UTILIZING BACKGROUND CHECKS TO IMPROVE PUBLIC SAFETY IN INDIAN COUNTRY

WHAT IS THE TRIBAL LAW & ORDER ACT?
Tribal Law & Order Act

- Updated 28 USC 534 to confirm that tribal criminal justice agencies have legal authority to access FBI criminal justice information.

- “The Attorney General shall ensure that tribal law enforcement officials that meet applicable Federal or State requirements be permitted access to national crime information databases.” TLOA, sec. 233(b); 34 USC 41107(1).

Crime Data as a Tool to Fight Crime

- Crime data to fight crime that is underway or under investigation.

- Crime data to reduce opportunities for crime: background checks.
Tribal Submissions to NGI

- FY 2017 civil fingerprint non-channeler submissions: 6,282
  - 35% increase over FY 2016
- FY 2017 civil fingerprint channeler submissions: 12,120
  - 7% increase over FY 2016
- FY 2017 civil fingerprint NIGC submissions: 82,179
  - .02% increase over FY 2016
- TOTAL civil submissions = **100,581**
Background Check Legal Authorities

- Public Law 92-544 (34 USC 41101)*
- Indian Gaming Regulatory Act
- National Child Protection Act/Volunteers for Children Act (NCPA/VCA)*
- Serve America Act
- Native American Housing Assistance & Self-Determination Act
- Indian Child Protection & Family Violence Prevention Act
- Native American Child Safety Act
- Head Start Act
- Purpose Code X
- Criminal justice agencies
- Firearms licensing/permitting

* Fingerprint authorized by State and may only be submitted through the State Identification Bureau

Public Law 92-544

- **Menard v. Mitchell**, 328 F.Supp. 718 (D. D.C. 1971) - disallowed use of FBI maintained criminal history record information for non-federal background checks for employment or licensing purposes because there was no federal law that authorized such use.

Public Law 92-544
(34 USC 41101)

- Authorizes FBI to provide criminal history records “…to officials of State and local governments for purposes of employment and licensing…”
- Requires a “…State statute…approved by the Attorney General…”
- Approval authority has been delegated to the FBI, Office of the General Counsel, Criminal Justice Information Law Unit.

Public Law 92-544
(34 USC 41101)

- Ways that tribes are incorporated:
  - State statute specifically names tribe and purpose, or
  - State statute adopts tribal resolutions that specify the purpose
- Common purposes: persons with access to children, tribal government employees, and tribal gaming employees.
National Indian Gaming Commission has broad authority to conduct background investigations.

NIGC “…shall conduct or cause to be conducted such background investigations as may be necessary.” 25 USC 2706(b)(3).

Applies to key employees and primary management officials.

34 USC 40102(a) – States can authorize a “qualified entity” to request background checks to determine whether a provider has been convicted of a crime bearing on fitness for providers having responsibility for safety & well-being of children, elderly, or disabled.

Definition of “State” does not include “Tribes” – 34 USC 40104(11).
However, definition of “qualified entity” can include a public organization “that provides care or care placement services…including an organization that licenses or certifies others to provide care or care placement services…” – 34 USC 40104(10).

A state can designate an appropriate tribal government agency (or a tribal non-governmental entity) as a qualified entity.

Serve America Act

Individuals serving with the Corporation for National and Community Service – including AmeriCorps.

- 42 USC 12645g
- 45 CFR 2540
Native American Housing Assistance & Self-Determination Act

- Applicants for employment with a tribal housing authority.
- Applicants for tenancy in a tribal housing authority property.
- Name-based query may be conducted by law enforcement to determine whether there is information. If there is information, then fingerprints must be submitted to obtain the criminal history record information.
- 25 USC 4138

Public Law 101-630 (25 USC 3207(a-c))

- Requires background checks for persons being considered for employment by Tribes (that receive federal contract/compact funding) in positions that have regular contact or control over Indian children.
- Tribes can set standards more stringent than DOI or HHS standards.
- 25 USC 3207(a-c)
Native American Child Safety Act (2016)

- Requires background checks for persons being considered to serve as tribal court ordered foster parents. Must do:
  - FBI – national background check, and
  - Also, check state child abuse/neglect registries, National Sex Offender Public Registry, tribal records & registries.

- 25 USC 3207(d)

Head Start Act

- Requires background checks for tribal Head Start employees. Must do:
  - FBI – national criminal history check,
  - State – criminal history check, or
  - Tribal – criminal history check.

- 42 USC 9843a(g)
Purpose Code X

- 28 CFR 901.2 & 901.3 – allows for name-based check to be followed by the delayed submission of fingerprints.

- BIA OJS submitted a proposal for approval to the National Crime Prevention and Privacy Compact Council to assist tribal agencies during emergency child placements, in absence of state laws governing such access.

- Compact Council approved on May 13, 2015.

Purpose Code X

- Each tribe must be approved to participate by BIA OJS.

- Exigent name-based check to be conducted by BIA OJS upon tribal government agency request.

- Residents must consent to provide fingerprints for a national check; if residents fail to consent, child may not be placed in that home.

- Fingerprint-based check to be submitted within 15 calendar days.
Criminal Justice Employment

- Criminal history record information can be accessed by criminal justice agencies to screen employees and applicants for employment for criminal justice agencies.

- 28 CFR 20.33(a)(1)

National Instant Criminal Background Check System (NICS)

- FBI CJIS NICS Rulemaking

- 28 CFR 25.6(j)(3) - allows tribal criminal justice agencies to access NICS for background checks pertaining to disposal of firearms in possession of tribal criminal justice agencies.
National Instant Criminal Background Check System (NICS)

- FBI CJIS NICS Rulemaking

- 28 CFR 25.6(j)(1) - allows tribal criminal justice agencies to access NICS for background checks pertaining to issuance of firearms-related permits or licenses (including firearm possession, acquisition, transfer, or carrying of a concealed firearm).

Uniform Crime Reporting

- FBI CJIS Uniform Crime Reporting
- Tribal statistics in Offenses Known to Law Enforcement – Table 11.
- Helps tribal officials spot trends and plan effectively.
Questions?

Chris Chaney
- FBI OGC Criminal Justice Information Law Unit
- cchaney@fbi.gov
- (304) 625-3510