

COMPARING THE IMPLEMENTING CODES of the FIVE PILOT TRIBES
TRIBAL PILOT PROJECT of VAWA 2013
March 29, 2015

The Violence Against Women Reauthorization Act of 2013 included restoration of tribal criminal jurisdiction over non-Indian perpetrators of domestic violence, dating violence and violation of protection orders. This is known as special domestic violence criminal jurisdiction (SDVCJ). As of March 7 of this year, Indian tribes have general authority to implement this jurisdiction. Prior to that date, five tribes were approved to implement and participate in the VAWA Pilot Project by the U.S. Attorney General. The VAWA pilot tribes are:

- Pascua Yaqui Tribe (approved February 6, 2014)
- Tulalip Tribes (approved February 6, 2014)
- Confederated Tribes of the Umatilla Indian Reservation (approved February 6, 2014)
- Assiniboine and Sioux Tribes of the Fort Peck Reservation (approved March 6, 2015)
- Sisseton-Wahpeton Oyate (approved March 6, 2015)

Each tribe submitted an application demonstrating how they met the statutory requirements of the law and subsequently received approval from the Department of Justice to implement SDVCJ. Because the tribal codes, policies, and procedures from the Pilot tribes had the benefit of review by the Justice Department, they provide particularly instructive examples of how a tribe can implement the statutory requirements in VAWA 2013. Although tribes no longer need federal approval to implement this jurisdiction, tribal governments must ensure VAWA's statutory requirements are met before prosecuting non-Indian domestic violence offenders.

This memorandum begins an analysis of the codes and procedures of the five pilot tribes to compare and contrast their approaches. Two primary areas of difference that emerge are how each tribe has approached the jury and indigent defense requirements of VAWA.

Jury Pools

In order to exercise special domestic violence criminal jurisdiction, a tribe must ensure that non-Indian defendants have the:

“right to a trial by an impartial jury that is drawn from sources that—

1. reflect a fair cross section of the community; and
2. do not systematically exclude any distinctive group in the community, including non-Indians.”

Fort Peck: Fort Peck has devised two separate jury pools, utilizing a process that incorporates non-member residents for SDVCJ cases only. For cases outside of SDVCJ, the Tribes' maintain a list of least 21 resident tribal members, summon 12 of those names for each jury trial, then chooses six persons to serve on each jury.

For SDVCJ cases, in order to comply with the "fair cross section of the community" requirement, the Tribes compile a master juror list of 50 resident tribal members and 50 non-member residents, randomly summon 21 from each list for each jury trial, and then choose six persons to serve on each jury. (Unanimous verdicts are required for six person juries.) The population of the Fort Peck Reservation is 60 percent Indian and 40 percent non-Indian, so the Tribes are particularly conscious that non-Indians are not underrepresented on SDVCJ juries.

The Fort Peck SDVCJ jury source list for non-member residents is generated by the 15th Judicial District of Montana, which accounts for 98 percent of the Fort Peck Reservation. The tribal code sets out a process to issue subpoenas for jurors in order to compel non-member resident attendance. Jurors will be compensated by the rate paid by Roosevelt County, which overlays a significant portion of the reservation. The presiding judge has discretion to compensate jurors for mileage.

Sisseton-Wahpeton Oyate: Sisseton also uses two separate jury pools. For cases outside of SDVCJ, jurors must be adult resident members of the Tribe.

For SDVCJ cases, potential jurors may be selected from a variety of sources including but not limited to enrolled members of the Sisseton-Wahpeton Oyate, residents within the jurisdiction of Lake Traverse Reservation pursuant, full-time employees of the Tribe or its entities, and persons leasing lands from the Tribe. A list of at least twenty-one potential jurors is prepared and maintained by the Clerk. Each voting district on the Reservation is to be represented on the list. Defendants have the right to a trial by a jury made up of at least six persons.

Pascua Yaqui: Pascua Yaqui uses the same jury pool for all crimes, and empanels its juries using enrolled members, spouses of tribal members, employees of the Tribe, and permanent residents of the reservation. In order to qualify for jury duty, enrolled members must be residents of Arizona, with preference given to those living in nearby counties. The Tribe draws its jury pools from the Tribal Census Roll, Housing Department, and Human Resources of the Tribe. Failure to appear for jury duty constitutes contempt of court and jury summons include a warning to this effect. The Tribe also incorporates a "severe hardship" exception for jury duty and jurors may be excused from service for limited reasons, including having to travel more than 150 miles one-way.

Tulalip: Tulalip uses the same jury pool for all crimes. The Tribes utilize tribal members living on or near the reservation, residents within the boundaries of the reservation, and employees

of the Tulalip Tribes. The Tribes devises its juror list from its tribal Enrollment Department and the Human Resources departments of the Tulalip Resort Casino and Quil Ceda Village. The Tribes then compare these numbers with census data to ensure the jury pool reflects a fair cross section of the community. The Tribes randomly select 25 names from its jury pool and summon by mail or personal service. Those who fail to appear for jury duty are held in contempt of court.

Umatilla: Umatilla uses the same jury pool for all crimes. Even before VAWA implementation Umatilla had incorporated non-Indians in its jury pools by utilizing residents within the boundaries of the reservation. The Tribes empanels all of its juries from a voter registration list provided by the local county, which represents a rough overlay of the reservation boundaries. The judge chooses 50 names per year to serve as prospective jurors and 18 names are summoned per trial.

Indigent and Effective Assistance of Counsel

Under VAWA 2013, tribes must afford non-Indian offenders with effective assistance of counsel and pay for defense counsel of indigent offenders. Such counsel must be “licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”

Fort Peck: Fort Peck guarantees indigent counsel for any person charged with the following three separate offenses: SDVCJ, physical domestic abuse, and domestic abuse. If a public defender employed by the tribe is unavailable, the Tribes will hire a licensed attorney on a contract basis.

Pascua Yaqui: The Tribe affords state-licensed indigent defense in all SDVCJ cases, as well as to indigent Indian offenders in “any criminal proceeding in which the Tribe is seeking punishment by loss of liberty.” Such attorneys must also be barred in the Pascua Yaqui Tribal Court.

Umatilla: The Tribes appoints state-licensed public defenders to any criminal defendant that requests one, including on appeal.

Sisseton-Wahpeton Oyate: The Tribe does not distinguish between Indians and non-Indians, or between those who are indigent or not, for purposes of representation by the Tribal Public Defender. All defendants in cases where a term of imprisonment of any length may be imposed are entitled to representation by the public defender at their request.

Tulalip: The Tribes provide indigent defense to all criminal defendants, regardless of race. Such attorneys must also be barred in the Tulalip Tribal Court.

Court Processes & Reforms

VAWA 2013 requires that a tribal judge overseeing a SDVCJ case has:

1. “Sufficient legal training to preside over criminal proceedings; and
2. “Licensed to practice law by any jurisdiction in the United States

All five of the pilot tribes have at least one state-barred judge. Although Fort Peck hired a state-barred judge to meet this requirement, the long-time chief judge of the Fort Peck Tribal Court is not state-barred. Instead, this judge has an undergraduate degree, is licensed in tribal court, and has two certificates from judicial college for “Tribal Judicial Skills” and “Special Court Trial Skills.” This judge also completes 40 hours of annual training and presides over criminal trials on a weekly basis.

Victim’s Rights & Safety

The Pascua Yaqui, Umatilla, and Tulalip tribes all have comprehensive codes that account for victims’ rights, including mandatory arrest requirements, violence prevention techniques, and notice to victims of certain rights. Umatilla has automatic protections orders issued in all DV cases. Tulalip and Fort Peck have instituted a domestic violence docket to handle all cases involving domestic violence, dating violence, or violation of protection orders. This DV docket is separate from the existing criminal docket and focuses on services for victims.

The five pilot tribes also have a host of other programs aimed at ensuring the rights and safety of victims. For example, Umatilla has a Family Violence Program that provides community-based advocacy to domestic violence victims. Fort Peck also has a well-established Family Violence Resource Center that provides comprehensive services to domestic violence and sexual assault victims. This program offers a court advocate, housing, counseling and other support services for any victim. The Fort Peck Tribal Court issues a “Hope Card” in conjunction with any orders of protection it grants. This card is wallet-sized and allows the person who has been granted an order of protection to easily prove this in other jurisdictions.

Definition of offenses

Each of the Pilot Tribes have chosen slightly different ways to define VAWA 2013’s covered offenses.

Assiniboine and Sioux Tribes of the Fort Peck Reservation: The Tribes incorporate the VAWA 2013 statutory definitions of domestic violence and dating violence, but tribal code also includes two other offenses of “severe physical domestic abuse” and “domestic abuse” as domestic violence.

Pascua Yaqui: The Tribe does not use VAWA’s definitions of domestic and dating violence. These offenses are defined by language devised by the Tribe. The tribal code includes a maximum statement of jurisdiction that it has authority over “all subject matters which, now and in the future, are permitted to be within the jurisdiction of any Tribal Court of any Indian tribe recognized by the United States of America.”

Umatilla: The Tribes use the exact language of VAWA 2013 to define offenses of domestic violence, dating violence and violations of protection orders.

Sisseton-Wahpeton Oyate: The Tribe incorporates the statutory definitions of domestic and dating violence, however, the tribal code offers a far more extensive definition of protection orders, including different types of protection orders than are covered under VAWA 2013

Tulalip: The Tribes incorporate the statutory definitions of domestic and dating violence. However, the tribal code expands on other behavior that constitutes domestic violence.

Notice

In order to notify their communities about SDVCJ, the five Pilot Tribes all utilized press releases to explain exercise of this jurisdiction. Umatilla published its notice via the United States Attorney Office for the District of Oregon. Fort Peck’s application states the Tribes will publish a number of newspaper articles in the local tribal affiliated newspaper and county-wide newspaper that explains all aspects of SDVCJ.