Federal Update: Untangling the News from the Nonsense

Gregory A. Smith

10th Annual Tribal Leadership Conference: TRANSITIONS

American Indian Law Center

October 1, 2019

Native Issues Before the Congress

- Missing and Murdered Indigenous Women
- NAHASDA reauthorization;
- TLOA reauthorization;
- IHS oversight and reform;
- Crime Victims Fund tribal set-aside;
- Infrastructure
- Tribal-specific legislation;
- General tribal legislation; and
- Indian Affairs oversight.

A Pitched Battle

Fighting for Recognition of Native Values

- Chaco Canyon
- Bears Ears
- Safeguard Tribal Objects
  Of Patrimony (STOP) Act
- Native Language Preservation

Warren – Haaland Proposal

Honoring Promises to Native Nations Act
Deadline—September 30

U.S. Congresswoman Deb Haaland (D-N.M.) and Senator Elizabeth Warrant (D-Mass.) are requesting written input on recently released legislative proposal for the forthcoming bill, the *Honoring Promises to Native Nations Act*. This legislation will address chronic underfunding and barriers to sovereignty in Indian Country and hold the federal government accountable for honoring America's legal promises to Native peoples.

These legal promises—to provide resources for housing, education, health care, self-determination, and public safety—are known as the federal government's 'Trust Responsibility.' While the federal government has substantial trust and treaty obligations to tribal nations, it has repeatedly failed to honor these obligations, leaving many programs affecting Native communities under-resourced and inefficiently structured.

The lawmakers are seeking feedback from tribal governments, tribal organizations, experts, and other stakeholders in advance of the bill's introduction in Congress. The proposal outlines options for legislatively implementing the recommendations of last year's U.S. Commission on Civil Rights (USCCR) report, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, which the lawmakers view as a call to action for the entire U.S. Congress. You can download the proposal at http://warren.senate.gov/HonoringPromises

Please submit input for this forthcoming bill by **September 30, 2019** deadline to:

HonoringPromises@mail.house.gov or HonoringPromises@warren.senate.gov

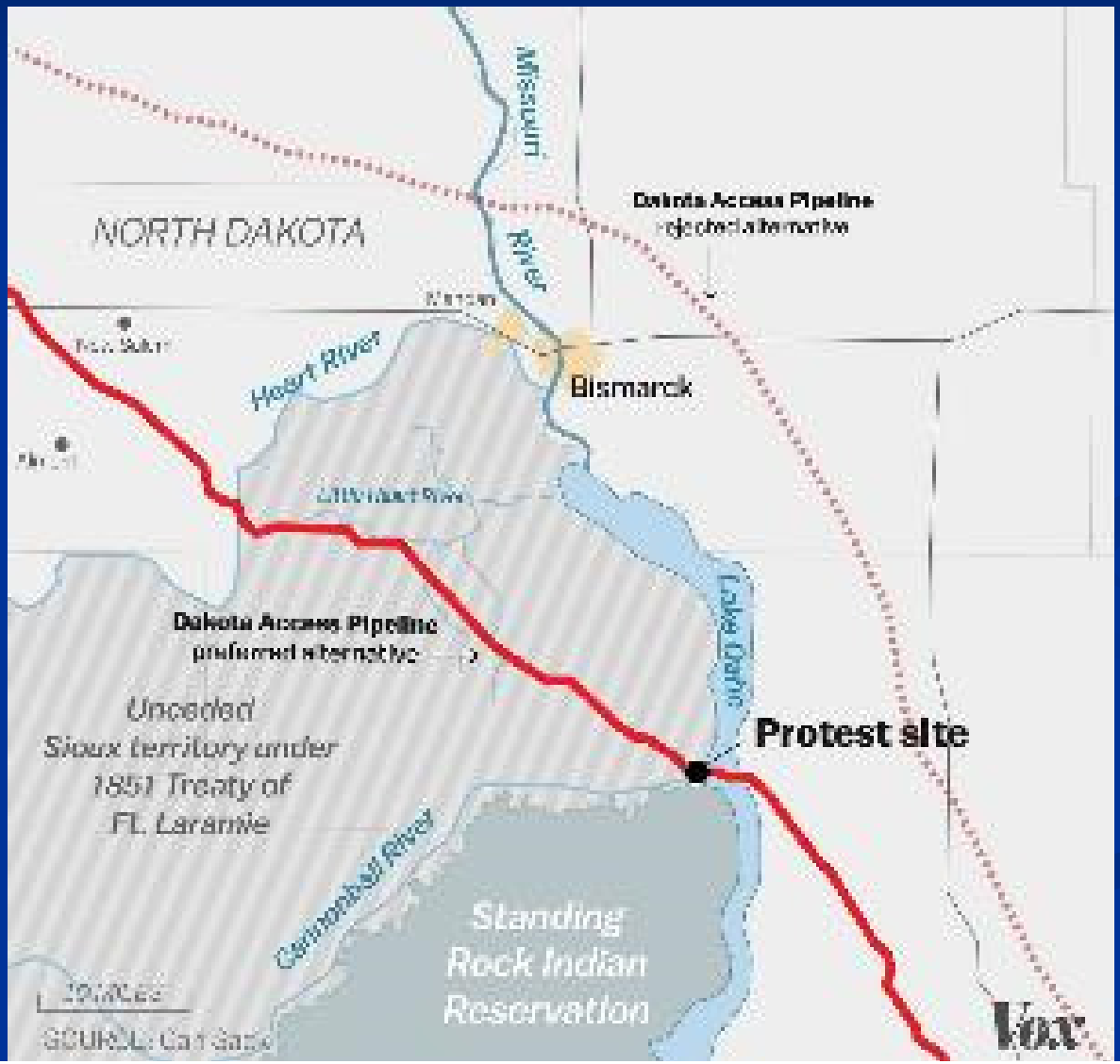
Thank you for your support,

Rep. Deb Haaland & Sen. Elizabeth Warren

Warren-Haaland

- Government-to-Government Relationship
- Health Care
  - IHCIA Implementation
  - Special Diabetes Program for Indians
  - Urban Indian Health Programs
  - Behavioral Health
  - Public Health
- Criminal Justice and Public Safety
- Education
- Housing
- Economic Development

DAPL:
Land Conflicts – Writ Large



Bears Ears

Chaco Canyon

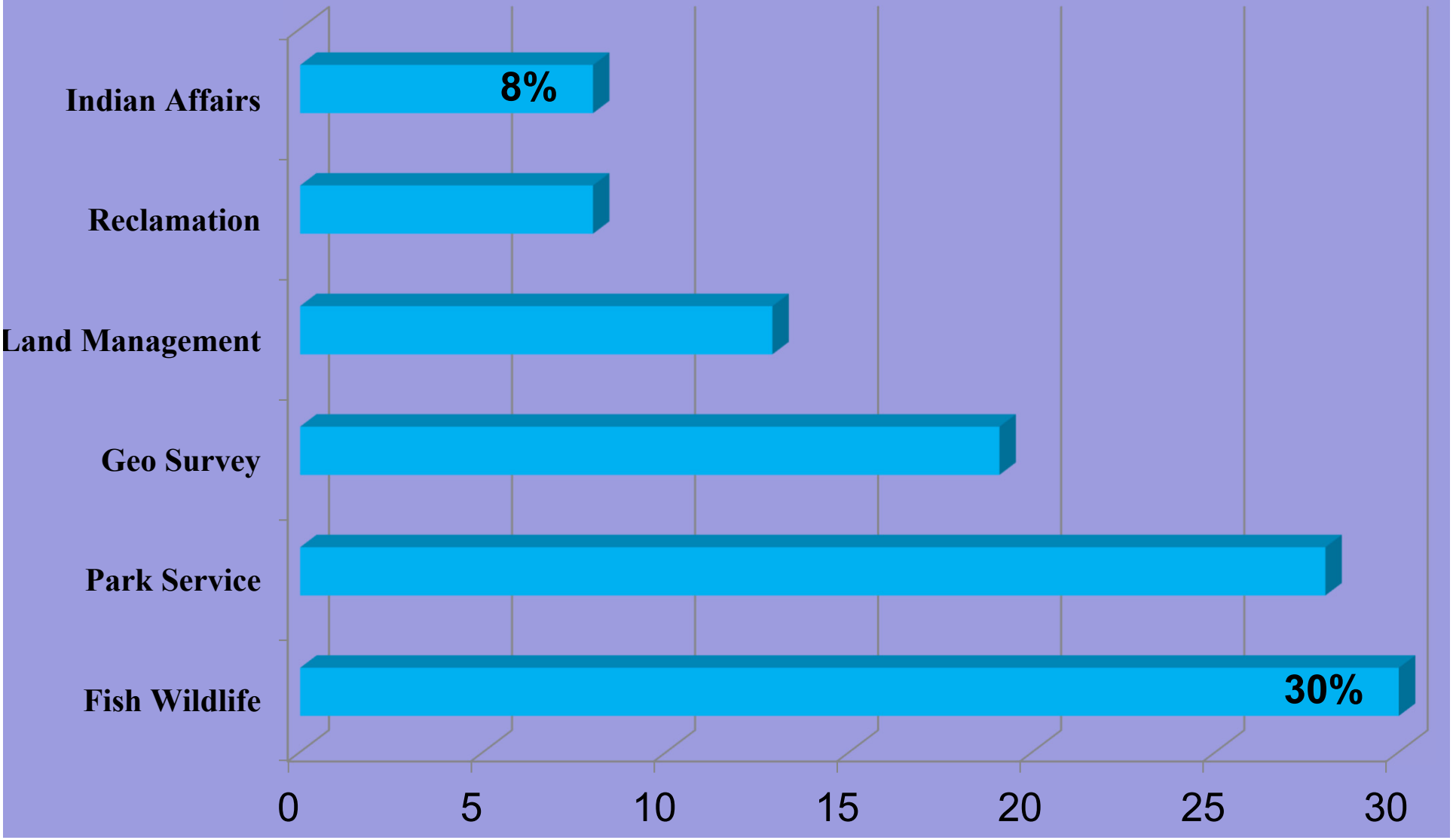
Interior Reverses its Position on Chaco Bill

Land Involuntarily Removed from Trust Status

- Mashpee Land into Trust Reversal
- First involuntary removal since termination
- A bad precedent

President Proposes 12-15% Cuts in Most Indian Programs

BUDGET INCREASES: 6 LARGEST INTERIOR AGENCY FY2004 TO FY2012



US Commission on Civil Rights

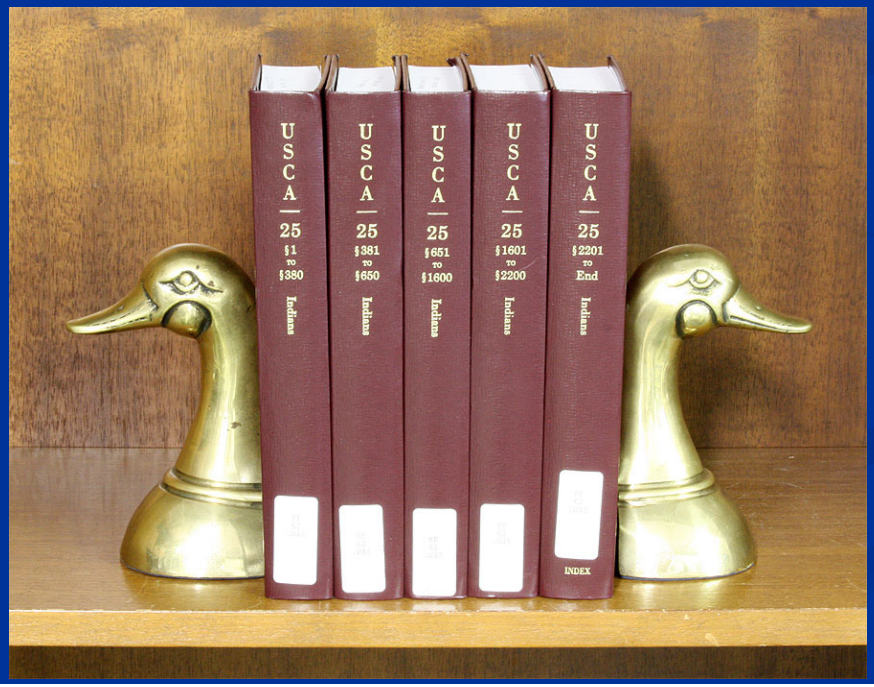
- "Crisis of Conscience: The Broken Promises to Native Americans" (2018 Report)
- "Unfortunately, the Commission's current study reflects that the efforts undertaken by the federal government in the past 15 years have resulted in only minor improvements, at best, for the Native population as a whole. And, in some respects, the U.S. Government has backslid in its treatment of Native Americans, and there is more that must be done compared to when the Commission issued *A Quiet Crisis.* "

Is Federal Indian Law Constitutional?

- Two Federal Court Decisions holding Federal Indian laws unconstitutional:
  - Indian Child Welfare Act, Texas v. Brackeen
  - Indian Health Care Improvement Act, Texas v. United States
- Supreme Court
  - Baby Veronica

Morton v. Mancari

- Morton v. Mancari (rational basis test)
  - Gov't purpose must be "legitimate"
  - Means used must be "rationally related"
  - Political Relationship Between US and Tribes



Indian Child Welfare Act

- Supreme Court in Baby Veronica limits application of the Indian Child Welfare Act
- Four briefs argued that ICWA was unconstitutional.
- The decision, a concurrence and the dissent all referenced the question of whether ICWA was constitutional, although the decision was not decided on that point.

Texas v. Bernhardt

- Judge interested in the **equal protection** arguments.
- Asked Feds what the Supreme Court had meant when it referred in *Adoptive Couple* to possible "equal protection concerns,"
- Asked about language in both *Mancari* and *Cayetano* that seemed to limit the *Mancari* "political classification" principle to on- and near reservation Indians.

- Two Statements by President Trump:
  - Indian Housing Program
  - Indian Contracting Preferences
- Federal Agencies:
  - Center for Medicaid Services
    - Medicaid Expansion – Work Requirements Exemption
    - Raised “civil rights” concerns

Justice Clarence Thomas

U.S. v. Lara, April 19, 2004

- Justice Thomas: "As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases … In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."
- "I do not necessarily agree that the tribes have any residual inherent sovereignty…"
- "I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs . . . And I would be willing to revisit the question."

Violence Against Women Act

- VAWA Tribal Provision
  - Partially Overturns Oliphant Case

VAWA Tribal Provision

- Greatest lobbying triumph for Indian Country in decades
- Tremendous resistance . . . On allegedly constitutional grounds: Senator Kyl: "by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race," the tribal jurisdiction provision "would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process."

Senate Indian Affairs Committee "No" Votes – A Different View of Tribal Sovereignty

- Senator John Barrasso
- Senator John McCain
- Senator John Hoeven
- Senator Deb Fischer

Senate Wing, Built @ 1850s

"The Progress of Civilization"

Juan de Onate, the Last Conquistador, and La Toma

President Reagan

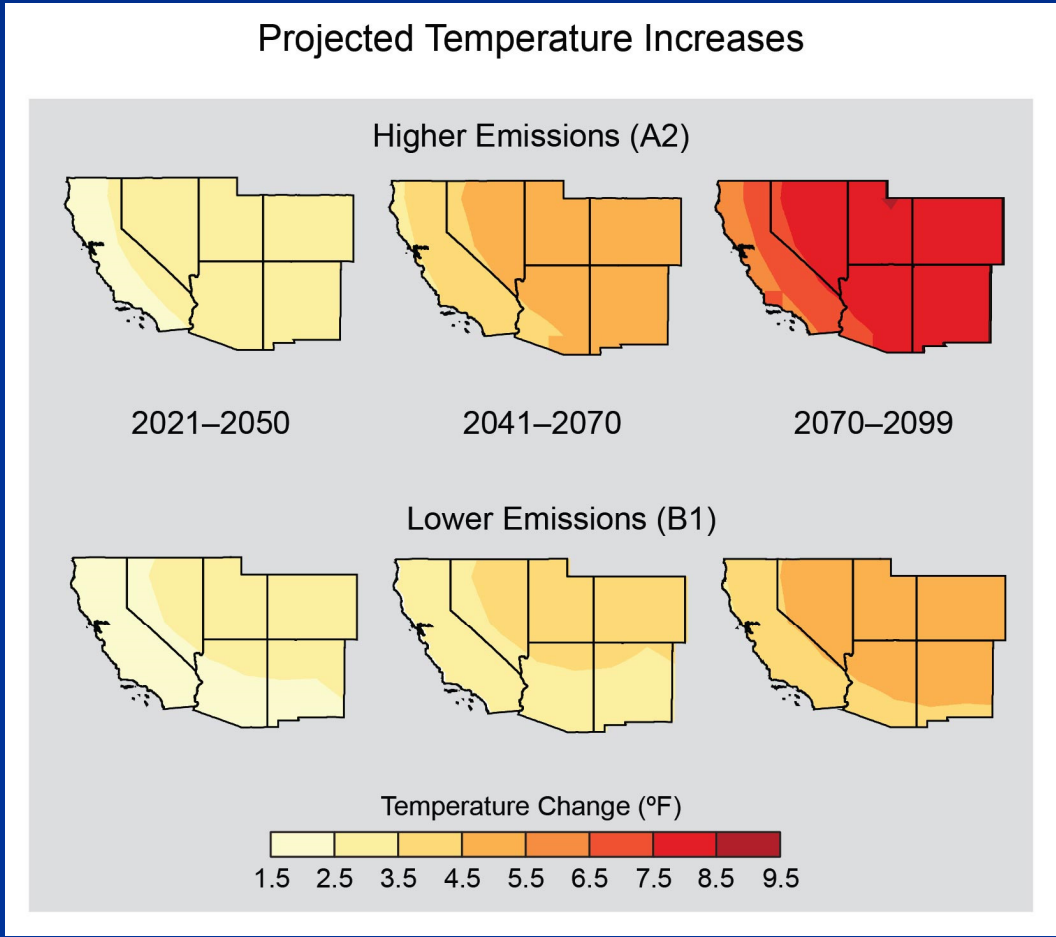
Pres. Bush awarding the Congressional Gold Medal to a Navajo Codetalker

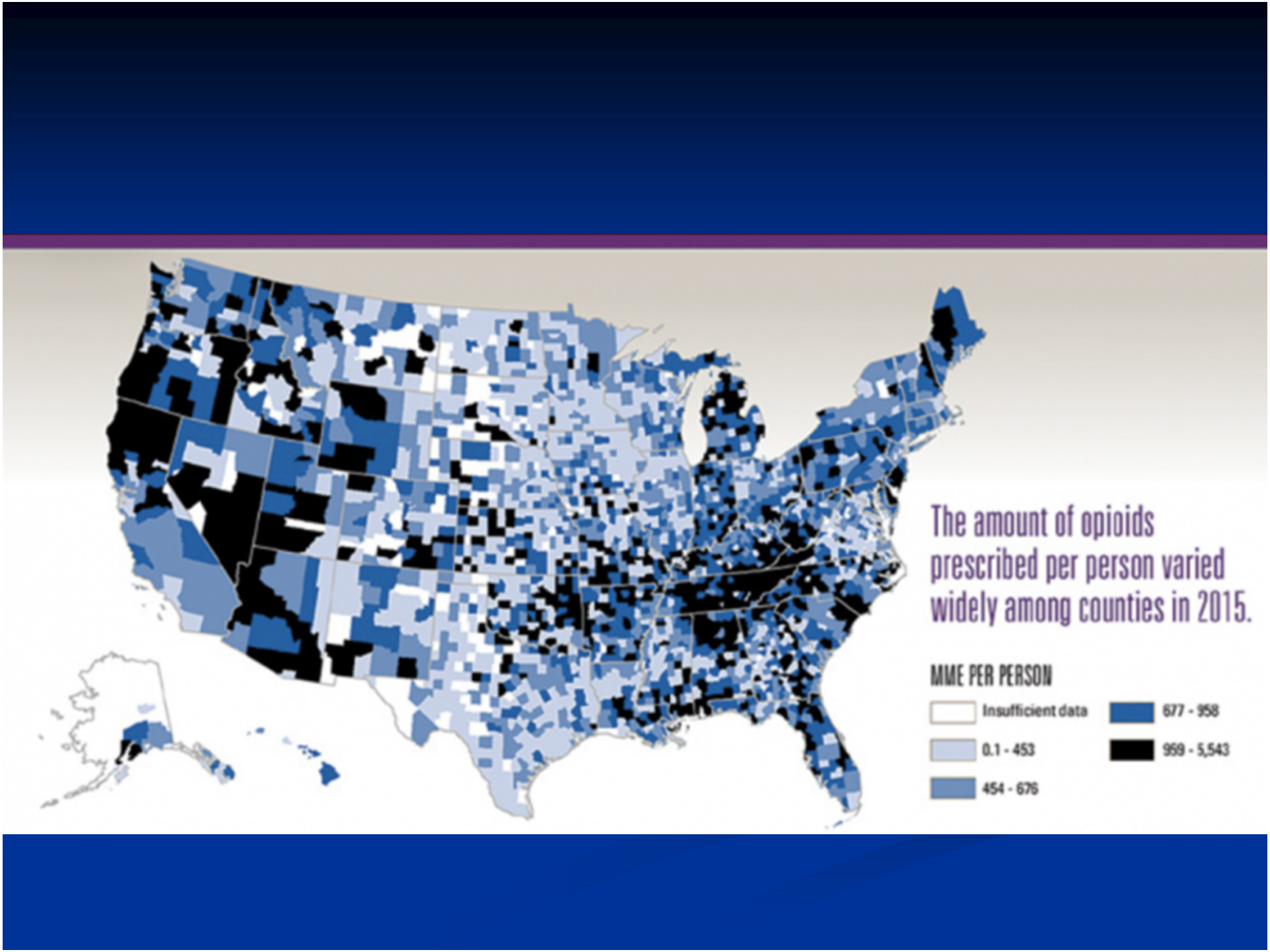
President Bush on "Tribal Sovereignty"

Most Prominent Native Issue Receiving National News Coverage: Pocahontas

White House Codetalkers Event

Climate Change – No Congressional Hearing Between 2012 and 2019




The amount of opioids prescribed per person varied widely among counties in 2015.
MME PER PERSON
Insufficient data
0.1 - 453
454 - 676
677 - 958
959 - 5,543

Studying the Missing and Murdered Indian Crisis Act of 2019

- S.336 — 116th Congress (2019-2020) **:** Sen. Tester, Jon [D-MT] (Introduced 02/05/2019) **Cosponsors:** (4) **Committees:** Senate - Indian Affairs **Latest Action:** Senate - 02/05/2019 Read twice and referred to the Committee on Indian Affairs. (All Actions)

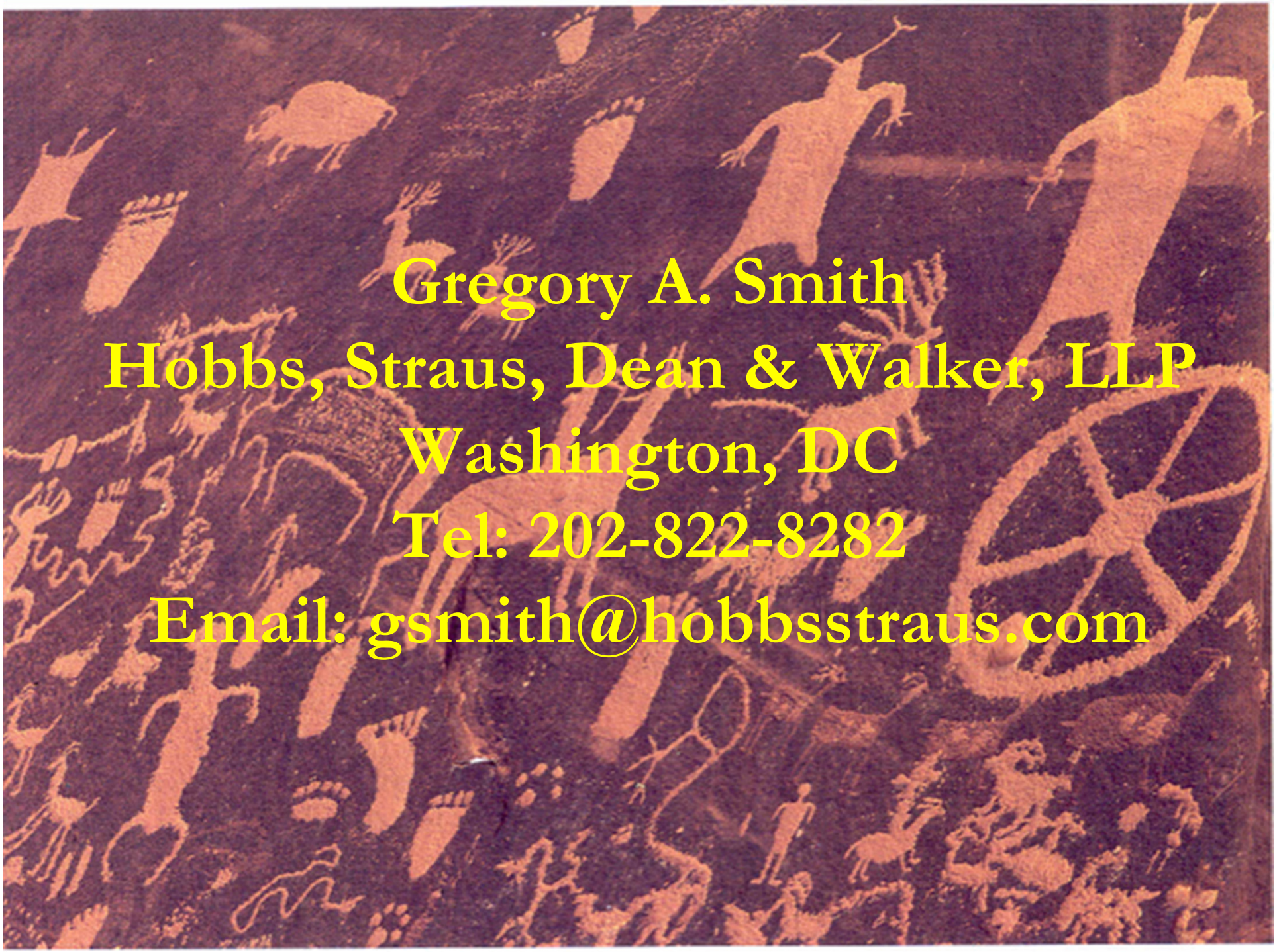
Tribal Labor Sovereignty Act

- Would confirm that Tribal governments, like state, local, and territorial governments determine their own labor practices and are exempt from the National Labor Relations Act

New Mexico's Strong Delegation The Strategically Right Moment

- Senator Udall – Ranking Member on both Senate Committee on Indian Affairs and Senate Interior Appropriations
- Senator Heinrich – Senate Energy Committee (oversight of Interior)
- Cong. Ben Ray Lujan – Deputy Speaker
- Cong. Deb Haaland – Speaking Up; House Indigenous Peoples Subcommittee
- Cong. Torres-Small

Tribal Leaders Defy "Progress of Civilization" Tympanum



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