VAWA at a Crossroads: the Constitutionality of Tribal Jurisdiction over non-Indians from the Perspective of the Women Jurisdiction Protects

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"Sovereignty and safety are hand and glove. The sovereignty of Indian Tribes is connected to the safety of Native women. This connection is the natural relationship of a People to their nation. It is also the natural relationship of a government to protect and safeguard the lives of its citizens."

Terri Henry, Eastern Band of Cherokee Indians Secretary of State & Co-Chair of NCAI Task Force on Violence Against Indigenous Women

WOMEN: THE FOUNDATION OF SOVEREIGNTY

The Nation shall be strong so long as the hearts of the women are not on the ground.
TSISTSISTAS (CHEYENNE)

The Voices of our Native Women Survivors brought us restored jurisdiction in VAWA 2013

VAWA 2013: A PARTIAL OVERTURN OF *OLIPHANT*-

- In 2013, Congress re-authorized the Violence Against Women Act with a tribal jurisdiction provisions (section 904) that restores a portion of the tribal jurisdiction that *Oliphant* erased.
- Specifically, VAWA 2013 restores tribal criminal jurisdiction over: (1) domestic violence; (2) dating violence; and (3) violation of protection orders.
- Because of *Oliphant*, Tribes are without jurisdiction to prosecute all other non-Indian crimes.

VAWA SOVEREIGNTY INITIATIVE

- The NIWRC and Pipestem Law have joined forces to establish the VAWA Sovereignty Initiative (VSI)
- VSI is a national project focusing on the defense of the constitutionality and functionality of all VAWA tribal provisions.
- VSI is an important step forward in defending the VAWA tribal legislative victories and other important advancements in federal law and policy related to the protection of Native women and children.
- Under the VSI:
  - an amicus brief was filed in the *Dollar General* case and the Quilt Walk for Justice was organized on the day of oral arguments.
  - Amicus briefs were also filed in *Voisine v. United States* and *United States v. Bryant*.
  - Amicus brief will be filed in support of Standing Rock.

THE *DOLLAR GENERAL* CASE

- Dollar General asked the Supreme Court to reach "the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*" (Pet'r's Br. 24 (citations omitted).
- The Fifth Circuit Court of Appeals upheld Mississippi Choctaw Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation based on the contractual relationship between the store owned by Dollar General and the Mississippi Band of Choctaw Indians.
- The store is located on tribal trust land leased to the non-Indian corporation (Dollar General) and the store agreed to participate in a youth job-training program operated by the Tribe.
- A young tribal member who participated in the program was sexually assaulted by the store manager during the course of his employment. Following his assault, he and his parents brought an action against the corporation in Tribal Court.
- The Petitioners' argued that the Tribal Court cannot adjudicate the sexual assault tort case because the defendant is non-Indian. However, because the sexual assault took place on tribal land, the tribe maintains its position that the tribal court is the appropriate forum.

Dollar General Corporation v. Mississippi Band of Choctaw Indians (2016)

- Pipestem Law co-authored amicus brief with Sarah Deer on behalf of NIWRC and 104 organizations working to end violence against women.
- 4-4 tie: affirmed the 2014 Fifth Circuit ruling, which constitutes a victory for Tribal Nations
- Dollar General must now litigate the case in Tribal Court on the merits.

United States v. Bryant

- NIWRC filed an amicus brief to support the United States' position, specifically, to make clear that Congress did not intend to make the application of the Habitual Offender Provision dependent on whether the defendant in the underlying tribal court DV conviction received assistance of counsel.
- Thus, NIWRC advocated that federal courts have no authority to dictate to Tribal Governments how they will treat their own members in their own Tribal Courts. Tribal Governments, like all other sovereign governments, know best how to balance the rights of their women to be free from domestic violence with the rights of the accused perpetrators to be treated fairly and afforded due process. Nothing in the United States Constitution provides the U.S. federal courts with the authority to determine how Tribal Governments will adjudicate disputes that fall exclusively between tribal citizens.
- NIWRC's brief also covered the extensive and important legislative history behind the enactment of the Habitual Offender Provision. DV is a pattern of violence that typically escalates over time in severity and frequency. Native women under federal jurisdiction however did not have this protection so the movement organized nationally to pass the Habitual Offender Provision as part of the Safety for Indian Women Title of VAWA in 2005.

United States v. Bryant

- Unanimous outcome, 8-0 decision authored by Justice Ginsburg upholding tribal sovereignty and safety for Native women.
- Supreme Court upheld prior Tribal Court convictions as basis for federal convictions under VAWA § 117(A) for repeat domestic violence offenders
- Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a §117(a) prosecution does not violate the Constitution.
- The Supreme Court acknowledged the extraordinarily high rates of domestic violence Native women experience, and that as a result of the tribal, state, and federal criminal jurisdictional patchwork, many repeat abusers fell through the cracks and escaped sentences of any real consequence prior to the enactment of VAWA § 117(a) in 2005.

Voisine v. United States

- Petitioners urged the Supreme Court to overturn the First Circuit's decision and conclude that Congress did not intend for § 922(g)(9)'s firearm prohibition to apply to criminals convicted of reckless domestic violence crimes. According to Petitioners, only those domestic violence crimes that are prosecuted as having been committed "knowingly" or "intentionally" should fall under the ambit of Congress' federal firearm prohibition.
- Tribal Court domestic violence convictions were added to § 922(g)(9)'s firearm prohibition in the 2005 re-authorization of VAWA.
- Five Indian Nations joined NIWRC's amicus brief, including the Confederated Tribes of the Umatilla Indian Reservation, the Eastern Band of Cherokee Indians, the Little Traverse Bay Band of Odawa Indians, the Nottawaseppi Huron Band of the Potawatomi, the Seminole Nation, and the Tulalip Tribes. All five amici Indian Nations have invested substantial resources in order to fully exercise their inherent sovereignty and eradicate domestic violence on tribal lands; indeed, all five amici Indian Nations have implemented the special domestic violence criminal jurisdiction restored in § 904 of the 2013 re-authorization of the Violence Against Women Act ("VAWA"), a provision that recognizes and restores the inherent sovereignty of Tribal Nations to prosecute non-Indians who commit crimes of domestic violence against tribal citizens on tribal lands.
- Eighteen tribal coalitions dedicated to supporting survivors and ending domestic violence in tribal communities across the United States also joined the NIWRC *amicus* brief.

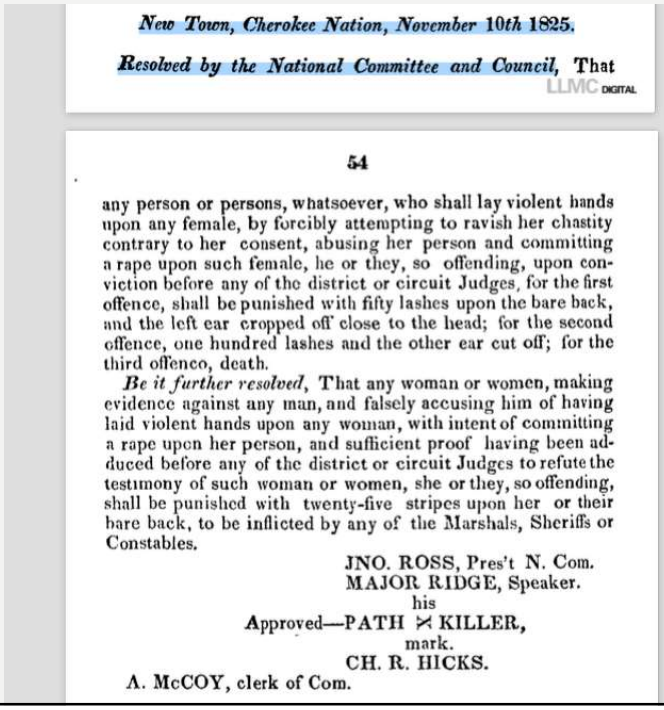
Voisine v. United States

- Affirmed that the federal firearm prohibition, 18 U.S.C. § 922(g)(9), prohibits an individual convicted of a misdemeanor crime of domestic violence from possessing a firearm, regardless of whether the underlying crime of domestic violence was committed with knowing, intentional, or reckless intent.
- The Supreme Court declined to carve reckless convictions out of § 922(g)(9)'s reach. Instead, Justice Kagan, writing for the majority, stated that "Congress's definition of a 'misdemeanor crime of violence' contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly 'uses' force, no less than one who carries out that same action knowingly or intentionally."
- NIWRC's amicus brief noted that, like the majority of States, many Tribal Governments define domestic violence as a crime that may be committed with reckless intent. Many Tribes allow for the prosecution of domestic violence crimes classified as "reckless," thus excluding reckless crimes from the reach of § 922(g)(9) would place a large number of Native women in grave danger.

When will VAWA 2013 be challenged in the Courts?

Art As Legal Remedy: *Sliver of a Full Moon*

- What story are we telling?
- The Supreme Court in *Oliphant*: "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196–97 (1978).
- But Tribal Nations have been exercising jurisdiction over non-Indians since they got lost at sea and landed here



New Town, Cherokee Nation, November 10th 1825.

Resolved by the National Committee and Council, That

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any person or persons, whatsoever, who shall lay violent hands upon any female, by forcibly attempting to ravish her chastity contrary to her consent, abusing her person and committing a rape upon such female, he or they, so offending, upon conviction before any of the district or circuit Judges, for the first offence, shall be punished with fifty lashes upon the bare back, and the left ear cropped off close to the head; for the second offence, one hundred lashes and the other ear cut off; for the third offence, death.

Be it further resolved, That any woman or women, making evidence against any man, and falsely accusing him of having laid violent hands upon any woman, with intent of committing a rape upon her person, and sufficient proof having been adduced before any of the district or circuit Judges to refute the testimony of such woman or women, she or they, so offending, shall be punished with twenty-five stripes upon her or their bare back, to be inflicted by any of the Marshals, Sheriffs or Constables.

JNO. ROSS, Pres't N. Com.
MAJOR RIDGE, Speaker.
his
Approved—PATH ⋈ KILLER,
mark.
CH. R. HICKS.

A. McCOY, clerk of Com.

Worcester v. Georgia: Which Sovereign May Exercise Jurisdiction on Cherokee Nation lands?

- Georgia passed a law making it illegal for any non-Indian to move onto and live on Cherokee lands without taking an oat of allegiance to the Governor of Georgia.
- Reverend Samuel Worcester was arrested and placed in a Georgia jail.
- The Supreme Court considered whether Georgia could exercise criminal jurisdiction over crimes committed on Cherokee lands, or whether Cherokee Nation was the only sovereign that could exercise such jurisdiction.
- "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . ." *Worcester v. State of Ga.*, 31 U.S. 515, 520 (1832).

WORCESTER V. GEORGIA

- "The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832).
- "The only inference to be drawn from them is, that the United States considered the Cherokees as a nation." *Worcester v. State of Ga.*, 31 U.S. 515, 518 (1832).
- The treaties the United States signed with Cherokee Nation "treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States." *Worcester v. State of Ga.*, 31 U.S. 515, 519(1832).

ANDREW JACKSON REACTS TO *WORCESTER V. GEORGIA*

- Andrew Jackson is the only President in United States history to openly defy a Supreme Court decision.
- To my grandfather, John Ridge, he stated: "John Marshall has made his decision, let him enforce it." Andrew Jackson, 1832.
- "They have neither the intelligence, the industry, nor the moral habits, nor the desire of improvement which are essential to any favorable change in their condition. Established in the midst of another and a superior race and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear." Andrew Jackson, 1833.
- Andrew Jackson proceeded to stack the Supreme Court with Justices that vowed to disregard Justice Marshall's ruling in *Worcester* and instead support the constitutionality of Jackson's Indian Removal Act.
- In 1835 Andrew Jackson appointed Roger B. Taney (eventual author of *Dred Scott*) as John Marshall's successor.
- The rest is history.

Oliphant v. Suquamish Indian Tribe (1978)

- 180 years after my grandfather worked with Cherokee Nation's Council to pass a law criminalizing non-Indian and Indian rape of women on Cherokee lands, the Supreme Court declared that Indian Nations could no longer exercise their criminal jurisdiction over non-Indians on tribal lands.
- This decision is known as *Oliphant v. Suquamish Indian Tribe.*
- "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196–97 (1978).
- "'[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.'" *Johnson v. M'ntosh*, 8 Wheat. 543, 574, 5 L.Ed. 681 (1823)." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

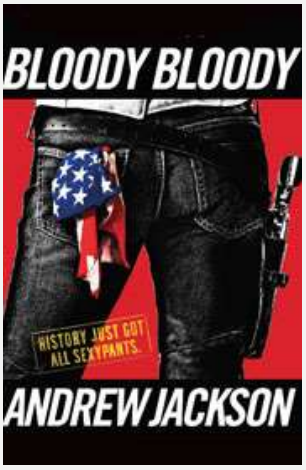
Oliphant Relies on *Johnson v. M'Intosh* (1823)

- "[D]iscovery gave exclusive title to those who made it." *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).
- "Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery." *Johnson v. M'Intosh*, 21 U.S. 543, 576–77 (1823).
- "**Conquest gives a title which the Courts of the conqueror cannot deny**." *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).
- "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823).

Today, Post Oliphant, Native Women Face Highest Rates of Sexual Assault and DV in the U.S.

And yet, our Voices Remain Silenced

- Today, statistics reveal that Americans who go to the theatre are more likely to witness the performance of redface on stage than the performance of Native stories by Native People.



Redface Was Created to Culturally Support Indian Removal & the Destruction of Indian Nations

- Redface, however, is not an authentic story. Instead, it is a false portrayal of Native Peoples—most often performance by non-natives wearing a "native" costume that bears no relation to real Native People. The continued dominant perception that American Indians are the racial stereotypes they see performed on the American stage is devastating to our sovereign right to define our own identity. Of course, that's why it was invented.
- Just as blackface was created in the nineteenth century to support the legalization of the institution of slavery, redface was concurrently created to support the taking of Indian lands and lives. Early examples of redface include non-native performers putting on fake feathers and painting their faces so they can be chased and shot by the heroes of the American story: cowboys. Instead of actual people with intelligent things to say about the desecration of our race, we were portrayed as a silent costume. A form of entertainment. An object to be killed.

Sliver of a Full Moon
Restoration of Sovereignty Thru Storytelling

- As a lawyer, and as a direct descendant of a survivor of genocide, I have committed my life's work to eradicating the harmful stereotypes and false stories this Nation created to justify the "legal" extermination of my people.
- "The play is a tool to change the law. Fear, ignorance and prejudice inspire non-Indians to question 'tribal jurisdiction,'" NAGLE explained. "What I hope to do with the play is to move the ball with respect to public ignorance, especially among law students and faculty. People don't know the status quo and when they find out, they're like, WHAT!?"
- Read more at http://indiancountrytodaymedianetwork.com/2016/04/12/vawa-play-changing-law-one-show-time-164069
- Watch at: https://www.radcliffe.harvard.edu/video/sliver-full-moon-play-reading-and-discussion
- www.sliverofafullmoon.org

SLIVER OF A FULL MOON
RESTORATION OF SOVEREIGNTY THRU STORYTELLING

- This is My Story Clip: https://www.youtube.com/watch?v=YhTqY7PAZ0I
- Start at 19:10
- End at 19:58

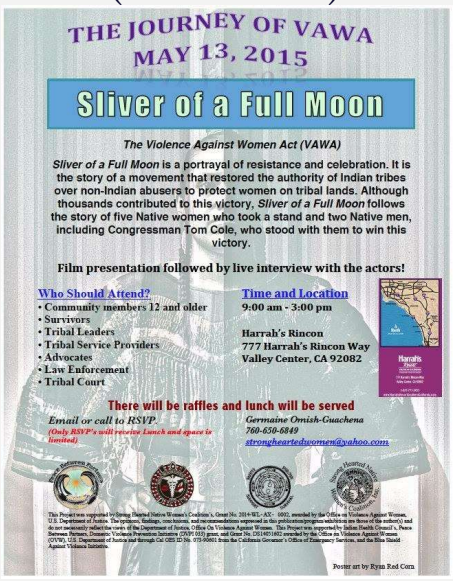
UNITED NATIONS, NEW YORK, NY (SEPTEMBER 2014)

Yale Law School (March 2015)

SLIVER OF A FULL MOON
Education of Oliphant

- Oliphant Clip: https://www.youtube.com/watch?v=YhTqY7PAZ0I
- Start at 1:07:47
- End at 1:11:20

RINCON (MAY 2015)



HARVARD UNIVERSITY (NOVEMBER 2015)

MHA Nation, New Town ND (January 2016)

MHA Nation, New Town ND (January 2016)

MHA TIMES
MANDAN HIDATSA ARIKARA
The People's Paper
Wednesday, January 27, 2016 Volume 28, Number 4 New Town, ND 58763 $1

'Sliver of a Full Moon' sheds light on domestic violence

The cast of "Sliver of a Full Moon." Photo by Tilden Bird.

By Cheryl Cedar Face
MHA Times Editor

The Fort Berthold Coalition Against Violence hosted "Sliver of a Full Moon," a reenactment of 2015's reauthorization of the Violence Against Women Act (VAWA). Told through first-hand accounts of both abuse and redemption, the play sheds light on domestic violence in Indian Country, while also seeking to promote healing through the telling of one's story.

The event, hosted by BJ Brady, was held at the 4 Bears Casino Grand Ballroom on Jan. 20. Speakers from across the state shared their take on the importance of VAWA, and the necessity of protecting Native women.

"Anytime Indian people come together, we make things happen," said North Segment Councilman Ken Hall.

"We all come from humble beginnings," Councilman Hall continued. "We were taught to enjoy life and

Story and more photos continued on pages Pg 8 & 9

TOP NEWS

Editor's Corner
Giving a voice to the voiceless.
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Completion of move in close at hand.
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Tribal members sue State
Voter ID's at the center of the suit.
Page 2

Boxing Tournament
Local boxers compete in the tournament.
Page 7

The MHA Times welcomes back Cedar Spotted Bear

By Cheryl Cedar Face
MHA Times Editor

Cedar Spotted Bear is a member of the Three Affiliated Tribes. She was born in Salt Lake City, and is the daughter of the late Sylvester Spotted Bear and Dolly Grady. She is the granddaughter of Emma Sondlo and Theodore Spotted Bear, and Roger Grady and Phyllis Florea. She previously worked at KMHA for three years, serving as the cultural public affairs coordinator. She is excited to return to the Fort Berthold Communications Enterprise family, and is looking forward to working with the staff. Spotted Bear will serve as a reporter and photographer for the MHA Times.

8 Wednesday, January 27, 2016 MHA TIMES

Continued

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respect one another."

Some speakers focused on the higher rates of sexual assault and domestic violence that Native American women face. 1-in-3 Native women will be raped or abused in her lifetime.

"Everyone has the right to live safe and free from violence," said Linda Thompson, director of the First Nations Women's Alliance. "It's through your stories that others can heal."

"Sliver of a Full Moon" was written by Mary Katherine Nagle, who based the story on interviews conducted with numerous survivors. Many of the cast members acted as themselves, sharing their personal stories with the audience.

"We're speaking for ourselves and for those who can't, and for those who are no longer with us," said Nagle.

The play opened with cast members discussing where they had been when VAWA was reauthorized, relaying the significance of the moment for advocates and survivors alike. The act restored tribal governments' ability to prosecute non-Natives for acts of violence against their members, finally removing a loophole that allowed Native women to be abused without consequence for generations.

Audience members were visibly moved as the cast shared stories of domestic violence. Many included issues involving lack of jurisdiction over non-Native American perpetrators, which allowed many attackers to go unpunished.

"Jurisdiction is a critical building block of sovereignty," said Nagle.

The play closed with the cast again discussing where they had been when VAWA was reauthorized, re-emphasizing the importance the act had for Native American women. Despite the victory, the play drove home one single point: there is still more to do.

Cheyenne Brady, Miss Indian World 2015, expressed it plainly. "Sometimes [violence] is shoved under the rug," she said. "We don't talk about it, but we can work harder to protect our women."

Staying on script. Photos by Tilden Bird.

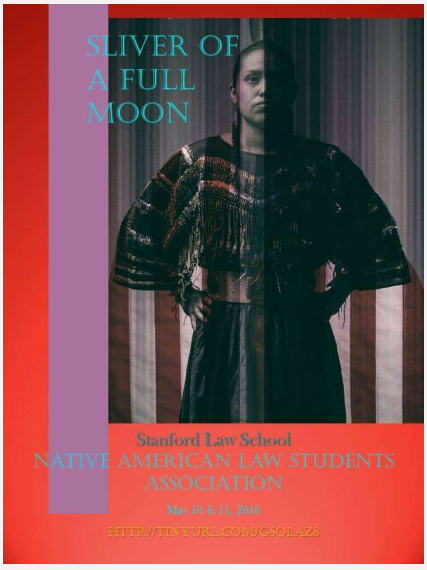
Mary Kathryn Nagle, Diane Millich, Candice Byrd.

IAIA, Santa Fe NM (March 2016)

NYU Law School (April 2016)

Sault Ste. Marie, Michigan (Uniting Three Fires, May 2016)

Stanford Law School (May 2016)



White House United State of Women Smithsonian NMAI (June 2016)

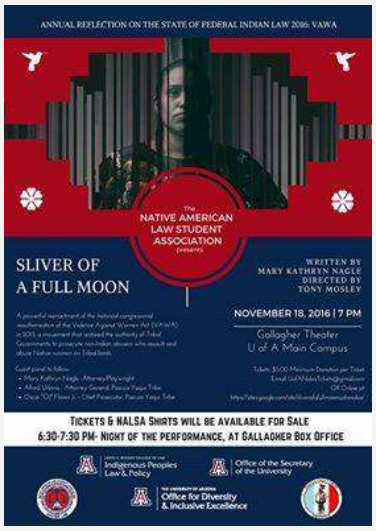
Fairbanks, AK (AFN) (October 2016)

SLIVER OF A FULL MOON
WHY WAS ALASKA LEFT OUT?

- Alaska Clip: https://www.youtube.com/watch?v=YhTqY7PAZ0I
- Start at 1:20:35
- End at 1:24:07

YUROK TRIBE, KLAMATH, CA (NOVEMBER 2016)

University of Arizona Law School (November 2016)



University of Arizona Law School (November 2016)

We Must Tell Our Own Stories

Chairman Dave Archambault, Standing Rock Sioux Tribe's Fight to Protect Water & Sacred Sites from Dakota Access

Statement from Chairman Dave Archambault, Standing Rock Sioux Tribe

- "History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites. . . . Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost."

#StandWithStandingRock #NoDAPL #RezpectOurWater

There's a reason she's called mother earth!

"The land is our Mother, so when we lose value for the land . . . People lose value for the women." Vanessa Grey (Aamjiwnaang First Nation)

The Bakken: Boom in Oil AND Violence

"Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped "man camps" of workers." **U.S. Dep't of Justice Office on Violence Against Women, 2013 Tribal Consultation Report 3 n.2 (2013).**

NIWRC's Amicus Brief

- The NIRWC amicus brief will be co-authored by Mary Kathryn Nagle and Sarah Deer, and will be filed by Pipestem Law P.C.
- The National Indigenous Women's Resource Center (NIWRC) will be filing an amicus brief in the United States District Court, District of Columbia, to support the Standing Rock Sioux Tribe in their fight to stop a pipeline that threatens their water, sacred sites, and ultimately, the health and welfare of their entire Nation.
- We are asking all organizations who joined us in signing onto the Dollar General *amicus* brief to join us now, and sign onto this brief as well.
- **Please sign onto the NIWRC brief by clicking on the link here: https://goo.gl/forms/SgSN2RQ4EPjOcEtP2**

WADO