United States Senate
Committee on Indian Affairs
Oversight Hearing on Law Enforcement in Indian Country

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Honorable Chairman and members of the Committee, thank you for the opportunity to testify today. This is the first hearing of the Committee since the loss of the distinguished Senator from Wyoming, Craig Thomas. At NCAI, we greatly appreciated Senator Thomas's constructive approach, his good will, and dedication to the betterment of our country. The people of Wyoming were fortunate to have Senator Thomas as their steward in the Senate. I want to acknowledge Senator Thomas today and thank him and his family for his many contributions.

At the outset of my testimony, I am not going to recount the problems facing law enforcement in Indian country. This is your second hearing on the subject this year, and you have heard a great deal about the horrible crime rates in Indian country, particularly violent crime, violence against women and drug trafficking. We have this knowledge in hand, and it is time for all of us to develop solutions and take action. My testimony outlines a series of potential solutions. We urge this Committee to write legislation, work with the tribes to gain their insights and support, and then pass legislation in this session of Congress.

Causes and Solutions for Law Enforcement Problems in Indian Country

The causes of the law enforcement problems can be boiled down to four related elements, and our proposed solutions would address each of these:

1) Criminal jurisdiction in Indian country is extremely complex and responsibility is shared among federal, tribal and state authorities. This complexity requires a high degree of commitment and cooperation from federal and state officials that is difficult to establish and maintain.

2) Federal and state authorities do not prioritize their role in law enforcement on Indian reservations. The complexity of jurisdiction makes it easy to avoid responsibilities and there is no system of accountability.

3) Law enforcement in Indian country suffers greatly from lack of resources – there are very significant needs in the personnel, equipment, training and facilities that make up the criminal justice system in policing, investigation, prosecution, courts, and detention facilities.

4) All of these factors combine to create a perception problem that encourages criminal activity and makes victims fearful in assisting law enforcement or prosecution. Criminal activity is encouraged when "routine" crimes such as domestic violence and drug and alcohol offenses are unaddressed.

Our proposed solutions would:

A. Improve and measure the federal law enforcement response;

B. Increase intergovernmental cooperation with state and local law enforcement;

C. Enhance tribal law enforcement authority;

D. Maximize the use of available resources; and

E. Together these efforts will create a new standard of tough law enforcement on Indian reservations that will discourage criminal activity, elevate public safety, and greatly improve the daily lives of crime victims and potential victims.

A. Improving the Federal Response to Crime on Tribal Land

Under the Major Crimes Act and other federal laws, Indian communities are completely dependent on the Department of Justice for investigation and prosecution of violent crimes and other felonies committed on Indian reservations. Despite these laws and the federal trust obligation to protect Indian communities, the violent crime rate on Indian reservations is two and a half times the national average, Indian women are victims of rape and sexual assault at three times the national average, and tribes are faced with an epidemic of drug trafficking in methamphetamines. These crime rates have been doubling and tripling in Indian country while crime rates have been falling in similarly low-income communities throughout the United States. Something is seriously wrong with the federal law enforcement response.

For many years, tribal leaders have raised the concern that the U.S. Attorneys do not consider Indian country crimes to be an enforcement priority. Although statistics are hard to find, we have heard of unreleased internal reports that U.S. Attorneys decline to prosecute as many as 85% of the felony cases referred by tribal prosecutors. These concerns are reflected in the Amnesty International Report "Maze of Injustice" that you heard about earlier today. The lack of data and interest is also reflected in general law enforcement reporting. Crime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have never been able to coordinate or accurately report on crime rates and prosecution rates in Indian country, making it extremely difficult to review their performance.

Some efforts have been made but with inconsistent results. Former Attorney General Janet Reno created the Office of Tribal Justice, but the status of this office has been diminished in recent years. Former Attorney General John Ashcroft supported the district priorities of the U.S. Attorneys, and under his leadership the Native American Issues Subcommittee of the Advisory Committee to the Attorney General worked to increase prosecutions and address problems with violent crime and drug trafficking in Indian country. However, six of the members of the Native American Issues Subcommittee were among those who were recently replaced, including both the former chair and vice-chairs Thomas Heffelfinger and Margaret Chiara. Monica Goodling, former aide to Attorney General Gonzales, stated in her House Judiciary Committee testimony that Thomas Heffelfinger was replaced because he spent "too much time" on the Native American Issues Subcommittee.

There is a serious concern that the Department of Justice central office places no priority on addressing crime in Indian country, and is subject to no oversight or accountability on its efforts

or performance. While we understand that Indian country crimes are not the top priority of Justice, it should be subject to consistent and focused attention. We would suggest the following reforms to improve the performance of the Department of Justice on Indian country crime.

- **Establish an Office of Assistant Attorney General for Indian Law Enforcement within the Department of Justice**. This position would be appointed by the President and confirmed by the Senate to measure performance and ensure that the law enforcement needs of Indian country receive requisite and focused attention; to ensure that the various branches of the Justice Department and other Departments coordinate on Indian country law enforcement; and to serve as a point of contact and information for Congress, the tribes and the public on matters related to Indian country law enforcement.

- **Increase Congressional oversight of the federal response to crimes under the Major Crimes Act.** As a first step, Congress should require both the FBI and the Executive Office of U.S. Attorneys to establish mechanisms for routinely collecting data on how Indian country crimes are handled. In particular, information should be collected and made available regarding referrals and declinations by the US Attorneys Offices. A policy should be established that U.S. Attorneys will respond in writing to tribal referrals for prosecution, that those decisions will be available for numerical analysis, and that tribes can appeal a declination directly to their district U.S. Attorney.

- **Collect crime data.** Congress should also require that the Bureau of Indian Affairs and the Department of Justice devise a "Tribal Category" and coordinate to produce Indian country crime data and statistics comparable to data collected from state law enforcement by the Bureau of Justice Statistics.

- **Do not transfer functions.** We do not support transferring the law enforcement functions of the Bureau of Indian Affairs to the Department of Justice. BIA Law Enforcement has for over a hundred years conducted general community policing in Indian country. The Department of Justice has no expertise in that type of police work, but instead is focused on investigation and prosecution of specific federal crimes. The Department of Justice has not adequately handled its current responsibilities in Indian country, and tribes are very concerned that the Indian policing funding would be redirected away from Indian country law enforcement.

- **Allow for indictment without a grand jury.** Amend federal law to mirror state law and allow for indictments without a grand jury in criminal cases brought under the Major Crimes Act in Indian Country. The grand jury requirement stands as a significant hurdle to routine prosecution.

- **Codify the consultation requirement** set forth in Executive Order 13175 and expressly require the Attorney General to consult with tribes on law enforcement issues.

- **Require specialized training**. Require all federal officers working in Indian country (FBI, US Marshalls, DEA, ATF, Border Patrol, etc.) to receive specialized training about Indian country law enforcement.

- The Senate Committee on Indian Affairs should facilitate a meeting between Attorney General Alberto Gonzales and tribal leadership to hear our concerns about law enforcement and to develop an action plan considering the following reforms:
    - Reestablish the policy to respect the law enforcement priorities of the U.S. Attorneys districts, particularly those districts that contain Indian country
    - Elevate the Native American Issues Subcommittee to a seat on the Advisory Committee to the Attorney General
    - Return the Office of Tribal Justice to its former status with direct access to the Attorney General
    - Implement Title IX of the Violence Against Women Act of 2005 as required by statute and establish the guidelines, tracking, resources, and research needed to address violence against native women.
    - Establish a policy that U.S. Attorneys will respond in writing to tribal referrals for prosecution, that those decisions will be available for numerical analysis, and that tribes can appeal directly to their district U.S. Attorney
    - Support tribal prosecution of domestic violence and drug crimes
    - Establish a policy for cross-deputization of tribal prosecutors as Special AUSA's
    - Establish a policy that the FBI will tape all confessions
    - Establish a policy that the U.S. Attorney will consult with the Indian tribe before seeking the death penalty in any capital case

- The Senate Committee on Indian Affairs, the House Resources Committee and the Senate and House Judiciary Committees should hold hearings soliciting testimony from the former and present U.S. Attorneys who are members of the Native American Issues Subcommittee, to request their views on criminal law enforcement in Indian country

B. Increasing Law Enforcement Coordination among Tribal, State and Federal Law Enforcement Authorities

Congress should create incentives and programs to increase cooperation between tribal, state and federal law enforcement. There is already a significant amount of cooperation in law enforcement between tribes, states, and counties, and there are hundreds of cooperative law enforcement agreements between tribes and their neighboring jurisdictions. These agreements are grounded in the shared recognition that tribes, states and counties can enhance their law enforcement efforts working together. Although law enforcement cooperation is common, it is not found everywhere. There are still a number of places where cooperation is minimal, and the relationships are sometimes antagonistic. In our experience, these poorer relationships are driven by the long histories of disrespect and indifference that have existed for many decades in the rural areas around some Indian reservations, and by a lack of support for individuals who would choose to forge stronger law enforcement ties.

NCAI maintains a partial repository of over a hundred law enforcement cooperative agreements, which vary in their details but typically contain a number of critical features. First, the agreements provide for the deputization of tribal police officers who meet certain minimum qualification and training requirements as state or county officers, so that tribal police can

enforce state criminal law within Indian country. Far from treating tribes as unreliable partners in the task of law enforcement, many states and counties have shared their criminal enforcement authority with tribes in order to enhance their ability to control crime. Recognition of these benefits is sufficiently widespread that a number of states such as Arizona, New Mexico, Nevada and North Carolina now provide for the deputization of tribal officers by statute. *See, e.g.*, Arizona Rev. Stat. Ann. § 13-3874 ("While engaged in the conduct of his employment any Indian police officer who . . . meets the qualifications and training standards adopted pursuant to section 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state).

Second, cooperative agreements often provide for the deputization of state officers as tribal police officers so that the former can enforce tribal laws. These provisions reflect recognition by the parties involved that tribal criminal laws form an important part of the law enforcement arsenal. Third, the agreements frequently address the execution of search and arrest warrants within Indian country, and contain a variety of cooperative approaches to these subjects. Fourth, the parties to these agreements often pledge substantial help to each other in carrying out their investigatory activities.

Through their cooperative agreements, tribes, states and counties pledge to work together extensively on matters of criminal law enforcement. They share authority, manpower, information and other resources in their common fight against crime. "Practice has found that the relationship that arises from the joint training, deputization, and working of tribal and nontribal police officers under a cross-deputization program can enhance the effectiveness of enforcement." Western Association of Attorneys General, Indian Law Deskbook at 413 (2d ed).

The benefits of cooperative agreements are sufficiently strong that the federal government should encourage and provide incentives for the development of law enforcement cooperation among states, counties and tribes. The following are some suggestions for doing so.

- **Consult with tribal, state and local law enforcement** organizations to discuss best practices and ways to create incentives for law enforcement cooperation.

- **Create incentives for states and counties for intergovernmental cooperation on law enforcement.** One method could be to provide specific funding or grants for joint tribal-state law enforcement efforts – for example funding for cooperative work on drug trafficking or gang violence. Another example can be found in the federal laws that require state governments to cooperate in the development of sex offender registries. In these statutes, any state that fails to meet certain goals will not receive ten percent of the federal funds that would be allocated under the Omnibus Crime Control and Safe Streets Act.

- **Federal law enforcement can facilitate state-tribal cooperation.** In the emergency response field, federal officials often bring together state, local and tribal officials to engage in emergency response planning and exercises, and these efforts assist greatly in building local government cooperation. Federally-led drug enforcement task forces have also been successful in integrating tribal and local police efforts. Consider establishing a

pilot project for FBI and U.S. Attorneys to Develop "Indian Country Community Law Enforcement Response Plans" with tribal and state/local law enforcement agencies in targeted areas where cooperation is lacking.

- Congress should ensure that Indian tribes have access to federal law enforcement databases and interoperable communications.

- It is important that Congress provide sufficient resources to accompany tribal responsibilities. State and local governments are far more likely to seek cooperation when the tribes have officers and resources to commit to the joint efforts.

C. Enhancing Tribal Law Enforcement Authority

Criminal jurisdiction in Indian country is divided among federal, tribal, and state governments, depending on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. The rules of jurisdiction were created over 200 years of Congressional legislation and Supreme Court decisions – and are often referred to as a "jurisdictional maze."[1] The following is a brief timeline of the development of the jurisdictional rules.

1790 – 1834 – Indian Country Crimes Act - Also know as the "General Crimes Act," this statute extends the federal criminal laws for federal enclaves to Indian country – but excludes crimes committed by one Indian against another Indian, and crimes where an Indian has been punished by the law of the tribe. The statute extends the "Assimilative Crimes Act" to Indian country, making state law crimes punishable in federal court.

1881 – U.S. v. McBratney – Supreme Court finds that states have exclusive jurisdiction over crimes committed in Indian country by one non-Indian against another non-Indian. Ruling later expanded to "victimless crimes" like traffic offenses.

1885 - Major Crimes Act - In the wake of the Supreme Court's decision in *Ex Parte Crow Dog*, Congress passed the Major Crimes Act, making Indians subject to federal prosecution for a list of 7 major felonies – expanded over time to the current list of 16.

1934 – Indian Reorganization Act - This statute set the stage for most BIA Courts of Indian Offenses to be replaced by tribal courts.

1953 – Public Law 280 – Congress delegated criminal and some civil jurisdiction over Indian Country to several states (CA, MN, NE, OR, WI and AK). The optional states (AZ, FL, ID, IA, MT, NV, ND, UT, and WA) assumed all or part of the jurisdiction offered. Amended in 1968, PL 280 permitted states to retrocede jurisdiction, and provided that no states in the future could assume jurisdiction without tribal consent. Tribes have concurrent jurisdiction.

[1] See Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 508-13 (1976)

1968 – Indian Civil Rights Act – This statute codifies most of the guarantees found in the Bill of Rights and applies them to tribes. In addition, the law limits tribal court sentencing to a maximum to one year in jail or a $5,000 fine.

1978 – Oliphant v. Suquamish Tribe – Supreme Court held that tribes do not have inherent criminal jurisdiction over non-Indians unless specifically authorized by Congress. Santa Clara v. Martinez – Tribal violations of the Indian Civil Rights Act may not be appealed to federal court except by write of habeas corpus. U.S. v. Wheeler - An Indian tribe may punish a tribal member as an independent sovereign, and not as an arm of the federal government.

1990 – Duro v. Reina – Supreme Court finds that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian. Duro Fix – Congress responds by amending the Indian Civil Rights Act to restore and affirm tribal inherent jurisdiction over all Indians.

2004 – U.S. v. Lara – The Supreme Court recently affirmed the Duro Fix and the authority of Congress to restore tribal jurisdiction via legislation –holding that separate tribal and federal prosecutions do not violate double jeopardy because a tribe is a separate sovereign. The decision left open the possibility of further constitutional challenges to jurisdiction over nonmember Indians on due process or equal protection.

The complexity of the jurisdictional rules - evident in this timeline - creates significant impediments to law enforcement in Indian country. Each criminal investigation involves a cumbersome procedure to establish who has jurisdiction over the case according to the nature of the offense committed, the identity of the offender, the identity of the victim and the exact legal status of the land where the crime took place. The first law enforcement officials called to the scene are often tribal police or BIA officers, and these officers may initiate investigation and/or detain a suspect. Then a decision has to be made whether the crime is of the type warranting involvement by the FBI or state law enforcement. These officers then decide whether to refer the case to the U.S. Attorney's office or the local District Attorney.

Federal law enforcement is generally limited to only the most serious crimes. If the offender is non-Indian the tribe has no jurisdiction. Local and state law enforcement are often reluctant to rely on tribal police investigations, subject to confusion over jurisdiction, or simply have a lack of resources. Each of the three sovereigns has less than full jurisdiction, and the consequent need for multiple rounds of investigation often leads to a failure to act. Overall, law enforcement in Indian country requires a degree of cooperation and reliance between federal, tribal and state law enforcement that that – while possible – is difficult to sustain on a broad basis. All of these issues are compounded by a severe lack of resources for law enforcement in Indian country.

The United States Department of Justice has testified to Congress that jurisdictional complexity has made the investigation and prosecution of criminal conduct in Indian Country very difficult and that some violent crimes convictions are thrown into doubt, recommending that the energy and resources spent on the jurisdictional questions would be better spent on providing tangible

public safety benefits.[2] A report of the Executive Committee for Indian Country Law Enforcement Improvements of the U.S. Department of Justice concluded that one of the major problems of law enforcement in Indian Country is the poor coordination between law enforcement bodies caused by the fragmentation of the criminal justice system.[3]

The impediments to Indian country law enforcement are directly reflected in crime rates. American Indians experience per capita rates of violence that are much higher than those of the general population, and 70% of American Indians who are the victims of violent crimes are victimized by someone of a different race.[4] In particular, the rate of aggravated assault among American Indians and Alaska Natives is roughly twice that of the country as a whole (600.2 per 100,000 versus 323.6 per 100,000). Indians are the victims of violent crime at twice the rate of African-Americans, two and a half times that of Caucasians, and four and a half times as often as Asian Americans.[5]

Since the Oliphant decision in 1978, NCAI has urged Congress to reaffirm tribal inherent criminal jurisdiction over all persons within Indian country. An increasing number of prominent state and federal law enforcement officials support this view because Indian tribal governments are the only entities that have a full and sustained interest and ability to carry out law enforcement on Indian reservations. We also agree with Amnesty International that it is a fundamental violation of human rights to deprive Indian tribes of the ability to protect their communities from violent crime. We fully expect that Congress will come to understand the wisdom of restoring tribal criminal jurisdiction, and look forward to engaging on the related issues, including disparate tribal resources, and the need for improvement of tribal courts and detention facilities.

However, there are also specific problems with law enforcement in Indian country that warrant a close look by Congress to improve tribal law enforcement in the areas where federal and state enforcement is least likely to succeed.

Domestic Violence and Violence Against Women and Children

There are enormous difficulties in dealing with law enforcement in Indian country on issues of domestic violence and violence among intimate partners. Indian women are being assaulted and raped by non-Indian family members – spouses, boyfriends and fathers – and the federal authorities are not interested and not organized to deal with domestic violence situations. Statistics on the rape and assault of American Indian and Alaska Native women are shocking and have been widely publicized. One in three American Indian and Alaska Native women will be raped in her lifetime. But the nature of this is less well-understood. Indian women were

[2] Testimony of The Honorable Thomas B. Heffelfinger, U. S. Attorney, Minneapolis, Minneapolis, Oversight Hearing before the Senate Committee on Indian Affairs on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court, July 11 2002.
[3] Report of the Executive Committee for Indian Country Law Enforcement Improvements of the U.S. Department of Justice, October 1997, Executive Summary.
[4] U.S. Department of Justice, Bureau of Justice Statistics, American Indians and Crime, February 1999, VI, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf
[5] Bureau of Crime Statistics, U.S. Dept. of Justice, Violent Victimization and Race, 1993-98, at 1 (NCJ 176354, 2001).

victimized by an intimate partner at rates higher than those for all other females (Whites at 8.1 per 1,000; Indians at 23.2 per 1,000). [6] The most notable characteristic is the identity of the assailant. Approximately 9 in 10 American Indian victims of rape or assault were estimated to have assailants who were non-Indian.[7] Among American Indian victims of violence, 75% of the intimate victimization and 25% of the family victimization involved an offender of a different race.

The Ninth Circuit Gender Bias Task Force report acknowledges that "[j]urisdictional complexities, geographic isolation, and institutional resistance impede effective protection of women subjected to violence within Indian country."[8] It further notes that although federal jurisdiction is technically available in some districts over spouse abuse, such prosecutions are rare. It concludes that crimes against women are under-prosecuted in Indian country as the difficulties of prosecution in general, coupled with traditions of non-involvement by law enforcement officials in spousal abuse, make federal and state enforcement more difficult. The Gender Bias Task Force Report recognized that calling for greater enforcement by the federal law enforcement agencies is inadequate in the case of violence against women in Indian country.

- **Reaffirm tribal authority to prosecute domestic violence crimes against non-Indians who are members of an Indian family.** Such authority might be limited to certain classes of persons, such as persons who are married to or co-habitate with a tribal member in Indian country, or persons who violate a protective order. Jurisdiction could be predicated on implied or explicit consent – i.e. by marrying and living in the tribal community on tribal land, a person consents to tribal laws for the purpose of regulating domestic relations.

- **Extend Tribal sentencing limitations under the Indian Civil Rights Act** to provide for appropriate sentences for more serious offenders. In the original 1968 law, tribal sentencing authority was limited to 6 months or $500. In 1986, the authority was expanded to 1 year or $5000. A 2003 report of the Native American Advisory Group to the U.S. Sentencing Guidelines Commission points out the disparity between tribal sentencing authority and the sentences that are imposed by the federal government for crimes committed under the Major Crimes Act. Assaults comprise the greatest percentage of crimes prosecuted under the Major Crimes Act, and the average federal sentence for Indians prosecuted for assault is three years. Because U.S. Attorneys rarely prosecute any crime in Indian country that is not a very significant assault, there is a large gap between the maximum sentencing authority of tribes and the average sentence for the least serious crime that is prosecuted by the federal government. Many crimes of domestic violence fall into this gap.

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[6] Tjaden, Patricia, and Nancy Thoennes, Full Report of the Prevalence, Incidents, and Consequences of Violence Against Women, Findings from the Violence Against Women Survey, Washington, DC; National Institute of Justice, November 2000, NCJ 183781, p.22.

[7] Lawrence A. Greenfeld and Steven K. Smith, American Indians and Crime, U.S. Department of Justice Bureau of Crime and Statistics, 1999.

[8] The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice, 67 S. Cal. L. Rev. 745 (1994), at 906.

The issue of increasing sentencing authority raises a concern about the relationship to federal prosecution declinations, because federal prosecutors often decline prosecution when they feel the tribe could impose a remedy. Most tribes do not have the resources or facilities for long term incarceration and need the federal government to continue to prosecute major crimes.

- **Amend the Adam Walsh Act to expand tribal governments' ability to participate in the national sex offender registry system and remove the unnecessary infringement on tribal authority included in Section 127.** Unfortunately, rather than help unravel the jurisdictional maze, Congress has recently added another layer of confusion to the system with the passage of the Adam Walsh Act. Under Section 127 of the Adam Walsh Act, Indian tribes who wish to participate in the national sex offender registration system as a registration jurisdiction must indicate their intent to do so before July 27, 2007. If a tribe fails to make such an election before the deadline, the authority under the law is delegated to the state. This represents a dramatic departure from the current scheme of criminal jurisdiction in Indian country. Section 127 of the Adam Walsh Act has the potential to effect a dramatic expansion of the scope of state jurisdiction in Indian Country over a narrow class of crimes and will undoubtedly create years of confusion among law enforcement agencies on the ground. It also threatens to destabilize countless carefully negotiated cross-jurisdictional collaborative agreements. This provision was added by the Department of Justice at the 11th hour with no tribal consultation.

  Tribes strongly support the tracking of sex offenders. Congress needs to remove the July 27, 2007 deadline and allow tribes to participate at any time after that date. PL 280 jurisdiction tribes should also be able to participate, and Congress should remove the provision delegating tribal and federal criminal authority to the states. Congress also needs to fund the National Tribal Sex Offender Registry that was authorized in the Violence Against Women Act in 2005.

  <u>Misdemeanors and Victimless Crimes Committed by Non-Indians</u>

The general lack of tribal jurisdiction for misdemeanors committed by non-Indians creates significant problems for law enforcement. Alcohol and drug related disturbances, traffic violations, domestic violence and gang activity commonly involve both Indians and non-Indians. The absence of tribal jurisdiction to deal effectively with non-Indians creates a perception that the likelihood of being caught and punished is low, and encourages a disregard for tribal law enforcement. This problem is compounded by the status of "victimless" crimes -- those committed on the reservation by a non-Indian that do not actually involve harm or threat to the person or property of an Indian. Neither the tribe nor the federal government has jurisdiction over victimless crimes, only the state. As a result, most routine disorderly conduct, traffic violations, gambling offenses and other moral offenses committed by non-Indians within Indian country are exclusively within the jurisdiction of the state and receive little enforcement attention. These gaps in tribal and federal jurisdiction defeat community-based policing initiatives and create disorder and disregard for law enforcement in Indian country. [9]

[9] Testimony of John St. Claire, Chief Judge, Shoshone and Arapaho Tribal Court, Wind River Indian Reservation, Senate Committee on Indian Affairs, February 27, 2002.

- **In consultation with tribes, expand tribal and Bureau of Indian Affairs authority to cover a broader range of "non-major" crimes as well as misdemeanors and "victimless" crimes committed by non-Indians.** This could be done in two ways. First, directly authorize tribes to prosecute misdemeanors. Second, the Bureau of Indian Affairs could be authorized to develop regulations governing misdemeanors and minor crimes committed by both Indians and non-Indians in a manner similar to the National Park Service. See 16 U.S.C. §1c and also the current regulations governing Indian offenses at 25 C.F.R. Part 11. Legislation and regulations would need to be carefully crafted not to overly "federalize" misdemeanor crimes that have normally been committed to tribal government enforcement, perhaps through establishment of federal-tribal agreements that would protect tribal law enforcement. Public Law 638 contracting could play a role, as well as an option for express consent to tribal court jurisdiction in lieu of federal prosecution.

- **Amend the ICRA to remove the overly burdensome jury trial requirement.** The ICRA requires Indian tribes to provide juries to anyone accused of an offense punishable by imprisonment. The federal Constitution only recognizes such a right for persons subject to a term of imprisonment for "serious offenses," which primarily refers to non-petty offenses, or those offenses which carry a prison term of greater than six months.

- **Amend Public Law 280 to affirm tribal concurrent jurisdiction and allow tribes to retrocede**. Under Public Law 280, state and local law enforcement has displaced federal enforcement and assumed full or partial jurisdiction over crimes committed within Indian Country in certain states and on certain reservations. Tribal opposition to P.L. 280 has focused on the law's failure to recognize tribal sovereignty and the lack of consent of the affected tribes. States have focused on the failure of the Act to provide federal funding -- an unfunded mandate on lands that are not taxable. Even though tribes retain concurrent jurisdiction, the federal government has viewed P.L. 280 as an excuse to cut off tribal financial and technical assistance for law enforcement. The law has contributed to mistrust and hostility between state and tribal officials on many reservations. A common tribal perception is that state law enforcement refuses or delays when the tribe asks for assistance, but vigorously asserts their authority when the tribe does not want them to intervene. Professor Carole Goldberg has made a compelling case that the law has worsened the problem of lawlessness on reservations[10]:

  > Public Law 280 has itself become the source of lawlessness on reservation. Two different and distinct varieties of lawlessness are discernible. First, jurisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory have no institutional support or incentive for the exercise of that authority. *** Second, where state law enforcement does intervene, gross abuses of authority are not uncommon.

[10] Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (UCLA American Indian Law Studies Center, 1997), p. 12.

National and Tribal Community Homeland Security

The Department of Homeland Security is responsible for assessing the nation's vulnerabilities related to terrorism, natural disasters and other major public safety matters. Tribal governments are partners and stakeholders in the national homeland security strategy. Tribal law enforcement agencies evaluate vulnerabilities, collect information, provide surveillance and respond and coordinate with federal, state, local and private entities in the event of a terrorism or related event as required by Homeland Security Presidential Directives. Federal preparedness funding is shared with state governments but not directly with tribal governments for national homeland security purposes. The national preparedness goals will fall short unless tribal governments are provided direct funding by the congress and the administration for planning, training, exercises, interoperability and equipment acquisition for major events as well as capacity building for prevention activities such as information gathering, detection, deterrence, and collaboration related to terrorist attacks.

D. Maximizing the Use of Available Resources

NCAI has long advocated for increased funding for law enforcement in Indian country because of the public safety crisis. Basic law enforcement protection and services are severely inadequate for most of Indian country. For example, a recent Bureau of Indian Affairs analysis indicates that in BIA Law Enforcement, 1,153 officers are needed but it has only 358. The gap is 795 officers (69% unmet need). In Tribal Law Enforcement – 3,256 officers are needed but tribes have only 2,197. The gap is 1,059 officers (33% unmet need). Total need is 1,854 law enforcement officers. To put this in perspective, these 2,555 Indian country law enforcement officers make up about 0.004 percent of the total of 675,734 state, city and county law enforcement officers in the United States, yet they patrol approximately 2% of the landmass of the United States and 1% of the population.

Increasing law enforcement funding is a top priority. In addition, there are several things that Congress can do to maximize the use of existing resources.

- Authorize BIA police departments to apply for federal law enforcement grants with tribal approval. Currently direct service BIA police departments are at a disadvantage from tribal police departments. Tribal police departments can apply for Department of Justice grants, HUD grants, and a series of other grants that enable them to access increased funds for personnel and equipment.

- Authorize a tribal courts set-aside in the Judiciary appropriations bill. The federal courts are funded separately under Judiciary appropriations. Tribal courts could be included this funding source as a way relieve the pressure on the Interior budget, and increase support for the Judiciary budget.

- Consolidate and streamline federal law enforcement funding sources to tribes. Amend grant programs to require federal agencies to provide maximum flexibility to tribal governments in program administration.

- Reauthorize the Indian Tribal Justice Act.

- Restore COPS program funding.

- Eliminate pass-through funding from states in federal programs. Indian tribes are separate sovereigns with a direct relationship with the federal government recognized in treaties and the Constitution. Unlike cities and counties, tribes are not a subset of a state government. Because of the separate status of tribal governments, in most states the state government does not readily share sources with tribes and it is very difficult for tribes to receive a fair allocation of program funding.

- A Tribal Government Enhancement Fund should be established for the development of tribal law enforcement and courts.

E. Creating a New Standard of Tough Law Enforcement in Indian Country

Law enforcement has been the leading concern of tribal leaders throughout the country for at least the last five years that priorities have been measured by the BIA Budget Advisory Committee, and probably for much longer. NCAI strongly encourages Congress to take action on all of the fronts that we have identified above. Taken together – an improvement in the federal response, an increase in state-tribal cooperation, enhancements to tribal authority, and maximizing law enforcement resources – we can dramatically change the environment for criminal activity on Indian reservations. Our goal is a short term clampdown that will send a new message to the criminal element that law will be vigorously enforced, and thereby create a deterrent to crime on Indian lands. This effort will bring great benefits to Indian communities and our neighbors in public safety, but also in health, productivity, economic development, and the well-being of our people. We thank you in advance, and look forward to starting our joint efforts immediately.