

**Comments of the Great Plains Tribal Chairmen's Association**

**Presented by Myra Pearson, Chairperson of Spirit Lake Sioux Tribe**

**And**

**Elected Secretary, Great Plains Tribal Chairmen's Association**

**Inter- Agency Consultation on the Implementation of the Tribal Law and Order Act**

**October 21, 2010, Prior Lake, MN**

On behalf of the Great Plains Tribal Chairman's Association, I would like to thank you for allowing us to comment on issues surrounding the implementation of the Tribal Law and Order Act of 2010. The following comments are directed to the White House, OMB and the agencies identified below.

**I. Opening Remarks**

It is now, and it has always been the position of the Great Plains Tribes that the primary responsibility for the services and facilities related to law enforcement, courts, 911, and detention rests with the Bureau of Indian Affairs. To this end, and despite their best attempts to do so, getting out of the detention, law enforcement and court operations and construction business is not an option for the BIA, and neither is deferring a sizable percentage of the funding responsibility for these services to the DOJ. Furthermore, the time for simply filling space is over. It is time that BIA not only does their job, but does it well.

As we move forward with the implementation of Tribal Law and Order Act, the BIA should not only be providing for the full operational and construction costs of the aforementioned programs, but should also be implementing a whole series of programs and services that are currently only funded by DOJ through their competitive grant process. The BIA can expect that tribal leaders will continue to hold the BIA responsible for rectifying the problems of severe staffing shortages in field offices, the lack of trained officers and the significant under funding of not only our law enforcement, but also our detention, courts, 911 operations and facilities. By holding the BIA accountable, we will find a measure of justice in our communities and we will provide our constituents with a complete, reliable and well-rounded justice system. To make that happen the BIA must step up and do its part.

While all of the agencies represented here have a trust and treaty responsibility to our tribes, and we do not want you to forget that, the BIA is the agency which has the primary authority and the primary responsibility for keeping our people safe. If the Tribal comments that

formed the basis for the passage of the Law and Order Act sent one message, it is that the BIA has got to start making a stronger and more concerted effort to fully fund, modernize and expand our law enforcement, courts, 911 and detention programs, and the facility construction programs, that support those efforts.

## **II. Problem Statements & Recommendations**

The problems relating to the development of justice systems in our tribal communities vary from tribe to tribe, however, as vast as our differences may be, there are also some very common issues, concerns and problems that exists for all of the tribes in the Great Plains Region. Common problems include: extreme deficiencies in the areas of officer recruitment, retention and training; a lack of inter-agency collaboration; a lack of cross-jurisdictional collaboration; inequitable funding distribution within the BIA system; inadequate and understaffed detention facilities for adults and juveniles; and major inaccuracies in the BIA's crime data reports.

### **A. Officer Recruitment & Retention & Training**

As you visit with tribal leaders across the Great Plains you will hear one common and very disturbing fact...there is a significant shortage of qualified officers patrolling our tribal communities. The result is alarmingly high rates of crime, lack of response to these crimes and very dangerous situations for our constituents and for the few officers providing services in our communities. Shortages are a huge problem, which is further compounded by insufficient training and a lack of collaboration and communication across agencies providing law enforcement services.

While we were very happy to hear that the BIA and the FBI are working to provide for quicker processing of commission cards, we nonetheless believe that there are still a series of issues which need further attention: (1) who is eligible to receive commission cards- just police-fish and game officers- highway safety officers- corrections' officers ? (2) Do those commission cards automatically bring with them the protections of the federal tort claims act for all of these individuals regardless of who funds their salaries? (3) What are the background check and training standards that are going to be applied? and (4) How do we recruit the officers that we need?

Let's start with the most important issue first, officer recruitment and retention. We know that there is a lack of consistency in background check standards. Different regions apply different standards. We have had officers fail to get adjudicated in the Aberdeen Area, only to find them working as BIA law enforcement officers in another part of the country. We believe strongly that the BIA needs to put its proposed background check standards in writing and give

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Inter-agency collaboration remains a significant problem both in terms of efficiency and effectiveness of funding and services. Disjointed programs, operated with funding from a variety of different agencies, are creating nothing but problems. For example: IHS personnel does not want to go into our BIA funded jails. DOJ is building jails which the BIA has no funds to operate or maintain. The Treaty responsibilities of our Fish and Gaming Enforcement staff are all but ignored, and BIA funded law enforcement is constantly re-arresting the same people because HHS and IHS have no adequate programs to treat their addictions.

Worst of all, the Tribes are constantly having to lay off and rehire persons to fill our DOJ funded officer and court staff positions every time a DOJ grant runs out, every time there is a delay in the award of those DOJ funds, and every time we face another continuing resolution. As a result, we spend BIA dollars to train DOJ funded officers, who get laid off after a year or two, or who run to the first permanent job that they can find because their job security stops when the DOJ grant runs out. The result, is a total waste of the limited dollars we all have available, and the fact that the Tribes are left to decide, issues like: Whether a DOJ officer becomes a BIA funded officer after nine hours of work because (1) that officer cannot leave the scene, and (2) DOJ won't pay overtime and (3) federal law prohibits the Tribe from refusing to pay the officer for those additional hours? And, can a Highway Safety funded officer assist a BIA officer in a house based non traffic related arrest, or drive a vehicle funded through the Fish and Game Program Department, to get to a stranded motorist during a storm, and who pays if that Highway Safety Officer is injured or worse yet injures someone else during either of these efforts? Disjointed multi-agency funding in important areas like public safety does not work, it's that simple!

To address this situation we need, and quite frankly we expect, the BIA to make a more concerted effort to get the Secretary of Interior, OMB, the White House and the Congress to support its efforts to secure the additional funding necessary to operate fully funded comprehensive programs, and we need DOJ to support BIA in these efforts. This may mean transferring some funds from the DOJ to the Interior budget, but that is better than what we are faced with today. We know that none of you in this room have control over the federal budget, but you do have the ability to educate people about the practical problems we are all facing and the ability to decide how hard to fight for the dollars that we need. Those of you from BIA OJS are all law enforcement and court professionals, and it is time for you to speak up and help us convince all of those important players at the higher levels of the Administration that Indian country crime is not going to decrease, and the President is not going to get the results he has called for, until we have the programs, staff, facilities and equipment necessary to make those goals a reality. You know what the problems are, and we are counting on you to sell the importance of these programs to the people above you, and to get us the information that we need in order to assist you in that effort.

Additionally, for far too long, the BIA has taken the position that all tribes can contract for is a service or function that the BIA is already performing, but this BIA position misses two important points. First, what the BIA is operating today is not all that it is authorized to operate, or request funding for under existing law, and second, the BIA gets many of the lab, legal, insurance and other services that it requires to operate its own programs from somewhere other than the BIA law enforcement and courts budget. This is one of the primary reasons that we, as tribes, are constantly having to look to other agencies for the funding for things like the diversion programs our courts so desperately need, and the jail construction and O & M dollars that are necessary to meet our local requirements. If the BIA needs the services of a lab, it simply picks up the phone and calls DOJ, and if it needs the services of a lawyer, it simply calls the solicitor's officer, we don't have that luxury and the contract support dollars that you provide don't fill those gaps. The new Law and Order Act recognized this problem and we are now counting on you to implement some of the new ideas we have been proposing for years.

While we greatly appreciate the assistance that we are receiving from the Department of Justice, we are tired of the BIA using the existence of the DOJ programs as an excuse for shirking its own responsibilities. About 15 years ago, the Administration tried to get Tribes to agree to transfer tribal law enforcement and courts responsibility to DOJ, and we rejected it, yet the BIA has forced us toward DOJ programs anyway, by consistently and repeatedly failing to request the dollars that we need. Just put the money that the U.S. is already spending into our 638 contracts and things will improve significantly. If you cannot do this because of statutory limitations, see if you can find a way to do this administratively through an inter-agency transfer of funds, and at the same time propose amendments to the existing laws that are creating these obstacles.

Because we know that this type of change is going to require a long and ongoing effort, the Great Plains Tribes have been on record calling for increased inter-agency cooperation and planning, and for the Tribes to be involved in all of those discussions. Although this type of inter-agency cooperation has improved a bit of late, we still have far too many federal programs operating in total disregard of what another agency is doing. One of the most vivid examples of this is the total disconnect between BIA OJS and IHS when it comes to dealing with persons with mental health and addiction problems who are arrested and sentenced by BIA funded programs. Because the IHS seems to feel that it has no responsibility in the area of criminal justice, our tribal courts are left with two choices- sentence these individual back to a jail that IHS does not want to service, or let them go back on the street. This is a nightmare for the Tribes, and it often results in an unnecessary waste of federal money, arresting and re-arresting the same people.

We were thrilled to see that this new law finally recognized that mental health and addiction treatment has to be a part of our public safety structure. Now we are counting on BIA,

DOJ and IHS to work directly with us to figure out how to make this happen. It is our position that the IHS has long been authorized to construct and operate residential treatment facilities. It just has failed to do so for the last 20 years. To date, the IHS, HHS and OMB seem to be too focused on the costs of constructing alcoholism, mental health and drug treatment facilities, and not focused enough on the federal costs that those agencies are already incurring on an on going basis because of their need to treat the victims of accidents and injuries' cause by people whose addictions are going untreated. Additionally, IHS and HHS are not taking adequate notice of the human costs which result from its failure to help these people help themselves. We need a 5-year plan for the development and construction of alcoholism and drug abuse treatment facilities and for the development and construction of regional mental health facilities and we need it as soon as possible. We also need a plan for the provision of these services in our tribal long term incarceration facilities and we need that plan put into place in the next few months.

Here are some inter-agency issues that you can start talking about right now:

What role should IHS play in the treatment of mental health and addiction in tribal jails? Who should fund these efforts, and who should be insuring that staff in the event of personal injury or tort claim? What changes need to be made in BIA corrections policies to insure the safety of the medical staff working in our jails and the people they are going to be treating?

Who is responsible for providing office space for all of the new federal and tribal employees who are going to be funded under this new law?

How can we insure that BIA will staff and provide operation and maintenance dollars for a facility constructed with DOJ funds?

For DOJ and BIA, what does and does not constitute supplanting?

How can DOJ, BIA and the Tribes better cooperate to avoid the kinds of hiring and lay off problems, and the diversity of benefit packages, that we are currently experiencing when DOJ funds law enforcement, court and emergency communications staff? Can DOJ extend the maximum term of all of these grants, and can DOJ funds be transferred to BIA at a tribe's request, so that the Tribes can fund all of these activities and positions through one P.L. 93-638 contract?

How can BIA and DOJ work together to insure that temporary officers, funded by DOJ, are in fact picked up with BIA funds at the end of the grant period?

For DOJ and BIA- What steps can each agency take to assist tribes in recruiting new officers and keeping them on the force once they are hired?

What steps can be taken to insure that our crime statistics are properly reported and properly reflected in Congressional funding requests? In the Great Plains, our local tribal data is substantially higher than that which has been reported on BIA crime reports to Congress and OMB and this is costing us a lot of money.

All of these are practical problems which need to be solved.

A recent article in the Washington Post discussed how past Presidents and past Administrations have used their Executive and Administrative authority to solve problems that Congress had left unresolved. It is our sincere hope that you will look carefully at ways that each of your agencies can use their existing administrative authority to solve some the funding and operations programs that we are currently experiencing. This new law is a major step forward, but it still leaves all of us with some major problems, not the least of which is the fact that the funding it provides is inadequate, not yet appropriated, and still has to come from more than one federal agency.

### **C. Cross-jurisdictional Collaboration**

Cross-jurisdictional communication and collaboration is also a problem that is to be addressed as the Tribal Law and Order Act is implemented. In order to maximize resources, tribal, federal and in some instances state justice systems must work together. One fact is most certainly true and that is crime knows no borders. What is a problem in our tribal community is most certainly a problem for our neighbors as well. We need to be creative in our solutions and we need to recognize and support the integrity of one another's systems. Inter-governmental task forces are an excellent forum to facilitate the identification of issues and the strategies for solutions.

### **D. Inequitable Funding Distribution**

This takes me to one of our most important issues- the BIA's funding distribution formula. It is ironic to us to have an agency, staffed by law enforcement professionals and lawyers, failing to understand how to decide how many officers, what types of equipment and training, and what types of facilities our programs need to operate properly. Clearly, population and major crimes are not the only criteria that up would want applied if you were servicing as our chief of police, yet that is what the BIA has been using. We have two radically different situations in the Great Plains. We have large land-based tribes, in non P.L. 83-280 states, who have a large volume of calls and little to no assistance from State officers and small less populated reservations who are still responsible for providing police services 24 hours a day, 7

days a week. These small reservations need the practical ability, the staff and the money, to meet that obligation, regardless of what their population is, because the State has no Indian crime jurisdiction on their reservations.

In the case of our large land-based tribes, their number of calls for service, reasonable response time, weather, bad roads, and the need for reasonable backup all need to be factored into any funding formula that you develop. You cannot look at population alone. The recent tragedy at Cheyenne River amplifies this point. We cannot allow another tragedy like that to occur because of inadequate back up, communications and funding and our hearts and prayers go out to that family, that Department and our sister Tribe.

We currently have far too many injuries resulting from totally unreasonable response times and a total lack of back up. Thus, the Great Plains Tribes want to be at the table when these funding formulas are discussed and formulated. Our officers and our citizens have paid, and are continuing to pay, the price for the failures of the current formula and we will not allow that to continue to happen. So invite us in and give us a real opportunity to participate in these discussions, so that we can all work together to solve our current problems.

#### **E. Crime Databases & Data Sharing**

Since crime data is currently being used as a tool for deciding how much money is made available for individual law enforcement programs, we would like to focus on that issue for a few minutes. In the Great Plains, we have two big problems: the data that we are collecting never seems to be reflected in the BIA crime reports, and the BIA's only focus is on major crime. First, we at Great Plains are calling upon the new Director of OJS to schedule a meeting with us in the immediate future to figure out why our data does not match yours. We submit numbers to Aberdeen and those number seem to disappear somewhere between our tribal office and your final report. This is costing us much needed funding and it needs to be corrected now! Our request is that this meeting be scheduled in South Dakota before the end of November.

Second, we are concerned that BIA is only using our major crimes as your basis for awarding additional funds. Most of the Tribes in the Great Plains area have full criminal jurisdiction on their reservations, and this means that we are responsible for the protection of our people against threats, robberies, and accidents that may not rise to the level of a felony, but which are clearly important law enforcement functions. While we all agree that all major crimes and all crimes involving violence need to be handled immediately, and with the full support of the federal government, we do not feel that the BIA should be ignoring the importance of our ongoing policing responsibilities, and the number of calls we get for these types of services when



it is looking at a tribe's funding needs. One of our citizens should not have to wait for a threat to become an attack in order to obtain police assistance and protection.

#### **F. Detention Facilities**

We, in the Great Plains, also want to play a major role in the development of your long term plan for detention facilities' construction, improvement and repair. While the BIA is preaching the importance of regional facilities, we need you to understand that on reservations like Pine Ridge and Rosebud, we have the equivalent area of two or even three regions, and in the Great Plains we also have many tribes who have no local space that they can lease from another government. The Kyle and Pine Ridge jails, for example, are more than 70 miles apart, and the Oglala's current law enforcement program is based upon, and funded based upon, the existence of both of those facilities. Thus, the location of jails and medical treatment facilities also has to be factored into your formula for the awarding of officer funding. Additionally, the need for a given jail needs to be weighed against the ongoing cost of providing additional officers to transfer the accused to other facilities a distance away and the public safety concerns that arise with such transports.

Your long term detention plan also has to include a plan for what to do until the new facilities it is calling for can be completed. Currently, we have facilities that are condemned, and endangering the lives of our staff and our detainees. Even if we received new money today, it would still be three years before we could open the door to those new buildings, and we need a plan for what to do in the meantime. We do not want to waste a lot of money on old dilapidated buildings, but we cannot close the doors and wait for a replacement, unless you want to more than double our current law enforcement budget to cover the costs of prisoner transport.

#### **G. Prosecution & Tribal Courts**

The same situation exists with our courts and police sub-stations. Unlike tribes who are closer to urban areas, we have nothing that we can rent, so if these buildings become more unsafe than they already are, we have no place else to house these functions. This lack of office space is something that the BIA has never factored into its formulas, but for our more remote and large land-based tribes, it is a real problem. Additionally, it's wonderful that the new Law and Order Act is providing for things like on-reservation US Attorneys, probation officers and other federal and tribal staff, but someone needs to decide where and how we are going to house these people.

We also need you to realize and address the fact that it does no good to increase law enforcement and detention dollars unless you provide us with the resources to properly operate our tribal courts. Today, virtually every tribal court in the Great Plains is underfunded,

understaffed and under equipped. Some tribes, like Pine Ridge are still operating their courts on computers that we purchased at Wal Mart over 6 years ago, and using blow dryers to dry off court documents which are water logged because they were stored in soggy basements in old banker's boxes. It does no good to arrest people that we lack the resources to prosecute and it does no good to call for quicker and more comprehensive background checks, if our court records cannot be properly maintained. We need a comprehensive approach which elevates the capabilities of law enforcement, prosecutors and courts, if we are really going to make a difference.

While we were thrilled that the Law and Order Act called for the transfer of un-prosecuted cases and curtailed federal investigations from the US to the Tribes, we are calling upon your agencies to give us the tools necessary to turn these transfers into successful prosecutions. All of the people in the FBI, and US Attorney's Office are lawyers or law enforcement professionals who know what it takes to put together a successful prosecution. We understand that there are always going to be legal limits on what information can be transferred to a tribal prosecutor or tribal police department, but if these referral efforts are going to work, then all of the agencies involved have got to put together policies and procedures which are designed to give a tribe its best chance at arresting and convicting the person involved. We need open and honest discussions between our tribal law enforcement officers and prosecutors and your federal representatives, and a federal directive which requires those federal officials to seek ways of solving the types of practical problems that result when cases of this nature get transferred to an underfunded, under trained and under equipped tribal program. Our friends from Yakima raised many of these points at your Billings consultation. How does a tribe preserve medical and DNA evidence when it lacks the facilities to store them properly? How does a tribe provide and pay for expert witness testimony, surveillance and lab work? These are areas where the US can and should provide its resources to assist the Tribal prosecutors and tribal courts. This requires the US Attorneys and the FBI to do more than just drop the box off at the Tribal prosecutor's office. In some regions, these problems may be solved by a regional contract with one or more labs that the Tribal prosecutors and law enforcement can use, or a regional contract with a series of experts in given fields, or with some type of agreement which allows federal employees to testify in tribal court on things like scientific findings, but unless these types of discussions take place, this transfer authority will continue to leave a number of very bad people walking around in our tribal communities. We are therefore asking you to examine your legal authority to enter into Memorandums of Understanding between various federal offices and agencies and the individual tribes, to address and resolve these types of issues. The Tribes cannot conduct a proper rape, narcotics trafficking or attempted murder trial without adequate resources to insure a fair trial and a decision which will be upheld on appeal.

We also need your assurance of federal funding and federal assistance when we accept these cases and have federal court appeals threaten our jurisdiction over these matters. We do

not want to be left to defend ourselves with no resources, and we have very good reason to fear that these types of appeals could result in some very bad challenges to tribal court jurisdiction.

### **III. Closing Remarks**

All of the aforementioned issues are addressed in various provisions of the Tribal Law and Order Act. The Act itself acknowledges these issues and calls for improvements in each area; however it is in the implementation of the Act that we are truly able to effectuate change. This will not happen if we simply repeat the same programs and policies that have not worked in the past. Equally true is the fact that we will not see success if we are forced to work with the same federal officials who have failed to effectuate change in the past. The truth is that a federal law should not have been necessary to call upon federal agencies to make improvements in the delivery of justice services. But the fact is that we do have a new federal law and the time is now for accountability and improvement and that is what we, as tribal leaders, will expect to see as we move into the implementation phases of this Act.

Finally, we have attached the Great Plains Tribal Chairman's Association Resolution 59-09-05-08 which calls for BIA law enforcement authority to be transferred from the Office of Justice Services to the local Agency Superintendent and for the immediate removal of Aberdeen Regional Special Officer Elmer Four Dance. These positions are supported by every tribe in the Great Plains Region and we are formally asking the Assistant Secretary and the New Director of OJS to act upon these requests before the end of November, 2010.