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MAPPING A WAY THROUGH DISASTER AND EMERGENCY ISSUES INVOLVING INDIAN COUNTRY AND THE IMPORTANCE OF LEGAL PREPAREDNESS

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Cover Page Footnote

J.D., Oklahoma City University School of Law (2019); M.L.S., University of Oklahoma School of Law (2016). While I am not of American Indian Indigenous ancestry, I believe that the fight to maintain the sovereignty of American Indian Nations carries with it some universal truths. These truths are related to identity, spirituality, and sense of community. This article represents my humble attempt to communicate and better understand some of the lessons I have learned. Moreover, I pledge to devote my professional career to collaborating with fellow allies of all backgrounds to achieve cultural mindfulness through the classroom and the courtroom. I want to express my sincere gratitude to the editors of the ALLJ for their suggestions in helping me better communicate my message. Any flaws or confusion rest solely upon me, as the author of this article. Special thanks go to my colleagues at Oklahoma Indian Legal Services, and the many others who have academically and professionally mentored me over the years. However, I save my deepest gratefulness, affection, and appreciation for my family and friends, past and present and future. In particular, I wish to thank: my amazing wife, Kathryn Candelaria; my mother Gloria Candelaria, my sister Tara Candelaria, my niece Ayla Driskell, my brothers-in-law, and the entire Gurule and James families. Their shared patience and support made my academic career, and thus this article, possible. Chief Flying Hawk, as quoted in M.I. MCCREIGHT, FIREWATER AND FORKED TONGUES: A SIOUX CHIEF INTERPRETS U.S. HISTORY 61 (Pasadena, California: Trail's End Publishing Co., Inc., 1947).

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I. INTRODUCTION.....	3
II. BACKGROUND OF FEDERAL INDIAN LAW.....	3
A. <i>What is Indian Country?</i>	3
B. <i>History of Federal Indian Policy</i>	4
C. <i>The “Cherokee Cases” and Doctrine Formation</i>	5
D. <i>The Resulting Limitations from the “Cherokee Cases”</i>	6
E. <i>Resulting Criminal and Civil Jurisdictional Issues</i>	7
1. <i>Split Status Approach for Criminal Cases From McBratney to Oliphant and Wheeler</i>	7
2. <i>Split Status Approach for Civil Cases—From Montana to Hicks Montana and its Remedy</i>	11
3. <i>Why Understanding Jurisdiction Issues is so Important</i>	14
III. A BASIC HISTORY OF FEDERAL APPROACH TO DISASTERS AND EMERGENCIES IN AMERICA.....	15
IV. EXAMPLES OF PAST DISASTERS IN INDIAN COUNTRY.....	18
A. <i>Examples of Past Natural Disasters in Indian Country - Mudslide in Oso, Washington</i>	18
B. <i>Examples of Past Human-Made Disasters in Indian Country</i>	20
V. FUTURE DISASTERS IN INDIAN COUNTRY.....	23
A. <i>Some Examples of Future Challenges Facing Tribes</i>	23
1. <i>Climate Change</i>	23
2. <i>The Threat of Terrorism in Indian Country</i>	24
B. <i>Importance of Tribes Being Prepared and Active in Trying to Influence Federal Policy Formation</i>	29
VI. CONCLUSION.....	44

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The teepee is much better to live in;
always clean, warm in winter, cool in summer; easy
to move.

The white man builds his big house, cost much
money, like big cage, shut out sun, can never move;
always sick. Indians and animals know better how
to live than white man; nobody can be in good
health if he does not have all the time fresh air,
sunshine, and good water.

--Chief Flying Hawk¹

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I. INTRODUCTION

In today's modern world and with the use of modern technology, people use electronic devices in a variety of ways. For example, the devices afford users with an opportunity to visualize various surroundings that to which they may not otherwise have access. While one of these "virtual reality" devices is not available to the author for purposes of this paper, we can use an older sometimes under-utilized form of "virtual reality" – the imagination. There are a variety of mental images that can be used to guide the reader through on the path of gaining knowledge and better understanding. Imagine for a moment the following scenarios:

- It is a quiet spring morning in March. You are asleep in your modest little home outside of Oso, Washington, when you feel the ground shake. You briefly think it is an earthquake until you hear the sounds of buildings around you being crushed and destroyed. You look out of your bedroom window and see a wall of mud tearing through the valley. Pushing and dragging houses and vehicles in its wake.
- It is a stormy spring afternoon in southern California. You have been told for a week that a severe winter storm may be coming and with it a large amount of snow. The day is here and so are the storms. The storm comes barreling through your town. As you wait in your home for the storm to pass, you wonder what will happen when the snow melts and its effect on the nearby Lake Henshaw reservoir. In a state of disbelief, you wait for the snow to stop.
- After a particularly devastating summer of wildfires and drought in north-central New Mexico. It is now raining. It has been raining constantly for days. You look out the window of your home, which your family has owned for generations, and see the river outside. The river ordinarily would be a quarter mile from the house but now it is only yards away. You

sigh and gather more of your belongings to load in your truck while your family members unload more sandbags to hold back the river.

- It is a gorgeous summer day in August. You are on a bank of the San Juan River. You are about to step into the river, hand-in-hand with your grandson, when you notice the water is slowly turning a bright orange color that you have never before seen in the river. Perplexed and a bit scared you decide that you and your grandson should not go into the river today. Your grandson turns to you and asks what happened. You tell him you do not know as you both stare at the river.
- Finally, you are on your North Dakota farm tending your cattle when you notice that one or two members of the herd are acting out of the ordinary. You approach the cows and begin thinking about separating them from the others so that whatever little bug they have does not spread. A couple days later your whole herd is wiped out. It is then you hear from your neighbors that it may be anthrax.

With those images in mind let us now add to each scenario the experiencing these events as a Native American tribe member. To whom would you turn prior to each disaster or emergency? To whom do you turn as the event is occurring? To whom do you turn after the event? As the results of this research paper demonstrate, these are not easy questions to answer. Difficulties range from the intricacies of federal Indian law, lack of coordination between federal, state and tribal agencies, and lack of shared vision for preparedness and prevention. This paper will explore why complex jurisdictional issues in Indian Country make disasters and emergencies, whether they be natural or human-made, extremely difficult for tribal authorities to address.

To fully illustrate the difficulties facing members of federally recognized American Indian Nations and Tribes in these situations, this paper is divided into multiple sections to guide the reader through the difficult jurisdictional terrain. Part I of this paper

will help get the reader familiar with the unique legal relationship American Indian Nations have with state and federal governments. This paper will first take a detailed, exhaustive look at the evolution of federal policies and applicable legal doctrines. It is the author's objective to assist the reader in better understanding the complexities regarding the current status of jurisdictional issues involving state, federal, and tribal governments. Part II will explore the disaster and emergency assistance program processes. This cursory legal background, then, will give the reader a helpful map with which the author will discuss past disasters in Indian Country in Part III. In Part III of the paper, the author will review examples of man-made, as well as natural disasters that have plagued American Indian Nations over the course of recent years. In Part IV, this paper will address the legal morass of future tensions and conflicts towards various paths of possible solutions as American Indian Nations prepare their citizens to face future disasters and emergencies. The paper will then conclude with a final look at what the author has learned over the course of the research and important final takeaways the reader should bear in mind regarding this subject.

II. BACKGROUND OF FEDERAL INDIAN LAW

To understand the evolution of Federal Indian Policy it is important to establish a groundwork for the discussion to follow. In particular, this overview will provide the context with which we will survey the legal jurisdictional issues involved in disaster and emergency issues in Indian Country. Historically, the Supreme Court has attempted to create a set of doctrines for the peaceful co-existence of the federal, state, and tribal governments. The success of such doctrines can be decided and debated at length, but some effects are indisputable and informative.

A. *What is Indian Country?*

Before we embark upon the history and background of Federal Indian Law, we must first agree upon an important definition and concept that will be used and understood throughout our journey. The concept is that of "Indian Country." While a

helpful way to descriptively unite the American Indian Nations and Tribes from through-out the United States, the term also serves as a helpful introduction in the “recognition” process that encapsulates the rest of our educational voyage.

Per the United States Code, “[e]xcept as otherwise provided in sections 1154 and 1156” “Indian Country” refers to:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United State Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.²

By exploring the history of Federal Indian policy, we can add legal context to what it means to live in and govern Indian Country.

B. Some History of Federal Indian Policy

A person need not be a student of federal Indian policy to realize that imbalances litter the history of Federal-Indian interactions. However, these inequities merely expose the complexities faced by federal and Native governments alike. The initial interactions between European settlers and Native American Tribes represented tentative attempts to establish boundaries based upon personal interactions. Depending upon the country of origin, colonists treated Native American Tribes with varying degrees of respect and esteem.³ As interactions between settlers and Native American Tribes increased, so did the need for more formalized dialogue that would take the form of treaty negotiations. The use of treaty formation served as an important initial establishment of expectations regarding property rights and sovereignty concerns,

² 18 U.S.C. § 1151.

³ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §1.02[1] (hereinafter COHEN’S HANDBOOK).

while also avoiding potential future conflicts.⁴ Treaties made during Colonial, and early Post-Constitutional Eras provide a backdrop for the interpretative tools and doctrine that courts would later use to sharpen the perimeters to decide future legal disputes.

It would not be until after the ratification of the United States Constitution that a more cohesive strategy would be developed. The United States Congress passed what would be the framework of how the country would interact with the Tribal Nations by passing the Trade and Intercourse Acts of 1790. However, these initial pieces of legislation were designed to prevent unlicensed, unauthorized purchases of Indian land, whether by individuals or by states. The resulting collision of federal versus state power necessitated the emergence of a body that could begin to address some of the initial points of conflict that would inevitably involve Native American Nations on issues of lands rights, access to resources, and to trade.⁵ The United States Supreme Court (hereafter Supreme Court) would be that body. The Supreme Court played a vital role in future Federal Indian policy interpretation and formation, as the federal judiciary laid “much of the groundwork for the subsequent development of Indian law and policy in these areas.”⁶

C. “Cherokee Cases” and Doctrine Formation

This formative impact began especially true with the early Supreme Court rulings of *Johnson v. M’Intosh*, 21 U.S. 543 (1823)⁷, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)⁸, and *Worcester v. Georgia*, 31 U.S. 515 (1832)⁹ (hereinafter referred to as the “Cherokee Cases”). The landmark doctrines created by the *Cherokee* cases centered upon the protection of the Indian Nations from the state governments by the young, fledgling federal government. In other words, the *Cherokee* Cases represented “the framework in which the relationship between the Native American

⁴ *Id.*

⁵ Lindsay G. Robertson, “Johnson v. M’Intosh” in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES, *as cited in* DENNIS W. ARROW, FEDERAL INDIAN LAW: A PRACTICE-ORIENTED CASEBOOK, p. 24 (Oklahoma City, Oklahoma: Dennis W. Arrow, 2016).

⁶ *Id.*

⁷ *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

and the European Settler (or Invader, depending upon one's perspective) would be established and ultimately settled. It is this relationship, this framework, this division of duty and responsibility, which prevails to this day in American Indian policy."¹⁰

The legal foundations established by the *Cherokee* Cases stemmed from Chief Justice Marshall's introduction of various innovative doctrines. The resulting discovery doctrine, the domestic dependent nation doctrine, and the trust doctrine all represented Marshall's attempt to address some of the initial issues regarding the sovereignty of Indian nations. For example, in *Johnson v. M'Intosh*, Marshall sought to address "the fundamental land question: what real property rights did Europeans acquire, and indigenous people lose, by virtue of the European "discovery" of America?"¹¹ To do this, he created the discovery doctrine, which resulted in the Native American peoples being "effectively converted into tenants on their lands and denied the right to sell their 'leases' on the open market, while the United States became their landlord."¹² Next, Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia* introduced the denominated domestic dependent doctrine and the guardian-ward relationship doctrine.¹³ The result of these doctrines was that the federal government would be obligated to assume trust duties that have proven to be relevant to the subsequent federal-tribal interactions. Finally, the Supreme Court's *Worcester v. Georgia* opinion established that:

Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular

¹⁰ Rennard Strickland, *The Story of the Cherokee Cases*, in INDIAN LAW STORIES, 62 (Carole Goldberg, ed., New York, NY: Foundation Press, 2011).

¹¹ Lindsay G. Robertson, *The Judicial Conquest of Native America: The Story of Johnson v. M'Intosh*, in INDIAN LAW STORIES, 29-30 (Carole Goldberg, ed., New York, NY: Foundation Press, 2011).

¹² *Id.* at 30.

¹³ DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW (Norman, OK.: University of Oklahoma Press, 2001).

region claimed: and this was a restriction which those European potentates imposed on themselves, as on the Indians. . . . The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.¹⁴

Thus, the federal judiciary had now recognized that: (1) American Indian Nations possessed only those property rights, those “aboriginal” property titles, as recognized by the federal government as the “discovering nation” (as per *Johnson v. M’Intosh*); (2) the relationship between recognized American Indian Nations, as denominated domestic dependent nations, and the Federal Government was that of “guardian-ward” with the accompanying trust obligations; (as per *Cherokee Nation*); and (3) only the federal government and not state governments would control the terms of trade and “intercourse” with American Indian Nations (as per *Worcester*). These three important foundational concepts allowed the Supreme Court to acknowledge the basic, but limited, sovereignty of American Indian nations.

D. *The Two Resulting Limitations from the Cherokee Cases*

The first limitation derived from the *Cherokee Cases* was that American Indian Nations could not enter into treaty negotiations with competing foreign nations. Established in *Johnson*, this limitation was designed to provide the United States with some peace of mind. In particular, government officials of the United States, including those on the Supreme Court, worried that American Indian Nations would be tempted to create alliances and, maybe more importantly, create constructive economic agreement with countries like Great Britain and France. It was feared that if this was allowed to happen, the United States would be caught in never

¹⁴ *Worcester*, 31 U.S. at 559, 561 (1832).

ending military and/or economic warfare that could ultimately lead to the possible destruction of the young and fragile nation.¹⁵

The second limitation on tribal sovereignty resulting from the *Cherokee* Cases was that American Indian nations “were stripped of their right to freely convey their land to anyone other than the U.S. federal government.”¹⁶ This limitation was also designed with United States economic security in mind. In essence, “Indian title was technically alienable, but only to the government, which alone could extinguish Indian title.”¹⁷ This limitation was further amplified by Chief Justice Marshall’s description of American Indian proprietary interest as “occupancy.” By describing the American Indian Nation property interests in terms of “occupancy,” Marshall’s Supreme Court opinions opened the way for subsequent courts to interpret the doctrines as providing a foundation by which American Indian Nations’ “right of free alienation was inherently lost to the overriding sovereignty of the United States.”¹⁸

Despite an apparent attempt to create an approach that balanced some recognition of American Indian Nation territorial integrity, the Court also recognized that “the government’s right of preemption was necessary to prevent the Indians from selling their land to citizens of hostile countries, a considerable concern along the North American frontier.”¹⁹ In the end, the *Cherokee* Cases established two important limits to the exercise of sovereignty by American Indian Nations: (1) restricting and prohibiting the ability of American Indian Nations to enter into treaties with competing foreign nations, and (2) limiting the ability of American Indian Nations to freely convey their land to anyone other than the U.S. federal government. By doing so, the *Cherokee* Cases created a foundation of federal case law that future Courts would use to address American Indian issues by either advancing or hindering American Indian Nation sovereignty.

¹⁵ See generally Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 753, 740 (2004).

¹⁶ Andrew K. Fletcher, *Suffocating Sovereignty: Implicit Divestiture and the Violation of First Principles*, 5 Dartmouth L.J. 31, 48, at 40 (2007).

¹⁷ Blumm, *supra* note 16, at 739.

¹⁸ *Id.* at 740.

¹⁹ *Id.*

E. *Resulting Criminal and Civil Jurisdictional Issues*

As the years passed and some formative legal doctrines had been established, the American Indian Nations recognized that when issues or conflicts warranted it, they could go the federal court system to seek relief. Soon, jurisdictional categories were acknowledged in terms of criminal jurisdiction and civil jurisdiction. It also soon became evident that two important factors would determine the judicial approach at curing the conflicts – “Indian status” of the land involved and the “Indian status” of the parties involved. Whether the matter entailed a criminal jurisdictional issue or a civil jurisdictional issue, the Supreme Court began to diversify legal doctrines established by the *Cherokee* Cases. One of the first cases that approached criminal cases using this bifurcated approach was *United States v. McBratney*²⁰ and was later followed by *Oliphant v. Suquamish Indian Tribe*²¹ and *United States v. Wheeler*.²² The subsequent case of *Montana* built upon the *Oliphant* approach, leading to a series of civil cases, both regulatory and adjudicatory in nature, that would seriously hobble the sovereignty of American Indian Nations.

1. Split-Status Approach for Criminal Cases—From *McBratney* to *Oliphant* and *Wheeler*

Even prior to the *Cherokee* cases, the Indian status of the perpetrator of a crime and the Indian status of the land involved were important factors in determining the jurisdictional venue within which the case would be heard. The United States Congress first codified this approach in 1790 with its passage of Indian Country Crimes Act.²³ This piece of legislation allowed for the federal prosecution of non-Indian perpetrators that committed crimes in Indian Country. It was designed as a means of protecting non-Indian defendants from the perceived inequality they would face if tried in a tribal court. The Indian Country Crimes Act was later amended in

²⁰ *United States v. McBratney*, 104 U.S. 621 (1881).

²¹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²² *United States v. Wheeler*, 435 U.S. 313 (1978).

²³ *See* 18 U.S.C. § 1152.

1817 to allow for the federal prosecution of crimes involving non-Indian victims but perpetrated by Indian defendants. It was designed as a means of protecting non-Indian victims from a perceived indifference by tribal courts. This was the status of criminal jurisdiction prior to the *Cherokee* cases, which did not outwardly alter this regime. Thus, following the *Worcester* case, American Indian Nations retained some important jurisdictional powers in the sphere of criminal law and civil law within its borders, especially over Indian tribe members. This would begin to change with *McBratney*.

In *McBratney*, the defendant was accused and later convicted in a federal court of killing a man on the Ute reservation in pre-statehood Colorado.²⁴ Both the defendant and the victim shared non-Indian status. The land upon which the murder occurred was considered Indian Country. As per the rationale of the *Worcester* case, the Supreme Court should have found that the federal court was indeed the correct venue to try the accused given his non-Indian status. However, the Court found that because of a treaty with the Ute Tribe and terms of the enabling statute for the state of Colorado, the federal government lacked criminal jurisdiction over the crime. The result was that the newly formed State of Colorado possessed sole criminal jurisdiction of crimes committed by a non-Indian against a non-Indian victim on a theory that activities not involving Indians did not impact the concerns or interests of the Indian tribes.²⁵

While seen for many years as a unique and narrow exception based on treaty language, the *McBratney* opinion nevertheless garnered its fair share of criticism. Judith Royster opined that “[t]he absurdity of that theory should be obvious; no other government is required to ignore crimes committed within its boundaries between non-citizens.”²⁶ This limited exception was later built upon by the opinion in *Draper v. United States*.²⁷ As in *McBratney*, the *Draper* Court held that Congressional authority would be crucial to a new state’s relationship with Indian tribes within its borders. In particular, the *Draper* Court established that if a new state’s

²⁴ *McBratney*, 104 U.S. at 621.

²⁵ See Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing The Case For Reargument Before The American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59, 62 (2003).

²⁶ *Id.*

²⁷ *Draper v. United States*, 164 U.S. 240 (1896).

“enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians, or against Indians, the state courts were vested with jurisdiction to try and punish such crimes.”²⁸

Another series of criminal cases which involved the split-status approach were *Ex parte Crow Dog*²⁹ and *United States v. Kagama*.³⁰ Decided within a four-year period between *McBratney* and *Draper*, these two cases added to the structural importance of using the split-status approach for assessing criminal jurisdiction. *Ex parte Crow Dog* involved the murder of an Indian chief named Spotted Tail by a fellow member of the Lakota tribe, Crow Dog. Crow Dog was tried and convicted in the manner dictated by Lakota customs and tradition. However, angered at the perceived leniency of Crow Dog’s punishment (restitution payment of \$600.00, eight horses, and one blanket to the victim’s family), a federal Indian agent had Crow Dog arrested to be tried again in Nebraska State Court. Crow Dog was charged, indicted, convicted, and sentenced to death by hanging. Crow Dog appealed his case to the Supreme Court. The Court held that the federal government lacked criminal jurisdiction because both the victim and the defendant were Indian tribe members and the crime occurred in Indian Country. “It is a case where...authority and power which seeks to impose upon them the restraints of an external and unknown code,... which judges them by a standard made by others, and not for them, ...makes no allowance for their inability to understand it...”³¹ The Supreme Court found for Crow Dog and set him free.

Following the case, an outraged populace pushed Congress to pass the Major Crimes Act of 1885.³² The Act placed seven major crimes within the exclusive jurisdiction of the federal court system, no matter the Indian status of the perpetrator, if the crime was committed in Indian Country.³³ The crimes were: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.³⁴ All other crimes could either be handled in Tribal court or

²⁸ *Id.* at 242.

²⁹ *Ex Parte Kan-Gi-Shun-Ca* (historically cited as *Ex Parte Crow Dog*), 109 U.S. 556 (1883).

³⁰ *United States v. Kagama*, 118 U.S. 375 (1886).

³¹ *Id.* at 406.

³² *Codified at* 18 U.S.C. §1152-1153.

³³ *Id.*

³⁴ *Id.*

in state court depending upon the jurisdiction status of the land upon which the crime was committed. Soon, the Major Crimes Act became a tool for the federal government to successfully assert jurisdiction following the *Kagama* case. The Supreme Court concluded in the *Kagama* case that the Major Crimes Act was constitutional despite not involving issues of interstate commerce. Instead the Court harkened back to the *Cherokee* cases and noted that as part of its dependent domestic nation status, American Indian Nations had to be protected by federal government in the form of Congressional plenary power.³⁵

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.³⁶

The result was a case that planted the seed for future limitations of Tribal Self-Governance.

Admittedly, the Supreme Court had only splinted a power that Congress already possessed, pursuant to the *Cherokee* cases. However, the Court had nevertheless created an environment where the “discovery” of future limitations could be “found” and cultured. Continuing with the field of criminal law, the Court would soon find those new limitations in the form of the *Oliphant* case and the *Wheeler* case.

Oliphant involved the August 1973 prosecution of two defendants accused of assaulting a tribal police officer in the course of his duties and resisting arrest.³⁷ The Indian membership status of the two defendants was that of non-Indians. Additionally, the crime occurred on the Suquamish Tribe’s land during a tribal celebration commemorating Chief Seattle. The two defendants argued that the

³⁵ *Kagama*, 118 U.S. at 384.

³⁶ *Id.* at 384-85.

³⁷ *Oliphant*, 435 U.S. at 194.

Suquamish Indian Provisional Court did not have criminal jurisdiction over non-Indians.³⁸ Before *Oliphant*, Supreme Court precedent suggested that although the federal courts or state courts were allowed to prosecute cases involving non-Indian defendants for crimes in Indian Country, this jurisdiction was not exclusive. Thus, jurisdiction could be maintained by state and federal courts and the tribes simultaneously. Departing from this established doctrine, “the Court ruled that activities within a tribe’s territory that unquestionably impacted the tribe were not within the tribe’s authority to address.”³⁹ The companion case of *United States v. Wheeler*, using the rationale from *Oliphant*, would soon create a destructive set of criteria that would be picked up by future cases.

Wheeler’s contribution to the split-status approach to resolving American Indian law issues was ironically an attempt to combine the Indian status of the parties with the Indian status of the land. The case involved the statutory rape of an Indian minor by a member of the Navajo Tribe.⁴⁰ He was tried and convicted in tribal court. However, as in the case of *Crow Dog*, non-Indian forces became outraged and demanded a stiffer sentence than 15 days in jail for what amounted to disorderly conduct.⁴¹ Wheeler was then arrested and indicted for the crime of statutory rape in federal district court. At the heart of the case was whether Double Jeopardy protections attached. Wheeler argued that they did. The Court, however, decided otherwise. The *Wheeler* Court held that “the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.”⁴² In a ruling designed to create importance for the companion case of *Oliphant*, the Court’s use of implicit divestiture acted much like a scalpel in the hands of a surgeon. With awkward, artificial reasoning, the Court found new harmful limitations to the exercise of tribal sovereignty. The Court held:

The area in which such implicit divestiture of
sovereignty has been held to have occurred are those

³⁸ *Id.*

³⁹ Royster, *supra* note 25, at 63.

⁴⁰ Wheeler, *supra* note 23, at 315-16.

⁴¹ *Id.* at 315.

⁴² *Id.* at 326.

involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And they cannot try nonmembers in tribal courts. These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.⁴³

Although the case was decided in favor of the Navajo Tribe and the Court held that Double Jeopardy did attach, the case undoubtedly provided the foundation for the most harmful Supreme Court case in recent memory – *Montana*.

2. Split-Status Approach for Civil Cases--From *Montana* to *Hicks Montana* and Its Remedy

“*Montana* is the centerpiece of the Court’s modern take on tribal civil jurisdiction over nonmembers.”⁴⁴ The *Montana* case involved the regulatory prohibition of hunting and fishing by non-Indian members within the reservation borders of the Crow Tribe of Montana.⁴⁵ Previous to the “discovery” of new limitations to tribal sovereignty “found” in *Wheeler* and *Oliphant*, civil jurisdictional power was held to be within the strict purview of American Indian Nations. Citing the section of the opinion in *Wheeler* previously noted above, the Court held that:

[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to

⁴³ *Id.* (internal citations omitted).

⁴⁴ Judith V. Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631, 633-647 (2006).

⁴⁵ *Montana v. United States*, 450 U.S. 544 (1981).

determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes and so cannot survive without express congressional delegation.⁴⁶

The Court then established what would later be known as the *Montana* Rule and also attached two exceptions. The *Montana* Rule states that “[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁴⁷ According to the Court, the two concessions given to American Indian Nations, commonly known as the “*Montana* exceptions”, are delineated as:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁴⁸

The effect of *Montana* was the weaponization of the *Oliphant* and *Wheeler* approach to split-status issues. Decided three years after *Oliphant*, “[t]he *Montana* exceptions held out hope, although ‘bait’ is perhaps more accurate of a term, that tribes would continue to exercise civil jurisdiction over all persons throughout their territories where tribal interests were at stake.”⁴⁹ In the end, the *Montana* Rule established support of tribal sovereignty only in situations where Indian status of the parties involved **AND** the

⁴⁶ *Id.* at 564 (internal citations omitted).

⁴⁷ *Id.* at 565.

⁴⁸ *Id.* at 566.

⁴⁹ Royster, *supra* note 25, at 64.

Indian Country status of the land involved must fall within American Indian Nations status.⁵⁰

Civil jurisdiction post-*Montana*: the lasting effects of a confused judiciary. “Since *Montana*[,] the Court has replicated that justification for using the member/nonmember distinction in a case involving tribal criminal jurisdiction and has invoked the distinction as dicta in cases involving tribal civil jurisdiction as well.”⁵¹ This is exemplified in the cases of *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,⁵² *South Dakota v. Bourland*,⁵³ *Atkinson Trading Co. v. Shirley*,⁵⁴ *Strate v. A-1 Contractors*,⁵⁵ and *Nevada v. Hicks*.⁵⁶ All of the cases represent concerted efforts to use the split-status approach to whittle away American Indian Nation sovereignty.

In theory, the Court could have designed *Montana*'s scope and effect to be limited in regard to civil jurisdiction. However, the effects of *Montana* have been the Supreme Court slowly bleeding the tribes of their sovereignty. For example, in *Brendale*, the Court held that “the Yakima Nation possessed inherent zoning authority over nonmember-owned parcels located in an area of the reservation closed to the general public and dominated by tribally owned and member owned parcels, but lacked such authority over nonmember-owned lands in an area in which nearly half the acreage was owned in fee by nonmembers.”⁵⁷ The result was a situation where tribal authorities had failed to satisfy either of the *Montana* exceptions.⁵⁸ Only Justice Harry Blackmun's dissent demonstrated a narrowly tailored application of *Montana* and suggested that the Yakima Nation “retained inherent authority to regulate land use by members and nonmembers alike throughout the Yakima Reservation because the exercise of this zoning authority” fell within *Montana*'s second exception.⁵⁹ By doing so, Justice Blackmun appeared to provide a

⁵⁰ John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes From the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 776 (May 2006).

⁵¹ *Id.* at 743.

⁵² *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408(1989).

⁵³ *South Dakota v. Bourland*, 508 U.S. 679(1993).

⁵⁴ *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

⁵⁵ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

⁵⁶ *Nevada v. Hicks*, 533 U.S. 353 (2001).

⁵⁷ LaVelle, *supra* note 51, at 744-45.

⁵⁸ *Id.* at 745.

⁵⁹ *Id.* at 745-46.

workable example of the second *Montana* exception in practice. In other words, to Blackmun and the two other Justices that agreed with him, the Yakima's exercise of this zoning authority was "central to the economic security, or the health or welfare of the tribe within the meaning of *Montana's* second exception."⁶⁰ I believe that, in the end, Justice Blackmun's dissent represented a sensible path from *Montana* – a path that was ignored and bypassed for the painful usage that followed.

The *Bourland* case out of South Dakota represented the Court's muddled application of the *Montana* general rule. In fact, the court noted that the Court of Appeals had incorrectly treated the tribe's mineral, grazing, and timber rights under the Cheyenne River Act as evidence that the taking ""was not a simple conveyance of land and all attendant interests in the land," and disagreed with the lower court's conclusion that "that "Congress has not abrogated the Tribe's pre-existing regulatory authority."⁶¹ Instead, the Court held that "Congress' explicit reservation of certain rights in the taken area does not operate as an implicit reservation of all former rights."⁶² Thus, "*Bourland's* minimal commentary appeared to portend further deterioration of inherent tribal powers under the Court's implicit divestiture approach."⁶³

The next example of the Court using *Montana's* confusing approach to civil issues, involved a case called *Atkinson Trading Co. v. Shirley*. Here, the issue was the application of a hotel tax on the Navajo Reservation and whether the Navajo Nation had the authority to levy the tax.⁶⁴ Proving yet again the *Montana* exceptions were like outdated road maps leading to dangerous unknown destinations, the Supreme Court in *Atkinson* held that "the Navajo Nation's hotel occupancy tax as applied to nonmembers on non-Indian fee lands could not be justified under either of *Montana's* exceptions."⁶⁵ This was because in the eyes of the Court "if it were to find *Montana's* first exception satisfied by the provision of tribal services the exception would swallow the rule."⁶⁶

⁶⁰ *Id.*

⁶¹ *Bourland*, *supra* note 54, at 693.

⁶² *Id.*

⁶³ LaVelle, *supra* note 51, at 747.

⁶⁴ *Id.*

⁶⁵ *Id.* at 750.

⁶⁶ *Id.*

Likewise, the court held the tax did not fall within *Montana*'s second exception because the court "failed to see how petitioner's operation of a hotel on non-Indian fee land threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁶⁷ *Atkinson* further bleeds American Indian Nation sovereignty in the area of civil jurisdiction by elevating the "threshold for application of the second Montana exception [by] implying that tribal power must be necessary to avert catastrophic consequences."⁶⁸ The Court's reasoning appeared to derive from its "misapprehension of the use of the term imperil in *Montana* and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*."⁶⁹ In the end, instead of clarifying *Montana*, *Atkinson* "evinces a strong trend of judicial disapproval of the exercise of tribal governing authority over nonmembers on non-Indian lands within reservation boundaries."⁷⁰

Despite "an unbroken string of modern era Supreme Court cases, beginning in 1959 with *Williams v. Lee*, in which the court consistently affirmed tribal courts' inherent sovereign authority over the conduct of all persons including non-Indians, within reservation boundaries,"⁷¹ the court struggled to maintain a healthier more cohesive approach. Instead, as the case of *Strate v. A-1 Contractors* demonstrated, the Court diminished the *Montana* exceptions and extended *Montana*'s general rule of the presumption against inherent tribal governing authority over nonmembers to include: "(1) tribal adjudicative jurisdiction as well as legislative jurisdiction, and (2) conduct on state highways as well non-Indian fee lands."⁷²

Finally, the case of *Nevada v. Hicks* represented the natural extension of the *Montana* decision. *Nevada v. Hicks* involved a tribal member's cause of action in Fallon Paiute-Shoshone Tribal court against Nevada game wardens, arguing that the Nevada game wardens had committed various civil offenses under tribal law and had also violated Hicks' federal civil rights under 42 U.S.C. §1983 by illegally searching his on-reservation property for evidence of an off-reservation crime. In its opinion, the Supreme Court held that "tribal courts lack jurisdiction over state officials for causes of

⁶⁷ *Id.*

⁶⁸ *Id.* at 751.

⁶⁹ *Id.*

⁷⁰ *Id.* at 752.

⁷¹ *Id.* at 755.

⁷² *Id.* at 758.

action relating to their performance of official duties....”⁷³ The Court’s opinion represented an “unprecedented application of the *Montana* test to an assertion of tribal authority over the conduct of nonmembers occurring with reservation boundaries on land belonging to a tribal member.”⁷⁴

3. Why Understanding Jurisdiction Issues is So Important

As the reader can now see, the tangle of criminal and civil jurisdictional issues has understandably left tribe and non-tribe members alike lost and confused during times and situations when affected individuals can least afford it. As discussed in the previous sections, the Supreme Court’s *Montana* decision has muddled the landscape of civil regulatory and enforcement jurisdiction. This is never more apparent than when discussing the effects of disasters in Indian Country – especially those that are man-made. At the core of these difficulties is the fact that tribes are left with very few legislative legal tools by which tribes can criminally punish evildoers and civilly recover damages from negligent actors. It is important for tribes to be able to act “when discharges of hazardous substances and other pollutants result in injuries to these natural resources and natural resource services, impairing the important ecological and economic functions that they provide.”⁷⁵ In order to better understand how detrimental these jurisdictional quagmires can be at times of disaster and emergency, let us now look back to some examples of past disasters, natural and man-made, that occurred in Indian Country.

III. A BASIC HISTORY OF FEDERAL APPROACH TO DISASTERS AND EMERGENCIES IN AMERICA

Before continuing with an analysis of past disasters let us first understand some key concepts regarding federal disaster relief and recovery resources. On April 1, 1979, President Jimmy Carter created the Federal Emergency Management Agency (FEMA) as the

⁷³ Hicks, *supra* note 57. at 369.

⁷⁴ LaVelle, *supra* note 51. at 759.

⁷⁵ Allan Kanner, *Tribal Sovereignty and Natural Resource Damages*, 25 PUB. LAND & RESOURCES L. REV. 93, 93 (2004).

nation's single domestic agency entrusted to "managing the Nation's disasters."⁷⁶ Although not the federal government's first "involvement in emergency management," since its 1979 inception and up to 2010, FEMA had coordinated "Federal response and recovery efforts and supported state, tribal, and local efforts in more than 1,800 incidents."⁷⁷ In 1988, Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act⁷⁸ and then the Homeland Security Act of 2002⁷⁹ (following the tragedy of the September 11th attacks in 2001) to act as the legislative foundations upon which FEMA derives its core mission. That mission was modified when, following the passage of the Homeland Security Act of 2002, FEMA was consolidated to become an agency within the Department of Homeland Security and not an independent agency as it once had been. As a result, FEMA was tasked to lead "the coordination of efforts across the Federal Government to support its partners in the Federal, State, Tribal and local government and private sector to enhance the Nation's preparedness to prevent, protect against, respond to recover from, and mitigate *all hazards*."⁸⁰

FEMA accomplishes its mission by providing affected citizens with assistance in response and recovery from a variety of events. Using the National Response Framework (NRF) and National Disaster Recovery Framework (NDRF), FEMA can help states, tribes and local governments coordinate "resources from one another, the Federal Government, voluntary, non-profit and private sector agencies regardless of an event's size, scale, or whether it receives a Presidential declaration."⁸¹ Additionally, FEMA can coordinate communities with federal support from agencies like the Environmental Protection Agency (EPA), Department of Agriculture (USDA), Department of Housing and Urban Development (HUD), Department of Health and Human Services

⁷⁶ FED. EMERGENCY MGMT. AGENCY, PUBL'N 1, p. 33 (Dep't of Homeland Sec. (Nov. 2010)), available at <https://www.hsdl.org/?view&did=691144> [<https://perma.cc/6EQL-XVER>].

⁷⁷ *Id.*

⁷⁸ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 (1988) (hereinafter Stafford Act).

⁷⁹ Homeland Security Act of 2002, 6 U.S.C. § 101 (2002).

⁸⁰ FEMA PUBL'N 1, *supra* note 77, at 20.

⁸¹ Erin J. Greten & Ernest B. Abbott, *Representing States, Tribes, and Local Governments Before, During, and After a Presidentially -Declared Disaster*, 48 URB. LAW. 489, 492 (2016).

(HHS) , Department of Defense (DOD), and many others.⁸² Both categorizations carry important legal duties and responsibilities which FEMA is, in turn, expected to provide for affected geographic populations and government agencies The Stafford Act defines an “emergency” as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

Additionally, the Stafford Act, defines a “major disaster” as:

[A]ny natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.⁸³

As one will note, an important difference between an “emergency” and a “major disaster” is that “[a] disaster is an event that has *already* caused damage to people or property – even if additional damage is continuing. By contrast, the statutory definition of an ‘emergency’ does not require existing damage.”⁸⁴ This distinction means that “[g]overnors and tribal leaders may, but are not required

⁸² *Id.*

⁸³ 42 U.S.C. § 5122(2) (2018).

⁸⁴ Greten, *supra* note 82, at 493. (emphasis included)

to, request and receive an emergency declaration before a major disaster declaration.”⁸⁵

Further differences between the two classifications include the fact that: (1) The President cannot declare a major disaster without a formal request from the Governor of the affected state or in the case of tribal land, a formal request from the affected federal recognized Indian or Alaska Native Tribe⁸⁶; (2) the President cannot declare a major disaster in regards to non-natural events unless the event involves a fire, flood, or explosion⁸⁷; and (3) a major disaster declaration authorizes “the President to approve more assistance programs than emergency declarations.”⁸⁸

In order to start the disaster declaration process, the Stafford Act requires that “[o]nly the governor of a state or the chief executive of a federally-recognized Indian tribal government may request a Presidential declaration.”⁸⁹ Within the required paperwork, the governor or the American Indian Nation chief executive “must furnish information on the nature and amount of state/tribe and local resources that have been or will be committed to alleviating the results of the disaster.”⁹⁰ Additionally, the request must include the estimates of “the amount and severity of damage” with the projected “impact on the private and public sector”, as well as “an estimate of the type and amount of assistance needed under the Stafford Act.”⁹¹ Finally, the Stafford Act requires that the “[t]he request must be based upon a finding that the event is of such severity and magnitude that effective response is beyond the capabilities of the state/tribe and the affected local governments, and that federal assistance is necessary.”⁹² It is important to note that until recently, American Indian Nations were required to submit their formal requests through the governor of the state within which the tribal boundaries exist. This was changed and codified in the Stafford Act so that the chief executive of a federally-recognized tribe could submit a formal request for declaration just as a governor

⁸⁵ *Id.* at 494.

⁸⁶ *Id.* at 495.

⁸⁷ *Id.*

⁸⁸ *Id.* at 496.

⁸⁹ *Id.* at 497, citing 42 U.S.C. §122 (4)-(6), (12) (Supp. 2015).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*, citing 42 U.S.C. §§ 5170, 5191(a) (Supp. 2013).

of an affected state would.⁹³ However, non-federally recognized tribes are still classified as “local governments” and require the governor of the affected state to actively assist in the application process.⁹⁴

Once a formal request has been submitted by the appropriate leadership representative, FEMA will then evaluate the request using a number of factors. According to its own regulations, and codified in the Code of Federal Regulations (C.F.R.), the factors FEMA uses for major disaster declaration evaluation includes, but is not limited to:

[t]he amount and type of damages; the impact of damages on affected individuals, the State, and local governments; the available resources of the State and local governments and other disaster relief organizations; the extent and type of insurance in effect to cover losses; assistance available from other Federal programs and other sources; imminent threats to public health and safety; recent disaster history in the State; hazard mitigation measures taken by the State or local governments, especially implementation of measures required as a result of previous major disaster declarations; and other factors pertinent to a given incident.⁹⁵

Once FEMA evaluates the request, the agency will then provide a written recommendation and analysis which is then delivered to the President for authorization as a formal declaration or rejection.

Upon formal Presidential declaration of an affected area’s status for “major disaster,” FEMA and the state or tribe work together to navigate the daunting task of recovery amid the difficult terrain to federal agency bureaucracy. In a Federal Aid process already fraught with complexities and obstacles, major disasters involving Tribal Nations are even more so. Some of these complications can best be understood by reviewing past events affecting tribal communities in Indian Country.

⁹³ 42 U.S.C. § 5170.

⁹⁴ Greten, *supra* 82, at 503.

⁹⁵ 44 C.F.R. §206.37(c)(1).

IV. EXAMPLES OF PAST DISASTERS IN INDIAN COUNTRY

A. Examples of Past Natural Disasters in Indian Country— Mudslide in Oso, Washington

During one of our opening scenarios, we challenged ourselves to imagine a quiet spring day in March and the mudslide that soon followed. Regretfully, this academic exercise represented the harsh reality encountered by the members of the Sauk-Suiattle Indian Tribe (SSIT) of Washington State. On the morning of March 22, 2014, deep within the North Cascade Mountains of Washington State, a devastating mudslide “engulfed 49 homes, was responsible for the deaths of 43 people and destroyed utility infrastructure... Without phone or Internet service, tribal government operation largely came to a standstill and made the process of initiating emergency services nearly impossible.”⁹⁶ To compound these initial difficulties, the SSIT leadership was further hampered by the fact that the loss of State Route 530 forced tribe members to commute “92 miles each way to the town of Arlington using an alternate route” in order to access employment obligations and medical services.⁹⁷ In addition to loss of life and property, the mudslide’s effect on tribe member day-to-day transportation expenses proved to be disruptive. For example, tribe members who had already been living well below the poverty line were forced to pay “gasoline prices at nearly \$4.00 per gallon.”⁹⁸

Shortly after the mudslide devastated their community, leaders of the SSIT testified before the Senate Committee of Indian Affairs and reported on their difficult experiences with FEMA and the deferral disaster responses process. At the hearings, the SSIT leaders recommended that FEMA must: (1) clarify its requirements for tribal emergency declarations, (2) improve its coordination with Tribes and Charitable Organizations like the Red Cross, and (3) assist the Bureau of Indian Affairs (BIA) and Indian Health Services (IHS) in enacting disaster response protocols and make emergency

⁹⁶ *When Catastrophe Strikes: Responses to Natural Disaster in Indian Country: Hearing before the Comm. on Indian Affairs, 113th Cong. (2014)* (Statement of Hon. Ronda Metcalf, Secretary, Sauk-Suiattle Indian Tribe).

⁹⁷ *Id.*

⁹⁸ *Id.*

resources available when needed.⁹⁹



100

Winter snowstorms in California. In April 2016, the Los Coyotes Band of Cahuilla and Cupeño Indians experienced a snowstorm. The storm caused over \$173,000 in damage and resulted in significant loss to the small tribes. Tribal leadership filed for public assistance and hazard mitigation but were denied by FEMA. The Tribe’s “request for a major disaster declaration was denied based on the determination that the damage was not of such severity and magnitude as to warrant supplemental federal assistance under the Stafford Act.”¹⁰¹ For a small tribe of 328 enrolled members a storm of the scale it faced during that April 2016 storm, the reported damages of over \$173,252.00 were huge and exemplified the difficulties some tribes encounter through FEMA’s disaster evaluation process.¹⁰²

Wildfires, drought, landslides, and flooding affecting the Santa Clara Pueblo of New Mexico. A third and equally

⁹⁹ *Id.*

¹⁰⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-433, EMERGENCY MANAGEMENT: IMPLEMENTATION OF THE MAJOR DISASTER DECLARATION PROCESS FOR FEDERALLY RECOGNIZED TRIBES (2018), pg. 17 (Although the picture was taken during the Confederated Tribes of Colville Reservation’s 2013 flooding event, it vividly demonstrates the bureaucratic quagmire and obstacles tribes have encountered when seeking post-disaster relief from the United States federal government that SSIT leadership discussed in their Senate testimony.)

¹⁰¹ FED. EMERGENCY MGMT. AGENCY, PRELIMINARY DAMAGE ASSESSMENT REPORT LOS COYOTES BAND OF CAHUILLA-CUPEÑO INDIANS – SEVERE WINTER STORM AND FLOODING – DENIAL (2016), pg. 2.

¹⁰² See general information about the Los Coyotes tribe at http://www.kumeyaay.info/los_coyotes.html [<https://perma.cc/M99H-7TLW>].

informative example is that of the difficulties faced by the Santa Clara Pueblo. When Santa Clara Pueblo Governor J. Michael Chavarria testified before the United States Senate in 2017, he submitted through a prepared statement that his north-central New Mexican tribe had lost “over 16,000 acres of our forestlands” and “when combined with the lands...lost in the Oso Complex Fire of 1998 and the Cerro Grande Fire of 2000 – has resulted in the destruction of 80% of our forests and a huge part of our cultural heritage.”¹⁰³ He also testified that “[n]one of the four fires we have faced in the past decade have originated on our lands, yet we have suffered the repeated and severe consequences of these natural disasters.” The Governor also informed the legislative body that the suffering he referred to took the form of physical damage to the land in the form of a 25.9 mile burn scar.¹⁰⁴ A burn scar refers to land that has been charred and stripped of all vegetation by a wildfire. Because the land is devoid of vegetation, no root systems remain in place to secure the land. As a result, the land is vulnerable to flash floods and mudslides. Our Pueblo has experienced severe flash flooding since the fire.¹⁰⁵

Governor Chavarria concluded his prepared statement by making the following five recommendations: (1) the creation of a BIA Emergency Response Fund so that the BIA could have “readily available significant funding that can be deployed as necessary to address short- and long-term disaster recovery and disaster mitigation needs”; (2) the use of the FEMA Tribal Guidance Document to help reflect “the diverse voices of tribal leaders and emergency management officials, among others, and is responsive to their concerns,”; (3) the continued use of the Stafford Act through the use of maintenance of amendments; (4) the appropriation of necessary funds for implementation of Forest treatment as identified under the Tribal Forest Protection Act (TFPA), and (5) additional funding for fire prevention treatments on and off tribal reservations.¹⁰⁶

¹⁰³ *Emergency Management in Indian Country: Improving FEMA’s Federal-Tribal Relationship with Indian Tribes: Hearing before the Comm. on Indian Affairs*, 115th Cong. (2017) (Statement of Hon. J. Michael Chavarria, Governor, Pueblo of Santa Clara).

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.* at 24.

B. Examples of Past Man-Made Disasters in Indian Country

We have explored together some the natural disasters that have plagued Indian Country over recent years. In addition to the natural disasters discussed above, tribes have also encountered devastating man-made disasters. As previously discussed, man-made events are technically categorized under “emergency” status, although as the example below will demonstrate, these events are no less devastating to those tribes affected by them.

Gold King Mine Disaster. On August 5, 2015, an Environmental Protection Agency contractor attempted to contain a leak from the Gold King Mine. Instead, the contractor ruptured the mine’s containing barrier, releasing millions of gallons of contaminated water into Cement Creek.¹⁰⁷ “The contractor using heavy machinery ruptured the mine’s containment barrier releasing millions of gallons of contaminated mine waste into a tributary of the Animas River, Cement Creek. This toxic wastewater containing heavy metals such as arsenic, lead, and cadmium flowed from Cement Creek into the Animas River, and into the San Juan River (hereinafter “SJR”).”¹⁰⁸ Delegate Lorenzo Bates noted that “the Navajo Communities along the river have experienced significant cultural and economic damages as a result of the spill. Water is sacred to the Navajo People; it is the basis of all life. Spiritually and culturally Navajo beliefs are deeply connected to the land, air, and water that lie between the four sacred mountains that form the aboriginal boundary of our land.”¹⁰⁹ Most importantly, Delegate Bates emphasized that “[t]he spill has contaminated or destroyed many of the essential elements of our religious practice, and desecrated a river we have treated with reverence since time immemorial.”¹¹⁰

Difficulties with the Federal response to the emergency were poignantly demonstrated by the 2015 Senate testimony of Navajo Nation President Russell Begaye. He testified that:

¹⁰⁷ *EPA’s Gold King Mine Disaster: Examining the Harmful Impacts to Indian Country: Hearing before the Comm. on Indian Affairs*, 114th Cong. (2015) (Statement of Lorenzo Bates, Navajo Nation Council Delegate for Communities of Nenahnezad, Newcomb, San Juan, Tiis Tsoh Sikaad, Tse’Daa’Kaan, and Upper Fruitland).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Simply, we do not trust the EPA. Why? They did not inform the Nation of the accident until two days after the blowout. I believe the only reason they finally informed the Navajo Nation is because you cannot hide an accident when the rivers turn orange.

When we first received notice, they told us it was 1 million gallons of contaminants that was released from the mine but later, they changed it to 3 million gallons. Since then, it has neared 30 million gallons.

At a public hearing, the USEPA representative said the water was churning up at the base of the mountain but when the vice president and I went to the mouth of the mine to visually investigate, we were stunned to see the yellow river.

I even showed the USEPA officials a picture I had just taken a few hours before of the toxic waters that were still pouring out of the mine and it was yellow.

The last straw was when USEPA gave my people 20 million gallon water tanks for relief. Those tanks were tainted with oil. I directly asked the USEPA about the tainted tanks. They vehemently denied that they had oily substances in them.

They said, it is only used for clean drinking water but when I personally went to one tank, put my hand into the intake valve of that tank, my hand came out blackened with oil. They expected us to give that tainted water to our livestock and crops.

Let me again say, the Navajo Nation does not trust the USEPA. We expect them to be held fully accountable for what they have done to my people and to all people who live along both the San Juan and Animas Rivers.

I am not just speaking today for my people but all peoples whose souls hurting from what should have been an avoidable, negligent act. Today is our greatest time of need with our people struggling for water for their animals, livestock and irrigation. *The USEPA has abandoned us.*

The water tanks are being pulled out, feed for our livestock has stopped. Last Friday, Ms. McCarthy and I spoke on the phone and she was

unaware that the USEPA had stopped giving water. I did not know that we stopped giving hay.

As EPA Administrator, how does she not know that this was happening? The orders to leave our Nation case from her regional directors. This just adds to the culture of distrust they have created.

What my people need first and foremost is compensation and need it now. The farmers have spent monies they do not have and are expected to purchase materials, haul water and buy hay for their livestock.

Our farmers and ranchers still need hay and water. EPA has pulled out. BIA has expended all of their funds. We are now taking monies from our emergency account to help our people.

I am saying that today I want this Committee to stand with us and make sure the EPA pays for what it has done to my people, to my Nation.¹¹¹

President Begaye’s testimony artfully and powerfully demonstrates the sense of powerlessness, abandonment, and betrayal felt by the Navajo Nation that he leads. Moreover, his testimony vividly highlights the flaws inherent in the disaster response process involving American Indian Nations and Tribes. In particular, President Begaye implored Senate committee members to recognize that tribes face many legal hurdles when dealing with man-made disasters. This is especially true due to the fact that the tribes lack the criminal jurisdictional tools (as per *Wheeler*). Tribes and also lack the civil jurisdictional tools (as per *Montana*) to punish contractors like those involved in the Gold King Mine disaster.

To complicate matters further, the negligence of federal government contractors and corporations force tribes to do what they can to recover damages. In fact, American Indian Nations are often forced to seek only civil remedies “for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury” as per federal statutes like the Comprehensive Environmental Response, Compensation, and Liability Act (CERLA).¹¹² Theoretically, statutes like CERLA are designed to

¹¹¹ *Id.* at 30-31 (Statement of the Hon. Russell Begaye, President of the Navajo Nation) (Emphasis added).

¹¹² 42 U.S.C. §§ 9601(6), 9607(a)(4), (c).

recognize “the authority of Indian tribes to commence actions for natural resources damages.”¹¹³

However, in practice how likely is it that American Indian Nations and Tribes like Navajo Nation will be able to recover something from a negligent federal contractor, the EPA, the federal government itself, or even private corporations acting negligently in Indian Country for the damages inflicted upon their natural resources by the Gold King Mine disaster? Regretfully, if the experiences of the Alaskan Native Villages following the *Exxon Valdez* oil tankard disaster in 1989 are any indication, the Navajo Tribes will recover very little and only after decades of litigation.¹¹⁴

When the *Exxon Valdez* oil tankard ran aground along the Bligh Reef of interior Alaska, “[e]leven million gallons of oil spilled into the pristine waters of Prince William Sound, and the oil slick itself spread over 1000 square miles. Oil soaked or spattered 1200 miles of coastline, a distance equal to a length of land running from Cape Cod to the Outer Banks of North Carolina. Hundreds of miles of beaches on federal, state, and municipal land were also covered with oil.”¹¹⁵ Attempting to use the authority under CERCLA and the Clean Water Act, the Alaska Native communities sought monetary remedies for cultural damages, in the form of “subsistence damages,” that they suffered. While “subsistence” is traditionally recognized in case law as simply meaning “a day-to-day utilization of game and other resources to provide for nourishment and other basic needs. However, in the context of native cultures, the term has a broader and deeper meaning, so that to Alaska Natives, loss of natural resources means something more than a simple inability to sustain the body for lack of food.”¹¹⁶ As Mary Kanciewick and Eric Smith noted in their article, “Subsistence in Alaska: Towards a Native Priority”, subsistence “has more to do with mental health and spiritual well-being than it does with economic security.”¹¹⁷ Even more tragic was the fact that state and federal statutes were not

¹¹³ Kanner, *supra* note 74, at 106.

¹¹⁴ Deborah S. Bardwick, *The American Tort System’s Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L. J. 259 (2000).

¹¹⁵ *Id.* at 261 (internal citations omitted).

¹¹⁶ *Id.* at 280 (internal citations omitted).

¹¹⁷ Mary Kanciewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 UMKC L. REV. 645, 649 (1991) as cited in Bardwick, *supra* note 118, at 280.

designed to recognize damages for the “subsistence culture of Native groups.”¹¹⁸ The result was that “Alaska Natives could not recover for cultural damages to their subsistence way of life. Judge Holland’s decision in the *In re The Exxon Valdez* and the Ninth Circuit’s subsequent affirmation of the district court’s decision confirmed that reading of the law.”¹¹⁹

Regretfully, little has legally changed during the time between the *Exxon Valdez* oil spill disaster and the Gold King Mine disaster. Although the Congressional passage of the Oil Pollution Act of 1990 states that “companies whose operations may lead to natural resource liability now face a new political willingness and stronger laws and regulations to prosecute these claims”, the scope of the new laws are limited and do not address the cultural damages suffered by tribes following man-made events like these.¹²⁰

After looking at the past natural and man-made disasters, we are left with a variety of pressing questions: What do the future of disaster and emergency issues in Indian Country look like? What are some possible solutions?

V. FUTURE DISASTERS IN INDIAN COUNTRY

In addition to natural disasters, it is impossible to ignore the likelihood that many different forms of disaster events will pepper our future. In particular, there may exist natural disaster events whose origins are man-made such as: (1) disastrous weather resulting from climate change, and (2) terrorist acts. Some of these risks can be seen even now.

A. *Some Examples of Future Challenges Facing Tribes*

1. Climate Change

A current example of the visible effects of climate change is exemplified by the plight of the Biloxi-Chitimacha-Choctaw tribe of Louisiana.¹²¹ Living on Isle de Jean Charles, the tribe members have

¹¹⁸ Bardwick, *supra* note 117, at 286.

¹¹⁹ *Id.*

¹²⁰ Kanner, *supra* note 76, at 94.

¹²¹ Madaline King, *A Tribe Faces Rising Tides: The Resettlement of Isle de Jean Charles*, 6 LSU J. ENERGY L. & RES. 295, Mar. 23, 2018, available at

seen their 22,400-acre area drop to “a mere 320 acres today”¹²² due to flooding and coastal water rising. Communities like those of the Biloxi-Chitimacha-Choctaw (BCC) tribe can be found in coastal communities lining the shores of the Pacific Northwest in Alaska. The legal and statutory tools available to tribal leaders and federal agencies appear limited as the waters continue to rise and the number of available options disappear. For example, can the tribe members be forced to leave? Should they be forced to leave?

In her law review article, recent Louisiana State University Law School graduate, Madaline King offers the timely argument that even restrained discussion of moving the tribe members can only occur after stakeholders can agree on some basic language and concepts. “The differences between relocation and resettlement clarify why one concept is preferred over the other. . . . Relocation is essentially the ad hoc migration of people. Resettlement is the permanent or long-term movement of a community from one site to another.”¹²³ King suggests that “relocation destroys any semblance of community the residents once had. Such movement is connected to a loss of identity. Although residents lose their homes, an even bigger price is paid: the loss of social, cultural, and religious aspects of the community.”¹²⁴ In contrast, “[d]uring resettlement, the essential characteristics of the original community, such as its social structures, legal and political systems, culture, and worldviews, are preserved. . . . The community maintains its unity in a form that is similar to the original community.”¹²⁵

Finally, an important consideration regarding the issue of relocation and resettlement of an American Indian Nation even when involving a climate-related disaster, is that historical and cultural contexts are of the utmost importance. In other words, asking a tribe like the BCC to relocate can reignite the historical tensions associated with past “relocations” that were tied to federal

<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1128&context=jelr>
<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1128&context=jelr> [https://perma.cc/S9WJ-AFPA].

¹²² *Id.* at 306, citing Carolyn Van Houten, *The First Official Climate Refugees in the U.S. Race Against Time*, NAT’L GEOGRAPHIC, (May 25, 2016), available at <https://www.nationalgeographic.com/news/2016/05/160525-isle-de-jean-charles-louisiana-sinking-climate-change-refugees/> [https://perma.cc/36VL-RD62].

¹²³ *Id.* at 301 (internal citations omitted).

¹²⁴ *Id.* (internal citations omitted).

¹²⁵ *Id.* at 302 (internal citations omitted).

policies designed to destroy and eradicate the social structures and sovereignty of tribes throughout the nation. Thus, King argues that tribal leadership and federal agencies should prioritize the option of resettlement instead of relocation. With this as a possibility the community can “play a major role in decision-making regarding where the resettlement site will be located, what resources the new community will have access to, when the first phases will begin, and how the plan will unfold.”¹²⁶ The resettlement plan can also be used to “protect what is left of Louisiana’s coastline and to create a model for other communities that will face similar problems.”¹²⁷

2. The Threat of Terrorism in Indian Country

In addition to an increased number of natural disasters, whether or not from climate-change, those in Indian Country must recognize the dangerous reality of terrorism. Regretfully, current federal statutes provide the American Indian Nations and Tribes with little in the way of regulatory powers to combat terrorism. Even worse is the fact that the failed jurisdictional approach results in the increased danger to individual tribe members

Following the terrorist attacks of September 11, 2001 federal legislation was passed to provide federal government agencies with the means “to guarantee the protection of border patrol and critical infrastructure” in hopes of protecting the “lives of United States citizens.”¹²⁸ The main legislative vehicle for providing this protection came in the form of the passage of the Homeland Security Act¹²⁹ and the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act).¹³⁰ Each statute was designed so that by making it “more difficult to get a passport into the country and pass through airport security, the country is under the impression that it is safe and that there is nothing left to fear.”¹³¹ However, there

¹²⁶ *Id.* at 314.

¹²⁷ *Id.* at 313.

¹²⁸ Jennifer Butts, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373, 374, (2004).

¹²⁹ Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

¹³⁰ United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹³¹ Butts, *supra* note 130, at 374.

remain significant flaws in the protection of critical infrastructure, especially infrastructure located in Indian Country. For example, “the Grand Coulee Dam on the Colville reservation, which is the largest producer of hydroelectric power in the United States, and the third-largest in the world. Also present are nuclear power facilities, power grids, military supply manufacturers, and transportation routes.”¹³²

The precarious nature of Homeland Security in Indian Country often results in jurisdictional chaos, especially when it comes to criminal jurisdiction. For example, the Navajo Nation struggled to punish the contractor involved in the Gold King Mine disaster for the same reason – jurisdictional chaos, especially in the form of criminal jurisdiction. As previously discussed in Part I of this paper, the Supreme Court ruling in *Oliphant* established that “tribal courts do not have criminal jurisdiction over non-Indians because Congress had not affirmatively granted that power by treaty or statute.”¹³³ The Court reasoned that “Congress must protect its citizens from infringement on their personal liberties. To allow United States citizens (non-Indians) to be subject to another judicial system would violate congressional responsibility over United States citizens.”¹³⁴ The limitations created by the *Oliphant* opinion regarding tribal court criminal jurisdiction were compounded by certain aspects of the Homeland Security Act of 2002. With the statutory creation of the Department of Homeland Security, tribal sovereignty was further intruded upon in a variety of ways.

This first example is how the Homeland Security Act statutorily defines terrorism and to whom the acts of terrorism apply. It defines terrorism as:

[A]ny activity that (A) involves an act that (i) is dangerous to human life or potentially destructive of critical infrastructure or key resources, and (ii) is a violation of the criminal laws of the United States or any state or *other subdivision of the United States*; and (B) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion;

¹³² *Id.* at 375.

¹³³ *Id.* at 378, citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203-04 (1978).

¹³⁴ *Id.*

or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.¹³⁵

In addition to statutorily defining terrorism, the Homeland Security Act clarifies the protections and safeguards it provides. As per the Homeland Security Act, the local government is defined as:

(A) a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(B) *an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation; and*

(C) a rural community, unincorporated town or village, or other public entity.¹³⁶

The Homeland Security Act “embraces the notion of federalism by empowering the local government”¹³⁷ because it “respects and acknowledges the importance of local law enforcement, emergency response providers, and social service agencies.”¹³⁸ However, at the same time, the treatment and definition of American Indian Nations and Tribes as local governments “seemingly ignores the doctrines of tribal sovereignty and domestic dependent status established in the Marshall trilogy.”¹³⁹

The second example of how the Homeland Security Act intrudes upon tribal sovereignty is demonstrated by the lack of a working relationship between the federal government.¹⁴⁰ Often, as the experiences of the Chippewa Cree Tribe highlight, “[a] look at the amount of money already allotted to tribes for homeland security indicates the nonexistent government-to-government

¹³⁵ *Id.* at 381, citing Homeland Security Act § 2(15), Pub. L. No. 107-296, 116 Stat. 2135 (2002) (emphasis added).

¹³⁶ *Id.*

¹³⁷ Butts, *supra* note 130, at 381.

¹³⁸ *Id.*

¹³⁹ *Id.* at 387.

¹⁴⁰ *Id.*

relationship.”¹⁴¹ To illustrate this point, of the \$9,000,000 the State of North Dakota received from the Department of Homeland Security, [o]nly \$75,000 was earmarked for all Indian tribes in the state.¹⁴² “With facilities such as the Minuteman launch site and Garrison dam present in the state, this does not seem to be enough to effectively prevent and respond to a terrorist attack. And to make matters worse, the state of North Dakota never consulted tribes when determining the homeland security needs within Indian Country.”¹⁴³

Other potential avenues of terrorism. Other means by which terrorists can target people are through 1) agroterrorism and 2) bioterrorism. Both are potential disasters and emergencies that citizens and their leadership must acknowledge is possible, even in Indian Country. Again, with each as in that of infrastructure targeted terrorism, issues of jurisdiction and sovereignty abound.

As early as December 2004, outgoing Secretary of Health and Human Services, expressed his concern that the nation’s food supply would be considered a particularly inviting target. In fact, during his farewell address, Secretary Tommy Thompson stated, “I, for the life of me, cannot understand why the terrorists have not . . . attacked our food supply because it is so easy to do. And we are importing a lot of food from the Middle East, and it would be easy to tamper with that.”¹⁴⁴ “Agroterrorism is the ‘deliberate introduction of an animal or plant disease with the goal of generating fear over the safety of food, causing economic losses, and/or undermining social stability.’”¹⁴⁵

Agroterrorism can be initiated in one of two ways. As a result, it is particularly difficult to combat. The two methods of attack come in the form of 1) deliberately infecting the food item

¹⁴¹ *Id.* at 388.

¹⁴² *Id.*

¹⁴³ *Id.* citing Alvin Windy Boy, Chairman, Chippewa Cree Business Committee in *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing on S. 578 Before the Senate Comm. On Indian Affairs*, 108th Cong. (2003), available at <http://indian.senate.gov/2003hrgs/073003pmhrg/Inouye.PDF> [<https://perma.cc/H7JK-TEVJ>].

¹⁴⁴ Erick Rhoam, *What Congress Gives, Congress Takes Away: Tribal Sovereign Immunity and the Threat of Agroterrorism*, 19 SAN JOAQUIN AGRIC. L. REV. 137 (2009), citing William Branigin, et.al., *Tommy Thompson Resigns From HHS*, WASH. POST, Dec. 3, 2004.

¹⁴⁵ *Id.* at 140, citing Jim Monke, CONGRESSIONAL RESEARCH SERVICE, *Agroterrorism: Threats and Preparedness*, CONG. RESEARCH SERV., 1 (2007).

before importing it into the United States, or 2) an individual or terrorist cell can enter the United States and deliberately infect the food supply chain from within the country.¹⁴⁶ Whether by deliberately infecting a food item from abroad or at home, terrorists could successfully wreak havoc upon the national psyche and sense of security. American Indian Nations and Tribes are essential links in the national food supply chain because “agriculture is Indian Country’s second-largest employer”¹⁴⁷ as “[s]everal tribes own farms and produce food that enters the nation’s food supply.”¹⁴⁸ To demonstrate this interaction, “[a] 2003 Food Safety Briefing, given by the Indian Health Service noted there are 4,068 tribal food service establishments operated by 334 tribes.”¹⁴⁹

Additionally, many tribes are located on the border of either Mexico or Canada. The resulting problems involve “jurisdictional issues, and law enforcement’s authority to handle a problem on Indian land ‘can change according to the civil/criminal nature of the offense, the seriousness of the offense, the tribal status of those involved, and the state in which the offense is committed.’”¹⁵⁰ The result is that “[t]hese entanglements make illegal migration into the United States easier because Indian tribes do not coordinate well, if at all, with border patrol. Compounding the problem is the friendliness shown by Indian tribes to illegal immigrants because they are more gracious than the Border Patrol agents. An agroterrorism attack originating from Indian land, via a successful border penetration, is a serious concern.”¹⁵¹

Once an act of agroterrorism or bioterrorism begins to involve tribe members, what tools and resources are available for Tribes to use to address the growing emergency? “A shifting and complex body of law controls jurisdiction on Indian lands. This leaves many open questions regarding the scope of tribal and state authority to regulate and respond to threats to public health.”¹⁵²

¹⁴⁶ *Id.* at 142.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 144, citing INDIAN HEALTH SERVICE, TRIBAL FOOD SAFETY ISSUES BY THE NUMBERS (2003).

¹⁵⁰ *Id.* at 144 (internal citations omitted).

¹⁵¹ *Id.* at 144-45.

¹⁵² Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions*, 15 YALE J. HEALTH POL’Y, L. & ETHICS 251, 254 (Summer 2015), available at

Traditional methods of addressing the emergency often involve quarantine and isolation or other methods of “social distancing.”¹⁵³ Other tools available to the state or local health officials and agencies include: (1) identifying and treating infected individuals;¹⁵⁴ (2) secure and separate personal and real property like livestock and domestic animals;¹⁵⁵ and (3) utilize investigative powers that may include “the power to enter and inspect private property, and may include other administrative investigation powers such as the ability to subpoena individuals and documents”.¹⁵⁶ However, should a terrorist attack befall a tribe, whether bioterrorism or agroterrorism in nature, it would be challenging to initiate the traditional techniques of addressing the emergency.

In other words, relying upon the traditional techniques of addressing an emergency is problematic because “[t]he coercive nature of these measures, coupled with the jurisdictional uncertainty. . . underscores the need for tribal and state governments to work together. It is important to ensure that the government entity implementing a particular response to a public health threat does so with a mantle of legitimacy and the support of its neighboring sovereign.”¹⁵⁷ In the end, when dealing with public health emergencies in Indian Country, no matter the cause, “[f]ederal and state laws generate, rather than answer, questions as to who has jurisdiction to pursue emergency response measures in areas that are likely to be of concern to state public health officials.”¹⁵⁸ In his article, “Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions,” author Justin B. Barnard, Esq., put it best when he noted that:

Given the coercive nature of many public health emergency measures—which may require holding individuals against their will, entering or destroying property, or closing down public spaces and businesses—the perceived legitimacy and acceptance of the implementing government’s

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1239&context=yjhple> [<https://perma.cc/5XUZ-7DB3>].

¹⁵³ *Id.* at 257.

¹⁵⁴ *Id.* at 258.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 259 citing Minn. Stat. § 144.054 (2015).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 280.

authority seems especially critical to the success of the response. Indeed, disputes over tribal sovereignty have ended in armed stand-offs between tribal members and the local, state, and federal government officials.¹⁵⁹

B. The Importance of Tribes Being Prepared and Active in Trying to Influence Federal Policy Formation

What can American Indian Nations and Tribes do when confronted with the jurisdictional hurdles and intrusions that occur during and after a disaster or emergency, no matter what the cause may be? There are three possible solutions to address some of the “global” jurisdictional concerns that will someday affect most tribes during a disaster or emergency.

First, it is vital that Tribes do what they can to develop “intergovernmental agreements” (IGA) with neighboring governmental entities in the form of state, county, and municipal agencies and organizations. “An IGA is an agreement or memorandum of understanding (MOU) negotiated between a tribe and a neighboring government to clarify some aspect of their legal relationship. In some case, these agreements permit cooperation and sharing of resources.”¹⁶⁰ The result of an agreement, “instituted *before* an active emergency, would establish and specify roles, responsibilities, and authorities to which the involved governments could agree.”¹⁶¹ In establishing and specifying roles, responsibilities, and authorities, the parties of the agreement also “clarify the application of broad and uncertain jurisdictional principles in very specific contexts likely to arise in a public health emergency.”¹⁶² Most importantly, just the “process of negotiation may foster a cooperative relationship between tribal and state or local governments that the involved governments can codify in an IGA or pledge of mutual assistance.”¹⁶³

Next, it is equally important for legal professionals who are entrusted with assisting the American Indian Nations during this preparation process to make themselves and their Tribal clients

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 279.

¹⁶¹ *Id.* at 281.

¹⁶² *Id.*

¹⁶³ *Id.*

aware of the applicable statutory processes during and after a disaster or emergency occurs in Indian Country. For instance, in the case of FEMA disaster recovery and assistance, tribes can take proactive steps that will pay in time, money, and expenditure of resources during a disaster. One such step includes communities “pre-qualifying” debris removal contractors, “or contractors for other emergency work that is commonly required, before an event and solicit bid prices from this list of contractors once an event has occurred. This method allows competitive bidding while preserving the ability to achieve reasonable market prices at the time the work is performed.”¹⁶⁴ In other words, by planning ahead, the tribe is more likely to develop a more viable and economical budget plan rather than risk higher costs that might result from limited post-disaster resources and the ensuing risk for “price-gouging” from vendors and contractors. Another pre-disaster preparation tool, tribes can utilize are the establishment of “mutual aid agreements *before* disaster strikes, and to address the subject of reimbursement in their written mutual aid agreements.”¹⁶⁵ Another example of how attorneys can help their tribal clients is that by “work[ing] with their clients to formally adopt, a local code or ordinance that give local government officials the responsibility to enter private property to remove disaster-related debris or perform work in the presence of an immediate threat.”¹⁶⁶ Additionally, the “[a]ttorney should ensure that their clients comply with requirements and permits for debris operations. For example, staging and disposal sites should be a safe distance from property boundaries, wetlands, surface water, structures, wells, septic fields, and endangered species, and appropriate sites should be identified for the disposal of hazardous materials.”¹⁶⁷ While not an exhaustive list of pre-disaster legal tasks, this list shows a glimpse of some of the expectations that federal agencies like FEMA will expect of those within Indian Country during and following a disaster or emergency declaration.

The third proposed solution for American Indian Nations and Tribes to consider is to maintain constant communication and involvement in the continued formation of federal disaster relief and recovery policy with the knowledge that by doing so, the voices of

¹⁶⁴ Greten, *supra* note 82, at 521.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 529.

¹⁶⁷ *Id.*

tribal citizens cannot be ignored. In particular, it would benefit all tribes to unite and force federal agencies and officials to understand that:

Tribes have not been invited to testify at other congressional committees regarding disasters and emergency preparedness and when FEMA testifies before other committees we do not hear tribal issues being highlighted or even mentioned. We hope members of the Committee will assist in ensuring that tribes will be included in all hearings regarding this important topic.

We urge the Committee to request the Congressional Research Service to report on the possible legislative actions related to tribal emergency management that Congress should consider. Specifically, the CRS should evaluate the Stafford Act and the Sandy Recovery and Improvement Act and recommend changes for tribal participation and consider whether separate tribal disaster laws are needed.¹⁶⁸

This request for active participation in policy formation is important to follow-up because it is evident that many of the solutions to the jurisdictional issues facing Indian Nation go through Washington D.C. and either Congress or the Supreme Court. A continued disconnect and/or hostility between American Indian Nations and the federal government will continue to result in the further marginalization of American Indian Nations and their citizens at times of disaster, man-made or natural. This counter-productive relegation of sovereignty risks coming at times when tribes and their members could least afford. In the end, it is up to Indian Country to demand a voice in legislative vehicles to forward tribal sovereignty or to fight in the Supreme Court for judicial interpretations consistent with the doctrine of self-determination and full tribal sovereignty.

¹⁶⁸ Prepared Statement of Hon. Brian Cladoosby, President, National Congress of American Indians, *When Catastrophe Strikes: Responses to Natural Disaster in Indian Country*: Hearing before the Committee on Indian Affairs, United States Senate, One Hundred Thirteenth Congress, Second Session, p. 63 Jul. 30, 2014, available at <https://www.indian.senate.gov/hearing/oversight-hearing-when-catastrophe-strikes-responses-natural-disasters-indian-country> [<https://perma.cc/Q7VN-YKG9>].

VI. CONCLUSION

Jurisdictional issues and complications hang over each tribe adding weight and force to already life-changing events, no matter the situation. The bureaucratic “no-man lands” which often trap tribe members and the tribal leadership that serve them make—natural or man-made— disasters and emergencies extremely difficult for tribal authorities to address. Difficulties range from the intricacies of federal Indian law, lack of coordination between federal, state and tribal agencies, and lack of shared vision for preparedness and prevention. Whether we imagine ourselves: as a person suffering from the effects of a Washington State mudslide, a Southern Californian surviving a severe winter storm, a tribe member in the wildfire-scarred mountains of North-Central New Mexico, a grandfather on the banks of his ancestral lands on the shore of the San Juan River, a Louisiana tribe member suffering the effects of climate-change-induced shoreline flooding and erosion, or a cattle rancher whose livestock is effected by agroterrorism and/or bioterrorism, we must recognize that only through the cooperation of the federal, state, and tribal governments can each tribe and tribe member navigate the complexities facing them in times of disaster. In the end, we must all prepare and take the necessary steps to avoid the ill-fated future that Chief Flying Hawk warned those willing to listen when he said: “nobody can be in good health if he does not have all the time fresh air, sunshine, and good water.”¹⁶⁹

¹⁶⁹ Chief Flying Hawk, *supra* at note 2.