JANET NAPOLITANO
GOVERNOR
STATE OF ARIZONA

FACSIMILE TRANSMITTAL SHEET

TO:	Laura L. Rogers, Esq. Director, SMART Office	FROM:	MARNIE HODAHKWEN POLICY ADVISOR, TRIBAL AFFAIRS
		ASSIST:	SANDY CHISMARK
FAX #:	202-616-2906	FAX #:	(602) 542-7601
DATE:	AUGUST 1, 2007		
RE:	Letter from Governor Janet Napolitano re Adam Walsh Act	TOTAL # OF PAGES INCLUDING COVER	THREE (3)

NOTES/COMMENTS:

Please see attached letter.

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STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
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July 31, 2007

United States Attorney General Alberto Gonzales
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington D.C. 20530-0001

Laura L. Rogers, Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 Seventh Street, NW
Washington D.C. 20531

Dear Attorney General Gonzales and Ms. Rogers:

On behalf of Arizona's twenty-two tribal nations, I would like to submit comments to the proposed National Guidelines for Sex Offender Registration and Notification that are being developed pursuant to the Sex Offender Registration and Notification Act ("SORNA") which is incorporated into Title I of Public Law 109-248 also known as the "Adam Walsh Act." Tribal, state, and federal officials agree that the goals of the Adam Walsh Act are both admirable and necessary to keep our communities safe from sexual offenders. However, I believe that Arizona's tribal leaders have some legitimate concerns with the proposed implementation of this law.

Today many of Arizona's tribal leaders are attending the Tribal Justice and Safety session here in Phoenix. This meeting is the first opportunity many of these tribal leaders have had to discuss these guidelines with federal officials. My understanding is that today is also the deadline for submitting formal comments on the proposed guidelines for SORNA implementation. Holding a consultation session on the final day comments will be accepted does not, in my view, amount to meaningful government-to-government consultation as contemplated by Executive Order 13175 signed by President Clinton in 2000. I encourage you to carefully consider the comments you receive from tribal leaders and undertake additional consultation before these guidelines are finalized.

I also share tribal leaders concerns relating to the absence of a bright line rule for determining whether a tribe has undertaken "substantial implementation" of SORNA. Under Section 127(a)(2) of the Adam Walsh Act, if the Attorney General determines that a tribe has not substantially implemented the Act and is unlikely to be capable of doing so in a reasonable amount of time, the tribe is presumed to have delegated this function to the state. Without a bright line rule for establishing substantial implementation, authority to delegate functions under the Adam Walsh Act can be exercised arbitrarily. This is an affront to tribal sovereignty and a deviation from generally accepted principles of federal Indian law, which hold that limitations on tribal sovereignty cannot be implied. A bright line rule would also promote cooperative partnerships between states and tribes because each government would have a clearer understanding of their duties under the Act.

Arizona's tribal leaders also have concerns regarding the use of traditional cultural names and genetic material in the implementation of the Adam Walsh Act. I will not attempt to articulate those concerns because I believe it is more appropriate for tribal leaders to express these concerns themselves. I do however support their efforts to have these concerns addressed.

Thank you for the opportunity to raise these important issues. If you have any questions please contact Marnie Hodahkwen, my Policy Advisor for Tribal Affairs, at 602 542 1442.

Yours very truly,

Janet Napolitano
Governor

c: Senator Jon Kyl

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:40 AM
To: Hagen, Leslie; Rosengarten, Clark
Subject: FW: adam walsh comments

Attachments: NCAI Adam Walsh Comments.pdf; NCAI Adam Walsh Comments.doc


NCAI Adam Walsh Comments.pdf (...


NCAI Adam Walsh Comments.doc (...

-----Original Message-----
From: Virginia Davis [redacted]
Sent: Wednesday, August 01, 2007 8:10 PM
To: Hagen, Leslie
Cc: GetSMART
Subject: adam walsh comments

Hi Leslie- Attached are NCAI's comments to the proposed Guidelines for implementation of the Adam Walsh Act. Thank you!

Virginia

August 1, 2007

Laura L. Rogers, Director,
SMART Office, Office of Justice Programs,
United States Department of Justice, Suite 810
7th Street NW.,
Washington, DC 20531

RE: OAG Docket No. 121

Dear Ms. Rogers:

I am writing on behalf of the National Congress of American Indians (NCAI), the nation's oldest and largest organization of American Indian and Alaska Native tribal governments, to provide comments regarding the proposed National Guidelines for Sex Offender Registration and Notification ("the Guidelines"). NCAI and our member tribes feel strongly that portions of the Guidelines must be revisited if the Adam Walsh Child Protection and Safety Act of 2006 ("the Act") is to achieve its stated purpose of creating a seamless national sex offender tracking system.

NCAI would like to state for the record that the legislation underlying the proposed Guidelines is an affront to tribal sovereignty and represents a dramatic departure from the way that criminal and civil jurisdiction is currently distributed among state, federal, and tribal sovereigns. Unfortunately, the underlying law is structured in a way that will also undermine its overall public safety effectiveness and create unnecessary challenges for the tribal and state officials charged with implementing the law on the ground. In addition, without the appropriations of funds authorized in the new law, the Act represents a substantial unfunded mandate for tribes, many of whom already suffer from a severe shortage of resources for public safety. The proposed Guidelines do little to mitigate the structural deficiencies of the underlying Act. Our specific comments and concerns are summarized below.

1. The Federal Government has Failed to Adequately Consult with Tribal Governments.

NCAI and our member tribes are gravely concerned by the federal government's insistence on developing laws for tribal communities without the appropriate inclusion and deference to tribal leaders and tribal members in the decision-making process. Section 127 of the Adam Walsh Act was included without any hearings, consultation or consideration of the views of tribal governments and current tribal practices. The unique government-to-government relationship between the Indian nations and the United States requires that tribal decision-makers have a meaningful role in the development of policies that will impact Indian tribes. Despite a clear mandate to this effect in Executive Order No. 13175, the Department of Justice has continually refused to engage in meaningful government-to-government consultation about the monitoring and tracking of sex offenders on Indian lands.

Thus far, consultation has been inadequate. First, tribes were not given enough time to plan for the first scheduled consultation session. Secondly, the scheduling of the second consultation on July 31, 2007 was one day before the deadline for written comment submission, August 1, 2007. This one day is not adequate time for tribes to provide meaningful written comments that may reflect any new information or issues that could arise during the session in Phoenix. NCAI strongly supports the request from tribal leaders at the July 31st consultation session that the deadline for comments be extended to allow tribal representatives to augment the record from the July 31st consultation with additional written statements.

NCAI also echoes the recommendation made by tribal leaders assembled at the July 31, 2007 consultation session in Phoenix, AZ that the Department of Justice immediately establish a Tribal Advisory Group to offer expert advice and guidance as the Adam Walsh Act implementation process moves forward. This Advisory Group should be composed of tribal leaders and should be vested with the necessary authority to have meaningful input into the Department of Justice decision-making process.

Additionally, we recommend that the Guidelines reflect the Department of Justice's intention to continue consulting with Indian tribes in an ongoing way. Consultation sessions should be more conveniently and frequently scheduled at locations convenient to Indian Country.

2. Due Process for Determining Tribal Compliance Must Be Addressed.

Under Section 127(2)(C) of the Act, the Attorney General has the authority to assess the compliance of those tribes who have elected to participate as a registration jurisdiction. If the Attorney General finds that the tribe is not in compliance, he has the power to delegate the tribe's authority under the Act to the state. Such a delegation would represent a major infringement on tribal sovereign authority, and Congress' decision to vest the Attorney General with this power is unprecedented.

If the Attorney General chooses to exercise this authority, it will dramatically change the current scheme of civil and criminal jurisdiction in Indian Country. As a practical matter, such a delegation will undoubtedly create a great deal of confusion among law enforcement agencies on the ground and will require significant adjustments in the state plan for implementation of the Act. It will also have the potential to destabilize countless carefully negotiated cross-jurisdictional collaborative agreements that currently exist between tribes and the states. This confusion and destabilization could easily undermine the effectiveness of the Act for the protection of both Native and non-Native communities.

Despite these potentially serious consequences, the Guidelines provide no indication of the process that will be used by the Attorney General to assess tribal compliance and make this delegation. The federal government's unique trust responsibility to Indian nations, the federal policy of promoting and supporting tribal self-determination, and the requirement in EO No. 13175 that the federal government "shall grant Indian tribal governments the maximum administrative discretion possible," require the Attorney General to provide adequate notice to tribes of their noncompliance and to take all actions that may be necessary to provide technical assistance to help a tribe come into compliance.

The goal of the DOJ should be to work cooperatively with the tribe to assist in bringing the tribe into compliance. The primary goal of the federal government should be to improve public safety on reservations and facilitate tribal self-determination. This should be an open and flexible process that reflects the longstanding relationships between the federal and tribal governments and the federal trust responsibility. This process should be informed by the EO No. 13175 and the DOJ Consultation Policy.

The complexity and importance of this particular issue requires a more formal and lengthy process for consultation than has been used by the Department of Justice thus far. As always, NCAI is willing to assist with such a consultation in any way that would be helpful. We urge the Department of Justice to state in the Guidelines that a consultation process with tribes will begin immediately to develop a process for assessing tribal compliance under the Adam Walsh Act, which will be the subject of future Guidelines.

3. Federal Prisons Must Be Held to the Same Standards as State and Tribal Prisons.

We also have significant concerns about the provisions in the Guidelines exempting federal corrections facilities from the Act's requirement that offenders be registered prior to release from incarceration. The Act requires that all corrections facilities "ensure" registration of sex offenders prior to their release. However, under the Guidelines all federal corrections facilities will merely provide the sex offender with notice that the individual must register within three days. Sex offenders in federal prisons are often the worst of the worst. It would be extremely irresponsible to release these prisoners without ensuring that they are registered and their home jurisdiction is notified of their release. This provision leaves Indian tribes particularly vulnerable because of the high proportion of offenders whose crimes arose in Indian Country that are incarcerated in federal prisons.

In addition to severely undermining public safety, this provision in the Guidelines will substantially shift the cost burden of initial registration from the federal government to the states and tribes. The responsibility of initially registering an incarcerated offender, including the collection of DNA and fingerprints, is a responsibility that clearly lies with the federal government under the Act. At the consultation session on July 31, 2007 federal representatives stated that the federal prisons could not register offenders because there is no federal registry. Many tribes, however, also do not currently have registry systems in place. The costs that would be associated with developing the federal infrastructure necessary to fulfill this responsibility are no greater than the cost the Indian tribes will incur in building the same infrastructure. We strongly recommend that the Guidelines be changed so that federal corrections facilities, like state and tribal facilities, are required to ensure that offenders are entered into the registry before their release.

4. All Tribal Governments Must Be Included in the National Sex Offender Registration System.

Even in those places where tribal governments do not have the option of participating as a registration jurisdiction under Section 127 of the Act, or in cases where the tribe opts-out, the

tribal government will play an important role in the successful implementation of the national sex offender registration system. Tribes and states are not interchangeable, and the state simply cannot fulfill all of the responsibilities of tribal governments. For example, even where a state has the authority under the Act on tribal lands, tribal courts will still have the responsibility of notifying offenders of their registration obligation. Tribal detention facilities will still be housing offenders. The state will need access to tribal codes to include in the registry the text of the law violated by the offender. Most importantly, the tribal or BIA law enforcement officers will still be the officers most likely to be in need of information about the whereabouts of registered offenders for investigation purposes and best positioned to assist registration personnel with tracking down non-compliant offenders.

The proposed Guidelines do not sufficiently address how tribal governments will be included in the system if they are not registration jurisdictions. Throughout the Guidelines provisions are included requiring the sharing of information between "jurisdictions" of an offender's whereabouts or updates to registration information. Indian tribes who have not opted-in under Section 127 have the same law enforcement and public safety need to receive this information as do other jurisdictions. Unfortunately, the definition of "jurisdiction" would leave them out and, as a result, the local law enforcement agency would not have the information it needs to keep the community safe. We encourage the DOJ to include all tribal governments and law enforcement agencies throughout the Guidelines in all appropriate places.

In addition, the Guidelines are silent as to how registration will occur for offenders being released from tribal detention facilities where the tribe is not a registration jurisdiction. This issue should be addressed before the Guidelines are finalized. It is also unclear from the Guidelines whether registry information about an offender's criminal history will include tribal court convictions from a tribe that is not participating as a registration jurisdiction.

5. The Guidelines Should Support Cross-Jurisdictional Coordination.

In every state where Indian tribes are located, regardless of whether the tribe is a registration jurisdiction, successful implementation of the Act will require coordination between state, local, and tribal governments. We urge the Department of Justice to make facilitating state-tribal and inter-tribal coordination through technical assistance a priority, and to include language in the Guidelines requiring states to document their coordination efforts with tribal governments in their compliance submissions. Similarly, we urge the Department of Justice to review the issues Indian tribes experience in accessing the NCIC database and address this issue in the Guidelines. In addition, where states are exercising expanded authority in Indian Country under the Adam Walsh Act, the Guidelines should require that state officials comply with all tribal procedures, particularly with regard to making arrests within tribal jurisdictions.

6. Tribal Court Convictions Must Be Respected.

Despite the language in the statute requiring registration for offenders convicted in tribal court, Section IV(A) of the proposed Guidelines permits states and other jurisdictions to choose not to require registration for these offenders if the jurisdiction determines that the defendant was denied the right to assistance of counsel in the tribal court proceeding. This proposal was sharply criticized by many tribal leaders at the July 31, 2007 consultation. The Indian Civil Rights Act

(ICRA) requires that all persons appearing in tribal court be afforded due process, including the right to counsel. Although this right is not identical to that afforded by the United States Constitution, in passing the Indian Civil Rights Act the Congress saw the wisdom in giving tribal courts the flexibility to provide due process in their own way. Rather than giving the states the unilateral authority to disregard tribal court convictions, the Guidelines should require any state with a due process concern to meet with the tribe to resolve the concern and determine together whether the conviction or convictions in question should be included in the registry.

7. Cultural and Religious Concerns

Section 114(a)(1) of the Act requires that the registry must include all names and aliases used by the offender. The Guidelines expand this requirement to include "traditional names given by family or clan pursuant to ethnic or tribal tradition." This requirement is deeply offensive to the religious and cultural traditions in some Native communities. Some tribal communities may give tribal members a traditional name that is never used or spoken aloud except in religious ceremonies. In some communities, a person will never share their traditional name and even members of a family may not know one another's ceremonial name. Given the secrecy that surrounds these traditional ceremonial names, there is no sound public safety reason that they be shared. We recommend that this provision be redrafted so that it is limited to names by which the individual may be known publicly.

Conclusion

The tribal governments represented by NCAI share the federal government's commitment to protecting our communities and citizens from sexual predators. In fact, prior to the Adam Walsh Act, many Indian tribes had adopted sex offender registry codes. NCAI and our tribal members also worked successfully to include a provision in the Violence Against Women Act of 2005 to create a National Tribal Sex Offender Registry so that Indian tribes could share information with one another and improve our ability to track dangerous offenders. We have no doubt that there are solutions to the many challenges and concerns outlined above, however finding those solutions will require bringing all of the necessary stakeholders together. The system simply will not work if the federal government continues to develop law in this area in a bureaucratic vacuum. Please contact me or NCAI Associate Counsel Virginia Davis, 202-466-7767, with any questions.

Sincerely,

Joe Garcia
President

The Native Village of Napakiak
Indian Reorganization Act Council
P.O. Box 34069
Napakiak, Alaska 99634
Ph:(907)589-2135 Fax:(907)589-2136

Fax Cover Sheet

To: Smart office From: June Ayagalria - Tribal Admin

Fax: (202) 616-2906 Pages: 2 w/ cover page

Phone: Date: Aug. 2, 2007

Re: Adam Walsh Child Protection + Safety Act CC:

Urgent ✓ For Review Please Reply Please Comment

Comments:

Napakiak, AK 99634
Phone: (907) 589-2135 Fax: (907) 589-2136

August 2, 2007

Dear Congressman Kildee:

I am writing on behalf of the Napakiak Tribe to urge you to amen the Adam Walsh Act to extend the July 27, 2007 deadline it imposes upon tribal governments. We share the federal government's commitment to protecting our communities from sexual predators. However, the Adam Walsh Act, which was passed without consulting with tribes, is written in a way that will undermine the ability of tribal governments to keep our communities safe.

The July 27, 2007 deadline established in the Act is unnecessary, arbitrary, and unfair. The deadline is fast approaching, and yet, the Department of Justice will not have completed the process of promulgating guidelines before July 27th, nor will grant funds be made available to participating jurisdictions. As a result, tribal governments are being forced to make an important decision with incomplete information. At the very least, the deadline should be extended to give tribes the opportunity to meaningfully participate in the development of the guidelines before making their election under section 127.

Even if one accepts the idea of requiring tribes to affirmatively opt-in to preserve their authority (which we do not), there is no sound reason why a tribe should have only one year to make that election. There are many self-determination programs that permit tribes to take on responsibilities as they develop the capacity to do so. We see no reason why this statue could not have been similarly structured. As the law is currently written, it may well force tribes to make this important election before they have the capacity required to fulfill the responsibilities of the Act in order to preserve their governmental authority. We urge you to extend, or remove entirely, the deadline for tribal election set out in the statute.

In addition to extending the deadline in the short term, there are a number of structural issues with the Adam Walsh Act that we believe will undermine its effectiveness for Indian and non-Indian communities alike. We have no doubt that there are solutions to all of these issues, and we urge you to support additional amendments to the law that we will be seeking in the months to come. I thank you in advance for your timely consideration of these issues. For more information, please contact myself, or the National Congress of American Indians at 202-466-7767.

Sincerely,

Jane C. Ayagalria

cc.file
Senator Dorgan

INTER TRIBAL COUNCIL OF ARIZONA, INC.
2214 N. CENTRAL AVENUE, SUITE 100
PHOENIX, ARIZONA 85004
(602) 258-4822/ITCA Business
(602) 258-4825 FAX

FASIMILE TRANSMITTAL

DATE: 7/31/07

NUMBER OF PAGES: (Including this page): 9

TO Laura L. Rogers, Director FAX NUMBER: 202.514.7805

FROM: John Lewis, Executive Director

SUBJECT: Comments to the proposed National Guidelines for sex offender registration and notification. May 2007. DAG Docket No. 121

COMMENTS:

If problems arise concerning the transmission of this fax, please call the Inter Tribal Council of Arizona, Inc., at (602) 258-4822. Thank you and have a nice day.

rge to Account#:

20 TRIBES

INTER TRIBAL COUNCIL of ARIZONA, INC.

IBE TRIBE
IN INDIAN COMMUNITY
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UDO RIVER INDIAN TRIBES
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ALOS APACHE TRIBE
IO O'ODHAM NATION
APACHE TRIBE
MOUNTAIN APACHE TRIBE
J APACHE NATION
J PRESCOTT INDIAN TRIBE

July 30, 2007

U.S. Attorney General, Alberto Gonzales
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Laura L. Rogers, Director
SMART Office, Office of Justice Programs
United States Department of Justice, Suite 810
7th Street, NW
Washington, DC 20531

Re: Comments to the Proposed *National Guidelines for Sex Offender Registration and Notification*, May 2007, OAG Docket No. 121

Dear Attorney General Gonzales and Ms. Rogers:

This letter is submitted by the **Inter Tribal Council of Arizona, Inc.** ("ITCA") as comments to the proposed National Guidelines for Sex Offender Registration and Notification ("National Guidelines" or "Guidelines") which are being proposed by the United States Department of Justice ("DOJ") to provide guidance to jurisdictions responsible for implementing the Sex Offender Registration and Notification Act ("SORNA"), which is incorporated into Title I of P.L. 109-248 (the "Adam Walsh Act" or "Act").

ITCA was formally established in 1952 to provide a united voice for Tribes located within the State of Arizona to address common Tribal issues and concerns. ITCA is an Arizona non-profit corporation, the members of which are comprised of the highest elected Tribal officials of 20 Tribes within the State of Arizona, including Tribal chairpersons, presidents and governors.

The Adam Walsh Act and SORNA place very ominous requirements upon Tribes and Tribal governments. Many of the Tribes in Arizona have concerns regarding the language and requirements of the Adam Walsh Act and how Tribal and state jurisdictions will interrelate to each other in the implementation of the Act. However, these comments do not address the concerns with the Act itself, but are limited to comments regarding the proposed National Guidelines and a request that the proposed National Guidelines be changed to remedy the concerns stated below. Upon request, ITCA would be glad to submit additional comments regarding the problems with the Act and the unique challenges it places upon Tribes.

2214 North Central Ave. • Suite 100 • Phoenix, Arizona 85004 • (602) 258-4822 • Fax (602) 258-4825

The Department of Justice Did Not Properly Consult With Tribes in Promulgating and Releasing the Guidelines Applicable to Tribes

Despite the fact that the inclusion of Indian Tribes in SORNA was a key objective of the Adam Walsh Act, Section 127 was included in the Act without consultation with Indian Tribes. As a result, Tribal participation is structured in a way that creates unnecessary challenges for the effective implementation of the Act. It is critically important that the Department of Justice conduct meaningful government-to-government consultation with Indian Tribes if these challenges are to be successfully addressed. Thus far, consultation efforts by the Department of Justice have been inadequate.

Tribes were not given adequate time to plan for the *first* scheduled consultation session. Now, the scheduling of the *second* consultation, on July 31, 2007, is only one day before the *deadline* for written comment submission, August 1, 2007. This one day is not adequate time for Tribes to provide meaningful written comments that may reflect any new information or issues that could arise during the second consultation session. In addition, it is more economically feasible for Tribes in the southwest to attend the second consultation session in Phoenix, and therefore, several Tribes have likely not had the benefit of the first session and will only have one day to prepare comments as a result of consultation. Due to the problematic scheduling of these sessions, this is a request that the comment period regarding the proposed National Guidelines be extended to allow *all* Tribes the opportunity to meaningfully comment.

We also request that the Guidelines reflect the Department of Justice's intention to continue consulting with Indian Tribes in an ongoing way throughout the implementation phase of the Act. Consultation sessions should be more conveniently and frequently scheduled at multiple locations convenient to Indian Country.

Additionally, ITCA requests the creation of a Tribal advisory group to offer expertise and guidance to the Department of Justice as the Adam Walsh Act is implemented in Indian Country. The ITCA has already formed its own Adam Walsh Working Group comprised of several Tribal leaders and Tribal attorneys in Arizona, who have been analyzing many issues and concerns regarding the implementation of the Act. The Department of Justice should have the benefit of a similar group to assist it in the implementation of the Act in Indian Country.

The Guidelines Must Define "Substantial Implementation" and Provide Guidance as to How a Determination of "Substantial Implementation" Will be Made by the United States Attorney General and Provide Due Process for Determining Such Tribal Compliance

The proposed Guidelines include a number of references to the term "substantial implementation," which is used throughout the SORNA. However, the proposed Guidelines do not clearly define the term, and there is no indication given as to what criteria will be used to determine whether a jurisdiction has substantially implemented the provisions of SORNA. The failure to provide guidance regarding the interpretation of that term is a fatal shortcoming of the Guidelines and must be remedied prior to its final implementation.

Under Section 127(2)(C) of the Act, the Attorney General has the authority to assess the compliance of those Tribes who have elected to participate as a registration jurisdiction under SORNA. The Act contemplates that the Attorney General has the authority to "delegate" to a state, on behalf of a tribe, authority to implement the Act within Tribal jurisdictions, if the Attorney General determines that the Tribe is not in compliance with the provisions of SORNA. The power that appears to have been vested in the Attorney General, to allow a state to act within a Tribal jurisdiction upon a finding by the Attorney General that a Tribe has not substantially implemented the Act, is an infringement on Tribal

sovereignty. Such power also cannot be vested without providing particularized and explicit guidance as to how a determination regarding "substantial implementation" will be made by the Attorney General. It is simply unconstitutional. It is of dire consequence to tribes that the Attorney General appears to have been given authority to delegate to a state the authority to implement the requirements of SORNA within a Tribal jurisdiction. Without a clear definition of substantial implementation, the Attorney General's decisions will be arbitrary. Objective criteria and procedures regarding this determination must be adopted by the Attorney General's office to be effective and lawful.

While Section II (E) of the Guidelines (p.10) attempts to provide some semblance of guidance as to how a jurisdiction's compliance (or lack thereof) will be assessed with regard to its implementation of the SORNA, its still falls far short of any meaningful guidance. The Guidelines simply state that such determinations will be made by the SMART Office on a "case-by-case basis.

Subjective determinations regarding whether a jurisdiction's departure from the SORNA requirements "will or will not substantially disserve the objectives of the requirement" are vague, ineffective, and simply unworkable. The lack of any objective criteria that will be used to determine whether a Tribe is "capable" of implementation within a "reasonable time" is impracticable, fails to provide meaningful assistance to Indian Tribes, and is unconstitutional.

Furthermore, if the Attorney General chooses to use this authority, it will represent a significant departure from the way civil and criminal jurisdiction is currently distributed among state, Tribal, and federal sovereigns. As a practical matter, should a state be given jurisdiction to implement SORNA within Tribal jurisdictions, it will undoubtedly create a great deal of confusion among various law enforcement agencies and will require significant adjustments in the state plan for implementation of the Act. It will also have the potential to destabilize countless carefully negotiated cross-jurisdictional collaborative agreements that currently exist between Tribes and the states. This confusion and destabilization could easily undermine the effectiveness of the Act for the protection of both Native and non-Native communities.

Despite these potentially serious consequences, the proposed Guidelines provide no indication of the process that will be used by the Attorney General to assess Tribal compliance or a process that will be used by the Attorney General to work with a Tribe to cure deficiencies in advance of a determination by the Attorney General that a Tribe is non-compliant. Given the federal government's unique trust responsibility to Indian nations and the policy of promoting and supporting Tribal self-determination, any action that would interfere with or abridge a Tribal government's sovereign authority on its own lands should not be taken, and all efforts should be made to remedy DOJ's concern by providing assistance to a Tribe with difficulty in implementing the requirements of the Act.

The proposed Guidelines simply do not address whether a Tribe will be given an opportunity to cure a deficiency, what efforts the DOJ will take to provide technical assistance, or how a Tribe can appeal an adverse decision by the Attorney General. ITCA strongly recommends that the Department of Justice consult with Tribal governments to develop a detailed and transparent process for assessing Tribal compliance which provides due process protections to the Tribes, and the highest level of technical and financial assistance to Tribes in the implementation process. Any assessment and determination by the Attorney General of Tribal compliance with the Act should, consistent with the trust responsibility and the canons of Indian Law and statutory interpretation, provide the greatest deference to Tribal governments.

The complexity and importance of this particular issue requires a more formal and lengthy process for consultation than the process that is currently underway. We request the Department of

Justice provide a written statement in the National Guidelines that a consultation process with Tribes will begin immediately to develop a written process for assessing Tribal compliance under the Adam Walsh Act which will be the subject of additional guidelines, and that the Attorney General will not make a finding of non-compliance as to any Tribe prior to the publication of such additional guidelines.

Cultural and Religious Concerns Are Not Adequately Addressed

Section 114(a)(1) of the Act requires that the sex offender registry must include all names and aliases used by the offender. The Guidelines expand this requirement to include "traditional names given by family or clan pursuant to ethnic or Tribal tradition." This requirement is deeply offensive to the religious and cultural traditions in many Native communities. Many Tribal communities give Tribal members a traditional name that is never used or spoken aloud except in religious ceremonies. In some communities, a person will *never* share their traditional name and even members of a family may not know one another's ceremonial name. Given the degree of importance placed upon the non-use of such names except for specific religious purposes, and the negative consequences to the person, the Tribal community or others, of speaking or knowing such a name, there is no sound public safety reason that this type of name be shared. We recommend that this provision be redrafted so that it is limited to names by which the individual may be known publicly and not explicitly for religious purposes.

Additional Guidance on Appropriate Use of DNA Evidence is Needed

Arizona Tribes are especially concerned with the collection and storage of DNA evidence. Recently, an Arizona Tribe brought suit against a university due to misuse of DNA evidence collected from Tribal members. Tribal members gave DNA evidence believing that they were participating in a study on diabetes. Instead their DNA was analyzed to find genes related to inbreeding, schizophrenia, and other sensitive topics. Understandably, Tribes are now wary about releasing any DNA information. The Guidelines (on page 34) indicate that any DNA sample collected must be entered into the Combined DNA Index System (CODIS). CODIS, which was formally established through the DNA Identification Act of 1994 (Public Law 103-322), is a DNA index, the use of which is limited to law enforcement purposes.

Section 210304 of the DNA Identification Act limits information contained in CODIS to, among other limitations, only that DNA evidence maintained by federal, state, and local criminal justice agencies pursuant to rules that allow disclosure of stored DNA samples and DNA analyses for express, limited purposes. The limited purposes include:

- By criminal justice agencies for law enforcement identification purposes;
- In judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; and
- For criminal defense purposes, when a defendant seeks access to samples and analyses performed in connection with the case in which such defendant is charged.

However, the DNA Identification Act also allows the information to be used for a population statistics database, for identification research and protocol development purposes, or for quality control purposes *if personally identifiable information is removed.* Public Law 103-322(b)(3)(D). "Personally identifiable" information is not defined, but is assumed *not* to include the ethnicity of the offender.

To be clear, the Department should create an additional paragraph, under the bullet point describing DNA, as used in §114(b)(6), that clarifies that the race of an offender is considered personally identifiable information and any use of DNA evidence contained in the CODIS cannot be used to create population statistics or other statistics that would use race as an identifier or category. Such a limitation is consistent with the other restrictions placed on use of DNA evidence and would assist in eliminating the

concerns of several Tribes that DNA evidence would be used in a manner that is inconsistent with the traditional and cultural practices of a Tribe.

Further, language should be included that discusses the unique cultural sensitivity of Native Americans' DNA information and the corresponding need to treat all DNA evidence, Native Americans or otherwise, with the utmost sensitivity and respect.

The Proposed Guidelines Must Be Clarified to State That Tribes Can Enter Into Cooperative Agreements With Tribes, in Addition to States, to Fulfill the Mandates of the Act

The Adam Walsh Act contemplates that Tribes may enter into cooperative agreements with "other jurisdictions" to implement the Act. These "other jurisdictions" certainly include other Indian Tribes in addition to state, county and municipal authorities. While the Act is clear, the proposed Guidelines are silent about cooperative agreements between Tribes. Several Arizona Tribes have discussed the possibility of entering into inter-Tribal cooperative agreements to implement the requirements of the Act. Some Arizona Tribes, such as the Tohono O'odham Nation, already have a wealth of experience managing sex offender registries that could be shared. Other Tribes, such as the Havasupai, which is located at the bottom of the Grand Canyon and lacks reliable Internet access, have seemingly insurmountable barriers to implementing the Act independent of a cooperative agreement. Language should be added to the Guidelines to clarify and confirm that Tribes may enter into cooperative agreements with other Tribes as well as a state or other jurisdiction, as permitted by the Act.

Resources, or Lack Thereof, Will Be the Biggest Obstacle Facing Tribes

Availability of resources is one of the biggest obstacles faced by Tribes in implementing the requirements of SORNA. While states have been under an obligation to maintain sex offender registries since 1994, Tribes were not subject to the same requirement until passage of the Act in 2006. Essentially, Tribes will start from nothing, and must build a functioning registry system in less than three years from enactment of the Act (by July 27, 2009) or risk having the states intrude into Tribal jurisdictions. While states have the benefit of taxation to offset the financial burdens arising from the Act, most Tribes do not have such a system. Tribes represent some of the economically poorest populations in the United States, yet they will bear the greatest burden in implementing the requirements of the Act.

It is a clear failure of Congress that the Act, which authorized grants to implement the Act, was not passed with an accompanying appropriations bill. In order to mitigate for this failure, ITCA recommends that any funds made available for grants to jurisdictions to implement SORNA be directed to Tribes due to significant Tribal needs, which far exceed the needs of the states.

State-Tribal Coordination

In every state where Indian Tribes are located, regardless of whether the Tribe is a registration jurisdiction, successful implementation of the Act will require coordination between state, local, and Tribal governments. We urge the Department of Justice to make facilitating state and Tribal coordination through technical assistance a priority, and to include language in the Guidelines requiring states to document their coordination efforts with Tribal governments in their compliance submissions.

Federal Prisons Must Be Required to Register Offenders

Many Tribes have significant concerns about the provisions in the proposed Guidelines exempting federal corrections facilities from the Act's requirement that offenders be registered prior to release from incarceration. The Act requires that *all* corrections facilities "ensure" registration of sex

offenders prior to their release. However, under the proposed Guidelines all federal corrections facilities will not ensure registration; instead, they would merely provide the sex offender with a notice that the individual must register within three days. In addition to violating the Act, it would be extremely irresponsible to release these prisoners without making sure that they are registered and their home jurisdiction is notified of their release. This provision leaves Indian Tribes particularly vulnerable because of the high proportion of offenders whose crimes arose in Indian Country that are incarcerated in federal prisons as a result of federal prosecution under the Major Crimes Act.

In addition to severely undermining public safety, this provision in the proposed Guidelines will attempt to substantially shift the cost burden of initial registration from the federal government to the states and Tribes. The responsibility of initially registering an incarcerated offender that has been convicted under federal law, including the collection of DNA and fingerprints, is a responsibility that lies with the federal government under the Act. The costs that would be associated with developing the federal infrastructure necessary to fulfill this responsibility are no greater than the cost the Indian Tribes will incur in building the same infrastructure. The proposed Guidelines must be changed so that federal corrections facilities, like state and Tribal facilities, are required to ensure that offenders are entered into the registry before or at the time of their release as required by the Act. The federal government is under the same obligation as the states and Tribes, and pursuant to the Act, the Department of Justice cannot attempt to shift this obligation to others.

The Guidelines Lack Language to Provide States With Guidance for State Actions Taken Pursuant to the Act Within Tribal Jurisdictions

Arrest authority is one of the key subject matter areas addressed in the proposed Guideline's discussion of cooperative agreements between the states and Tribes. Tribes are greatly concerned about state action when conducting arrests of Tribal members or non-Tribal members that are found within Tribal lands. The Act went into great detail to ensure that Tribal jurisdictions are included under the requirements of the Act, which is evidence that Congress recognized the distinct and separate nature of Tribal and state governments. The Guidelines should better incorporate the Act's recognition of Tribal sovereignty and jurisdiction. Language should be included that instructs states seeking to make arrests within Tribal jurisdictions that Tribal procedures must be complied with when making arrests inside Tribal jurisdictions.

The Guidelines significantly undermine the effectiveness of SORNA by its failure to provide for equal recognition of Tribal court convictions, on a par with convictions in other jurisdictions

The proposed Guidelines lack recognition of Tribal sovereignty and authority where it provides that recognition of Tribal court convictions of sex offenses is left up to the individual jurisdiction for purposes of implementing the SORNA. More importantly, perhaps, is that this failure to provide for equal recognition of Tribal court convictions effectively undermines the SORNA's effectiveness in that it permits dangerous sexual offenders to escape from the graduated sanctions imposed under SORNA solely based on the status of the convicting jurisdiction.

Although the proposed Guidelines state that Indian Tribal court convictions for sex offenses are to be given the same effect as convictions by other United States jurisdictions, the actual language of the Guidelines has precisely the opposite effect. The Guidelines state that because Indian Tribal court proceedings may differ from other jurisdictions in that they "do not uniformly guarantee the same rights to counsel," a jurisdiction can choose not to require registration based on a Tribal court conviction. The Guidelines further make clear that if a defendant was denied to right to the assistance of counsel and would have had the right to the assistance of counsel under the United States Constitution in "comparable state proceedings", a jurisdiction can simply choose not to require registration.

By relegating all Tribal court convictions as Tier I offenses simply due to the incarceration limitations placed upon Tribes by Congressional Act, and by failing to provide for the recognition (by a State) of the most severe and reprehensible sex offenses *merely because they happen on a Reservation*, the Guidelines significantly hinder the heart of the SORNA requirements. The effect is far-reaching: by confining Tribal court convictions to Tier I, the ability of both Tribes and states to implement the SORNA for the protection of the general public (both on and off-reservation) is curtailed significantly, instead a dual standard is created with regard to the requirements imposed on offenders.

Effectively, the proposed Guidelines hamper the efficacy of the entire SORNA, solely based on the location of conviction, by permitting some sexual offenders to have the lesser restrictions placed on them. Any final Guidelines issued by the DOJ, therefore, must take into account this loophole and provide a mechanism by which Tribal court convictions are placed on an equal footing with convictions handed down in other jurisdictions.

The Conflict Between the Guidelines and the Frequently Asked Questions Must be Resolved

Conflict between the Guidelines and the Frequently Asked Questions (FAQ) must be resolved. Under FAQ, question #36, the table of contents reads, "How are foreign convictions treated under SORNA?" In the FAQ text, the question reads "How are foreign convictions and *Tribal* convictions treated under SORNA?" The answer proceeds to discuss convictions that were not "obtained with sufficient safeguards for fundamental fairness." This language conflicts with the language contained in the Guidelines, which indicates that Tribal convictions may differ from those in other states' jurisdictions because there is no guaranteed right to counsel in Tribal courts. Lumping Tribal convictions with foreign convictions and implying Tribal convictions were obtained without sufficient safeguards for fundamental fairness is offensive and disrespectful to Tribes and their courts. Accordingly, either 1) the word "Tribes" must be removed from FAQ #36, or 2) the FAQ answer should include a more lengthy explanation, such as the language found on page 16 of the Guidelines.

Tribal Governments not Functioning as Registration Jurisdictions

Even in those places where Tribal governments do not have the option of participating as a registration jurisdiction under Section 127 of the Act, or in cases where a Tribe opts-out, the Tribal government will play an important role in the successful implementation of the national sex offender registration system. Tribes and states are not interchangeable. Even if the Tribe is not a registration jurisdiction, the state simply cannot fulfill all of the responsibilities of Tribal governments. For example, Tribal courts will still have the responsibility of notifying offenders of their registration obligation, Tribal detention facilities will still be housing offenders, the state will need access to Tribal codes to include in the registry the text of the law violated by the offender, and the Tribal or Bureau of Indian Affairs ("BIA") law enforcement officers will still be the officers most likely to be in need of information about the whereabouts of registered offenders for investigation purposes and best positioned to assist registration personnel with tracking down non-compliant offenders.

The proposed Guidelines do not sufficiently address how Tribal governments will be included in the system if they are not registration jurisdictions. Throughout the Guidelines provisions are included requiring the sharing of information between "jurisdictions" of an offender's whereabouts or updates to registration information. Indian Tribes who have not opted-in under Section 127 have the same law enforcement and public safety need to receive this information as do other jurisdictions. Unfortunately, the definition of "jurisdiction" would leave them out and, as a result, the local law enforcement agency would not have the information it needs to keep the community safe. We encourage the DOJ to include <u>all</u> Tribal governments and law enforcement agencies throughout the Guidelines in all appropriate places.

In addition, the Guidelines are silent as to how registration will occur for offenders being released from Tribal detention facilities where the Tribe is not a registration jurisdiction. This issue should be addressed before the Guidelines are finalized. It is also unclear from the Guidelines whether registry information about an offender's criminal history will include Tribal court convictions from a Tribe that is not participating as a registration jurisdiction.

Conclusion

The proposed Guidelines for the Adam Walsh Act do not resolve several important issues that are crucial to the successful implementation of the Act. If the Department of Justice is going to require substantial implementation by the Tribes, the Guidelines must reflect the unique status of Tribes and resolve any question as to how these differences will be dealt with.

ITCA shares the federal government's commitment to protecting our communities and citizens from sexual predators. In fact, prior to the Adam Walsh Act, many Tribes in Arizona had already adopted sex offender registry codes. With the careful consideration by the Department of Justice of the comments that are submitted by the Tribes regarding the proposed Guidelines, ITCA is hopeful that the sex offender registry and its implementing guidelines will help to provide the same level of safety and security for Tribal communities as it will provide for the rest of nation.

ITCA would welcome an opportunity to meet with you to discuss these issues further at your convenience.

Sincerely,

John R. Lewis

John R. Lewis
Executive Director

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(541) 382-3011
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Fax Transmission Cover Page

Date: July 30, 2007

To: Leslie Hagen
SMART OFFICE, Office of Justice Programs

FAX: (202) 616-2906

From: Susan C. Landers for Howard G. Arnett

RE: The Confederated Tribes of the Warm Springs Reservation's Comments regarding National Guidelines for Sex Offender Registration and Notification

File No. W1091.07(b)

No. of pages (Including this cover page): 4

(Please contact Susan C. Landers at the above number if you had any trouble receiving this transmission.)

KARNOPP PETERSEN LLP
ATTORNEYS AT LAW

July 30, 2007

Laura L. Rogers, Director,
SMART Office, Office of Justice Programs,
United States Department of Justice
810 7th Street, N.W.
Washington, D.C. 20531

Re: Proposed Guidelines to interpret and implement the Sex Offender Registration and Notification Act. OAG Docket No. 121.

Dear Ms. Rogers:

This office serves as general counsel to the Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe" or "Warm Springs"). We are submitting this letter as Warm Springs Tribal Attorneys to convey the Tribe comments on the proposed National Guidelines for Sex Offender Registration and Notification ("Guidelines"). Our comments are as follows:

First, Warm Springs joins in and adopts as its own the comments of the National Congress of American Indians ("NCAI") on the proposed Guidelines. Warm Springs is a longtime member of NCAI and we played an active role in the development of the NCAI comments. Accordingly, we strongly support NCAI's comments.

In adopting the NCAI comments, the Tribe especially wishes to emphasize its support for the NCAI comment regarding the need for a "due process" mechanism for determining tribal compliance with the requirements of the Act. It is highly objectionable to Warm Springs that the Attorney General is allowed to unilaterally determine that a tribe has failed to comply with the Act and, as a penalty, delegate jurisdiction over the tribe's reservation to the state. Clearly, such an administrative delegation of state jurisdiction over Indian Country is not only offensive to tribal sovereignty, it appears to be unprecedented in the more than two centuries of Federal-Tribal relations. Certainly, such a grave decision by the Attorney General, with such serious consequences for tribal sovereignty and jurisdiction, should be undertaken with great reluctance. Moreover, such a decision must, at a minimum, be subject to judicial challenge by the affected tribe under procedures that are consistent with the due process requirements of the United States Constitution.

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Second, we strongly object to the provisions of the Guidelines regarding initial registration of convicted sex offenders incarcerated in the federal prison system. Under the draft Guidelines (p. 51-52), unlike prisoners incarcerated in state and tribal facilities, federal prisoners are not required to register before they are released to the community. The supposed justification for that glaring omission in the otherwise comprehensive requirement that incarcerated sex offenders must register before release is that there is no federal registration system. That is no excuse for not registering federally incarcerated sex offenders before their release. Certainly, it should be possible for the Federal Bureau of Prisons to arrange for incarcerated sex offenders to register with the State in which the federal correctional facility is located. That is simply a matter of Federal-State coordination and cooperation. The alternative--simply releasing without registering sex offenders convicted of the most serious felonies, many of whom committed their sex crimes in Indian Country--is unacceptable in view of the public safety threat these violators pose. Not only do these incarcerated felony violators pose the greatest threat to the public, but they are also the offenders least likely to voluntarily comply with registration requirements once they are released. For the Adam Walsh Act's goal of a comprehensive, national sex offender registration and notification system to become a reality, sex offenders incarcerated in the federal prison system must be registered before they are released.

Third, the provision of the Guidelines (p. 28-29) requiring the registry to include "traditional names given by family or clan pursuant to ethnic or tribal tradition" is unnecessary as well as offensive to many Native Americans and their cultural traditions. It should be removed from the Guidelines. The Guidelines already require "names," "aliases," "nicknames," and "pseudonyms," which covers the universe of names that a convicted sex offender would be known by in a community. By contrast, the "traditional names" given an individual in a tribal community are generally not known outside of the family or religious group and are often used in only very limited circumstances, usually in a private ceremonial or religious setting. If a "traditional name" should become a name of common usage in the community, it then rises to the level of a "nickname" and must be included in the registry by other provisions in the Guidelines. Again, we urge that the "traditional names" requirement be removed from the Guidelines.

Fourth, we disagree with the statement that all tribal court convictions should be treated as tier I offenses, simply because the maximum sentence is no more than one year in jail (Guidelines p. 25). In fact, many tribal court prosecutions are for sex offenses that would be classified as tier II or tier III offenses if the convictions occurred in state or federal court. The reason for this is many tribes prosecute serious sex offenses after federal prosecutors have declined to take the case to federal court. In our view, if a tribal court conviction is for an offense (in light of the elements of the crime proven at trial) that would be classified as a tier II or tier III offense if the conviction was in state or federal court, then the tribal court conviction should similarly be classified as a tier II or tier III offense.

Finally, we would like to see several additions to the Guidelines. Specifically, we would like to see the Guidelines include a model "Tribal-State Cooperative Agreement" that would meet the requirements of Sec. 127(b)(2) of the Adam Walsh Act. We anticipate that many tribes, and Warm Springs may be one of them, will want to develop a cooperative agreement with their local state government to share some of the registration and notification requirements of the Act. Such agreements are specifically authorized under Sec. 127(b)(2) of the Act. It would be very helpful if the Guidelines included a form or model of such an agreement.

We also would like to see the Guidelines include specific provisions regarding possible grants or funding that may be made available to Tribes to carry out their responsibilities under the Act. We note that the Guidelines (p. 60, 61 and 64) refer to the funding authorization of Section 631 of the Act. The Guidelines, however, do not indicate that a portion of the available funding will be set aside for Tribes. If Congress omits a tribal set aside in appropriations legislation, we believe that the Department of Justice has the administrative discretion to make such a set aside of appropriated funds for Tribes. Moreover, we believe the Department's intent to do so should be indicated in the Guidelines. The Guidelines should also state that grants will be awarded on a non-competitive basis. We are hopeful that the Department of Justice will request from Congress, and Congress will appropriate, sufficient funds to meet the needs of all tribes that have exercised the Section 127 election to assume the responsibilities of a jurisdiction under the Act. Accordingly, grants should be awarded according to the size, population and estimated compliance workload of each tribe.

Thank you for your consideration of these comments on the proposed Guidelines. Please feel free to call me if you have any questions.

Sincerely,

Howard G. Arnett by SCh

HOWARD G. ARNETT

HGA:ldd

cc: Leslie Hagen, SMART Office (via facsimile and first-class mail)

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:43 AM
To: Rosengarten, Clark; Hagen, Leslie
Subject: FW: Docket No. OAG 121
Attachments: Rogers SORNA comments080107FNL.pdf

From: Trent S.W. Crable [redacted]
Sent: Wednesday, August 01, 2007 4:26 PM
To: GetSMART
Subject: Docket No. OAG 121

SMART Office:

Please find attached the comments of the Quechan Indian Tribe regarding OAG Docket No. 121, the Proposed Guidelines for Interpreting and Implementing the Sex Offender Registration and Notification Act.

Thank you,

Trent S.W. Crable
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August 1, 2007

Via Email to
Subject: Docket No. OAG 121

Laura L. Rogers, Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 7th Street NW.,
Washington, DC 20531
Email: getsmart@usdoj.gov

Re: OAG Docket No. 121 – Comments of the Quechan Indian Tribe on the Proposed Guidelines for Interpreting and Implementing the Sex Offender Registration and Notification Act

Dear Ms. Rogers:

On behalf of the Quechan Indian Tribe, we submit the following comments on the proposed guidelines announced in OAG Docket No. 121 for interpreting and implementing the Sex Offender Registration and Notification Act ("the Act").

1. Part III of the Guidelines Should be Revised to Appropriately Recognize and Uphold Tribal Jurisdiction and Sovereignty.

As the Guidelines recognize, under section 127(a)(1) a federally recognized tribe has the option of "electing to carry out the sex offender registration and notification functions specified in SORNA in relation to sex offenders subject to its jurisdiction, or delegating those functions to a State or States within which the tribe is located."[1] Unfortunately, and unnecessarily, section 127(a)(2) places certain limits and restrictions on that authority. It is the Tribe's view that the Guidelines incorrectly interpret section 127(a)(2)(A) and its effect on a tribe's right to function as a "jurisdiction" under the Act.

[1] Proposed Guidelines at 13.

Section 127(a)(2)(A) provides that "a tribe subject to the law enforcement jurisdiction of a State under section 1162 of title 18, United States Code" will be treated as if it elected to delegate its functions to the State(s) under 127(a)(1)(B). Section 127(a)(2)(A) is very poorly drafted. First, it mischaracterizes the law, as no tribe is "subject to the law enforcement jurisdiction of a State under section 1162 of title 18."[2] Second, it fails to address the fact that tribes maintain jurisdiction over certain offenses, even where 18 U.S.C. § 1162 has granted concurrent jurisdiction to the State.[3] Because of these shortcomings, the Guidelines should be revised to affirmatively reflect that tribes in the states covered by 18 U.S.C. § 1162 may still elect to participate as a "jurisdiction" under the Act, while recognizing that to a certain extent the State would have concurrent authority.

If the Guidelines are not revised to clarify that tribes located within the states covered by 18 U.S.C. § 1162 may participate as a jurisdictions under the Act, there will be uncertainty as to what extent the tribes and states should function as "jurisdictions" over tribal lands.

If it is determined that the Act flatly prohibits tribes located within the states covered by 18 U.S.C. § 1162 from functioning as a jurisdiction under the Act, then the Act would be a gross invasion on tribal sovereignty that goes beyond the provisions of Public Law 280. If the Act is read as essentially prohibiting tribes from acting as a jurisdiction under the Act, ordering them to "delegate"[4] their authority, and requiring them to open their doors and assist the State, then the Act: (1) reaches farther and deeper than Public Law 280; and (2) is an unfunded mandate. In light of the longstanding federal policy of tribal self-government and self-determination, it should be assumed that Congress would require serious and lengthy discussion, and consultation with the affected tribes and states, before passing an act that so grossly and profoundly affects tribal sovereignty.

It is essential that the Guidelines make it clear that tribes located within states covered by 18 U.S.C. § 1162 may elect to function as a jurisdiction under the Act to the extent they have jurisdiction.

2. Part IV of the Guidelines Should be Revised to Provide Full Faith and Credit to All Lawful Tribal Court Prosecutions.

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[2] 18 U.S.C. § 1162 granted to states jurisdiction over "offenses committed by or against Indians in the areas of Indian country listed [in the section] . . . ." While the statute granted to states jurisdiction over certain offenses occurring within a reservation, it in no way subjects *tribes* to State jurisdiction.

[3] "The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor's Office for the Department of Interior, and legal scholars, is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched." Nell J. Newton et al., Cohen's Handbook of Federal Indian Law 560–61 (2005 ed.) (internal footnotes omitted).

[4] While the Act uses the phrase "elect to delegate," in the context of 127(a)(2)(A) the tribe is clearly not "electing" to "delegate."

The Guidelines note that "Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions," but they go on to provide that:

> a jurisdiction may choose not to require registration based on a tribal court conviction resulting from proceedings in which: (i) the defendant was denied the right to the assistance of counsel, and (ii) the defendant would have had a right to the assistance of counsel under the United States Constitution in comparable state proceedings. A jurisdiction will not be deemed to have failed to substantially implement SORNA based on its adoption of such an exception.[5]

This is, frankly, outrageous. The Act itself does not require, or even suggest, such discriminatory treatment of tribal court convictions.[6] The quoted language should be stricken from the Guidelines. Lawful tribal court convictions should receive full faith and credit.

The Indian Civil Rights Act prohibits tribes from denying "any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense."[7] Therefore, if a tribe did deny a defendant the right to the assistance of counsel obtained at the defendant's expense, then the conviction would have been secured in violation of the Indian Civil Rights Act and could be challenged accordingly. While it is most logical to read the language of the Guidelines as permitting other jurisdictions to ignore tribal convictions only where the tribe prohibited the defendant the assistance of counsel, if it is intended to mean that tribal convictions may be ignored if counsel is not provided free of charge, that would still be inappropriate as Congress specifically recognized that tribal courts need not provide free counsel.

The Act does not provide for such disparate treatment of tribal convictions, and such disparate treatment is not justified. The Guidelines note that convictions in Canada, Great Britain, Australia, and New Zealand, are all deemed to have been obtained with sufficient safeguards for fundamental rights, and that convictions of other foreign jurisdictions will be deemed to have provided sufficient safeguards if the State Department "has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial . . . ."[8] The Guidelines inappropriately subject tribal court convictions to a higher standard than foreign judgments.

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[5] Proposed Guidelines at 16.

[6] That the Act does provide a basis for discounting or ignoring *foreign* convictions (section 111(5)(B)), while not providing for such treatment of tribal convictions, strongly suggests that Congress did not intend to permit other jurisdictions to discriminate against tribal convictions.

[7] 25 U.S.C. § 1302(6).

[8] As noted in note 6, the Act does permit the discounting, or ignoring of, foreign judgments.

3. Part VII of the Guidelines Should be Revised to Ensure that Tribes and Tribal Agencies Receive Community Notification and Target Disclosures Issued Under Section 121(b).

It is vital that tribes and tribal agencies (particularly police departments, schools, and daycare centers) receive the notifications provided for in section 121(b). The Tribe recommends that Subpart B of Part VII be revised so that it is clear that tribes and tribal agencies are to receive such notification.

4. It is Inappropriate that the Act Creates Burdensome Requirements for Tribes Without Providing Sufficient Guaranteed Funding.

The Act places costly burdens on tribes, but does not guarantee funding to offset the costs of implementing the Act's requirements. Even if a tribe elected to delegate its functions to a state, the Tribe would still be required to provide "cooperation and assistance" to the State. If tribes are to be required to dedicate scarce resources and participate in Congress's national system, Congress should guarantee adequate funding to all tribal participants.

Thank you for your consideration. The Tribe reserves the right to supplement these comments. Please include our office on all future notices and distributions of documents regarding the implementation of these guidelines.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

Frank R. Jozwiak
Trent W. Crable
Attorneys for the Quechan Indian Tribe

cc: President Mike Jackson Sr.
Vice President Keeny Escalanti Sr.
Members of the Quechan Tribal Council

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mmc:8/1/07

SAC AND FOX NATION

Route 2 Box 246, Stroud, OK 74079 (918) 968-3526 Fax (918) 968-4837

REQUEST THE ATTACHED NUMBER OF PAGES 4 INCLUDING COVER SHEET TO BE DISPATCHED BY FACSIMILE.

TO:

NAME: Laura Rogers TITLE: Director

OFFICE: SMART DOJ PHONE #: 202-514-1689

CITY/STATE: Washington DC FAX #: 202-616-2906

FROM:

NAME: Rusty Brown TITLE: Policy Analyst

OFFICE: Sac+Fox Nation PHONE #: 918-290-1152

CITY/STATE: Stroud OK FAX #: 918-9684834

MESSAGE: Public Comments For OAG Docket No. 121

DISPATCHED BY: RGB DATE: July 31 2007 TIME: 3:00 PM

Sac and Fox Nation

Route 2, Box 246 Stroud, OK 74079

Principal Chief KAY RHOADS
Second Chief DARRELL L. GRAY
Secretary GEORGE THURMAN
Treasurer MICHAEL W. HACKBARTH
Committee Member AUSTIN GRANT

July 30, 2007

Laura L. Rogers, Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 7th Street NW
Washington, DC 20531
202.514.4689 (office)
202.616.2906 (fax)
getsmart@usdoj.gov

RE: OAG Docket Number 121: Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification

Ms. Rogers:

As the Principal Chief of the Sac and Fox Nation, I share the federal government's concerns over sex offenders and sexual predators. It is in the best interest of all citizens of the U.S. and the Sac and Fox Nation (the Nation) to enforce sex offender laws, including sex offender registries.

The Nation has "opted-in" as a registry jurisdiction and as such, I submit the following public comments regarding OAG Docket No. 121, U.S. Attorney General's Proposed Guidelines for Sex Offender Registration and Notification under the Adam Walsh Act, published in the Federal Register on Wednesday, May 30, 2007, on behalf of the Sac and Fox Nation and the citizens I represent.

Comment 1:

Federal Register, Vol. 72, No. 103, Wednesday, May 30, 2007 pp. 30214-15, III. Covered Jurisdictions.

Throughout this section of the Guidelines, it states that tribes may enter into cooperative agreements with the state(s). For example, page 30215, first column, first paragraph, second sentence states:

> Duplication of registration and notification functions by tribes and States is not required, however, and such tribes may enter into cooperative agreements with the States for the discharge of these functions, as discussed below in connection with section 127(b).

Within this section there are at least, five (5) other references to tribes entering into cooperative agreements with states. The guidelines do not mention tribal nations entering into cooperative agreements with other tribal nations, or forming tribal coalitions for the purposes of

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implementing and enforcing SORNA. As written, these Guidelines seem to limit a tribe's ability to enter into a cooperative agreement with only states.

The Nation recommends a modification of this section to clearly affirm tribal nations may enter into cooperative agreements with states, local governments, and other tribal nations while including specific provisions for the formation of tribal coalitions to implement SORNA. It is the Nation's view that as long as the terms of SORNA are legally met and substantially implemented cooperative agreements, with all registry jurisdictions, are appropriate.

Comment 2:

Federal Register, Vol. 72, No. 103, Wednesday, May 30, 2007 pg. 30216, first column, second paragraph under A. Convictions Generally, starting with the second sentence states:

> Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions. It is recognized, however, that Indian tribal court proceedings may differ from those in other United States jurisdictions in that the former do not uniformly guarantee the same rights to counsel that are guaranteed in the latter. Accordingly, a jurisdiction may choose not to require registrations based on a tribal court conviction resulting from proceedings in which: (i) The defendant was denied the right to the assistance of counsel, and (ii) the defendant would have had a right to the assistance of counsel under the United States Constitution in comparable state proceedings. A jurisdiction will not be deemed to have failed to substantially implemented SORNA based on its adoption of such an exception.

The Nation would remind the Department of Justice of the Indian Civil Rights Act of 1968 (ICRA) (25 U.S.C. §§ 1301-03) which clearly states that every party appearing in a tribal court proceeding has the right "to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." Under ICRA, a tribal nation has no authority to deny any party to a tribal proceeding the right to counsel.

The Guidelines allow other jurisdictions to review tribal court proceedings to ensure a defendant's rights have been guaranteed; tribal jurisdictions should have the same right of review. While going through state courts Native Americans' rights are not always properly guaranteed or protected. The Guidelines either need to ensure full faith and credit applies to and is afforded to all registry jurisdictions or alternatively, each jurisdiction should be granted the right to review each defendant's conviction and have the same opportunity of adopting an exception.

Comment 3:

Federal Register, Vol. 72, No. 103, Wednesday, May 30, 2007 pg. 30220, second column, last paragraph, second sentence states:

> The names and aliases required by this provision include, in addition to the registrant's primary or given name, nicknames and pseudonyms generally, regardless of the context in which they are used, any designations or monikers for

self-identification in Internet communications or postings, and traditional names given by family or clan pursuant to ethnic or tribal tradition.

It is the Nation's opinion a clear distinction needs to be made in an individual's use of a traditional or ceremonial name. A blanket statement forcing Native Americans to give up their traditional or ceremonial name is inappropriate and may violate an individual's right to freedom of religion. If the individual publicly uses their traditional name and is known by that name, then it may be reasonable to include the name in the registry. However, in many instances a traditional name is used for religious ceremonial purposes only and not spoken or used outside of the religious ceremonies. If the name is used for the latter purpose the name should not be required for the registry nor should the name be put on the Internet.

Comment 4:

The Nation agrees with the National Congress of American Indians (NCAI) comment on OGA Docket Number 117 interim rule on retroactivity submitted to David J. Karp, Senior Counsel, Office of Legal Policy on April 30, 2007.

Comment 5:

A general concern the Nation has with the Act and the Guidelines are the numerous unfunded mandates placed on participating tribal jurisdictions. The Act provides for funds to be available to tribes to implement SORNA. It is the Nation's current understanding that neither the financial assistance nor the extent of assistance, for implementation, has yet been appropriated or determined. The Nation believes these issues must be addressed and should require full consultation with tribes.

If you have any questions concerning the Sac and Fox Nation's public comments on OAG Docket Number 121, please contact Mr. Rusty Creed Brown, Policy Analyst at 918.968.2031 or rusty.brown@sacandfoxnation-nsn.gov.

Sincerely,

Kay Rhoads,
Principal Chief
Sac and Fox Nation

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Tuesday, July 31, 2007 10:58 AM
To: Hagen, Leslie; Rosengarten, Clark
Subject: FW: Docket No. OAG 121
Attachments: Comments_-_Sex_Offender_Registration[1].pdf

From: OLC Intern [redacted]
Sent: Monday, July 30, 2007 7:34 PM
To: GetSMART
Cc: Darren Williams; OLC Intern
Subject: Docket No. OAG 121

Attached are the Nez Perce Tribe's comments on the Proposed Guidelines for the Sex Offender Registration and Notification Act.

Morgen Reynolds
Legal Intern
Office of Legal Counsel
Nez Perce Tribe
P.O. Box 305
Lapwai, ID 83540
Office: 208-843-7355
ax: 208-843-7377

Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

July 30, 2007

Leslie A. Hagen
SMART Office/OJP
U.S. Department of Justice
810 Seventh Street, NW
Washington DC 20531

OAG Docket No. 121
Comments on the Attorney General's National Guidelines for the Sex Offender Registration and Notification Act – Proposed Guidelines, May 2007

Dear Ms. Hagen,

Thank you for the opportunity to comment on The National Guidelines for Sex Offender Registration and Notification – Proposed Guidelines ("Proposed Guidelines"). The Nez Perce Tribe is committed to promoting public safety and to protecting all individuals in Indian Country. However, the Nez Perce Tribe is concerned with the disparate application of the Sex Offender Registration and Notification Act ("SORNA") to state and tribal jurisdictions.

SORNA requires registration jurisdictions to substantially implement and comply with SORNA guidelines by July 27, 2009, although, SORNA provides inconsistent penalties on state and tribal jurisdictions for failure to meet this deadline. A state's failure to comply by the specified date will result in a mandatory ten-percent reduction of federal justice assistance funding under 42 U.S.C. 3750 (Byrne justice Assistance Grant

Funding).[1] Whereas, if the Attorney General determines that a tribe has not substantially implemented the requirements and is not likely to become capable of doing so within a reasonable amount of time, the tribe will be treated as if it has made the election to delegate its functions to another jurisdiction.[2] This treats tribal jurisdictions in such a way that is inconsistent with the treatment of other sovereign entities, i.e. states.

This discrepancy in treatment of tribal jurisdictions in comparison to other jurisdictions will result in the expansion of state jurisdiction on tribal lands, it will be an unprecedented diminishment of tribal sovereignty and will unnecessarily complicate the already confusing system of criminal jurisdiction on tribal lands. If this provision were applied equally, it would provide for the diminishment of state sovereignty. For example, if the Attorney General determines that a state has not substantially carried out the requirements, it would be treated as if it has elected to delegate its functions to a neighboring state or to the federal government. Such a diminishment of state jurisdiction would be extraordinary and unacceptable. Therefore, the Nez Perce Tribe recommends that the provision be amended to apply equivalent consequences for state and tribal jurisdictions that fail to substantially implement SORNA.

In addition, SORNA inadequately applies standards for penalties when sex offenders fail to comply with the registration requirements, by completely neglecting to include penalties in tribal jurisdictions. "Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of

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[1] *Proposed Guidelines*, U.S. Department of Justice, Office of Justice Programs, http://www.ojp.usdoj.gov/smart/proposed.htm at 10 (May 2007); *See also* SORNA § 16925(a).
[2] 42 U.S.C.A. § 16927(a)(2)(C). *See also Proposed Guidelines* at 15; and *U.S. Department of Justice, Office of Justice Programs, Frequently Asked Questions: The Sex Offender Registration and Notification Act (SORNA) Proposed Guidelines* (http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf) (These functions are delegated to the State or States if the Attorney General determines that the tribe has not substantially implemented SORNA and is not likely to become capable of doing so within a reasonable amount of time).

imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter."[3] The Proposed Guidelines state that. "Indian tribes are not included in this requirement because tribal jurisdiction does not extend to imposing terms of imprisonment exceeding a year."[4] Tribal jurisdictions are only able to impose terms of imprisonment of up to one year, while SORNA requires states to enforce penalties of no less than one year. This disparity of sentencing authority needs to be addressed and the Guidelines should establish equivalent federal penalties that would apply in tribal jurisdictions and discourage the violation of SORNA.

The lack of tribal sentencing authority adds to the complications faced by law enforcement in tribal jurisdictions, which was recently discussed by the United States Senate Committee on Indian Affairs during the June 21, 2007 oversight hearing on law enforcement in Indian Country. Federal authorities do not prioritize their role in law enforcement in Indian Country and the U.S. Attorneys rarely prosecute any crime when they feel the tribe could impose a remedy. Therefore, the Nez Perce Tribe urges the Department of Justice to include a provision that would expressly impose federal penalties and would direct the U.S. Attorneys in the prosecution of sex offenders who fail to comply with the registration requirements in tribal jurisdictions.

The Nez Perce Tribe seeks to ensure public safety in Indian Country and is thankful for the opportunity to comment on this issue.

Sincerely,

Samuel N. Penney

Samuel N. Penney
Chairman,
Nez Perce Tribal Executive Committee

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[3] SORNA § 16913(c); *See also Proposed Guidelines* at 64.
[4] *Proposed Guidelines* at 64.

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Thursday, July 26, 2007 3:50 PM
To: Rosengarten, Clark
Subject: FW: Guideline Recommendation
Importance: High
Attachments: Blank Bkgrd.gif

From: Desiree Allen-Cruz[redacted]
Sent: Wednesday, July 25, 2007 9:37 PM
To: GetSMART
Cc: Desiree Allen-Cruz
Subject: Guideline Recommendation
Importance: High

We have reviewed the Proposed Guidelines and agree "Notification to Jurisdictions" need to be defined to the greatest extent possible. While we understand that larger more electronically advanced jurisdictions (state, fed) are likely to work closely and quickly, smaller jurisdictions such as rural or frontier areas within the state do not. And, as such, Tribal jurisdictions are not usually a priority especially when we reside in the rural or frontier areas. **Defining an agency within jurisdictions** (residential, school, employment) **that must give notification to ensure quick and reliable notification is important for the safety of our communities.**

Example: A sex offender currently a resident of Colorado employed with a construction company within that state, travels to Pendleton, Oregon for a construction project on our Reservation. Will the Colorado SO Registering office contact the state of Oregon? Or will the Colorado SO Registering office be contacting our Tribal agency? Will that notification reach the Tribal agency before the SO arrives or within 3 days after arrival? Or, will the SO Colorado employer have to notify our Tribal Law Enforcement or other Tribal agency upon or prior to arrival? Or will we have to bear the wait of Colorado State notifying Oregon or the Federal jurisdiction who will in turn contact our Tribe?

If racism prevails within jurisdictions (by agency or employee), defining the agency responsible to notify along with timelines is of utmost and imperative importance.

Please detail or further refine, within the proposed Guidelines, which agency within each jurisdiction that must notify which receiving agency of each jurisdiction and timeline for each.

Folks in attendance and in agreement of above include:

Jessie Grow Hodges, Tribal Sexual Assault/Teen Advocate; Desiree Allen-Cruz, Domestic Violence Services Coordinator; Kate Beckwith, Tribal Prosecutor; Ron Harnden, Tribal Chief of Police.

Respectfully,

Desiree Allen-Cruz
CTUIR, Domestic Violence Services Coord.
PO Box 638
Pendleton, OR 97801
Office: 541.276.7011
Direct: 541.966.2895
Fax: 541.278.5391
email: desireeallen-cruz@ctuir.com

July 9, 2007

Comments on proposed Guidelines
The National Guidelines for Sex Offender Registration and Notification

Submitted by Maureen White Eagle, Attorney, 3868 Heather Drive, Eagan, MN 55122
MWhiteEagle@msn.com

I reviewed the guidelines focusing on the **effects it will have on tribes**, participating and non-participating. The following are comments or questions which may or may not have been considered.

1. Jurisdiction-wide registration system: It should be clarified that if a reservation participates, it is responsible for registering non-Indian as well as Indian offenders in Indian country, although agreements could delegate some of that responsibility.

2. Identify reservations: Currently **an offender is not required** to **identify whether he will be residing, working, or schooling on an Indian reservation** when he registers. If this question is not asked, and the offender is not required to identify the reservation, other jurisdictions are **not** going to know when notification of a tribal jurisdiction is necessary. Zip codes are not going to accurately help in identifying when the residence, school, employer is on a reservation. Because of the belief that sex offenders migrate to reservations this is particularly important, even when the reservation identified is not a participating reservation. This could be an extremely important way to gather statistical information about sex offenders on Indian Reservations. If the question is not asked, a federal prison in Kansas (or elsewhere), is not going to know if an Indian reservation is one of the jurisdictions that is required to be notified, nor will the offender know where he is required to register. You need another field on the website for reservations. Indicating both state and reservation should be possible.

3. Notification of non-participating tribal jurisdictions. Another potential problem which could be solved in the regulations is the need to **insure that non-participating tribal jurisdictions are notified** of offenders residing/working/schooling in their jurisdictions. There are no requirements in your rules that law enforcement on non-participating jurisdictions must be included in the notification system. If this is not a requirement, many states may choose not to include tribal law enforcement in their system. If the state is responsible for a Jurisdiction-wide system which includes non-participating tribal governments, requiring them to provide notification to non-participating tribes provides some respect to tribal governments and also insures that tribes be aware of offenders (working/living/schooling on tribal lands), which should permit tribes to take action they may wish to take to protect their citizens.

4. Regulation IV. A. Convictions Generally: Exception for Indian tribal court convictions of sex offenses: This is gong to cause confusion. On one hand you are saying that Indian tribal court convictions for sex offenses should be included in the required offenses and on the other hand you are saying that tribal courts do not provide

attorneys for defendants so no need to require registration for their offenses. I see many states not including tribal convictions at all, rather than individually determining whether the individual had counsel or had a constitutional right to counsel for a tribal offense. In a time where we are trying to encourage tribes to prosecute sexual offenses, since the federal and states don't seem to be doing enough on reservations to hold perpetrators accountable, allowing states to ignore tribal sexual convictions, seems counterproductive. Indeed more and more tribes are providing defense counsel, but I doubt this will be recognized. I think a presumption supporting tribal offenses would be justified. Let the perpetrator demonstrate that he was denied counsel.

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:32 AM
To: Rosengarten, Clark; Hagen, Leslie
Subject: FW: Cayuga Nation of New York

From: Alcott, Lee [redacted]
Sent: Friday, August 03, 2007 2:28 PM
To: GetSMART
Cc: [redacted]
Subject: Cayuga Nation of New York

Re: Cayuga Nation of New York
Nation Resolution Re: SORNA Jurisdiction

Dear Sir or Madam:

This firm represents the Cayuga Nation of New York ("Cayuga Nation"). Please be advised that by resolution of the Cayuga Nation's governing body, the Cayuga Nation Council, dated June 21, 2007, a copy of which is attached, the Cayuga Nation has elected to become a Sex Offender Registration and Notification Act (SORNA) jurisdiction, as defined under the Adam Walsh Child Protection and Safety Act.

I believe this resolution was previously transmitted to you; however, my client received an e-mail indicating that it had not been received. I would appreciate if you would kindly acknowledge receipt. Thank you for your attention and assistance.

Very truly yours,

Lee Alcott

Lee Alcott
French-Alcott, PLLC
One Park Place
300 South State Street
Syracuse, NY 13202
Tel: [redacted]
Dir: [redacted]
Fax: [redacted]
Dir: [redacted]

[redacted]

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-WOHEHIV-
Morning Star

NORTHERN CHEYENNE TRIBE
ADMINISTRATION
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(406) 477-6284
FAX (406) 477-6210

-WOHEHIV-
The Morning Star

June 27, 2007

Leslie A. Hagen
SMART Office/OJP
U.S. Department of Justice
810 7th Street, NW
Suite 8241
Washington, DC 20531

Dear Sir:

This is in reference to the letter dated May 25, 2007 to my office from Ms. Regina Schofield, Assistant Attorney General regarding Consultation on Attorney General Guidelines for Sex Offender Registration and Notification Act and our comments to the guidelines.

Our comments to the guidelines are:

1. Northern Cheyenne Tribe has elected to carry out this subtitle, section 127 of P.L. 109-248 as a jurisdiction subject to its provisions.
2. Northern Cheyenne Tribe enacted an Ordinance entitled Sex Offender Registration Program. On final review and approval of the Ordinance a copy will be mailed to your office under separate cover.
3. Review of the guidelines and provisions are technical but comprehensive. We recommend revision for simplicity after a period of time. The guidelines demonstrate compliance to which the tribe recognizes.
4. Northern Cheyenne Tribe has limited automation, electronic databases and software. Tribe requires federal justice assistance funding from the OJP and will file for grant funding. Registering, tracking and sharing information with other jurisdictions in regards to SORNA requires updated automation and funding.
5. Tribe will do everything possible to accomplish the set up of this law within the three year proposed time period effective as of July 27, 2006.

This concludes our comments and as always please be assured of our cooperation in this very important endeavor. For more information pertaining to the Tribe's status please do not hesitate to call the Chief Prosecutor's office at (406) 477-8222.

Sincerely;

Eugene Little Coyote, President
Northern Cheyenne Tribe

8/2/07

QUILEUTE TRIBAL COUNCIL
POST OFFICE BOX 279
LA PUSH, WASHINGTON 98350-0279
TELEPHONE (360) 374-6163
FAX (360) 374-6311

August 1, 2007

Ms. Leslie Hagen
SMART Office
Office of Justice Programs
Department of Justice
810 7th Street NW, Suite 8241
Washington, D.C. 20531

Re: Quileute Indian Nation Comments on
Implementation of the Adam Walsh Act
Sex Offender Registration and Notification

Dear Ms. Hagen:

The Quileute Indian Nation is extremely concerned about the Proposed Guidelines for implementation of the Sex Offender Registration and Notification Act (SORNA), particularly Section III of the Proposed Guidelines issued in May 2007.

The Quileute Indian Nation is situated on the Pacific Ocean, in an isolated location of the Olympic Peninsula in La Push, Washington.

We wish to make clear that the Quileute Nation is very much in support of the purpose and intent of the Adam Walsh Act. Previously, the Quileute Tribal Council passed a resolution to indicate our intent to begin a sexual offender registration process. Historically, our women and children have been, and continue to be, victimized by sexual predators – we estimate that 60 to 80 percent of these sexual offenders are non-Natives. In routine traffic stops over the last six months alone, our tribal police have pulled over three men registered as sex offenders in outside jurisdictions. These men were on our reservation "trolling" for new victims among our women and children. It appears that these sex offenders target victims on reservations – moving from reservation to reservation. Our women and children are very vulnerable to being sexually victimized for many reasons – a major reason being the jurisdictional complexities in our area. We are within 50 miles of seven different jurisdictions – the Olympic National Park (federal), the City of Forks, the Makah Indian Nation, the Hoh Indian Nation (Bureau of Indian Affairs), Clallam County Sheriff's Department and the Washington State Patrol. The Federal Bureau of Investigation handles felonies on the reservations and we are within 50 miles of two state correctional facilities.

With that said, the Quileute Indian Nation is very concerned about the proposed SORNA Guidelines, particularly section III. We were never consulted in the drafting of the Adam Walsh Act (nor to our knowledge were any of the other Tribes in Washington consulted). Washington State is a partial PL 280 state, asserting ***concurrent*** jurisdiction over only eight enumerated areas. The Quileute Indian Tribe, along with a handful of other Washington tribes, lawfully retroceded from Washington's concurrent jurisdiction under PL 280. Our retrocession from state concurrent jurisdiction under PL 280 is codified in the Revised Code of Washington RCW.

Yet, under Section III of SORNA, the federal government appears to be attempting to expand PL 280 so that the State of Washington would now also have jurisdiction over registration of sex offenders convicted in our tribal court. The Quileute Tribal Court would effectively be required to acknowledge Washington's ***exclusive*** jurisdiction over the area, an incredible expansion of the effect of PL 280 over our Tribe. With all due respect, this is an offense to our sovereign right to legislate, prosecute and police to protect our own people.

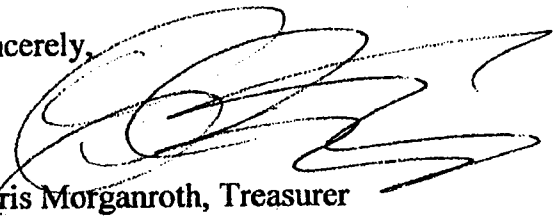
There are very large barriers to the Quileute Nation's ability to comply with the provisions of the Adam Walsh Act. For example, the Quileute Juvenile Code provides that the identity of juvenile offenders convicted of tribal offenses is absolutely confidential. A retroactive change to that law would be a potential violation of the *ex post facto* provision of the Indian Civil Rights Act. We could and would consider a possible change to the Juvenile Code to comply with the provisions of the Adam Walsh Act in the future, but we would need time to bring this very sensitive issue before our people. Additionally, we would need time to make tribal code revisions to give full faith and credit to conditions of probation in court orders for sex offenders from outside jurisdictions. We will need a mechanism to ensure that outside jurisdictions notify the Tribe when a person who has either been convicted of an offense which was committed upon our reservation, or where one of our tribal members was a victim, or where the perpetrator either resides on our reservation or is a tribal member, so that we can track compliance with conditions of probation and registration.

In conclusion, the Quileute Tribe respectfully respects clarification of the jurisdictional authority under partial PL 280 states such as Washington, particularly where a tribe (such as the Quileute Nation) has retroceded from the ***limited, concurrent*** (***not*** exclusive) jurisdiction set forth in this State's version of PL 280.

Additionally, the Quileute Tribe expresses its strong support of the Joint Statement of the Tribal Leadership present at the July 31, 2007 Consultation Session between federal agencies, including the Department of Justice, and the Tribes. The Quileute Tribe joins in that statement. Although we unfortunately were unable to have a tribal leader present at this conference, our tribal prosecutor was present and we are fully informed of the discussion.

We do remain distressed and condemn the fact that we have such little time to fully consider all ramifications of this matter. Frankly, it appears that the federal government has acted in a most cavalier fashion regarding a matter which is so critical to the welfare and safety of our women and children and which is so critical to the sovereignty which has been our legacy from our ancestors, and a legacy of self-governance which we are committed to preserve for future generations.

Sincerely,



Chris Morganroth, Treasurer
Quileute Tribal Council

cc: National Congress of American Indians

Walker River Paiute Tribe

1022 Hospital Road • P O. Box 220 • Schurz, Nevada 89427
Telephone: (775) 773-2306
Fax. (775) 773-2585

Jul[illegible], 2007

U.S. Attorney General, Alberto Gonzales
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Laura L. Rogers, Director
SMART Office, Office of Justice Programs
United States Department of Justice, Suite 810
7th Street, NW
Washington, D.C. 20531

Re: Comments to the Proposed *National Guidelines for Sex Offender Registration and Notification*, May 2007 OAG Docket No. 121

Dear Attorney General Gonzalez and Mrs. Rogers

I am writing on behalf of the Walker River Paiute Tribe of Nevada in which a federally recognized Indian Tribe and provide comments to the proposed national guidelines for the Sex Offender Registration and Notification. (the Guidelines) which is being proposed by the United States Department of Justice that will provide guidance to jurisdictions responsible for implementing the Sex Offender Registration and Notification Act, ("SORNA") which is incorporated into Title-1of P.L. 109-248 (the "Adam Walsh Act")

I would like to state for the record that the Legislation underline the proposed Guidelines is and affront to tribal sovereignty and represents a dramatic departure from the way criminal and civil jurisdictions is currently distributed among state, federal and tribal sovereign. Unfortunately, the underline law is structured in a way that will also undermine its overall public safety, effectiveness and create unnecessary challenges for tribal and state officials charged with implementing the law on the ground and addition the act represents an substantial unfunded mandate for tribes, many of whom already suffer from a severe shortage of resources for public safety.

The act allows the Attorney General the authority to assess the compliance of those tribes who have elected to participate as a registration jurisdiction. If the Attorney General finds that the tribe is not in compliance, he has the power to give authority under the act to the state such delegation would represent a major infringement on tribal sovereign authority, and congress decision to vest the Attorney General with this power is unprecedented. This delegation of authority will dramatically impact civil and criminal jurisdiction in Indian Country. This could undermine carefully negotiate cross-jurisdictional collaborative agreements that exist between tribe and states.

We strongly recommend the Department of Justice consult tribal governments to develop a detailed, process for assessing tribal compliance. This complex issue requires a more formal and lengthy process for consultation that has been used by the Department of Justice in the past.

Tribal governments will play an important role in the successful implementation of the National Sex Offender System. Tribes and states are unique and the state simply can not fulfill all the responsibilities of the tribal government. The state will need to have access to tribal codes to include in the registry the text of the law violated by the offender. Tribal and BIA law enforcement officers will still be in need of

information about the whereabouts of registered offenders for investigation purposes and best positioned to assist registration personnel with tracking down offenders. In addition, the Guidelines are silent as to how registration will occur for offenders from being released from tribal detention facilities for the tribe is not a registration jurisdiction. It is unclear if an offender's criminal history will include tribal court convictions from a tribe that is not participating as a registration jurisdiction.

Most importantly, the Indian tribes and state will require coordination, we request that the Department of Justice to facilitate state and tribal coordination through technical assistance. The Guidelines should require states to document their coordination efforts with tribal governments and their compliance submission. We are also requesting for the Department of Justice to review the issues Indian tribes experience in accessing the National Criminal Information Center (NCIC) or through participating state Criminal Information System database and address this issue in the guidelines.

In conclusion, this one day consultation is inadequate for tribes to provide meaningful written comments that may reflect any new information or issues that may arise in this session in Phoenix, Arizona. We recommend that the guidelines reflect the Department of Justice to continue consulting with Indian Tribes in an ongoing way throughout the implementation phase of the act. Additionally, a creation of a Tribal Advisory group to offer expertise and guidance to the Department of Justice as the Adam Walsh Act is implemented in Indian country.

Respectfully Submitted,

Genia Williams, Chairman
Walker River Paiute Tribe
Schurz, Nevada

Dated this **31st** day of **July, 2007**

AK-CHIN INDIAN COMMUNITY

Community Government

507 W. Peters & Nall Road • Maricopa, Arizona 85238 • Telephone: (520) 568-1000 • Fax: (520) 568-4566

August 2, 2007

Leslie Hagen
SMART Office
Office of Justice Programs
810 7th Street, NW, Suite 8240
Washington, DC 20531

RE: Supplemental Comments to the Ak-Chin Indian Community's Initial Comments on "The National Guidelines for Sex Offender Registration and Notification."

Dear Ms. Hagen:

As anticipated, after the Department of Justice (DOJ) tribal consultation, on July 31, 2007 in Phoenix, Arizona, the Ak-Chin Indian Community (the "Community") has additional comments to submit for your consideration. Therefore, we respectfully submit, for your further consideration, these supplemental comments to our original comments. In addition, we request that you fully consider the issues raised by the Inter-tribal Council of Arizona and the issue statement prepared by NCAI, which was provided to you at the consultation.

To begin with, we thank you for the opportunity to dialogue with you during the July 31 consultation. While you were able to provide only some answers at that time, the information you did provide brings to light additional issues and considerations for the Community with regards to implementing the Adam Walsh Act (the "Act"). We look forward to working with the DOJ, other tribes, and, where applicable, the states to resolve all issues pertaining to implementing the Act.

Tribes Need an Opportunity to Apply for Sex Offender Management Training and Technical Assistance Grants

As mentioned in our previous comment, resources, including financial resources, will pose large obstacles for many tribes, such as the Community. At the consultation, you informed meeting participants of a grant funding opportunity that would help jurisdictions implement the Act. You also acknowledged that this was not the first grant

that was available for this purpose. Considering that tribes have the most work to do to in developing their respective sex offender registries, it is disappointing to learn that the Sex Offender Management Training and Technical Assistance grant opportunity has already closed.

Tribes have been so occupied with trying to understand the Act and the requirements imposed upon tribes that the opportunity to apply for the Sex Offender Management Training and Technical Assistance grant was missed. Considering that tribes had until July 27 to make a decision on whether or not to implement the Act themselves, it is unreasonable to assume that tribes were in a position to apply for training and technical assistance grants at any time prior to July 27, 2007. Accordingly, we respectfully request that additional funding be made available to provide similar grant opportunities to tribes.

Determinations that a Jurisdiction Has Substantially Implemented the Act Should Not Be Made on a Case-By-Case Basis

During the consultation, many tribal leaders expressed concern about the case-by-case nature of the determinations of whether or not a jurisdiction has substantially implemented the Act. It was not reassuring to hear that no more specific guidelines are likely to be forthcoming. You had indicated that states are submitting information on legislation passed to implement the Act; however, you did not indicate whether or not merely submitting information was sufficient to deem a jurisdiction is compliant. Further, you did not indicate what legislative information was being submitted. Without additional guidance, tribes are at a loss on how to determine what to submit to make the necessary showings. All jurisdictions must be given more definitive guidance on how to "substantially implement" the Act.

In addition to greater clarity on how to obtain substantial implementation, jurisdictions must be given an appeal process or remedial period to correct any perceived deficiencies. Because there is no formula for ensuring compliance, it is reasonable to assume some jurisdictions won't successfully obtain substantial implementation on the first try. The Department of Justice must be willing to work with a jurisdiction before penalizing them.

Tribes, Above All Others, Must Be Afforded Opportunities to Remedy Perceived Deficiencies in Substantially Implementing the Act.

The need for an opportunity to correct deficiencies is especially crucial for tribes. While states that fail to substantially implement the Act only lose funding, tribes lose sovereignty to implement the Act at all. Understandably this disparate treatment is embodied within the Act itself; however, DOJ and the SMART Office have a role in making substantial implementation determinations. Accordingly, the DOJ and the SMART Office must make every effort possible to guide a tribe into obtaining substantial implementation before stripping away that tribe's jurisdiction.

If the Guidelines are Only Minimum Requirements, Confusion Will Result When Jurisdictions Go Beyond the Minimum

Tribal leaders were concerned that all tribal convictions will be deemed tier I convictions due to the sentencing limitations placed on tribal courts by the Indian Civil Rights Act. You responded that a tribe can pass laws that alters the tiers within the tribe's jurisdiction. While this seemed to provide a solution, it will ultimately only create more confusion.

Assume that Tribe X does alter its registration classification tiers. Subsequent to this change, Tribe X convicts Offender for a sex offense that, despite the one-year sentencing limitation, will require a tier III registration under Tribe X's revised tiers. How does Tribe X explain the registration requirements to Offender, who may live, work, or attend school outside of Tribe X's jurisdiction? The confusion will only be further compounded if the jurisdiction in which Offender lives, works, or attends school refuses to acknowledge the tribal conviction. If explaining such a situation in a hypothetical is confusing, just imagine how complicated this will become in the real world.

The Proposed Tribal/State Symposium to Discuss Implementation in Indian Country is Good... in Theory

While the concept of a tribal/state symposium to discuss implementation of the Act in Indian Country sounds good in theory, certain logistical considerations must be taken into account. Such a symposium could likely not address all of the situations nation-wide. Arizona tribes have a very different relationship with Arizona than the State of Wyoming has with its tribes. Further, each tribe will implement the Act differently. Some tribes have not opted to implement the Act at all. Others will implement only portions. While the symposium could address various hypothetical situations, ultimately each individual state will need to meet with each individual tribe within that state to discuss implementation logistics.

As you mentioned, much of what states have sought so far regarding implementation of the Act in Indian country is "Indian Law 101." Although it is disheartening that states still have not figured this out, such a basic topic could be a good symposium topic. A general topic symposium could both remind states that tribes are separate, sovereign governments that must be treated accordingly, and lay the foundation for further government-to-government discussions between each tribe and its respective state.

The Federal Government Needs to Take Responsibility for Offenders Released from the Federal Prison System.

If the federal government can impose a registry requirement upon states and tribes, it should subject itself to the same burden. Considering that the United States

Attorney General is responsible for developing the software for the uniform registry, it makes the most sense that the federal government be the pilot project for implementing the system. Claims that the federal system does not have a registry do not respond to tribal objections. Many tribes are situated identically to the federal government, yet the tribes are being forced to act with no resources.

Even if the registration obligation is not placed on the federal prisons, it is insufficient to simply have an offender sign a notice that the offender will register within three days of arriving within a jurisdiction upon release. The federal prisons must provide notice to the receiving jurisdiction. Considering that jurisdictions are free to adopt laws and regulations that are more stringent than those proposed in the guidelines, simply faxing a notice to the receiving jurisdiction is insufficient. The federal prisons must work with the receiving jurisdiction so that each offender understands the offender's unique registration obligations.

Conclusion

There is still much work to be done to implement the Act, especially within Indian country. Tribes have raised many issues that must be resolved in order for the Act to be implemented successfully. States are only beginning to realize the issues arising from Indian country that will have an impact. The DOJ must be willing to dedicate the time and the resources necessary to address each issue.

Again, thank you for the opportunity to submit these additional comments. If you have questions or would like additional information, please contact me at 520.568.1000.

Sincerely.

AK-CHIN INDIAN COMMUNITY

Delia M. Carlyle, Chairman

CC: Manuel Garcia, Acting Chief of Police
Gary LaRance, Ak-Chin Indian Community Prosecutor

The Confederated Tribes of the Colville Reservation
Colville Business Council
P.O. Box 150, Nespelem, WA 99155
(509) 634-2200
FAX: (509) 634-4116

August 1, 2007

Laura L. Rogers
Director, SMART Office
United States Department of Justice
810 7th Street, NW
Suite 8241
Washington, D.C. 20531

August 1, 2007

RE: OAG Docket No. 121

Dear Ms. Rogers:

On behalf of the Confederated Tribes of the Colville Reservation ("Colville Tribes"), a federally recognized Indian tribe, I provide the following comments regarding the proposed National Guidelines for Sex Offender Registration and Notification ("the Guidelines"). Like the United States, the Colville Tribes is committed to protecting our community from sex offenders. The Colville Tribes sincerely hope that the final version of the Guidelines will help to protect our community. As an Indian tribe which has elected to retain jurisdiction under Section 127 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §16911 et. seq ("the Act"),[1] the Colville Tribes feel strongly that portions of the Guidelines must be revisited if is to achieve its stated purpose of creating a seamless national sex offender tracking system.

1) Inadequate Government-to-Government Consultation

The Colville Tribes is concerned about consultation regarding the Guidelines. We believe that the Department of Justice (DOJ) has thus far failed to adequately engage tribes in government-to-government consultation concerning the Guidelines in accordance with the mandates of the President's Memorandum for the Heads of Executive Departments and Agencies, dated September 23, 2004, Executive Order 13175, and the Department's own Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes.[2] Particularly, we are convinced that the notice and scheduling of government-to-government consultation meetings have not provided the tribes with a fair opportunity to fully engage and comment on the guidelines with full information.

Two one-day consultation meetings do not provide nearly enough time for adequate consultation between the Department of Justice and over 560 sovereign tribal governments. As individual sovereigns with particular geographic, demographic, and socio-economic conditions, each tribe requires one-on-one consultation with the Department. The two days scheduled will not accommodate such consultation.

[1] Colville Business Counsel Resolution 2007-149, March 15, 2007.
[2] Available at: http://www.usdoj.gov/ag/readingroom/sovereignty.htm

Notice of the consultation sessions to the Colville Tribes has also been inadequate. All letters concerning this matter have been addressed to "Chairman Harvey Moses, Jr.," the former chairman of the Colville Tribes.[3] A May 4, 2007 letter about the Act's July 27, 2007 tribal-opt-in deadline buries notice of the first, June 4, 2007, consultation in Shelton, WA in the last paragraph on the third page of the wrongly-addressed letter. Thus, the Tribes missed out on this meeting because of the poor notice.

More troubling, the second, July 31, 2007 consultation session in Phoenix was scheduled *one day* prior to the deadline for submission of these written comments. This does not provide tribes with adequate time to fully digest and consider the dialog that occurred at the Phoenix session and properly include it within these written comments. As a matter of courtesy, the DOJ should have provided at least a week between the session and deadline. This would be useful to tribes and DOJ, alike—providing better informed and more thoughtful comments.

2) No Legal Obligation to Provide Notice of Exercising the Section 127 Tribal Election

The DOJ's insistence on demanding that tribes provide notice and copies of the adoption of a tribal resolution opting into the Act's registry scheme is not founded on the law and offends the mutual respect required for effective government-to-government relations. As sovereigns recognized under the Article I of the U.S. Constitution, only Congress has authority (or delegate authority) to compel tribes to act—not the Executive. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Despite DOJ letters stating that tribes must "communicate the tribal election to SORNA prior to July 27, 2007," the Colville Tribes have found no law that grants DOJ the authority to compel tribes to communicate the tribal election to the DOJ. Moreover, citing no provision of law, the DOJ has stated that a copy of the tribal government's election resolution must be received by Leslie Hagen at the SMART office by close of business on July 27, 2007. Again, nothing in the law supports this assertion.

Still, despite these patent affronts to tribal sovereignty, the Colville Tribes intends to work cooperatively and in the interests of comity, with DOJ. The Colville Tribes are happy to present copies of our public laws, such as the Adam Walsh election, to other governments and the general public. However, like other governments, we grant these requests when we are respectfully asked. As part of the government-to-government relationship between the Tribes and the United States, the Tribes expect to be treated with the respect granted to other sovereigns.

3) Attorney General Determining Tribal Compliance

The Attorney General has the authority to assess the compliance of those tribes who have elected to participate as a registration jurisdiction under Section 127(2)(C) of the Act. The Act contemplates that the Attorney General will have the power to give authority under the Act to the state where the Tribe is located if the Attorney General determines that the Tribe is not in

[3] A quick look at the Tribes' website (or a call to the Tribes) would reveal the current Chairman, Mike Marchand—who has been in office since July 2006.

compliance. This delegation represents a major infringement on tribal sovereign authority and an unprecedented delegation of authority to the Executive.

If the Attorney General chooses to exercise this provision, it will represent a significant departure from the current distribution of authority over civil and criminal matters of the states, tribes, and the federal government. As a practical matter, such a delegation will undoubtedly create a great deal of confusion among law enforcement agencies on and near the Colville Reservation and will require significant adjustments in the state plan for implementation of the Act. It will also have the potential to destabilize the carefully negotiated cross-jurisdictional collaborative agreements that currently exist between the Colville Tribes, State of Washington, and local governments in North Central Washington. This confusion and destabilization could easily undermine the effectiveness of the Act and the protection of both Native and non-Native communities.

Despite these potentially serious consequences, the Guidelines provide no indication of the process that will be used by the Attorney General to assess tribal compliance and make this delegation. Given the federal government's unique trust responsibility to Indian tribes, and its policy of promoting and supporting tribal self-determination, any action that would abridge the Colville Tribes' sovereign authority on its own lands should be only an action of absolute last resort. Yet, the Guidelines do not address whether the Colville Tribes will be given an opportunity to cure, what efforts the DOJ will make to provide technical assistance, how the state will be included in the conversations, nor how a tribe can appeal an adverse decision by the Attorney General. Through consultation with the Colville Tribes and other tribes, the DOJ would be able to develop a detailed, transparent process for assessing tribal compliance. Consistent with the trust responsibility and the canons of Indian Law statutory interpretation, such a process should provide the greatest deference to tribal governments. Moreover, without clear standards in the Guidelines, cooperative agreements among jurisdictions will be more difficult to achieve because of the uncertainty as to when, and with what criteria, the Attorney General will make a tribal non-compliance determination. The complexity and importance of this particular issue requires a more formal and extensive consultation process. The Colville Tribes urges the DOJ to provide a consultation process in the Guidelines for developing a process for assessing tribal compliance.

4) The Role of Federal Prisons

The Colville Tribes also has significant concerns about the provisions in the Guidelines exempting federal corrections facilities from pre-release registration. The Act requires that state and tribal corrections facilities "ensure" registration of sex offenders prior to their release. Though this is not a requirement for federal facilities, seamless integration will not be possible under this exemption. However, under the Guidelines all federal corrections facilities will not ensure registration; instead, they will merely provide the sex offender with a notice that the individual must register within three days. This provision leaves Indian tribes particularly vulnerable because a high proportion of offenders whose crimes arose in Indian Country and are likely to return there are incarcerated in federal prisons as a result of federal prosecution under the Major Crimes Act.

In addition to severely undermining public safety, this provision in the Guidelines will substantially shift the burden of initial registration from the federal government to the states and tribes. The responsibility of initially registering an incarcerated offender, including the collection of DNA and fingerprints, is a responsibility that clearly lies with the federal government. The costs that would be associated with developing the federal infrastructure necessary to fulfill this responsibility are no greater than the cost the Indian tribes will incur in building the same infrastructure. Clearly, this also falls within the DOJ's trust responsibility to tribes. The Colville Tribes recommends that the Guidelines be changed to require federal corrections facilities to enter all sex offenders into the registry before their release.

5) State-Tribal Coordination

The Colville Tribes will need to coordinate with the state of Washington for successful implementation of the Act. However, the Guidelines provide no direction as to how such coordination will occur. The Colville Tribes urges the DOJ to make state and tribal coordination a priority, and to provide sufficient assistance to achieve their goal. Additionally, federal regulators should require states to document their coordination efforts with tribal governments in their compliance submissions.

6) Cultural and Religious Concerns

Section 114(a)(1) of the Act requires that the registry must include all names and aliases used by the offender. The Guidelines expand this requirement to include "traditional names given by family or clan pursuant to ethnic or tribal tradition." This requirement is deeply offensive to the religious and cultural traditions in native communities. Some tribal communities may give tribal members a traditional name that is never used or spoken aloud except in religious ceremonies. In some communities, a person will *never* share their traditional name and even members of a family may not know one another's ceremonial name. Given the secrecy that surrounds these traditional ceremonial names, there is no sound public safety reason that they be shared. As part of the trust responsibility, religious freedom, and mutual respect of government-to-government relations, the Guidelines should account for this. The Colville Tribes recommend that this provision be redrafted so that it is limited to names by which the individual may be known publicly.

Additionally, the Guidelines lack any guidance on how DNA information will be taken, stored, and distributed. The Colville Tribes is convinced that the DOJ needs to have clear standards that will protect tribal concerns about cataloging genetic data, as required under the Act. The DOJ needs to engage all of Indian Country on this issue, because values vary from tribe to tribe. The Colville Tribes also request that the DOJ fully assess how this requirement may be impact privacy laws like the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

The Colville Tribes is committed to protecting our community and citizens from sexual predators. In fact, prior to the Adam Walsh Act, the Colville Tribes had adopted and implemented its own sex offender registry.[4] The Colville Tribes also joined other tribes to work

[4] Colville Tribal Code § 3-1-265.

successfully to include a provision in the Violence Against Women Act of 2005 to create a National Tribal Sex Offender Registry, so that Indian tribes could share information with one another and improve our ability to track dangerous offenders. It is unfortunate that the federal government has chosen to challenge tribal sovereignty through these ill-conceived provisions of the Adam Walsh Act. The Colville Tribes welcomes the opportunity to work with the DOJ to appropriately and fully protect our reservation from sex offenders.

Sincerely,

Michael Marchand for
Chairman
Colville Business Council

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Laura L. Rogers, Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 7th Street NW.
Washington, DC 20531

RE: OAG Docket No. 121

Dear Ms. Rogers:

The National Guidelines for Sex Offender Registration and Notification that were published on May 30, 2007 are lengthy and informative. The Yakama Nation has passed a Tribal Council Resolution to be a registration jurisdiction under the Adam Walsh Law and these guidelines will assist us as a registration jurisdiction.

At this time, there is at least one part of the published Guidelines deserves comment and it is the second full paragraph under IV A: Convictions Generally. This paragraph provides as follows:

> The convictions for which SORNA requires registration include convictions for sex offenses by any United States jurisdiction, including convictions for sex offenses under federal, military, state, territorial, or local law. Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions. It is recognized, however, that Indian tribal court proceedings may differ from those in other United States jurisdictions in that the former do not uniformly guarantee the same rights to counsel that are guaranteed in the latter. Accordingly, a jurisdiction may choose not to require registration based on a tribal court conviction resulting from proceedings in which: (i) The defendant was denied the right to the ***assistance of counsel***, and (ii) the defendant would have had a right to the ***assistance of counsel*** under the United States Constitution in comparable state proceedings. A jurisdiction will not be deemed to have failed to substantially implement SORNA based on its adoption of such an exception.

In fact, this paragraph is a concern to the Yakama Nation for several reasons. (1) The assertion that 'a jurisdiction may choose not to register a tribal court conviction when a defendant was denied assistance of counsel and the defendant would have had a right to the assistance of counsel under the United Stated Constitution in comparable state proceedings' is a misstatement of applicable law. Under the United States Constitution, state and federal jurisdictions are required to appoint counsel for indigent defendants in certain circumstances. This is not the law that is applicable to tribal governments. The Indian Civil Rights Act (ICRA) was passed in 1968 and it defines civil rights of defendants in tribal courts, including the Yakama Nation Tribal Court. 25 U.S.C. § 1302 (6) provides that "No Indian tribe in exercising powers of self-government shall – deny

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense". The right of assistance of counsel in tribal courts should not be compared to the right of assistance of counsel under the United States Constitution. This paragraph should be redrafted. (2) Although tribal governments are not required to provide assistance of counsel to defendants in tribal courts, tribal governments, like the Yakama Nation, have Public Defender Programs. These Public Defender Programs provide 'assistance of counsel' for defendants in tribal courts. Public defenders in tribal courts are trained and hired under tribal policies and procedures, and they are not necessarily 'attorneys'. For purposes of this discussion, these individuals will be described as 'lay public defenders'. 'Assistance of counsel' is not defined in the published Guidelines. Defining 'assistance of counsel' as the assistance of an 'attorney' will have a detrimental effect on Tribal Public Defender Programs, like the program at Yakama Nation, because 'lay public defenders' are not attorneys. The Yakama Nation recommends that 'assistance of counsel' be broadly defined so that 'lay public defenders' will be included in the definition, and tribal court convictions will be recognized. (3) As stated above, the Yakama Nation has passed a Tribal Council Resolution to be a registration jurisdiction under the Adams Walsh Act. It would seem to be a logical conclusion that substantial implementation of SORNA would also mean that convictions will be recognized. Allowing a jurisdiction may choose not to require registration based on a tribal court conviction in certain circumstances is counter intuitive to substantial implementation of SORNA. The Yakama Nation recommends that substantial compliance of SORNA by a tribal government also means that tribal court convictions will be recognized by other jurisdictions.

Your favorable consideration of these comments is appreciated.

Sincerely,

Lavina Washines

Lavina Washines, Chairperson
Yakama Tribal Council

the Chickasaw Nation HEADQUARTERS
Arlington at Mississippi / Box 1548 / Ada, OK 74821-1548 / (580) 436-2603

Bill Anoatubby
Governor

Jefferson Keel
Lieutenant
Governor

August 2, 2007

Ms. Leslie Hagen, Director
SMART Office
Office of Justice Programs
810 Seventh Street, N.W. – Suite 8240
Washington, DC 20531

Dear Ms. Hagen:

The Chickasaw Nation agrees that the Sexual Offender Registration and Notification Act (SORNA) has enormous potential to address the safety needs of the Indian population related to providing protections against sexual offenders. However, we remain concerned about how the SORNA will be implemented, and offer the following comments in response to the May 2007 proposed *National Guidelines for Sex Offender Registration and Notification*:

1. We are very concerned about tribal courts being given a second-class status related to criminal convictions. The proposed guidelines indicate that perpetrators of sexual offenses convicted in tribal courts will be classified only under Tier I criteria. We strongly urge that tribal court convictions be given the full faith and credit status as a conviction in any other court.
2. We strongly urge that the U.S. Department of Justice (DOJ) mandate state and local jurisdictional cooperation and consultation with tribes. Many states, counties and local governmental entities already have effective working relationships with tribes, but many actively resist tribal cooperation. We are concerned that without a clear mandate from DOJ, tribal consultation and jurisdictional cooperation may not occur, resulting in reduced ability to monitor and track sexual offenders.
3. We are concerned about DOJ's capacity to effectively handle the potential outcomes of the SORNA requirements. As many as 70% of offenders in Indian country are non-Native. There are currently 5,386 registered sex offenders in Oklahoma, and 21% of Indian offenders and 17% of all offenders are in non-compliance with existing registration requirements. Under the SORNA, felony charges are required for violators of the registration requirements, but tribes are unable to prosecute non-Natives or criminal felony cases in general. In this regard, we have these questions: Does DOJ have the manpower to prosecute potentially hundreds of additional cases per year in our region? Will DOJ cooperate with the Chickasaw Nation by giving "commissions" to tribal attorneys as special assistant U.S. attorneys, to assist in prosecutions?

God Bless America!

4. There are many uncertainties associated with cross-jurisdictional monitoring, tracking and potential prosecutions, and there is no clear assurance that tribal law enforcement and courts will not be held liable for good faith efforts. Penalties for non-compliance are specified in the proposed guidelines, but equivalent specifications for good faith efforts to develop cooperation among surrounding jurisdictions should be taken into account when DOJ determines the tribal level of compliance. Additionally, adequate protection for tribes and tribal personnel should be specified (e.g., Federal Tort Claims Act protection) when acting in good faith to assure compliance with the requirements of the SORNA.

We appreciate your consideration of our comments in this matter. If you have any questions about these comments, please contact Mr. Thomas John, administrator of self governance, at (580) 436-7214.

Sincerely,

Bill Anoatubby

Bill Anoatubby, Governor
The Chickasaw Nation

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:44 AM
To: Rosengarten, Clark; Hagen, Leslie
Subject: FW: Docket No. OAG 121

Attachments: 20070801144216983.pdf

20070801144216983.pdf (398 KB)...

-----Original Message-----
From: Marcia Shahab [redacted]
Sent: Wednesday, August 01, 2007 3:49 PM
To: GetSMART
Cc: [redacted] Dione Carroll
Subject: Docket No. OAG 121

Attached, please find the comments of the Miccosukee Tribe. Should you have any difficulty opening the attached, please do not hesitate to contact [redacted].
Thank you.

Marcia Shahab
Paralegal to the General Counsel
Phone: (305) 894-5213 - direct
Fax: (305) 894-5212
Miccosukee Tribe of Indians of Florida
P.O. Box 440021, Tamiami Station
Miami, Florida 33144

>>> "MarciaS" <marcias@miccosukeetribe.com> 08/01/07 3:42 PM >>>
This E-mail was sent from "ADMIN_R2045eSP" (Aficio 2045e).

Scan Date: 01.08.2007 14:42:16 (-0500)

Miccosukee Tribe of Indians
of Florida

Business Council Members
Billy Cypress, Chairman

Jasper Nelson, Ass't Chairman
Max Billie, Treasurer
Andrew Bert Sr., Secretary
William M. Osceola, Lawmaker

August 1, 2007

Laura L. Rogers
Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 7th Street NW
Washington, DC 20531

Re: Comments on the National Guidelines for Sex Offender Registration and Notification
Docket No. OAG 121

Dear Ms. Rogers:

I am writing on behalf of the Miccosukee Tribe of Indians of Florida ("Miccosukee Tribe"), a federally-recognized Indian Tribe, to comment on the proposed National Guidelines for Sex Offender Registration and Notification set-forth at Docket No. OAG 121.

On July 27, 2006, Congress passed the Adam Walsh Child Protection and Safety Act, Public Law 109-248, hereinafter referred to as "AWA". The stated purpose of AWA is to protect children from sexual exploitation and violent crime; to prevent child abuse and child pornography; to promote internet safety; and to honor the memory of child crime victims. Title I of AWA, the Sex Offender Registration and Notification Act, hereafter referred to as "SORNA", endeavors to promote the purpose of AWA through a comprehensive revision of registration and notification requirements.

The Miccosukee Tribe shares the federal government's goals to protect the public from sex offenders and offenses against children, and remains committed to protecting its community members and promoting public safety on tribal lands.

Generally, the AWA represents a positive step towards the protection of the public from sex offenders. However, the effective implementation and enforcement of the AWA has been severely compromised as a result of the flawed provisions affecting Indian Tribes and Indian Country, caused largely by

a failure to consult with Tribes during the drafting. In that regard, we offer the following comments

Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, was issued in part:

> in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; . . .

Executive Order 13175, (November 6, 2000)

For purposes of this order, "policies that have tribal implications" refers to:

> Regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13175, Section 1 (a).

Indian tribal governments were not consulted in the development of the AWA and SORNA. At the time the AWA-SORNA was drafted there was no coordination with tribal governments and no consideration given to tribal sovereignty concerns, tribal customs and practices, or the unique circumstances arising in Indian Country. Similarly, there was no meaningful tribal consultation[1] in the development of the proposed National Guidelines for Sex Offender Registration and Notification, hereinafter referred to as "Guidelines".

The tribal provisions of the AWA-SORNA legislation and proposed Guidelines, do not adequately take into consideration the respective roles and interaction between federal, state and tribal governments with respect to law

[1] The U.S. Department of Justice has recently initiated a consultation process with tribal governments. However, given that the AWA has already been enacted into law, and given that the proposed Guidelines have already been drafted, this "after-the-fact" consultation belies the unique relationship between the federal government and Indian tribes as set-forth in the U.S. Constitution, treaties, statutes, court decisions, executive orders, and federal trust responsibilities to Indian tribes.

enforcement issues arising in Indian Country. While Section 127 purports to grant Indian tribes authority to enforce the provisions of the AWA-SORNA, within tribal lands, tribes already have that authority pursuant to their inherent powers of self-governance. Therefore, the effect of Section 127 is to attempt to diminish or abrogate tribal sovereignty and transfer tribal authority to the states and place specific financial burdens on tribes.

Generally, the federal government has possessed and exercised primary responsibility for law enforcement in Indian Country, except when sovereignty has been asserted by tribes. However, it now appears that responsibility has been relinquished to the states as a result of the AWA-SORNA legislation. Given that this apparent relinquishment adversely impacts tribal sovereignty, it is fatally flawed. Therefore, we strongly urge appropriate amendments to maintain and preserve tribal sovereignty and tribal authority in Indian Country.

Section 127 (a) (1) and the corresponding Guidelines, provide that only federally-recognized Indian tribes may elect to carry out SORNA authority or delegate that authority to the states. This provision does not give any consideration to those Indian tribes that have pending applications for federal recognition or may do so in the future. This provision also does not take into consideration circumstances where a federally-recognized Indian tribe may not have an interest, capacity, or funding to exercise SORNA authority, at the present time, but may wish to do so in the future. This oversight would permanently deprive such tribes the right to exercise SORNA authority within their tribal lands.

Therefore, we recommend that the SORNA election provisions be amended to provide an opportunity to those tribes that will be federally-recognized in the future, and these federally-recognized tribes which do not have the funding or capacity at the present time, but may do so in the future, to exercise SORNA authority. The amendment should include a process within which to accomplish the foregoing.

Also, cultural and religious concerns are not adequately addressed by the Guidelines. Section 114(a)(1) of the AWA requires that the sex offender registry must include all names and aliases used by the offender. The Guidelines expand this requirement to include "traditional names given by family or clan pursuant to ethnic or Tribal tradition." This requirement is offensive to the religious and cultural traditions in many Native communities. The provision should be redrafted so that it is limited to names by which the individual may be known publicly. And, measures should be taken to assure there is no misuse of DNA evidence in connection with this program. It would be appropriate to do further research to understand the cultural limitations on use of DNA evidence with the various tribes to assist in articulating the Guidelines in a manner to be protective of tribal cultural values.

The "imputed election" provisions of Section 127 and the corresponding proposed Guidelines provide that if the Attorney General determines that an Indian tribe has not "substantially implemented" the SORNA requirements, and is not likely to do so within a "reasonable amount of time", that tribe will be treated as having delegated its SORNA authority to the state wherein tribal lands are situated. See Section 127 (a) (1) (B) and (2) (c), and corresponding Guidelines.

Neither the SORNA provisions nor the Guidelines define what is "substantial" implementation or "reasonable time" to implement, therefore, both are impermissibly vague. Neither SORNA or the Guidelines provide any objective criteria to evaluate whether an Indian tribe has "substantially implemented" the SORNA requirements. Moreover, there is no process to challenge such a determination, nor the opportunity to be heard before a final determination is made.

Moreover, even though the Guidelines may not cure the defect in the SORNA provisions, nevertheless, the Guidelines should contain definitions as to the meaning of "substantially implement" and "reasonable time" and also objective criteria that can be evaluated in making a determination of whether a particular Indian tribe has "substantially implemented" the SORNA requirements. Also, the proposed Guidelines fail to provide a process to enable tribal governments to cure any deficiencies prior to a determination of non-compliance by the Attorney General. Additionally, the Guidelines should provide for proceedings, consistent with due process rights, including a hearing, to challenge the Attorney General's determination, and a right to appeal any such adverse determination. In any event, automatic reversion to the state is an inappropriate impingement on tribal sovereignty.

It should be noted also that it appears from a reading of SORNA and the corresponding proposed Guidelines, that there is a disparate treatment between states and Indian tribes Section II, A of the Guidelines describes a mandatory 10% reduction in certain federal assistance funding for jurisdictions that fail to "substantially implement" the SORNA requirements. Therefore, it appears that the only penalty imposed on states for non-compliance is a reduction of federal funding. On the other hand, Indian tribes that similarly fail to "substantially implement" are penalized by not only a reduction in federal funding, but also having their sovereignty diminished by automatically delegating SORNA authority to the states and granting state access to tribal lands. It is clear that non-complaint Indian tribes will be treated more severely than other jurisdictions. *See* SORNA, 125 (1) and 127 (a) (2) (c).

SORNA, Section 125 (b), referring to state constitutional issues, and the corresponding Guidelines provide that if the (state) jurisdiction is unable to "substantially implement" SORNA, because of a limitation imposed by the (state) jurisdiction's constitution, then the Attorney General may determine if the (state) jurisdiction has made, or is in the process of making, "reasonable alternative procedures" which are consistent with the purposes of the AWA. It

does not appear that the proposed Guidelines provide for similar accommodations, vis-à-vis tribal constitutions, tribal laws, and tribal customs and practices. Therefore, SORNA and the Guidelines should be amended accordingly.

Another troubling aspect of the AWA-SORNA legislation and corresponding Guidelines, is the federal government's inadequate funding to help Indian tribes implement the SORNA requirements. Along with funding, the federal government should also provide the hardware and other equipment as well as, technical assistance and sufficient support, to implement the "nuts and bolts" of the registration and notification requirements. This is, essentially, an unfunded mandate.

Neither the AWA-SORNA nor the Guidelines adequately address the funding and technical assistance issues. The funding issue is critical because Indian tribes that do not have the financial means to implement this program would be forced under the SORNA Section 127, to relinquish their sovereign powers and involuntarily delegate tribal authority to the states.

With respect to technical assistance, it is widely recognized that information stored in data bases have integrity issues, and may be subject to "hacking", "viruses" or alteration by malicious individuals. A system must be developed and implemented by the federal government to ensure that the integrity of the stored information will be safeguarded. The federal government should bear the full cost of implementing such safeguards.

States already have sex offender data bases and thus may be more experienced in maintaining the registration and notification requirements of SORNA, than some Indian tribes. Many Indian tribes, however, must create registration and notification systems. Therefore, to the extent funding and technical assistance is to be provided by the federal government to fulfill the mandates of SORNA, Indian tribes should be given priority over other jurisdictions as recipients of such aid.

Section 127 (b) (2) of SORNA and the corresponding proposed Guidelines provide for cooperative agreements with other jurisdictions "within which the territory of the tribe is located." This reference is vague but may be construed as mandating that Indian tribes may only enter into such agreements with states. This provision is flawed because it does not appear to provide for cooperative agreements with, and among, Indian tribes. Therefore, this provision should be amended to give tribal governments the option to enter into such agreements, with one another.

While the AWA-SORNA is necessary to promote public safety, it is evident that by failing to consult with tribal governments in the development of this legislation and the Guidelines, the federal government has compromised the effectiveness of its implementation and the authority of tribal governments within their own lands. We urge the Department of Justice to give serious

consideration to the comments submitted by tribal governments and use its best efforts to amend the flawed provisions of the AWA-SORNA and the Guidelines, in order to fulfill its trust responsibilities and maintain the sovereignty and territorial integrity of Indian tribes.

Sincerely,

Dionè C Carroll, Esq.
General Counsel

cc: Business Council

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:43 AM
To: Hagen, Leslie; Rosengarten, Clark
Subject: FW: Docket No. OAG 121
Attachments: Rogers_SORNAComments080107FNL.pdf

From: Trent S.W. Crable [redacted]
Sent: Wednesday, August 01, 2007 4:35 PM
To: GetSMART
Subject: Docket No. OAG 121

SMART Office:

Please find attached the comments of the Makah Indian Tribe regarding OAG Docket No. 121, the Proposed Guidelines for Interpreting and Implementing the Sex Offender Registration and Notification Act.

Thank you,

Trent S.W. Crable
Attorney at Law
Morisset, Schlosser, Jozwiak & McGaw
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Seattle, WA 98104
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August 1, 2007

Via Email to
Subject: Docket No. OAG 121

Laura L. Rogers, Director
SMART Office
Office of Justice Programs
United States Department of Justice
810 7th Street NW.,
Washington, DC 20531
Email: getsmart@usdoj.gov

Re: OAG Docket No. 121 – Comments of the Makah Indian Tribe on the Proposed Guidelines for Interpreting and Implementing the Sex Offender Registration and Notification Act

Dear Ms. Rogers:

On behalf of the Makah Indian Tribe, we submit the following comments on the proposed guidelines announced in OAG Docket No. 121 for interpreting and implementing the Sex Offender Registration and Notification Act ("the Act").

1. Part III of the Guidelines Should be Revised to Make it Clear that Section 127(a)(2)(A) Does Not Apply to Tribes Located Outside of the States Currently Listed in 18 U.S.C. § 1162.

As the Guidelines recognize, under section 127(a)(1) a federally recognized tribe has the option of "electing to carry out the sex offender registration and notification functions specified in SORNA in relation to sex offenders subject to its jurisdiction, or delegating those functions to a State or States within which the tribe is located."[1] Unfortunately, and unnecessarily, section 127(a)(2) places certain limits and restrictions on that authority. The Tribe recommends that the Guidelines be revised to make it clear that section 127(a)(2)(A) does not apply to Tribes located in states other than those currently listed in 18 U.S.C. § 1162.

[1] Proposed Guidelines at 13.

Section 127(a)(2)(A) provides that "a tribe subject to the law enforcement jurisdiction of a State under section 1162 of title 18, United States Code" will be treated as if it elected to delegate its functions to the State(s) under 127(a)(1)(B). Since 18 U.S.C. § 1162 only covers California, Nebraska, Wisconsin, and parts of Alaska, Oregon, and Minnesota, it is clear that the Act does not prohibit a tribe located in a state other than those listed from electing to participate as a jurisdiction under the Act, even if the state in which the tribe is located previously assumed some degree of jurisdiction over tribal lands under other provisions in Public Law 280.

As the states that did opt to assert some degree of jurisdiction under other provisions in Public Law 280 assumed varying degrees of jurisdiction over varying offenses, section 127(a)(2)(A) would be extremely difficult to implement, and would be a source of confusion and animosity, if it were determined to apply to such "optional" states. Section 127(a)(2)(A) also fails to address the fact that tribes maintain jurisdiction over certain offenses, even where a state has assumed some concurrent jurisdiction under 18 U.S.C. § 1162.[2] For these reasons, the Guidelines should be revised to make it clear that tribes in states not currently included in 18 U.S.C. § 1162 may elect to participate as a "jurisdiction" under the Act.

2. Part IV of the Guidelines Should be Revised to Provide Full Faith and Credit to All Lawful Tribal Court Prosecutions.

The Guidelines note that "Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions," but they go on to provide that:

> a jurisdiction may choose not to require registration based on a tribal court conviction resulting from proceedings in which: (i) the defendant was denied the right to the assistance of counsel, and (ii) the defendant would have had a right to the assistance of counsel under the United States Constitution in comparable state proceedings. A jurisdiction will not be deemed to have failed to substantially implement SORNA based on its adoption of such an exception.[3]

This is, frankly, outrageous. The Act itself does not require, or even suggest, such discriminatory treatment of tribal court convictions.[4] The quoted language should be stricken from the Guidelines. Lawful tribal court convictions should receive full faith and credit.

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[2] "The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor's Office for the Department of Interior, and legal scholars, is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched." Nell J. Newton et al., Cohen's Handbook of Federal Indian Law 560–61 (2005 ed.) (internal footnotes omitted).

[3] Proposed Guidelines at 16.

[4] That the Act does provide a basis for discounting or ignoring *foreign* convictions (section 111(5)(B)), while not providing for such treatment of tribal convictions, strongly

The Indian Civil Rights Act prohibits tribes from denying "any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense."[5] Therefore, if a tribe did deny a defendant the right to the assistance of counsel obtained at the defendant's expense, then the conviction would have been secured in violation of the Indian Civil Rights Act and could be challenged accordingly. While it is most logical to read the language of the Guidelines as permitting other jurisdictions to ignore tribal convictions only where the tribe prohibited the defendant the assistance of counsel, if it is intended to mean that tribal convictions may be ignored if counsel is not provided free of charge, that would still be inappropriate as Congress specifically recognized that tribal courts need not provide free counsel.

The Act does not provide for such disparate treatment of tribal convictions, and such disparate treatment is not justified. The Guidelines note that convictions in Canada, Great Britain, Australia, and New Zealand, are all deemed to have been obtained with sufficient safeguards for fundamental rights, and that convictions of other foreign jurisdictions will be deemed to have provided sufficient safeguards if the State Department "has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial . . . ."[6] The Guidelines inappropriately subject tribal court convictions to a higher standard than foreign judgments.

3. Part VII of the Guidelines Should be Revised to Ensure that Tribes and Tribal Agencies Receive Community Notification and Target Disclosures Issued Under Section 121(b).

It is vital that tribes and tribal agencies (particularly police deparments, schools, and daycare centers) receive the notifications provided for in section 121(b). The Tribe recommends that Subpart B of Part VII be revised so that it is clear that tribes and tribal agencies are to receive such notification.

4. It is Inappropriate that the Act Creates Burdensome Requirements for Tribes Without Providing Sufficient Guaranteed Funding.

The Act places costly burdens on tribes, but does not guarantee funding to offset the costs of implementing the Act's requirements. Even if a tribe elected to delegate its functions to a state, the Tribe would still be required to provide "cooperation and assistance" to the State. If tribes are to be required to dedicate scarce resources and participate in Congress's national system, Congress should guarantee adequate funding to all tribal participants.

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suggests that Congress did not intend to permit other jurisdictions to discriminate against tribal convictions.

[5] 25 U.S.C. § 1302(6).

[6] As noted in note 6, the Act does permit the discounting, or ignoring of, foreign judgments.

Thank you for your consideration. The Tribe reserves the right to supplement these comments. Please include our office on all future notices and distributions of documents regarding the implementation of these guidelines.

Sincerely,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

Frank R. Jozwiak
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Attorneys for Makah Indian Tribe

cc: Chairman Ben Johnson Jr.
Vice Chair Debbie Wachendorf
Members of the Makah Tribal Council

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rmc:8/1/07

Rosengarten, Clark

From: Rogers, Laura on behalf of GetSMART
Sent: Monday, August 06, 2007 10:42 AM
To: Rosengarten, Clark; Hagen, Leslie
Subject: FW:
Attachments: Res07-498.pdf; Comments.pdf

From: Pete Delgado [redacted]
Sent: Wednesday, August 01, 2007 5:04 PM
To: GetSMART
Subject:

Attached are the Tohono O'odham Nation's comments on the proposed guidelines for Sex Offender Registration and Notification.

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All of Us Together

Office of the Chairman
& Vice-Chairman
Tohono O'odham Nation
Ned Norris, Jr., Chairman
Isidro B. Lopez, Vice-Chairman

Tohono O'odham Nation
Comments on Proposed National Guidelines
for Sex Offender Registration and Notification

Introduction

While Arizona is the sixth-largest state in the United States, more that one-quarter of Arizona consists of lands governed by tribal nations. In order to achieve the goal of providing a truly integrated and comprehensive sex offender registration and notification system in Arizona and across the United States, Indian tribes, tribal courts, and tribal court judgments must be accorded the same level of respect as those of any state jurisdiction. If not, the Adam Walsh Act's central goal will be defeated and, contrary to the Act's intent, sex offenders will be able to disguise their criminal histories simply by crossing invisible political boundaries to another jurisdiction.

The Tohono O'odham Nation is the second-largest reservation in the United States and the Nation's government has formed long-standing partnerships with state and federal law enforcement officials to protect public safety on the Nation's 75 miles of international border. Despite this great burden on the Nation's law enforcement resources, we are at the forefront of sex offender registration and notification in Indian County.

Many years before the Adam Walsh Act was enacted by Congress, the Tohono O'odham Legislative Council enacted a stringent registration and notification law. The Tohono O'odham Police Department implemented a rigorous registration and notification program staffed by a full-time, certified police detective. As a result, the Nation has a current database listing more than 150 registered sex offenders on a reservation with a resident population of 14,000. We understand the dangers posed by sex offenders whose identities remain hidden.

While the Nation and other Indian tribes are essential law enforcement allies and partners in the effort to protect the public from sex offenders, the **proposed National Guidelines for Sex Offender Registration and Notification Guidelines ("Guidelines")** undermine tribes' law enforcement role in a way that exposes both the on- and off-reservation public to convicted

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offenders. This is the case because offenders convicted in tribal courts will not all be registered and their criminal records will remain unavailable in the communities where they reside.

If tribal court sex offense convictions can be ignored, if tribal court proceedings are given less weight than those of foreign countries, and if even the most serious sex crimes are relegated to the least serious tier of offenses because those convictions are gained in tribal courts, the entire premise of the Adam Walsh Act-one comprehensive system, one safety net without gaps-is undermined.

The Tohono O'odham Nation therefore calls on the Attorney General of the United States to make a strong system stronger, and to provide the greatest measure of safety nationwide by fully recognizing tribal governments as equal partners in the mission we all already share.

I. Jurisdictions should not be permitted to ignore tribal court convictions if they determine a convicted sex offender was "denied the right to counsel" in tribal proceedings. Federal law mandates that *all* tribes guarantee the right to counsel at the defendant's expense in all criminal cases.

One of the central features of the Adam Walsh Act is the inclusion of Indian tribes in the national system of sex offender registration and notification. The Guidelines in fact require registration for convictions of sex offenses by any United States jurisdiction, noting that "Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions."[1]

Despite this provision, the Guidelines permit jurisdictions to ignore tribal sex offense convictions if the registering jurisdiction believes the relevant tribal court denied the defendant the right to counsel.[2] This provision is contrary to the reality of federal law as tribes *cannot* deny this right. The Indian Civil Rights Act expressly mandates that all tribes guarantee the right to counsel at the defendant's expense in all criminal cases. (25 U.S.C. § 1302(6))

While the right to counsel in tribal court is not necessarily identical to that provided in state or federal criminal proceedings, this is because Indian tribal governments are separate sovereign nations with justice systems predating the United States Constitution. Even still, the Congress has enacted a minimum standard for the right to counsel in tribal criminal cases that many tribes exceed. The Nation, for example, funds and staffs an Advocate Program providing free legal counsel to criminal defendants. The Nation also uses tribal funds to employ licensed

[1] 72 Fed. Reg. 30216 (May 30, 2007); Guidelines, IV.A.

[2] 72 Fed. Reg. 30216 (May 30, 2007); Guidelines, IV.A.

attorneys on contract to represent defendants in the event the Advocate Program has a conflict of interest precluding its representation. In this way, criminal defendants are guaranteed the right to counsel as required under federal and tribal law.

It is therefore illogical and demeaning for jurisdictions to recognize certain foreign proceedings which may, for example, lack a jury system and whose proceedings may vary substantially from state and federal court systems, while tribal proceedings that guarantee fundamental rights and fairness may be ignored. In contrast to the implicit perception that tribal criminal proceedings inadequately protect defendants' rights, tribal, like state and federal criminal justice systems, guarantee the right against self-incrimination, excessive bail, and double jeopardy, while guaranteeing the right to trial by jury, equal protection, due process, confrontation, and the right to speedy and public trial. (25 U.S.C. § 1302(4), (7), (3), (10), (8), and (6))

The Guidelines require that foreign proceedings provide only fundamental fairness and due process; they do not require that all convictions result from proceedings identical to those of state and federal courts.[3] This same standard can be applied to Indian tribes by recognizing that the Congress has mandated guarantees of fundamental fairness and due process for all Indian tribal courts within the Indian Civil Rights Act. This is the state of existing federal law. It is unnecessary for states to be given a role in evaluating the fairness of validity of independent tribal proceedings over which the states have no jurisdiction or control.

Tribal sex offender convictions should be recognized on par with state convictions. Whether the tribal conviction results in a maximum one year sentence-a restriction imposed on tribes by the United States-is irrelevant in assessing the danger of the offense or offender. All children and other sex crime victims suffer equally. All members of the public, whether Indian or non-Indian, are equally at risk. Minimizing the danger posed by tribally-convicted sex offenders is illogical and dangerous and the Guidelines must be amended accordingly.

II. The Department of Justice must work closely with tribes to develop a clear standard for measuring tribal compliance with the Adam Walsh Act.

Like other executive department heads, the Attorney General has a duty to "continue to ensure to the greatest extent practicable and as permitted by United States law that the agency's working relationship with federally recognized tribal governments fully respects the rights of self-government and self-determination due tribal governments."[4]

[3] 72 Fed. Reg. 30216,30217 (May 30,2007); Guidelines, IV.A. and B.

[4] Executive Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments, dated September 23, 2004.

Under Section 127(2)(C) of the Act, the Attorney General is vested with the authority to assess the compliance of tribes that have elected to participate as registration jurisdictions. The Act also contemplates that the Attorney General will have the power to transfer authority under the Act to the state where the tribe is located if the Attorney General determines that the tribe is not in compliance. Such a delegation would significantly infringe upon sovereign tribal law enforcement authority and would undermine the federal policy of promoting tribal self-determination.

If the Attorney General exercises this authority, it will represent a significant departure from the current distribution of civil and criminal jurisdiction among state, tribal, and federal sovereigns. As a practical matter, such a delegation will undoubtedly create a great deal of confusion among law enforcement agencies on the ground and will require significant adjustments in the state plan for implementation of the Act. It will also have the potential to destabilize countless carefully negotiated cross-jurisdictional collaborative agreements that currently exist between tribes and the states. This confusion and destabilization would undermine the Act's goal of protecting Native and non-Native communities alike.

Despite these serious consequences, the Guidelines fail to provide a clear standard or process that the Attorney General will use to assess tribal compliance before delegating away tribal powers. Given the federal government's unique trust responsibility to Indian nations and policy of promoting and supporting tribal self-determination, any action that would abridge a tribal government's sovereign authority on its own lands should be seen only as an action of last resort. Yet, the Guidelines do not provide an apparently noncompliant tribe with an opportunity to cure, do not identify any Department of Justice technical assistance that will offered such tribes, explain how the state will be included in a proposed delegation, or how a tribe can appeal an adverse decision by the Attorney General.

The Nation strongly recommends that the Department of Justice consult with tribal governments to develop a detailed, transparent process for assessing tribal compliance. Because any delegation of tribal authority to a state would drastically undermine tribal sovereignty, the assessment and determination of tribal compliance should, consistent with the trust responsibility and the canons of Indian Law statutory interpretation, provide the greatest deference to tribal governments.

We therefore join the National Congress of American Indians in urging the Department of Justice to amend the Guidelines to include a meaningful consultation process with tribes that will allow us to cooperatively develop a standard and process for assessing tribal compliance.

III. Federal corrections facilities should not be exempt from the duty to register sex offenders prior to release.

The Nation also shares the National Congress of American Indians' concern that the Guidelines exempt federal corrections facilities from the Act's requirement that offenders be registered prior to release from incarceration. The Act requires that *all* corrections facilities "ensure" registration of sex offenders prior to their release. In contrast, the Guidelines merely provide that federal facilities give a sex offender notice that he or she must register in the jurisdictions in which they reside.[5]

This provision leaves Indian tribes particularly vulnerable because of the structure of federal criminal statutes, where felony-level penalties for on-reservation sex offenses may only be imposed in federal but not tribal prosecutions. The most severe sentences for these crimes are therefore served in federal facilities. It would be irresponsible to release these prisoners without making sure that they are registered and their home jurisdictions are notified of their release.

In addition to undermining public safety, this provision will shift the cost of initial registration from the federal government to the states and tribes. The responsibility of initially registering a federally incarcerated offender is clearly a federal responsibility under the Act.

We strongly recommend that the Guidelines be changed so that federal corrections facilities, like state and tribal facilities, are required to ensure that offenders are entered into the registry before their release.

Conclusion

The Tohono O'odham Nation is a proven law enforcement partner dedicated to public safety nationwide. The Nation therefore calls upon the Attorney General to include the Nation as an active participant in developing a process that fully included Indian tribes in the system Congress envisioned when it enacted the Adam Walsh Act.

For its part, the Nation is eager to commit its time and resources, as it already has, to ensure that the national sex offender registration and notification system is truly comprehensive and protects all Americans. This will only be true in a system recognizing that tribal sex offense convictions are no less serious and should be accorded no less weight than those gained off-reservation.

We are your partners in this effort. We ask that you treat us as equals.

[5] 72 Fed. Reg. 30229 (May 30, 2007); Guidelines, IX.

Rogers, Laura

From: [redacted]
Sent: Wednesday, June 27, 2007 3:01 PM
To: GetSMART
Subject: OAG Docket No 121

Under the SONRA; Indian tribes will be required to set up sex offender registries or turn that power over to another unit of government outside the Indian tribe. This is a clear removal of power from the Indian tribal units of government and may be a violation of treaties signed by the US Government. It will also be the first time in history that the US Government is forcing the Indian Nations of sovereign governments to conform to a standard set by an outside unit of government. Clearly this should be corrected to ask the Indian Tribal unit of government for their cooperation; but if they refuse the requirement that another unit of government take over the responsibility of registering sex offenders from the tribal unit should be removed from the SONRA.