

# RAPING INDIAN COUNTRY

Elizabeth Ann Kronk Warner

Associate Dean of Academic Affairs, Professor of Law, Director, Tribal Law and Government Center

University of Kansas School of Law

October 8, 2018

# PRESENTATION OVERVIEW

- Why Raping Indian Country?
- Policies of the Trump Administration
- Increased Natural Resource/Energy Development Leads to Increased Vulnerability of Native People
  - Climate change and climate “refugees”
  - Man Camps
- Proposed Solutions to Improve Upon the Status Quo

# WHY RAPING INDIAN COUNTRY?

- Use “rape” as a metaphor is controversial, as it can minimize the experience of sexual assault survivors.
- Can be understood as serious harm to both the climate and Indian nations.
- Two reasons to use the language of sexual violence:
  - Many tribal cultures understand the unchecked exploitation of the earth to be a violent attack on the land, which itself carries feminine qualities (e.g. Mother Earth). The rape metaphor therefore has particular relevance for many native cultures.
  - Because the crime of sexual violence has exponentially increased in communities where extractive industries activities have been established, we can understand how rape against the bodies of Native women and children are directly linked to extractive industries.
- In the context of this presentation, rape therefore unifies both what is happening to the land and to individual bodies.

# FEDERAL ROLE IN ENERGY AND NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

- Tribal sovereignty persists.
- For a variety of historical reasons, the federal government also plays a significant role in Indian country (e.g. federal trust responsibility, trust land, plenary power).
- The federal government plays a significant role in energy and natural resource development within Indian country.
  - Indian Mineral Leasing Act
  - Indian Mineral Development Act
  - Energy Policy Act of 2005
  - HEARTH Act
  - Rights of Way Act
  - Long-Term Leasing Act
  - Federal Power Act
  - Public Utility Regulatory Practices Act
  - Natural Gas Act
- Further, federal environmental law statutes, such as the CAA, CWA, and SDWA, are statutes of general application

# TRUMP ADMINISTRATION'S EFFORTS TO INCREASE ENERGY DEVELOPMENT IN INDIAN COUNTRY

- The Trump Administration is likely interested in energy development within Indian country given the significant potential there.

*Based on Department of the Interior statistics, the Government Accountability Office (GAO) reported in November 2016 that tribes and their members – collectively – are the third largest owner of mineral resources, including oil, gas and coal in the United States. Similarly, the Department of Energy estimates that Indians lands in the Lower 48 states have the potential to produce 1.1 billion megawatt hours of electricity from wind – 3.4 percent of the potential in the United States. -- Paul Moorehead, Outlook for the Trump Administration, 2017 NO. 4 RMMLF-INST 4A (Sept. 26, 2017) (citations omitted).*

- Administration's response to the Keystone and Dakota Access pipelines suggest a strong interest in development affecting Indian country.

# TRUMP ADMINISTRATION'S EFFORTS TO INCREASE ENERGY DEVELOPMENT IN INDIAN COUNTRY

- Issued Executive Order 13766, *Expediting Environmental Reviews*
- Issued Executive Order 13783, *Promoting Energy Independence and Economic Growth*
- Withdrew the United States from the Paris Climate Accord
- In June 2017, President Trump also met with tribal leaders to discuss energy development in Indian country.

*President Trump stated his Administration's intent to roll back harmful regulations that prevent State, local, and tribal communities from accessing vital energy resources. These regulations hinder economic growth that would create jobs and could be used to fund roads, schools, and infrastructure. It is President Trump's hope that the roundtable will allow for more cooperation between local governments and the Trump Administration in order to unleash America's energy potential.* -- WHITE HOUSE, PRESIDENT TRUMP HOSTS TRIBAL, STATE, AND LOCAL ENERGY ROUNDTABLE, (June 28, 2017).

- Issued the *Presidential Proclamation Modifying the Bears Ears National Monument*
- Federal agencies have followed:
  - DOI ended the moratorium on federal coal leasing
  - DOI reviewing policies related to climate change to identify which impede development

# THE TRUMP ADMINISTRATION'S EFFORTS TO PROTECT NATIVE PEOPLE

- Less clear about how the Administration will protect the lives of Native people from criminal behavior often associated with natural resource development.
- As with energy and natural resource development, the federal government asserts significant criminal jurisdiction in Indian country:
  - Major Crimes Act
  - Indian Civil Rights Act
  - U.S. Supreme Court's decision in *Oliphant*
- The Result:

Since 1999, the federal government has released a variety of different crime reports which universally come to the same conclusion – that Native people experience some of the highest rates of crime in the Nation, and most of that crime is being committed by non-Indians. The most recent federal report, released in May of 2016, concluded that over 80% of Native women will experience some form of violent crime in their lives, and that over 56% of Native women will experience some form of sexual violence in their lifetimes. The 2016 report also concluded that over 90% of Native people report that they have been the victims of inter-racial violence – that is, a victim of a non-Indian perpetrator. -- ANDRE ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (2016).

- Obama-Era Legislation

- Tribal Law and Order Act of 2010
- Violence Against Women Act of 2013

- Unfortunately, it appears that TLOA and VAWA have not had their intended effect of improving prosecution rates in Indian country. In December 2017, the Department of Justice Office of the Inspector General (OIG) issued a scathing report concluding that the federal government was not in full compliance with the Tribal Law and Order Act – in part due to the abject failure of some federal officials to faithfully implement the various components in TLOA. The report found that some of the officials most important to the implementation were not even familiar with the Act. Because the report covers activities between FY2011 through November of 2016, the report is an actual indictment on the Obama Justice Department. And while the Obama Administration did a great deal to celebrate its efforts in Indian country, the IG report concluded that “the Department has not prioritized assistance to Indian country at the level consistent with its public statements or annual reports to Congress.” The report includes 14 specific recommendations for improvement. -- Office of the Inspector General, Review of the Department’s Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010, December 2017.

# TRUMP ADMINISTRATION'S EFFORTS TO PROTECT NATIVE PEOPLE

- We are now at a cross-roads, as it is not clear whether the Trump Administration will implement these OIG recommendations or otherwise act proactively to prosecute more violent crimes in Indian country. (It is possible the Trump administration will not announce any major policy changes since the concerns in the report were specific to the Obama administration.) Our only potential clue to the position of the Trump DOJ is the official response to the OIG report, which was written on December 8, 2017 and published along with the report. Unfortunately, the letter gives little indication of how the current Department views its responsibilities under TLOA and is carefully crafted to be minimally responsive to the recommendations. In fact, after reviewing the DOJ response, the OIG noted that it still considered 4 of the 14 recommendations “unresolved” because the DOJ response was not satisfactory.

# INCREASED NATURAL RESOURCE/ENERGY DEVELOPMENT LEADS TO INCREASED VULNERABILITY OF NATIVE PEOPLE

- Climate Change
  - Such development increases climate change because of the connection between increased greenhouse gas emissions and climate change.
  - Tribes may be particularly vulnerable because of unique connections to land, both legal and cultural.
- Negative impacts of climate change on tribes:
  - Increased temperatures
  - Drought
  - Shifting vegetation and animal ranges
  - Loss of species
  - Decreased life spans
  - Erosion
- Climate change has created climate “refugees” within the United States.
  - Native Village of Kivalina in Alaska
  - Isle de Jean Charles in Louisiana

# MAN CAMPS: THE PROBLEM

- “In the United States, violence against indigenous women has reached unprecedented levels on tribal lands and in Alaska Native villages. More than 4 in 5 American Indian and Alaska Native women have experienced violence, and more than 1 in 2 have experienced sexual violence. Alaska Native women continue to suffer the highest rate of forcible sexual assault and have reported rates of domestic violence up to 10 times higher than in the rest of the United States. Though available data is limited, the number of missing and murdered American Indian and Alaska Native women and the lack of a diligent and adequate federal response is extremely alarming to indigenous women, tribal governments, and communities. On some reservations, indigenous women are murdered at more than ten times the national average.” – Indian Law Resource Center, <http://indianlaw.org/issue/ending-violence-against-native-women>

# MAN CAMPS

- Energy companies seeking to engage in natural resource extraction in or near tribal nations must attract large numbers of temporary workers. Typically, this large transient work force is made up almost exclusively of non-Indian men. Life in these “man camps” is often centered around “sexism, hypermasculinity, and a disconnection from the local community.”
- Natural resource extraction tends to lead to increased crime. In the last 15 years there has been significant natural resource extraction in and near Indian country.
- Since the onset of the Bakken oil boom, the number of assault cases in North Dakota increased by over 82%.
- While there is no comprehensive data collection system that allows us to quantify the increased rates of violence associated with man camps, there is ample anecdotal evidence to establish a significant problem. Anecdotal reports (often collected by investigative journalists) suggest that Native women experience a marked change in their comfort-level in public places.

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

One of the things we ran into while working up there was a 15 year old boy had gone missing. He was found in one of the Man Camps with one of the oil workers. They were passing him around from trailer to trailer. He went there looking for a job and was hired by individuals within the Man Camp to do light cleaning in and around their personal areas. The young teenager was forced into sex slavery. ... We [also] found a crying, naked, four year old girl running down one of the roads right outside of the Man Camp. She had been sexually assaulted..."

- Damon Buckley, *Firsthand Account of Man Camp in North Dakota From Local Tribal Cop*, LAKOTA COUNTRY TIMES, May 22, 2014, [http://www.lakotacountrytimes.com/news/2014-05-22/Front\\_Page/Firsthand\\_Account\\_Of\\_Man\\_Camp\\_In\\_North\\_Dakota\\_From.html](http://www.lakotacountrytimes.com/news/2014-05-22/Front_Page/Firsthand_Account_Of_Man_Camp_In_North_Dakota_From.html).

- Moreover, Native women and children are already at high risk for becoming victims of human trafficking. Add in the dynamics of man camps, and the risk factors increase substantially.
- Horror stories involving women and children being bought and sold in man camps have begun to emerge in recent years.
- Prostitution is often understood to be part and parcel of the man camp experience, where local women (including Native women) turn to selling sex because of poverty, addiction, and/or homelessness.
- Local authorities have seen the rates of prostitution significantly increase over prior years. The higher rates of prostitution can be linked directly to the boomtown expansion. One reported discovered that “for the past 10 years...there were almost no prostitution or sex trafficking-related cases in far western North Dakota until 2011, when there were a dozen.”
- Women and children being used in prostitution are also at high risk for kidnapping and homicide. The emerging Missing, Murdered and Indigenous Women (MMIW) crisis can be traced, in part, to linkages between human trafficking in the fracking regions and missing women. Prostitution can be a lethal experience, since prostitutes are much higher risk for homicide.

- The federal government itself has acknowledged the danger presented by these man camps. In 2013, the Department of Justice acknowledged the relationship between energy extraction in the Bakken and high rates of crime targeting Native women and children:
  - Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped “man camps” of workers.
- United States Attorneys, federal prosecutors that are co-responsible for crime control on most reservations in the lower 48, have also noted this phenomenon: “In the course of approximately the last five years, [extractive industries have] cause[d] a social eruption – in population, jobs, and money. It has exposed, predictably, the seedy and underbelly of these promising advances: resource shortages, young men with money to burn, and a veritable buffet of vices to spend it on.”

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

# OPTIONS TO IMPROVE UPON THE STATUS QUO

- VOTE!
- Tribal Empowerment
  - Successes under P.L. 638
    - *Under P.L. 638, tribes may enter into contracts and self-governance compacts to assume administration of federal Indian programs, and may use the 638 program to gain significant control over natural resources development. For example, a statistical analysis of seventy-five forestry tribes showed that in the 1980s, forty-nine of the tribes used the 638 program to take some degree of management over their forest resources. The study concluded that 'tribal control of forestry under PL 638 results in significantly better timber management.' When tribes took complete management over their forest resources under 638, output rose as much as forty percent with no increase in the number of workers, and the tribes received prices as much as six percent higher than they had when the forest resources were managed by the Bureau of Indian Affairs. -- Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark 1065, 1070 (Winter 2008) (citations omitted).*
  - Recent Legislation:
    - Energy Policy Act of 2005
    - HEARTH Act
    - VAWA 2013

- Reform the Criminal Justice System Applicable in Indian Country
  - Repudiate *Oliphant* through a comprehensive congressional fix
  - In March 2018, NCAI released a 5-year report on the efficacy of the jurisdictional fix in VAWA 2013. According to NCAI, jurisdiction over non-Indians “has fundamentally changed the landscape of tribal criminal jurisdiction in the modern era.” Even though only 18 tribal nations are known to be taking advantage of the fix, prosecution of non-Indians is providing a welcome relief from non-Indians who have committed physical violence against their partners or former partners. Since 2013, there have been at least 143 arrests of non-Indians for domestic violence across the 18 tribal nations, resulting in 74 convictions. Contrary to the perception that non-Indians “can’t get a fair trial” in tribal courts, there have been 21 dismissals and 5 acquittals during the same time period. At least 73 non-Indian defendants charged in tribal court had prior criminal records. -- NATIONAL CONGRESS OF AMERICAN INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT (2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf).

# ADDITIONAL RESOURCES

- National Sexual Violence Resource Center: <https://www.nsvrc.org/publications/nsvrc-publications/sexual-assault-indian-country-confronting-sexual-violence>
- Tribal Court Clearinghouse: <https://www.tribal-institute.org/lists/assault.htm>
- Mending the Sacred Hoop: <https://mshoop.org/resources/manuals/>
- Tribal Law and Policy Institute: <http://www.tribal-institute.org/download/NativeVictimsSexualAssault.pdf>
- National Congress of American Indians: <http://www.ncai.org/policy-issues/tribal-governance/public-safety-and-justice/violence-against-women>

# QUESTIONS?

Elizabeth Kronk Warner

Associate Dean of Academic Affairs, Professor of Law, and Director, Tribal Law and  
Government Center

University of Kansas School of Law

(785) 864-1139

[elizabeth.kronk@ku.edu](mailto:elizabeth.kronk@ku.edu)