



INTER TRIBAL COUNCIL

of ARIZONA, INC.

July 30, 2007

MEMBER TRIBES
AK-CHIN INDIAN COMMUNITY
COCHOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI NATION
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIABAB-PAIUTE TRIBE
KASCUA YAQUI TRIBE
KUEBLO OF ZUNI
KUECHAN TRIBE
KALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
OHONHO O'ODHAM NATION
SONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

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.

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, it 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 the 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 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.

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,

A handwritten signature in black ink that reads "John R. Lewis". The signature is written in a cursive, slightly slanted style.

John R. Lewis
Executive Director