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THESIS

HOMELAND SECURITY FROM A TRIBAL CONTEXT

by

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December 2018

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A gap exists between the federal government and the 567 tribal nations, which hampers tribal inclusion in homeland security. American Indian and Alaskan Native lands comprise 100 million acres of land within the territory of the United States, with 250 miles of borderlands—potentially a formidable rift in the nation's homeland security. According to its mission statement, the United States homeland security enterprise necessarily assumes tribal participation, cooperation, and communication in upholding its mission to "ensure a homeland that is safe, secure, and resilient against terrorism and other hazards." Keeping the nation safe encompasses many aspects of protection, and "hundreds of thousands of people from across the federal government, state, local, tribal, and territorial governments, the private sector, and other nongovernmental organizations are responsible for executing these missions." If not well supported with staff, training, and funding, the tribal nations struggle to fulfill such federal expectations. The first step to close that gap, and build stronger, more collaborative homeland security practices, is improving tribal preparedness.

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HOMELAND SECURITY FROM A TRIBAL CONTEXT

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ABSTRACT

A gap exists between the federal government and the 567 tribal nations, which hampers tribal inclusion in homeland security. American Indian and Alaskan Native lands comprise 100 million acres of land within the territory of the United States, with 250 miles of borderlands—potentially a formidable rift in the nation's homeland security. According to its mission statement, the United States homeland security enterprise necessarily assumes tribal participation, cooperation, and communication in upholding its mission to "ensure a homeland that is safe, secure, and resilient against terrorism and other hazards." Keeping the nation safe encompasses many aspects of protection, and "hundreds of thousands of people from across the federal government, state, local, tribal, and territorial governments, the private sector, and other nongovernmental organizations are responsible for executing these missions." If not well supported with staff, training, and funding, the tribal nations struggle to fulfill such federal expectations. The first step to close that gap, and build stronger, more collaborative homeland security practices, is improving tribal preparedness.

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LIST OF ACRONYMS AND ABBREVIATIONS

BIA	Bureau of Indian Affairs
DoD	Department of Defense
DHS	Department of Homeland Security
FEMA	Federal Emergency Management Agency
SRIA	Sandy Recovery and Improvement Act of 2013

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EXECUTIVE SUMMARY

A gap exists between the federal government and the 567 tribal nations in the United States, which hampers tribal inclusion in homeland security efforts. American Indian and Alaskan Native lands comprise 100 million acres of territory within the United States, including 250 miles of borderlands—potentially a formidable rift in the nation's homeland security if this population is excluded. The United States homeland security enterprise necessarily assumes tribal participation, cooperation, and communication in upholding its mission to "ensure a homeland that is safe, secure, and resilient against terrorism and other hazards."[1] If not well supported with staffing, training, and funding, the tribal nations could struggle to fulfill such federal expectations.

Indigenous tribes were here, as functioning governments, long before the British colonized and created the 13 colonies that eventually became the United States. Settlers made treaties with the individual governments, as one would negotiate with any other sovereign nation. The rights of tribes were retained, not granted. Sovereignty inherently recognizes the authority and capability of the tribe, nation, or government entity. Recognizing each tribe as an individual nation offers some perspective: the relationship between tribes and the United States is about international complexity and relations. And when the balance of power is uneven, such as the domestic dependent status of tribes within the United States, it needs to be addressed. Laws and policies for the American Indians exist because of tribal sovereignty, not the other way around.

In the original Homeland Security Act of 2002, the words "tribes" and "tribal" only appear four times; with recent amendments, however, the number is more than 200.[2] The Act—the purpose of which was to define the homeland security enterprise—failed to recognize tribal rights, and tribes immediately noticed the policy's diminishment of their

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[1] "Our Mission," Department of Homeland Security (DHS), last modified August 4, 2011, www.dhs.gov/our-mission.

[2] "Summary: H.R. 5005—107th Congress (2001-2002)," Congress, accessed September 21, 2018, https://www.congress.gov/bill/107th-congress/house-bill/5005; Homeland Security Act of 2002, Pub. L. No. 107-296 (2018), as amended, https://legcounsel.house.gov/Comps/Homeland%20Security%20Act%20Of%202002.pdf.

sovereignty. Bills were introduced and legal challenges began. The White House's published analysis of the Act admits many of the definitions used were "borrowed from pre-existing statutes such as the Robert T. Stafford Disaster Relief and Emergency Act," which had been observed by some to violate the sovereignty of tribes by lumping them in with local governments under state authority. As a statement from the National Congress of American Indians emphasizes, "It is a dramatic irony that tribal peoples indigenous to what is now called the United States have always come together to secure our homelands, a phrase now adopted by the federal government, but are now excluded from participating in strategies and processes to better protect everyone, including tribal citizens."[3]

The main concern regarding the Homeland Security Act was that the tribal nations were balanced precariously "at the mercy of their state executives."[4] The lack of tribal recognition indicated a "fail in keeping with consistent with federal policy."[5] And although many bills and reports were filed, inappropriate terminology still leaves a gap in homeland security and is a legal insufficiency for the tribes. On a procedural level, the fact that some Indian lands cross state borders compounds the difficulties. If the federal policies do not help the tribes that depend on their protections, tribal leaders are not likely to trust new policies—especially those that are intrusive to a tribe, such as policies that deal with homeland security issues along an international border.

Two important changes are needed: improvements in the terminology used in American Indian policies and collaboration efforts between the two sets of sovereign governments—the federal government and tribal nation governments. Repetitive lists of "Federal, State, local, and tribal" within Department of Homeland Security documents continually belittle tribal sovereignty; it has become a mantra that diminishes tribal nations' perceived authority. The belittling sequencing—with tribal sovereignty at the lowest level—needs to be singled out as inconsistent with tribal law, and it needs to be changed.

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[3] Tom Zoellner, "Homeland Security Concerns Continue," Indian Country Media, September 18, 2003, https://indiancountrymedianetwork.com/news/homeland-security-concerns-continue/.

[4] Heidi K. Adams, "Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts," *American Indian Law Journal* 1, no. 5 (2017): 131, https://digitalcommons.law.seattleu.edu/ailj/vol1/iss1/5.

[5] Adams, "Sovereignty, Safety, and Security," 138.

In the same vein, clearer definitions of consultation and collaboration between the government entities will reinforce the consistent use of this powerful and unifying tool to build a stronger policy or plan, regardless of the department involved.

According to the 2010 Quadrennial Homeland Security Review, "Tribal Leaders are responsible for the public safety and welfare of their membership."[6] Also, tribal governments must "ensure the provision of essential services to members within their communities, and are responsible for developing emergency response and mitigation plans."[7] If the tribal leaders are responsible for these activities but lack the personnel, funding, or training to put together plans and agreements with other local agencies, they are essentially powerless. Without a tax base to build financial revenue, tribes are at a disadvantage for providing adequate support for an emergency management program without federal funding. In the middle of this cycle, if the tribe needs the funding and lacks a grant writer or cannot hire one, there is no way for the tribe to exit this loop of unpreparedness.

To integrate into federal homeland security efforts, tribal nations need to have preparedness capabilities, including sufficient staff, training, and funding. The federal policies that hinder these elements need to be evaluated carefully. Only after the tribes are authentically integrated into the federal system of emergency preparedness can the United States hope to close this homeland security gap. The process of preparing for a disaster, either natural or human-caused, involves coordination with the tribal government. The momentum from this coordination can improve resiliency and give the tribal nations more support by pairing their efforts with national efforts. Respect for tribal sovereignty and an acceptance and admission of the importance of tribal leadership must occur at this foundational level. When addressing this gap in homeland security, the flow of progress from basic to more complex needs to create an integrated federal system of national security.

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[6] DHS, *Quadrennial Homeland Security Review Report: A Strategic Framework for a Secure Homeland* (Washington, DC: DHS, February 2010), A-6, https://www.dhs.gov/sites/default/files/publications/2010-qhsr-report.pdf.

[7] DHS, A-6.

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I. INTRODUCTION

A gap exists between the federal government and the 567 tribal nations, which hampers tribal inclusion in homeland security efforts. American Indian and Alaskan Native lands comprise 100 million acres of territory within the United States, including 250 miles of borderlands—potentially a formidable rift in the nation's homeland security if this population is excluded. The United States homeland security enterprise necessarily assumes tribal participation, cooperation, and communication in upholding its mission to "ensure a homeland that is safe, secure, and resilient against terrorism and other hazards."[1] Keeping the nation safe encompasses many aspects of protection, and "hundreds of thousands of people from across the federal government, state, local, tribal, and territorial governments, the private sector, and other nongovernmental organizations are responsible for executing these missions."[2] If not well supported with staff, training, and funding, however, the tribal nations could struggle to fulfill such federal expectations.

The tribes have expectations of the federal government as well. Each tribal member is first and foremost a U.S. citizen and, as such, expects protection from natural and human-made disasters. The treaties that their ancestors made promise federal respect and support to maintain native culture and heritage. Because the tribal governments are sovereign, the federal and state governments cannot simply impose homeland security activities on the members or their lands; the tribes must be included and supported in the homeland security mission if it is to succeed. In fact, according to Donald Reed, homeland security has a "collective imperative," which "requires … vertical and horizontal integration," to seamlessly mend the gap.[3]

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[1] "Our Mission," Department of Homeland Security (DHS), last modified August 4, 2011, www.dhs.gov/our-mission.

[2] DHS.

[3] Donald Reed, "An Examination of Tribal Nation Integration in Homeland Security National Preparedness" (PhD dissertation, Walden University, 2015), 1–2, https://scholarworks.waldenu.edu/dissertations/598/.

For the governments to collaborate, tribes must choose to participate. Only by clarifying the expectations and needs of each side can a framework be built to strengthen homeland security. Thus, to increase the security of the nation, a concerted effort must be made to collaborate with the tribal nations. This thesis explores how such an effort might unfold, focusing on the initial improvement of tribal preparedness to promote further inclusion in homeland security processes.

A. RESEARCH QUESTION

How would strengthening tribal preparedness and emergency management help build stronger, more collaborative homeland security practices?

B. DEFINITIONS

Allotment: During the Dawes Act's enforcement (1887–1934), tribal members were registered on federal rolls and given the title to an individual parcel of land, from 40- to 160-acre lots, depending on family size. This allotment was an attempt to assimilate the American Indians by breaking the collective attachment to the tribal lands and turn that land into real estate. Allotments also opened land to non-Indians who wanted those properties. These practices led to the checkerboarding of certain reservations seen today, wherein much tribal land was lost and jurisdictional protections were further complicated by the lot-by-lot mix of Indian and non-Indian lands in close proximity.

Blood quantum: A defining number quantifying a verified percentage an individual is of a certain tribe. For instance, "a one-quarter" might have one grandparent who was 100 percent from a single tribe, meaning all ancestors can prove lineage through birth certificates and roll lists. Another scenario has two grandparents with 50 percent quantum. These fractions continually grow smaller as intermarriage dilutes the bloodlines.

American Indian: One who identifies him or herself as a member of one of the tribes of the continental United States. For legal purposes, the recording of the individual as a member of a specific tribe usually requires documentation and the approval of the tribe. Some tribes, but not all, require a certain percentage of blood quantum. The term itself can apply to anyone who is a member or a descendant, or who self-identifies.

Denominated domestic dependent nations: A term used by Chief Justice John Marshall during the 1800s to describe the attitude of the United States toward the various tribal nations in his three rulings, known as the Marshall Trilogy, which helped to define tribal law. This phrase acknowledges that tribes maintain sovereignty, yet still rely on U.S. federal systems of support.

Elders: Tribal nations traditionally value the wisdom and experience of their elders and may have one or a council of elders who offer direction or decision-making policies to the tribe. In the case of emergency management, their knowledge and understanding of the area are crucial and their support can be pivotal to making any changes. Some tribes believe talking about talking about a negative event—such as a natural disaster—invites it to happen, so the culture that the elders adhere to can influence whether or not preparedness practices will occur.

Federally recognized tribes: Tribes formally recognized by previous treaties, or more recently by Congress, as meeting the requirements of a sovereign nation. The tribe needs to show existence predating 1900, as well as other factors to determine a self-governing tribe or band. The list is updated every January in the Federal Register, with 567 cataloged in 2018.[4] Many tribes are in the arduous process of acquiring recognition.

Homeland security: Beyond the definition outlined by policies and the Department of Homeland Security (DHS) itself, in this study homeland security is defined primarily by the perception of DHS and its policies by members of tribal nations under its jurisdiction.

Hunting and fishing rights: Some tribes have additional legislation granted due to previous treaties or laws that allow tribal members to perform certain functions in areas to which they might otherwise not be granted passage. It implies access only, not necessarily ownership or use beyond culinary purposes or for medicinal traditions.

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[4] "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs," Federal Register, last modified January 30, 2018, www.federalregister.gov/documents/2018/01/30/2018-01907/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian.

Indian Country: Applies to reservations and rancherias, as well as fee lands and areas with access granted for ceremonies, hunting, or gathering use. Although all are given a certain amount of special protection, it can vary widely.[5]

Indigenous: Original inhabitants of an area invaded or overtaken by a more dominant group.

Member: A tribal member is an individual who meets the requirement of a specific tribe to be a recognized as a voting member. This designation is an intersection of federal law and tribal law, including without limitation, tribal constitutions and tribal enrollment ordinances, and usually requires proven descendancy, blood quantum, and birth certification. Tribal constitutions and other tribal laws also may codify the option of disenrolling members, even if they meet the aforementioned requirements, for reasons such as criminal charges, likely removing voting privileges and other social and economic benefits. Federal courts cannot interfere in the process of disenrolling members because that decision is an absolute function of tribal self-determination.[6] Often triggered by a change of leadership, family relationships, or casino per capita funds, each tribe is permitted to make its own final decisions regarding who does or does not count as an official member and therefore is eligible for the benefits of belonging to a federally recognized tribe.[7]

Native American: Indigenous person from the North American continent. The term includes American Indians, Native Canadians, Alaskan natives, and Hawaiian peoples.

Reservations/rancherias: Land secured for the tribe by federal trust. State law, for the most part, does not apply to reservation lands, which allows, for instance, for tribes to build casinos. The tribal residents may build and own the homes on the reservations, but they do not own a deed to the land. These requirements complicate water and mineral rights. Jurisdictions are complex, and Public Law 280, a law allowing certain states to

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5 See 18 U.S. Code § 1151 – "Indian country defined," passed by Congress in 1948 for legal definition.

6 Pevar, *The Rights of Indians and Tribes*, 92.

7 Pevar, 92.

enforce some criminal laws on tribal lands, further convolutes law enforcement on reservations.

Rolls: Census lists of tribal members gathered by the federal government to document and justify such things as allotments. Used now to validate membership, often along with blood quantum and birth records, and to validate descendancy.

Sacred sites: These can be located on reservations, in Indian Country, or can exist off the reservation as a site holding value due to religious or other cultural significance for members of one or more specific tribes. These locations are often protected by federal regulations.

Self-determination: After the Indian Self-Determination and Education Assistance Act of 1975, tribes may receive grant funding to run certain programs the federal government had previously provided.[8]

Sovereign: Having the rights of a nation based on accepted governmental cohesiveness. It is not a status to be granted, but a position to be recognized.

Tribal law: A complex field that involves both federal law pertaining specifically to tribes, policies such as Public Law 280 which grant extra jurisdictional responsibility to states and local entities, and the laws of each individual tribe. Each of these can influence the jurisdiction and responsibility of emergency response with regard to the individual involved and/or the location of the occurrence. A good source of general information is *Cohen's Handbook of Federal Indian Law*.

Tribal leadership: Often a tribal council or committee, headed by a chairperson/ chief/governor or another title of the tribe's choosing—which can be business-based, judicially based, and/or politically based. Depending on the population size and written constitution of the tribe, there may be one or several leadership groups that may or may not overlap. Members may gain positions by democratic voting, appointment, or other means, depending on the laws of the individual tribe. The distinct interworkings are important to

[8] "Division of Self-Determination Services," Bureau of Indian Affairs, accessed July 12, 2018, https://www.bia.gov/bia/ois/dsd.

understand for recognizing the possibility of abrupt change or application of specific political policies when working with individual tribal nations.

Tribal nations/tribes: Interchangeable terms referring to individual groups of American Indians. The terms can also apply to tribes that are not currently federally recognized; although not all policy will apply to them, some may. The list of federally recognized tribes from the contiguous forty-eight states, plus a separate listing for Alaska Natives, is available in the Federal Register every year. However, even the tribes that have not yet met or no longer meet the standards of the Federal Register's federal recognition are considered tribal nations.

C. A BRIEF HISTORY OF U.S.-TRIBAL RELATIONS

The indigenous tribes were here, as functioning governments, long before the British colonized and created the 13 colonies that eventually became the United States. Settlers made treaties with the individual governments, as one would negotiate with any other sovereign nation. The rights of tribes were retained, not granted. Sovereignty inherently recognizes the authority and capability of the tribe, nation, or government entity. Yet the United States has frequently used its power to subjugate the rights and protections guaranteed in treaties and early legislation. With awareness, however, government agencies can continue to improve their relationships with tribal governments. In the original Homeland Security Act of 2002, the word "tribal" only appears three times; with recent amendments, however, the number is more than 200.[9] The displacement, slaughter, forceful relocation to reservations, and allocation of tribes were shameful breaches of trust and treaties, but those are not the issue here. As defined by the Supreme Court in 1905, it is important to view treaties "not [as] a grant of rights to the Indians, but a grant of rights from them."[10] Laws and policies for the American Indians exist because of tribal sovereignty, not the other way around.

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[9] "Summary: H.R. 5005—107th Congress (2001-2002)," Congress, accessed September 21, 2018, https://www.congress.gov/bill/107th-congress/house-bill/5005; Homeland Security Act of 2002, Pub. L. No. 107-296 (2018), as amended, https://legcounsel.house.gov/Comps/Homeland%20Security%20Act%20Of%202002.pdf.

[10] United States v. Winans, 198 U.S. 371 (1905).

Tribal concerns are often dealt with as a single issue, without acknowledging the groups of diverse people and their individual concerns. The issues may seem simple but the unique challenges they create are not. Tribal water regulation rights are more complex, for example, than the regulations or policy imply—a treaty might not recognize the water rights inherent on certain tribal lands, or it might fail to grant additional protection for a needed watershed outside of the designated reservation land. Tribal land rights affect more than just the lands themselves. Civil liberties for American Indians are instrumentally different than they are for other marginalized populations, based on their treaties, sovereignty, and indigenous culture. To dismiss, trivialize, or lump together tribal concerns—as one might with a special interest group—not only violates the collective tribal sovereignty, but is unconstitutional and illegal. Inclusion in homeland security is not therefore simply convenient; it is an inextricable component of a complete strategy.

Tribes where shortchanged when the United States ended its practice of negotiating treaties and transferred power to Congress. In 1871, Congress passed Title 25, U.S.C. section 71, which forbid new tribal treaties. Tribal approval, and therefore negotiations, was no longer necessary. Former treaties could be broken or amended without any tribal input as well. In *The Rights of the Indians and Tribes*, Stephen Pevar asserts that "the passage of section 71 reflected a severe loss of legal and political status for Indian tribes."[11] For instance, when gold was found in the Black Hills in 1877, Congress removed that land from the Sioux, blatantly violating the Fort Laramie Treaty of 1868.[12]

The original Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, written to amend previous disaster relief acts and refine the system of presidential declarations, incorrectly delegated tribal sovereignty to the states, not the tribes. Discussed in more detail later, this is one reason the Stafford Act was amended by the Sandy Recovery and Improvement Act of 2013 (SRIA). Accustomed to such slights, the tribes described

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[11] Stephen L. Pevar, *The Rights of Indians and Tribes*, 4th ed. (New York: Oxford University Press, 2012).

[12] Pevar.

the SRIA amendments as a relief.[13] As an emergency manager from the Choctaw Nation emphasized, "The ability for tribes to request a disaster declaration through the President of the United States is a remarkable step forward in the recognition of the Nation-to-Nation relationship and Trust Responsibility of the Federal Government and Indian Country. I believe the relationship between Tribes and specifically the Federal Emergency Management Agency have improved exponentially in recent years."[14] Prior to this amendment, tribes had to ask the state for permission to pursue a presidential declaration during times of devastation; this tremendous lack of empowerment must have created huge trust barriers.

Does homeland security implementation for tribal nations fall under services the nation ought to afford to the tribal citizens, or is it a function of criminal jurisdiction? This thesis focuses on the social responsibility aspects of the former. All citizens deserve the protections of a safe United States, whether those citizens consider themselves American Indians or not; whether they are from a recognized or non-recognized tribe; whether they hold official membership with a tribe, are a documented descendant of a tribe, are disenrolled, or self-identify as Native American. These categories, however, are complicated by the legal responsibilities and restrictions, which are muddled further by state laws and Public Law 280 obligations.[15] For these reasons, the law enforcement aspects of homeland security are impossible to explore fully in the scope of this thesis.

To review the entire history of all tribal nations from before Columbus' arrival to today would be equally overwhelming. However, to understand policy implications, it is important to have a sense of the relationship between the tribal nations, the settlers, and the federal government. Historical trends cast light upon the legislation drafted within those

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[13] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes Hearing Before the Committee on Indian Affairs*, 115th Cong., 1 (2017), www.hsdl.org/?view&did=805721.

[14] *Emergency Management in Indian Country.*

[15] Margaret Muhr, "What Is the Problem to which the Answer was Public Law 83-280: How Is it Working Out and What Should We Do Next?" (master's thesis, Naval Postgraduate School, 2013), https://calhoun.nps.edu/handle/10945/37914.

eras. A broad overview, based on information from the National Congress of American Indians, is shown in Table 1.

Table 1. Tribal Nations and Other American Governments through History[16]

1492–1828	COLONIAL PERIOD
	Defined by treaties with settlers and synchronizing with a new national constitution.
1828–1887	REMOVAL, RESERVATION, & TREATY PERIOD
	Tribes were moved off their lands to make room for settlers, but treaties made some contribution to keeping tribal rights protected.
1887–1934	ALLOTMENT & ASSIMILATION PERIOD
	Defined by the intentions of the Dawes Act to break tribal affiliations and open up further lands to non-Indians. About two-thirds of reservation lands were lost to tribes during this period.
1934–1945	INDIAN REORGANIZATION PERIOD
	A brief period marked by programs to help tribes recover socially and economically
1945–1968	TERMINATION PERIOD
	Congress passed aggressive policies to assimilate tribes without any consultation with tribes.
1968–2000	SELF-DETERMINATION PERIOD
	Policies again reflect the tribes' abilities to make governmental decisions and manage their own governmental programs, leading to less reliance on federal oversight.
2000–present	NATION-TO-NATION PERIOD
	Current policies are swinging the relationship marked by government-to-government respect, recognition of self-determination, and indigenous rights.

[16] Adapted from National Congress of American Indians, "Tribal Nations and the United States: An Introduction" (guide, National Congress of American Indians, 2015), 13–14, www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-.pdf.

1. Treaties

Before 1871, the protections and promises afforded to the indigenous tribes were solidified in treaties. Close to 400 treaties currently exist between the United States and tribal nations. As mentioned, however, tribal recognition was then delegated to Congress. Still, violations or subjugations based on these treaties and laws continue to this day, contributing to the storylines for a variety of past and current litigation. For instance, the U.S. Senate refused to validate any of the California treaties, hiding the paperwork for fifty years to avoid the permanent transfer of prime land.[17]

While each treaty is as unique as each tribe, the treaties generally acknowledge sovereignty and offer protections in exchange for a price—such as the tribe leaving the lands it had occupied for centuries. Because of language barriers and varying ideas of what constitutes land ownership, the legitimacy of these documents rests primarily on establishing the intention of the dominant government to barter on a government-to-government level rather than a simple victory or domination leading to submission or complete genocide of the native peoples. Whether the drafters were looking to protect their own interests or improve the welfare of the tribes does not change the impact of the terms. If no treaties were signed, nor any plenary action taken to distinguish a responsibility and obligation for the United States to acknowledge tribal sovereignty over native lands and citizens, there would be no reason to work with the tribes in this capacity at all. However, these treaties and legislation exist and are repeatedly upheld by the Supreme Court, giving them continued legal standing, which must be acknowledged when assessing the adequacy of existing homeland security practices and policies.

2. Federally Recognized Tribes

Currently, the majority of active tribes are federally recognized, which gives them formalized access to federal tribal programs. While not a panacea, recognition provides the construct to effectively negotiate on a government-to-government basis. More than 150 tribes are currently seeking this status and some have been waiting for decades for a

[17] Pevar, *The Rights of Indians and Tribes*.

response. The process requires the tribe to meet seven objectives, usually to take on a great financial burden for legal fees, and to be tenacious.[18] Yet federally recognized tribes are not the only ones that need and deserve protection from federal homeland security agencies. A book written for the Department of Defense proclaims that, with relevant policy, "non-federally recognized tribes should receive the same commitment."[19]

3. Distinctions of Race, Blood Quantum, and Divided Lands

An important distinction to make in consideration of tribal policy is that "American Indian" does not designate a race. Interestingly, the Jay Treaty of 1794, later codified into immigration policy, allows those born in Canada who belong to American Indian tribes to gain citizenship to the United States; this is considered the last race-based legislation still in effect.[20] This thesis does not debate the ease or legitimacy of enforcing this right, but simply notes the existence of treaties and laws that acknowledge border difficulties, and

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[18] The abridged version of the legislation, 25 CFR § 83, *Procedures for Federal Acknowledgement of Indian Tribes*, provided by the Bureau of Indian Affairs, states the mandatory criteria are:

(a) Indian entity identification: The petitioner demonstrates that it has been identified as an American Indian entity on a substantially continuous basis since 1900.

(b) Community: The petitioner demonstrates that it comprises a distinct community and existed as a community from 1900 until the present.

(c) Political influence or authority: The petitioner demonstrates that it has maintained political influence or authority over its members as an autonomous entity from 1900 until the present.

(d) Governing document: The petitioner provides a copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner

must provide a statement describing in full its membership criteria and current governing procedures.

(e) Descent: The petitioner demonstrates that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(t) Unique membership: The petitioner demonstrates that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

(g) Congressional termination: The Department demonstrates that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. "25 CFR Part 83," Bureau of Indian Affairs, accessed September 2, 2018, www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/admindocs/25CFRPart83_2015_abbrev.pdf.

[19] Donald Mitchell and David Rubenson, *Native American Affairs and the Department of Defense* (Santa Monica, CA: RAND, 1996), 51.

[20] "Green Card for an American Indian Born in Canada," U.S. Citizenship and Immigration Services, last updated February 28, 2011, https://www.uscis.gov/greencard/american-indian-born-in-canada.

discusses current challenges and potential modifications. The Jay Treaty—originally signed in 1794 by Great Britain and the United States when the countries were working out the details of the Canadian border—and subsequent law have guaranteed ease of travel across the border to the United States for those who could document birth and descendancy records.[21] A recent bill proposal, still awaiting further action, seeks to amend the wording to eliminate the blood quantum, which remains at 50 percent[22] Canadians, on the other hand, do not still recognize the Jay Treaty, considering the policy nullified by the War of 1812.[23] The U.S. Embassy in Canada does have information about the process on its website, which means the opportunity to "enter the United States for the purpose of employment, study, retirement, investing, and/or immigration."[24]

Unlike some programs, this immigration law does not stipulate that the quantum must be all from one tribe. Even still, the required percentage is becoming increasingly difficult to meet; unless the law is modified, it will become obsolete. There is no similar option for tribal lands divided by the U.S.–Mexico border, a source of agitation and frustration for tribes such as the Tohono O'odham, whose land extends from Arizona to Sonora, Mexico.[25] Only the Kickapoo—who have a unique history of geographic displacement, being forced off lands repeatedly and bouncing back and forth across what would eventually become the U.S.–Mexico border—have been granted any leniency with

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[21] The Jay Treaty is also known as Jay's Treaty or *Treaty of Amity, Commerce and Navigation, between His Britannick Majesty; and the United States of America, by their President, with the Advice and Consent of their Senate (original spelling.)* The current law states, "Sec. 289. [8 U.S.C. 1359] Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."

[22] H.R. 5412, 114th Cong. 2 (2016); worded as: "To provide the right of American Indians born in Canada *or the United States* to pass the borders of the United States, but such right shall extend only to persons *who are members, or are eligible to be members, of a Federally recognized Indian tribe in the United States or Canada*." Italics added to indicate proposed changes.

[23] Marcia Yablon-Zug, "Gone but not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right," *Queen's Law Journal* (April 2008): 565–618, https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1833&context=law_facpub.

[24] "First Nations and Native Americans," U.S. Embassy and Consulates in Canada, accessed September 21, 2018, https://ca.usembassy.gov/visas/first-nations-and-native-americans/.

[25] Joseph Kowalski, "Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples," *American Indian Law Journal* 5, no. 2 (July 2017): 645–67, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1169&context=ailj.

the southern border.[26] An article presented at a 2017 conference in Finland describes the impact of the arbitrary political borders; the borders "provide physical, cultural, and psychological barriers for American Indians forcing them to abandon traditional lands and cultural ways in order to accommodate the demand of the Euro-American way of life."[27]

Jay Treaty aside, the appellation of American Indian is not one of race, but based solely on treaty guarantees and descendancy. This foundation of tribal law is challenged by President Donald Trump's administration, which has changed the Medicaid work requirement obligation to state that the American Indians, as a race, should not be treated differently and should therefore comply with the required work obligation.[28] This health care policy is a further affront to tribal members who already face higher-than-average unemployment rates; Medicaid provides 13 percent of the funding for Indian health programs, so this will have an immediate impact in the states that are implementing the new requirement.[29] Mary Smith, former acting head of the Indian Health Service argued, "It's the largest prepaid health system in the world—they've paid through land and massacres—and now you're going to take away health care and add a work requirement?"[30] Such policy decisions erode tribal sovereignty and sabotage trust in the government by the tribal members vulnerable to these policies. This, in turn, hampers relationship building and nation-to-nation collaboration between the tribes and the federal government. The administration is looking to remove treaty rights and alter similar language for welfare, even though states and law firms are already petitioning for

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[26] Richard Osburn, "Problems and Solutions Regarding Indigenous Peoples Split by International Borders," *American Indian Law Review* 24, no. 2 (January 2000): 471–85, https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1234&context=ailr.

[27] Laurence Armand French and Magdaleno Manzanarez, "North American Border Challenges: Terrorists/Drugs/Trade & American Indians," *Indigenous Policy Journal* 28, no. 1 (July 28, 2017): 1–10, http://www.indigenouspolicy.org/index.php/ipj/article/view/406.

[28] Dan Diamond, "Trump Challenges Native Americans' Historical Standing," *POLITICO*, April 22, 2018, https://politi.co/2Hk48ta.

[29] Mark Trahant, "Trump Administration Supports Changing Indian Helath Programs," *Indian Country Today*, April 23, 2018, https://indiancountrymedianetwork.com/news/native-news/trump-administration-supports-changing-indian-health-programs-will-sabotage-treaty-rights/.

[30] Trahant.

exemptions.[31] As *Morton v. Mancari* affirmed in a similar situation: "the preference is political rather than racial in nature."[32]

Despite this, there are occasions when the terms used by the federal government indicate racial demographics. In U.S. Census categories, "American Indian or Alaskan Native" and "Native Hawaiian or Other Pacific Islander" are two options to select for race to indicate aboriginal origins, but this relies solely on "self-designation."[33] Although census data has been collected since 1790, "Indian" was not added as an option until 1860, and then originally only for taxed American Indians who had renounced their heritage.[34] According to its website, the Census Bureau maintains government-to-government standards in its relationships with the tribal nations themselves as part of the Intergovernmental Affairs Office.[35] The Census Bureau also survey tribes to maintain accurate maps of tribal lands. One of the reasons the Census Bureau says it collects racial data is "to promote equal employment opportunities and to assess racial disparities in health and environmental risks."[36]

As previously mentioned, the original Stafford Act contained language that relegated tribes to local entities dependent on state approval; the language was not changed until 2013, twenty-five years later, when the SRIA took effect. Other policies need to be scrutinized and debated with the same interest to improve the homeland security enterprise, protect the tribes, and ensure tribal buy-in and support—which can only happen through collaboration.

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[31] Diamond, "Trump Challenges."

[32] Morton v. Mancari, 417 U.S. 535 (1974), https://supreme.justia.com/cases/federal/us/417/535/.

[33] "Race," Census Bureau, accessed July 12, 2018, www.census.gov/topics/population/race/about.html.

[34] "Measuring Race and Ethnicity Across the Decades: 1790-2010," Census Bureau, accessed July 12, 2018, www.census.gov/data-tools/demo/race/MREAD_1790_2010.html.

[35] "Intergovernmental Affairs: Tribal Affairs," Census Bureau, accessed July 12, 2018, www.census.gov/about/cong-gov-affairs/intergovernmental-affairs/tribal-aian/about.html.

[36] "2014 Census Test," Census Bureau, accessed July 12, 2018, www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/testing-activities/2014-census-test/questions.html.

D. RESEARCH DESIGN AND CHAPTER OVERVIEW

Because I conducted my evaluation within the framework of a living relationship between the federal government and many individual tribes, a typical policy analysis was insufficient. Therefore, I used a blend of policy analysis and program evaluation to synthesize the research findings. First, I defined the primary policy chosen and qualify its impact to homeland security and tribal nations. I then used data, available written opinions, and any available quantifiable figures to evaluate the policy. My focus was on recent policies, with the historical relevance previously chronicled in this chapter. After examining both viewpoints, I synthesized the information to determine possible trends or recommendations suggested by my conclusions.

After this introductory chapter, Chapter II explores the available literature with a focus on the differing definitions of land. Through these definitions, I delve into the concepts of communication, independence and jurisdictions, and interconnection. The concepts involved in the early exploration, treaties, and eventual policies play a major role in the legislation to follow. Chapter III includes an overview of the relevant policies, including the Homeland Security Act, the Stafford Act, and the Sandy Recovery and Improvement Act, other proposed legislation and other FEMA policies that have been enacted in response, and emergency management on tribal lands. The last two chapters contain an analysis of the aforementioned policies, along with findings and recommendations.

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II. LITERATURE REVIEW: LAND AS CULTURE, LAND AS COMMODITY

In the context of Native American history, this literature review addresses communication, independence, and interconnection in the exploration of land. The prominent literature draws from books, journal articles, and government documents. The way the federal government defines land and the way the tribes define it may differ, and that can lead to misunderstandings and misrepresentations. Examining the literature on this topic can help identify the strengths and weaknesses inherent in the relationships between the United States and the tribal nations. To get a complete picture of this dynamic, some relevant writings stretch back to before the United States was a nation, but this analysis also focuses on more current documents.

A. COMMUNICATIONS

The examination of land from the perspective of the tribal nations must start with early treaties and federal legislation that defined Indian Country. These documents still hold the full force of law and supersede any other rulings. The courts can interpret the preexisting documents, but they cannot disregard them. Charles Wilkinson's classic textbook for tribal lawyers provides a logical and sequential grouping of various treaties and court decisions, and historical background to understand the ebb and flow of the U.S. and tribal relationships. It starts off with a quote from legal philosopher Felix S. Cohen, who states, "Our Indian law originated, and can still be most closely grasped, as a branch of international law, and…in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the 16th and 17th centuries."[37] From first treaties to the current homeland security enterprise, the documents are drawn up by the federal government, not the tribes. The tribes agree to the terms, but the focus has rarely been to the benefit of the tribes. For instance, the creation of

[37] Charles F. Wilkinson, *Indian Tribes as Sovereign Governments: A Sourcebook on Federal-Tribal History, Law, and Policy*, second edition (American Indian Resource Institute, 1991), 4.

reservations and encouraging American Indians to move westward was to appease the settlers who wanted the land, under the guise of protecting the Indians.

Today, the gap in terminology between tribes and the federal government, when referring to land, fosters resentment, making a seamless enterprise of homeland security impossible. The pivotal Marshall Trilogy of Supreme Court rulings of the 1800s reiterated that the tribes, and therefore their lands held in trust, are "under the protection of the United States."[38] However, in practice, the tribal nations are not always willing to acquiesce. "We want Federal protection, not Federal domination," said Ada Deer half a century ago.[39] Similar resistance is echoed today in the voices of the Tohono O'odham protesting the building of a wall across their tribal lands, which span from Arizona into Mexico.

B. INDEPENDENCE AND JURISDICTIONS

An ethnohistorical book by William Cronin, *Changes in the Land*, describes how the settlers misrepresented the natives they saw by analyzing the cultures based on Eurocentric assumptions. Gender roles, seasonal patterns, and eating habits were judged by how different they were from European traditions. The first merchants and settlers noticed the things they did not have in their homeland that could bring a high price if sold. Therefore, the open land they claimed the Native Americans were not using to its full potential was up for grabs as "the rest of the country lay open to any that could and would improve it," according to colonial theorist John Winthrop.[40] Puritan Francis Higginson wrote, "The *Indians* are not able to make use of the one fourth part of the Land, neither have they any setled places, as Townes to dwell in, nor any ground as they challenge for their owne possession, but change their habitation from place to place."[41] An obvious disparity existed between the European idea of lands and the understanding of lands from indigenous people they encountered. Again, since the majority of treaties and legislation

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[38] Cherokee Nation v State of Georgia, 30 U.S. (5 Pet.) 1 (1831).

[39] Harold Froehlich, "H.R.7421 - 93rd Congress (1973-1974): Menominee Restoration Act," legislation, last modified May 2, 1973, https://www.congress.gov/bill/93rd-congress/house-bill/7421.

[40] William Cronin, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, 20th Anniversary Edition (New York: Hill and Wang, 2003), 55.

[41] Cronin, *Changes in the Land*, 55.

came about during this time, it is important to note this level of miscommunication. The author describes this divegence, "If English visitors … thought it a paradox that Indians seemed to live like paupers in a landscape of great natural wealth, then the problem lay with the English eyesight rather than with any real Indian poverty."[42]

Although that was centuries ago, similar hermeneutical challenges exist in recent legislation. Until revised by the SRIA in 2013, the Stafford Act stated that tribes applying for grants had to get the approval of the state they were located in, just as a city would. This step ignored the government-to-government relationship and treated tribal lands as private property, not as nations within a nation. The amendment also allowed for a more reasonable financial amount of damage that the tribes needed to sustain to apply for a presidential emergency declaration, due to the smaller size and historic poverty levels inherent with most tribal areas.

David Chang, in his historical book on Oklahoma, highlights the dynamics of land, race, and culture, illustrating, "Race is a way that we imagine differences between people and make hierarchies among them seem right and natural. So racializing a land (marking it with a race) really means tying it to a particular people.… After all, speaking of 'a land' is also a way of speaking of a country or a nation."[43] The particulars of policies made within this framework are shown to treat the indigenous Indians as minorities, not bothering to recognize the individual nuances of tribes nor the identity challenges this caused. Because the emphasis of this book is the history based on the land use, it gives a unique perspective and also reinforces the lack of communication bearing heavily on the interactions between the United States and tribes. Again, the land is viewed so differently, based partially on race and politics but more affected by common history, culture, and spirituality.

The Dawes Act of 1887, viewed in the context of land definitions, illuminates the crux of this issue. This act was proposed to further assimilate the American Indians by

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[42] Cronin, *Changes in the Land*, 54-55.

[43] David A. Chang, *The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832–1929* (Chapel Hill: University of North Carolina Press, 2010), 1.

breaking their collective connection to the land. Dawes himself justified it by saying, "Until this people consent to give up their lands and divide them among their citizens so that each can own the land he cultivates, they will not make much progress."[44] The thousands of years of history before the settlers was obviously not progress in his eyes since it did not look like the progress they were accustomed to acknowledging. Naomi Schaefer Riley's article for *The Atlantic* in 2016 sounds eerily familiar when it states that "Indians can't own land, so they can't build equity. This prevents American Indians from reaping numerous benefits."[45] Regardless of reservations existing as federal trust lands, Indians can most certainly purchase other property, just as any citizen can. Equities and benefits as described here are very vague and sound Eurocentric in the context. There may be inadequacies in the reservation system, beyond the scope of this literature review, but they ought to be addressed by those living in the areas, not by outsiders. From history, those viewing the land from the outside usually have an eye to their interests. In recent times, with large amounts of oil and gas contained under tribal lands, one should be wary of such claims.[46]

C. INTERCONNECTION

Chang's book demonstrates how the policies unintentionally strengthened the tribal devotion to the land and to other tribes. From the Heritage Preservation's perspective, "Getting Ready in Indian Country: Emergency Preparedness and Response for Native American Cultural Resources" describes the inherent stewardship of the land. For instance, it states, "All tribal cultural heritage is at risk—not only material objects and structures, but also landscapes, archaeological sites, natural resources, native language, traditions, and

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[44] Chang, 74.

[45] Naomi Schaefer Riley, "Here's One Way to Help Native Americans: Property Rights," *The Atlantic*, last modified July 30, 2016, https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/.

[46] Valerie Volcovici, "Trump Advisors Aim to Privatize Oil-Rich Indian Reservations," Reuters, December 5, 2016, https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1.

customs. All of these expressions of Native American cultural heritage should be considered in emergency planning."[47]

In her piece for the "Advances in Information, Security, Privacy, and Ethics" series, Leigh R. Anderson assesses the current relationship between the United States and the tribes in light of homeland security. Although finding instances of hostility and conflict, as well as the subordination of tribes to state authority, she writes optimistically that the situation can improve. Some steps recommended are becoming more familiar with tribal cultures, including input from all relevant parties, and being responsive toward tribes' needs.[48] This idea of working together echoes Presidential Executive Order 13175 of 2000, *Consultation and Coordination with Indian Tribal Governments*, signed by President Bill Clinton.[49] Although Anderson notes that the progress toward an effective relationship is moving incrementally, there is still room for improvement; "understanding how culture and identity can impact public policy is essential, especially in emergency management."[50] This chapter provides a strong foundation for the need for improvement, especially for homeland security, but only provides a starting point. Remaining attuned to current issues and maintaining velocity will be essential for continual improvements. Neither the field of homeland security nor tribal relations are static, so the parties will need to commit to collaboration: regularly talking, learning, listening to, and understanding each other.

To protect civil rights and guarantee First Amendment rights for the tribes, the American Indian Religious Freedom Act allows tribal member access to sites for

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[47] Heritage Preservation, "Getting Ready in Indian Country: Emergency Preparedness and Response for Native American Cultural Resources," The American Institute for Conservation of Historic & Artistic Works, September 2010, http://www.conservation-us.org/docs/default-source/emergency-resources/getting-ready-in-indian-country-report.pdf.

[48] Leigh R. Anderson, "Frienemies: Assessing the Interactions between Native American Tribes and the U.S. Government in Homeland Security and Emergency Management Policy," in *Cases on Research and Knowledge Discovery: Homeland Security Centers of Excellence*, eds. Cecelia Wright Brown, Kevin A. Peters, and Kofi Adofo Nyarko (Hershey, PA: IGI Global, 2014), http://doi.org/10.4018/978-1-4666-5946-9.ch006.

[49] Executive Office of the President, *Consultation and Coordination with Indian Tribal Governments*, Executive Order 13175 (Washington, DC: White House, 2000), https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments.

[50] Anderson, "Frienemies," 126.

ceremonies, hunting, or gathering, and permits possession of items considered sacred.[51] Such rituals as gathering eagle feathers and use of public lands may be permissible under this act, even if otherwise illegal. Executive Order 13007, *Indian Sacred Sites*, extends the safeguarding of cultural landscapes, sites, and pathways beyond the public lands.[52] There is a movement to inform more people about this collaborative protection of sacred sites with memorandums of understanding with the Departments of Defense, Interior, Agriculture, and Energy, and the Advisory Council on Historic Preservation.[53] This effort is in line with Article 25 of the UN Declaration on the Rights of Indigenous Peoples, which contends, "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[54] Consultant, researcher, and native botanist Donna House, in her piece for a book commemorating the opening of the National Museum of the American Indian in Washington, DC, spoke of the importance of retaining the relationship with the land and its plants, rocks, and features. Today, when many tribal members and descendants are living outside of Indian Country, that connection must still be protected. "The land has a memory. By respecting that memory, we honor the land."[55]

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[51] *Protection and Preservation of Traditional Religions of Native Americans*, 42 U.S.C. (1996), https://www.gpo.gov/fdsys/granule/USCODE-2010-title42/USCODE-2010-title42-chap21-subchapI-sec1996/content-detail.html.

[52] Executive Office of the President, *Indian Sacred Sites*, Executive Order 13007 (Washington, DC: White House, 1996), https://www.federalregister.gov/documents/1996/05/29/96-13597/indian-sacred-sites.

[53] "The Protection of Indian Sacred Sites: General Information," Advisory Council on Historic Preservation, July 2015, http://www.achp.gov/docs/sacred-sites-general-info-july-2015.pdf.

[54] "United Nations Declaration on the Rights of Indigenous Peoples," United Nations, March 2008, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[55] Duane Blue Spruce (ed.), *Spirit of a Native Place: Building the National Museum of the American Indian* (Washington, DC: Smithsonian Institution, 2004).

III. POLICIES

If history provides the foundation, policy provides the framework to build an inclusive relationship between the tribes and the federal government in regards to homeland security. The Homeland Security Act, and the way it relates to the Stafford Act both before and after modification by the SRIA, are examined in this chapter. Multiple bills proposed during this time are also discussed. The resulting *Tribal Declarations Pilot Guidance* and its impact on disaster response are noted, as well as other forms of tribal preparedness support. An examination of consultation—particularly its advantages and shortcomings, given momentum by presidential memorandums and executive orders—follows. Finally, a discussion of tribal emergency management rounds out the review of relevant tribal policies in this chapter. These issues highlight the challenges faced by tribes who request assistance as well as the federal government's limitations to secure the nation without investing more effort and financial support for tribal nations.

A. HOMELAND SECURITY ACT

As a result of the tragic events of the 9/11 and anthrax attacks of 2001, the Homeland Security Act was enacted in November 2002. The resulting document, defining the homeland security enterprise to follow, failed to recognize tribal rights; immediately, tribes noticed the omissions and the policy's diminishment of their sovereignty. Bills were introduced, legal challenges began, and articles were published. To understand the impact and the concerns, it is necessary to inspect the original document, reactions from the American Indian community and others, the bills introduced and where they went, reactions to those bills, and the eventual changes.

Tribal authors Vine Deloria, Jr., and Clifford Lytle foreshadowed events to come with the title of their 1984 book, *The Nations Within*: *The Past and Future of American Indian Sovereignty*, and the appropriately titled chapter, "A Status Higher than States."[56] From a tribal perspective, this was the main failure of the Homeland Security Act: it

[56] Vine Deloria, Jr., and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984), 1–15.

subjugated the tribes to the status of a local jurisdiction under state authority, violating tribal sovereignty. The original document only mentioned the words "tribes" and "tribal" four times. Although more than 200 mentions of tribes appear in the amended Act, a "close comparison of texts, for instance, shows that legislators have simply added the word *tribal* to the phrase *state, local, and tribal government*," finds Monica Kueny.[57] She also argues that the Act "altered a long-standing foundation for collaboration between tribal and federal governments, which has the potential of weakening rather than strengthening cooperation on homeland security."[58]

The second Native American Border Security Conference took place a month before the Homeland Security Act was signed. It was titled "All Americans Protecting America!"[59] Representatives from twenty-one tribes met with the newly formed U.S. Customs and Border Protection, the formation of which rolled the former responsibilities of three separate agencies into one. In his opening remarks, U.S. Customs Commissioner Robert Bronner acknowledged the new department as an improvement: "fragmentation was not just terribly inefficient; it made America more vulnerable to international terrorism."[60] The concern for a unified border plan was not reflected in the upcoming Homeland Security Act. In his remarks Bronner cited that, of the 7,400 miles of international borderland in the United States, 260 of those miles are on tribal lands—a length 100 miles longer than the border California shares with Mexico. "We are all Americans," Bronner emphasized, "and all of us must help in protecting America."[61] Another speaker, Attorney General John Ashcroft, mentioned the importance of strong borders to protect against smuggling, drug trafficking, and illegal immigration. Based on

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[57] Monica R. Kueny, "Federal-Tribal Government Collaboration in Homeland Security" (master's thesis, Naval Postgraduate School, 2007), 6, https://calhoun.nps.edu/bitstream/handle/10945/3258/07Sep_Kueny.pdf?sequence=1&isAllowed=y.

[58] Kueny, 2.

[59] Robert C. Bonner, "Remarks of U.S. Customs Commissioner," Native American Border Security Conference, October 7, 2002, www.roadblockrevelations.org/roadblock/customs/conference/conferenceOpeningRemarks.pdf.

[60] Bonner.

[61] Bonner.

former ad hoc collaborations, he proclaimed that "as coordination increases, so does the security of our borders."[62]

The reactionary legislation of the Homeland Security Act created the Department of Homeland Security (DHS) to prevent and reduce the United States' vulnerability to terrorist attacks.[63] The White House's published analysis of the Act admits many of the definitions used were "borrowed from pre-existing statutes such as the Robert T. Stafford Disaster Relief and Emergency Act," which had been observed by some to violate the sovereignty of tribes by lumping them in with local governments under state authority.[64] To develop "national strategy for combating terrorism and other homeland security activities," a large amount of the population, acres of homeland, and miles of borderlands were not explicitly included by omitting references to tribes and American Indians.[65] As a statement from the National Congress of American Indians emphasizes, "It is a dramatic irony that tribal peoples indigenous to what is now called the United States have always come together to secure our homelands, a phrase now adopted by the federal government, but are now excluded from participating in strategies and processes to better protect everyone, including tribal citizens."[66]

B. REACTIONS AND PROPOSED BILLS

A call for amendments was swift, and Congressman Frank Pallone, Jr., initiated the first of five versions of a similar bill before President George W. Bush signed the Homeland Security Act in 2002. Pallone's last attempt to pass the legislation was in 2009 and,

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[62] John Ashcroft, "Prepared Remarks of Attorney General," U.S. Border Patrol-Native American Border Security Conference, January 17, 2002, www.justice.gov/archive/ag/speeches/2002/011702agpreparedremarks.htm.

[63] Homeland Security Act of 2002.

[64] George W. Bush, "Analysis for the Homeland Security Act of 2002," White House, accessed July 12, 2018, https://georgewbush-whitehouse.archives.gov/deptofhomeland/analysis/index.html; Heidi K. Adams, "Sovereignty, Safety, and Sandy: Tribal Governments Gain (Some) Equal Standing under the Hurricane Sandy Relief Act," *American Indian Law Journal*, 2, no. 1 (2017): 376–87, law.seattleu.edu/Documents/ailj/Spring%202013/Adams-Sovereignty%20Safety%20and%20Sandy.pdf.

[65] Office for State and Local Government Coordination, Pub. L. No. 107-296, Title VI §801 (2002), 116 Stat. 2220, https://www.law.cornell.edu/uscode/text/6/361.

[66] Tom Zoellner, "Homeland Security Concerns Continue," Indian Country Media, September 18, 2003, https://indiancountrymedianetwork.com/news/homeland-security-concerns-continue/.

afterward, enough of his concerns must have been met by other amendments and changes that he did not find it relevant to resubmit, although he remains an advocate for the American Indian.[67] In an article Pallone wrote for *Indian Country Today* in the summer of 2002, he promotes, "To make certain the United States is fully prepared to prevent and respond to terrorist activities on all fronts, I believe tribal governments must also be included."[68] He had consulted with tribal representatives while drafting what would become HR 5490 (107th Congress), the Tribal Government Homeland Security Coordination and Integration Act. Noting the subjugation of tribal sovereignty in the upcoming legislation, he reports the federal government "disregarded its trust responsibility and failed to include and consult with tribal governments in homeland security planning."[69] He notes that tribes had requested treatment similar to states, an element reflected in his proposed bills as well as those of others.[70]

Related bills include former Senator Byron Dorgan's S 578 (108th Congress) of March 2003 and S 477 (109th Congress) of March 2005, which as well as adding the word "tribal" after "State" and before "local," spoke to the federal government's dual purpose: involving tribes in the process while also expecting tribes to "participate fully in the protection of the homeland of the United States."[71] Neither offers a system of support and funding nor do they outline what those expectations might be for the individual or collective tribes. These were not adopted.

In May 2003, Senator Patrick J. Kennedy, along with seventeen others including Pallone, introduced H.R. 2242 (108th Congress), Tribal Government Amendments to the

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[67] Pallone introduced a bill to improve tribal health care in 2017, called the Native Health Access Improvement Act of 2017; see https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/INDIANHEALTH_001_xml.pdf

[68] Frank Pallone, Jr., "American Indian Governments Deserve Homeland Security," *Indian Country Today*, August 28, 2002, https://newsmaven.io/indiancountrytoday/news/american-indian-governments-deserve-homeland-security/.

[69] Pallone.

[70] Pallone.

[71] Tribal Government Amendments to the Homeland Security Act of 2002, S. 477, 109th Cong. 1 (2005), https://www.congress.gov/bill/109th-congress/senate-bill/477/text.

Homeland Security Act.[72] It was presented to elevate tribes past the local level. After it went nowhere, in June of the following year Pallone reintroduced "Tribal Government Homeland Security and Coordination and Integration" for the second time to fix the omission of tribes as equivalent to states, in hopes of restoring recognition of tribal sovereignty.[73] His concern was that the federal government "failed to include and consult with Indian tribes with regard to homeland security prevention, protection, and response activities planning."[74]

In an article written for the summer 2003 edition of the *Penn State Law Review*, Courtney Stouff demonstrated that sovereignty was compromised by the Homeland Security Act, and tribes should either have their own designation or receive recognition equivalent to states.[75] The article quotes from Pallone's bill as well as the Marshall Trilogy's definitions of sovereignty and stewardship. The article's title, "Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty," makes a strong statement of position alone.[76] Stouff also includes statements of dissatisfaction about the act by the National Indian Health Board.[77] She also expounds upon the requirement for tribes to receive approval and permission from states before receiving funding, and the difficulties this causes.[78] She holds up the equivalency of tribes to states in the Clean Air Act of 1995, the Clean Water Act of 1948, and the Safe Drinking Water Act of 1986 as good practices to follow.[79] She concludes by promoting change to

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[72] A Bill to Amend the Homeland Security Act of 2002, H.R. 2242, 108th Cong 1 (2003), https://www.congress.gov/bill/108th-congress/house-bill/2242/all-info.

[73] Tribal Government Homeland Security Coordination and Integration Act, H.R. 4526, 108th Cong. 2 (2004), https://www.congress.gov/bill/108th-congress/house-bill/4526/text.

[74] Tribal Government Homeland Security Coordination and Integration Act.

[75] Courtney A. Stouff, "Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty," *Penn State Law Review* 108 (2003–2004): 375–94, heinonline.org/HOL/LandingPage?handle=hein.journals/dlr108&div=26&id=&page.

[76] Stouff, 375–94.

[77] Stouff, 379.

[78] Stouff, 380.

[79] Stouff, 384–389.

address tribal needs while improving homeland resiliency, for which "the Native American community is persevering in its fight for an amendment to the Homeland Act."[80]

In July 2003, S 578, the Tribal Government Amendments to the Homeland Security Act of 2002, introduced by the late Senator Daniel Inouye, had two days of hearings before the Committee on Indian Affairs, providing rich feedback of the tribal perceptions even though the bill, like the others so far, never became law.[81] During the hearings, the committee discussed the numbers of tribal acres featuring critical infrastructure, the large number of energy reserves located in Indian Country, as well as the patriotism of those American Indians who have served in the military.[82] The general tone of the presentation was one of being "committed to waging this war not only on crime, but also against terrorists in Indian Country."[83] The high cost to tribes of implementing homeland security measures was brought up as a need for support. For instance, the chairwoman of the Tohono O'odham said her tribe spent half of its police budget to protect the international border between the tribal land and Mexico, plus another $500,000 for health care for undocumented immigrants—not to mention the autopsy costs for those who died on their side of the border.[84] The tribal chief of police discussed the herculean task of meeting federal mandates without federal funding and partnerships.[85] Another tribal leader, emphasizing the tribal embodiment of the "spirit of homeland," insists, "to leave us out is

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[80] Stouff, 394.

[81] *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing before the Committee on Indian Affairs, House of Representatives*, 108th[h] Cong. 1 (2003), https://www.hsdl.org/?abstract&did=451940.

[82] *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing before the Committee on Indian Affairs, House of Representatives*, 108th Cong. 1 (2003) (statement of Tom Heffelfinger, U.S. Attorney for the State and District of Minnesota).

[83] Heffelfinger.

[84] *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing before the Committee on Indian Affairs, House of Representatives*, 108th Cong. 1 (2003) (statement of Vivian Juan-Saunders, Chairwoman, Tohono O'odham Nation, Arizona).

[85] *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing before the Committee on Indian Affairs, House of Representatives*, 108th Cong. 1 (2003) (statement of Richard Saunders, Chief of Police, Tohono O'odham Police Dept.).

to leave us behind."[86] He ended with the plea: "Please help us educate your colleagues in Congress about American Indians and tribal governments and our right and responsibility to participate as equals to the States in homeland security."[87]

With an article published in the *American Indian Law Review* in 2003, Jennifer Butts, a law student at the University of Oklahoma School of Law, also called to amend the Homeland Security Act of 2002.[88] Citing the importance of securing vital infrastructure, borders, and transportation routes while protecting sovereignty, she remarks, "The Department of Homeland Security has failed to recognize the government-to-government relationship," which has hampered the rights of tribes.[89] Her article refers to the previous bill, S 578, while sounding more of an alarm: "the terrorism vulnerabilities in Indian Country are mind-boggling," she says.[90] As she sees it, if the Act is not amended, it essentially overwrites hundreds of years of treaties, laws, and policy. She also brings in Ashcroft's remarks from the second Native American Border Security Conference, that "homeland security remains threatened so long as any portion of our international border remains unprotected."[91]

The Homeland Security Act of 2002 raised concerns about sovereignty and lack of inclusion for tribes. The main concern was that the tribal nations were balanced precariously "at the mercy of their state executives," according to Heidi Adams.[92] The lack of tribal recognition indicated a "fail in keeping with consistent with federal policy."[93]

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[86] *Tribal Government Amendments to the Homeland Security Act of 2002: Hearing before the Committee on Indian Affairs, House of Representatives*, 108th Cong. 1 (2003) (statement of Anthony Pico, Chairman, Viejas Band of Kumeyaay Indians).

[87] Pico.

[88] Jennifer Butts, "Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands," *American Indian Law Review* 28, no. 2 (2003): 373–394, www.jstor.org/stable/10.2307/20070712?origin=crossref.

[89] Butts, 374.

[90] Butts, 392.

[91] Ashcroft, "Prepared Remarks."

[92] Heidi K. Adams, "Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts," *American Indian Law Journal* 1, no. 5 (May 2017): 131, https://digitalcommons.law.seattleu.edu/ailj/vol1/iss1/5.

[93] Adams, 138.

And although many bills and reports were filed, poor terminology still leaves a gap in homeland security and is a legal insufficiency for the tribes.

C. STAFFORD ACT

Creating an architecture for emergency planning and disaster assistance, the 1998 Robert T. Stafford Disaster Relief and Emergency Assistance Act amended the 1974 Disaster Relief Act. The Stafford Act had undergone other amendments before SRIA but had never specifically addressed tribal concerns. A section of the Federal Register from 1999 mentions how a "Tribal organization commented that the rule does not address how Tribal governments fit within the declaration process."[94] The categorization of tribes as local governments, under the control and authority of states, was the primary concern as it violated tribal sovereignty. On a procedural level, the fact that some Indian lands cross state borders compounded the difficulties. The process described by Adams required tribes to "beg their state executives for assistance that may never be granted, or may be granted in grossly inadequate form. Thus, when disasters do strike in Indian Country, tribal members often suffer needlessly due to this basic lack of services and access."[95] Add this delay to the complexity of tribal jurisdictions, and many tribes were overlooked in the process. There were cases in which tribal nations did not ask the state to sponsor funding when the "sovereignty of the tribe took precedence over even the ability to get grant dollars," according to a Federal Emergency Management Agency (FEMA) administrator.[96] The option most often sought to resolve the situation would allow tribes to choose to declare an emergency as a grantee or subgrantee, depending on the tribe's ability to administer the grant or defer to the state or locality.

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[94] FEMA, "Disaster Assistance; Factors Considered When Evaluating a Governor's Request for a Major Disaster Declaration," *Federal Register*, no. 44 (September 1, 1999), www.gpo.gov/fdsys/pkg/FR-1999-09-01/html/99-22510.htm.

[95] Adams, "Sovereignty, Safety, and Security," 146.

[96] Rob Capriccioso, "Interview, FEMA Administrator Craig Fugate Applauds US House Passage of Tribal Bill," Indian Country Media Network, September 22, 2012, https://indiancountrymedianetwork.com/news/interview-fema-administrator-craig-fugate-applauds-us-house-passage-of-tribal-bill/.

D. SANDY RECOVERY IMPROVEMENT ACT

On January 29, 2013, President Barack Obama signed Public Law 113-2 (113th Congress), and tribes were specifically included in the Stafford Act, their sovereignty restored. The law itself included two Divisions: Division A—the Disaster Relief Appropriations Act, 2013, and Division B—the Sandy Recovery Improvement Act of 2013 (SRIA).[97] One small section of SRIA, Section 1110, "Tribal Requests for a Major Disaster or Emergency Declaration under the Stafford Act," made emergency and disaster declarations more equitable for tribal nations. As well as addressing the funding to rebuild from Hurricane Sandy, there was "an amendment removing American Indian tribes from the Stafford Act's definition of 'local governments' while listing them as separate government entities."[98] The provisions moved the position in the list from "State, local, tribal" to "State, tribal, local." Tribes were no longer regarded as local governments, but more akin to states.

SRIA also allowed tribes the option to request a disaster declaration from the president through their chief executive or to continue to send a request through the state the disaster affected. From the law, "the Chief Executive of an affected Indian tribal government may submit a request for a declaration by the President that an emergency exists consistent with the requirements."[99] The reaction to the changes was positive, and FEMA Administrator Craig Fugate remarked, as this legislation passed the House of Representatives, "For more than a decade Indian tribes have sought a direct line to the federal government in order to expedite aid during an emergency or major disaster. Now with this action … they are one crucial step closer to being able to access appropriate

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[97] Disaster Relief Appropriation, Pub. L. No. 113-2 (2013), https://www.congress.gov/113/plaws/publ2/PLAW-113publ2.pdf.

[98] Adams, "Sovereignty, Safety, and Sandy."

[99] Tribal Requests for a Major Disaster or Emergency Declaration under the Stafford Act, Pub. L. No. 113-2 § 1110 (a) c(1), 127 stat. 48, https://www.congress.gov/113/plaws/publ2/PLAW-113publ2.pdf.

federal assistance when unforeseen adversity hits."[100] He later mentions how this action fortifies the "nation's emergency management team."[101]

According to an article in *Indian Country Today*, tribes "applauded" the SRIA legislation.[102] The article adds a comment from a tribal leader that "we trust that when we are faced with another emergency, our relationship with FEMA and the rest of the federal government will assure the safety and well-being of our people."[103] From the signing of the SRIA to May 2018, eleven tribes have had twelve major disasters and one emergency declared by the president.[104] After suffering more than 5 million dollars of damage in winter storms, the emergency manager from the first tribal nation to make a declaration, the Eastern Cherokee Nation, proudly proclaimed, "I think it's an honor, because we're the first to lead the other tribes."[105] From this experience, FEMA Assistant Administrator Alex Amparo observed, "Lessons learned included clarification and guidance regarding policies and procedures on tribal declarations and the need for more cultural awareness by FEMA staff."[106] Financial assistance for this declaration "topped $2.4 million" according to FEMA.[107]

As far as the implications for the future, this legislation required other changes to work smoothly. FEMA's Elizabeth Zimmerman addressed the process of tribes needing a

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[100] Capriccioso, "FEMA Administrator."

[101] Capriccioso.

[102] "Tribes Applaud Sandy Recovery Improvement Act," *Indian Country Today*, February 4, 2013, https://newsmaven.io/indiancountrytoday/news/politics/tribes-applaud-sandy-recovery-improvement-act/.

[103] *Indian Country Today*.

[104] "Data Visualization: Disaster Declarations for Tribal Nations," FEMA, accessed July 13, 2018, https://www.fema.gov/data-visualization-disaster-declarations-tribal-nations.

[105] Brian Daffron, "Six Tribes that Took Advantage of Amendment for FEMA Relief in 2013," *Indian Country Today*, December 6, 2013, https://newsmaven.io/indiancountrytoday/news/environment/6-tribes-that-took-advantage-of-amendment-for-fema-relief-in-2013/.

[106] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes: Hearing before the Committee on Indian Affairs, U.S. Senate* (February 8, 2017) (statement of Alex Amparo, Assistant Administrator Recovery Directorate FEMA), 6, www.indian.senate.gov/sites/default/files/upload/2.8.17%20Alex%20Amparo%20Testimony.pdf.

[107] "FEMA Assistance Tops $2 Million in First Tribal Recovery," FEMA, May 10, 2013, https://www.fema.gov/news-release/2013/05/10/fema-assistance-tops-2-million-first-tribal-recovery.

new format to declare an emergency, and the drafters of the "Tribal Declaration Pilot Guidance" began to seek input from the federally recognized tribes since SRIA "was just the first step in fully implementing this important authority."[108] Zimmerman also affirmed, "Inclusion of Tribal Nations is an essential component of FEMA's whole community emergency management strategy."[109] Fugate concurred that the adoption by FEMA would "acknowledge the sovereignty of federally recognized tribes and the trust responsibility of the United States, enhancing FEMA's working relationship with tribal governments, and improve emergency responsiveness throughout Indian Country."[110]

The Homeland Security Act has not gone through the same improvement process, even though it shares some of the same priorities of the Stafford Act. The number of mentions of "tribe/tribal" has increased since 2002, but it is still most often used in the list of "Federal, State, local, and tribal." Both the original and the latest 2018 updates define, under local government, "an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation" right between entities such as counties, localities, and school districts in a rural area.[111]

E. TRIBAL DECLARATIONS PILOT GUIDANCE

The Stafford Act's SRIA amendments "allow tribal governments the **choice** to either request an emergency/major disaster declaration independently of a state **or** seek disaster assistance through a state declaration."[112] FEMA created steps to have these initial changes implemented immediately, and language continuously improved to reflect the

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[108] *When Catastrophe Strikes: Responses to Natural Disasters in Indian Country, Hearing before a Senate Committee on Indian Affairs* (July 30, 2014) (written testimony of FEMA Office of Response and Recovery Deputy Associate Administrator Elizabeth Zimmerman), www.dhs.gov/news/2014/07/30/written-testimony-fema-senate-committee-indian-affairs-hearing-titled-%E2%80%9Cwhen.

[109] Amparo, *Emergency Management in Indian Country*, 6.

[110] Craig Fugate, "A Long Overdue Policy Change to Recognize the Sovereignty of Tribal Governments," FEMA, last updated June 2, 2017, https://www.fema.gov/blog/2011-12-07/long-overdue-policy-change-recognize-sovereignty-tribal-governments.

[111] Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2001), www.congress.gov/bill/107th-congress/house-bill/5005; Homeland Security Act of 2002, as amended.

[112] "Tribal Declarations Pilot Guidance Fact Sheet," FEMA, December 13, 2017, https://www.fema.gov/tribal-declarations-pilot-guidance.

tribal differences in declarations as reviewed with tribal leaders. In April of 2014, FEMA released the *Tribal Declarations Pilot Guidance* and opened the documentation process for comments.[113] The opening period for the use of this pilot guidance began in January 2017 and will continue until it has proven complete and useful enough to become authoritative.[114] The guidance document is the "culmination of over three years of tribal consultation and development of a Stafford Act declarations process specifically to tribal nations."[115] One unique aspect is that it provides Individuals and Households Program coverage for "non-enrolled tribal community members" as approved by the tribal leadership.[116]

The steps for a tribe to declare an emergency include activating the tribe's emergency plan, assessing the damage, requesting a joint FEMA–Tribal assessment, and then requesting a disaster declaration, which passes to the regional FEMA administrator for approval before being routed to the president for final determination. FEMA then refers that determination back to the tribal leadership.[117] If the damage is extensive enough to conclusively meet the disaster threshold ($250,000), the declaration can be requested earlier, without a preliminary assessment.[118] The rules for what constitutes an emergency plan are the responsibility of the tribal government, and FEMA staff are available if help

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[113] Zimmerman, *When Catastrophe Strikes*.

[114] "Tribal Declarations Pilot Guidance Webpage," FEMA, December 13, 2017, www.fema.gov/tribal-declarations-pilot-guidance.

[115] "FEMA Finalizes Pilot Guidance for Tribal Declarations Process for Stafford Act Disasters," FEMA, January 10, 2017, https://www.fema.gov/news-release/2017/01/10/fema-finalizes-pilot-guidance-tribal-disaster-declarations-process-stafford.

[116] FEMA, *Tribal Declarations Pilot Guidance* (Washington, DC: DHS, January 2017), www.fema.gov/media-library-data/1523033284358-20b86875d12843441a521a6141c15099/Pilot_Guidance.pdf.

[117] "Tribal Declaration Reques Cover Letter Template," FEMA, March 2017, www.fema.gov/media-library/assets/documents/128307.

[118] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes: Hearing before the Committee on Indian Affairs, U.S. Senate*. (February 8, 2017) (statement of Cody Desautel, Natural Resources Director Confederated Tribes of the Colville Reservation), 3, www.indian.senate.gov/sites/default/files/upload/2.8.17%20Cody%20Desautel%20Testimony.pdf; (testimony of Russell Begaye, President, The Navajo Nation), 4, www.indian.senate.gov/sites/default/files/upload/2.8.17%20Russell%20Begaye%20Testimony.pdf.

is requested in the assessment phases, unlike the state requirements.[119] This policy of additional assistance takes into consideration the potential lack of staffing and expertise that tribal governments may face in the area of emergency management. Table 2 shows some of the decision points tribes might experience in their decision to proceed as a grantee or a subgrantee.

Table 2. Tribal Declarations Pilot Guidance Method of Request[120]

Decision Point	Tribal Government Direct Declaration	State Disaster Declaration Options	
Direct Recipient vs. Recipient or Subrecipient through a state declaration	Tribal government is sole direct Recipient through their own tribal declaration	State is a Recipient; Tribal government is a Recipient through a State declaration	State is a Recipient; Tribal government is a subrecipient (NOTE: Some states, based on state law, do not allow this option.)
Who receives Declaration Letter from the President?	Tribal government receives letter from the President.	State receives letter from the President.	State receives letter from the President.
Who pays the non-federal cost share (25%)?	25% paid by tribal government	25% paid by tribal government	The state, as recipient, determines how the 25% cost share is apportioned.
Public Assistance (PA) Minimum Damage Amount	$250,000 minimum damage amount to request a Joint Preliminary Damage Assessment.	State subject to $1 million minimum damage amount.	State subject to $1 million minimum damage amount.

119 "Current Process for Tribal Governments to Request a Presidential Declaration," FEMA, updated May 4, 2018, https://www.fema.gov/frequently-asked-questions-current-process-tribal-governments-request-presidential-declaration.

120 Adapted from FEMA, *Tribal Declarations Pilot Guidance*, 42.

One concern voiced by tribes who had their declarations rejected at the initial FEMA review was that there is no feedback about why a request is denied.[121] Tribes "need more guidance and clarity from FEMA when they deny assistance to Indian tribes which encounter disasters," said the president of the Navajo Nation, who personally had two different applications rejected.[122] Another concern is how to determine the amount of damage when the land is not privately owned. To determine the amount of damage on the Colville Reservation, for example, "they used the county recorder to assess the value to try to get to that threshold but for trust properties, they are not assessed by the county so they do not have a good way to value resources whether it be homes or land damage."[123]

F. OTHER FEDERAL TRIBAL PREPAREDNESS SUPPORT

DHS administers a Tribal Homeland Security Grant Program (THSGP), which "provides funding to eligible tribes to strengthen their capacity to prevent, protect against, mitigate, respond to, and recover from potential terrorist attacks and other hazards."[124] The very specific requirements make this grant unavailable for some federally recognized tribal

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[121] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes: Hearing before the Committee on Indian Affairs, U.S. Senate*. (February 8, 2017) (statement of Alex Amparo, Assistant Administrator, Recovery Directorate, FEMA), 6, www.indian.senate.gov/sites/default/files/upload/2.8.17%20Alex%20Amparo%20Testimony.pdf.

[122] Begaye, *Emergency Management in Indian Country*.

[123] Desautel, *Emergency Management in Indian Country*.

[124] "Fiscal Year 2018 Tribal Homeland Security Grant Program," FEMA, accessed September 21, 2018, www.fema.gov/media-library-data/1526581696418-8e51861fad50589db9930c8c16baa41b/FY_2018_THSGP_Fact_Sheet_FINAL_508.pdf.

nations.[125] Since 2010, $6 to 10 million per year of funding from this specific grant have been dedicated to the process of improving tribes' core capabilities, and therefore the nation's. The funding may change in the future, but the current law requires .01 percent of DHS grant funding to go toward tribes.[126] Additional requirements for the grant are the implementation of National Incident Management System (NIMS) for emergency response, and completion of a Threat and Hazard Identification and Risk Assessment (THIRA) as well as a Stakeholder Preparedness Review (SPR).[127]

The FEMA Tribal Curriculum provides a series of five courses designed to reflect the needs of tribes.[128] The material is evaluated for its cultural sensitivity and appropriateness. These courses are available at the Emergency Management Institute in Maryland and are delivered at many on-site locations, as requested and budgeted. The classes include an overview for tribal leaders, emergency management, emergency operations, mitigation, and continuity of operations for tribal governments. From FEMA's

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[125] The initial THSGP requirements are as follows:

> In order to be eligible to receive THSGP funding, recipients must be considered "directly eligible tribes." Per 6 U.S.C. § 601(4), the term "directly eligible tribe" means—(A) any Indian Tribe – (i) that is located in the continental United States; (ii) that operates a law enforcement or emergency response agency with the capacity to respond to calls for law enforcement or emergency services; (iii) a. that is located on or near (50 miles) an international border or a coastline bordering an ocean (including the Gulf of Mexico) or international waters; b. that is located within 10 miles of a system or asset included on the prioritized critical infrastructure list established under section 210E(a)(2) [of the Homeland Security Act of 2002, as amended] or has such a system or asset within its territory; c. that is located within or contiguous to one of the 50 most populous metropolitan statistical areas in the United States; or d. the jurisdiction of which includes not less than 1,000 square miles of Indian country, as that term is defined in section 1151 of title 18, United States Code; and (iv) that certifies to the Secretary that a State has not provided funds under section 2003 [Urban Area Security Initiative] or 2004 [SHSP] of [the Homeland Security Act of 2002, as amended] to the Indian Tribe or consortium of Indian Tribes for the purpose for which direct funding is sought; and (B) a consortium of Indian tribes, if each tribe satisfies the requirements of subparagraph (A). In summary, eligible tribes must meet the requirements set forth in (A) (i), and (A) (ii), and (A) (iv). Tribes must also meet one of the requirements set forth in (A) (iii); either (A) (iii) (a), or (A) (iii) (b), or (A) (iii) (c), or (A) (iii) (d). Finally, (B) may also be satisfied, if each tribe satisfies the requirements of subparagraph (A).

FEMA, "Fiscal Year 2018," 1–2.

[126] Zimmerman, *When Catastrophe Strikes*.

[127] "The U.S. Department of Homeland Security (DHS) Notice of Funding Opportunity (NOFO) Fiscal Year 2018 Tribal Homeland Security Grant Program (THSGP)," FEMA, accessed September 21, 2018, www.fema.gov/media-library-data/1526581605569-bb605a756d0be9f37d95a9bf47fd487b/FY_2018_THSGP_NOFO_FINAL_508.pdf.

[128] "Tribal Curriculum," FEMA, last modified January 10, 2017, https://training.fema.gov/tribal/.

first Tribal Policy in 1998 (updated in 2016) to the programs available today, many tribal members, students of the tribal classes, and FEMA staff members have continuously worked to refine and improve the programming.[129] The goal of the curriculum is "to collaborate with tribal governments to build emergency management capability and partnerships to ensure continued survival of Tribal nations and communities."[130]

"Ready Indian Country" is a partner site of DHS geared toward tribal preparedness. It is a part of the national Ready.gov movement to "promote preparedness through public involvement."[131] The website offers a variety of tips for making a disaster kit and plan and staying informed, and provides tips for unique regional hazards, such as desert hazards in the Southwest or gulf oil spills in the Southeast.[132] The site has a variety of downloadable brochures, posters, and audio and video materials for tribes to use to promote preparedness.

Under the Department of the Interior, the Bureau of Indian Affairs (BIA) Emergency Management Division is responsible for developing policy and managing emergency management efforts involving tribes. Their staff can help with support, coordination, and liaison assistance. Since the efforts initiate from the BIA, which inherently recognizes the sovereignty of tribes, that information can be directly relayed to the other agencies in a response. The BIA offers the advantage to coordinate, through the Tribal Assistance Coordination Group (TAC-G), with FEMA, Indian Health Services, and the Environmental Protection Agency.

The Department of Defense (DoD) is also involved in the protection of Indian Country. According to a RAND publication, "collectively, DoD agencies administer 2 million acres of public land. Every acre of DoD agency-administered public land once was occupied by members of Indian tribes that held 'aboriginal title' to the land prior to Congress' extinction of that title."[133] Many tribes still utilize these lands under treaty

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[129] FEMA.

[130] FEMA.

[131] "About the Ready Campaign," Ready.gov, accessed July 13, 2018, www.ready.gov/about-us.

[132] "Indian Country," Ready.gov, accessed July 13, 2018, www.ready.gov/make-a-plan/indian-country.

[133] Mitchell and Rubenson, *Native American Affairs*, 3.

guarantees to fish, hunt, and gather, or for ceremonial purposes. Due to the need for consultation policies, the DoD policies must reflect the coordination of such interactions, to include the ramifications of when "an affected tribe or Native American organization and interested environmental organization coordinate their activities to advance the attainment of common political objectives."[134] The RAND piece admits that the cultural protection of Indian Country is less enforceable than environmental policies, which offer more precise restrictions; however, the rise of organized movements of tribal support, such as National Congress of American Indians, will put more pressure on the DoD to include highlighted tribal lands on their priority list.[135]

While there are many agencies providing assistance, and those listed here are only a sampling of the largest ones, the agencies can also compound the confusion. Where is a tribe supposed to start? Who can help a tribe with preparedness assistance? How do members find shelter when the flood waters rise? And how do tribes start to rebuild their reservation following a disaster? Even with proper staffing, supplies, and training, the answers to these questions are difficult and may depend on regional differences. A non-recognized tribe faces less certainty and more rejection of requests for assistance. The Lumbee, made up of several tribes, faced this issue following Hurricane Matthew in 2016. One member remarked, "It took a hurricane to highlight why we should be federally recognized."[136] Had it been designated as a recognized tribe, the Lumbee might have received funding pre-disaster, and they would likely have received support following the devastation. Instead, the "present model of disaster relief and recovery magnifies every division, demoralizes every spirit, and disempowers every family and community."[137] This limitation hampers bridges of communication and collaboration with tribal nations, legally recognized or not.

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[134] Mitchell and Rubenson, 12.

[135] Mitchell and Rubenson, 50.

[136] Emma Way, "One Year after the Flood in Lumberton," *Charlotte Magazine*, September 26, 2017, www.charlottemagazine.com/Charlotte-Magazine/October-2017/One-Year-After-Hurricane-Matthew-in-Lumberton/.

[137] Way.

G. CONSULTATION

The concept of discussing plans with all stakeholders is not groundbreaking, but it has yet to become standard procedure between the federal government and tribes, despite federal actions. President Richard Nixon's administration pivotally tipped the policies from assimilation-based to supporting self-determination, striving to "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[138] The Indian Self-Determination and Education Act of 1975 allowed contracts to be approved to transfer responsibility for certain programs from the federal government to the tribes, recognizing that many tribes had the desire and capabilities to conduct these programs. It was a boost to sovereignty and a new phase of the government-to-government relationship.

The next president to voice support of tribal nations was President Bill Clinton, in a pair of executive orders in 1993 and 1998. The first, Executive Order 12875, *Enhancing the Intergovernmental Partnership*, allowed tribes to offer input on federal policies. More specific to tribes was Executive Order 13084, which was annulled in 1998 and replaced by Executive Order 13175 of the same title, *Consultation and Coordination with Indian Tribal Governments*. This order directed federal agencies to propose a way to garner tribal input, and sought to "reaffirm our commitment to tribal sovereignty, self-determination, and self-government" in the process.[139] President George W. Bush further supported this idea with an executive memorandum titled, "Government-to-Government Relationship with Tribal Governments" in 2004. He reiterated the crucial issues of sovereignty and self-determination.

Obama also issued an executive memorandum on this topic, identifying that the previous proposals lacked enforceability. He stipulated that policies in compliance with tribal consultation must be provided within ninety days. Unfortunately, many departmental

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[138] Richard Nixon, "Special Message to Congress on Indian Affairs, July 8, 1970," The American Presidency Project, accessed April 8, 2015, http://www.presidency.ucsb.edu/ws/?pid=2573.

[139] William J. Clinton, "Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments," Environmental Protection Agency, November 6, 2000, www.epa.gov/sites/production/files/2013-08/documents/13175sgn.pdf.

policies produced were scanty, and some not completed at all.[140] A repeated concern is that the process of consultations will "often meet the letter of the law while providing tribes little or no opportunity to meaningfully shape agency decisions."[141] Difficulties arise because "there is no consensus regarding the nature of the components of the consultation duty."[142] Some of the challenges of both the federal government and tribes will be further explored in Chapter V. For instance, who needs to be involved and when should it start? What format needs to be used for initial contact and for documenting the interactions? Should physical meetings take place and, if so, where and how many? How much consultation is enough to fulfill the requirement and, furthermore, constitute a thorough consultation?

What constitutes enough consultation is perhaps intentionally vague due to the differing situational needs of the discussion item and individual tribal policies. There is no stipulation that one or more tribal leaders must sign off on a project, a possibility to consider if the action would impact more than one tribe, or if tribal members from one tribe have conflicting concerns. The level of effort required is determined by the federal departments, whether or not the tribes were heard or the assertions or concerns drawn into the final decision.[143]

DHS, in response to President Obama's memorandum in support of President Clinton's Executive Order 13175, purported that the mission of unified national security "simply cannot be achieved without the full participation and integration of the Nation's Indian tribes."[144] This piece mentions information sharing, a culture of regular

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[140] Colette Routel and Jeffrey Holth,"Toward Genuine Tribal Consultation in the 21st Century," *University of Michigan Journal of Law Reform* 46, no. 2 (2013): 447, https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1038&context=mjlr.

[141] Matthew J. Rowe, Judson Byrd Finley, and Elizabeth Baldwin, "Accountability or Merely 'Good Words'? An Analysis of Tribal Consultation under the National Environmental Policy Act and the National Historic Preservation Act," *Arizona Journal of Environmental Law and* Policy 8 (2018): 1, https://docs.wixstatic.com/ugd/952f0d_bee74c58ac234760bf96f787d4185e45.pdf.

[142] Routel and Holth, "Toward Genuine Tribal Consultation," 420.

[143] Rowe, Finley, and Baldwin, "Accountability," 18.

[144] "Department of Homeland Security Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175," DHS, March 1, 2010, www.dhs.gov/news/2010/03/01/dhs-tribal-consultation-and-coordination-plan-unveiled.

communication between governments, and setting up a system within the system to facilitate integration. For current departmental concerns, the impact of this policy is two-fold. Creating homeland security policies, preparedness planning, and coordinating infrastructure would benefit from the shared knowledge and resources of both parties. More potential impacts would be identified initially, and problems could be mitigated before the process begins. Another aspect, from a law enforcement position, is the example of a disputed consultation that turned public and controversial between the Dakota Access Pipeline and the Standing Rock Sioux: it could be implied that an inadequate consultation process might trigger lawsuits or result in violent protests. According to an article in the *Arizona Journal of Environmental Law and Policy*, protests began due to "the claim that they had not been properly or meaningfully consulted about the project."[145]

Ambiguities as to what constitutes "meaningful" leaves much open to interpretation on both sides and makes it difficult to achieve President Obama's charge to "establish regular and meaningful consultation and collaboration with tribal officials."[146] The term "collaboration" is even more esoteric and less of a legal mandate, so the system will need to evolve more to accommodate that, but the standard has been set to strive toward.

Next, looking at the relevant consultation policies of DHS and FEMA showed some of the weaknesses listed above, and also some areas of proactivity.[147] For instance, both departmental annexes only describe the federal responsibilities, without mention of the tribal obligations. These documents are undoubtedly geared toward their own departments' staff, but some mention of the tribal involvement is necessary to indicate a true partnership. FEMA does mention collaboration, as well as consultation, which may illustrate more of a willingness to go above the minimum mandate of consultation obligation, including a detailed worksheet for planning the process. FEMA also mentions that the need for

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[145] Rowe, Finley, and Baldwin, "Accountability," 3.

[146] Executive Office of the President, *Consultation and Coordination*.

[147] FEMA, *Tribal Relations Support Annex*, TRB-1 (Washington, DC: DHS, May 2013), www.fema.gov/media-library-data/20130726-1914-25045-3973/nrf_support_annex_tribal_relations_20130505.pdf; *FEMA Tribal Consultation Policy*, FP 101-002.01 (Washington, DC: DHS, August 2014), www.fema.gov/media-library-data/1496250462411-e7b73f4f4b03a3dc48e384f1fd654335/Tribal_Consultation_Policy.pdf.

consultation can be initiated by either FEMA or one or more tribes, and they should work together to determine the details. For both of these federal departments, more liaisons and support systems were added as a result of the process. These are progressive policies that hold the potential to enhance both the end result of the two sets of governments working together and set the standard for consultation policies in the future.[148] For each new improvement, according to Elizabeth Leemon, comes progress; "Executive Orders, statutes, and treaties that affirm Indian tribal rights to consultation promote diplomacy and inter-governmental communications that help facilitate positive interactions between agencies and tribal governments."[149]

H. EMERGENCY MANAGEMENT

According to Richard Sylves, "working the seams" means "working the edges of administrative-legislative interaction, intergovernmental relations, agencies and interest groups."[150] Recognizing each tribe as an individual nation offers some perspective: the relationship between tribes and the United States is about international complexity and relations. And when the balance of power is uneven, such as the domestic dependent status of tribes within the United States, it needs to be addressed.

Traditionally, though unofficially, tribes tend to lag ten to twelve years behind the nation in preparedness.[151] In a Loma Linda University study that asked California tribes about all-hazard capabilities, 91 percent of respondents reported that "they were less than adequately prepared."[152] Only 5 percent of those tribes thought its residents were aware of any emergency plans tribal leadership did have in place, and less than half of the tribes

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[148] FEMA, *Tribal Consultation Policy*.

[149] Elizabeth S. Leemon, "A Voice in the Storm: Tribal Consultation in the Wake of the Sandy Recovery Improvement Act of 2013," *American Indian Law* Journal 2, no. 2 (May 2017): 598, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1161&context=ailj.

[150] Richard Sylves, *Disaster Policy and Politics: Emergency Management and Homeland Security* (Thousand Oaks, CA: SAGE, 2015), 42.

[151] Reed, "Tribal Nation Integration," 107.

[152] Rachel I. Lawrence et al., "Disaster Preparedness Resource Allocation and Technical Support for Native American Tribes in California," *Journal of Homeland Security and Emergency Management* 13, no. 3 (September 2016), http://doi.org/10.1515/jhsem-2015-0067.

had a disaster mitigation plan approved by FEMA, meaning that most are unable to access federal disaster funding.[153] This section analyzes the factors that contribute to these challenges and why they continue to do so. This disparity affects not only the individual tribe but also the other local communities and the nation as a whole.

One of the crucial findings of the 2014 National Preparedness Report was that "the Nation is integrating tribal partners more systematically into preparedness. However, challenges remain for Federal agencies and tribal nations to increase engagement and expand training opportunities on relevant policies."[154] These challenges may be the most urgent when it comes to involving tribes in emergency management. Outreach is necessary to ensure tribes know what to do in an emergency, but even better is preaching the need for preparedness. Understanding the tribe's responsibility and knowing steps that can improve the situation set the urgency. Tribal leadership might be less likely to seek out training opportunities that take them far from their tribe, so it is important to continue offering courses on request, when possible.

The message is out there, but whether tribes are receiving it is uncertain. Many tribal lands are remote and lack internet, which is the predominant medium of many informative materials. It can also be difficult to know which resources are legitimate and which are not. Many beneficial programs such as those offered by FEMA, BIA, Ready.gov, and iTEMA have overlapping links and materials which helps get the word out and allows the organizations to work together to reach the target audience with consistent messaging. However, the redundancy can be confusing, and can leave a tribe wondering where to start. Chairman Hoeven, in a hearing before the Committee on Indian Affairs, attested, "I am very concerned. When a tribe or anyone else has to start trying to figure out which agency is going to help and each agency says, it is really that agency, it can be a very frustrating

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[153] FEMA-approved hazard mitigation plans are a prerequisite for federal disaster funding. Lawrence et al., "Disaster Preparedness."

[154] DHS, *National Preparedness Report* (Washington, DC: DHS, 2014), www.fema.gov/media-library-data/1409688068371-d71247cabc52a55de78305a4462d0e1a/2014_NPR_FINAL_082914_508v11.pdf.

and difficult situation."[155] There are plenty of sites that outline what to put in a three-day supply box, but not as many that explain what a tribal community should do when it is unsure if assistance will be there after those three days. Remote locations, jurisdictional concerns, and an absence of pre-existing partnerships or reciprocity could prevent help from arriving quickly.

A successful emergency management program needs funding, equipment, and supplies, as well as personnel and partners. For tribal nations, which do not tax their members, raising money for such improvements can be an insurmountable challenge. As an emergency manager from the Choctaw Nation of Oklahoma explains, "The lack of available funding continues to be a major issue in the establishment and enhancement of emergency management core capabilities in Indian Country."[156] Not all tribes have income-generating businesses such as casinos, and even fewer have businesses that are lucrative enough to allow capital improvements. Many wealthier tribes have voted to disperse more in per capita per month rather than invest in community-benefitting programs. Until they see the need, the funding goes elsewhere, perhaps assuming tribal leadership has a reserve fund for this purpose.

Funding must then come from the federal government, but the grant forms and requirements can be daunting. Even funds designated for tribes are cumbersome to apply for, and if there is not a designated grant writer, emergency manager, or similarly skilled individual, a tribe is at a disadvantage, despite the likelihood that it will need the assistance the most. As mentioned, the tribal populations are notoriously challenged by unemployment, poverty, and poor educational achievement. The president of the Navajo Nation opined that the federal staff "should be coming alongside us and helping us develop those applications because we do not know what the right answers are and what the right

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[155] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes Hearing Before the Committee on Indian Affairs*, 115th Cong. 1 (February 8, 2017) (statement of Senator John Hoeven, Committee Chairman), 38, https://www.hsdl.org/?view&did=805721.

[156] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes Hearing Before the Committee on Indian Affairs*, 115th Cong. 1 (February 8, 2017) (prepared statement of Jeff Hansen, Director, Office of Emergency Management, Choctaw Nation of Oklahoma), 48, https://www.hsdl.org/?view&did=805721.

languages are. We need FEMA to come alongside and help those people who are losing homes, vehicles, farms, crops, irrigation and things like that. We need them to come alongside us and treat us as human beings."[157]

Scarcity of equipment on tribal lands also makes emergency management difficult. Some tribes do have first responders on their reservations, which could be an asset. However, having the ability to evacuate, shelter, care for the various demographics, and simultaneously respond to and recover from a disaster is a complicated process, even with a large and functioning emergency operations center. An article in *Ethnic and Racial Studies* explains, "Lack of infrastructure on the reservation and the dearth of resources are themselves the result of the original ongoing disaster."[158] The article calls the factors suppressing the demographics of tribal regions a "permanent disaster" situation.[159] Necessary funding is difficult to allot for or request from the federal government without a detailed plan already in hand. Extra response tools may be necessary to protect the infrastructure crucial to the tribe and the surrounding community, such as transportation routes, dams, power plants, bridges, or other structures. "The results of federal policies of self-determination must be judged an overall success in terms of their impacts on the economic, social, cultural and political status and well-being of the Indian nations. Many prior decades of federal management of virtually all tribal affairs found American Indians on reservations to be the most distressed populations in the United States."[160]

Finally, perhaps the best place to start the emergency preparation process is with personnel—another issue for tribes. Hiring an emergency manager or assembling a team to oversee the efforts is essential. Initial buy-in from tribal leadership is crucial; without it, neither a plan nor an individual has any authority and may create chaos. Tribal members

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[157] Begaye, *Emergency Management in Indian Country*.

[158] Rachel E. Luft, "Governing Disaster: The Politics of Tribal Sovereignty in the Context of (Un)natural Disaster," *Ethnic and Racial Studies*, 39, no. 5 (April 8, 2016): 802–820, http://doi.org/10.1080/01419870.2015.1080376.

[159] Luft.

[160] Stephen Cornell and Joseph P. Kalt, "American Indian Self-Determination: The Political Economy of a Policy That Works" (working paper, Harvard Kennedy School, November 2010), 26–27, https://dash.harvard.edu/handle/1/4553307.

need to be aware of those authorized to lead in this capacity, even if those selected are the members of leadership themselves. Members may disregard essential messaging if they wait for something they discern is from an authority, who may be a local or state official rather than the tribal leader. This can lead to conflicting and perhaps harmful advice being taken if the tribal members and lands were not specified in those alternative-messaging systems. However, initiating conversations about partnerships with regional governments and local businesses can help tribes harness the power of personnel and resources they would otherwise lack.

A unique aspect of tribal preparedness is the consideration of cultural resources. This consideration can connect to the land, animals, plants, bodies of water, or other features of the reservation that might not have the same significance to a non-tribal community. Spiritual, psychological, and cultural threats need to be addressed along with the basic protection of life, property, and infrastructure.

For tribes to be fully prepared to face an emergency or disaster, they need to have access to sufficient staff, training, and funding. The federal policies that hinder these elements need to be evaluated carefully. Only after the tribes are authentically prepared for and integrated into the federal system of emergency preparedness can the next step toward homeland security proceed. These gaps need to be closed to achieve an integrated federal system of security.

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IV. ANALYSIS

Rachel Luft, in an article on racial demographics, purports, "Land is the paradigmatically literal and figurative site of Native exploitation. When natural disaster strikes, the 'permanent disaster' that haunts reservation life is exposed in symbolic and substantive detail. More importantly, tribal disaster policy, as a microcosm of federal tribal policy, helps to reveal the shortcomings of current U.S. frameworks for addressing the larger, enduring crisis."[161] Only by understanding the relationship between the tribes and the federal government, the differing viewpoints on land, and individual tribal dynamics and struggles can one begin to address tribal preparedness and eventually unifying homeland security policy. The nuances of intention can be interpreted in various ways and can be skewed by Eurocentrism or presentism, but the resulting policies and actions are available for further analysis.

A. PRESIDENTIAL DECLARATIONS

Although the ability to request a presidential declaration as either a grantee or a subgrantee has supported tribal sovereignty, the tribes themselves are not getting the amount of support they need or have been assured. The president of the Navajo Nation explained, "Given the limited resources of all types for Indian tribes, even a localized disaster event will greatly challenge the internal resources of most Indian tribes."[162] For example, in 2016, the Fort Peck Tribes of Montana suffered summer storms with winds that damaged 100 structures, but federal funds were not approved to help respond to the disaster or for recovery. In an *Indian Country Today* article, Senator Steve Daines lamented that the "their crisis did not meet the agency's required magnitude."[163] The senator also called for FEMA to hold more listening sessions with the tribes regarding the upcoming changes to their consultation policy, to hear these concerns and address them for future

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[161] Luft, "Governing Disaster."

[162] Begaye, *Emergency Management in Indian Country*, 5.

[163] Rob Capriccioso, "Senator Asks FEMA to Listen to Tribes Desperate for Emergency Assistance," *Indian Country Today*, April 26, 2017, https://newsmaven.io/indiancountrytoday/news/politics/senator-asks-fema-listen-tribes-desperate-emergency-assistance/.

improvements.[164] The article also gave the example of the Chippewa Cree Tribe, which lost its water supply but did not attempt to apply to FEMA because they knew they would not receive funding; although it was a devastating event for the tribe, they knew the damage threshold for funding had not been met.[165]

Of further concern is that such instances are frequently not documented. If the squeaky wheel gets the grease, from a federal perspective, this situation took care of itself. The likely perception is that the tribes were suffifiently capable to manage the issue absent additional outside help or funding. As a result, the desperation, isolation, and frustration with the system continues to build. If the federal policies do not help the tribes that depend on their protections, tribal leaders are not likely to trust new policies—especially those that are intrusive to a tribe, such as policies that deal with homeland security issues along an international border. FEMA must see the complete need and then address it at the most basic level to fully incorporate all of the tribes, which comprise a large portion of the land of the United States. Only then can the nation be prepared.

Sylves proffers that "a presidential declaration of a major disaster or emergency has far-reaching consequences because it opens the door to federal assistance and aid by legitimizing the disaster for affected populations."[166] This is particularly important for tribal nations, which are now able to request their own declarations. However, imagine the feelings of disenfranchisement they endure when a request is rejected without any backup or explanation. From 2013 to early 2017, only 47 percent of tribal presidential declaration requests were granted; 83 percent of states' requests, however, were approved for financial compensation.[167] With less than half of the declarations approved, tribes are not likely to feel as empowered as they hoped they would be when SRIA amended the Stafford Act. They likely feel unsure of their worth, their ability to speak the technical language of disasters, or the relevance of their people, land, and resources to the nation as a whole. The

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164 Capriccioso.

165 Capriccioso.

166 Sylves, *Disaster Policy and Politics*, 100.

167 *Emergency Management in Indian Country*, 3.

fact that some tribes that need assistance never attempt a declaration indicates a lack of trust, which continues to deepen. This inclination puts undue hardship on the tribes and also magnifies a weakness in federal policies, which creates a gap for emergency response and homeland security.

The data regarding Presidential Declarations indicate that the number of declarations per year is going up dramatically. From an average of 16.5 per year in the '50s and '60s to more than 120 per year since 2000, the number of emergencies and disasters that require federal assistance has increased.[168] These figures can be influenced by changing laws or weather patterns.[169] From current data, the majority of declarations are for fire (28 percent), severe storms (25 percent), floods (21 percent), and hurricanes (a distant fourth at 9 percent), as visualized in Figure 1.[170] It can be extrapolated that there will also be an increase of tribal declarations as a result, as either grantees or subgrantees in the process.

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168 "Disaster Declarations by Year," Department of Homeland Security, accessed July 1, 2018, https://www.fema.gov/disasters/year.

169 Bruce R. Lindsay and Francis X. McCarthy, *Stafford Act Declarations 1953–2014: Trends, Analyses, and Implications for Congress*, CRS Report No. R42702 (Washington, DC: Congressional Research Service, 2015), https://fas.org/sgp/crs/homesec/R42702.pdf.

170 "Data Visualization: Summary of Disaster Declarations and Grants," FEMA, accessed August 7, 2018, https://www.fema.gov/data-visualization-summary-disaster-declarations-and-grants.

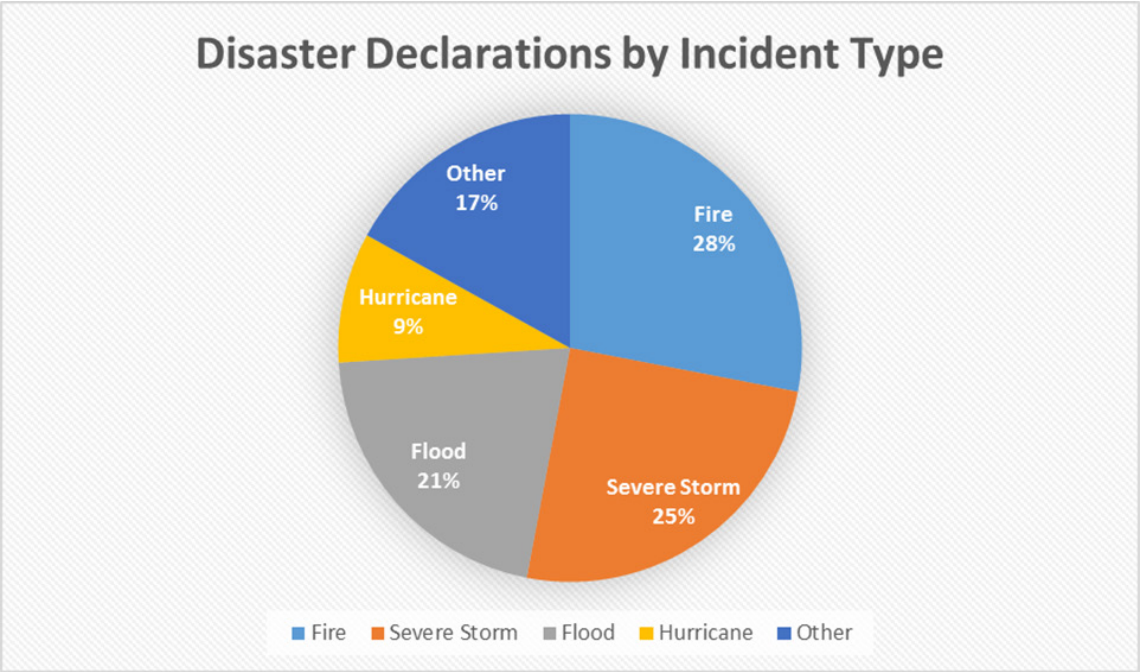

Figure 1. Disaster Declarations[171]

In tribal declarations since SRIA, only 9 percent of those that involved tribes had the tribe named as a grantee .[172] All the rest were subgrantees, with one being a subgrantee to another tribal grantee. For the nearly $21 million going to tribal requestors so far, the tribes involved were responsible for contributing their share, totaling more than $5 million.[173] With some tribes suffering subsequent disasters, the reality of the hardship is evident. So far, the tribes have averaged 2.7 tribal declarations per year as grantee and more than thirty as a subgrantee, but these numbers do not account for the declarations that were either rejected or never applied for due to apprehension or low damage thresholds.[174]

[171] Adapted from FEMA.

[172] FEMA, "Data Visualization: Disaster Declarations for Tribal Nations."

[173] FEMA.

[174] FEMA.

B. DHS AND FEMA PROGRAMS

Two of the most important changes that need to occur are improvements in terminology used in American Indian policies and collaboration efforts between the two sets of governments. Just as the use of tribal language and imagery for sports teams is outdated, the time has come to retire some old and limiting vocabulary. An article for the National Congress of American Indians reflects some similarities, "Specifically, rather than honoring Native peoples, these caricatures and stereotypes are harmful, perpetuate negative stereotypes of America's first peoples, and contribute to a disregard for the personhood of Native peoples."[175] Repetitive lists of "Federal, State, local, and tribal" within DHS and FEMA documents continually belittle tribal sovereignty; it has become a mantra that diminishes tribal nations' perceived authority. The sequencing—with tribal sovereignty at the lowest level—needs to be singled out as inconsistent with tribal law, and it needs to be changed. Otherwise, the pattern remains ingrained by those who refer to the materials regularly. In the same vein, clearer definitions of consultation and collaboration between the government entities will reinforce the consistent use of this powerful and unifying tool to build a stronger policy or plan, regardless of the department involved.

The second edition of the National Preparedness Goal, published in 2015 by DHS, starts by emphasizing, "Preparedness is the shared responsibility of our entire nation. The whole community contributes, beginning with individuals and communities, the private and nonprofit sectors, faith-based organizations, and all governments (local, regional/ metropolitan, state, tribal, territorial, insular area, and Federal)."[176] The footnote on tribes goes on to describe the "unique and direct relationship" between tribal nations and the federal government.[177] The wording of both of these reflects the changes in mentality due to SRIA and collaboration efforts. The ordination of the governmental bodies with the tribes listed closer to federal than states is encouraging. The additional clarification of the

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[175] "Ending the Era of Harmful 'Indian' Mascots," National Congress of American Indians, accessed July 14, 2018, http://www.ncai.org/proudtobe.

[176] DHS, *National Preparedness Report*.

[177] DHS.

rights of tribal self-government give support for the order and highlight the importance of a government-to-government alliance.

C. CULTURAL PROTECTIONS

As stewards of their nation, a unique dimension of tribal emergency management is the preservation of historical, cultural, archaeological, and spiritual resources. Essentially, many tribal nations house an unofficial living museum as well botanical and zoological preserves. The individual geographical features, as well as the entirety of a landscape, can have special significance to the tribe. Two complications emerge from the addition of important physical features of the individual tribe: first whether or not to include it in a public (FEMA) document, and second, how to protect it, especially if the actual feature is not on tribal lands. For instance, although the "lands of our origin" are no longer a part of the reservation of the Santa Clara Pueblo, they are visible from their current lands and remain significant to the tribe.[178] Marking a feature, such as an irreplaceable rock painting that dates back generations, opens that location to the public and possibly leads to damage or destruction of the site the plan intended to protect. Public safety officers, tribal members, and other stakeholders need the ability to communicate about these sites without putting them at risk. During a wildfire, dropping fire retardant on that same rock painting could be catastrophic. The best way to address these issues is to have a relationship between the first responders and knowledgeable tribal leaders that can pinpoint areas of concern. Tribal members trained in these fields can be an asset.

Another consideration is cultural sensitivity training for a better connection to tribal members. An Arizona group used elements of Talking Circles to teach the Incident Command System to tribal health care staff.[179] The discussions included standardized messages, but the transmission was more interactive in this initiative. A card with the

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[178] *Emergency Management in Indian Country: Improving FEMA's Federal-Tribal Relationship with Indian Tribes Hearing Before the Committee on Indian Affairs*, 115th Cong., 1, (February 8, 2017) (written testimony of J. Michael Chavarria, Governor of the Santa Clara Pueblo), 2, www.indian.senate.gov/sites/default/files/upload/2.8.17%20J.%20Michael%20Chavarria%20Testimony.pdf.

[179] Brenda Granillo et al., "Utilization of the Native American Talking Circle to Teach Incident Command System to Tribal Community Health Representatives," *Journal of Community* Health, 35, no. 6 (December 2010): 625–634, https://doi.org/10.1007/s10900-010-9252-7.

scenario to be discussed, such as who should alert the public in the case of an epidemic, served as the starting point.[180] The results for the retention of information from the pretest to the post-test were not significant, but the creative effort is to be applauded nonetheless.[181] Including more traditional methodology may enhance the amount of buy-in tribes admit, especially if they are consulted in the design process. Of course, with so much diversity in tribal geography, culture, and traditions, there is no way this can be standardized; but a collaborative effort could make the resulting programs more useful than the ones preceding them.

[180] Granillo et al.

[181] Granillo et al.

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V. FINDINGS AND CONCLUSIONS

To be ready to integrate into federal homeland security efforts, tribal nations need to have preparedness capabilities. The process of preparing for a disaster, either natural or human-caused, involves coordination from the tribal government. The momentum from this coordination can improve resiliency and give the tribal nations more support by pairing their efforts with national efforts. After studying California tribes, Rachel Lawrence et al. recommended creating teams to formulate plans and write grants, taking advantage of free training opportunities, boosting individual member involvement, and fostering partnering relationships to help with such a process.[182] While these are important steps for any community, they lack the one unique feature that tribal nations need: support of tribal leadership. No plans, funding, or supplies are going to be useful without leadership to give authority to those decisions. The leadership, be it one primary individual or a team, is where the tribal members will look for guidance in an emergency, and where they will expect the assistance to come from when they need it.

According to the Quadrennial Homeland Security Review of 2010, "Tribal Leaders are responsible for the public safety and welfare of their membership."[183] Also, tribal governments must "ensure the provision of essential services to members within their communities, and are responsible for developing emergency response and mitigation plans."[184] But again, that is not the whole story. If the tribal leadership is responsible but lacks the personnel, funding, or training to put together the plans and agreements with other local agencies, they are essentially powerless. This combination affects the implementation of any new policy. For instance, according to a study by Reed, "The tribal nations were not prepared for the administrative and financial burdens of the Sandy Recovery Improvement Act in advance so, in some circumstances, their expectations and understanding were not

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[182] Lawrence et al, "Disaster Preparedness."

[183] DHS, *Quadrennial Homeland Security Review*, A-6.

[184] DHS, A-6.

managed."[185] Without a tax base from which to build financial revenue, tribes are at a disadvantage for providing adequate support for an emergency management program without federal funding. In the middle of this cycle, if the tribe needs the funding and lacks a grant writer or cannot hire one, there is no way to exit this loop of unpreparedness.

Anderson explains that the "current homeland security and emergency management policies are extremely ambiguous with relation to the position of the tribes."[186] The irregular placement of tribal governments in the ordering of authoritative entities from federal to state and local adds substantial confusion. In this context, even the victory of choice given in SRIA can present another hurdle, requiring a choice from a leader in a time of extreme distress. This muddling of jurisdictional responsibility also exacerbates "the possibility for conflicts existing between tribes and states," as they compete for resources and funding.[187]

Tribes strive to be self-sufficient but need support to fit into the larger scheme of federal homeland security. Recognizing Stephen Cornell and Joseph Kalt's claim that "federal promotion of tribal self-government under formal policies known as 'self-determination' is turning out to be, after a century or more of failed efforts to improve the lives of the U.S. indigenous people, the only strategy that has worked" means tribal policy trends are on the correct trajectory.[188] "Culturally and politically, self-determination has clearly empowered the Indian nations to assert themselves, and has allowed Native communities and their governments to begin to break long-standing patterns of dependency and second-class status."[189] Vine Deloria and Clifford Lytle are not as confident that the solution is truly sufficient reparation, as "the postwar generation of Indians had been

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[185] Reed, "Tribal Nation Integration," 81.

[186] Anderson, "Frienemies," 128.

[187] Anderson, 129.

[188] Cornell and Kalt, "American Indian Self-Determination," 17.

[189] Cornell and Kalt, 26–27.

enthusiastic about self-government because it has represented a step forward from the absolute prostration the tribes suffered" under previous federal policies.[190]

What is considered progress in the realm of tribal relations is by no means static, as history has shown. Especially in the area of homeland security, a policy could be enacted that intentionally or unintentionally erodes tribal sovereignty. Such are the concerns of tribes in the borderlands. Even if such a policy is challenged, there is no guarantee of resolution. Due to Congress's plenary power over tribal policies, improvement and decimation of previous policies are just as easy to make with a majority vote.[191] To improve integration, tribes need consistency in policy, no state intermediary, liaison outreach and networking, and a simplification of the process of involvement. Once the basic plans for preparedness and mitigation are in order, tribal representatives can ease into additional training, exercises, and grant proposals. Only after these capabilities are in place and consistent funding is secured will an all-hazard response capability be possible for the tribes. And until each tribe is fully integrated, the gap will continue to leave an open seam in the homeland security of our nation.

A. CONSULTATION

Consultations can be divided into the categories of preemptive and enforced. "Consultation can take place either before, during, or after a disaster occurs. Preemptive consultation happens before decisions are made and implemented, while enforced, or after the fact, consultation is when actions are taken before consultation begins."[192] An example of preemptive consultation is the inclusion of tribes in every step of the transformation of the presidential declaration process that is still evolving following SRIA. Talking sessions, webinars, correspondence, and phone calls all took place regularly as FEMA sought input, and still do during the current pilot phase. An enforced consultation occurred when a raid on a tribal business crossed jurisdictional lines, but the tribal authorities were not alerted

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[190] Deloria and Lytle.

[191] The Commerce Clause of the U.S. Constitution and Indian Appropriations Act of 1871, which was affirmed by U.S. v Kagama, Pactah Billy, an Indian, and Another, 118 U.S. 375 (6 S. Ct. 1109, 30 L.Ed. 228) (1886), https://www.law.cornell.edu/supremecourt/text/118/375.

[192] Leemon, "A Voice in the Storm."

until after the action.[193] The Department of Justice settlement that followed "affirmed the importance of preemptive consultation for both parties."[194] For the purposes of tribal inclusion and strong homeland security policies, preemptive consultation is preferred. As long as the obligation to consult with tribes is considered, even occasionally, like a box to check, true consultation is not occurring and collaboration is even less obtainable. Leemon stated, "If continued progress is going to be made, tribal nations and sectors of the U.S. government will have to adopt a comprehensive approach to creating a governance structure amongst and between each other."[195] The methods of informing tribes, travel and communication concerns, financial obligations, the makeup of the groups, and the common terminology all need to be worked out to reach a fully developed course of action. Rubber-stamping the process will not make watertight plans for a secure nation.

Representatives from the government agencies involved, plus the tribe or tribes affected and any other relevant stakeholders should be included in discussions. One of the concerns the tribes voice is that their top officials end up meeting with a low-ranking person from the issuing department, not one with decision-making powers or one truly familiar with the fundamentals of the project or policy at hand.[196] When tribal leaders walk out when faced with non-senior officials they do effectively show their displeasure, but can risk forfeiting any chance of speaking for their tribe. With small numbers of decision-makers in the individual tribes, such sessions could be a waste of their time, especially if they are asked to travel for the meetings. Ideally, equally ranking officials would discuss the issues and communicate on a government-to-government basis, respecting the sovereignty of the tribal nation. From the words of the memorandums and orders, mandating this interaction to what can be legally upheld as "enough" is common.[197] Even though some consultations show diligence and good practices, it is, unfortunately, these poor examples that open wounds from previous federal oversteps, giving the perception

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[193] Leemon, 600.

[194] Leemon, 601.

[195] Anderson, "Frienemies," 124–151.

[196] Routel and Holth, "Toward Genuine Tribal Consultation."

[197] Rowe, Finley, and Baldwin, "Accountability."

that the process tends to "fail to acknowledge the government-to-government relationship and instead revert to a patriarchal relationship where tribes are considered subjugated dependents. This can result in miscommunication at best and a near disregard of tribal voices and sovereignty at worst."[198] This evaluation echoes Reed's description of national tribal policy being "at best disjointed and inconsistent."[199]

The tribal hope for these consultations is that they occur early and often. The use of the phrase "decide and defend" as a method by the tribes to describe the process of consultation confirms the prejudice the tribes feel when consultations take place late in the process. The box is checked, but no more than the minimum legal obligation to inform has been fulfilled. In a legislative hearing, a president of the Navajo Nation lamented "that 'consultation' is nothing more than a pretense to being able to say we listened and took notes but other priorities governed the process." [200]

Communication and notification are vital aspects of consultation. Tribes can receive notification via letter, Federal Register notice, an email, or phone call. Tribal leaders, many living in remote areas with limited access to communication, may not receive the notices in time to respond. There is no mandate for how many attempts by how many means is necessary to be enough. Diligence would imply that the concerned department would continue to reach out until they received some confirmation of acceptance or dismissal of intention to meet, but again, this is not mandated and can fall short. Adequate consultation is one of the areas in which the Dakota Access Pipeline notoriously fell short of the tribes' expectations, but there was no legal precedent for the tribe to build upon.[201]

A related element is how to best document and continue the conversation to reflect the information and allow it to be accessed to shape the next step. This might be considered

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[198] Rowe, Finley, and Baldwin, "Accountability," 8.

[199] Reed, "Tribal Nation Integration," 4.

[200] *Consultation and Coordination with Indian Tribal Government Act: Before the Committee on Natural Resources, Hearing*, H.R. 5608, 110th Cong. 2 (April 9, 2008) (testimony of Dr. Joe Shirley, Jr., President, The Navajo Nation). naturalresources.house.gov/uploadedfiles/shirleytestimony04.09.08.pdf.

[201] Rowe, Finley, and Baldwin, "Accountability."

above and beyond the mandate by some, but has been successful when well organized.[202] Providing interactive tools, such as a centralized website, encourages input and involvement by all stakeholders, including those outside of the federal and tribal government leadership. This inclusion provides more feedback and eliminates the backlash if the decision is not favored by all.[203] The extra effort involved with repeated contact and continued conversation may take time but respects sovereignty and openness in government, providing stronger plans and policies as an outcome.

The number, if any, of physical meetings to take place is not specified. Tribal leaders asked to attend multiple meetings outside of their reservation may feel tension under time or financial constraints. This pressure hardly seems the intent of consultations. According to Matthew Rowe, Judson Finley, and Elizabeth Baldwin, "while the process had its challenges and obstacles, consultation is not about unanimous decision-making; rather, the goal is informed decision-making in an environment where all stakeholders have the opportunity to meaningfully participate in the decision-making process."[204] Respecting tribal leadership is implied in the idea of having a consultation with that leader, and it ought to be reflected in the approach. An elected official, or a designated representative, is being asked to respond, and that position will not appear appreciated if their travel is not considered. Most of Indian Country is not in proximity to a large airport or metropolitan area, and the leaders may feel trepidation being far from the members that rely on them.

As intended, a consultation should yield useful information, foster government-to-government interactions, and improve decision-making by mutual respect and responsiveness. Whether accountability and transparency, the help of tribal liaisons, or more legal framing is needed shall be determined by future study, court hearings, and policy response. Inviting a larger number of stakeholders, facilitating the time and place of communication, and continuing the conversation during all phases of the process would

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[202] Alexis, "On the Tongue River Railroad – 'None of You Would Be Here if the Bottom Line Wasn't Money," *East of Billings* (blog), April 29, 2014, http://www.eastofbillings.com/on-the-tongue-river-railroad-none-of-you-would-be-here-if-the-bottom-line-wasnt-money/.

[203] Rowe, Finley and Baldwin, "Accountability."

[204] Rowe, Finley and Baldwin.

undoubtedly improve the results for both sides, but would require time, effort and willingness.

Cultural justice is another concern regarding tribal relations. It is defined "as the fair treatment and meaningful involvement of all people with respect to the implementation of laws and policies intended to protect and preserve cultural artifacts, including archaeological resource and affiliated cultural sites."[205] An article from the National Indian Law Library describes the process "as 'stop, look, and listen' laws—they do not mandate or forbid particular actions, but they do require that agencies make informed decisions."[206] The weakness of these well-intended policies is their lack of teeth to enforce the participation of agencies and the slippery complication of how much interaction with the tribes is sufficient. It is another name with a slightly different connotation, but ultimately covers the same elements as consultation. Once someone realizes that a tribe or group of tribes could face potential impact by a policy or action, that person should follow outlined procedures to discuss the implications together before proceeding. It makes for better neighbors and improved end products, especially in something such as homeland security, which demands the involvement of all stakeholders.

B. FINANCES

To effectively integrate into the larger homeland security framework, and the underlying processes headed up by FEMA, the tribes need money to allocate. These programs all require staff, supplies, and support. "The current public safety crisis in many tribal communities is the result of decades of gross underfunding for tribal criminal justice systems; a uniquely complex jurisdictional scheme that keeps tribal governments from being able to fully police their lands; and a centuries-old failure by the federal government to fulfill its public safety obligations on tribal lands."[207] Although the need is higher for additional support of tribal nations, who lack tax bases to draw from, the figures reflect the

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[205] Rowe, Finley, and Baldwin, 7.

[206] Rowe, Finley and Baldwin, 10.

[207] "2017 Policy Update," National Congress of American Indians, accessed September 22, 2018, www.ncai.org/attachments/PolicyPaper_zZTmwUgiMOBFwXQKgNIDMPzHsGLyRoEArzrzjCwRJtJznxBGJFJ_Annual%20Policy%20Update%202017%20-%20Final%2010.13.pdf.

opposite. According to current figures, the money allocated to states and tribes works out to $26.24 for state citizens and only $3.41 for each tribal citizen.[208] How can the tribes be expected to do so much more when given so much less?

Another financial burden is the cost sharing of a presidential disaster declaration. The tribes are expected to contribute 25 percent of the funding for the response, which can be a prohibitive amount. The governor of the Santa Clara Pueblo of New Mexico, a tribe that received five declarations in five years due to fires and resulting floods, admitted that the declarations "have been a significant financial burden. The matching funds requirement has drained the Pueblo's financial resources."[209] If a vulnerable tribe such as this exhausts funding for emergency management efforts, yet still faces the risks, what can it do to prepare for, mitigate, respond to, or recover from the next event? The temptation might be to resist the declaration next time, but that affects not only the tribe but also the surrounding areas. The federal government is responsible for providing support, but the system as it exists now fails to support the tribal governments. Tribes cannot afford the assistance, but neither can they afford the resources to manage the response on their own. Policies need to address, and possibly waive, the cost-sharing for tribes. If a declaration is made when the tribal resources are overwhelmed, that should be the point where the federal government picks up the difference. The tribal government cannot be negligent previous to this, but if it has sought to mitigate and prepare for possible threats, those efforts should be recognized as contributing to the financial offset. Perhaps this acknowledgment would encourage more tribes to invest the time toward designing plans and training for preparedness, unlike now, when stories of resulting financial hardship repel tribes from participating in federal assistance programs.

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[208] National Congress of American Indians, "Investing in Indian County for a Stronger America," (report, National Congress of American Indians, 2018), 37, www.ncai.org/FY2018-NCAI-Budget-Request2.pdf.

[209] Chavarria, *Emergency Management in Indian Country*, 6.

C. CLEARLY DEFINED OBLIGATIONS

What tribes and the federal government expect from each other must be clearly defined. The United States cannot simply impose policy on the tribal nations. That tactic not only violates tribal sovereignty but it might be impossible for tribes to meet the implied obligations either financially, logistically, or politically. Tribes have shown a willingness to work with the federal government if they can receive the support needed and expected. Following the SRIA implementation, the Navajo Nation proclaimed, "The passage of this bill is a welcoming sign of the blossoming recognition nationally of the sovereignty of the Navajo Nation as a co-equal government within the United States."[210] Speaking to the Committee on Indian Affairs, the Chairman of the All Pueblo Council of Governors said,

> We look forward to working with the new Administration to collectively tailor an approach that recognizes and acknowledges tribal sovereignty, assures a continuous government to government relationship, allows tribal economies to achieve their full economic potential, in respectful of traditional belief systems and draws on the intellectual capacity, talent and contributions of Pueblo People to the growth and development of this great country.[211]

This statement shows an understanding of the process of balancing expectations with respect and flexibility. Some concessions and compromise will be necessary from both sides for a unifying plan to emerge. FEMA office of Response and Recovery Deputy Associate Administrator Zimmerman observes that "inclusion of Tribal Nations is an essential component of FEMA's whole community emergency management strategy."[212] She goes on to say, "FEMA recognizes that the consistent participation and partnership of tribal governments is vital in helping FEMA achieve its mission."[213] It is also vital to the

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[210] Jared King, "Bipartisan Disaster Relief Bill Approved: Tribes to be Treated Like States, Navajo President Encouraged," Navajo Nation Washington Office, January 19, 2013, http://nnwo.org/content/bipartisan-disaster-relief-bill-approved.

[211] Paul Torres, "Identifying Indian Affairs Priorities for the Trump Administration," Senate Committee on Indian Affairs Oversight Meeting (March 8, 2017) (written testimony of Paul Torres), 1, https://www.indian.senate.gov/sites/default/files/upload/3.8.17%20Paul%20Torres%20Testimony.pdf.

[212] Zimmerman, *When Catastrophe Strikes*.

[213] Zimmerman.

tribe's safety and security that these practices are maintained—just as it is critical to the safety and security of our nation as a whole.

The importance of communicating to understand the nuances of tribal culture cannot be underestimated. When discussing the emergency management concerns of most neighborhoods, it is common to think in terms of protected lives, clearly delineated property lines, and secured infrastructure. For tribes, the land, the family, the history, the culture, the hunting, the herbal support, the elders, the ceremonial sites, the burial grounds, the social structure, the leadership, the educational, governmental, and economic support all happen within that one area. The connection is deeply rooted—beyond what average Americans feel about their houses. Whether this area has been the same land inhabited for tens of thousands of years or has become the refuge after being forced from their land during our shared time here, the land is more than acreage and lot lines. It is tied to the individual and group identity. This distinction is not only important during emergency response but also during planning and mitigation phases. An open field may not appear that important from a threat perspective, but if that is the only place for hundreds of miles where a certain ceremonial sage grows, it has incalculable value beyond the obvious. A cultural sensitivity of other government officials and emergency support needs to be addressed as well. This consensus needs to occur before a disaster hits so the trust relationship can exist and serve as a foundation. Those dynamics cannot be built in a time of panic and despair between entities with centuries of animosity and tension.

D. CONCLUSION

To improve the relationship between tribal nations and the federal government—for the purpose of strengthening homeland security—the first step is improving tribal preparedness. This sets the baseline and integrates the tribal nations into a dynamic framework. Respect for tribal sovereignty and an acceptance and admission of the importance of tribal leadership must occur at this foundational level. Further growth will include consultation, collaboration, a response to the financial challenges, and a clearly defined set of responsibilities and obligations for both parties.

Addressing this gap in homeland security, progression must proceed from the basic to more complex needs. As stated in Adam's second piece following SRIA, "building on the momentum of the Stafford Act amendments, Congress should also amend the Homeland Security Act to elevate the standing of tribes within the paradigm of national security."[214] Tribal homeland security concerns will admittedly require more attention to the complicated realms of jurisdiction since by virtue of sovereignty, a solution "must necessarily address the issue of criminal and civil jurisdiction over both Indians and non-Indians, a long-standing point of contention in federal Indian law and policy."[215] Just as preparedness is the logical first step for further inclusion into homeland security, so is the re-evaluation of the limiting wording of the Homeland Security Act the next essential step in the process to tighten homeland security practices.

[214] Adams, "Sovereignty, Safety, and Sandy," 376.

[215] Adams, 386.

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