



**UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS  
LEGISLATIVE HEARING ON “S. 2785, A BILL TO PROTECT NATIVE CHILDREN  
AND PROMOTE PUBLIC SAFETY IN INDIAN COUNTRY;” S. 2916, “A BILL TO  
PROVIDE THAT THE PUEBLO OF SANTA CLARA MAY LEASE FOR 99 YEARS  
CERTAIN RESTRICTED LAND AND FOR OTHER PURPOSES;” AND S. 2920, “THE  
TRIBAL LAW AND ORDER REAUTHORIZATION ACT OF 2016.”**

**WRITTEN TESTIMONY OF THE  
HONORABLE ALFRED L. URBINA,  
ATTORNEY GENERAL, PASCUA YAQUI TRIBE OF ARIZONA**

**May 18, 2016**

Chairman Barrasso and Distinguished Members of the Committee:

Good afternoon, my name is Alfred Urbina, and I currently serve as the Attorney General of the Pascua Yaqui Tribe, a Federally Recognized Tribe from the State of Arizona. On behalf of our Tribal Council and membership, thank you for this opportunity. It is an honor to be here today to provide testimony to the Committee regarding the need for public safety improvement and tribal law and order in Indian Country. I am pleased to offer support for the “Tribal Youth and Community Protection Act of 2016,” and the “Tribal Law and Order Reauthorization Act of 2016.” Both Bills will go a long way to help tribes confront lingering jurisdictional gaps regarding violence against tribal families, help stop the proliferation of illegal drugs, and provide additional tools for cross-jurisdiction cooperation.

First, I would like to thank the Committee and staff for your leadership on these matters. The drafting, passage, and implementation of the “Tribal Law & Order Act of 2010” (TLOA) and the

“Violence Against Women Reauthorization Act of 2013,” (VAWA 2013) is having a positive impact in Indian Country. Recent TLOA and VAWA authority provided measured tools that foster longstanding policies of tribal self-determination and tribal self-governance.

Before expanding on the need for the new proposed legislation, I will talk briefly about the current state of VAWA and TLOA implementation on the Pascua Yaqui Reservation because it provides relevant context to the bipartisan measures brought forward today.

## **THE SUCCESS OF TLOA & VAWA IMPLEMENTATION**

To begin, the strength of the Pascua Yaqui Tribe flows directly from our people. Domestic violence is considered a serious crime against the Tribe, and our families. In enacting the provisions of TLOA and VAWA, the Tribe sought to afford the victims of domestic violence the maximum protection that the law provides. The safety of victims of domestic violence and drug related crimes, especially children, became easier to address through the intervention of Tribal law enforcement, Tribal Special Assistant U.S. Attorneys (SAUSA), and support from our federal partners and Tribal Liaisons.<sup>1</sup>

## **VAWA CASES AND OFFENDERS**

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes to begin exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian perpetrators of domestic violence. On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians,<sup>2</sup> the Pascua Yaqui Tribe obtained the first conviction of a non-Indian, a twenty-six year old Hispanic

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<sup>1</sup> Senior Litigation Counsel and Tribal Liaison, John Joseph Tuchi, 2009-2012 (now United States District Judge-District of Arizona), Tribal Liaison Rui Wang, Assistant U.S. Attorney, District of Arizona.

<sup>2</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

male, for the crime of domestic violence assault committed on the Pascua Yaqui Reservation. Since that time, the Pascua Yaqui Tribe has prosecuted a total of 22 non-Indian cases involving 15 males and 1 non-Indian female involved in 30 VAWA investigations that have thus far resulted in 8 criminal convictions. VAWA cases include crimes of domestic violence and violations of protection orders where 15 tribal females and 2 tribal male were victims. Most of the VAWA perpetrators have extensive criminal records in the State of Arizona.

- Two offenders had active state warrants for their arrests, one for armed robbery out of the State of Oklahoma.
- Four of the cases were serious enough to warrant referrals for federal prosecution.
- On average, VAWA offenders were contacted by Tribal police at least six times before VAWA authority existed on the Pascua Yaqui Reservation and VAWA offenders have been involved in close to 90 Pascua Yaqui police incidents, pre and post VAWA.
- Eleven of the cases involved children in the home. A total of 20 children, all under the age of eleven, were exposed to violence, were victims, or actually reported the crime while it was in progress.
- Three of the VAWA offenders have already reoffended with the same victim, demonstrating a pattern of abusive behavior that we know can be a part of domestic violence relationship dynamics.
- Thirteen (13) of the offenders are of Hispanic descent, two (2) are “Legal Permanent Residents” from Mexico. Two (2) offenders are Caucasian males, four (4) are African-American, one (1) is of Asian descent, and one (1) offender is a lineal tribal descendant who does not qualify for enrollment.
- Thirteen (13) of the incidents involved alcohol or drugs. Ten (10) of the offenders have been previously arrested for cases involving drug use, possession, DUI, or alcohol related offenses.
- Most of the offenders appeared to be unemployed and only two (2) offenders did not have a criminal record in the State of Arizona. Seven of the offenders had previously been arrested for violent crimes, weapons, or threats in the State of Arizona. Two offenders are felons, both having been convicted for Burglary in the State of Arizona.
- Five cases remain open and in 2 cases, tribal warrants have been issued, one post-conviction (probation absconder) and one pre-trial for failure to appear. Seven (7) cases were declined after review.
- Seven (7) cases were dismissed for issues related to the *U.S. v. Castleman* case.<sup>3</sup>

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<sup>3</sup> The Supreme Court issued a decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014) during the Pilot Project for tribal special domestic violence criminal jurisdiction. Both the majority opinion and Justice Scalia’s concurrence included footnotes referencing the definition of the term “domestic violence” under the new federal law, 25 U.S.C. §1304. The discussion of the VAWA statute by the Justices in dicta raised questions about the scope and severity of “violence” required for crimes that can be charged by tribes who have implemented special domestic violence criminal jurisdiction (SDVCJ) under VAWA. Several of the

## **PROBLEMS PERSIST**

Recent and important Tribal justice measures presented some Indian Nations with an opportunity to restore and exercise selected authority to protect their people from crime and violence. However, notwithstanding VAWA, TLOA, and the crime fighting efforts of tribes, there still exists a super storm of injustice that has darkened Indian Country for decades. Today, in 2016, a public safety and public health crisis is still present on most Native American reservations and communities, especially for the villages of our relatives in Alaska. The long-term lack of security for women and children has brought on a “crisis of confidence” in both tribal and federal justice systems. The restoration of authority, new proposed legislation, and enhanced coordination with federal authorities represents a new dawn. Not only are we now able to address human rights abuses perpetuated for decades upon women, but we are also able to do this while guaranteeing the civil rights of the accused. On the other hand, just like when a major storm passes, our community will have to take time to survey the damage, reconcile with victims and families, and rebuild the trust that has been lost. There are shattered homes across our Reservation and across Indian Country. Many men, women, and children will continue to suffer through this storm of injustice. The new legal and jurisdictional framework, while slightly changed, will not work absent the proper funding for tribal courts, victims, and support services. The majority of tribes simply do not have the resources to provide comprehensive changes to their systems or guarantee suitable services for victims and their families.

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tribes who have implemented SDVCJ report that the *Castleman* decision had an immediate impact on their charging decisions. There have been several cases where the tribes felt it could not prosecute based on the dicta in *Castleman* and dismissed the cases only to have the offenders subsequently reoffend with a more serious crime.

## **TRIBAL CONTROL IS THE KEY**

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems. Criminal investigations occur at the local level. Local government is the best government to protect Indian Country's mothers, daughters, sisters and children. Tribes are in the best position to close jurisdictional gaps and safe havens for lawbreakers.

With a self-reported 500 non-Indian community members living on the Pascua Yaqui Reservation and approximately 800 Non-Indians working or attending school on the Pascua Yaqui Reservation, the probability that additional VAWA cases will arise is foreseeable and likely. Hypothetically, given the 20 incidents that occurred during the pilot period, if 500 other federally recognized Indian Tribes had the same authority and averaged 20 incidents, then at least 10,000 crimes of domestic violence across Indian Country could have been investigated, prosecuted, or possibly prevented.

Thank you for the opportunity to appear before you today. I am happy to answer any questions the Committee may have.

## **BACKGROUND INFORMATION**

### **PASCUA YAQUI VAWA IMPLEMENTATION**

On March 7, 2013, VAWA 2013 was signed into law by President Obama. On Jun 26, 2013, the U.S. Attorney for the District of Arizona, John Leonardo, visited the Pascua Yaqui Tribe and toured our court facility. The Tribe expressed an interest in the implementation of Special Domestic Violence Criminal Jurisdiction. On July 09, 2013, the Tribal Chairman submitted a letter to the Department of Justice's, Mr. Tracy Toulou, as a preliminary expression of interest in

exercising SDVCJ and asked to be designated as a participating Tribe. On July 15, 2013, the Pascua Yaqui Tribe was one of approximately 27 federally recognized Indian tribes that timely sent “preliminary expressions of interest” in participating in the Pilot Project. By doing so, tribes expressed an interest in participating in both Phase One and Phase Two of the Pilot Project.

The Department of Justice launched the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG), as part of Phase One of the Pilot Project. The ITWG is a voluntary working group of designated tribal representatives who exchange views, information, and advice, peer to peer, about how tribes may best exercise SDVCJ, combat domestic violence, recognize victims’ rights and safety needs, and safeguard defendants’ rights. Between July, 2013 and December 2013, Tribal representatives participated in a series of teleconferences, participated as panelists, and participated in ITWG in-person meetings.

On December 30, 2013, the Tribe submitted an extensive application to the DOJ to be designated a Pilot Tribe and to start exercising SDVCJ (Phase II).<sup>4</sup> On February 6, 2014, the Tribe received official notice that the Tribe was designated a participating Pilot Tribe authorized to exercise SDVCJ.<sup>5</sup> The Pascua Yaqui Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House.<sup>6</sup> On February 12, 2014, VAWA

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<sup>4</sup> <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf>

<sup>5</sup> <http://www.justice.gov/tribal/docs/letter-to-pascua-yaqui.pdf>

<sup>6</sup> (<http://www.whitehouse.gov/blog/2014/02/06/moving-forward-protect-native-american-women-justice-department-announces-va-wa-2013->), Department of Justice (Attorney General) (<http://www.justice.gov/opa/pr/2014/February/14-ag-126.html>), the U.S. Attorney for the District of Arizona, [http://www.justice.gov/usao/az/press\\_releases/2014/PR\\_02062014\\_Vawa.html](http://www.justice.gov/usao/az/press_releases/2014/PR_02062014_Vawa.html)), and a Pascua Yaqui press release, that was sent to the following Southern Arizona news organizations: Television Stations: KOLD, KVOA, FOX, and KGUN; Newspaper: AZ Daily Star, Explorer News, Wick Publications, and the Tucson Weekly. [http://www.pascuayaqui-nsn.gov/index.php?option=com\\_content&view=article&id=144:pascua-yaqui-tribe-asserts-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence&catid=12:newa](http://www.pascuayaqui-nsn.gov/index.php?option=com_content&view=article&id=144:pascua-yaqui-tribe-asserts-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence&catid=12:newa)

There was also some television coverage in Phoenix via a news video segment available at <http://www.azcentral.com/news/free/20140206tribes-authority-non-indians.html>

Pilot information was posted for notice in the Federal Register by the Department of Justice.<sup>7</sup> Official Tribal notice was sent out via global e-mail to all tribal government and casino enterprise employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6<sup>th</sup>, 2014.<sup>8</sup> On February 10<sup>th</sup>, 2014, the Arizona Daily Star ran a front page story that circulated to 238,000 readers in Southern Arizona, including the City of Tucson. The story was also posted on their online news site. The online AZSTARNET has a reach of 1 million independent views per month and has approximately 12 million page views per month.<sup>9</sup> The Pascua Yaqui press release was shared online through a leading internet Indian Country legal news blog called “Turtle Talk,” it was posted on February 7, 2014.<sup>10</sup>

The Tribe conducted interviews with several news outlets to include, the Arizona Daily Star, the Seattle Times, the L.A. Times, Washington Post, Tucson KVOA television news, Colorlines, Aljazeera, NPR, 91.5 KJZZ, MintPress, the Arizona Daily Wildcat, and Cronkite News.<sup>11</sup> The

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<sup>7</sup> Fed. Reg. Volume 79, Number 29 (Wednesday, February 12, 2014)[[Notices]][Pages 8487-8488] Federal Register Online via the Government Printing Office [www.gpo.gov] [FR Doc No: 2014-03023]

<http://regulations.justia.com/regulations/fedreg/2014/02/12/2014-03023.html> See also 78 Fed. Reg. 71645 (Nov. 29, 2013)

<sup>8</sup> (<http://www.pascuayaqui-nsn.gov/>).

<sup>9</sup> See ([http://azstarnet.com/news/local/pascua-yaqui-gain-added-power-to-prosecute-some-non-indians/article\\_3417ac6e-c683-50d4-9a55-cc386524c468.html](http://azstarnet.com/news/local/pascua-yaqui-gain-added-power-to-prosecute-some-non-indians/article_3417ac6e-c683-50d4-9a55-cc386524c468.html))

<sup>10</sup> (<http://turtletalk.wordpress.com/2014/02/07/pascua-yaqui-press-release-re-vawa-pilot-program-selection/>)

<sup>11</sup> <http://www.kvoa.com/news/domestic-violence-not-tolerated-by-pascua-yaqui-tribe/>),

([http://colorlines.com/archives/2014/02/a\\_small\\_victory\\_for\\_native\\_women.html](http://colorlines.com/archives/2014/02/a_small_victory_for_native_women.html)),

[http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american-](http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american-tribesbeginpilotprogramtoprosecutedomesticviolence.html)

[tribesbeginpilotprogramtoprosecutedomesticviolence.html](http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american-tribesbeginpilotprogramtoprosecutedomesticviolence.html), <http://n.pr/Nei2Mx>, <http://www.nativeamericacalling.com/>,

<http://kjzz.org/content/24088/pascua-yaqui-begins-prosecuting-non-natives-under-vawa>,

[http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-](http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html)

[bf20-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html), [http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-](http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-on-pascua-yaqui-tribe)

[on-pascua-yaqui-tribe](http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-on-pascua-yaqui-tribe), [http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-](http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribe)

[tribe](http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribe) [chanceforjusticeafterdecadesoflegallimbo.html](http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribe), [http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-](http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-indian-tribe-in-suing-non-indians)

[indian-tribe-in-suing-non-indians](http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-indian-tribe-in-suing-non-indians), [http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-](http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-for-domestic-violence/)

[for-domestic-violence/](http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-for-domestic-violence/)

Tucson area news story by KVOA ran on the nightly news on February 23, 2014 and on the morning of February 24, 2014, and was broadcast in the greater Southern Arizona area, to include the City of Tucson and the Pascua Yaqui Reservation.

Recently, after the Tribe started to exercise VAWA SDVCJ, a survey was administered by the Prosecutor's Office. 220 surveys were filled out by community members about VAWA and the Tribe's implementation. Of the 220 people surveyed, 130 respondents thought that DV/family disputes were a big problem. Thirty-six people knew someone who was a victim of domestic violence and the perpetrator was a non-Indian. An additional twenty-seven were the victims of DV and the perpetrator was Indian. An additional thirty-six knew someone who was a victim of DV and the ethnicity of the perpetrator was unknown. Twenty-five had been an actual victim of DV, of those, six were victims of non-Indian perpetrators. 140 respondents had heard of VAWA and 155 had heard of the tribe having VAWA jurisdiction.

## **CHALLENGES**

There have been challenges during Pascua Yaqui's VAWA SDVCJ implementation. For example, on March 26, 2014, the Supreme Court decided *U.S. v. Castleman*.<sup>12</sup> *Castleman* had an immediate impact on the Tribe's criminal charging decisions when evaluating arrests under SDVCJ authority. In the *Castleman* case, James Castleman moved to dismiss his 2008 federal indictment under 18 U. S. C. §922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his 2001 conviction in Tennessee did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force" required by 18 U. S. C. §921(a)(33)(A)(ii).

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<sup>12</sup> *United States v. Castleman*, 134 S. Ct. 1405 (2014).



The Court held that the use of physical force was “satisfied by even the slightest offensive touching.” What is problematic for new SDVCJ cases is that the VAWA defines the term domestic violence as “violence” committed by a current or former spouse or intimate partner of the victim...” 25 U.S. Code § 1304 (a)(2). The federal definition of a “misdemeanor crime of domestic violence” used to determine *Castleman*, will likely be used by federal and tribal courts to establish the charging boundaries under VAWA. The Tribe, like many other jurisdictions commonly charge crimes that arise early in the cycle of domestic violence relationships that may not include an “offensive touching” as an element to the crime, but nonetheless, they are violent and dangerous. These crimes can include Trespassing, Threatening and Intimidation, Tampering with Communications, Burglary, Breaking & Entering, Stalking, Disorderly Conduct, Unlawful Imprisonment, Harassment, Endangerment, Custodial Interference, and Malicious Mischief.

The dynamics and cycle of intimate partner violence is that offenders, in order to maintain power and control, will use escalating abusive and violent behavior against their partner. Over the life of a relationship, aggressive and hostile behavior increases in both frequency and severity. The cycle may end in the eventual separation of the couple, harm to the victim, or even the death of the victim. The Tribe’s ability to address and prevent violent encounters through the limited authority of VAWA SDVCJ appears to be further restricted by the holding in *Castleman*.

## **VAWA FUNDING**

The Pascua Yaqui Tribe is requesting that Congress or the Department of Justice, make sufficient funds directly available to Tribes to properly implement and sustain into the future VAWA, SORNA, and the Tribal Law and Order Act (TLOA), during and beyond the implementation phase. Tribes require permanent funding and access to resources and services that are available to state, county, and municipal governments. Within VAWA 2013, there is

authorization for appropriations of up to \$5,000,000 for each of fiscal years 2014 through 2018 for *participating* tribes that are exercising SDVCJ. The Pascua Yaqui Tribe officially requested a proportional share of the funding for the 2015-2018 fiscal years, in order that we may carry out all of the many responsibilities that we have as a VAWA Pilot Project Tribe, **but the tribe was denied funding.**

Section 904 of VAWA 2013, Public Law 113-4(2013) as codified in 25 U.S.C. 1304(f) allows the Attorney General to award grants to Indian Tribes for the following purposes:

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(A) of title 18, consistent with tribal law and custom.

The Pascua Yaqui Tribe currently expends considerable resources on all of the above programs, through both federal grants as well as significant sums of tribal dollars. The Tribe had two cases

arise that implicated SDVCJ within the first two weeks of implementation and have had a total of 30 VAWA investigations and filed 22 into Tribal Court. Significant resources have been dedicated to the cases. The Tribe would be better able to fund these programs as well as additional programs going forward if monies are appropriated under VAWA 2013, which are intended, pursuant to 25 USC 1304(g) to “supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.” A possible mechanism would be for the Department of Justice OVW Office to develop a Tribal Funding Plan and distribute the funds as tribal set-aside funding which could be added to existing Tribal 638 Contract as a modification. This method would allow the funding to be easily transferred to the Tribe. As such, we respectfully request that Congress or the Department of Justice provide a mechanism for disbursement of any funding provided for in VAWA 2013.

Costs: The implementation of some of the provisions of the Tribal Law & Order Act, and the Violence Against Women Act, have raised costs that have been fully covered by the Tribe, with virtually no additional federal assistance. Through the Office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to over 95% of all persons arrested on the reservation. All VAWA defendants who have been prosecuted have had a public defender or contracted defense attorney appointed at the Tribes expense in their cases to assist them.

## **LESSONS LEARNED**

Some offenders have had a long history of contact with Tribal Police & generally have a State criminal history:

1. NCIC access is required to properly assess who the offender is (DOJ TAP Program).
2. Offenders may have warrants or a history of harming the victim in another jurisdiction.

3. Offenders are using Indian Country to exploit jurisdictional gap and offenders are aware of jurisdictional gap.
4. Victims were reluctant to report DV incidents due to jurisdictional gap and no safety option from Tribal, State, or Federal system (no trust).
5. Difficult DV cases are increasingly difficult in VAWA SDVCJ context.

Multi-jurisdictional environment makes prosecution difficult:

1. Offenders can flee Tribal jurisdiction and Tribal Court process. Tribes may require a State/Tribal IGA/MOU to extradite, ensure comity to tribal court order, and domesticate & execute tribal warrants. Outreach between tribes and surrounding jurisdictions need to occur.
2. Proximity to Mexico raises issues of prosecuting Legal Permanent Residents, or undocumented aliens, must advise Border Patrol upon arrest. There is heightened scrutiny as a conviction can also trigger deportation. Tribes may be required to provide Spanish language court interpreters.
3. The limited nature of jurisdiction & the Supreme Court *Castleman* decision makes cross-deputization and jurisdictional flexibility important. This allows officers to arrest into surrounding State or Federal jurisdictions on ancillary charges (trespassing, drugs, non-victim crimes, etc.).
4. Criminal investigations are more difficult and police officers require additional training. Depending on the facts, an SDVCJ case can have several different matters evolve from one incident (Tribal criminal case, federal case, tribal dependency case, or a state criminal case).
5. Offender can have a state felony or misdemeanor warrants. Coordination, extradition and inter-jurisdictional movement of offenders have to occur.
6. Ethical issues arise if a Defendant is not provided effective assistance of counsel. Public Defenders must have a working knowledge of Indian Law and how to operate in a cross-jurisdictional environment.

Non-Indian offender issues:

1. There is no requirement from the VAWA law to collect offender or victim data.
2. VAWA convictions are not being entered into NCIC, national database (yet).
3. Preliminary profile of PYT VAWA offender is an unemployed male in a long term relationship with a Tribal member, who may have drug or alcohol use history, previous criminal history and previous tribal police contact.
4. Healthcare costs are an issue. Who covers when a non-Indian is in Tribal custody? While in BIA custody? Jail costs & transportation?
5. Indirect costs have increased: Healthcare, case related investigative costs, expert witnesses, mental health evaluations, child welfare matters, ancillary cases, post-conviction costs, additional litigation.
6. Who funds Offender sanctioned classes and programming. There will be a requirement to loop in state services or contract for such services.
7. Equal protection and due process issues may arise, fairness & equal treatment in sentencing, pre-trial release determinations, and jury composition.

8. Composition of jury is difficult when attempting to hail non-Indian jurors and not excluding non-Indian jurors.
9. Non-Indians can be lineal tribal descendants who don't meet blood quantum requirements (1 case for Pascua Yaqui).

TLOA//VAWA authority maximized, gives tribes the flexibility to control crime:

1. The purpose of VAWA Pilot Program was to develop best practices.
2. Exercising integrated authority of TLOA and VAWA through Tribal SAUSAs, Tribal Law enforcement with SLEC cards, NCIC access, and State law enforcement & prosecution authority, provides 360 degree jurisdictional management and complete criminal data intelligence. This provides an opportunity for planning, prevention, and crime control policy creation.
3. Hybrid systems allow for better coordination with DOJ, BIA, and State authorities. The DOJ sponsored Inter-Tribal Working Group (ITWG), SAUSA Program, SLEC Cards, Central Violations Bureau (CVB) citations program, BIA Purpose Code X Program, and the DOJ Tribal Access Program (TAP), provides maximum jurisdictional flexibility for tribal justice systems.
4. The TLOA DOJ Bureau of Prisons (BOP) Pilot program must be reauthorized by Congress and expanded to include VAWA defendants and lower level crimes and convictions involving multi-year sentences related to Domestic Violence.

Victim issues:

1. VAWA victim Profile: Single tribal female with children, unemployed, living in Tribal housing as head of household or in a multi-generational household, in long term relationships with Non-Indian males. (Married, children in common, or residing in same household).
2. VAWA does not include funding for prevention services.
3. Tribal Orders of Protection are not being entered into NCIC, making it difficult to enforce off Reservation.
4. VAWA Offender Tribal Criminal history currently is not being added to NCIC.
5. Women, children, and non-intimate partners living in the household are not being fully protected by VAWA. (Grandparents, elders, cousins, etc.)
6. Many Domestic Violence crimes can't be prosecuted due to *Castleman* issues.
7. Sexual assault by a non-Indian "stranger" who is not in a relationship with the victim is not covered by VAWA 2013.

## **PASCUA YAQUI JUSTICE SYSTEM**

Historically, the Yaqui people have always had some form of law enforcement and dispute resolution, most notably through our ceremonial societies. In 1982, the Tribe adopted a Criminal Code, some parts of our Civil Code, and adopted our Constitution in 1988, all of which helps spell out current Yaqui Law. In addition to our Constitution, our elders, chose to create a Tribal

Court system as the arbiter of Yaqui justice and our forum for the resolution of disputes. Our official formal justice system has been operating in one form or another, for nearly 30 years. Pursuant to its sovereign authority, our Tribal Council also created a law enforcement department and a tribal prosecutor's office as the representatives of the tribe in matters both criminal and civil in nature. The various functions performed by the Office of the Prosecutor, law enforcement, and the Tribal Court, are instrumental in ensuring that the Tribal Council can help guarantee the safety and protection of our people. A sustainable future for our government and people is largely dependent on a robust judiciary and a strong executive arm to enforce the mandates of our Constitution, ensure the protection of the people, and defend individual rights guaranteed by our laws.

In 1978, the Tribe was originally subject to Arizona State jurisdiction under 25 U.S.C. § 1300f(c) and PL280. In 1985, the State of Arizona retroceded criminal & civil jurisdiction.<sup>13</sup> Between 1985 and 1988, the Department of Interior operated the Pascua Yaqui tribal court system through a "Court of Indian Offenses," a "CFR" Court operated by the Bureau of Indian Affairs, (B.I.A.). In 1988, the Tribe took over the Tribal Court from the B.I.A. through a 638 contract.<sup>14</sup>

The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside the B.I.A. officers. In 1998, The Tribe signed a 638 agreement with the B.I.A. to direct its own law enforcement services. In 1997, the Tribe started the Pascua Yaqui Victim Services program. Currently, the Tribe employs twenty-six uniformed patrol officers who are certified by Arizona P.O.S.T as State certified officers and most are federal Special Law Enforcement Commissioned (SLEC) certified officers.

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<sup>13</sup> 50 Fed. Reg. 34,555 (Aug.26, 1985)

<sup>14</sup> Indian Self-Determination and Education Assistance Act, Pub. L. 93-638

Three of the officers are Criminal Investigators. The Tribe also employs a number of Victim advocates.

The Tribe is also served by the Federal Bureau of Investigation (F.B.I.) (Phoenix Division), for assistance with major criminal investigations. In 1993, the Tribe entered into a User Agreement with the Arizona Department of Public Safety (DPS) for limited NCIC<sup>15</sup> and ACJIS<sup>16</sup> criminal information access. In 2005, the Tribe entered into an Intergovernmental Agreement with Pima County to participate in the Pima County Regional Special Weapons and Tactics (SWAT) Team program for police SWAT services. In 2006, the Tribe approved an Intergovernmental Agreement with Arizona DPS for crime laboratory services for the purpose of examining and processing evidence collected during criminal investigations. In 2009, the Tribe entered into an Intergovernmental Agreement (IGA) with the Pima County Sheriff's Department for participation in the Spillman Records Management System and Computer Aided Dispatch System for enhanced access to ACJIS, NCIC, ALETS, NLETS, and MVD databases. In 2010, the Tribe entered into an IGA with Pima County to take part in the Pima County Wireless Integrated Network (PCWIN). PCWIN provides improved public emergency services and regionally coordinated mutual aid.

In 2011, through the American Reinvestment Recovery Act (ARRA), the Tribe constructed a \$21 Million dollar, state-of-the-art multi-purpose justice/court complex. In May of 2012, the Tribe began operating the Pre-Trial Services (PTS) Division of the Tribal Court. Pre-Trial Services has effectively reduced the number of Yaqui defendants being held for pre-trial detention, kept some offenders employed, and monitors offenders in the community who are

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<sup>15</sup> <https://www.fbi.gov/about-us/cjis/ncic>

<sup>16</sup> Arizona Criminal Justice Information System (ACJIS)

released during the pre-trial phase of their case. In 2011, the Tribe, in partnership with the Department of Justice (DOJ) and the U.S. Attorney's Office, appointed tribal prosecutors as federal Special Assistant United States Attorneys (SAUSA). The Tribe was also certified by the DOJ as substantially implementing the Sex Offender Registration and Notification Act (SORNA).

Adult and Juvenile Detention Services are mostly handled by the Bureau of Indian Affairs, (B.I.A.). Adult Tribal inmates, including Non-Indian VAWA defendants, are transported to a private regional B.I.A. contracted detention facility in San Luis, Arizona. On Dec 20, 2013, the BIA began delivering Tribal inmates to the B.I.A. detention Pilot program at Emerald Corporation in San Luis, Arizona. The contracted facility, while located far from the tribal Reservation, is sensitive to tribal detainee needs. The Tribe employs detention officers for short-term tribal detention, booking, transportation, and pre-trial detention needs.

## **DUE PROCESS**

In 1995, the Tribe opened the Pascua Yaqui Public Defenders Office to provide public defense services to indigent tribal members. In 2010, the Tribal Council amended the Pascua Yaqui Court Rules to implement federal amendments to the Indian Civil Rights Act (ICRA)<sup>17</sup>, which was modified by the 2010 Tribal Law & Order Act (TLOA). The 2010 amendment guaranteed tribal members, (including Indians from other tribes) the right to defense counsel at the Tribe's expense if the Tribe seeks any amount of jail time in their criminal cases. On Dec 18, 2013, the Tribal Council passed Ordinance 20-13, the Court Rules Amendments of 2013 to comply with VAWA 2013 implementation requirements. Ordinance 20-13 changed the Tribe's jurisdiction,

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<sup>17</sup> 25 U.S.C. §§ 1301-1304



ensured defense counsel for indigent non-Indian defendants, and changed the composition of the Tribe's jury pool to ensure that a fair cross-section of the community is included in the jury selection process. VAWA contains explicit language that requires tribes choosing to exercising authority under the new provisions, draw people from jury pools that reflect a fair cross-section of the community and do not systematically exclude any distinct group of people, including non-Indian community members.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state or federal court. The original Pascua Yaqui Constitution expressly incorporated the language of the Indian Civil Rights Act (ICRA) for the Tribe's own Bill of Rights. The tribe funds a full-fledged Public Defenders Office with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. Defendants are guaranteed all protections, including an indigent defendant's right to appointed counsel at the expense of the tribe. Our Tribal Court enforces the Indian Civil Rights Act (ICRA), fundamental due process, Tribal common law, U.S. Supreme Court case law, and fundamental human rights.

The right to counsel and due process that are products of American jurisprudence are deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on behalf of the accused. These concepts, teachings, and traditions pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law. As early as 1918, in the United States, the Yaqui formed a quasi-governmental body in charge of the "Yaqui Nation" within the United States, presided over by a "commandante-general" (captain) which is equated to a war chief, (wikoiijaut)

of a Yaqui Pueblo in present day Sonora, Mexico (it can also be equated to the executive branch of government).<sup>18</sup> The Captain was responsible for maintaining order, recruiting a police force, preside over trial courts, and administering punishments. The Yaqui Nation also had a Kovanau, or, in Spanish, gobernador, (governor). The ‘kovanau’s duty was first, to administer the land of the pueblo, and, second, to concern himself in all disputes and difficulties that arose. The war chief presided over “trials” and the ‘Kovanau gathered witnesses for defense and tried to uncover extenuating circumstances.<sup>19</sup> While courts generally enforce individual responsibility for crime and enforce individual rights, Pascua Yaqui historical cultural practices revolve around the principle of collective responsibility arising from a foundational social kinship system. Some concepts of traditional practices and norms included, “Lutu’uria,” which translates to “truth.” The phrase “yo’ora lutu’uria” refers to “elders truth” and the notion of senu noka (one word) was used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism was prominent.<sup>20</sup>

## **DEMOGRAPHICS & STATISTICS**

Approximately 4-5000 people reside on the 2,200 acre Pascua Yaqui Reservation, located in Pima County, Arizona, near the southwestern edge of the City of Tucson. The Reservation is approximately 60 miles north of the United States-Mexico International Border.<sup>21</sup> The Tribe is located near a major metropolitan city, while this is important for business ventures, it can have a negative impact on crime that occurs on the reservation. Crime does not respect borders and the

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<sup>18</sup> Spicer, Edward. Pascua: A Yaqui Village in Arizona, University of Chicago Press, 1940. Reprint: University of Arizona Press, 1984.

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

<sup>20</sup> Via email, Dr. David Delgado Shorter.

<sup>21</sup> The Tribe has more than 19,000 members, many of whom have relatives residing on both sides of the border. Both the Pascua Yaqui Tribe and our Yaqui relatives in Mexico regularly visit each other for religious, cultural, and tribal purposes.

influx of illegal drugs, guns, and wrongdoers from surrounding communities is a major issue that impacts the safety of our community and strains our criminal justice system. Tribal members are exposed to drug smuggling, drug cartels, human traffickers, and gang members. The most recent murder of a tribal member to occur on the Pascua Yaqui Reservation was a shooting that was committed by a non-Indian, Hispanic male.

According to U.S. Census data, Pascua Yaqui Reservation residents include non-Indians and a small number of individuals who are members of other tribes. Nearly 43 percent of all Pascua Yaqui households consist of a mother and children with no father present, making single mother households the most common type of household on the reservation. Approximately 800 Non-Indians work for the Tribal government, work for Tribal casino enterprises, or attend school on the Reservation. The 2010 U.S. Census, estimates that a large percentage of Tribal members on the Reservation live in poverty. Per capita income on the reservation is \$9,039, a third of the per capita income in Pima County (\$25,093) and the State of Arizona (\$25,680). Pascua Yaqui households are four times more likely to receive Food Stamps (49 percent) and eight times more likely to receive public assistance than are residents of the county or state. Nearly forty percent of Pascua Yaqui adults, and forty-two percent of children, live at or below the federal poverty level, more than twice the county and state rates.

The Pascua Yaqui Police responds to approximately 6000 calls for service a year. A percentage of the criminal cases are referred to the Pascua Yaqui Prosecutor's office, the U.S. Attorney, or the Pima County Attorney for possible prosecution. The cases referred are evaluated and the majority are independently charged into tribal court.

- In FY 2011-2012, the Tribal Prosecutor's Office filed a total of 684 cases. Of those, 650 were criminal and 267 were domestic violence cases. 121 cases were declined.
- In FY 2012-2013, the Tribal Prosecutor's Office filed a total of 698 cases. Of those, 600 were criminal matters and 155 cases were declined. A large percentage of the cases involved alcohol and domestic violence.
- In FY 2013-2014, the Tribal Prosecutor's Office filed a total of 934 cases. Of those, 610 were adult criminal matters and 176 cases were declined, (including 3 potential VAWA cases). A large percentage of the cases have been related to alcohol and domestic violence. Our recent VAWA cases increased the number of adult criminal cases filed by 5%.

The Pascua Yaqui Prosecutor's Office also routinely handles criminal extradition cases. In the past few years, the office has extradited murder suspects, sex offenders, burglary suspects, witnesses, and people who were evading justice in other jurisdictions by hiding on our reservation. The Tribe has conducted 30 criminal extraditions in the past few years. Over all we have conducted a total of 65 criminal extraditions, mostly to the State of Arizona through The Pima County Prosecutor's Office, and the Tucson Police Department.

## **CRIMINAL JURISDICTION**

The Pascua Yaqui Pueblo's criminal jurisdiction is divided into three separate prongs: tribal jurisdiction, federal jurisdiction, and state jurisdiction. The court system where a person is prosecuted depends on the accused person's citizenship status, status as an "Indian," and the status of any victims. The determination can be complex. Roughly speaking, the Tribe has jurisdiction over all Indians who commit crimes within the reservation boundaries. The federal government also has jurisdiction over major crimes committed by Indians in our community. The federal government and the State of Arizona, by and large retain jurisdiction over crimes committed by non-Indians on the reservation. However, the Tribe now has criminal jurisdiction pursuant to VAWA 2013 over non-Indians in crimes of domestic violence committed on our

Reservation. In the near future, the Pascua Yaqui Tribe hopes to better coordinate all three prosecution prongs from the reservation. This coordination will ensure that the Tribe can seek better outcomes for victims and be more accountable to the members of our community. For example, four Pascua Yaqui tribal prosecutors now have the opportunity to prosecute reservation based crimes in federal court as Special Assistant United States Attorneys, (SAUSAs). The Tribal Council recently signed a historic agreement with the Arizona U.S. Attorney's Office that allows this to occur.

### **TRIBAL LAW AND ORDER ACT OF 2010**

On September 22, 2010, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Rules of Criminal Procedure and Criminal Court Rules to implement the federal amendment to the Indian Civil Rights Act (ICRA), to benefit from the changes to Indian Country criminal justice by the Tribal Law & Order Act, (TLOA).<sup>22</sup> Prior to the signing of the Act, the Tribal Council and the Office of the Attorney General were actively involved in shaping the federal language and urging our federal representatives to pass the law. For years, the Pascua Yaqui Tribal Council worked to change the status quo and informed Congress and federal officials about our struggles with crime control, safety, and security.

Beginning on October 1, 2010, any Indian accused of a crime, including Indians from other tribes, have had the right to defense counsel at the Tribe's expense, if the Tribe will seek *any* amount of jail time in their criminal cases. Soon, the Tribe will also be able to take advantage of additional authority to sentence criminals up to three years of incarceration per offense, up to a

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<sup>22</sup> <https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20%20Order%20Act%202010.pdf>

maximum total of nine years. At the time, TLOA was the most significant change in federal law affecting Indian Country and the Pascua Yaqui Tribe in close to 40 years. However, in order to benefit from the additional sentencing authority, the Pascua Yaqui Tribe had to amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, and incorporated the provisions as our “Bill of Rights.” Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution limited punishment to one (1) year per offense. On July 24, 2015, the Tribe held an election and removed the sentencing restrictions. In a few months, the Tribal Council will vote to consider changes to the criminal code that will adopt the enhanced sentencing authority found in TLOA.

#### **TRIBAL LAW AND ORDER ACT 2010 IMPLEMENTATION**

The Pascua Yaqui Tribal Prosecutor’s Office and the Office of the Attorney General took lead roles in providing input to federal authorities as they revised the ICRA. The Prosecutor’s office sent a representative to Washington D.C. and Minneapolis, Minnesota, to speak to lawmakers and the U.S. Attorney General to advocate for changes to tribal criminal justice. The Prosecutor’s office also worked closely with the U.S. Attorney’s Office for Arizona to help create an Indian Country framework that was put into practice by the U.S. Attorney to combat crime on Arizona reservations. The Tribe aggressively sought to promote an enhanced coordinated response to crime on reservations. This led directly to a sharp increase in tribal, federal, and state prosecutions for crimes that occur on our reservation. This policy and work will continue and it will hopefully increase the federal prosecution and convictions of those who commit major crimes and prey on our people.

1. **Costs:** The implementation of some of the provisions of the Tribal Law & Order Act, namely, Title III, Section 304, has cost the Tribe approximately \$300,000-\$400,000 a year in additional attorney salaries and benefits by the hiring of 4 full time attorneys (2 prosecutors and 2 defense attorneys), and 4 defense conflict (contract) attorneys.
2. **Representation:** Through the office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to 95% of all Indians and non-Indians arrested on the reservation. Approximately 2.5% of individuals arrested do not qualify for free legal representation and approximately 2.5% waive representation.
3. **Resources and Complexity:** The majority of Pascua Yaqui criminal cases are appointed to the Pascua Yaqui Public Defender's Office. Although the Tribe has hired additional attorneys, there is still a deficiency in resources when considering the resulting complexity of a full adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, additional scientific evidentiary analysis, expert testimony, competency evaluations, and an increase in criminal trials.

#### **PASCUA YAQUI TRIBAL-FEDERAL SAUSA PROGRAM**

Between October 31, 2011 and November 4, 2011, the United States Attorney's Office for the District of Arizona held a week-long course to train prosecutors from several of Arizona's tribal governments so they could participate in the federal prosecution of offenders from their communities. The training kicked off the U.S. Attorney's Office Tribal Special Assistant United States Attorney (SAUSA) program.<sup>23</sup> This cross-commissioning is encouraged by the Tribal Law and Order Act and mandated by the District of Arizona's Operational Plan for Public Safety in Indian Country. The goal of the Tribal SAUSA program is to train eligible tribal prosecutors in federal law, procedure, and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court, or both if necessary. The program also allows the tribal prosecutors to co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities.

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<sup>23</sup> <https://www.justice.gov/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning>

After completing training, each tribal SAUSA is mentored by an experienced federal prosecutor assigned to the District of Arizona's Violent Crime Section.

## **SAUSA PROGRAM IMPLEMENTATION**

The early phase of implementing the SAUSA program has focused on coordination of cases through federal/tribal Multidisciplinary Team Meetings (MDT), advancing the timeline for presentation of cases for federal prosecution, and improving coordination and management of cases between Tribal and Federal authorities. Special attention is given to cases involving violent crimes, sex crimes, and habitual domestic violence offenders, even in cases where the Defendant is a non-Indian. The tribal program has been in operation since 2011. The U.S. Attorney's Office has been diligent in working cooperatively with the assigned tribal SAUSA and the Tribal Prosecutor's Office.

A primary challenge has become coordinating time and scheduling. The Tribal SAUSA has a full criminal case load with the Pascua Yaqui Prosecutor's Office in addition to the evaluation, follow-up, and assisting with the prosecution of cases at the federal level. As the program continues, it may be helpful for the SAUSAs to have dedicated support staff to help with logistics, coordination of calendars, and case management. Communication, coordination, and cooperation has been enhanced with several different agencies responsible for law enforcement on the Pascua Yaqui Reservation, to include, the U.S. Attorney's Office (Tucson), the F.B.I., tribal Law Enforcement, and federal victim services. Cases are being filed, reopened, and appropriate cases are being declined after thorough review and coordinated follow-up investigations. Tribal criminal investigators, F.B.I. agents, and crime labs are working closely



together to bring strong tribal and federal investigations. Defendants are being transferred and transported to tribal court and federal court via writ and arrest warrants. The charging and prosecution of federal crimes committed on the Pascua Yaqui Reservation has increased exponentially due to the SAUSA program and enhanced local MDT meetings. Although federal prosecution is not the ultimate answer to social problems in our community, the Pascua Yaqui Tribe will continue to work with our federal partners to develop a coordinated crime control policy for our community.

### **ADAM WALSH SEX OFFENDER REGISTRATION AND NOTIFICATION (SORNA)**

The Tribe has recently enacted the Adam Walsh Sex Offender Registration and Notification Act (SORNA).<sup>24</sup> The Prosecutor's Office is working with the Tribal Council, Attorney General, and Law Enforcement to completely implement the new law. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification to the Tribal community. SORNA aims to close potential gaps and loopholes that existed under prior law and strengthens the nationwide network of sex offender registration and notification programs. The Pascua Yaqui Tribe has substantially implemented SORNA and is registering, monitoring, and informing the community about the presence of twenty-four (24) registered sex offenders who are living on the Reservation.

### **OFFICE OF THE PROSECUTOR**

The Prosecutor's Office performs several different functions for the Pascua Yaqui Tribe. The Office is responsible for representing our government in Tribal Court in all misdemeanor and felony type criminal matters, including adult and juvenile crimes. The Pascua Yaqui Police

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<sup>24</sup> <http://pascuayaqui.nsopw.gov/Home.aspx>

respond to approximately 6000 calls for service a year. A large percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The cases are evaluated and many are independently charged into tribal court. The Tribal Prosecutor also represents the tribe in civil related matters, to include civil forfeiture of property used in the transportation or sale of narcotics and all civil Child Welfare/Child Dependency matters that originate on the Reservation. The Prosecutor's office advises, coordinates, and collaborates with Pascua Yaqui Law Enforcement, Pre-Trial Services, Probation, Victim Services, Centered Spirit, Education, and Social Services. The Tribal Prosecutor's Office also handles victim notification in criminal cases. Victims are notified about the status of their case, the release conditions involving the defendant, plea agreements, provided transportation if needed, and advised of the terms of any sentence imposed by the court.

#### **DEPARTMENT OF JUSTICE INDIAN COUNTRY LEGAL FELLOW**

On Thursday, December 4, 2014, the Department of Justice selected the First ever Indian Country Justice fellow Charisse Arce, of Bristol Bay, Alaska, to serve in the District of Arizona.<sup>25</sup> Arce will also serve a portion of her appointment in the Pascua Yaqui tribal prosecutor's office. This is the first Gaye L. Tenoso Indian Country Fellowship within the Attorney General's Honors Program, and it is awarded to an extraordinarily well-qualified new attorney with a deep interest in and enthusiasm for improving public safety in tribal communities.

"The Pascua Yaqui Tribe is pleased to have the opportunity to partner with the District of Arizona U.S. Attorney's Office and the Attorney General's Honors Program, through the Gaye L. Tenoso Indian Country Fellowship," said Pascua Yaqui Tribal Chairman Peter Yucupicio.

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<sup>25</sup> <https://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship>

“We welcome the new Department of Justice fellow and look forward to a productive partnership as we fight violent crime, work to keep our community safe, and continue to implement the Violence Against Women Act (VAWA), and Special Domestic Violence Criminal Jurisdiction (SDVCJ).”

### **ACCESS TO NATIONAL CRIMINAL INFORMATION DATABASES**

On November 5, 2015, the Department of Justice announced that the Pascua Yaqui Tribe would participate in the initial User Feedback Phase of the Tribal Access Program for National Crime Information (TAP),<sup>26</sup> a program that provides federally recognized tribes the ability to access and exchange data with national crime information databases for both civil and criminal purposes.

“TAP will support tribes in analyzing their needs for national crime information and help provide appropriate solutions, including a state-of-the-art biometric/biographic computer workstation with capabilities to process finger and palm prints, take mugshots and submit records to national databases, as well as the ability to access the FBI’s Criminal Justice Information Service (CJIS) systems for criminal and civil purposes through the Department of Justice. TAP will also provide specialized training and assistance for participating tribes.”

Currently, the Tribe has limited NCIC “read only” access through an IGA with the Arizona Department of Public Safety (DPS). The TAP program will help the Tribe upload outstanding tribal warrants, orders of protection, and criminal conviction information.

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<sup>26</sup> <https://www.justice.gov/opa/pr/departments-justice-announces-10-tribes-participate-initial-phase-tribal-access-program>

## **PURPOSE CODE X**

The Pascua Yaqui Tribe has requested to formally participate in the Bureau of Indian Affairs' Office of Justice Services (BIA-OJS) Purpose Code X<sup>27</sup> program that was created in 2015 to assist our tribal Social Services Department when they are seeking to place children in safe homes.

"The BIA-OJS Purpose Code X Program will provide tribal social service agencies with the information they need [through name-based checks] to protect the children they place into care in emergency situations when parents are unable to provide for their welfare." Currently, Pascua Yaqui social workers may be able to conduct a warrant check or private research of potential placement options, but warrant checks do not generally reveal criminal history. Also, the checks are impractical at night and after regular work hours in emergency situations.

## **BUREAU OF INDIAN AFFAIRS TIWAHE (FAMILY) INITIATIVE**

In 2016, the Pascua Yaqui Tribe was selected by the Bureau of Indian Affairs to participate in the federal Tiwahe initiative.<sup>28</sup> "The initiative promotes a comprehensive and integrated approach to supporting family stability and strengthening tribal communities by addressing interrelated issues associated with child welfare, domestic violence, substance abuse, poverty, and incarceration. Tiwahe means "family" in the Lakota language. The Tiwahe initiative directly supports the Generation Indigenous initiative, which is focused on addressing barriers to success for Native youth by leveraging BIA programs in concert with other Federal programs that support family, community stability, and cultural awareness."

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<sup>27</sup> <http://www.bia.gov/cs/groups/public/documents/text/idc1-031473.pdf>

<sup>28</sup> <http://www.bia.gov/cs/groups/xasia/documents/document/idc1-032110.pdf>

The Pascua Yaqui Tribe will work with our federal partners to implement the Tiwahe program this fiscal year, through a tribal centered plan. The Tribe will attempt to address the interrelated problems of poverty, violence, and substance abuse faced by our community. The Tribe will do this through the coordination and integration of social service programs with our Tribal Court. We will work to strengthen and maintain family cohesiveness, prepare our family wage earners for work opportunities, and provide rehabilitative alternatives to incarceration for family members with substance abuse issues.

### **FEDERAL COURT SENTENCING, PRIOR CONVICTIONS, AND DISPARITY**

Violent crime in Indian Country has created a public safety and public health crisis across the Nation. Although federal sentencing is not the main issue, it is a contributing factor when violent crime is not prosecuted, cases are declined, or when sentencing outcomes do not fit the crime. In order to help address this problem, counseled Tribal Court convictions should be recognized, considered, and applied to federal sentencing determinations of persons who commit crimes in Indian Country and additional data must be collected by all agencies responsible for criminal investigations.

Federal prosecutions of offenders from Pascua Yaqui Indian Country generally consist of dangerous felony level cases.<sup>29</sup> In Arizona, Tribal borders do not protect Reservations from crimes related to gangs, drug sales, human smuggling, and major drug cartel enterprises. We are on the front line. The majority of offenders prosecuted federally have lengthy tribal criminal histories. Their criminal acts and individual crime sprees have harmed tribal families, injured vulnerable children, and have disrupted the peace of our tribal community. Tribal criminal

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<sup>29</sup> Offenses like murder, manslaughter, aggravated assault, sexual offenses, child abuse, child molestation, gang related crimes, gun related offenses, burglary, home invasions, and arson make up a majority of Pascua Yaqui cases referred for federal prosecution.

convictions are not included as part of the criminal history determination of the federal sentencing guidelines in our Indian Country cases, (particularly felony-level crimes) and sentences only average approximately 32 months in length (when outliers are removed). Our outcomes are certainly less than a Native or non-Native offender would receive in Arizona State court for similar serious and violent felony crimes. Thirty-two months is generally not a long enough period to properly consider punishment, rehabilitation, justice, job training, or other restorative practices and policies prior to an offender returning home to our Tribal community.

Criminal jurisdiction in Indian Country is evolving and many tribal Courts are as sophisticated as their state counterparts. Some of the arguments against recognition and reliance of tribal sentencing outcomes are outdated, paternalistic, do not afford comity and respect for tribal decision making, and do not account for present day reality. There are now dozens of Tribes that are exercising either enhanced Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the Violence Against Women Act, (VAWA) or that have implemented the Tribal Law and Order Act (TLOA) provisions. The Pascua Yaqui Tribe is one of those Tribes. The Tribe has investigated 30 different cases of domestic violence committed by Non-Indians on our Reservation. The cases involved incidents of strangulation, hair-dragging, physical assaults, and conduct that repeatedly victimized whole families. Of those cases, the offenders had close to 90 separate Tribal police contacts, pre and post VAWA implementation. The majority of the offenders also had lengthy state criminal histories that consisted of violent offenses, drug and alcohol related offenses, and weapons related offenses. Three of the offenders were felons. Three offenders had felony warrants, two for burglary and one for armed robbery out of the State of Oklahoma. Two of the offenders were Legal Permanent Residents (LPR) from Mexico. The Tribe has convicted eight of the non-Indian offenders in Tribal court for domestic violence

related offenses. Tribal Court convictions of Non-Indians and Indians should be recognized by federal courts. This is the new reality and the future of Indian Country jurisdiction. Jurisdiction is changing, tribes are fighting hard to protect their community, crime is multi-jurisdictional in nature, and there is no reason the federal court process should not properly account for this.

Moreover, every person arrested and charged in the Pascua Yaqui Tribal Court is guaranteed legal representation if they face a day in jail, that has been the case now for many years. Most of the offenders that will be prosecuted in federal court will have a tribal criminal history and possibly, a State criminal history. The majority of their relevant Tribal court convictions will be counseled, unless they chose to waive legal representation. The actions of major crime offenders are not traditional, they are not cultural, and they are not the norm for our tribal community.

Policymakers should also consider the unique nature of each tribe and each federal district. The District of Arizona is different than the District of South Dakota. Likewise, the Pascua Yaqui Tribe differs from the Navajo Nation and any other Tribe. Although we may be faced with some of the same realities, crime is different, laws are different, and approaches to justice, punishment, restoration, and sentencing are different. For example, in Arizona, federal priorities and resources are largely spent on immigration related enforcement. Federal courts in Arizona are clogged with immigration reentry cases, drug smuggling matters, and criminal charges centered on the policies of Operation Streamline.<sup>30</sup> Although necessary, the result is that there are less resources devoted to Indian Country crime in Arizona. This means that less Indian Country cases are investigated, less cases are referred, more cases are declined, and the cases that are referred

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<sup>30</sup> [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf)

are more likely to be declined due to inadequate investigations and delayed indictments.<sup>31</sup> We should also consider jurisdictional realities and how each Federal District policy impacts sentencing outcomes.

In Arizona, generally, the U.S. Attorney's Office does not prosecute Indian Country drug cases. It is hard to recall the last federal drug case prosecuted from the Pascua Yaqui Reservation. Drug use and sales, including marijuana, cocaine, crack, heroine, and methamphetamine have reached epidemic levels on the Pascua Yaqui Reservation. There have been drop houses, drug related shootings, gang violence, drug related violence, and serious crimes related to the sale of drugs. Many of the social ills in our community are directly related to drug use. The reason given for the lack of federal prosecutions of street level drug sales in Indian Country is that there is a threshold issue concerning the comparison of "drug mules" who smuggle large quantities of drugs into the Country from Mexico and how those cases are handled.

Disparity in sentencing is not an issue in Southern Arizona when comparing Indian defendants prosecuted for major violent felony crimes with similarly situated defendants prosecuted in Arizona. Often, federal "crack" conviction sentencing issues will be compared to sentences of tribal defendants to indicate the disparity that exists in Indian Country criminal outcomes. Because of the lack of federal drug prosecutions and our actual major crimes sentencing results, the analogy does not fit in the District of Arizona cases that flow from the Pascua Yaqui Reservation. However, if there is a glaring disparity, it may be in the justice received by victims and families. Victims may face language barriers, cultural barriers, discrimination, and inadequate federal jury representation. Largely, the Pascua Yaqui community and our victims

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<sup>31</sup> <https://www.justice.gov/tribal/file/796976/download>



were dissatisfied with our federal court outcomes, and our tribal court outcomes for that matter. Justice was hampered and limited by our tribal Constitution, our code, scarce resources, and decades enduring federal agencies who were not investigating or prosecuting our major crimes. This history helped to create a lawless atmosphere and a situation where the community simply does not trust our justice systems. Tribal Court outcomes should be respected and given as much weight as mitigating factors would have on downward departures during federal sentencing determinations. Tribal court criminal history should also play a factor when federal courts are considering pre-trial release of tribal defendants, especially if a court is contemplating release back into the Tribal community. Federal policies, regional factors, and Reservation crime rates should be considered when allocating prosecution, victim, and investigative resources.

## **FEDERAL DECLINATIONS**

Any consideration of federal sentencing, federal prosecution, or Indian Country jurisdiction should include an analysis of federal declinations, as federal jurisdiction has been primary since the passage of the Major Crimes Act of 1885. Federal prosecutions and sentencing must be considered together with federal declinations and federal resources for law enforcement investigations.

On the Pascua Yaqui Reservation, the declination rate has risen dramatically. In 2008, the U.S. Attorney advised the Tribe that there was no crime on the Pascua Yaqui Reservation and no declinations. Although that may have been true when reviewing federal referrals and convictions, it was not an accurate representation of what was actually occurring in our community. As expected, once federal crimes started to get prosecuted in earnest in 2009, the tribal declination rate increased. However, the rate is not as high as other places in Indian Country. Interrelated,

less than half of the major crime incidents reported since 2008 have been officially referred for federal prosecution. Nevertheless, in the major crime cases that have been officially referred since 2009, a majority have been indicted by the U.S. Attorney's Office. Most of the cases were investigated and referred by tribal detectives who have their federal Special Law Enforcement Commission (SLEC) and they were assisted by local F.B.I. agents in complex cases. The prosecution process was facilitated by tribal prosecutors who are tabbed as Special Assistant United States Attorneys, (SAUSAs).

Attached is a recent breakdown of most of the Pascua Yaqui Tribe's Federal case outcomes from 2009-2014 (taken from federal Sentencing Orders and press releases). The attached spreadsheet notes thirty-two federal convictions and six revocations. When you remove outliers, the average federal sentence involving Pascua Yaqui defendants is between 32-36 months, with 36 months of federal Supervision. That is fairly low when you compare a federal sentence to a sentence from the State of Arizona for a comparable crime. The Tribe has had approximately sixty cases officially referred over this time span. Referred means that a Tribal investigator, tribal police officer, or a federal agent sent an investigation to the U.S. Attorney for prosecution. This is much higher than what was occurring prior to 2008. Approximately fifteen cases have been officially declined, three cases were dismissed, one person was found not guilty at trial, and one case was prosecuted by the State. Five non-Indians were prosecuted federally over this time span (two for domestic violence incidents). Twenty of these cases were also prosecuted tribally, some were joint prosecutions, and most outcomes were concurrent to each other. The investigation, timing, (Statute of limitations) evidence, and coordination issues impact when, how, and by what government, a case gets prosecuted by.

There were many potential federal (felony) cases, (probably close to 50 between 2008-2014) that were reported and investigated, but never officially referred, indicted, or prosecuted because the investigation did not yield the proper probable cause to support charges or there were witness issues or a lack of cooperation.

The Tribe has been working well with the F.B.I. and the U.S. Attorney's Office and the listed outcomes serve as evidence of overall improved cooperation and good work by police, victim services, and other support divisions in our criminal justice system. The Tribe believes that recent federal arrests and convictions have helped to lower the overall crime rate on the Reservation, increased the quality of life, and also helped to provide a general deterrent, now and for the foreseeable future.

## **RECOMMENDATIONS**

- The Pascua Yaqui Tribe strongly recommends that Congress require that counseled tribal court convictions be considered in federal sentencing determinations.
- Federal Courts should also consider Tribal criminal history during pretrial release determinations.
- The Pascua Yaqui Tribe recommends that federal sentences, release dates, and timely notification occur to Tribal authorities and victims.
- The Tribe strongly recommends other sentencing alternatives, reentry programs, education, and or job related programming be included as part of criminal sentences, especially if the tribal defendant is going to return to the reservation.
- The Pascua Yaqui Tribe recommends that federal declinations by the U.S. Attorney's Office be broken out by Tribal jurisdiction, annually.
- The Pascua Yaqui Tribe recommends that all criminal investigations with a potential federal nexus that are opened by tribal law enforcement, B.I.A., and the F.B.I. be accounted for separately, aggregated annually, broken out by crime, and distinguished from investigations that are actually referred for prosecution.

## **PREVIOUS & RELEVANT PASCUA YAQUI HABEAS MATTER**

On August 17, 2011, the United States Court of Appeals for the 9<sup>th</sup> Circuit issued an Opinion in the case of *Miranda v. Anchondo*<sup>32</sup>, supporting the Pascua Yaqui Tribe's argument that our Tribal Court has the authority to sentence those convicted of multiple offenses to more than one year in jail. The case had wide ranging implications because it set precedent concerning the issue and affected tribes across the United States.

The Pascua Yaqui Tribal Court convicted Miranda of eight criminal violations. The Honorable Cornelia Cruz sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days imprisonment. While serving her sentence, Miranda, through Chief Public Defender, Nicholas Fontana, appealed her conviction and sentence to the Pascua Yaqui Tribe Court of Appeals, arguing, inter alia, that her 910-day sentence violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(7). The tribal appellate court rejected Petitioner's arguments and affirmed her conviction on all counts.

Miranda then sought redress through the federal court system via a writ of habeas corpus. On habeas review, by the U.S. District Court of Arizona, the court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction and ordered that Miranda be released." The United States, through the U.S. Attorney's Office, and the Pascua Yaqui Tribe, through the Office of the Attorney General,

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<sup>32</sup> *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 844), cert. denied, 2012 WL 2396988 (U.S. Oct. 1, 2012); *Bustamante v. Valenzuela*, 715 F.Supp.2d 960 (D.Ariz.2010). Tribes are allowed to impose consecutive one year terms for separate offenses charged in a single criminal proceeding.

appealed the Arizona District court's order granting Miranda's petition for writ of habeas corpus. The 9<sup>th</sup> Circuit ultimately disagreed with the district court and held that the Indian Civil Rights Act § 1302(7), unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation and reversed the lower court's ruling. "Because § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation, and because it is undisputed that Petitioner committed multiple criminal violations, we reverse the district court's decision to grant Petitioner's amended habeas corpus petition."

Although the *Miranda* case never should have required federal court intervention, it cleared up any lingering doubt that tribal courts and our Tribal Council have the authority to impose punishments that are consistent with the Indian Civil Rights Act (ICRA), due process, and necessary to help keep our community members and visitors safe from harm.

## **CONCLUSION**

The first responsibility of any government, tribal or otherwise, is the safety and protection of its people. For there can be no security or peace where there is insecurity and fear. Protecting victims of violent crime, domestic violence, and sexual assault is about justice and safety, and it is also about fairness, and dignity.

There are still major flaws in the jurisdictional framework of Indian country. The criminal and civil jurisdictional structure, underserved reservations, inadequate federal law enforcement response, and the lack of resources, have prevented tribes from properly protecting women and children from harm and has instead, caused them to experience actual physical harm, fear, discrimination, and marginalization. The lack of access to justice or redress, based on where

indigenous women and girls happen to live, their gender, their economic circumstances, and their status as tribal women, helped to create a historic pattern of violence, trauma, abuse, and an increased risk of sexual and economic exploitation, stalking, and sex trafficking. Specific acts of domestic and dating violence perpetrated by non-Indians are still going unprosecuted in Indian Country. The long-term trauma associated with the lack of justice has severely impacted the public health, welfare, and vitality of the Pascua Yaqui community.

Although, VAWA conferred the ability of tribes to exercise “Special Domestic Violence Criminal Jurisdiction” (SDVCJ) over non- Indian perpetrators who commit crimes related to domestic, dating or certain protection orders in Indian country, it left out children, sex crimes perpetrated by strangers, and ancillary offenses that occur during the commission of a SDVCJ offense, like crimes involving assaults on police and detention officers and drug and weapon offenses.

We urge Congress to continue to build upon the successes of VAWA 2013 and continue to support the Pascua Yaqui Tribe and other tribes so that we can collectively improve our capacity and resources to continue the self-determined development of our courts and law enforcement services. Pascua Yaqui tribal officials no longer have to simply stand by and watch women be victimized with no recourse. Violent behavior against intimate partners or vulnerable family members by tribal members or non-Indians is conduct that is no longer tolerated.

Full restoration of criminal jurisdictional authority for Tribal governments over all crimes and persons should also be considered. Currently, SDVCJ under VAWA 2013 is limited to only crimes of domestic violence, dating violence, or violations of an order of protection committed in Indian country, where the defendant is a spouse or intimate partner of a tribal member. VAWA

does not permit tribal prosecutions unless the defendant has “sufficient ties to the Indian tribe,” meaning he/she must either reside in the Indian country of the prosecuting tribe, be employed in the Indian country of the prosecuting tribe, or be the spouse or intimate partner of a member of the prosecuting tribe. The recently proposed “Tribal Youth and Community Protection Act of 2016” will help address some of the gaps to cover children and ancillary crimes a VAWA defendant may commit. Full restoration would help ensure fairness, safeguard tribal communities, and help clear up long standing jurisdictional problems. When a resident of one State crosses the border to visit another, that individual is subject to the criminal jurisdiction of the State he or she is visiting, even though he or she cannot vote or serve on a jury there, his external criminal history may also be considered. Noncitizens visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the U.S. political process.

#### **ADDITIONAL TRIBAL EMPOWERMENT AND SUPPORT IS KEY**

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems that are supported with the required resources. Criminal investigations occur at the local level. Along with strong and meaningful federal prosecutions, our local government and court system is the best vehicle to protect Yaqui victims, mothers, and children from violent perpetrators. The recent Pascua Yaqui VAWA and TLOA implementation process bear those beliefs out. However, without the resources to fund robust court and victim services, the gains may only lead to the same revolving door of repeat violence and ineffective criminal prosecutions that we are all too familiar with. The Tribal Law & Order Act, the amendments to the Indian Civil Rights Act, the Adam Walsh Act, VAWA, and changes to the

Pascua Yaqui code will enhance the safety and security of our community as the laws are implemented, followed, and properly enforced.

For several different reasons, the challenges facing law enforcement and the justice system in our community are substantial. However, a window of opportunity exists to revolutionize and strengthen our court system and heal our community. The Pascua Yaqui Tribal Council, law enforcement, the Tribal Court, the Prosecutor's office, technical assistance providers, and our federal partners have recognized our current needs and have taken the opportunity to work together to effect change. In short, the Tribe has taken significant steps to protect our people, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, federal legislation, resources, and dedication to continue to fully and effectively protect and support our victims who have been impacted by violence. We respectfully request additional Congressional assistance to help address the persistent violence and drug abuse that plagues our community. Additional support for Tribal Court systems, will also further the current federal strategy that promotes the longstanding policies of Indian self-determination, tribal self-governance, and tribal self-sufficiency.

In closing, we thank the U.S. Congress, the Department of Justice (DOJ), the BIA, the National Congress of American Indians (NCAI), the Tribal Law & Policy Institute (TLPI), the National Indigenous Women's Resource Center (NIWRC), and the National Council of Juvenile & Family Court Judges (NCJFCJ)<sup>33</sup> for the leadership, cooperation, and assistance during the past few years as we worked to better protect our Reservation community.

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<sup>33</sup> Humble thanks to the United States Congress for drafting and passing TLOA & the Reauthorization of VAWA, thanks to the Department of Justice, (DOJ) Deputy Associate Attorney General Sam Hirsch, Director Tracy Toulou, Counsel to the Director, Marcia Hurd, National Indian Country Training Coordinator Leslie Hagen, Native American Issues Coordinator Jeremy Jehangiri. And the U.S. Attorney's Office, District of Arizona. Thanks for the efforts of the Department of the Interior (DOI),



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