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July 17–18, 2019 | Chicago

# 2019 NATIONAL SYMPOSIUM

on Sex Offender Management and Accountability

# Interplay of the Tribal Law and Order Act, the Violence Against Women Act, and SORNA

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July 18, 2019



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# Prosecuting Domestic Violence in Tribal Court

## Pascua Yaqui Tribe



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# Context

- Tribal Law and Order Act (TLOA)
- Violence Against Women Act (VAWA)
- Sex Offender Registration and Notification Act (SORNA)
- Washington post

April 18, 2014

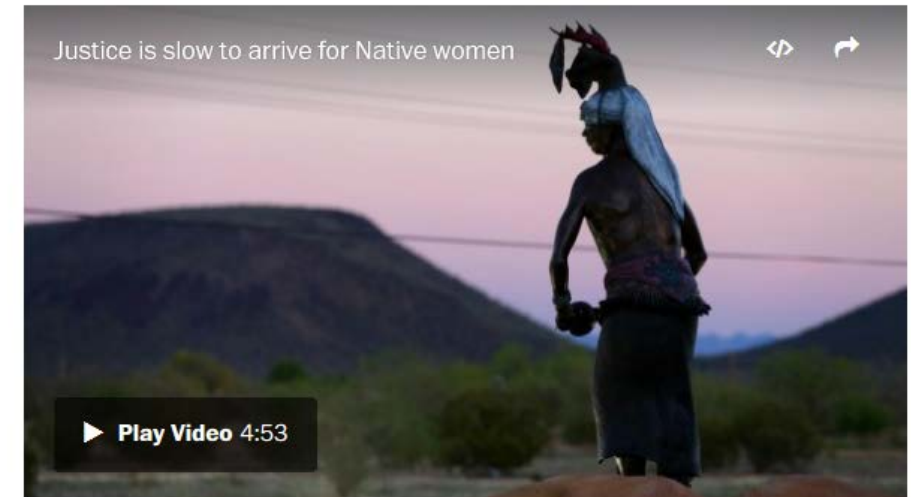


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National

## Arizona tribe set to prosecute first non-Indian under a new law

By **Sari Horwitz** April 18, 2014



The Violence Against Women Act was expanded in 2013 to allow Native American tribes to prosecute non-Indians in cases involving domestic violence. Before that, women like Frances Cupis were unable to press charges against violent partners in tribal court. (Whitney Shefte/The Washington Post)



# Indian Civil Rights Act (ICRA) 1968

## Defendant Rights (Pre-TLOA)

- The right to the equal protection of the tribe's laws.
- The right not to be deprived of liberty or property without due process of law.
- The right against unreasonable search and seizures.
- The right not to be twice put in jeopardy for the same tribal offense.
- The right not to be compelled to testify against oneself in a criminal case.
- The right to a speedy and public trial.



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# ICRA 1968

## Defendant Rights (Pre-TLOA) – cont.

- The right to a trial by jury of not less than six persons.
- The right to be informed of the nature and cause of the accusation in a criminal case.
- The right to be confronted with adverse witnesses.
- The right to compulsory process for obtaining witnesses in one's favor.
- The rights against excessive bail, excessive fines, and cruel and unusual punishments.



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# TLOA and VAWA: A Preliminary Note

- Important to understand what each statute does and how they relate to each other.
- TLOA 2010 restores tribal sentencing authority.
- VAWA 2013 restores tribal criminal jurisdiction.
- Tribes can choose to comply with —
  - Either
  - Neither
  - Both

## Section 908: Pilot Project

- VAWA 2013 went into force for all tribes on March 7, 2015.
- Statute authorized a pilot project.
- Three tribes selected to take part:
  - Pascua Yaqui
  - Tulalip Tribes
  - Confederated Tribes of the Umatilla Indian Reservation



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# July 29, 2010: President Obama Signs TLOA



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# TLOA

- Provide defendant with attorney.
- Presiding judge has sufficient legal training and is licensed.
- Make publicly available —
  - Criminal laws
  - Rules of evidence
  - Rules of criminal procedure
  - Judicial recusal standards and procedures
- Record proceeding.



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## TLOA (continued)

- “require excessive bail, impose excessive fines, or inflict cruel and unusual punishments, and in no event impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both”
- **TLOA:** Impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
- impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years



# March 7, 2013: President Obama signs VAWA



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# VAWA 2013: What It Does & How It Works

If a Tribe complies with statutory requirements, VAWA 2013 ***restores to the tribe the ability to prosecute*** defendants —

- Who live or work in the tribe's Indian country or who are a spouse/intimate partner of a tribal member or an Indian who lives in the tribe's Indian country; and
- Who commit dating violence or domestic violence or who violate the no contact/no harassment portion of a protection order
- Within the tribe's Indian country



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# Special Domestic Violence Criminal Jurisdiction (SDVCJ): 25 U.S.C §1304

Tribe must provide defendant with —

- All the rights guaranteed by the Indian Civil Rights Act
- Including (if defendant is sentenced to jail time) all rights listed in Section 1302(c) [TLOA]
- Right to trial by an impartial jury that is drawn from sources that
  - Reflect a fair cross-section of the community, and
  - Do not systematically exclude any distinctive group in the community, including non-Indians
- “all other rights necessary...” catch-all provision



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# Other Prosecution Case Concerns

- 25 U.S.C. § 1304(d) Rights of defendants
- 25 U.S.C. § 1302(c) Rights of defendants



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## 25 U.S.C. § 1304 (2014)

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

- 1. Domestic violence and dating violence**
- 2. Violations of protection orders**



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# Orders of Protection

18 U.S.C. § 2265

(b) Protection order.--A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(a) Full Faith and Credit

Term: “Protection Order”



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# Domestic Violence

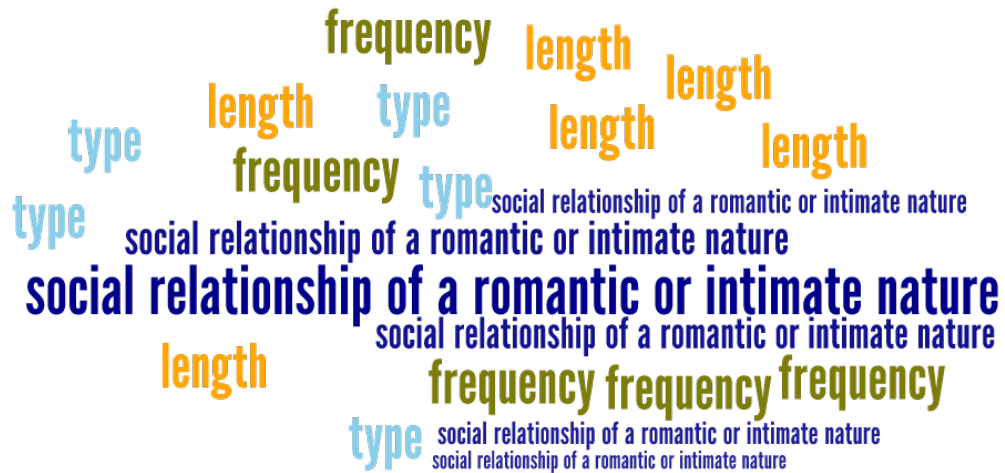
- By statute, means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated 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.
  - Spouse or intimate partner has same meaning as in 18 U.S.C. § 2266
  - Is the U.S. v. Castleman standard satisfied? (crime of violence)
- Must occur in tribe's Indian country



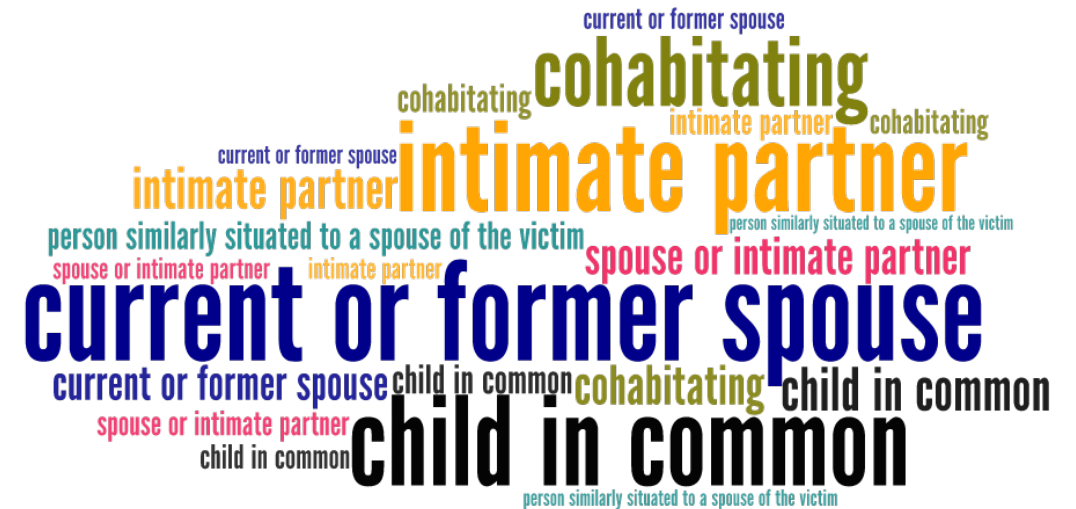
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# Dating Violence & Domestic Violence

## Dating Violence



## Domestic Violence



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# Spouse or Intimate Partner

- (7) Spouse or intimate partner: The term “spouse or intimate partner” has the meaning given the term in section 2266 of Title 18.

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# Exceptions = Defense to Jurisdiction

## (b) Nature of criminal jurisdiction

### (4) Exceptions

(B) Defendant lacks ties to the Indian tribe: A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant--

- (i) resides in the Indian country of the participating tribe;
- (ii) is employed in the Indian country of the participating tribe; or
- (iii) is a spouse, intimate partner, or dating partner of--
  - (I) a member of the participating tribe; or
  - (II) an Indian who resides in the Indian country of the participating tribe.



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# Case Consideration

- Limited by geographic jurisdiction
- Limited by relationship
  - Dating: social relationship of a romantic or intimate nature with the victim determined by length, type and frequency
  - Domestic
- Limited by “violence” or offense?

# U.S. v. Castleman

Argued Jan. 15, 2014

Pilot project began February 2014

Decided March 26, 2014



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# Other Prosecution Case Concerns

- *Ake v. Oklahoma*, 470 U.S. 68 (1985): Requiring the government to make one expert available to indigent defendants was not an excessive financial burden.
- *Miranda v. Arizona*, 384 U.S. 436 (1966): Statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of his rights and waived them.
- *Protections order v. orders* in a criminal matter protecting

A low-angle, upward-looking perspective of several tall skyscrapers with glass facades, reaching towards a clear blue sky. The entire image is overlaid with a semi-transparent blue filter. The text is centered in the upper half of the image.

# **Pascua Yaqui Tribe Special Domestic Violence Criminal Jurisdiction Experience**

# Pascua Yaqui Tribe

- 2 square mile reservation
- 7 miles from city of Tucson
- Approx. 65 miles from Mexico border
- 19,000+ enrolled tribal members (7 off-reservation communities)
- Approx. 500 non-tribal members reside on reservation
- 799 non-Indian government and casino employees (32% of all employees)



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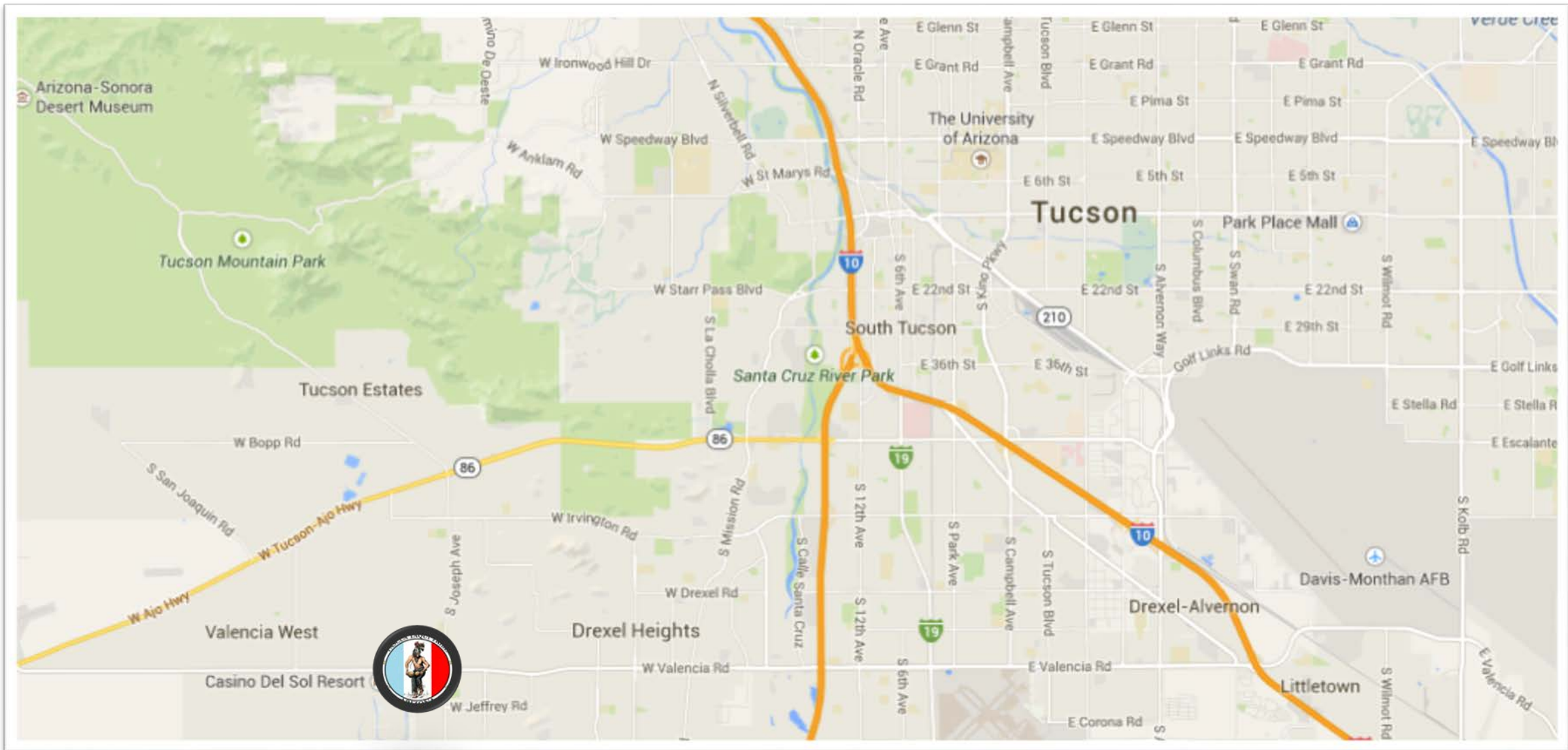




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# Pascua Yaqui Tribe Demographics

- Population + 5.1%
- Population: 4,000-5,000 (2010 Census)
- Median age: 24
- Traditional married couples: 32% (state: 48%)
- Female head of household: 42.9% (single mothers) (county: 12.4%)
- Approx. 40-45% of all families live in poverty.
- Unemployment: 24%
- Mortality: Male, 49; Female, 59



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# Pascua Yaqui Tribe: VAWA Overview, Year 1

- 20 during pilot period
- 16 defendants
- 15 male, 1 female
- 86 law enforcement contacts pre- and post-VAWA
- 1 same-sex
- 10 violent injuries
- 3 defendants have re-offended post-VAWA



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# Pascua Yaqui Tribe: VAWA Overview, Current

- 68 investigations
- 54 cases charged
- 2 extraditions
- 21 rearrests post-VAWA
- 45 defendants
- 1 same-sex
- Violent offenses
- 32+ children present during acts of domestic violence



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## PYT v. Garris

JT Nov. 14, 2014 – Tribe did not sufficiently prove “intimate partner or dating relationship.”  
No verdict as to guilt.



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## PYT v. Jaimez

May 9, 2017 — the first jury trial conviction of a non-Indian defendant in a Tribal Court since Oliphant decision under the Violence Against Women Act (VAWA) authority.



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# PYT VAWA Cases Debriefing

- Pretrial Motions / Issue resolution
  - Jury instructions / verdict form
  - Jury pool selection process – objection
  - Court clerk record keeping
  - Motions in limine – tribal court predictability
- Law Enforcement Trial Prep
  - Report writing
  - Evidence collection
- Warrants & Extraditions



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# PYT Implementation Challenges

- Investigative/defense funds
- Mental health costs (Ake motion)
- Notice issues
- Interpreter issues
- Law enforcement training to establish domestic violence relationship
- Domestic violence trial training
- Access to national criminal databases (NCIC, etc.)
- Cooperation from U.S. Attorney, county attorney and all law enforcement agencies
- Warrant checks to maintain custody



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# PYT Implementation Challenges (continued)

- Intergovernmental policies and procedures
- Plea agreements should contain the domestic violence allegation
- Pre-trial services
- Detention facility
- Data collection



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# **Tribal Access Program Overview**

# Tribal Access Program (TAP )

- U.S. Department of Justice launched TAP in August 2015 at DOJ Criminal Justice Information Services (CJIS) Tribal Day
- Partnership with SMART, Community Oriented Policing Services, Office for Victims of Crime, CJIS, Bureau of Indian Affairs and Tribes
- Managed by the DOJ Chief Information Officer and Office of Tribal Justice



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# TAP's Three Elements

## ACCESS

**DOJ serves as the CJIS Systems Agency (CSA) for federally recognized Tribes.**

DOJ assumes responsibility for granting network access, extending the model used by federal agencies to Tribes.

DOJ ensures security training (i.e., personnel, IT, and physical), on-boarding/vetting (agency and individual users), training and testing, and auditing.

## TECHNOLOGY

**DOJ provides two solutions: TAP-LIGHT and TAP FULL.**

TAP-LIGHT provides agencies with the ability to conduct name-based record checks and enter person and property information, while TAP-FULL provides the additional hardware necessary to conduct fingerprint-based criminal and civil record checks and submit arrest booking data.

## TRAINING

**DOJ provides enhanced training and assistance.**

TAP provides online and onsite training; assists Tribes in analyzing needs and identifying/providing appropriate solutions to maximize the value of national crime information.



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# Criminal Justice Agencies

- Law Enforcement / Police Departments
- Criminal Courts
- Prosecutors Office
- Pretrial Services
- Corrections
- Probation and Parole

- Document Tribal arrests and Tribal court dispositions
- Access to enter missing persons information
- Access to investigative records to include DOJ components
- Access unclassified criminal and national security intelligence products



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# Criminal Justice Agencies (continued)

- Access officer safety-related information, including gang members and known or suspected terrorists
- Enter information to prevent guns from being purchased by prohibited persons
- Enter no contact orders
- Secure, encrypted email to exchange sensitive information
- Search and enter information about persons and property



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# Civil Agencies

- Sex Offender Registry
- Civil Courts
- Public Housing
- Child Protective Services

- Children's Social Services
- Child Support Enforcement Agencies
- Head Start Program

- Register sex offenders
- Perform fingerprint-based record checks of persons having contact or control over Indian children



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## Civil Agencies (continued)

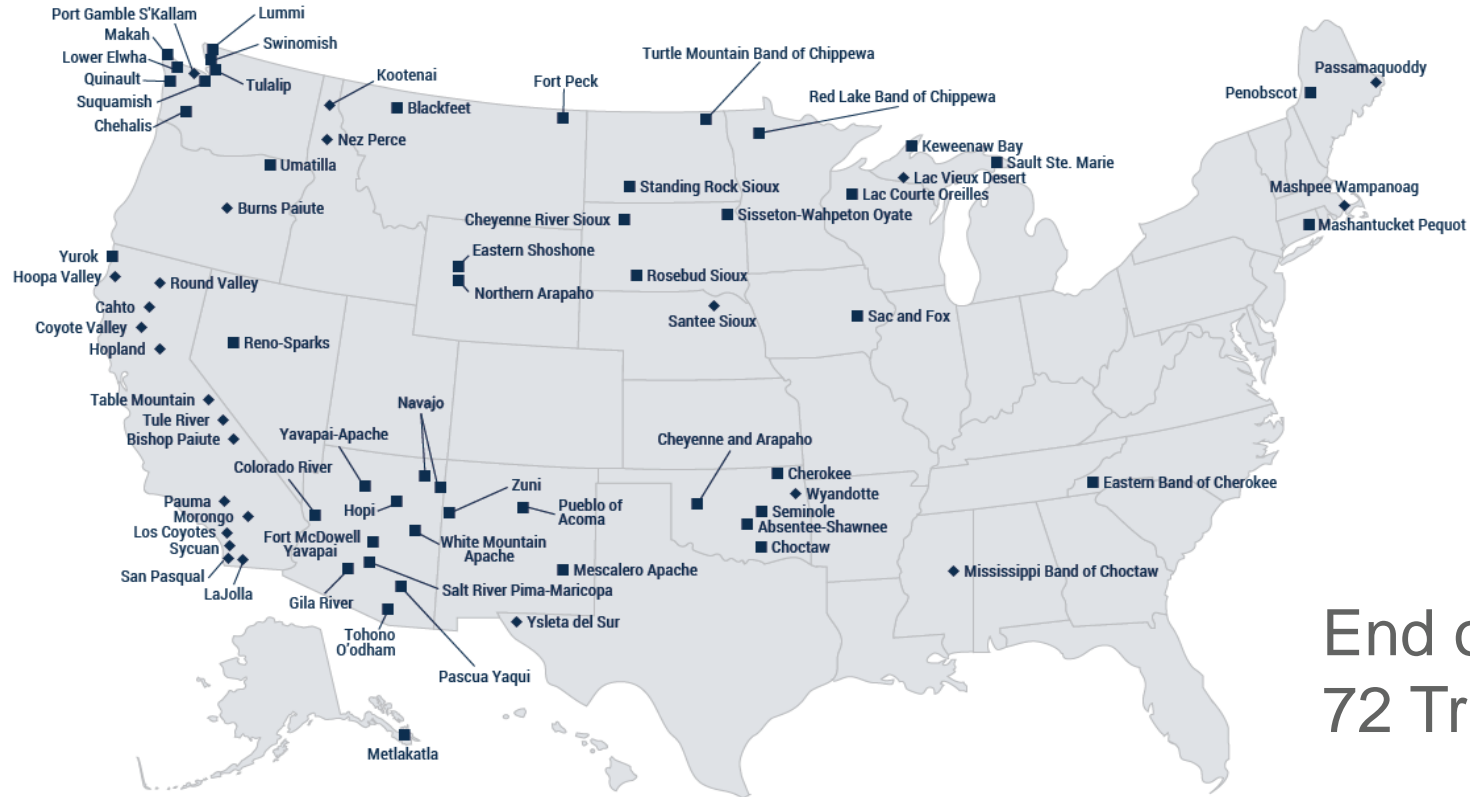
- Obtain criminal history record information to respond to or investigate allegations of abuse, neglect and exploitation of children
- Perform fingerprint-based record checks on public housing applicants and tenants
- Enter orders of protection
- Perform record checks to locate absent parents to enforce child support orders



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# TAP TRIBES



End of fiscal year 2019:  
72 Tribes, 338+ agencies

## KEY

- TAP-FULL tribe (receive a kiosk workstation for whole-of-government needs)
- ◆ TAP-LIGHT tribe (receive software for criminal justice agencies)

10/2018

Funded by:



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# Next Steps

Interested in participating in TAP?

- Application period for FY 2020 runs September 1 through October 31, 2019
- Must apply through the Tribe and have Tribal leadership support
- Application available online: <https://www.justice.gov/tribal/tribal-access-program-tap>



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A blue-tinted photograph of a city skyline, likely New York City, featuring several tall skyscrapers and a dense forest of green trees in the foreground. The word "Questions?" is overlaid in white text in the center of the image.

Questions?

# SMART Office

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# Thank you.



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