

# INVESTIGATING MURDER AND MAJOR CRIME ON TRIBAL LANDS

---

Prepared for the New Mexico Indian Affairs Department  
Prepared by the Southwest Indian Law Clinic of the University of New Mexico School of Law

<b>I.</b>	<b>Introduction to Tribes and Tribal Sovereignty.</b>	<b>2</b>
<b>II.</b>	<b>Jurisdictional complexities challenge criminal investigations in Indian Country.</b>	<b>2</b>
<b>a.</b>	<b>Tribal jurisdiction history restricts criminal investigations in Indian Country.</b>	<b>3</b>
<b>b.</b>	<b>Criminal jurisdiction in Indian Country is affected by procedural gaps.</b>	<b>4</b>
<b>III.</b>	<b>Funding gaps create challenges for law enforcement.</b>	<b>6</b>
<b>IV.</b>	<b>Identity of the victim and suspect impacts the investigation process.</b>	<b>8</b>
<b>V.</b>	<b>Indian Country identification impacts criminal investigations in New Mexico.</b>	<b>9</b>
<b>a.</b>	<b>“Indian Country” in New Mexico</b>	<b>9</b>
<b>b.</b>	<b>Pueblo Lands</b>	<b>10</b>
<b>c.</b>	<b>Allotments</b>	<b>12</b>
<b>VI.</b>	<b>Prosecution impacts the later stages of criminal investigation in Indian Country.</b>	<b>14</b>
<b>a.</b>	<b>Indian Defendants</b>	<b>14</b>
<b>b.</b>	<b>Non-Indian Defendants</b>	<b>14</b>
<b>c.</b>	<b>Violence Against Women Act</b>	<b>15</b>
<b>d.</b>	<b>Interstate Violation of a Protection Order, 18 U.S.C. 2262</b>	<b>16</b>
<b>VII.</b>	<b>Differences in process-sentencing &amp; declinations impact investigations.</b>	<b>17</b>
<b>a.</b>	<b>Differences between Federal, Tribal, and State Sentencing</b>	<b>17</b>
<b>b.</b>	<b>USDOJ Declinations for Crimes Occurring in Indian Country</b>	<b>17</b>
<b>c.</b>	<b>FBI Reasons for Declining a Case</b>	<b>18</b>
<b>d.</b>	<b>USAO reasons for declining a case</b>	<b>19</b>
<b>e.</b>	<b>Categories for declining a case</b>	<b>20</b>
<b>f.</b>	<b>The United States Attorney’s Office District of New Mexico</b>	<b>22</b>
<b>VIII.</b>	<b>Conclusion</b>	<b>23</b>

## Investigating Murder and Major Crime on Tribal Lands<sup>1</sup>

### I. Introduction to Tribes and Tribal Sovereignty.

There are over 500 federally recognized American Indian and Alaska Native tribes and villages in America<sup>2</sup>, each unique in exercising their tribal sovereignty. It is important to understand tribal sovereignty before understanding jurisdiction and crime in Indian Country. Tribes dominated the Americas prior to European contact. Tribal inherent sovereignty, powers recognized prior to the United States Constitution, is the right for tribes to govern and regulate their own communities, membership, land and resources, and external relations.<sup>3</sup> As foreign contact increased, tribal sovereignty decreased. Today, many of those powers are still exercised but are impacted by all three branches of government as a result of the Indian Commerce Clause<sup>4</sup> and Congress' federal ward duty. The Marshall Trilogy<sup>5</sup>, defined a federal duty since tribes were a dependent upon Congress', especially to protect them from various infringements by the States. The Marshall Trilogy commenced thousands of cases that now define Federal Indian Law. Federal Indian Law still protects tribal sovereignty of lands, people, and government to government relations while ensuring that state laws do not infringe on Indian Country without consent from tribes or Congress. With over 500 tribal governments, fifty states, all three branches of government, the evolution of Indians, and the scarcity of resources, investigations, protection, and enforcement of laws for murder and major crimes on tribal lands is quite complex. New Mexico is rising to the challenge and collaborating with various state, federal and tribal agencies to reduce complexity to increase safety of its twenty-three tribal nations within the state, especially in addressing major crimes in Indian Country. Challenges to this goal include checkerboard jurisdiction, funding gaps, misidentification, and sentencing procedures.

### II. Jurisdictional complexities challenge criminal investigations in Indian Country.

Jurisdictional complexities between tribal, state and federal law enforcement pose the biggest challenge in determining who has legal authority to proceed over a criminal case. Understanding the historical background on criminal law in Indian Country is necessary to understand why jurisdictional complexities exist. Cases involving missing and murdered Indigenous women ("MMIW") fall into a perfect storm of federal, tribal, and state jurisdiction – often referred to as the "multi-jurisdictional maze." Simply determining who retains jurisdiction

---

<sup>1</sup> In a complimentary effort to supplement the significant efforts of the New Mexico Indian Affairs Department to ensure integral, efficient, and effective relationships with New Mexico Tribes to answer the safety needs of their unique communities, this document was drafted by Krista Thompson, Vanessa Hidalgo, and Felisha Adams (2021 Juris Doctor Candidates, under the supervision of Samuel Winder) from the Southwest Indian Law Clinic of the University of New Mexico School of Law. The use of "Indian" is not intended to offend, rather it is used as a legal term of art. The use of "Native", "Tribal", and ""Indian" are also not meant to generalize the unique, rich Indigenous cultures; each of the above-mentioned contributors to this document are related to and are dedicated to the advancement of Tribal communities. The information contained in this document is not legal advice and any actions taken should be made after consulting independent legal counsel.

<sup>2</sup> Indian Affairs, *Frequently Asked Questions*, U.S. DEPT. OF INTERIOR (Oct. 23, 2020), <https://www.bia.gov/frequently-asked-questions> (identifying 574 federally recognized tribes).

<sup>3</sup> *Id.*

<sup>4</sup> U.S. CONST. art. I, § 8, cl 3.

<sup>5</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

over a crime requires a multi-faceted analysis beginning with identifying where a crime occurred and whether a victim or perpetrator is an Indian.

Typically, when crimes occur outside the exterior boundaries of a reservation, federalism serves as the dominate theme to distinguish state and federal jurisdiction. In most cases, states have jurisdiction since federal laws are limited in scope. When crimes occur in Indian Country, tribes and the federal government have concurrent jurisdiction.<sup>6</sup> In New Mexico, the wide variety of land ownership often referred to as the “checkerboard” creates difficulties in determining whether federal, tribe, or state law enforcement has jurisdiction to respond, investigate, and prosecute a crime. Unfortunately, MMIW victims suffer significantly from this confusion.

a. Tribal jurisdiction history restricts criminal investigations in Indian Country.

The jurisdictional maze developed just over 200 years ago when Congress and the U.S. Supreme Court started to dictate federal Indian policy.<sup>7</sup> Jurisdiction remains controversial as it often “disaggregates” aspects of tribal sovereignty by restricting who can be prosecuted and what crimes tribes can prosecute.<sup>8</sup> Criminal jurisdiction in Indian Country has been shaped by each branch of the federal government. For example, when Congress creates laws related to Indians and tribes, executive branch agencies are charged with promulgating the laws. In some instances, either the law or its effect present legal questions for federal courts to resolve. The national crisis of Missing and Murdered Indigenous Relatives is further complicated by criminal jurisdiction in Indian Country.

In times where Congress has been unsatisfied with a judicial ruling related to jurisdiction, they have responded with a legislative fix. Consequently, there remains jurisdictional gaps where neither a tribe, state, or federal agency have a jurisdictional hook to investigate or prosecute a crime often due to a lack of evidence, witness cooperation, or land boundary issues. Since the Court and Congress have developed a jurisdictional scheme with certain gaps, the severity of these gaps creates challenges for certain law enforcement agencies and frustrates victims, their families, and entire tribal communities. The Governor and Task Force have begun working to resolve some of these gaps including those unique to New Mexico.

Initially, the Court acknowledges that federally recognized tribes are sovereign nations having inherent jurisdiction over everything that occurred within tribal boundaries — including criminal acts.<sup>9</sup> Overtime, the Federal Government has diminished tribal sovereignty. Congress enacted laws that provided limited jurisdictional authority to the Federal Government by enacting

---

<sup>6</sup> Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1603 (2016).

<sup>7</sup> Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to improve Public Safety in Indian Country*, 81 MONT. L. REV. 59 (2020) (discussing that non-Indians are essentially above the law in Indian Country and how federal caselaw has created a structure where Indians have become easy targets for violent crimes committed by non-Indians).

<sup>8</sup> See Joseph William Singer, *Sovereignty and Property*, 86 NW U. L. REV. 1,2 (1991) (using Indian law as a framework to provide a detailed account of the complex relationship between sovereign power and property; Criminal jurisdiction is governed through contradictory statutes that vary depending on whether a victim is an Indian, whether the suspect is an Indian, whether the crime occurred in Indian country, and the type of crime.)

<sup>9</sup> *Supra*, at note 6.

the General Crimes Act<sup>10</sup> and Major Crimes Act.<sup>11</sup> Additionally, Congress later gave six states, California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska, criminal jurisdiction over tribal lands by passing Public Law 280 (PL 280) further diminishing tribal sovereignty in those states.<sup>12</sup>

Prior to 1883, tribal members in Indian Country were not under state jurisdiction nor federal jurisdiction. The general rule was that tribes retained exclusive jurisdiction over crimes between Tribal members.<sup>13</sup> However, a push for Federal governance over Tribal self-governance, began to make its way to the forefront with the taking of Tribal lands.<sup>14</sup> In *Ex parte Crow Dog*,<sup>15</sup> a Lower Brule Sioux Indian, Crow Dog killed another Lower Brule Sioux Chief and the Tribe addressed the matter by using their traditional customs and ordering Crow Dog to pay “\$600 in cash, eight horses and one blanket.”<sup>16</sup> The Federal government then prosecuted Crow Dog in Federal Court, but the Supreme Court ultimately reversed the conviction stating that they lacked jurisdiction.<sup>17</sup> This case prompted the passing of the Major Crimes Act by Congress, which allows Federal jurisdiction over “major crimes” committed by Indians within Indian Country.<sup>18</sup> The seven enumerated major crimes listed are: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.<sup>19</sup>

The Court then diminished tribal governments sovereign authority in *Oliphant v. Suquamish Indian Tribe*.<sup>20</sup> This case stated tribal governments do not have inherent jurisdiction to prosecute non-Indians for crimes committed on the reservation without a clear statement from Congress.<sup>21</sup> In 2013, Congress passed the Violence Against Women Act (“VAWA”), which granted tribes authorization to exercise Special Domestic Violence Criminal Jurisdiction (“SDVCJ”) to prosecute non-Indians for offenses such as domestic violence, sexual assault, dating violence, and violation of protection order, but the Nation must meet certain requirements to do so.<sup>22</sup> In 1990 the Court ruled in *Duro v. Reina*,<sup>23</sup> that tribal courts did not have criminal jurisdiction over non-member Indians, but this was overturned by Congress who stated that pursuant to the Indian Civil Rights Act, Indian Tribes can exercise criminal jurisdiction over all Indians.<sup>24</sup>

b. Criminal jurisdiction in Indian Country is affected by procedural gaps.

When crimes occur in Indian Country, the process of determining proper jurisdiction begins with initial law enforcement response. Next is a formal criminal investigation, prosecution, and finally sentencing. Consequently, the jurisdictional maze does not always allow for a case to

---

<sup>10</sup> 18 U.S.C. §1152.

<sup>11</sup> 18 U.S.C. §1153.

<sup>12</sup> 18 U.S.C. §1162, 25 U.S.C. §§1321-1326, 28 U.S.C. §1360.

<sup>13</sup> Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N. C. L. REV. 779, 802 (2006).

<sup>14</sup> *Id.* at 799.

<sup>15</sup> 109 U.S. 556 (1883).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 435 U.S. 191 (1978).

<sup>21</sup> *Supra*, at note 6.

<sup>22</sup> *Id.*

<sup>23</sup> 495 U.S. 676 (1990).

<sup>24</sup> *Id.*

reach each of these phases. Determining jurisdiction dictates whether federal, tribal, or state law will preside over a case. When the police or investigators initially respond to a crime, the investigatory team must assess where the exact offense occurred. When a crime begins in Indian Country and ends outside of Indian Country, or vis-versa, law enforcement must determine who will continue investigating and prosecuting the crime. At this point in a case, fact and evidence collection is a critical stage so that relevant evidence is properly maintained and sufficient to be used in the proper courts of law.



As mentioned earlier, in *Oliphant v. Suquamish Indian Tribe*, the Court stripped tribes of criminal jurisdiction over non-Indians.<sup>25</sup> Tribes have inherent authority over their own lands and members, however in *Oliphant* the Court reasoned that tribal courts lacked the “inherent authority to try and to punish non-Indians.”<sup>26</sup> Since tribes are unable to prosecute non-Indians for crimes committed in Indian Country, this places a significant burden on federal law enforcement to pursue non-Indian prosecutions. Within the conclusion of *Oliphant*, Chief Justice Rehnquist signaled Congress to respond with its legislative power – “We are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are consideration for Congress to weigh in deciding whether Indian tribes should be authorized to prosecute non-Indians.”<sup>27</sup> Since *Oliphant*, Congress has responded legislatively by enacting the Tribal Law and Order Act of 2010 (“TLOA”)<sup>28</sup> and Violence Against Women Act of 2013 (“VAWA”).<sup>29</sup>

While TLOA and VAWA have started to address the holding in *Oliphant*, the case continues to impede upon tribal sovereignty. Particularly in cases involving a non-Indian offender, a lack of sufficient evidence can lead to a federal declination. During the initial investigation phase the U.S. Department of Justice (“USDOJ”) will assess the evidence to evaluate the likelihood of a conviction. In some cases, witnesses are uncooperative, there may be a lack of investigatory resources, and possibly even loss of evidence due to the remote location of a crime creating a lag in response time. When there is a lack of evidence, the USDOJ may be required to decline prosecution due to a low likelihood the prosecution can prove their case to jury beyond a reasonable doubt.

Although Congress passed the TLOA in 2010, and reauthorized VAWA on September 13, 2020, jurisdictional gaps still exist whereas certain crimes go unprosecuted. In some states, suspects have learned more about the types of crimes they can and can’t get away with. For

---

<sup>25</sup> 435 U.S. 191, 212 (1978).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 25 U.S.C. 2801.

<sup>29</sup> Pub. L. No. 113-4, 127 Stat. 54 (2013).

example, in 2017 a non-Indian male reported himself to tribal police after beating his girlfriend.<sup>30</sup> The non-Indian taunted tribal police by stating, “[you] can’t do anything to me anyways.”<sup>31</sup> Although jurisdictional loopholes can effectively contribute to an influx of violence against Indigenous women in Indian Country, states have the ability to leverage a federalism argument that not only asserts state sovereignty but also reduces the number of violent crimes occurring within its jurisdiction.<sup>32</sup> Since newly enacted laws provide federal funding predominately to its own agencies, states will quickly find themselves forced to craft state policies that address deficiencies of federal policy.

The Tenth Amendment of the U.S. Constitution reserves all governmental powers not delegated to the federal government to the states.<sup>33</sup> At this point, MMIW extends beyond the exterior boundaries of Indian Country and into the states. In 2018, the Urban Indian Health Institute (“UIHI”) released a report which concluded 71% of American Indians and Alaska Native live in urban areas.<sup>34</sup> Within the report the UIHI identified 506 MMIW cases, 78 of the cases occurred in New Mexico, and 54 additional cases occurred neighboring Arizona.<sup>35</sup> Arguably, New Mexico’s own public safety capacity suffers from increased burdens, as there is an increasing number of these cases occurring in the states’ urban cities and border towns.

Caselaw clearly outlines which crimes are within tribal jurisdiction, and Congress has clearly delegated USDOJ with the responsibility of responding to MMIW cases within federal jurisdiction. Logically, states remain responsible for responding to crimes occurring within state jurisdiction. Federalism supports the idea of states utilizing their power to reduce the number of MMIW happening in its own cities and towns. Currently, Albuquerque (38) is ranked second, and Gallup (25) ranked sixth out of seventy-one cities nationwide with the highest number of MMIW cases.<sup>36</sup> Seattle is ranked number one with 45 cases.<sup>37</sup> Although federal and tribal governments are restricted to their own jurisdictional boundaries, New Mexico has flexibility to confront MMIW in a way that not only addresses reducing the number of cases, but also the underlying social complexities that may contribute to MMIW.

### III. Funding gaps create challenges for law enforcement.

New Mexico is home to 19 Pueblos and 4 Tribes, each with its own land base bordering either state or federal lands. In rural parts of the state, where roadways stretch for many miles with little roadside infrastructure, there can be delays in response time for law enforcement. Although New Mexico is well acquainted with rural policing and investigations, challenges exist when boundaries are not clearly marked, and land records are not easily obtained. When law enforcement

---

<sup>30</sup> *Supra*, at note 6.

<sup>31</sup> *Id.*

<sup>32</sup> See *FEDERALISM*, BLACK’S LAW DICTIONARY (11th ed. 2019) (Distribution of power between the federal government and the states whereby each recognizes the powers of the other while jointly engaging in certain governmental functions. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other).

<sup>33</sup> U.S. CONST. amend. X.

<sup>34</sup> Urban Indian Health Institute, *Missing and Murdered Indigenous Women and Girls Report* (2018).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

is asked to respond about a possible missing or murdered person, there can be confusion about which agency should respond.

According to congressional findings, the Tribal Law and Order Act Reauthorization of 2019, which remains for consideration by the U.S. Senate Committee on Indian Affairs, only 43% of the total need for law enforcement officers was being met as of May 6, 2019.<sup>38</sup> Indian country is currently under-policed by 57%, and jurisdictional gaps continue to perpetuate violent crime against not only women, but also children and men. According to Navajo Nation Council Delegate Amber Crotty, the Navajo Nation only has 0.85 police officers per 1,000 individuals living on the Nation.<sup>39</sup> Significantly, the Federal Bureau of Investigation (“FBI”) has reported that violent crime has fallen by 48% nationwide, however the same data also reflects an inverse trend on the Navajo Nation with an increase of violent crime occurring.<sup>40</sup> Should Congress choose to appropriate additional funding to meet the need for additional tribal law enforcement, there could be a decrease in violent crime and MMIW, however jurisdictional gaps could still outweigh the possibility of any significant decrease.

On October 10, 2020, President Trump signed both Savanna’s Act<sup>41</sup> and the Not Invisible Act<sup>42</sup> into law. Savanna’s Act is dedicated to improving coordination amongst law enforcement agencies and allows Tribal agencies to access law enforcement databases to help solve cases involving MMIW.<sup>43</sup> The Not Invisible Act is dedicated to improving coordination among federal agencies by establishing a Tribal and Federal stakeholder commission to address and recommend solutions to the Department of Interior and Department of Justice on how to combat the MMIW crisis.<sup>44</sup> Currently, there is no national database or collaboration between Federal agencies to track the MMIW cases.<sup>45</sup>

The scope of Savanna’s Act is primarily focused on directing the USDOJ to address the administrative obstacles related to reporting MMIW cases in Indian Country. Additionally, the Act mandates the USDOJ to complete several tasks targeted at improving case reporting by improving the national database protocols.<sup>46</sup> The Act also provides some grants to tribal and state agencies looking to improve their own MMIW policies, protocols, and training.<sup>47</sup> According to the Congressional Budget Office, the Act would cost \$14 million from 2020-2024.<sup>48</sup> Significantly, funding would predominately be spent by USDOJ attorneys and staff to “consult with interested parties, travel, develop guidance and disseminate information to law enforcement partners.”<sup>49</sup>

---

<sup>38</sup> Tribal Law and Order Reauthorization and Amendments Act of 2019, S.210, 116<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2019).

<sup>39</sup> *Missing and Murdered: Confronting the Silent Crisis in Indian Country: Hearing Before Senate Committee on Indian Affairs*, 115<sup>th</sup> Cong. (2018) (statement of Honorable Amber K. Crotty, 23<sup>rd</sup> Navajo Nation Council).

<sup>40</sup> *Id.*

<sup>41</sup> Savanna’s Act, Pub. L. No. 116-165, S. 277, 116<sup>th</sup> Cong. (2020).

<sup>42</sup> Not Invisible Act of 2019, Pub. L. No. 116-166, S. 982, 116<sup>th</sup> Cong. (2020).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Homeland Security Digital Library, *Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women: Exploring Solutions to End the Cycle of Violence*, March 14, 2019, <https://www.hsdl.org/?abstract&did=825675>.

<sup>46</sup> Summary S.227 – 116<sup>th</sup> Congress (2019-2020) Savanna’s Act, <https://www.congress.gov/bill/116th-congress/senate-bill/227> (last visited October 16, 2020).

<sup>47</sup> *Id.*

<sup>48</sup> Congressional Budget Office Cost Estimate, S. 277 Savanna’s Act (Dec. 2019).

<sup>49</sup> *Id.*

Although Savanna’s Act was enacted to improve MMIW case reporting in Indian Country, the bill does not include funding to hire additional tribal law enforcement officers or criminal investigators. Additionally, the overall context of the bill predominately looks at addressing reporting issues only where federal jurisdictional exists. Potentially, this could leave states out of the funding stream even if they are looking to improve their own MMIW policies, protocols, and training.

The Not Invisible Act designates one official to coordinate programs and grants between the Bureau of Indian Affairs and the U.S. Department of Justice, focused on reducing violent crime experienced by American Indians.<sup>50</sup> In the bill, Congress established a commission made up of federal agencies, various tribal, state, and federal officials, and victims of violent crime. The commission is charged with providing recommendations to both the BIA and USDOJ, and would meet three times a year for the next two years. The Congressional Budget Office projects that the law will require an appropriation of \$150,000 for a coordinator and additional \$350,000 for support staff and travel for commission members.

Consequently, MMIW cases in Indian Country are only one part of the situation. With a growing number of Native people relocating permanently or temporarily into New Mexico’s cities and towns, MMIW extends well into state jurisdiction.

#### IV. Identity of the victim and suspect impacts the investigation process.

In 2015, the MMIW movement developed out of victim frustration.<sup>51</sup> This frustration is because “in Indian Country, non-Indians know they are above the law.”<sup>52</sup> In instances where families were unsatisfied by law enforcement efforts, families turned to social media as a means to locate their loved ones.<sup>53</sup> According to the U.S. Department of Justice, there are cases which lack adequate evidence or witness cooperation, which ultimately stalls an investigation or possibly leads to a declination. A federal declination then requires sole tribal prosecution. When federal prosecution becomes near impossible, the tribe retains exclusive jurisdiction over a case and requires the case to be prosecuted under tribal law. Depending on the tribe or pueblo, there can be a lack of resources available to dedicate to a single case. Furthermore, tribes may not have enough time file charges once the statute of limitations runs. In some cases, the USDOJ may decline a case and the tribe has little time to prepare a case for trial. When an on-reservation crime occurs, there remains an inquiry of whether a suspect(s) is an Indian or non-Indian.

#### **Indian Offender: for offenses against a victim’s person<sup>54</sup>**

Victim	Crime	Jurisdiction
--------	-------	--------------

<sup>50</sup> Congressional Budget Office Cost Estimate, S. 982, Not Invisible Act (Nov. 2019).

<sup>51</sup> Tom Lutley, *When Government Fails, Indigenous women take their search for missing love ones online*, BILLINGS GAZETTE (Mar. 10, 2019), [https://billingsgazette.com/news/state-and-regional/mmiw/when-government-fails-indigenous-women-take-their-search-for-missing-loved-ones-online/article\\_94de0a6f-a07a-5242-8d73-0740be50404a.html](https://billingsgazette.com/news/state-and-regional/mmiw/when-government-fails-indigenous-women-take-their-search-for-missing-loved-ones-online/article_94de0a6f-a07a-5242-8d73-0740be50404a.html).

<sup>52</sup> *Supra*, at note 6.

<sup>53</sup> *Id.*

<sup>54</sup> Arvo Mikkanen, AUSA District of Oklahoma, *Indian Country Criminal Jurisdictional Chart* (July 2020), <https://www.justice.gov/usao-wdok/page/file/1049076/download>.

<b>INDIAN</b> (enrolled or recognized as Indian by a government entity and possessing some degree of Indian blood)	Major Crimes Act crimes:18 U.S.C. 1153	Federal
	All remaining crimes contained in a tribal code	Tribal
<b>NON-INDIAN</b>	Major Crimes Act crimes:18 U.S.C. 1153	Federal
	Other federal crimes (unless tribe has punished Indian defendant), including crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act:	Federal
	All remaining crimes contained in a tribal code: ( <i>Authority: tribal code or 25 CFR Pt. 11, if CFR Court</i> )	Tribal

**Non-Indian Offender: Offense against a victim’s person or property<sup>55</sup>**

<b>Victim</b>	<b>Crime</b>	<b>Jurisdiction</b>
<b>INDIAN (enrolled or recognized as Indian by a government entity and possessing some degree of Indian blood)</b>	Indian Country Crimes Act Crimes: All federal crimes which apply to the "special maritime and territorial jurisdiction of the United States under the U.S. Code." (Authority: 18 U.S.C. § 1152)	Federal
	All remaining crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act. (Authority: 18 U.S.C. §§ 1152 & 13)	Federal
<b>NON-INDIAN</b>	All crimes contained in state code. (Authority: United States v. McBratney, 104 U.S. 621 (1881))	State

**V. Indian Country identification impacts criminal investigations in New Mexico.**

**a. “Indian Country” in New Mexico**

New Mexico law is consistent with 18 U.S.C. § 1151,<sup>56</sup> which defines “Indian country” ‘as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within

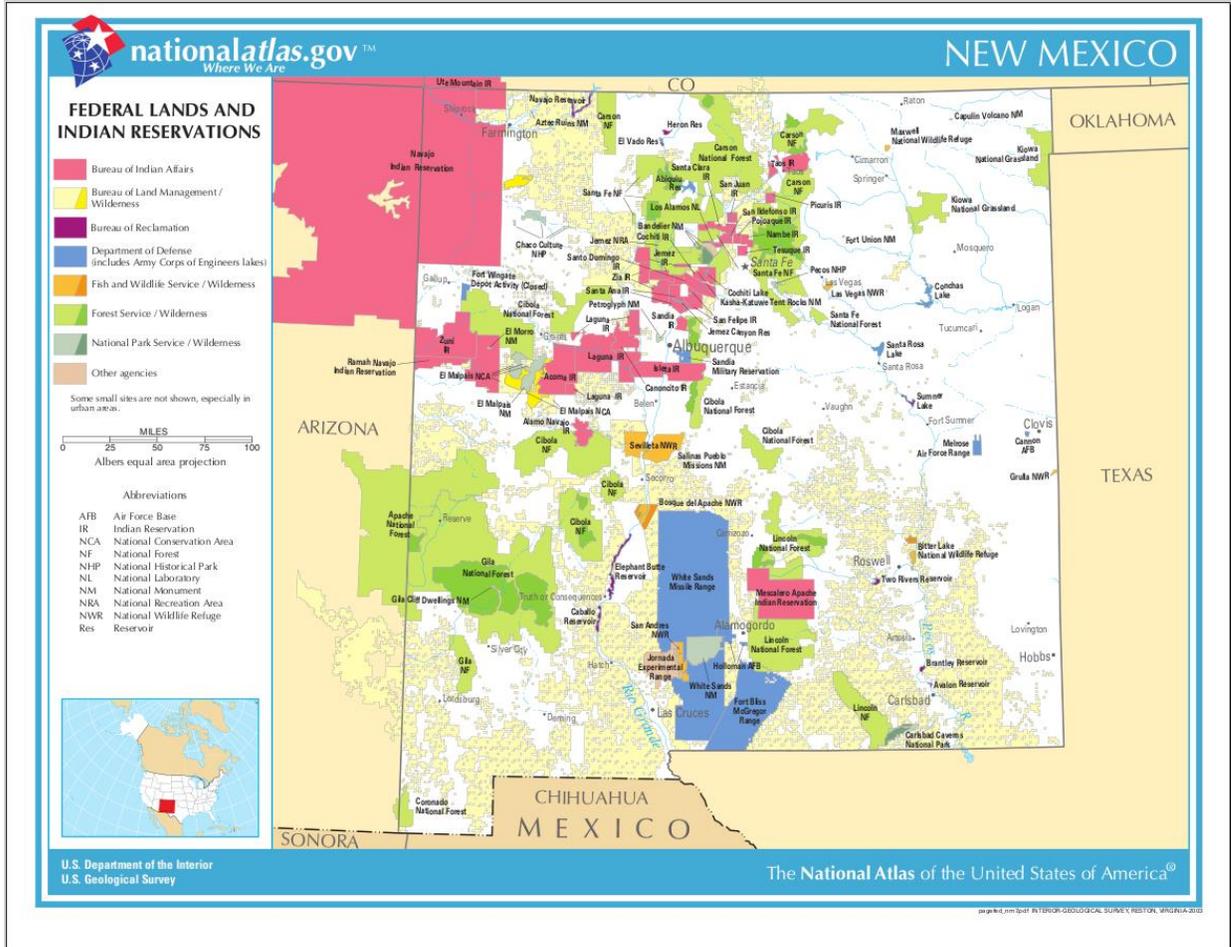
<sup>55</sup> *Id.*

<sup>56</sup> *State v. Ortiz*, 1986-NMCA-131.

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.”<sup>57</sup> The U.S. Court of Appeals concluded that Indian Country includes three different types of lands:

1151(a)	Reservations	<b>Including</b>	Patents and Rights-of-Way
1151(b)	Dependent Indian Communities	<b>Not Including</b>	Patents and Rights-of-Way
1151(c)	Allotments	<b>Including</b>	Rights-of-Way

Below is a map<sup>58</sup> of Federal lands and Indian Reservations in New Mexico.



b. Pueblo Lands

New Mexico has a unique history that greatly differs from any other state. Unlike other Tribes across the country, the Pueblos had their property rights recognized by Spain, Mexico, and United States. In 1834, Congress passed the Nonintercourse Act which made it a crime for non-

<sup>57</sup> District of N. M., *Public Safety in Indian Country*, U.S. ATTORNEY’S OFFICE (July 8, 2019), <https://www.justice.gov/usao-nm/public-safety-indian-country>.

<sup>58</sup> U.S. DOI, *New Mexico Federal Lands and Indian Reservations* (2002), [https://www.gifex.com/images/0X0/2009-09-18-9675/New\\_Mexico\\_Federal\\_Lands\\_and\\_Indian\\_Reservations\\_United\\_States.pdf](https://www.gifex.com/images/0X0/2009-09-18-9675/New_Mexico_Federal_Lands_and_Indian_Reservations_United_States.pdf).

Indians to settle in Indian Country.<sup>59</sup> During the time that Spain and Mexico occupied New Mexico, non-Indians started to live within the boundaries of Pueblos. Later in 1848, Mexico ceded New Mexico and Arizona to the United States with Treaty of Guadalupe Hidalgo.<sup>60</sup> After the treaty was ratified by Congress, there was uncertainty about whether Pueblo lands were considered a part of Indian Country. Since both Spain and Mexico recognized the property rights of the Pueblos as private property rights, the Federal government itself was unsure of whether they had any authority over Pueblo lands.<sup>61</sup>

In the case of *United States v. Lucero*, the New Mexico Territorial Supreme Court ruled the Non-intercourse Act did not apply to the pueblos.<sup>62</sup> In the case of *United States v. Joseph*, the Court reaffirmed *Lucero* by holding that Congress did not intend for Pueblo lands to fall within purview of the Non-intercourse Act, and thus would not receive federal protection.<sup>63</sup> Following the *Joseph* decision, non-Indians continued to encroach on Pueblo lands, however since the Non-Intercourse Act was inapplicable, the federal government did not have the authority to punish non-Indians settling on Pueblo lands.<sup>64</sup> Thus, the Pueblos continued to lose property rights and the federal government did nothing to protect their rights as more non-Indians developed homesteads within Pueblo lands.

Then in *United States v. Sandoval*<sup>65</sup>, the Court created the Dependent Indian Community concept, backtracking on their previous decision in *Joseph*. The Court stated Pueblos maintained a different Legislative and Executive relationship with the U.S. government because they owned their land in fee simple title due to their previous relationship with the Spanish government.<sup>66</sup> A relationship that differed from tribes, whose land is held in trust by the federal government.<sup>67</sup> Following *Sandoval*, Pueblo lands were thereafter within federal protection, however there remained a question about who retained jurisdiction over the lands non-Indians encroached on, that were located within the exterior boundaries of the various Pueblos.

In 1924, Congress enacted the Pueblo Lands Act to address quieting title to the non-Indian lands within Pueblo land grants and prohibiting non-Indians from acquiring anymore land within the Pueblo land grants.<sup>68</sup> Although the Act was intended to address land disputes between the Pueblos and non-Indians, equivocally it created more confusion in regard to crimes occurring on these lands. Within the Pueblo Lands Act, Congress created the Pueblo Lands Board who was delegated authority to hear and resolve land dispute claims. In the greater scheme of the Act, there remained pockets of “checkerboarded” land, which is exactly what the Pueblo Lands Board intended to prevent.<sup>69</sup>

---

<sup>59</sup> U.S. Gov’t Accountability Office, GAO-08-751, Treaty of Guadalupe Hidalgo – Findings and Possible Options Regarding Longstanding Community Land Grants Claims in New Mexico (2004).

<sup>60</sup> *Id.*

<sup>61</sup> Robert L. Lucero, *State v. Romero: The Legacy of Pueblo Land Grants and the Contours of Jurisdiction in Indian Country*, 37 N.M. L. REV. 671 (2007).

<sup>62</sup> 1 N.M. 422 (1869).

<sup>63</sup> 94 U.S. 614 (1876).

<sup>64</sup> *Supra*, at note 59.

<sup>65</sup> 231 U.S. 28 (1913).

<sup>66</sup> Paul W. Shagen, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation*, 27 N.M. L. REV. 421, 425 (1997).

<sup>67</sup> *Id.*

<sup>68</sup> *Supra*, at note 59.

<sup>69</sup> *Id.*

In 2005, Congress amended the Pueblo Lands Act<sup>70</sup> in order to “clarify the uncertainty and potential law enforcement problems,” that could arise on non-Indian fee lands, located within the exterior boundaries of a Pueblo.<sup>71</sup> In 2006, the Federal District Court of New Mexico addressed the case *United States v. Antonio*,<sup>72</sup> where the court was asked if federal jurisdiction applied to non-Indian fee lands situated within the exterior boundaries of a Pueblo. In its decision, the court was not persuaded to deter from the congressional intent of the 2005 amendments.<sup>73</sup> On appeal, the 10<sup>th</sup> Circuit U.S. Court of Appeals affirmed the district court’s interpretation of the 2005 Amendments.<sup>74</sup> Thus, when an Indian commits a crime on a parcel of land owned by a non-Indian that is still within the exterior boundaries of a Pueblo, the 10<sup>th</sup> Circuit has determined federal jurisdiction is proper. However, when a non-Indian commits a crime on the same location, state jurisdiction is proper.

New Mexico courts have come to the same conclusion, however, have applied a different legal analysis. In *State v. Romero*, the Supreme Court of New Mexico stated that there was no clear congressional intent to treat the Pueblos, as Dependent Indian Communities, differently than reservations for the purposes of criminal jurisdiction.<sup>75</sup> Therefore, the court held Pueblos are considered Indian Country. The court determined the Pueblo Land Grant never changed the Pueblo Lands Indian Country status and Congress did not diminish or extinguish Indian Country.<sup>76</sup> The Supreme Court of New Mexico in *Romero* concluded that “The privately-held fee lands within the exterior boundaries of both Taos and Pojoaque Pueblos are Indian country within the meaning of § 1151(b) and Congress has not extinguished Indian country status. Therefore, the lands in question remain Indian country, and the State does not have jurisdiction to prosecute the alleged crimes occurring there.”<sup>77</sup>

Pueblo lands include an extensive history and complex case law unique only to New Mexico. With a clearer picture of who has jurisdiction over crimes occurring within Pueblos, there remains the issue of funding and resources for those responding to those crimes.

### c. Allotments

Another land issue, that is not unique to New Mexico, but well-known to create jurisdictional confusion are allotted lands. The eastern portion of the Navajo Nation is “checkerboarded,” which means not only are there tribal trust lands, but similar to the Pueblos, parcels of land that are privately held by individual Navajo Nation tribal members and some non-Indians.<sup>78</sup> Coincidentally, the checkerboarding is only on the portion of the Navajo Nation within

---

<sup>70</sup> 25 U.S.C. §331.

<sup>71</sup> S. Rep. 108-406, at 3 & n.1 (2004).

<sup>72</sup> *United States v. Antonio*, CR-16-1106, 2017 WL 3149361, at 44 (D.N.M., June 5, 2017).

<sup>73</sup> *Id.* at 45.

<sup>74</sup> *United States v. Antonio*, 936 F.3d 1117 (10<sup>th</sup> Cir. 2019) (determining offense occurred in Indian Country, so that jurisdiction was proper).

<sup>75</sup> 2006-NMSC-039, ¶ 21, 140 N.M. 299.

<sup>76</sup> *Id.* at 25.

<sup>77</sup> *Id.* at 26.

<sup>78</sup> Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503 (2012).

New Mexico. To decrease “jurisdictional impediments,” the Navajo Nation has chosen to form partnerships with state and county police through the form of cross-commissioning agreements.<sup>79</sup> Despite the mix of territorial boundaries, cross-commissioned officers can enforce both Navajo and state law accordingly.<sup>80</sup>

Together, the Navajo Nation and New Mexico have developed a system where arrests, searches, extradition, and jailing work around *Oliphant*. Although *Oliphant* prevents tribal police from arresting non-Indians,<sup>81</sup> federal and tribal law prevents state law enforcement from arresting an Indian on the reservation for offenses that occurred in state jurisdiction<sup>82</sup>, the agreements work around this. Although it is a stretch to suggest these agreements are flawless, the agreements create processes whereas the location and identity of a suspect almost becomes irrelevant. Many officers working in these areas have become so well acquainted with the structure, the agreements improve efficiency between law enforcement agencies.

The cross-commissioning agreements allow for Law enforcement officers to engage extradition agreements when an Indian commits a violent crime in state jurisdiction. In the event a state officer arrests an Indian person on the reservation (presumably near a territorial border), Navajo law enforcement is notified, and the individual is taken into tribal custody. Conversely, if a non-Indian offender is arrested by tribal officers, the individual is extradited or transported to state custody.<sup>83</sup> However, if a non-Indian offender is involved in a crime where the victim is an Indian, the individual is transferred to federal custody.<sup>84</sup>

<b>Offender</b>	<b>Arresting Agency</b>	<b>Location of Crime</b>	<b>Location of Arrest</b>	<b>Custody</b>	<b>Prosecuting Agency</b>
Indian	Navajo Nation	Navajo Nation	Navajo Nation	Navajo Nation	Navajo Nation
Indian	State/County	State	Navajo Nation	Navajo Nation Extradition Statute	State
Non-Indian	Navajo Nation	State/Navajo Nation	Navajo Nation	Transported to state jail	State
Non-Indian	Navajo Nation	Navajo Nation w/ Indian victim	Navajo Nation	Federal	Federal

Cross-commissioning agreements are a proactive step toward protecting local communities from violent offenders. Although the Navajo Nation allows for some state officers to enforce tribal law, the agreements ensure Indian offenders are transferred into tribal custody.<sup>85</sup> It is important to

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Benally v. Marcum*, 553 P.2d 1270, 1271 (N.M. 1976); *City of Farmington v. Benally*, 892 P.2d 629, 631 (N.M. Ct. App. 1995).

<sup>82</sup> See 7 N.N.C. § 607; 17 N.N.C. § 1951 (2005).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

note that the agreements do not extend any prosecutorial authority or provide any kind of waiver of sovereign immunity between the Navajo Nation, New Mexico, or county.<sup>86</sup>

## VI. Jurisdictional impacts with criminal investigation in Indian Country.

This report is primarily geared toward understanding the full scope of MMIW. To reduce cases and victims, some attention must be placed on the law that treats Indian and non-Indian defendants differently. In *U.S. v. Wheeler*,<sup>87</sup> the Supreme Court held that a defendant may be tried in both Federal Court and Tribal Court without violating the Indian defendant's right against double jeopardy.<sup>88</sup> In contrast, a non-Indian offender is only subject to federal or state prosecution because double jeopardy is barred by the Fifth Amendment,<sup>89</sup> including a non-Indian's right to counsel in the Sixth Amendment.<sup>90</sup>

### a. Indian Defendants

When Indians commit an offense in Indian Country, the federal government and tribe share concurrent jurisdiction,<sup>91</sup> which means some cases involving an Indian defendant are prosecuted both in tribal and federal courts. For some tribes, they are forced to rely on the USDOJ to prosecute a case simply because a tribal court does not have adequate funding for a full criminal trial. However, when a case is tried in tribal court, the Indian defendant is not afforded the Fifth and Sixth Amendment protections.<sup>92</sup> Only when an Indian is tried in federal court are they afforded Fifth (due process and right to counsel) and Sixth Amendment (right to counsel) protections.<sup>93</sup> Tribes have their prerogative to include due process and right to counsel protections in their Tribal codes or constitutions. Typically, when a defendant is unable to afford a lawyer, they are appointed legal counsel through a public defender's office. However, the Indian Civil Rights Act makes clear that legal counsel is only available at the expense of the defendant.<sup>94</sup> In most cases, Indian defendants are unable to afford legal counsel.

### b. Non-Indian Defendants

When a non-Indian defendant commits a crime in Indian country, and the USDOJ has sufficient evidence to pursue prosecution under 18 U.S.C. §1151, the defendant is afforded Fifth and Sixth Amendment protections. Thus, unlike Indian defendants, non-Indian are only prosecuted for in federal courts. Together, *Oliphant*<sup>95</sup> and the Fifth Amendment protect non-Indians from being prosecuted by Tribes and bar double jeopardy.

---

<sup>86</sup> *Id.*

<sup>87</sup> 435 U.S. 313 (1978).

<sup>88</sup> *Id.*

<sup>89</sup> U.S. CONST. amend. V.

<sup>90</sup> U.S. CONST. amend. VI.

<sup>91</sup> *Supra* at note 12.

<sup>92</sup> Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317 (2013).

<sup>93</sup> *Id.*

<sup>94</sup> Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1970).

<sup>95</sup> 435 U.S. 191 (1978).

### c. Violence Against Women Act

In 2013, Congress reauthorized the Violence Against Women Act (“VAWA”) in response to significant rates of domestic violence crimes taking place across Indian Country, specifically by non-Indian men.<sup>96</sup> Non-Indian offenders often went unpunished for heinous abuses against Indian women. The VAWA was specifically intended to provide tribes with the necessary jurisdictional hook to prosecute non-Indian offenders.<sup>97</sup> VAWA ultimately provides tribes with a funding source, so that non-Indian defendants are afforded their Fifth Amendment right to due process.<sup>98</sup> The Act requires non-Indians be given the right to counsel (public defender) and the tribe must have adopted a law and order code that is compliant with federal regulations.<sup>99</sup>

As of 2018, eighteen tribes have adopted the 2013 VAWA provisions, which have totaled 143 arrests of non-Indians defendants by tribal police, not all of which are males.<sup>100</sup> Of the arrests, were a total 74 convictions and 14 referrals for federal prosecution.<sup>101</sup> In 2013, the Pasua-Yaqui Tribe was one of the first adopters of the VAWA and has since made the highest number of arrests totaling 40 as of 2018.<sup>102</sup>

Some tribes have been successful in implementing VAWA into their existing judicial system. When a non-Indian commits a related domestic violence crime on the reservation, law enforcement must be able to show a violation of a tribal, state or federal protection order.<sup>103</sup> VAWA includes a “full-faith and credit” provision which enforces comity between the state, municipal, tribal, and federal courts.<sup>104</sup> The basic premise is that if a potential victim obtains an order of protection from any court, the order can be enforced by any jurisdiction. Thus, in order for the police to make an arrest, they need sufficient evidence to prove an order was violated or in the absence of an order there must be an adequate showing of *mens rea* and *actus reas* for a tribal prosecutor to make a conviction.<sup>105</sup> Unfortunately, VAWA has not been enough to protect women and children from violence.

VAWA remains available to tribes who can afford to operate on a reimbursement basis.<sup>106</sup> For tribes with limited court budgets, VAWA might not be an option. Providing defense counsel or a qualified law and order code can become quite costly.<sup>107</sup> Although VAWA is a good tool to have, there are some tribes simply unable to afford it.

---

<sup>96</sup> Nat’l Cong. of Am. Indians, *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report* (2018).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.* at 7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 11.

<sup>103</sup> Violence Against Women Act Reauthorization of 2019, S. 2920, 116<sup>th</sup> Cong.

<sup>104</sup> *Id.*

<sup>105</sup> *Supra* at note 96.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

#### d. Interstate Violation of a Protection Order, 18 U.S.C. 2262

In 1996, Congress passed the Interstate Stalking Punishment and Prevention Act to supplement Title 18 of the United States Code of Crimes and Criminal Procedure.<sup>108</sup> Section 2262 provides statutory language for federal prosecutors to prosecute offenses by both Indian and non-Indian offenders who: (1) “travels in interstate or foreign commerce, or enters or leave Indian Country..., with the intent to engage in conduct that violates the portion of the protection order that prohibits or provides protection against violence.”<sup>109</sup> Prosecutions can also be made if an offender (2) “causes another person to travel in interstate...[commerce] or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order.”<sup>110</sup> These provisions were adopted by Congress and were intended to address the increasing number of non-Indian offenses committed through interstate domestic violence. Violations of protection orders were not only a criminal offense of a state or tribe, but the provision converts such an act to a federal crime.

Section 2262 (a)(1) provides USDOJ Office of Tribal Justice law enforcement officers to arrest non-Indian offenders solely on their intent to cross reservation boundaries for the purpose of violating a protection order. Tribal prosecutors can use this jurisdictional hook to either prosecute or gather sufficient evidence to be forwarded to federal prosecutors. Section 2262 (a)(2) closes another jurisdictional loophole for non-Indians who abduct and individual to cause harm off the reservation. Together these provisions provide another source of reassurance for tribes that may be unable to afford the cost of VAWA expenses.

This reassurance can be seen in case law. In 1999, the 8<sup>th</sup> Circuit reaffirmed the conviction of a husband who dragged his wife off the reservation in order to sexually assault and beat her.<sup>111</sup> In 2006, in the U.S. District Court of North Dakota, a non-Indian defendant was charged under 2262 (a)(1) for the intention of crossing a reservation boundary line to stalk his victim.<sup>112</sup> The defendant challenged his conviction by asserting the defense that the statute was overbreadth under the Tenth Amendment of U.S. Constitution.<sup>113</sup> However, the court ruled that the “overbreadth doctrine” specifically pertains to the First Amendment’s Free Speech Clause, whereas 2262 (a)(1) criminalizes conduct.<sup>114</sup> Thus far, federal prosecutions under 18 U.S.C. 2262 have provided some tribes with additional layer of assurance that their members can look toward some federal protection in the absence of VAWA.

Like VAWA, 18 U.S.C. 2262 still requires a protection order but removes the requirement of the defendant completing a criminal act of bodily harm. Adding a stalking provision to Title 18 is an effective way to continue closing jurisdictional loopholes for non-Indian offenders to escape prosecution of crimes committed in Indian country.

---

<sup>108</sup> 18 U.S.C. §2262 (2018).

<sup>109</sup> 18 U.S.C. §2262 (a)(1)(2018).

<sup>110</sup> 18 U.S.C. §2262 (a)(2)(2018).

<sup>111</sup> *United States v. Cree*, 166 F.3d 1270 (8<sup>th</sup> Cir. 1999).

<sup>112</sup> *United States v. Rettinger*, 2006 U.S. Dist. Lexis 90251 (D.N.D. 2006).

<sup>113</sup> *Id.*(citing U.S. Const. amend. X).

<sup>114</sup> *Id.*(citing U.S. Const. amend. I).

## VII. Differences in process-sentencing & declinations impact investigations.

### a. Differences between Federal, Tribal, and State Sentencing

The 2010 Tribal Law and Order Act limits tribal court sentences with a maximum of 3 years, or a fine up to **\$15,000.00** or both per offense.<sup>115</sup> Incarcerating a repeat offender can become expensive, however tribes should research the most feasible options available. Individuals who pose a severe threat to the welfare of a community, should be deterred from breaking criminal laws with possible incarceration and fines if that is what a tribe feels is necessary to protect integrity and welfare of the tribe and its members.

The TLOA amended section 1302 of the Indian Civil Rights Act allowing tribal courts to enhance sentencing stating that, “No Indian tribe in exercising powers of self-government shall impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years.”<sup>116</sup> The defendant can be subject to an enhanced sentencing if they are accused of a criminal offense that they have been previously convicted of by any jurisdiction in the United States; or they are being prosecuted for a similar offense that if prosecuted in any of the States or the U.S. is punishable by more than a year of imprisonment.<sup>117</sup> Some qualifying crimes include burglary, robbery, weapons violations, murder, manslaughter, rape, child molestation, and aggravated assault, etc.<sup>118</sup> However, there are requirements that a tribe needs to fulfill in order to sentence a defendant for more than 1 year and as stated above, it is a costly process. Not only is it costly, but in the case that a defendant is sentenced to more than one year, the tribal court may require the defendant to serve the sentence (A) in a tribal correctional center that has been approved by the BIA for long-term incarceration; (B) in the nearest appropriate Federal facility; or (C) in a State or local government-approved detention or correctional center.<sup>119</sup> The many requirements make it difficult for tribes to retain jurisdiction over offenders who commit crimes in Indian Country, and often it is up to the federal government to prosecute the more serious crimes. Although, there are many ways in which a case might not even make it past the FBI or AUSA declinations list.

### b. USDOJ Declinations for Crimes Occurring in Indian Country

The FBI and the Executive Office for the United States Attorneys (“OUSA”) are required to submit an annual report to the Attorney General who will then submit the findings to the Department of Justice. This satisfies Section 212 of TLOA, the obligations of the FBI and OUSA are as follows:

1. The type of crime(s) alleged;
2. The status of the accused as Indian or non-Indian;

---

<sup>115</sup> Tribal Law and Order Act of 2010 §234 (a)(2)(B), 28 U.S.C. 2815 (2010).

<sup>116</sup> Michelle Rivard Parks et al., *Tribal Law and Order Act: Enhanced Sentencing Authority* (July 2015), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/TLOAESAQuickReferenceChecklist.pdf>.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *Id.* at 5.

<sup>119</sup> *Id.*

3. The status of the victim as Indian or non-Indian; and
4. The reason for deciding against referring the investigation for prosecution (FBI) or the reason for deciding to decline or terminate the prosecution (OUSA) (this is also known as declinations).<sup>120</sup>

### c. FBI Reasons for Declining a Case

The 2017 U.S. Department of Justice (USDOJ): Indian Country Investigations and Prosecutions Report, reported that around 79.5% (1,511 out of 1,900) of the Indian country criminal investigations opened by the FBI were referred for prosecution.<sup>121</sup> The FBI closed 699 Indian country investigations 21% of them were closed because the case, “did not meet statutory definitions of a crime or USAO prosecution guidelines.”<sup>122</sup> Reasons for the non-prosecutions were due to lack of evidence that a crime was committed, and that the deaths being investigated were a result of an, “accident, suicide, or natural causes (i.e., non-homicides).”<sup>123</sup> This is also consistent with the reason why 84 % (141 out 167) of the death investigations were closed by the FBI in 2017.<sup>124</sup> In 2017, 37% (891) of all (2,390) Indian Country matters resolved were declined, the most common reason for the USAOs to decline to take a case was for insufficient evidence.<sup>125</sup>

In 2017 the totality of Indian Country violent crime was unknown because the USDOJ Report only covered cases presented to them by the FBI and EOUSA, not including cases reported to the BIA or other law enforcement agencies.<sup>126</sup> The numbers reported in the 2017 Department of Justice report from the FBI and the EOUSA includes, “only cases subject to Federal jurisdiction and reported to the FBI or referred to a USAO by a Federal, state, local, or Tribal agency.”<sup>127</sup> Data collection on all Indian Country violent crimes and prosecution data across sovereigns did not exist in 2017 to give a full account of Indian Country violent crimes.<sup>128</sup>

There is a difference between FBI reporting and USAO reporting and described as, “The information the FBI is required to report under TLOA is substantively different from the information reported by the USAOs.” The FBI is responsible for investigating allegations of Federal crimes in Indian country, while the USAOs are responsible for prosecuting such crimes referred by all Federal investigative agencies.”<sup>129</sup>

The FBI has Field Divisions dedicated to investigating federal crimes alongside the BIA and other federal law enforcement agencies.<sup>130</sup> There is both an FBI and BIA office in Albuquerque, New Mexico. Non-Referral Categories include:<sup>131</sup>

---

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 4,5.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 7.

- Death was not a homicide
- Does not meet USAO guidelines or statutory definitions
- No remaining leads
- Victim is unable to identify subject
- Unsupported allegation
- Victim or witness is unable or unwilling to assist
- Interagency cooperation
- Cannot be addressed with current resources
- Duplicate or case reopened
- Subject died <sup>132</sup>

The FBI reports are reflective of the cases only reported to the FBI not investigations made by the BIA-OJS or Tribal law enforcement. <sup>133</sup> However, this does not include the allegations and cases reported to the BIA and other law enforcement agencies.

#### d. USAO reasons for declining a case

The United States Attorney’s Office (USAO) prosecutes crimes in Indian Country that are included in the General Crimes Act and the Major Crimes Act. <sup>134</sup> There are two primary reasons why the US Attorney’s Office decides not to take a case, an immediate declination and a later declination. <sup>135</sup> An immediate declination is when the USAO does “not open a file on a referral and does not pursue prosecution of the referral.” <sup>136</sup> Examples of the types of cases that are immediately declined:

A crime that was thought to have been committed on Indian lands, which upon further examination, turned out to have been committed on state land. The state—not the Federal Government—would have jurisdiction to prosecute. A crime that involves a Native American victim and defendant but that does not violate the Major Crimes Act. The Tribal court would have exclusive jurisdiction to prosecute in this instance. A crime committed on Tribal lands that involves two non-Indians. In this case, the state ordinarily would have exclusive jurisdiction to prosecute. <sup>137</sup>

---

<sup>132</sup> *Id.* at 7.

<sup>133</sup> *Id.* at 6.

<sup>134</sup> The U.S. Attorney’s Office District of New Mexico, *Public Safety in Indian Country* (July 8, 2019), <https://www.justice.gov/usao-nm/public-safety-indian-country>; *See also* 18 U.S.C. § 1152, 18 U.S.C. § 1153.

<sup>135</sup> U.S. Department of Justice, *Indian Country Investigations and Prosecutions* (2017), 1 <https://www.justice.gov/tribal/page/file/1113091/download>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

Other examples of immediately declined cases include sexual assault referrals such as if Native juveniles are involved and it occurred on Indian country.<sup>138</sup> The reasons for this would be because the Tribal system had the resources to deal with the case more effectively than the government.<sup>139</sup> Later declinations occur when the “USAO opens a file on the referral, conducts a more significant amount of work on the matter, but ultimately does not pursue prosecution of the referral.”<sup>140</sup> Both types of declinations must be entered into CaseView, which is the EOUSA’s case management system.<sup>141</sup> CaseView allows the person inputting the data to choose from six declination reasons when recording a declination.<sup>142</sup>

e. Categories for declining a case

Categories for declining a case include: (1) Legally Barred; (2) Defendant Unavailable; (3) Matter Referred to Another Jurisdiction; (4) Alternative to Federal Prosecution Appropriate; and (5) Prioritization of Federal Resources and Interests.<sup>143</sup>

Legally Barred-Means cases where the U.S. has no choice but to decline a case because legally the U.S. lacks jurisdiction to file charges due to:

- Jurisdiction or venue problems
- No Federal offense evident
- No known suspects
- The file was open in error
- Staleness
- Statute of limitations has run<sup>144</sup>

Insufficient Evidence-are cases where the U.S. declines a case because of an inability to prove the case in court beyond a reasonable doubt due to:

- Lack of Evidence of Criminal Intent
- Weak or insufficient Admissible Evidence
- Witness Problems<sup>145</sup>

Defendant Unavailable-Cases where the defendant is physically unavailable or where the prosecutor exercises prosecutorial discretion based on defendant’s circumstances:

- Offender’s Age, Health, Prior Record, or Personal Matter
- Suspect Deceased
- Suspect Deported

---

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 20.

<sup>141</sup> *Id.* at 24.

<sup>142</sup> *Id.* at 26.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

- Suspect a Fugitive <sup>146</sup>

Matter Referred to Another Jurisdiction-cases where the defendant is not prosecuted by the Federal government but is subject to the authority of another jurisdiction:

- Juvenile Suspect
- Petite Policy <sup>147</sup>
- Recusal
- Suspect to be prosecuted by other Authorities
- Suspect referred for prosecution decision in State/Local/Military Court
- Suspect Referred for Prosecution Decision in Tribal Court
- Suspect Being Prosecuted on Other Charges <sup>148</sup>

Alternative to Federal Prosecution Appropriate-Cases where the defendant could have been prosecuted by the Federal government but an alternative to prosecution was viewed by the United States, within its discretion, as appropriately serving the ends of justice:

- Civil, Administrative, or Other Disciplinary Alternative
- Pretrial Diversion Completed
- Restitution/Arrearage Payments Made or Being Made
- Suspect Cooperation

Prioritization of Federal Resources and Interests-Cases where the case is declined because of existing USDOJ or USAO policy:

- Agency Request
- Department Policy
- Declined per Instructions from USDOJ
- Lack of Investigative Resources
- Lack of Prosecutorial Resources
- Local Agency Referral Presented by Federal Agency
- Minimal Federal Interest or No Deterrent Value
- Office Policy (Fails to Meet Prosecutorial Guidelines)
- Suspect Serving Sentence <sup>149</sup>

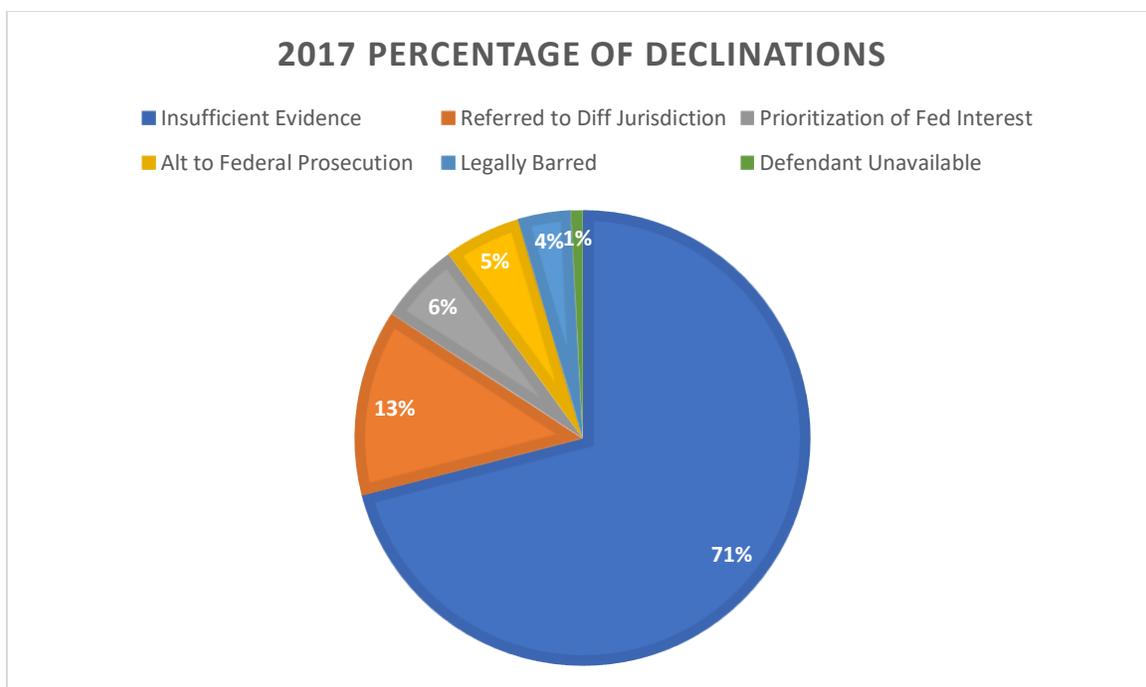
---

<sup>146</sup> *Id.*

<sup>147</sup> “The Department of Justice’s Petite policy generally precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s).” *See JM 9-2.031.*

<sup>148</sup> U.S. Department of Justice, *Indian Country Investigations and Prosecutions* (2017), 27, 28, <https://www.justice.gov/tribal/page/file/1113091/download>.

<sup>149</sup> *Id.*



Graph from the 2017 US DOJ Indian Country Investigations and Prosecutions Executive Summary. <sup>150</sup>

#### f. The United States Attorney’s Office District of New Mexico

The USAO’s main office is in Albuquerque with branches in Las Cruces and Santa Fe. <sup>151</sup> The District of New Mexico Office has a Victim-Witness Assistance Unit that is involved with victims and witnesses of federal criminal crimes. <sup>152</sup> They offer support and assistance for court proceeding information, case status, crisis intervention, access to other federal services and financial assistance with travel and lodging for witnesses in a case. <sup>153</sup> They also have a Public Safety in Indian Country program which focuses on the, “prosecution of violent crime and the reduction of violence against women and children.” <sup>154</sup> The USAO-NM adopted the Operations Plan for Public Safety in Indian Country (“Operations Plan”) which intends to give responsibility to the tribal communities in the district, “premised upon respect for tribal sovereignty and recognition of the government-to-government relationship between the U.S. and the tribes and Pueblos within the District of New Mexico.” <sup>155</sup>

Some of the more recent efforts of the USAO-NM include the appointment of both a SAUSA and a Missing and Murdered Indigenous Persons (“MMIP”) Coordinator. On September 17, 2020, John C. Anderson, U.S. Attorney for the District of New Mexico, announced that the Laguna Pueblo received a \$450,000 award through the Office of Violence Against Women

<sup>150</sup> *Id.* at 32. (Percentages have been rounded up)

<sup>151</sup> U.S. Attorney’s Office, U.S. Attorney John C. Anderson Announces \$450,000 Award to Laguna Pueblo . <https://www.justice.gov/usao-nm/programs>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Supra*, at note 147.

<sup>155</sup> *Id.*

(“OVW”) to appoint a Special Assistant United States Attorney (“SAUSA”).<sup>156</sup> The SAUSA will be appointed by the Tribe and the USAO working collaboratively with both the USAO and tribal prosecutor’s office.<sup>157</sup> The SAUSA will be trained as a federal prosecutor and will dedicate 50 percent of their time prosecuting domestic violence, dating violence, sexual assault, and stalking cases.<sup>158</sup> One of their goals is to promote “higher quality investigations and better inter-governmental communication.”<sup>159</sup>

On November 22, 2019, the USDOJ announced the creation of the MMIP Initiative which invested \$1.5 million in hiring MMIP coordinators to work in the U.S. Attorney’s Office in eleven states, which includes New Mexico.<sup>160</sup> Denise Billy was appointed by U.S. Attorney John Anderson to be the first MMIP Coordinator in New Mexico.<sup>161</sup> Ms. Billy’s duties consist of outreach to tribal communities, assist in the creation and implementation of community action plans, coordinating with state, tribal, local and federal law enforcement to, “develop protocols and procedures for responding to and addressing MMIP cases, and improve data collection as well as assist tribal partners and advocacy groups.”<sup>162</sup>

### VIII. Conclusion

Where there is a will there is a way to overcome challenges to major crimes investigations in Indian Country. The challenges are cultural, financial, land, legal, political, and procedural challenges. The cultural challenge includes suppression of tribal customs, non-Indian suspects who are aware of what crimes they can and cannot get away with, and cookie cut solutions that are often inapplicable to the number of unique tribes. The land challenges include boundaries that are not clearly marked, difficulty in obtaining land records, and unpoliced rural areas. The financial challenges include increased burdens on federal law enforcement, insufficient funds to hire additional tribal enforcement, cost of independent legal counsel, and the incarceration of repeat offenders. The legal challenges include determining legal authority, land boundary issues, and varying statute of limitations. The political challenges include multiple government involvement that leaves jurisdictional gaps in a jurisdictional maze, diminished tribal sovereignty, insufficient agency collaboration to track MMIW cases, and limited scopes in legislation. The procedural challenges include insufficient fact and evidence, low witness cooperation, delayed response times, limited data and no national database of MMIW cases, reporting, and insufficient preparation time allowed after transfer of cases.

There are many challenges that must be identified and overcome, that include the actions that support the many agencies involved. Tribes must continue exercising their voice and legislators must continue listening. Congress has prioritized action on various detrimental findings

---

<sup>156</sup> *Supra*, at note 151.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> The United States Attorney’s Office District of New Mexico, *U.S. Attorney John Anderson Appoints Denise Billy as the Missing and Murdered Indigenous Persons Coordinator for the District of New Mexico* (July 28, 2020), <https://www.justice.gov/usao-nm/pr/us-attorney-john-anderson-appoints-denise-billy-missing-and-murdered-indigenous-persons>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

by enacting Savanna's Act, Tribal Law and Order Act, and Violence Against Women Act, Savanna's Act, and the Not Invisible Act. The State of New Mexico has successfully formed partnerships and cross commissioning agreements, established departments and staff to support victims and tribal criminal enforcement, and enacted various laws that align with federal and tribal law. To make a greater collaborative impact, State, and Federal governments should: consult with Tribes: dedicate needed funding for long term improvements: create clearer jurisdictional lines: improve data collection on all violent crimes in Indian Country: utilize social media and technology: provide grants: respect tribal sovereignty: and communicate more on a community level. All efforts are will benefit the victims of crime and the Native community.

[End of document]