11 years of age or under. The result is that the institutional work, instead of being done wholly by able-bodied youths of 15 to 20 nominally enrolled in the early grades, has to be done, in part at least, by very small children–children, moreover, who, according to competent medical opinion, are malnourished.[232]

The Department has explained the need for Indian child manual labor in the Federal Indian boarding school system as follows:

> In our Indian schools a large amount of productive work is necessary. They could not possibly be maintained on the amounts appropriated by Congress for their support were it not for the fact that students are required to do the washing, ironing, baking, cooking, sewing; to care for the dairy, farm, garden, grounds, buildings, etc.-an amount of labor that has in the aggregate a very appreciable monetary value.[233]

At the Haskell Institute, Kansas, for instance, the children were "encouraged to enjoy the work," "the children were carefully instructed in the cultivation of strawberries, and under proper supervision were allowed to gather the fruit and enjoy strawberry suppers."[234] "If the labor of the boarding school is to be done by the pupils, it is essential that the pupils be old enough and strong enough to do institutional work."[235] The economic contribution of Indian and Native Hawaiian children to the Federal Indian boarding school system and beyond remains unknown.

[232] Meriam Report, at 375.

[233] Meriam Report, at 376 (1928) (citing Course of Study for United States Indian Schools 1 (1922)).

[234] ARCIA for 1904, at 396.

[235] Meriam Report, at 375.

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10. Federal Indian Boarding Schools and Alaska Native Villages

"If provision is made for schools [Alaska Natives] will become a valuable element in the development of a country rich in furs, fish, lumber, and minerals."

– U.S. Department of the Interior, 1886[237]

The Federal Indian Boarding School Initiative investigation demonstrates that the Russian government, missionaries, and the United States established Indian boarding schools for Alaska Native children. The investigation shows that between 1819 to 1969 the United States operated or supported approximately 21 boarding schools in Alaska. Note, an individual Federal Indian boarding school may account for multiple sites.

[236] Lubken, Walter J. (n.d.). [Photograph of young male students in metalworking shop at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

[237] ARCIA for 1886, at LXIX.

As the Department has recognized, both the Russian-American Fur Company and the Russian government, beginning with Catharine II, Empress of Russia, established schools for Alaska Native children throughout Alaska.[238] In 1793, Catharine II issued an *ukase* (edict) ordering missionaries to be sent to the North American Colony to provide education for Alaska Natives.[239]

As the United States later acknowledged following the acquisition of Alaska, "nearly all of them read and write … Many of them are highly educated, even in the classics."[240] "The administration of the [Russian-American Fur Company] often reposed great confidence in them. One of their best physicians was an Aleutian; one of their best navigators was an Aleutian; their best traders and accountants were Aleutians."[241]

To obtain the territories that became Alaska, the United States entered into a treaty with Russia in 1867.[242] But the treaty did not address the land tenure of Alaska Natives, clouding title to the majority of land in Alaska deemed available.[243] "The schools sustained by the Fur Company, representing the Russian Government, were disbanded."[244] "The schools once taught by Russian priests have one after another died."[245] Between 1867 and 1884, only mission schools existed in Alaska.[246] As the Department later transmitted to Congress, the "children of those who learned to read and write in the Russian schools, deprived of schools by the neglect of the [U.S.] government, are left to grow up in ignorance."[247]

As a result, the Department engaged and contracted with non-Federal entities to commence Indian education in Alaska.[248] Russia transferred to the United States in 1867 "dock-yards, barracks, hospitals, … schools," and other buildings.[249] This infrastructure

[238] S. Ex. Doc. No. 47-30, at 2–3 (1881).

[239] S. Ex. Doc. No. 47-30, at 2–3 (1881).

[240] S. Ex. Doc. No. 47-30, at 3 (1881).

[241] Secretary of the Interior, S. Ex. Doc. NO. 47-30, at 3 (1881).

[242] Treaty Concerning the Cession of the Russian Possessions in North America (Mar. 30, 1867), 15 Stat. 539.

[243] Treaty Concerning the Cession of the Russian Possessions in North America (Mar. 30, 1867), 15 Stat. 539.

[244] S. Ex. Doc. No. 47-30, at 3 (1881).

[245] S. Ex. Doc. No. 47-30, at 4 (1881).

[246] Office of the Solicitor, Department of the Interior, Federal Indian Law, at 940 (1958).

[247] S. Ex. Doc. No. 47-30, at 4 (1881).

[248] ARCIA for 1886, at LXIX; S. EX. DOC. NO. 47-30, at 4 (1881).

[249] S. Ex. Doc. No. 47-30, at 13 (1881).

was predominantly used "in harmony with the government efforts at Indian education and civilization."[250]

The Department has described the collaboration between the U.S. military and religious institutions and organizations for Indian education in Alaska. For example, at the Sitka school, including the "boarding department," overseen by Rev. John G. Brady, Captain [H.] Glass, of the United States ship Jamestown, "from the first, with his officers, took a deep interest in the school."[251] "In February, 1881, Captain Glass "caused the houses to be numbered, and an accurate census taken of the inmates, adults, and children."[252] He then caused a tin label to be made "for each child, which was tied around the neck of the child, with his or her number, and the number of the house on it," so that if a child was found outside of the school, the Indian policeman or teacher took the numbers on the labels and reported them.[253] "The following morning the head Indian of the house to which the absentee belonged was summoned to appear and answer for the absence of the child. If the child was willfully absent, the headman was fined or imprisoned."[254]

Early on, there was no variation in the education between Alaska Natives and non-Alaska Natives.[255] Later, in "the act providing for a civil government in Alaska," in 1884, Congress appropriated funds for "Indian education in Alaska."[256] The Nelson Act of 1905 established a dual school system in Alaska and provided in part that Alaska Native children have the right to be admitted to any Indian boarding school.[257] The United States in turn has officially supported Alaska Native education during Alaska's status as a U.S. territory starting in 1867 and prior to its entry into the Union.

As questions about land title to the territory emerged, the Federal officials acknowledged that "[d]ifficulties will, however, in all probability arise between the whites and our own Indians. These tribes live along the shores of the various bays, rivers, and inlets."[258] "To keep them in subjugation will require either the interposition of the navy,

[250] S. Ex. Doc. No. 47-30, at 7 (1881).

[251] S. Ex. Doc. No. 47-30, at 6 (1881).

[252] S. Ex. Doc. No. 47-30, at 6 (1881).

[253] S. Ex. Doc. No. 47-30, at 6–7 (1881).

[254] S. Ex. Doc. No. 47-30, at 7 (1881).

[255] Office of the Solicitor, Department of the Interior, Federal Indian Law, at 939 (1958).

[256] ARCIA for 1886, at LXIX.

[257] 33 Stat. L. 619, 7 codified at 48 U.S.C. § 169; see Davis v. Sitka School Board, 3 Alaska 481 (1908).

[258] ARCIA for 1868, at 309.

manifested by one or more light-draught gun-boats paying periodical visits to the various villages, and inflicting summary punishment when necessary, or the constant employment of an armed quartermaster's steamer, which could probably perform such duty while transporting supposed from post to post." Federal officials accordingly recommended "that a show of military power be made at the earliest practicable moment" to select Alaska Native Villages.[259]

In 1953, when the Department invited the University of Pittsburgh to study health care in the Territory of Alaska, the resulting Parran Report found: "Few [federal Indian boarding schools] had physical facilities that could be considered modern or even desirable. Some were fire traps. Children were housed in basements and attics although legal capacity was not exceeded, in fact, crowding was commonly observed."[260]

Later, the 1958 Alaska Statehood Act authorized the burgeoning state to select over 100 million acres from Federal public lands—and again did not resolve the land tenure of Alaska Natives.[261] To face Alaska Native aboriginal territory claims, Congress enacted the Alaska Native Claims Settlement Act in 1971.[262] The Act extinguished claims of aboriginal title in exchange for funds and land selections by non-Tribal government Alaska Native Corporations, and further authorized the Secretary to withdraw unreserved public lands for conservation purposes.[263] Congress, however, failed to authorize the withdrawals within the statutory time limit, leaving significant land tenure and jurisdiction questions unanswered. Then, in 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA) to fulfill both the Alaska Statehood Act and Alaska Native Claims Settlement Act by defining the delicate balance between Federal, State, Alaska Native Village, Alaska Native Corporation, and private ownership and authority over 104 million acres of land in Alaska.[264] While land tenure history differed for Alaska Natives, the United States applied its assimilation policy to Alaska Natives after 1905 through Indian education, including Federal Indian boarding schools.

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[259] ARCIA for 1868, at 309.

[260] Thomas Parran, et al., Alaska's Health: A Survey Report to the United States Department of the Interior [hereinafter Parran Report] 193–94 (1954).

[261] Alaska Statehood Act, Pub. L. 85–508, § 4, 72 Stat. 339 (1958).

[262] Alaska Native Claims Settlement Act, Pub. L. 92-203, codified as amended at 43 U.S.C. §§ 1601–1629 (2020).

[263] 43 U.S.C. §§ 1605, 1610–1615 (2020).

[264] Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371, codified as amended at 16 U.S.C. §§ 3101–3233 (2020).

The Federal Indian Boarding School Initiative investigation shows that between 1819 to 1969, the United States operated or supported approximately 21 Federal Indian boarding schools in Alaska. Note, an individual Federal Indian boarding school may account for multiple sites, and an institution primarily operated or supported by a non-Federal entity could qualify as a Federal Indian boarding school, if the institution met all four required criteria as described in the sections entitled Executive Summary and Developing the Indian Boarding School List.

The Department has identified the following Federal Indian Boarding Schools in Alaska:

1. **Anvik Mission**
2. **Copper Valley Boarding School**
3. **Douglas Island Friends Mission School**
4. **Eklutna Industrial School**
5. **First Mission House**
6. **Fort Wrangell Tlingit Industrial School**
7. **Friends High School**
8. **Holy Cross Boarding School**
9. **Jesse Lee Home for Children – Anchorage**
10. **Jesse Lee Home for Children – Seward**
11. **Jesse Lee Home for Children – Unalaska**
12. **Kanakanak Hospital, Orphanage, and School**
13. **Kodiak Aleutian Regional High School**
14. **Longwood School**
15. **Mt. Edgecumbe Boarding School**
16. **Nunapitsinghak Moravian Children's Home**
17. **Seward Sanitarium**
18. **Sitka Industrial Training School**
19. **St. Mark's Episcopal Mission School**
20. **St. Mary Mission School – Akulurak**

21. **St. Mary Mission School – Andreasfsky**
22. **White Mountain Boarding School**
23. **William E. Beltz Boarding School**
24. **Woody Island Mission and Orphanage**
25. **Wrangell Institute**

In addition to boarding schools operated or supported by the Russian government, Alaska Native Villages and their children experienced the Federal Indian boarding school system for over a century. Given the unique historical experience of Alaska Native Villages, the Federal Indian Boarding School Initiative provides an appropriate first step for intergenerational healing for Alaska Native Villages.

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11. Federal Indian Boarding Schools and the Native Hawaiian Community

The Federal Indian Boarding School Initiative investigation demonstrates that missionaries, the Kingdom of Hawai‘i, and individual Native Hawaiian monarchs and royalty established boarding schools to educate Native Hawaiian children, including for assimilation and retention of culture. Some boarding schools operated throughout the Kingdom of Hawai‘i, Republic of Hawai‘i, Territory of Hawai‘i, and State of Hawai‘i. The investigation shows that between 1819 to 1969 the United States supported approximately seven boarding schools in Hawai‘i. Note, an individual Federal Indian boarding school may account for multiple sites.

The political relationship between the United States and the Native Hawaiian Community has been recognized and reaffirmed by the United States.[265] The United States has acknowledged that “Native Hawaiians are a distinct and unique [I]ndigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago, whose society was organized as a nation and internationally recognized as a nation by the United

[265] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 847 (9th Cir. 2006) (en banc); see also 20 U.S.C. § 7512 (12), (13) (2020); 43 C.F.R. part 50 (2022) (Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community).

States, Britain, France, and Japan, as evidenced by treaties governing friendship, commerce, and navigation."[266]

Over nearly a century, Congress has determined repeatedly through a body of legislation that the Native Hawaiian Community is within the scope of Federal powers over Indian Affairs and with which the United States has already recognized an inherent special political and trust relationship.[267]

Under its powers over Indian Affairs, the U.S. Federal Government in Native Hawaiian relations directed and supported land acquisition and Native Hawaiian assimilation through education simultaneously.[268]

The United States has concluded that at the time of European arrival to the Hawaiian Islands "in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion."[269] In 1795, the Kingdom of Hawai'i developed as an absolute monarchy and a "unified monarchal government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii."[270]

"The 1800s are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom."[271] The United States has acknowledged "[r]ights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to

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[266] 20 U.S.C. § 7512 (1) (2021).

[267] Congress described this trust relationship, for example, in findings enacted as part of the Native Hawaiian Education Act, 20 U.S.C. §§ 7511–7517 (2020), and the Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701–11714 (2020). Those findings observe that ''[t]hrough the enactment of the Hawaiian Homes Commission Act, 1920, Congress affirmed the special relationship between the United States and the Native Hawaiians,'' 20 U.S.C. 7512(8) (2020); see also 42 U.S.C. 11701(13), (14) (2020) (citing earlier laws conferring leasing and fishing rights on Native Hawaiians). Congress then "reaffirmed the trust relationship between the United States and the Hawaiian people'' in the Hawaii Admission Act, 20 U.S.C. § 7512(10) (2020); accord 42 U.S.C. § 11701(16) (2020). Since then, ''the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians'' in at least ten statutes directed in whole or in part at American Indians and other native peoples of the United States such as Alaska Natives. 20 U.S.C. § 7512(13) (2020); see also 42 U.S.C. § 11701(19), (20), (21) (2020) (listing additional statutes).

[268] 43 C.F.R. § 50 (2016); S. Rep. No. 111–162 at 1, 4–7, 9–13 (2010); U.S. Department of Justice & U.S. Department of the Interior, Rep. on the Reconciliation Process Between the Fed. Government and Native Hawaiians 1, 23–25, 29–40 (2000) [hereinafter Reconciliation Report].

[269] 20 U.S.C. § 7512 (2) (2020).

[270] 20 U.S.C. § 7512 (3) (2020).

[271] Rice v. Cayetano, 528 U.S. 495, 501 (2000).

use and to own land and to be secure in their title."[272] From 1820 to 1850, the Kingdom transformed the communal land tenure system to a private land ownership system following pressure from the United States and European nations which "wanted stable land ownership to permit long-term leasing and outright land ownership for large-scale agricultural ventures."[273]

At the same time, non-Federal entities supported assimilation of Native Hawaiians. Between 1819 and 1847, the American Board of Commissioners for Foreign Missions (ABCFM), which received Federal support through the Indian Civilization Fund Act of 1819, sent 12 missionary companies to Hawai'i to promote Calvinism and claimed civilized practices.[274] ABCFM mandated the first company as follows: "You are to aim at nothing short of covering those islands with fruitful field and pleasant dwellings and schools and churches, and of raising up a whole people to an elevated state of Christian civilization."[275] The missionaries built schools to reduce the Native Hawaiian language ('Ōlelo Hawai'i) to writing, teach Native Hawaiians to read and write, and promote Christian conversion.[276] As the U.S. Supreme Court has noted, "They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices."[277]

Soon after, in 1826, Ka'ahumanu, the Queen Regent, negotiated the first treaty with the United States, settling debts and granting it permission to use Hawaiian ports.[278] As Congress has proclaimed, between 1826 to 1893, "the United States recognized the sovereignty and independence of the Kingdom of Hawaii, … extended full and complete diplomatic recognition to the Kingdom of Hawaii, and entered into treaties and conventions

[272] Id.

[273] Reconciliation Report at 25.

[274] Hawaiian Mission Children's Society, Portraits of American Protestant Missionaries to Hawaii (1901).

[275] American Board of Commissioners for Foreign Missions, Instructions of the Prudential Committee of the American Board of Commissioners for Foreign Missions to the Sandwich Islands Mission, at 27 (1838).

[276] Larry K. Kimura and William Wilson, U.S. Dept. of Interior, Native Hawaiians Study Commission. Report on the Culture, Needs and Concerns of Native Hawaiians Pursuant to Public Law 96-565, Title III, Vol. I, at 196 (1983)1 Native Hawaiians Study Commission Minority Report, 196 (U.S. Dept. of Interior 1983)

[277] Rice v. Cayetano, 528 U.S. 495, 501 (2000).

[278] H. Exec. Doc. 53-1, Foreign Relations of the United States, 1894, App. II, Affairs in Hawaii, Treaty of Friendship, Commerce, and Navigation Between the United States and the Sandwich Islands (Hawaii) (Dec. 23, 1826).

with the Kingdom of Hawaii to govern friendship, commerce[,] and navigation in 1826, 1842, 1849, 1875, and 1887."[279]

By the end of the 1820s, the majority of the adult Native Hawaiian population attended missionary schools.[280] The missionaries in 1831 then established a teacher training school at Lahainaluna, Maui.[281] The Lahainaluna Seminary trained young Native Hawaiians to teach other Native Hawaiians to read, write, and embrace Christianity.[282] In 1834, the school began to accept boarding students.[283] The missionaries in 1834 also supplied a printing press and printed school primers, catechisms, and the Bible in ʻŌlelo Hawaiʻi for distribution among newly literate Native Hawaiians.[284]

In 1836, the missionaries formed the Hilo Boarding School for Native Hawaiian male children.[285] "From the first, religious instruction, practical farming, and the mechanical skills of the time were dominating elements of the curriculum."[286] The Charter of the Hilo Boarding School, created in 1848, required schooling of Native Hawaiian male children in the various branches of Christian living and teaching of sound, useful knowledge, coupled with manual labor to promote good citizenship training.[287] The Department has described that the School "served well in the early days in educating leaders among the Hawaiian race, producing what was most needed among them, teachers, preachers, and intelligent agriculturists and homemakers."[288] The Department has also assessed the connections between other boarding schools: The Hilo Boarding School "served as a feeder for Lahainaluna Seminary which was then a higher school for the training of native preachers and missionaries."[289]

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[279] 20 U.S.C. § 7512 (4) (2020).

[280] Benjamin O. Wist, A Century of Public Education in Hawaii (1940) [hereinafter Wist].

[281] Department of the Interior, Bureau of Education Bulletin No. 16, A Survey of Education in Hawaii, at 95 (1920) [hereafter Survey of Education].

[282] Wist, at 90.

[283] Wist, at 90

[284] Linda K. Menton, A Christian and "Civilized" Education: The Hawaiian Chiefs' Children's School, 1839-50, 32 Hist. of Educ. Q., 213 (1992) [hereinafter Menton].

[285] Survey of Education, at 347.

[286] Survey of Education, at 347.

[287] Hilo Boarding School Charter (June 2, 1848).

[288] Survey of Education, at 347.

[289] Survey of Education, at 347.

For operation, the Hilo Boarding School relied on student manual labor, including for agriculture. As such, it was cautious to admit male children younger than age 10 or 12.[290] "It has always been predominately an industrial school and the labor of the pupils themselves has been a large factor in building up the plant, developing the farm[,] and maintaining the subsistence department."[291]

In 1900, the Hilo Boarding School established a "pupil government" including a judiciary body composed of child magistrates to distribute penalties to other children for school regulation violations and military discipline.[292] In 1910, the School instituted a military regimen including uniforms, drills, and rifles.[293] As the Department has acknowledged, the Hilo Boarding School "is conducted largely on a military basis, drill instruction, and daily routine being made regular features of the boys' life in the school."[294] The "military regimen proves to be of great assistance in the formation of right habits and ideals. It is a most important aid in maintaining good discipline and morale, and instilling loyalty to the school and the Nation."[295]

The daily schedule at the Hilo Boarding School remained largely unchanged from its opening to its closing as a school in 1925. Original records document the daily schedule as follows:

A.M.	5:20	Rising Bell
	5:35–6:25	Study Hour
	6:30	Breakfast
	7:00–8:20	Work Hour
	8:20	Dispensary
	8:40	Inspection of Rooms
	8:50–12:00	School
P.M.	12:00-1:00	Lunch
	1:00–4:00	Work Hour or Shop
	4:15-5:15	Drill (Tuesdays)
	5:45	Supper

[290] Letter from David B. Lyman, Hilo to R. Anderson, (Nov. 15, 1840), at 18–19.

[291] Survey of Education, at 348.

[292] Catalogue of the Hilo Boarding School for boys, Hilo, Hawaii, H.T. 1920–1921, at 12 (1920).

[293] Catalogue of the Hilo Boarding School for boys, Hilo, Hawaii, H.T. 1920–1921, at 20 (1920).

[294] Survey of Education, at 349.

[295] Survey of Education, at 349.

7:15	Chapel
7:20–8:30	Study Hour
8:45	Taps

On Sundays, the male children were permitted to rise at 7:00 a.m.[296] The newly educated teachers from Lahainaluna Seminary and Hilo Boarding School were charged to establish new mission schools throughout the Hawaiian Islands.

In 1840, King Kamehameha III developed a Bill of Rights providing for a ʻŌlelo Hawaiʻi-based public school system, making education a Kingdom responsibility instead of a missionary one.[297] By 1848, over 200 schools operated in the Kingdom of Hawaiʻi.[298]

King Kamehameha III also created the Chiefs' Children's School, also known as the Royal School, to train future monarchs of the Kingdom of Hawaiʻi.[299] Maintained by missionaries, Native Hawaiian children were segregated by gender in the School, which was a change from Native Hawaiian culture and practices, and disciplinary practices included food denial and corporal punishment:[300] "When we thought the case demanded it we have not hesitated to use the rod, taking them alone and conversing with them awhile before we applied it and the result has generally been a happy one."[301]

The Department has recognized that by 1850, the well-being of Native Hawaiians was diminishing: "With the rapid development of the sugar industry, which set in strongly about the middle of the [18th] century, and in view of the steadily and rapidly decreasing native population, it became evident that a supply of new and cheap labor must be found."[302]

[296] Catalogue of the Hilo Boarding School for boys, Hilo, Hawaii, H.T. 1920–1921, at 26 (1920).

[297] See Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III, at 40–43 (1842).

[298] Richard Armstrong, Journal of a Tour – Around the Windward Islands, Hawai, Maui and Molokai, in the Months of September, October, November, 1848 (1848).

[299] Menton, at 213–242.

[300] Menton, at 213–242.

[301] Menton, at 228 (citing Report of the Chiefs' Children's School (1841)).

[302] Survey of Education, 9.

So "her own people"[303] could once again thrive, the last direct descendant of King Kamehameha I, Princess Bernice Pauahi Bishop, in 1883 left her estate in "trust for a school dedicated to the education and upbringing of Native Hawaiians."[304] Princess Bernice Pauahi Bishop's will provided for the construction and maintenance of "two schools, each for boarding and day scholars, one for boys and one for girls,"[305] "in the Hawaiian Islands, called the Kamehameha Schools, on the Hawaiian monarchy's ancestral lands,"[306] with the purpose of providing "a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women."[307]

In 1888, the Kamehameha School for Boys incorporated a military training program, which the War Department recognized as a military school in 1910.[308] Between 1916 and 2002, under the National Defense Act, Kamehameha Schools participated in the Reserve Officers Training Corp and Junior Reserve Officers Training Corp programs.[309] From 1935 to the early months of World War II, the United States recruited attendees and graduates of the Kamehameha School for Boys to colonize the Howland, Baker, and Jarvis Islands, first through the Department of Commerce until jurisdiction was transferred to the Department.[310] The Kamehameha Schools continue to benefit Native Hawaiian education today.

Although the ʻŌlelo Hawaiʻi-based public school system initially operated using only the Hawaiian language, it eventually repressed ʻŌlelo Hawaiʻi in education by promoting English.[311] By 1888, only 16 percent of children were taught in Hawaiian.[312]

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[303] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 831 (9th Cir. 2006) (en banc) (citing Charles R. Bishop, The Purpose of the Schools, at 3 (1889)).

[304] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 831 (9th Cir. 2006) (en banc).

[305] Will of Bernice Pauahi Bishop (Oct. 31, 1883), in In re Estate of Bishop, Probate No. 2425 (Haw. Sup. Ct. 1884).

[306] Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 831 (9th Cir. 2006) (en banc).

[307] Will of Bernice Pauahi Bishop (Oct. 31, 1883), in In re Estate of Bishop, Probate No. 2425 (Haw. Sup. Ct. 1884).

[308] The Adjutant General's Off., The War Department, Officers of the Army of the U.S., Oct. 20, 1910, at 80 (1910).

[309] War Department Appropriation Bill for 1932, Military Activities: Hearings before the Subcommittee of House Committee on Appropriations, 71st Cong. 936, 940 (1930).

[310] S. Res. 114-109 (2015) (enacted).

[311] 81 Fed. Reg. 71,280 (Oct. 14, 2016); Reconciliation Report, at 29.

[312] Native Hawaiian Law: A Treatise, (MacKenzie, Serrano, et al. eds.), at 1261 (2015).

In 1891, when crowned, Queen Lili‘uokalani advanced the Kingdom, seeking to reduce control and influence by U.S. and European sugar planters, missionaries, and business interests over it.[313] Then, as the United States has recognized, in 1893, the "sovereign, independent, internationally recognized, and [I]ndigenous government of Hawaii, the Kingdom of Hawaii, was overthrown by a small group of non-Hawaiians, including United States citizens, who were assisted in their efforts by the United States Minister, a United States naval representative, and armed naval forces of the United States."[314] As President Cleveland noted, "it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister."[315] "United States agents and citizens" participated in deposing Queen Lili‘uokalani, and non-Native Hawaiians established the Republic of Hawai‘i in 1894.[316]

The United States has further recognized the resulting deliberate policy to suppress ‘Ōlelo Hawai‘i:

> Following the overthrow of the Kingdom of Hawaii in 1893, Hawaiian medium schools were banned. After annexation, throughout the territorial and statehood period of Hawaii, and until 1986, use of the Hawaiian language as an instructional medium in education in public schools was declared unlawful. The declaration caused incalculable harm to a culture that placed a very high value on the power of language, as exemplified in the traditional saying: ''I ka ‘o¯ lelo no¯ ke ola; I ka ‘o¯ lelo no¯ ka make. In the language rests life; In the language rests death.''[317]

For over a century, the various governments controlling the Hawaiian Islands banned ‘Ōlelo Hawai‘i and required the use of the English language in public education, coinciding with additional land acquisition by the United States of the Hawaiian Islands.

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[313] Reconciliation Report, at 26, 27.

[314] 20 U.S.C. § 7512 (5) (2020).

[315] S. Rep. No. 103–126, at 1, 27–28 (1993) (quoting President Cleveland's Message Relating to the Hawaiian Islands—December 18, 1893).

[316] 20 U.S.C. § 7512 (5) (2020); Reconciliation Report, at 29.

[317] 20 U.S.C. § 7512 (19) (2015).

As the United States codified, in 1898, the ‘‘Joint Resolution to provide for annexing the Hawaiian Islands to the United States,” “ceded absolute title of all lands held by the Republic of Hawaii, including the government and crown lands of the former Kingdom of Hawaii, to the United States,”[318] totaling 1.8 million acres.[319] The Joint Resolution notably “mandated that revenue generated from the lands be used ‘solely for the benefit of the inhabitants of the Hawaiian Islands for *educational* and other public purposes.’”[320] The United States in turn officially supported Native Hawaiian education prior to Hawaii’s status as a U.S. territory and state.[321]

Congress in 1900 enacted The Hawaiian Organic Act, establishing the Territory of Hawai‘i, extending the U.S. Constitution to Hawai‘i, placing ceded lands under Federal control and directing the use of proceeds from those lands to benefit the inhabitants of Hawai‘i.[322] By 1902, the Territory replaced the ‘Ōlelo Hawai‘i-based public school system with 203 English-required schools and instituted discipline practices for speaking ‘Ōlelo Hawai‘i.[323] “[T]he extraordinary feature of the Hawaiian educational plan is that, in a land far removed in the Pacific, it did become typically American, and that the transformation was achieved even before the Islands themselves became American soil.”[324]

In 1959, when the United States admitted the State of Hawai‘i into the Union, it also reaffirmed the trust relationship between the United States and the Native Hawaiian Community.[325] It did so in part by retaining exclusive power to enforce the Ceded Land Trust and Hawaiian Home Lands Trust, including to ensure “proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians.”[326] The United States therefore officially supported Native Hawaiian education following the statehood of Hawai‘i.

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[318] 20 U.S.C. § 7512 (6) (2020).

[319] 81 Fed. Reg. 71,280 (Oct. 14, 2016).

[320] 20 U.S.C. § 7512 (6) (2020) (emphasis added).

[321] 20 U.S.C. § 7512 (6) (2020).

[322] Act of April 30, 1900, Ch. 339, 31 Stat. 141.

[323] Paul F. Nahoa Lucas, E Ola Mau Kākou I Ka ‘Ōlelo Makuahine: Hawaiian Language Policy and the Courts, 34 Haw. J. Hist. 1, 12 (2000)

[324] Wist, B. Othello. (1940). A century of public education in Hawaii. [Honolulu]: The Hawaii educational review.

[325] 20 U.S.C. § 7512 (10), (11) (2020).

[326] Act of March 18, 1959, Pub. L. 86–3, § 5, 73 Stat. 4, 6.

After statehood of Hawai‘i, the United States as part of Native Hawaiian relations also supported established missionary and other boarding schools for Native Hawaiians.

The Federal Indian Boarding School Initiative investigation shows that between 1819 to 1969 the United States supported approximately seven boarding schools in the Hawaiian Islands. Note, an individual Federal Indian boarding school may account for multiple sites and an institution primarily operated or supported by a non-Federal entity could qualify as a Federal Indian boarding school, if the institution met all four required criteria as described in the sections entitled Executive Summary and Developing the Indian Boarding School List.

The Department has identified the following Federal Indian Boarding Schools in the Hawaiian Islands:

1. **Hilo Boarding School**
2. **Industrial and Reformatory School (Kawailou)**
3. **Industrial and Reformatory School (Keoneula, Kapalama)**
4. **Industrial and Reformatory School (Waialee, Waialua)**
5. **Industrial and Reformatory School for Girls (Keoneula, Kapalama)**
6. **Industrial and Reformatory School for Girls (Maunawili, Ko’olaupoko)**
7. **Industrial and Reformatory School for Girls (Mo’ili’ili, Honolulu)**
8. **Kamehameha Schools**
9. **Lahainaluna Seminary**
10. **Mauna Loa Forestry Camp School**
11. **Molokai Forestry Camp School**

Today, the United States has held that the “long-standing policy of the United States has been to protect and advance Native Hawaiian interests. Native Hawaiians continue to suffer the consequences of the 1893 overthrow of their [I]ndigenous government,” including higher poverty rates and lower incomes than non-Native Hawaiians in Hawaii.[327] As Congress expressed in the Joint Resolution to Acknowledge the 100th Anniversary of the Overthrow of the Kingdom of Hawaii, a commitment to acknowledge the ramifications

[327] S. Rep. No. 111-162, at 2 (2010).

of past Federal actions is necessary to provide the proper foundation for reconciliation between the United States and the Native Hawaiian Community.[328] The Federal Indian Boarding School Initiative provides a proper first step for intergenerational healing from the effects of Federal Indian boarding schools in the Native Hawaiian Community.

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12. Federal Indian Boarding Schools and Freedmen

The Department also recognizes the inclusion of select non-Indians in the Federal Indian boarding school system, given the established association of certain Freedmen with the Five Civilized Tribes or because schools accepted both Indians and non-Indians, including because of Federal legislation.[329]

Following President Lincoln's Emancipation Proclamation in 1863 and the end of the Civil War in 1865, emancipated African Americans were referred to as "Freedmen." From 1865 to 1872, the Federal Bureau of Refugees, Freedmen, and Abandoned Lands—commonly referred to as the Freedmen's Bureau—supervised all relief and educational activities relating to Freedmen, including issuing rations, clothing, and medicine.[330] The Freedmen's Bureau recruited teachers and worked with non-Federal entities to establish schools and develop educational opportunities for the Freedmen.[331]

Some people from the Five Civilized Tribes, including the Cherokee Nation, Chickasaw Nation, Choctaw Nation, Muscogee (Creek) Nation, and Seminole Nation, had enslaved people before the United States forced the removal of the Tribes to the Indian Territory in present-day Oklahoma.[332] The Five Civilized Tribes continued to hold enslaved people in the Indian Territory until 1866 when they executed treaties with the United States that required the Tribes to free their enslaved people.[333] The Freedmen's

[328] Pub. L. 103-150, 107 Stat. 1510 (1993).

[329] *See, e.g.*, ARCIA for 1903, at 76–82.

[330] National Archives and Records Administration, The Freedmen's Bureau, Records of the Federal Bureau of Refugees, Freedmen, and Abandoned Lands.

[331] Robert D. Parment, Schools for the Freedmen, 34 Negro Hist. Bull. 128 (1971).

[332] Michael F. Doran, Negro Slaves of the Five Civilized Tribes, 68 Annals Ass'n Am. Geographers 335 (1978).

[333] Treaty with Choctaw and Chickasaw, Apr. 28, 1866. 14 Stat. 769; Treaty with the Creeks, June 14, 1866., 14 Stat. 785; Treaty with the Seminole, July 19, 1866, 14 Stat. 755; Treaty with the Cherokee, July 27, 1866, 14 Stat. 799.

Bureau operated in the Indian Territory until and just after the treaties were executed in 1866.[334]

Efforts to educate Freedmen associated with the Five Civilized Tribes after 1866 originated with each of the Five Civilized Tribes but differed in rates of establishment and number of schools, most of which were lacking in resources and adequate facilities.[335] In some cases, the Tribes already had established educational systems for their children, which then accommodated Freedmen.[336] In those cases, the Freedmen's schools were typically built as stand-alone segregated schools.

Some of the Freedmen's schools were connected to existing Indian boarding schools. For example, the Creek Nation opened the Tullahassee School in 1850 for Indian children as a boarding school.[337] After a fire destroyed the building, the school reopened in 1883 as the Tullahassee Manual Labor School with the cooperation of the Baptist Home Mission Society and the Creek Freedmen and their descendants.[338] The government provided funds to the school and controlled it from 1908 to 1914, after which Wagoner County operated it until 1924 as a school for African Americans in Oklahoma.[339]

[334] Carol Sue Humphrey, Freedmen Schools, in The Encyclopedia of Oklahoma History and Culture; Donald A. Grindle, Jr., & Quintard Taylor, Red vs Black: Conflict and Accommodation in the Post Civil War Indian Territory, 1865-1907, 8 Am. Indian Q. 216, 211–229 (1984).

[335] Grindle & Taylor, at 216; ARCIA for 1903, at 76–82; ARCIA for 1900, at 112, 115, 116; ARCIA for 1887, at LXII – LXIII.

[336] Grindle & Taylor, at 216.

[337] Board of Foreign Missions of the Presbyterian Church in the U.S., Forty-first Annual Rep. 6 (1882).

[338] ARCIA for 1889, at 206; Bd. of Foreign Missions of the Presbyterian Church in the U.S., Forty-first Annual Rep. 9, 10 (1882).

[339] Rep. of the Department of the Interior, 350 (1907).

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13. Other Types of Schools

In addition to schools for the Freedmen of the Five Civilized Tribes, the Department acknowledges that other schools had combined enrollments of Indian, African American, White, and Hispanic students.

For example, in 1878, the government took a party of newly released Indian prisoners of war from Fort Marion in St. Augustine, Florida, to the Hampton Normal and Agricultural Institute in Virginia to receive an education.[340] These represented the first Indian students at Hampton, initiating an Indian education program that lasted until 1923. From 1878 to 1912, the government provided an annual payment of $167 per Indian student for board and clothing at Hampton.[341] Between 1878 and 1923, approximately 1,388 Indian students representing 65 Indian Tribes attended the school.[342] The Hampton Normal and Agricultural Institute eventually became Hampton University, a private institution designated today as a Historically Black College or University.

In other cases, the Federal Government funded schools for Indian students that later admitted non-Indian students. For example, in 1888, the Catholic Church established the St. Boniface Indian School in Banning, California because of its proximity to several Indian reservations in southern California.[343] At-risk White, Hispanic, and African American children also attended the school until it closed in the 1970s.

[340] The Hampton Normal and Agricultural Institute, The Work of Hampton, 3 (1905); ARCIA for 1878, at XLIII.

[341] The Hampton Normal and Agricultural Institute, at 15.

[342] Paulette Fairbanks Molin, Training the Hand the Head and the Heart: Indian Education at Hampton Institute, 51 Minn. Hist. 84, 82–98 (1998).

[343] R. Bruce Harley, The Founding of St. Boniface Indian School, 1888-1890, Vol. 81., No. 4, S. Cal. Q., Winter, 1999, 449–466 (1999); Precious Blood School, 1953-2008, Over 50 Years of Hope.

 [344]

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14. Federal Indian Boarding School List

Through the Federal Indian Boarding School Initiative, the Department details the first official list of Federal Indian boarding schools operated or supported by the United States. Under its Memorandum of Understanding with NABS, the Department cross-referenced its list with that of NABS to secure comprehensive identification of schools in the Federal Indian boarding school system. Each site met the four required criteria: (1) housing, (2) education, (3) Federal support, and (4) timeframe. The list details that the Department operated or supported 408 Federal Indian boarding schools across 37 states or then-territories, including 21 schools in Alaska and 7 schools in Hawaii. Given that an individual Federal Indian boarding school may account for multiple sites, the 408 Federal Indian boarding schools comprised 431 specific sites.

[344] Johnston, F.B., *Hampton Institute, Va. – Indian orchestra*. [Photograph]. (1899 or 1900). Johnston, Frances Benjamin, 1864-1952. Hampton Normal and Agricultural Institute, Hampton, Virginia, Library of Congress Prints and Photographs Division Washington, D.C..

The official list of Federal Indian boarding schools, organized by state (or then-territory) is provided in **Appendix A**. The overview of Federal Indian boarding schools by state is as follows:

Alabama - 1
Alaska - 21
Arizona - 47
Arkansas - 1
California - 12
Colorado - 5
Connecticut - 0
Delaware - 0
Florida - 1
Georgia - 2
Hawaii - 7
Idaho - 6
Illinois - 2
Indiana - 2
Iowa - 3
Kansas - 12
Kentucky - 1
Louisiana - 0
Maine - 0
Maryland - 0
Massachusetts - 0
Michigan - 5
Minnesota - 21
Mississippi - 7
Missouri - 2
Montana - 16
Nebraska - 9
Nevada - 3
New Hampshire - 0
New Jersey - 0
New Mexico - 43
New York - 3
North Carolina - 4
North Dakota - 12
Ohio - 0
Oklahoma - 76
Oregon - 9
Pennsylvania - 3
Rhode Island - 0
South Carolina - 0
South Dakota - 30
Tennessee - 1
Texas - 0
Utah - 7
Vermont - 1
Virginia - 1
Washington - 15
West Virginia - 0
Wisconsin - 11
Wyoming - 6

Summaries for each Federal Indian boarding school are provided in **Appendix B**. The data captured in each summary where confirmed includes the following information:

- **School Name**[345]
- **Possible Other Name(s)**[346]
- **Associated School(s)**[347]
- **School Address**
- **Years of Operation (Start Date and End Date)**[348]
- **Currently Operating**
- **Federal Indian Boarding School Definition Criteria (Housing, Education, Federal Support, Timeframe)**
- **School Type**
- **General Notes**

As the investigation continues, the Department recognizes the number of Federal Indian boarding schools may change.

[345] In either this category or in the "Possible Other Name(s)" category, an [*] denotes the current name of a school still in operation.

[346] Includes other names the school was known by or other name variations found in various reports; some variations appear to be clear typographical and, or spelling errors.

[347] An associated school is typically where the same school moved locations and either changed operators or changed name.

[348] May include "as early as" or "as late as" where the date is not a definitive open or closing date, but rather the earliest or latest reference found for the school. Occasionally the date indicates "circa" for estimated dates.

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15. Marked and Unmarked Burial Sites Across the Federal Indian Boarding School System

The Federal Indian Boarding School Initiative investigation includes identifying the location of marked and unmarked burial sites across the Federal Indian boarding school system, which may later be used to assist in locating unidentified remains of American Indian, Alaska Native, and Native Hawaiian children. This investigation component will provide a basis for the Department to plan future sitework, including protection of burial sites and potential repatriation or disinterment of remains of children, under Federal law, including NAGPRA, and in coordination with sister Federal agencies as relevant.

The identification of marked and unmarked burial sites across the Federal Indian boarding school system remains ongoing. The Department faced several limitations to complete this aspect of the investigation, including budget and appropriations restrictions, limits within the current year's budget related to appropriations as part of the continuing resolution process, and COVID-19 pandemic restrictions affecting access to physical records locations. Research limitations included (1) inconsistent Federal reporting of child deaths, including the number and cause or circumstances of death, and burial sites and (2) certain potentially relevant records are in the control of other Federal agencies and, or non-Federal entities.

[349] Lubken, Walter J. (n.d.). [Photograph of teacher and young female students seated with sewing machines in classroom at the Phoenix Indian Industrial School]. U.S. Bureau of Reclamation, Phoenix Area Office.

To date, across the Federal Indian boarding school system, the Department investigation has identified approximately 53 marked or unmarked burial sites. As the investigation continues, the Department expects the number of sites to increase. The composition of approximate identified burial sites is as follows:

- Unmarked burial sites – 6
- Marked burial sites – 33
- Both marked and unmarked burial sites present at a school location – 14

For the Federal Indian Boarding School Initiative investigation, the Department is recruiting staff with the requisite skill sets—including Federal Indian law and policy and history and community knowledge—to identify additional locations of marked and unmarked burial sites across the Federal Indian boarding school system.

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[350] Department of the Interior, Bureau of Indian Affairs, Albuquerque Indian School, 1947-ca. 1964 (most recent creator). (ca. 1885). Albuquerque Indian School in 1885, Relocated from Duranes to Albuquerque in 1881 [Photograph]. National Archives (292865)].

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16. Other Indian Institutions

The Federal Indian Boarding School Initiative is identifying Indian boarding schools that received Federal oversight or support. In its investigation, the Department identified approximately 500 Indian boarding schools and classified a subset of those schools as Federal Indian boarding schools. Outside the scope of the investigation, the Department also identified over 1,000 other Federal and non-Federal institutions, including Indian day schools, sanitariums, asylums, orphanages, and stand-alone dormitories. Some of the other aforementioned institutions may have involved education of Indian people, mainly Indian children.

As part of this investigation, when one of the four required criteria was not met for a specific institution, that institution was removed from the list of Federal Indian boarding schools and classified as an "other institution." The Department did not conduct final quality control for the list of other institutions.

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17. Legacy Impact of the Indian Boarding School System


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[351] *Blindfolded children stacking blocks at the Fort Yuma Indian Boarding School* [Photograph]. (n.d.). Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

As the Federal Indian boarding school system operated for over a century and a half, the Department identifies the watershed Running Bear studies, quantitative research based on now-adult Federal Indian boarding school attendees' medical status, that indicate the Indian boarding school system continues to impact the present-day health of Indians who participated in the studies. These results verify the need for a comprehensive examination and report by an independent research group to assess the current impacts that Indian boarding schools have had on American Indians, Alaska Natives, and Native Hawaiians, including health, education, and economic status.[352] A comprehensive analysis of the Federal Indian boarding school system will inform future Federal Indian law and policy changes in health care, education, and economic development.

Indian childhood experiences in Indian boarding schools, "at a minimum, the separation from family," contributed to poor health impacts on child attendees as adults.[353] The Running Bear studies, funded by the National Institutes of Health (NIH), are the first medical studies to systematically and quantitatively examine the relationship between American Indian boarding school child attendance and physical health status, the number of physical health conditions diagnosed by a medical doctor, and specific chronic health conditions, while also controlling for parental attendance in a large sample. The "[c]ombined direct and indirect results (beta = –.39, CI = –1.20, .42) show American Indians who attended boarding school have lower physical health status (beta = –1.22, CI= –2.18, –.26, p. ≤ .01) than those who did not."[354] Indian boarding school child attendees had a 44 percent greater count of past-year chronic physical health problems (PYCPHP) as adults compared with adult nonattendees.[355] Now-adult attendees were more likely to have cancer (more than three times), tuberculosis (more than twice), high cholesterol (95 percent), diabetes (81 percent), anemia (61 percent), arthritis (60 percent), and gall bladder disease (60 percent) than nonattendees.[356] Other studies demonstrate that now-adult

[352] *See, e.g.*, Kathryn E. Fort, American Indian Children and the Law 8 (Carolina Academic Press, 2019) ("Training for jobs that didn't exist left many young adults with an inability to gain employment in the newly industrialized American society. The tribal society that many young adults returned to was unrecognizable due to removal, relocation, and federal policies of allotment. The resulting poverty of American Indian families was used as a justification for removing Native children from their homes.").

[353] Maria Yellow Horse Brave Heart, The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration, 35 J. of Psychoactive Drugs 1, 7–13 (2003).

[354] Ursula Running Bear et al., Boarding School Attendance and Physical Health Status of Northern Plains Tribes, 13 Applied Res. in Qual. of Life 633 (2018).

[355] Ursula Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Fam. Community Health 1, 3–4 (2019).

[356] Id. at 5.

attendees experience increased risk for PTSD, depression, and unresolved grief.[357] As a result, a "prevailing sense of despair, loneliness, and isolation from family and community are often described."[358]

"Both individual and paternal boarding school attendance are associated with chronic health problems" of now-adult Indian boarding school attendees.[359] A father's boarding school attendance was independently associated with chronic physical health problems.[360] Participants whose fathers attended Indian boarding school had on average a 36 percent greater PYCPHP count than those whose fathers did not attend boarding school.[361] When controlling for maternal and paternal boarding school attendance, only a father's attendance was related to an increased number of PYCPHP in adulthood, suggesting that a father's Indian boarding school attendance is an *independent* predictor of his child's adult PYCPHP.[362] Previous research has noted that American Indian men experienced more physical and sexual abuse in boarding school then women, particularly those more "language-experienced."[363] The increased trauma that men faced in the Indian boarding school system may have produced increased stress, which then may affect the biological systems of the body.[364] These stressors may then introduce epigenetic alterations that are then transferred to their children, also known as epigenetic inheritance.[365]

In the Running Bear studies, American Indian child attendees "punished for the use of language and who were also 8 years or older when attendance began reported the lowest

[357] Maria Yellow Horse Brave Heart, The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration, 35(1) J. of Psychoactive Drugs 1, 7–13 (2003).

[358] Ursula Running Bear et al., Boarding School Attendance and Physical Health Status of Northern Plains Tribes, 13 Applied Res. Qual. of Life 633 (2018).

[359] Ursula Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Fam. Community Health 1, 3–4 (2019).

[360] Id. at 4–5.

[361] Id.

[362] Id.

[363] Maria Yellow Horse Brave Heart, Gender differences in the historical trauma response among the Lakota, 10 J. Health Soc Policy 1, 14 (1999).

[364] Michelle Sotero, A conceptual model of historical trauma: implications for public health practice and research, 1 J. Health Dispar. Res. Pract 93 (2006).

[365] Rachel Yehuda et al., Holocaust exposure induced intergenerational effects on FKBP5 methylation, 80 Biol. Psychiatry 372 (2016); Zaneta Thayer et al., Biological memories of past environments: epigenetic pathways to health disparities, 6 Epigenetics 798 (2011).

physical health status scores."[366] "The critical age for learning language is up to 7 and 8, after which there is a steep decline."[367] American Indian children "removed from their homes at age 8 or older had a greater degree of language skill and proficiency and may have been more likely to speak their language leading to punishment."[368] Although similar interaction effects are not found for other boarding school experiences, the studies point to other adverse effects.[369] Now-adult attendees with then-limited family visits, forced church attendance, and who were prohibited from practicing their culture and traditions had lower physical health status as adults than those who did not have these experiences in boarding school as children.[370] The Running Bear studies reinforce that Federal Indian boarding school policies "often impacted several generations."[371]

The Federal Indian Boarding School Initiative investigation further demonstrates that "children of the first attendees of [Federal Indian] boarding schools went on to attend, as did their grandchildren, and great grandchildren leading to an intergenerational pattern of cultural and familial disruption"[372] under direct and indirect support by the United States and non-Federal entities.

[366] Ursula Running Bear et al., The relationship of five boarding school experiences and physical health status among Northern Plains Tribes, 27 Applied Res. in Qual. of Life 153 (2018).

[367] Dale Purves et al., The development of language: A critical period in humans, in Neuroscience (2d ed.) (2001).

[368] Ursula Running Bear et al., The relationship of five boarding school experiences and physical

health status among Northern Plains Tribes, 27 Applied Res. Qual. of Life 153 (2018).

[369] Id.

[370] Id.

[371] Ursula Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Fam. & Community Health 1 (2019).

[372] Ursula Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Fam. & Community Health 1 (2019).

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18. Federal Indian Boarding School Initiative Findings and Conclusions

The Assistant Secretary's findings of the Federal Indian Boarding School Initiative, which remain under investigation, based on examination of records under its control, include the following:

1. The Federal Indian boarding system was expansive, consisting of 408 Federal Indian boarding schools, comprised of 431 specific sites, across 37 states or then-territories, including 21 schools in Alaska and 7 schools in Hawaii.

2. Multiple generations of American Indian, Alaska Native, and Native Hawaiian children were induced or compelled by the Federal Government to experience the Federal Indian boarding school system, given their political and legal status as Indians and Native Hawaiians.

3. The twin Federal policy of Indian territorial dispossession and Indian assimilation through Indian education extended beyond the Federal Indian boarding school system, including an identified 1,000+ other Federal and non-Federal institutions,

[373] *Female students standing and playing with blocks at the Fort Yuma Indian Boarding School* [Photograph]. (n.d.).Fort Yuma Quechan Indian Tribe Photo Gallery, Ft Yuma Indian School Collection.

including Indian day schools, sanitariums, asylums, orphanages, and stand-alone dormitories that involved education of Indian people, mainly Indian children.

4. Funding for the Federal Indian boarding school system included both Federal funds through congressional appropriations and funds obtained from Tribal trust accounts for the benefit of Indians and maintained by the United States.

5. The Federal Indian boarding school system deployed militarized and identity-alteration methodologies to assimilate American Indian, Alaska Native, and Native Hawaiian people—primarily children—through education.

6. The Federal Indian boarding school system predominately utilized manual labor of American Indian, Alaska Native, and Native Hawaiian children to compensate for the poor conditions of school facilities and lack of financial support from the Federal Government.

7. The Federal Indian boarding school system discouraged or prevented the use of American Indian, Alaska Native, and Native Hawaiian languages or cultural or religious practices through punishment, including corporal punishment.

8. Tribal preferences for the possible disinterment or repatriation of remains of children discovered in marked or unmarked burial sites across the Federal Indian boarding school system vary widely. Depending on the religious and cultural practices of an Indian Tribe, Alaska Native Village, or the Native Hawaiian Community, it may prefer to disinter or repatriate any remains of a child discovered across the Federal Indian boarding school system for return to the child's home territory or to leave the child's remains undisturbed in its current burial site. Moreover, some burial sites contain human remains or parts of remains of multiple individuals or human remains that were relocated from other burial sites, thereby preventing Tribal and individual identification.

9. The Federal Government has not provided a forum or opportunity for survivors or descendants of survivors of Federal Indian boarding schools, or their families, to voluntarily detail their experiences in the Federal Indian boarding school system.

Based on the initial findings of the Federal Indian Boarding School Initiative, which remain under investigation, and despite factors outside the Department's control, including

the ongoing COVID-19 pandemic and funding issues, the Assistant Secretary concludes that:

1. The United States' creation of the Federal Indian boarding school system was part of a broader policy aimed at acquiring collective territories from Indian Tribes, Alaska Natives, and the Native Hawaiian Community and lands from individuals therein. From the earliest days of the Republic, the United States' official objective—based on Federal and other records—was to sever the cultural and economic connection between Indian Tribes, Alaska Native Villages, the Native Hawaiian Community, and their territories. The assimilation of Indian children through the Federal Indian boarding school system was intentional and part of that broader goal of Indian territorial dispossession for the expansion of the United States.

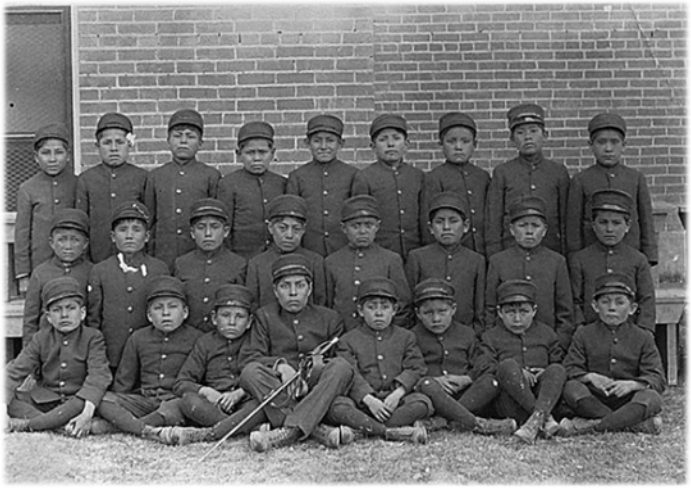
2. Assimilation of American Indian, Alaska Native, and Native Hawaiian people eventually became an objective of Federal policy in and of itself. The Federal Indian boarding school policies targeted Indian children as one method to accomplish this objective.

3. The intentional targeting and removal of American Indian, Alaska Native, and Native Hawaiian children to achieve the goal of forced assimilation of Indian people was both traumatic and violent. Based on initial research, the Department finds that hundreds of Indian children died throughout the Federal Indian boarding school system. The Department expects that continued investigation will reveal the approximate number of Indian children who died at Federal Indian boarding schools to be in the thousands or tens of thousands. Many of those children were buried in unmarked or poorly maintained burial sites far from their Indian Tribes, Alaska Native Villages, the Native Hawaiian Community, and families, often hundreds, or even thousands, of miles away. The Department's research revealed at least 53 different burial sites across the Federal Indian boarding school system and leads to an expectation that there are many more burial sites that will be identified with further research. The deaths of Indian children while under the care of the Federal Government, or federally supported institutions, led to the breakup of Indian families and the erosion of Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community.

4. Many more Indian children who survived the Federal Indian boarding school system live(d) with their experiences from the school(s). Moreover, several generations of

Indian children experienced the Federal Indian boarding school system. The Federal Indian boarding school system directly disrupted Indian families, Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community for nearly two centuries.

5. Further review is required to determine the reach and impact of the violence and trauma inflicted on Indian children through the Federal Indian boarding school system. The Department has recognized that targeting Indian children for the Federal policy of Indian assimilation contributed to the loss of the following: (1) life; (2) physical and mental health; (3) territories and wealth; (4) Tribal and family relations; and (5) use of Tribal languages. This policy also caused the erosion of Tribal religious and cultural practices for Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community, and over many generations.

 [374]

[374] Department of the Interior, Bureau of Indian Affairs, Albuquerque Indian School, 1947-ca. 1964 (most recent creator). (ca.1900). *Class of younger boys in uniform at the Albuquerque Indian School* [Photograph]. National Archives (292871).

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19. Recommendations of the Assistant Secretary – Indian Affairs Bryan Newland

For nearly two full centuries, the United States pursued, embraced, or permitted a policy of forced assimilation of American Indian, Alaska Native, and Native Hawaiian people. The Federal Indian boarding school system was developed to target Indian children to accomplish this policy objective for over 150 years and influence U.S.-Indian relations and U.S.-Native Hawaiian relations. The Department must fully account for its role in this effort and renounce forced assimilation of Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community as a legitimate policy objective.

To begin the process of healing from the harm and violence caused by assimilation policy, the Department should affirm an express policy of cultural revitalization—supporting the work of Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community to revitalize their languages, cultural practices, and traditional food systems, and to protect and strengthen intra-Tribal relations.

To complete the Secretary's objectives of the Federal Indian Boarding School Initiative, and to begin the pursuit of this express policy, the Assistant Secretary – Indian Affairs provides the following recommendations based on the current findings:

1. **Continue full investigation.** Support Secretary Haaland to authorize further investigation of the Federal Indian boarding school system to complete a comprehensive review of records under the Department's control. Congress appropriated $7 million in new funds through the Fiscal Year (FY) 2022 Consolidated Appropriations Act (Public Law 117-103) to authorize action by the Department to expand its investigation of the Federal Indian boarding school system, with funds that are continued as part of the FY 2023 President's request.

   Conduct several additional, critical research priorities including digitization, examination, and analysis of records from both AIRR and NARA. The BTFA identified 39,385 boxes in AIRR with potentially responsive documents (approximately 98.4 million sheets of paper).

   Recognize that specific needs and priorities include, but are not limited to, identification and evaluation of available records, such as Indian boarding school

facilities and planning documents, enrollment records and vital statistics, correspondence, maps, photographs, and administrative reports, that:

- Approximate the total number of American Indian, Alaska Native, and Native Hawaiian children that attended Federal Indian boarding schools;
- Approximate the total number of marked and unmarked burial sites associated with Federal Indian boarding schools;
- Locate marked and unmarked burial sites associated with a particular Indian boarding school facility or site, which may later be used to assist in locating unidentified remains of Indian children, Indian Prisoners of War, and Freedmen from the Five Civilized Tribes;
- Expand the summary profiles of individual Federal Indian boarding schools;
- Detail the health and mortality of Indian children who experienced the Federal Indian boarding school system, which may later be used to develop dataset(s) for analysis of health impacts of Indian boarding school attendance, including an approximate mortality rate for attendees, as the Department was responsible for the health care of American Indians and Alaska Natives until 1954;
- Identify documented methodologies and practices used in the Federal Indian boarding school system that discouraged or prevented the use of American Indian, Alaska Native, and Native Hawaiian languages or cultural or religious practices;
- Approximate the amount of Federal support, including financial, property, livestock and animals, equipment, and personnel for the Federal Indian boarding school system, recognizing that some records are no longer available;
- Approximate the amount of Tribal or individual Indian trust funds held by the United States in trust that were used to support the Federal Indian boarding school system, including to non-Federal entities and, or individuals, recognizing that some records are no longer available;
- Identify religious institutions and organizations that have ever received Federal funding in support of the Federal Indian boarding school system;

- Identify States that may have ever received Federal funding in support of the Federal Indian boarding school system;
- Identify nonprofits, associations, academic institutions, philanthropies, and other organizations that may have received Federal funding in support of the Federal Indian boarding school system;
- Confirm additional sites within the Federal Indian boarding school system;
- Examine the connection between the use of Federal Indian boarding schools and subsequent systematic foster care and adoption programs to remove Indian children, including the Indian Adoption Project established by the Bureau of Indian Affairs and Child Welfare League of America, that were not repudiated by Congress until the enactment of the Indian Child Welfare Act of 1978.

With additional investigation, produce a second report by the Department, including the following: (1) determining locations of marked or unmarked burial sites associated with the Federal Indian boarding school system; (2) identifying names, ages, and Tribal affiliations of children interred at such locations; and (3) approximating a full accounting of Federal support for the Federal Indian boarding school system, including a proactive approximate accounting of any Tribal and, or individual Indian trust funds held in trust by the United States used to support the Federal Indian boarding school system. The portions of that report that contain sensitive information such as individual names or locations of burial sites will not be released to the public.

Continue departmental engagement and support of relevant Federal agencies that have control or possession of records pertaining to the Federal Indian boarding school system.

2. **Identify surviving Federal Indian boarding school attendees.** Develop a system for voluntary identification of surviving now-adult attendees, including communication methodologies.

3. **Document Federal Indian boarding school attendee experiences.** Develop a platform for now-adult Federal Indian boarding school attendees and their descendants to formally document their historical accounts and experiences, and understand current impacts such as health status, including substance abuse and violence.

4. **Support protection, preservation, reclamation, and co-management of sites across the Federal Indian boarding school system where the Federal Government has jurisdiction over a location.**

5. **Develop a specific repository of Federal records involving the Federal Indian boarding school system at the Department of the Interior Library to preserve centralized Federal expertise on the Federal Indian boarding school system.**

6. **Identify and engage other Federal agencies to support the Federal Indian Boarding School Initiative, including those with control of any records involving the Federal Indian boarding school system or that provide health care to American Indians, Alaska Natives, and Native Hawaiians, including for the provision of mental health services to students attending Bureau of Indian Education (BIE) operated and funded schools.**

7. **Support non-Federal entities that may independently release records under their control.** To make the Federal investigation more thorough and accurate, support non-Federal entities, such as States and religious institutions and organizations, including those that have received Federal funding to operate Federal Indian boarding schools, that may independently release records relating to the Federal Indian boarding school system such as those that cover Indian child removal and provision of health care services to Indians, including at military installations.

8. **Support Congressional action involving the following policies:**

    - **NAGPRA.** Support exemptions from Freedom of Information Act requests to protect sensitive, specific information on burial locations across the Federal Indian boarding school system that contain remains of Indian children to prevent against well-documented grave-robbing, vandalism, and other disturbances to Indian burial sites.

        - Support action to direct Federal agencies that control cemeteries to allow the reburial of remains of Indian children and funerary objects repatriated pursuant to NAGPRA, and consistent with specific Tribal practices. Amendment of the Recreation and Public Purposes Act may be needed to facilitate use of BLM lands for this purpose.

- Support action to increase appropriations and professional staffing for programs in Federal agencies that are responsible for agency compliance with NAGPRA.

- Support action to authorize the appropriate agencies to disinter or repatriate, under the direction of an Indian Tribe, Alaska Native Village, or the Native Hawaiian Community, or family with an identified interest, and consistent with specific Tribal practices, any remains of Indian children discovered in marked or unmarked burial sites associated with the Federal Indian boarding school system.

- **Advance Native language revitalization.** Support funding for the expansion and development of programs implementing or supporting Native language revitalization for Bureau of Indian Education (BIE) operated and funded schools, as well as non-BIE schools. Also work to seek funding for the expansion and development of programs outside BIE schools implementing or supporting Native language revitalization, including language immersion schools and community organizations.

- **Promote Indian health research.** Support scientific studies that turn discovery into health by appropriating specific funds to authorize Federally funded research on the Federal Indian boarding school system, including health impacts on Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community and individual American Indians, Alaska Natives, and Native Hawaiians.

- **Recognize the generations of American Indian, Alaska Native, and Native Hawaiian children that experienced the Federal Indian boarding school system with a Federal memorial.**

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[375] Department of the Interior, Bureau of Indian Affairs, Albuquerque Indian School, 1947-ca. 1964 (most recent creator). (ca. 1910). *Young School Girls Attending Sewing Class at Albuquerque Indian School* [Photograph]. National Archives (292877).

In 1905, after nearly 20 years of U.S. prisoner of war captivity,[376] Geronimo (Goyaałé) was temporarily released from Fort Sill, Oklahoma to attend the inauguration of U.S. President Theodore Roosevelt.[377] Geronimo also negotiated to visit the Carlisle Indian Industrial School in Pennsylvania. Speaking to the Federal Indian boarding school attendees, Goyaałé said: "You are all just the same as my children to me, just the same … when I look at you all here … You are here to study, to learn the ways of white men; do it well."[378]

[376] Commissioner of Indian Affairs, Annual Rep. to the Secretary of the Interior XXXIV (1887) (noting the Apaches under Geronimo were not "under the care of the Interior Department").

[377] Commissioner of Indian Affairs, Annual Report to the Secretary of the Interior 431 (1905).

[378] Carlisle Arrow, Mar. 7, 1905.

The Office of the Assistant Secretary – Indian Affairs, U.S. Department of the Interior values the special contributions to this report from the following:

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The Bureau of Indian Education (BIE)
The Bureau of Indian Affairs (BIA)
The Department of the Interior Library
The National Native American Boarding School Healing Coalition (NABS)
National Archives and Records Administration (NARA)