



Department of Justice

STATEMENT

OF

DIANE HUMETEWA
UNITED STATES ATTORNEY
FOR THE DISTRICT OF ARIZONA

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ENTITLED

"LAW AND ORDER IN INDIAN COUNTRY"

PRESENTED ON

MARCH 17, 2008



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Chairman Dorgan, Vice-Chairman Murkowski, and Members of the Committee: The Department of Justice (“the Department” or “DOJ”) appreciates the opportunity to testify before the Committee regarding the Department’s efforts to combat crime in Indian Country. I am Diane Humetewa, United States Attorney for the District of Arizona. I welcome you all to the great State of Arizona, and I am pleased to talk to this Committee about DOJ efforts to ensure that the rule of law prevails in Indian Country.

We at the Department of Justice know well that the needs of Indian tribal governments in combating crime and violence continue to be great. We appreciate these challenges, and the President and the Attorney General are committed to working with tribal, state and local law enforcement, the Department of the Interior, and others to do what it can to provide safety and security in Indian Country.

In fact, one of the first extended trips by Attorney General Mukasey was to Indian Country. On January 14th, the Attorney General visited the Navajo Nation’s seat of government in Window Rock, Arizona. While here, he met with the Navajo Nation’s Tribal President, Attorney General, members of the Tribal Council, and the Chief Justice of their Supreme Court. He also toured a justice center, including the jail and tribal courts, and met with prosecutors, defense attorneys, and behavioral health employees. Furthermore, on February 20th, the

Attorney General had a private meeting with representatives of the National Congress of American Indians (NCAI); the National American Indian Court Judges Association (NAICJA) and the Indian Law Section of the Federal Bar Association (FBA) to discuss justice related issues impacting Indian Country.

In general, the Department's efforts in Indian Country are led by the federal law enforcement agencies and the United States Attorneys. The Federal Bureau of Investigation ("FBI") is critical to bringing the perpetrators of serious crimes in Indian Country to justice, and investigating major crimes, while the Drug Enforcement Administration ("DEA") takes the lead on combating drug trafficking on Indian lands. The U.S. Attorneys daily prosecute federal offenses on Indian lands to the fullest extent of the law. The Department's Office of Tribal Justice, Office on Violence Against Women, Civil Rights Division, Office of Justice Programs, Community Relations Services, and Environment and Natural Resources Division, among others, provide support or supplement these efforts.

First, let me speak about U.S. Attorneys efforts. Of the 94 federal U.S. Attorney districts, 29 have Indian Country jurisdiction. Each of these districts has at least one tribal liaison, an Assistant United States Attorney ("AUSA") who is responsible for coordinating Indian Country relations and prosecutions. While many more AUSAs have responsibility in Indian Country, there are currently 44 AUSAs serving as tribal liaisons nationwide. In Arizona, along with the tribal liaison, every AUSA in our violent crime section has some responsibility to prosecute crimes in Indian Country. Each AUSA in the group is assigned to a specific tribe and to a tribal Multi-Disciplinary Team in order to establish routine working relationships with the tribal law enforcement and prosecutors. We have been doing this for more than 10 years. Furthermore, in our northern Arizona office, we have assigned two AUSAs to triage cases from the northern-

most Indian reservations. This has greatly benefitted the Northern Arizona Indian tribes because it enables them to bring their cases for initial review in Flagstaff, rather than having to travel all the way to Phoenix. This has saved the tribes a substantial amount of overtime and travel-time pay for their employees, and enables victims of crimes to have greater access to the preliminary state of a Federal court proceeding.

Nationwide, we dedicate significant prosecutorial resources in Indian Country. For example, approximately 25 percent of all violent crimes handled by U.S. Attorneys' Offices occur in Indian Country. These efforts are leading to many successes. In Fiscal Year 2006, the Department's efforts in Indian Country were above average across the board. The Department filed nearly 5 percent more cases than the average since 1994. Almost 14% more cases went to trial than the average since 1994, while our conviction rate rose to 89.4% from the 86.2% average since 1994. Eighty percent of those guilty of violent crimes were sentenced to prison, and the number of defendants convicted of violent crimes receiving sentences greater than five years increased from 31% on average since 1994 to 36%.

On the law enforcement side, the FBI has worked very hard to improve lives in Indian Country. FBI Indian Country activities are coordinated by the Indian Country / Special Crimes Unit. This Unit develops and implements strategies to address identified criminal problems in Indian Country, and supports the efforts of all law enforcement personnel working in Indian Country. This includes managing manpower resources, addressing budgetary and resource issues, providing training, procuring services and specialized equipment, and providing assistance to FBI Special Agents assigned to Indian Country, BIA criminal investigators, and law enforcement officers from tribal police departments. These strategies ensure that the

investigation of crimes in Indian Country is performed in a manner that will provide the most effective law enforcement services to American Indian people.

These efforts have paid off. Even with the heightened demands from terrorism investigations, Indian Country law enforcement has remained a high priority for the FBI. Contrary to some claims, the FBI has increased the number of Special Agents working Indian Country cases by 7% since the 9/11 terrorist attacks.

Additionally, DEA field offices work with state, local, and tribal law enforcement to address issues of drug trafficking in Indian Country. During the past few years, the DEA has made significant gains with the Indian law enforcement community and has coordinated efforts to come up with strategies and solutions to tribal smuggling, distribution and abuse problems. For example, DEA's strategy now includes the increased use of Title III wire tapping as an investigative tool in dealing with the unique problems associated with addressing drug trafficking on Indian lands.

Again, these efforts have paid off. Here, in Arizona, the Tohono O'odham Indian Reservation is the second largest reservation in the United States, sharing approximately 70 miles of border with Mexico. The reservation is believed to be used as a primary corridor for the movement of illegal drugs by Mexican drug trafficking organizations. In 2007, approximately 31.4 tons of marijuana were seized on the reservation.

Much of this success can be ascribed to the Safe Trails Task Forces initiative. The FBI, in conjunction with the DEA and our partners at the Bureau of Indian Affairs ("BIA"), started the initiative to form interagency partnerships composed of federal, tribal, state, and local law enforcement officers operating throughout Indian Country. The purpose of the Task Forces is to benefit Indian Country law enforcement by leveraging scarce resources in the fight against

methamphetamine and other drugs. In 2002, we had six STTFs up and running. Today, we have expanded the program to include eighteen Safe Trails Task Forces nationwide. During Fiscal Year 2007, the STTFs obtained 106 indictments, arrested and/or located 129 subjects, obtained 144 convictions, and disrupted two drug trafficking organizations.

The Department's Office of Justice Programs (OJP) has developed a close working relationship with many American Indian and Native Alaskan tribes and remains committed to helping tribal communities meet the unique challenges they face in the areas of law enforcement and criminal justice. In September 2007, OJP implemented a new Tribal Grants Policy, which will help Native communities seeking OJP resources through its competitive grant solicitation process. OJP has hosted several interdepartmental Tribal Consultations and Training & Technical Assistance (T&TA) sessions. OJP also coordinates the Department of Justice's Tribal Web site, www.tribaljusticeandsafety.gov, which is used to keep Indian Country informed on all of our tribal initiatives, grants, activities, training and events. This site has grown in popularity since it was launched in 2006. We recognize that the successful STTF efforts impact other components of the tribal, state, and federal justice system and support services, such as meeting confinement needs, placement of drug endangered children, substance abuse treatment, probation, community re-entry, and recidivism. We are collaborating with other federal agencies to address law enforcement and safety in a comprehensive fashion.

Let me now turn to an issue that I know the Committee has expressed some interest in – declination rates. First, I want to say that I understand the frustration that many tribal members may feel when they do not know how and why a particular case was handled the way it was. But I want to assure those tribal members and the members of this Committee that my office and the offices of my colleagues take very seriously every case referred to us. We investigate each case

and work to prosecute, to the fullest extent of the law, as facts and circumstances warrant.

Second, I want to caution that declination rates do not show the full picture on the Department's actions in a given case and the Department has some concerns about publicizing declination reports. As this Committee knows, U.S. Attorneys' Offices share jurisdiction with state and tribal prosecutors in many Indian Country cases, working closely with our partners such as the BIA to ensure that each alleged crime is effectively and appropriately handled. A decision not to prosecute federally does not mean the end of the case, and for this reason, federal declination figures cannot give a complete picture of how Indian Country crimes are prosecuted. Where federal courts have exclusive jurisdiction—in cases falling under the Major Crimes Act—a case that is initially declined may still be returned for prosecution after further investigation. Additionally, some cases do not fall within federal jurisdiction at all and may be declined after being erroneously referred to a U.S. Attorney's Office.

In some cases, we are restricted by statute from providing declination reports. For example, where Indian tribes have entered into confidentiality agreements with the US Attorney's office, as with Multi-Disciplinary Teams (MDTs) for child sexual abuse cases, information about cases is routinely shared between the federal and tribal agencies. But MDTs are also governed by federal statute, and penalties can apply to those who breach the confidentiality of the investigation and a victim's right to privacy. In other instances, a declination may occur because there is an on-going investigation that requires the law enforcement agency to protect the investigation. For example, if a grand jury investigation has been convened, law enforcement officers and prosecutors can be subject to criminal liability for improper disclosure of information.

Furthermore, in my experience, we have seen declination reports getting into the wrong hands, jeopardizing investigations and the safety and privacy of witnesses and victims. This is particularly a concern for districts with small tribal populations, in which even reports that have personally identifying information redacted could still be linked to victims.

Next, let me turn to the issue of Congress's ability to create tribal court jurisdiction over misdemeanor crimes committed by non-Indians in Indian Country. Let me start addressing a misunderstanding often perpetuated about a "jurisdictional gap" in Indian Country. I want to state clearly — for every crime in Indian Country, there is a court of justice, be it tribal, state, or federal. For every criminal who commits an offense in Indian Country, there is a venue for justice. In many cases, there are multiple courts with jurisdiction over the matter.

If Congress is considering legislation in this area, it should be aware of significant constitutional concerns. As the Committee knows, the Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), held that tribal courts do not have jurisdiction over non-Indians. Since that case, the Executive and Legislative branches have considered proposals that would give the tribes jurisdiction over non-Indians. Because DOJ has not yet been presented with a specific legislative proposal on the subject, the Department cannot opine at this time on precisely what kind of magnitude of constitutional concerns a particular proposal would raise. At a minimum, however, the Department believes Congress must consider the type of constitutional concerns identified below.

First, any federal legislation on criminal matters must comport with the due process and other rights guaranteed to criminal defendants by the Constitution and federal law. For example, the Indian Civil Rights Act ("ICRA") only guarantees counsel in a criminal prosecution at the defendant's own expense and does not provide for court-appointed counsel. Any grant of tribal

court authority over non-Indians, especially in felony cases, would need to address the issue of counsel for indigent defendants, including the process for appointment and compensation of counsel for indigent defendants.

Currently under the ICRA, the only means of federal court review is by means of habeas corpus petitions, which is generally a collateral review involving some form of incarceration. As with state criminal cases, direct review of tribal court determinations by a federal court may be both desirable and necessary. For example, serious misdemeanors that do not lead to imprisonment can significantly impact a defendant even without incarceration. Accordingly, any attempt to expand tribal court jurisdiction to non-Indians must be evaluated to determine whether it could provide recourse to federal courts for appellate review, including clarification of the scope of that judicial review (i.e., whether the review is focused exclusively on constitutional due process or on the application of the given body of law by the tribal court).

Some tribal courts assemble juries from pools composed only of tribal members, and the criminal law and procedure that governs proceedings in tribal courts can be the product of tribal government decisionmaking in which non-Indian and/or non-tribal members and their interest are not represented. The lack of representation by non-Indian or non-tribal members of a tribal community in the tribal governmental process and specifically in jury selection for criminal cases raises equal protection and due process questions that must be considered in deciding whether it is possible to extend tribal criminal law and tribal criminal court procedure and jury selection to non-tribal members.

Finally, let me conclude by highlighting one of many success stories fostering cooperation and coordination between tribal, state, local, and the federal government – that is our cross-deputization program. We have improved the ability of state, local and tribal law

enforcement to fully investigate federal crimes and to make arrests under federal law in Indian Country. Under our cross-deputization program, we work with our partners in the BIA to train tribal, state, and local officers, about federal law and give them an opportunity to take an examination and if successful, receive federal Special Law Enforcement Commissions (“SLECs”) through the BIA.

SLECs assist the federal government in combating crime in Indian Country and, in turn, are entitled to the same immunities as other federal law enforcement officers. SLECs allow tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country, particularly against crimes perpetrated by non-Indians against tribal members. Most significantly, cross-deputized officers are empowered to make arrests on federal charges in Indian Country, including misdemeanor and felony violations of federal law. In essence, cross-deputizing tribal, state, and local law enforcement is a force multiplier, allowing tribal and state police officers to increase the law enforcement efforts within Indian Country.

Once cross-deputized, these law enforcement officers receive the same protections as federal employees under the Federal Tort Claims Act (FTCA). Thus, if such an officer is sued for state common law torts committed while acting within the scope of the federal deputation, the Department would certify that the individual is a federal employee acting within the scope of employment and move to substitute the United States in his or her stead for the common law torts. The result of substitution is that the officer would be immune from liability for the common law claims as the FTCA provides the exclusive remedy in tort. As with all federal employees, however, coverage is limited to non-constitutional claims. If the deputized tribal officer is sued for a constitutional violation under the Supreme Court’s decision in *Bivens v. Six*

Unknown Narcotics Agents, 403 U.S. 388 (1971) (which recognized an implied cause of action for deprivation of a constitutional right by a federal officer), the suit would proceed against the individual for that claim, just as it would proceed against any federal officer who is sued on a *Bivens* theory.

I am proud of the work that the Arizona U.S. Attorney's Office and the BIA have done in recruiting tribal and state police officers to earn federal enforcement authority in Indian Country. Just last month, AUSAs from my office trained and tested more than 40 tribal police and Arizona Department of Public Safety officers for SLECs. Those who passed the SLEC test received a certificate granting them federal law enforcement authority in Indian Country. This was the third time that the BIA and the U.S. Attorney's Office in Arizona have teamed up to give the training over the past year, with approximately 100 tribal and state police officers certified through the program. Those officers are making a real difference in tribal communities. The Department is committed to supporting further training sessions such as the one held in Arizona last month. I want to thank the Committee for the opportunity to discuss these issues today. We stand ready to work with the Committee to improve the safety and security of all those who live in Indian Country. Thank you.