



Indian Law Newsletter



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Message from the Chair



By Kelly S. Croman

Thank you to all those Section members who attended this year's Indian Law Section CLE at Daybreak Star on May 4. Attendance was beyond expectations and WSBA staff tells us that the evaluations were some of the best they've ever seen.

The CLE was successful because of the dedicated efforts of a large number of people. Your Trustees deserve the highest praise and appreciation for the effort they put into developing an interesting and diverse program, as do the speakers who volunteered their time and energy to prepare interesting and informative presentations and materials. WSBA staff also spent countless hours supporting our efforts, for which we are very grateful. Last but definitely not least, I want to personally thank **Lael Echohawk (Pawnee)**, your Chair Elect, for stepping in to host the day when I was unable to attend due to a family event.

We've also been busy planning and hosting several mini-tele-CLEs. To date we've held four such events, on the following topics: Public Law 109-158 and the limitations of 28 U.S.C. 2501 for tribal trust funds mismanagement claims (11/3/06); hydroelectric relicensing (1/12/07); cultural property law and Washington Senate Bill 5938 (3/2/07); and *San Manuel v. National Labor Relations Board* (4/27/07). All of these one-hour CLEs have been offered free to Section members and have been well-attended.

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The Adam Walsh Act: Protecting Tribal Children While Preventing State Encroachment into Indian Country



By Julio V.A. Carranza

Last summer, the U.S. Congress passed the Adam Walsh Child Protection and Safety Act of 2006 ("Act"), P.L. 109-248,² which made significant changes to sexual predatory crimes¹ and established a nation-wide sex offender registry and notification system.³ Despite the well-intentioned goals of protecting all children in our country from sexual exploitation, the law was passed without any notice to or consultation with Indian tribes.⁴ Accordingly, it should come as no surprise that such a law does not respect tribal sovereignty.

Still, to the astonishment of tribes, the Act contains mandatory language requiring tribes to affirmatively declare their participation in the national sex offender program created by the Act, by **July 27, 2007** – or automatically cede civil and criminal authority to the state for purposes of enforcing the new law.

While prior to the Act federal law provided standards for state sex offender registration programs, federal law offered no comparable provisions for sex offenders who were convicted in tribal courts or entered a reservation following conviction from a non-tribal jurisdiction.⁵ The

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lapse in tribal sex offender registration was – and remains – especially troubling, since one of the “most destructive problems affecting children in ‘Indian country’ is sexual abuse.”⁶ The Act is designed to fill jurisdictional gaps on the reservation and thus help protect tribal communities from sexual abuse, by requiring tribal participation in the national sex offender registration and notification system.⁷

According to the Act, the following categories of tribes that fail to disclaim state jurisdiction by July 27 will be treated as having acquiesced to state civil and criminal authority for purposes of enforcing the Act:⁸

- Tribes subject to state authority pursuant to Public Law 280 (as further discussed below);⁹
- Tribes electing to participate under the Act by July 27, which later withdraw their participation;
- Tribes the U.S. Attorney General determines are likely incapable of substantially implementing the requirements of the Act.

Importantly, tribes do not have to be fully compliant with the federal sex offender registry and notification requirements by July 27, 2007. Tribes must achieve full compliance by July 27, 2009. And one to two year extensions can be obtained from the U.S. Attorney General, in which case a tribe would have until July 27, 2010 or 2011 to become fully compliant with the Act.¹⁰

The Sex Offender Registration/Notification System

By electing to participate as a registered jurisdiction to the exclusion of the state, a tribe must fully implement the following requirements of the Act:

1. Maintain a jurisdiction-wide sex offender registry and website.¹¹
2. Ensure that the tribal sex offender registry includes:¹²
 - a. Physical description of the sex offender;
 - b. Text of the provision of law defining the criminal offense for which the sex offender is registered;
 - c. Criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender;
 - d. Current photograph of the sex offender;
 - e. Fingerprints and palm prints of the sex offender;
 - f. DNA sample of the sex offender;

- g. Photocopy of a valid driver’s license or identification card issued to the sex offender by a jurisdiction; and
- h. Any other information required by the Attorney General.

3. Make sure sex offenders on the reservation register, understand the tribal registration requirements, and remain registered.¹³

With such requirements comes a notable financial burden that electing tribes must be prepared to bear. According to the federal government, implementation of the necessary sex offender website hardware and software could exceed \$40,000.¹⁴ And, that amount does not contemplate the direct and indirect costs of tribal technical, law enforcement and other services that will be needed to implement the Act. Although the Act contemplates grant funding to tribes for implementation, the U.S. Attorney General has not yet established a funding program under the Act.¹⁵

Tribal Participation Election

The steps for tribes to elect to participate in the national sex offender registry and notification system are as follows:

1. **Pass a Tribal Resolution by July 27.** First and foremost, a tribe must enact a “resolution or other enactment of the tribal council or comparable governmental body,” which either (a) expresses an intent to implement all of the duties imposed by the Act or (b) designates the tribe as a registration jurisdiction via cooperative agreements with local jurisdictions.¹⁶
2. **Contact U.S. DOJ by July 27.** A tribe must transmit a tribal resolution or enactment to the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) office. Tribes may send the resolution/enactment to Leslie A. Hagen, Smart Office/Office of Justice Programs, U.S. Dept. of Justice, 810 7th St., NW, Suite 8241, Washington, DC, 20531, (202) 616-6459, Leslie.Hagen@usdoj.gov.
3. **Explore Federal Funding.** An electing tribe should work with the SMART office to secure funding authorized under the Act for implementation of the above-outlined sex offender registry and notification system requirements.
4. **Implement the Act by July 27, 2009.** Tribes must fully implement the requirements of the Adam

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Walsh Act within two years – or obtain an extension until 2010 or 2011 – or risk having the U.S. Attorney General decertify the tribes and allow the state enforcement of the Act.¹⁷

Recommendations

Since the Adam Walsh Act was just recently passed and there are no guiding implementation regulations, much of the responsibilities and practical enforcement issues are still unknown. Despite the coercive nature of the new federal law, tribes should consider taking the following actions to further safeguard their communities from sexual predators.

- Elect to establish a tribal sex offender registration system and/or to enter into a cooperative agreement with local government for that purpose;
- Evaluate inherent banishment or exclusionary authority to keep reservation sex offenders at bay; and
- Enact tribal law specific to a particular reservation community to identify, punish and/or deter sexual predators.

These are just a few of the legal options tribes have to keep their reservations and children safe.

P.L. 280

P.L. 280 tribes, please take note. The U.S. Department of Justice appears to be construing the Adam Walsh Act to confer both criminal and civil jurisdiction to states with “full” or “partial” criminal and/or civil jurisdiction on the reservation pursuant to P.L. 280. The federal government sent a letter to the tribes stating “delegation to the state is automatic if a tribe is subject to the law enforcement jurisdiction of the state under 18 U.S.C. 1162 (P.L. 280).”¹⁸ While tribes that have ceded criminal authority to the state by way of P.L. 280 appear clearly subject to state criminal enforcement under the Act, the same does not necessarily hold true for civil regulatory authority on the reservation.

P.L. 280 of course did not grant states “civil regulatory” jurisdiction on the reservation. See e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-215 (1987). As such, tribes maintain civil regulatory jurisdiction to, e.g., civilly banish or exclude sexual predators from the reservation. However, P.L. 280 tribes that do not affirmatively assert such civil regulatory jurisdiction over sex offenders by July 27 risk ceding that authority to the state. A tribe that does not elect to comply with the Act but later attempts to exclude a sex offender from the reservation could be faced with a jurisdictional objection from the offender – i.e., an argument that the tribe ceded civil exclusion authority over sex offenders to the state under

the Act. Thus, even P.L. 280 tribes should consider electing to participate in the national sex offender registry and notification system as outlined above.

In sum, the Adam Walsh Act highlights the need for tribes to implement safeguards to ensure the health and safety of Indian children and adolescents on the one hand, while protecting and strengthening tribal sovereignty and self-governance on the other. All the same, tribes should take appropriate legislative action by July 27, 2007. As the old saying goes – “Speak now or forever hold your peace.”

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- 1 Pub. L. No. 109-248, 120 Stat. 587 (partially codified at 42 U.S.C. §§ 16901-16991).
- 2 Of particular importance, the Act adds felony child abuse and neglect to the Major Crimes Act’s list of offenses that are subject to federal prosecution when committed by an Indian against the person or property of another Indian or other person within Indian country. *Id.* at § 16911(5)(a)(iii).
- 3 *Id.* at § 16911; The Sex Offender Registration and Notification system was established “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.” *Id.* at § 16901.
- 4 See National Congress American Indians Memorandum to Tribal Leaders, available at www.ncai.org/ncai/resource/documents/governance/Adam_Walsh_Act/Adam_Walsh_Memo_4.12.07.doc (accessed May 29, 2007).
- 5 *Id.*; Sex Offender Registration in Indian Country, TRIBAL JUDICIAL INSTITUTE, available at www.law.und.edu/npilc/judicial/web_assets/pdf/TJ106sexoffend.pdf (accessed May 23, 2007); see also Larry EchoHawk, Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 83 (2001).
- 6 EchoHawk, Child Sexual Abuse, *supra* note 5 at 85. Native American children suffer the second highest rate of reported child abuse and neglect. See Table 3-11 Race and Ethnicity of Victims, 2005 Child Maltreatment, Administration for Children and Families, available at www.acf.hhs.gov/programs/cb/pubs/cm05/table3_11.htm (accessed May 23, 2007).
- 7 Letter from Laura Rogers, U.S. Office of Justice Programs, May 3, 2007, available at www.tribal-institute.org/download/Adam%20Walsh%20Tribal%20Letter.pdf (accessed May 23, 2007).
- 8 42 U.S.C. § 16927.
- 9 See 18 U.S.C. § 1162.
- 10 42 U.S.C. §§ 16923 - 16924; see also Laura Rogers Letter, *supra* note 7.
- 11 *Id.* at §§ 16912-16919. Under the Act, sex offenders are classified as Tier I, Tier II, or Tier III. *Id.* at § 16911. Since Tier II and Tier III each maintain imprisonment exceeding one year and Congress limited tribes authority to impose jail sentence in excess of a

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result in the dismissal of the application unless the "No" is carefully explained in an exhibit.

Section III – Solicits information relevant to determining whether the applicant will provide a first or second NCE service to at least 10% of the total population in its predicted (60dBu) contour and at least 2,000 people. This question is important because it may result in a decisive "fair distribution of service" preference, awarded under Section 307(b) of the Communications Act (and known fondly as a "307(b) preference"). This preference comes into play only if two or more mutually exclusive applications specify different communities of license.

Section IV – Asks the applicant to certify whether it qualifies for certain points awarded under the point system, which is used to award a construction permit when two or more qualified mutually exclusive applicants apply and when no applicant is entitled to a 307(b) preference. The possible points are:

Established Local Applicant – 3 points

Diversity of Ownership or Stateside Network 2 points

Technical Parameters 1 – 2 points

Section V – Solicits information about attributable interests in licenses and construction permits for other stations (including full service commercial and noncommercial stations and translators). This information is used to break point system ties. The first tie-breaker awards a preference to the applicant with the fewest authorizations. If two or more applicants are still tied, the second tie breaker awards a preference to the applicant with the fewest pending applications.

Section VI – Requires the applicant to certify that the information contained in the application is "true, complete, and correct." The certification should be signed by an authorized representative of the applicant. For corporations, that representative should be an officer of the corporation. It is not necessary to submit a signature, but it is wise to keep a signed and dated copy of the application as evidence that the certification was proper.

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year, Tribes will not have any Tier II or III offenses. *Id.*; see Civil Rights Act of 1968, 25 U.S.C. §1302(7) (limiting the sentences tribal courts may impose to a maximum of \$5,000 and one year in jail for any crime). Thus, it is unlikely that Tribes will be required to place but a limited group of Tier I offenses (as defined by their own tribal criminal code) onto the Internet. Forthcoming implementing guidelines may provide further direction for this issue.

- 12 *Id.* at § 16914.
13 *Id.* at § 16916.
14 See Technical Assistance, SMART office, available at www.ojp.usdoj.gov/smart/faq.htm#registry (accessed May 28, 2007).
15 See generally, Title VI, sections 621-629, Pub. L. No. 109-248. Under the Act, the Attorney General is mandated to establish and implement a Sex Offender Management program, under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing the sex offender registry and notification system. This also includes awarding bonus payments to tribes that promptly comply and implement the registry and notification standards not later than July 27, 2008. *Id.*
16 *Id.* at §16927(a)(1)(A), (B). A tribe may choose to do nothing but under the Act still is treated as allowing Congress to cede to the state authority to implement the requirements of the Act.
17 As of this date, no appellate courts have directly examined issue related to tribal compliance with the Adam Walsh Ac. However, a recent dissent opinion in State v. Jones, 729 N.W.2d 1, 19-20 (Minn. 2006), which addressed the issue of whether Minnesota, a "full" PL-280 state, could enforce a sex offender registry statute against a Leech Lake Band of Ojibwe tribal member, outlined similar tribal compliance procedures under the Act.
18 See Laura Rogers Letter, supra note 7 at p. 2.

II. The Backlog Order

On March 27, 2007, the FCC released an order (the "Backlog Order") that applied the point system to approximately 200 mutually exclusive applications and tentatively selected some 76 applicants to receive construction permits. The Backlog Order is the best available guide for understanding how the point system works. Here are a few take-away principles.

A. Back to Basics

An applicant must establish that it is eligible to hold a noncommercial license. Its "basic qualifications" include a showing that it has an educational purpose which will be advanced by a radio station, that it possesses requisite "character qualifications," complies with limits on alien ownership, and is financially qualified. If these qualifications are not demonstrated, its application will be dismissed without ever advancing to a "fair distribution" or point system analysis. Similarly, if Section VII of the application does not establish that the technical facilities proposed comply with technical and environmental requirements, the application will be dismissed without regard to the applicant's qualifications under the point system.

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