

Implementing the Expanded Jurisdiction Provisions of VAWA in Our Tribal Courts



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**The National Congress
of American Indians
&
The Tribal Law and
Policy Institute**



Today's Presenters

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Welcome & Introduction: NCAI's VAWA Task Force
VAWA Programmatic Overview : Jacqueline Agtuca, National Indigenous Women's Resource Center


Moderator: Chia Halpern Beetso, Tribal Court Specialist, TLPI


Panelists: Brent Leonhard, Attorney, Confederated Tribes of the Umatilla Indian Reservation
Jill Engel, Attorney, Hopi Tribe
Michael Carter, Attorney, Gila River Indian Community
John Dossett, General Counsel, NCAI
Sam Hirsch, Deputy Associate Attorney General, DOJ*

* For Q&A only; not responsible for slides.

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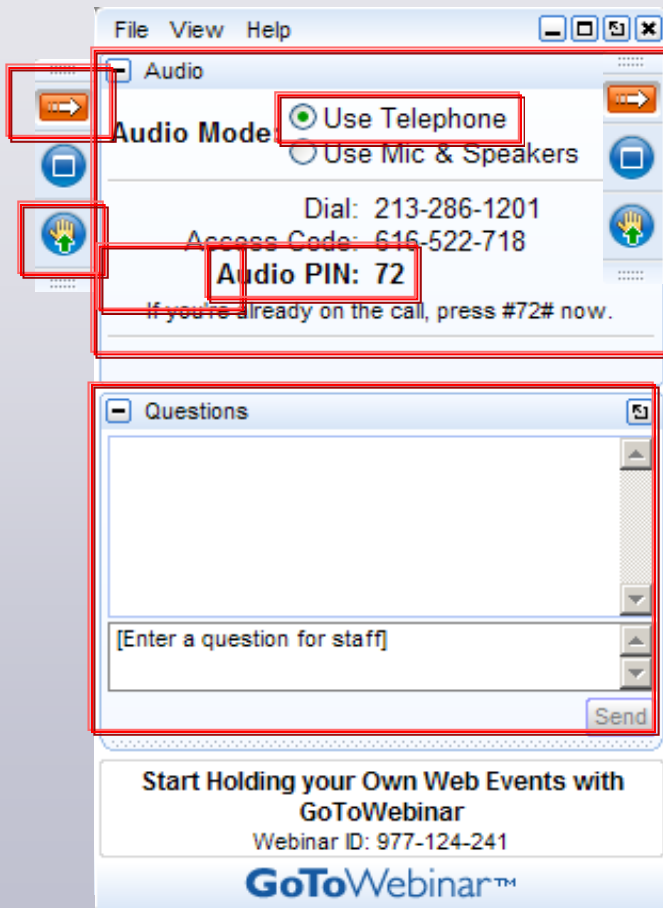
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Webinar Roadmap

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- I. Introduction & Remarks on Significance of Recent 2013 VAWA Reauthorization
- II. Brief Overview of VAWA Programs
- III. Technical Discussion of Due-Process Requirements Necessary for Implementation
- IV. Strategy Discussion with Our Federal Partners
- V. Q & A

Welcome from the NCAI Task Force

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Co-Chairs Juana Majel & Terri Henry

- Thank you for participating
- VAWA 2013 is a tremendous accomplishment
- Still lots of work to be done



Violence Against Women Act: A Brief Overview of Tribal Programs

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VAWA programs and services are the building blocks to protect victims long before criminal prosecutions occur.

Title IX: Safety for Indian Women

- Grants to Indian Tribal Governments Program
- Grants to Tribal Coalitions Program
 - Grants to Encourage Arrest Program – Allocation for Tribal Coalitions
- Consultation
- Research

Other Titles:

- S.T.O.P. Grant Program
- Rural Grants Program
- Sexual Assault Services Program
- Campus Provisions

A Historic Victory for Tribes

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President Obama signed the Violence Against Women Reauthorization Act into law on March 7, 2013.

VAWA & the Tribal Law and Order Act

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Examining the intersections and similarities between implementation of the Tribal Law and Order Act's (TLOA) enhanced sentencing authority and VAWA's Special Domestic Violence Criminal Jurisdiction:

- **Due-Process Requirements (Both)**
- **Jury Selection (VAWA)**

Tribal Law and Order Act of 2010 Becomes Law

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July 29, 2010: President Obama signs the Tribal Law and Order Act.

Section 234(a) enhances tribal sentencing to 3 years per count and 9 years per case (with conditions).

Requirements for Enhanced Sentencing:

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- I. Felony crime or previous conviction
- II. Effective assistance of counsel
- III. Licensed attorneys for indigent defendants
- IV. Law-trained licensed judge
- V. Laws, rules of evidence, and procedures must be publicly available
- VI. Proceedings must be recorded



Umatilla Implemented in March 2011

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- Provide public defenders to everyone, law-trained tribal-member judge for 30+ years, hearings are recorded, laws are on public website, etc....
- Amended criminal code to define felonies and make defendants' rights under TLOA explicit.
- Approved by Law and Order Committee, went to Board of Trustees work session twice, advertised in paper for tribal member input, and presented to the General Council for input and approval.
- Thus far, two people have been placed in the BOP TLOA Pilot Program.

Hopi Tribe Implemented in August 2012

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- Hopi Law Enforcement Task Team is created.
- Community Involvement.
- Hopi Tribal Council 2013 Agenda
 - Detention Facility
 - Alternatives to Incarceration
 - Bureau of Prisons
 - Trained Law Enforcement
 - Tribal Council appropriated funds without federal funds for the Public Defender Office
 - Investigators for Prosecutor and Public Defender's Office

Gila River Indian Community

TLOA Implementation in Progress

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- **Revising the Criminal Code**
 - Community workgroup
 - Code development
- **Satisfying TLOA's requirements**
 - For every felony offense, citation to state or federal law(s) provided for comparability requirement
 - Judge requirement hurdles
 - State-licensed defense attorneys already provided
 - Developed indigent defense standards for non-Indians
- **Tribal Jails – long-term incarceration**
 - BIA approval required (must comply with BIA guidelines for tribal jails)
 - Community currently putting together submittal packet to BIA
- **Anticipated Implementation Date**
 - Draft Criminal Code expected to be passed in May, with felony sentencing to commence in January 2014
 - Allows departments to fully prepare and jail to obtain BIA approval

BOP Pilot Program & Tribal Sentence Stacking

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TLOA allows for tribes to house convicted felons in Bureau of Prison (BOP) facilities under a 4-year pilot project.

- BOP form is insufficient. Be prepared for delays and frustrations. First referral took over a month to finalize; the second took 3 weeks.
- Work with U.S. Marshals Service and local USAO tribal liaison to arrange transfer to federal custody.

Sentence Stacking - Prior to TLOA, district courts were split on this issue.

- However, TLOA prohibits sentences in excess of one year per criminal proceeding (not per offense), unless TLOA's requirements are satisfied.

VAWA & the Tribal Law and Order Act

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- The new Special Domestic Violence Criminal Jurisdiction under VAWA 2013 builds directly upon the expanded tribal sentencing authority under the Tribal Law and Order Act.
- After a quick overview of two other VAWA provisions, this presentation will examine Special Domestic Violence jurisdiction as well as VAWA implementation and strategy.

VAWA 2013 Tribal Jurisdiction Provisions – A Brief Overview

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- **Sec. 905 – Tribal Civil Jurisdiction**

Clarifies that tribal courts have full civil jurisdiction to issue and enforce protection orders involving Indian or non-Indian persons regarding matters that arise in Indian country.

- **Sec. 906 – Amendments to the Federal Assault Statute**

Gives federal prosecutors more tools to effectively combat three types of assault frequently committed against women in Indian Country by amending the federal code to include the following assault crimes:

- ✦ Assault by strangling or suffocating –
 - Max 10-year offense
- ✦ Assault resulting in substantial bodily injury –
 - Max 5-year offense
- ✦ Assault by striking, beating, or wounding –
 - Max 1-year offense

VAWA Special Domestic Violence Criminal Jurisdiction – Section 904

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VAWA 2013 affirmed tribal inherent authority to exercise criminal jurisdiction over non-Indians who commit domestic violence, dating violence, or violations of protection orders in Indian country (as defined by 18 USC 1151).

- Exercising special DV criminal jurisdiction is entirely voluntary and elective.
- Special DV criminal jurisdiction is concurrent with existing federal (or state) jurisdiction.
- Tribe may not exercise special DV criminal jurisdiction if both the victim and the defendant are non-Indians.

VAWA Special Domestic Violence Criminal Jurisdiction – Section 904

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- **Domestic violence**—violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.
- **Dating violence**—violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- **Violation of Protective Orders**

VAWA Special Domestic Violence Criminal Jurisdiction – Due-Process Requirements

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- Tribal court ensures “all applicable rights” under the Indian Civil Rights Act.
- If any term of imprisonment, all rights described in TLOA – indigent counsel, law trained judge, etc.
- Tribal court must provide the right to a trial by an impartial jury.
 - Drawn from sources that reflect a fair cross-section of the community.
 - That do not systematically exclude any distinctive group in the community, including non-Indians.

VAWA Special Domestic Violence Criminal Jurisdiction – Other Requirements

- Tribal court must ensure anyone detained under VAWA’s special DV criminal jurisdiction is “timely notified” of right to file for a writ of *habeas corpus* in federal court.
- Tribal court ensures “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant” are provided.
- Defendant must have sufficient ties to the tribal community – resides in Indian country or is employed in Indian country or is a spouse or intimate partner of an Indian residing in Indian country or a tribal member.

VAWA Special Domestic Violence Criminal Jurisdiction – Implementation

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Goals of Implementation:

- 1) Create an effective deterrent
- 2) Provide authority for early intervention and rehabilitation
- 3) Protect Native women by incarcerating offenders

Tribes will need to implement the law effectively with criminal and procedural codes, professional policing and investigations, victims' services, prosecutions, defense counsel, law-trained judges and due process in tribal courts.

VAWA Special Domestic Violence Criminal Jurisdiction – Implementation

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Keys to Effective Implementation:

- Information-sharing among tribes during pilot project
- Tribal community engagement
 - Education, development of community support, and involvement of non-Indians
- Code and procedure development
 - “Fair cross-section” jury requirement
- Detention of non-Indian prisoners
- Funding

VAWA Special Domestic Violence Criminal Jurisdiction – Implementation & Legal Strategy

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- Implementation by tribal governments is closely related to legal strategies for defending the new law from constitutional challenges.
- Particularly in early cases, it will be important to have compelling evidence and clear compliance with required due process.

VAWA Special Domestic Violence Criminal Jurisdiction – Legal Strategy

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- May take time to unfold – the *Duro* fix and *U.S. v. Lara*.
- Necessitates: solid facts, clean boundaries, evidence beyond a reasonable doubt; implementation of codes, victims services, juries, procedures, due process, and indigent defense.
- Difficult facts or litigious defendant → consider referral to US Attorney instead of tribal prosecution.
- Building legal support for new law (law-review articles and education of the federal bench).

VAWA Special Domestic Violence Criminal Jurisdiction – Section 904 Pilot Project

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- **Pilot Project** → The special DV criminal jurisdiction provisions do not take effect until two years after enactment in order to give tribes time to amend their codes and procedures to exercise this expanded jurisdiction.
- Except, tribes wishing to exercise special DV criminal jurisdiction on an accelerated basis will be able to do so upon approval by the Attorney General. The experiences and work of the pilot tribes can be shared with future participating tribes.

Questions?

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