

***Pascua Yaqui Tribe--Tribal Law and Order Act Update
Submitted to the Indian Law and Order Commission
Field Hearing January 13, 2012***

Background Information

Historically, the Yoeme people have always had some form of law enforcement and dispute resolution, most notably through our ceremonial societies. The first responsibility of any government or tribe is the safety and protection of their people.

In 1982, the Tribe adopted a Criminal Code (Law & Order Code), some parts of our Civil Code, and adopted our Constitution in 1988, all of which helps spell out current Yaqui Law. In addition to our Constitution, our elders, in their wisdom, chose to create a Tribal Court system as the arbitrator of Yaqui justice and our forum for the resolution of disputes. Prior to 1988, the Department of Interior operated the court system through a “Court of Indian Offenses,” a court operated by the Bureau of Indian Affairs, (B.I.A.). This court operated under federal regulations and was referred to as a “CFR” court. The Tribe took over the Judicial System from the B.I.A. in 1988. Our official justice system has been operating, in one form or another, for approximately 30 years. Our law is organized into a Code that is maintained by the Attorney General’s Office.

Pursuant to its sovereign power, our Council also created a law enforcement department and a tribal prosecutor’s office as the representatives of the tribe in matters both criminal and civil in nature. The various functions performed by the Office of the Prosecutor, working with law enforcement and the Tribal Court, are instrumental in ensuring the Tribal Council can help guarantee the safety and protection of the people. A sustainable future for our government and people is largely dependent on a strong judiciary and a strong executive arm to enforce the mandates of our Constitution and ensure the protection of individual rights guaranteed by our Constitution.

Office of the Prosecutor

The Prosecutor’s Office performs several different functions for the Pascua Yaqui Tribe. The Office is responsible for representing our government in Tribal Court in all misdemeanor and felony type criminal matters, including adult and juvenile crimes. The Pascua Yaqui Police responds to approximately 6000 calls for service a year. A large percentage of the criminal calls are referred to the Prosecutor’s office for possible prosecution. The cases are evaluated and many are independently charged into tribal court. The Tribal Prosecutor also represents the tribe in civil related matters, to include civil forfeiture of property used in the transportation or sale of narcotics. The Office handles all civil Child Welfare/Child Dependency matters that originate on the Reservation and any child welfare matters transferred from state courts. The Prosecutor’s office advises, coordinates, and collaborates with Pascua Yaqui Law Enforcement, Probation, Victim Services, Centered Spirit, Education, and Social Services.

Jurisdiction

The Pascua Yaqui Pueblo’s criminal jurisdiction is divided into three separate prongs: tribal jurisdiction, federal jurisdiction, and state jurisdiction. The court system where a person is

prosecuted depends on the accused person's citizenship status, status as an "Indian," and the status of any victims. The determination can be complex. Roughly speaking, the Tribe has jurisdiction over all Indians who commit crimes within the reservation boundaries. An "Indian" is not simply someone who is an enrolled member of a federally recognized tribe. An "Indian" can generally be defined as a person who has a percentage of Indian blood and is recognized as an Indian through the assessment of several different factors (family, use of tribal services, participation in ceremonies, etc.). The federal government also has jurisdiction over major crimes committed by "Indians" in our community. The federal government and the State of Arizona, by and large retain jurisdiction over crimes committed by non-Indians on the reservation.

In the near future, the Office of the Prosecutor hopes to better coordinate all three prosecution prongs from the reservation. This coordination will ensure that the Tribe can seek better outcomes for victims and be more accountable to the members of our community. For example, Pascua Yaqui tribal prosecutors now have the opportunity to prosecute reservation based crimes in federal court, as Special Assistant United States Attorneys, (SAUSAs). The Tribal Council recently signed a historic agreement with the U.S. Attorney's Office that allows this to occur. This new program will ensure that crimes that are identified by law enforcement and the Tribal Council as priorities will receive proper prosecutorial attention (Domestic Violence and Narcotics). In short, our victims will have a better chance of receiving justice and criminals who harm tribal members will truly be held accountable for the crimes they commit.

Tribal Law & Order Act Implementation:

The Tribal Prosecutor's Office and the Office of the Attorney General took lead roles in providing input to federal authorities as they revised the ICRA. The Prosecutor's office sent a representative to Washington D.C. and Minneapolis, Minnesota, to speak to lawmakers and the U.S. Attorney General and advocated for changes to tribal criminal justice. The Prosecutor's office has also worked closely with the U.S. Attorney's Office for Arizona to help create a framework that will be implemented by the U.S. Attorney to combat crime on Arizona reservations. We have aggressively sought to promote an enhanced coordinated response to crime on the reservation. This has directly led to a sharp increase in federal and state prosecutions for crimes that occur on our reservation. This policy and work will continue and it will hopefully increase the federal prosecution and convictions of those who prey on our people. The Tribal Law & Order Act, the amendment to the Indian Civil Rights Act, the Adam Walsh Act, and changes to the Pascua Yaqui's code will enhance the safety and security of our community as the laws are implemented, followed, and enforced. The new laws provide tools for tribal law enforcement, federal officials, and state officials to work together to solve cross-jurisdictional crime and better protect our families and children. The laws also ensure that the individual rights of tribal members will be protected.

On September 22, 2010, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Rules of Criminal Procedure and Criminal Court Rules to implement the federal amendment to the Indian Civil Rights Act (ICRA) and to implement and benefit from the changes to Indian Country criminal justice by the Tribal Law & Order Act, (TLOA), signed by President Barack Obama on July 30, 2010. Prior to the signing of the Act, the Tribal Council and the Office of the Attorney General was actively involved in shaping the federal language and pressing our federal representatives to pass the law. For over two years, the Pascua Yaqui Tribal Council worked to

change the status quo and informed Congress and federal officials about our struggles with crime control, safety, and security.

Beginning on October 1, 2010, any tribal member accused of a crime, including Indians from other tribes, have the right to defense counsel at the Tribe's expense, if the Tribe will seek jail time in their criminal cases. The Tribe will also have additional authority to sentence criminals up to three years of incarceration per offense, up to a maximum total of nine years. This is the most significant change in federal law that has affected Indian Country and the Pascua Yaqui Tribe in over 40 years. However, in order to fully benefit from the additional authority, the Pascua Yaqui Tribe must amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, incorporated as our "Bill of Rights." Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution currently limits punishment to one (1) year per offense.

Implementation Effects:

1. **Costs:** The implementation of some of the provisions of the Tribal Law & Order Act, namely, Title III, Section 304, has cost the Tribe approximately \$300,000-\$400,000 a year in additional attorney salaries and benefits by the hiring of 3 full time attorneys (2 prosecutors and 1 defense attorney), and 4 conflict (contract) attorneys.
2. **Representation:** Through the office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to over 90% of all Indians arrested on the reservation. Approximately 5% of Indians arrested do not qualify for free legal representation and approximately 5% waive representation.
3. **Resources and Complexity:** The majority of Pascua Yaqui criminal cases are appointed to the Pascua Yaqui Public Defender's Office. Although, the Tribe has hired additional attorneys, there is still a deficiency in resources when considering the resulting complexity of a full blown adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, scientific evidentiary analysis, expert testimony, and other indirect costs.

Tribal SAUSA Program

From October 31, 2011 through November 4, 2011, the United States Attorney's Office for the District of Arizona held a week-long course to train prosecutors from several of Arizona's tribal governments so they may participate in the federal prosecution of offenders from their communities. The training kicks off the U.S. Attorney's Office -Tribal Special Assistant United States Attorney (SAUSA) program. This cross-commissioning is encouraged by the Tribal Law and Order Act and mandated by the District of Arizona's Operational Plan for Public Safety in Indian Country.

The goal of the Tribal SAUSA program is to train eligible tribal prosecutors in federal law, procedure and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court or both. The program also allows the tribal prosecutors to co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities. After completing training, each tribal SAUSA will be mentored by an experienced federal prosecutor assigned to the District of Arizona's Violent Crime Section.

The District of Arizona's SAUSA program currently has 13 participants from 8 participating tribes – the Salt River Pima-Maricopa Indian Community, the Gila River Indian Community, the Fort McDowell Yavapai Nation, the Pascua Yaqui Tribe, the Colorado River Indian Tribes, the Tohono O'odham Nation, the Hopi Tribe, and the White Mountain Apache Tribe -- and is expected to grow.

Pascua Yaqui Deputy Prosecutor, Guadalupe Gutierrez currently is appointed as the Tribe's SAUSA and is working with the United States Attorney's Office, Tucson Office.

SAUSA Program Implementation

The early phase of implementing the SAUSA program has focused on coordination of cases through federal/tribal Multidisciplinary Team Meetings (MDT), advancing the timeline for presentation of cases for federal prosecution, and improving coordination and management of cases between Tribal and Federal authorities. Special attention is given to cases involving violent crimes, sex crimes, and habitual domestic violence offenders, especially if the Defendant is non-Indian.

As of January 2012, the appointed SAUSA has four (4) cases being prosecuted at the federal level. These cases involve two incidences of domestic violence by a non-Indian upon an Indian victim, a stabbing incident, and an assault upon a tribal detention employee. Currently, approximately, 14 cases are pending review and follow up investigation for presentation to the U.S. Attorney's Office for possible prosecution.

The program is proceeding well. The U.S. Attorney's Office has been diligent in working cooperatively with the assigned SAUSA and the Tribal Prosecutor's Office. The primary challenge is coordinating time and scheduling. The SAUSA has a full criminal case load with the Pascua Yaqui Prosecutor's Office in addition to the training, follow-up and prosecution of cases at the federal level. As the program proceeds it may be helpful for the SAUSAs to have dedicated support staff to help with logistics, coordination of calendars, and case management.

Communication, coordination, and cooperation has been enhanced with several different agencies responsible for law enforcement on the Pascua Yaqui Reservation, to include, the U.S. Attorney's Office (Tucson), the F.B.I., tribal Law Enforcement, and victim services. Cases are being filed, reopened, and appropriate cases are being declined after thorough review and coordinated follow-up investigations. Tribal criminal investigators, F.B.I. agents, and crime labs are working closely together to bring successful tribal and federal prosecutions. Defendants are being transferred and transported to tribal court and federal court via Writ and Arrest Warrants.

Generally, in the past few months, the charging and prosecution of federal cases has increased exponentially due to the SAUSA program that enhances our local MDT meetings. The Pascua Yaqui Tribe will continue to work with our federal partners to develop a successful coordinated crime control policy for the Yaqui community.

Federal Court of Appeals

On August 17, 2011, the United States Court of Appeals for the 9th Circuit issued an Opinion in the case of *Miranda v. Braatz*, supporting the Pascua Yaqui Tribe's argument that our Tribal Court has the authority to sentence those convicted of multiple offenses to more than one year in jail. The case has wide ranging implications because it sets precedent concerning this issue and affects all tribes in the western portion of the United States. Below are some select excerpts of the decision:

“On the evening of January 25, 2008, Beatrice Miranda, an enrolled member of the Pascua Yaqui Tribe, while drunkenly wandering the Pascua Yaqui Indian Reservation, stumbled upon M.V., a minor teenager. Apparently believing that M.V. was laughing at her, Petitioner drew a knife and initiated a profanity-laden chase scene across the reservation. M.V. ran home and alerted her sister, B. V., that a woman was chasing her with a knife. B.V. went outside to investigate, where she observed an agitated Miranda, yelling and brandishing the knife. Miranda ignored B.V.'s pleas to leave; instead, she raised the knife and threatened to throw it at the girls. In a last-ditch effort to protect herself and her sister, M.V. took aim with a basketball and launched it at Miranda, hitting her squarely in the face. Miranda retreated across the street but continued to shout obscenities and threats. She finally left after B.V. called the police, who quickly apprehended Miranda near the girls' home. Miranda was on probation at the time and has a lengthy criminal history with the Pascua Yaqui Tribal Courts.

The Pascua Yaqui Tribal Court convicted Miranda of eight criminal violations arising from that night. The Honorable Cornelia Cruz sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days imprisonment. While serving her sentence, Miranda, through Chief Public Defender Nicholas Fontana, appealed her conviction and sentence to the Pascua Yaqui Tribe Court of Appeals, arguing, inter alia, that her 910-day sentence violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(7). The tribal appellate court rejected Petitioner's arguments and affirmed her conviction on all counts.

Miranda then sought redress through the federal court system via a writ of habeas corpus. On habeas review, by the U.S. District Court of Arizona, the court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction and ordered that Miranda be released.”

The United States, through the U.S. Attorney's Office, and the Pascua Yaqui Tribe, through the Office of the Attorney General, appealed the Arizona District court's order granting Miranda's

petition for writ of habeas corpus. The 9th Circuit ultimately disagreed with the district court and held that the Indian Civil Rights Act § 1302(7), **unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation and reversed the lower court's ruling.**

“Because § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation, and because it is undisputed that Petitioner committed multiple criminal violations, we reverse the district court's decision to grant Petitioner's amended habeas corpus petition.”

Although we did not need a federal court to remind us, this case clears up any lingering doubt that the Pascua Yaqui Tribal Court and our Tribal Council have the sovereign authority to impose punishments that are consistent with the Indian Civil Rights Act and necessary to help keep our community members and visitors safe from harm.

Conclusion:

For several different reasons, the challenges facing law enforcement and the justice system in our community are substantial. However, a window of opportunity exists to revolutionize and strengthen our system of justice. The Pascua Yaqui Tribal Council, the Prosecutor's Office and partners in our justice system recognized our current needs and have taken the opportunity to effect change in this area. In short, the Tribe has taken significant steps to protect our community, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, resources, and dedication to continue to fully implement the new laws.

The new federal Act makes a number of important changes to federal laws that are used on a daily basis and will affect the rights of criminal defendants in Indian Country. Education of tribal law enforcement officers, prosecutors, judges, defense counsel and other officials will be important. Under Section 304 of the Act, tribal courts now have expanded sentencing authority under the **Indian Civil Rights Act**, with some limitations. There are many other important features of the law for both tribal and federal officials, including provisions to expand police training, improvements to the Special Law Enforcement Commissions, crime data and reporting, coordination with federal officials on prosecutions, detention facilities and expanded funding opportunities. The law also mandates a number of key studies and reports, particularly on tribal jurisdiction, federal declinations, and alternatives to juvenile incarceration. The Act will require a significant amount of interagency coordination and it will be important to establish a framework or process for follow through.