



Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2018

Sex Offender Registration and Notification in Indian Country

SORNA created, for the first time under federal law, the possibility for certain federally recognized tribes to register sex offenders who live, work or attend school on tribal lands.¹ Generally, the tribes eligible to opt-in as SORNA registration jurisdictions are those who are **not** PL-280 tribes.² As of March 1, 2018, there are approximately 160 federally recognized tribes operating as SORNA registration jurisdictions: They either have established — or are in the process of establishing — a sex offender registration and notification program.

The vast majority of the more than 125 tribes that have substantially implemented SORNA have used the Model Tribal Code, which was developed by Indian Law experts in conjunction with the SMART Office and fully covers all of SORNA's requirements.³ Many tribes have passed more rigorous registration requirements than the states within which they are located — in particular, those tribes located within states that have not substantially implemented SORNA.⁴ For example, in addition to possible criminal sanctions for failure to register, tribes are also generally able to exclude any person (such as a convicted sex offender) from their lands altogether.⁵

There are legal issues unique to Indian Country that impact the registration of tribal sex offenders or the enforcement of sex offender registration requirements against persons who reside on tribal lands or were convicted by tribal courts. For example, because of the different standards regarding the right to counsel in some tribal courts, it was sometimes argued that prosecuting a person based in part on an underlying tribal conviction violates the Sixth Amendment. However, in *United States v. Bryant*⁶ the United States Supreme Court held that tribal court convictions obtained in proceedings that comply with the Indian Civil Rights Act may be used as predicate convictions in a subsequent federal prosecution.⁷

Tribal Residents and State Registration Responsibilities

Further complications may develop when an offender lives on tribal land but was convicted of a state or federal offense. One question that arises is whether an offender who exclusively lives, works and attends school on tribal land can be compelled to register with the state within which that tribal land is located. If the offender cannot be compelled to register with the state, it falls to the tribe to register the offender, if the tribe has opted-in to SORNA's provisions and is operating as a registration and notification jurisdiction under its terms.

For example, in New Mexico, the state cannot impose a duty to register on enrolled tribal members living on tribal lands who have been convicted of federal sex offenses.⁸ In neighboring Arizona, persons living in Indian Country are required to keep their registration current with both the state and the tribe.⁹ In Arizona, however, a tribal member residing on tribal land could not be prosecuted under state law for failure to register unless that tribe's registration responsibilities had been delegated to the state via SORNA's delegation procedure.¹⁰

¹ 34 U.S.C. § 20929.

² See 34 U.S.C. § 20929(b)(2); 18 U.S.C. § 1162.

³ www.smart.gov/pdfs/MTSOR_Code.pdf.

⁴ For example, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) was one of the first tribes to implement SORNA, and met all of SORNA's requirements in doing so, see Substantial Implementation Report: Confederated Tribes of the Umatilla Indian Reservation at www.smart.gov/pdfs/sorna/ConfTribes-UmatillaIndianReservation.pdf. CTUIR is located entirely within the State of Oregon, which falls short of many of SORNA's provisions. Maxine Bernstein, *Sex Offenders in Oregon: State Fails to Track Hundreds*, The Oregonian (Oct. 2, 2013), available at www.oregonlive.com/sexoffenders/special-presentation/ (Oregon only posts 2.5 percent of its registered sex offenders on its public sex offender registry website).

⁵ See *United States v. Nichols*, 2014 U.S. Dist. LEXIS 118129 (D. S.D. Aug. 20, 2014) (tribes have the inherent power to exclude outsiders from their territory).

⁶ 136 S.Ct. 1954 (2016).

⁷ The Indian Civil Rights Act is found at 25 U.S.C. §§ 1301-1304. For previous cases holding that tribal court convictions could be used in subsequent federal prosecutions, see *United States v. First*, 731 F.3d 998 (9th Cir. 2013) (admissible so long as the uncounseled conviction would not violate the Constitution) (possession of a firearm prosecution), *United States v. Shavanaux*, 647 F.3d 993 (11th Cir. 2011) (tribal court convictions that meet the due process requirements of the Indian Civil Rights Act may be admitted in subsequent federal prosecutions) (domestic violence prosecution), *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011) (domestic violence prosecution); *Kirkaldie v. United States*, 21 F.Supp. 3d 1100 (D. Mont. 2014) (domestic violence prosecution), *rev'd and remanded*, 670 Fed. Appx. 452 (9th Cir. 2016). There are also cases that have interpreted the above decisions in other settings, see, e.g., *United States v. Bundy*, 966 F.Supp. 2d 1175 (D. N.M. 2013) (tribal conviction did not meet the *Shavanaux* test) (DUI prosecution).

⁸ *State v. Atcitty*, 215 P.3d 90 (N.M. 2009).

⁹ *United States v. Begay*, 622 F.3d 1187 (9th Cir. 2010), *abrogated on other grounds*, *United States v. DeJarnette*, 741 F.3d 971 (9th Cir. 2013).

¹⁰ *State v. John*, 308 P.3d 1208 (Ariz. Ct. App. 2013). If such an offender had an independent registration responsibility because they worked or attended school on state lands in Arizona, they would be subject to the state's registration laws and any failure to register (based on the requirements triggered by employment and/or school attendance) could therefore be prosecuted by the state.