

SEX OFFENDER REGISTRATION AND NOTIFICATION IN INDIAN COUNTRY



**Southwest Center for Law
and Policy**

2008 REPORT

**National
Roundtable On
Sex Offender
Registration
And Notification
In Indian Country**

This project was supported by Grant Number 2004-WT-AX-K053 awarded by the Office on Violence Against Women, United States Department of Justice. Points of view expressed in this document are those of the authors, and do not necessarily represent the official position of the Office on Violence Against Women, United States Department of Justice.

**2008 Report of the
National Roundtable on Sex Offender Registration
and Notification in Indian Country**



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I. Introduction:

The Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act Of 2006,⁴ requires tribes to develop and implement sex offender registration and notification systems or to delegate that responsibility to the state(s). SORNA significantly impacts tribal sovereignty, yet it was passed without input from Tribes. In response to this challenge, the Southwest Center for Law and Policy convened a meeting of legal experts and law enforcement professionals on the Tohono O'odham Nation. The meeting was held on February 26-27, 2008 and utilized a roundtable format. Funding for the Roundtable was provided through a grant from the Office on Violence Against Women, United States Department of Justice.

Roundtable participants were tasked with developing a series of recommendations on how Tribes can best protect their sovereignty while substantially complying with SORNA's mandatory requirements of sex offender registration and notification.

II. Roundtable Participants

Detective Karin Ashby

Tohono O'odham Police Department

The Honorable Steve Aycok

Confederated Tribes of the Colville Reservation

The Honorable Montie Deer (*Mvskogee Creek Nation*)

Juana Majel Dixon (*Pauma Band of Mission Indians*)

Secretary, National Congress of American Indians
Chair, NCAI Task Force on Addressing Violence Against Women
Legislative Council Woman, Pauma Band of Mission Indians

David Flannigan

Assistant United States Attorney
United States Attorney for the District of Arizona

⁴ Sex Offender and Notification Act, Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109 – 248.

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SMART Office
Office of Justice Programs
United States Department of Justice

Thomas Henman

Deputy United States Marshall
United States Marshals Service

Patty Morris

Supervisor
Arizona Department of Public Safety
Sex Offender Compliance Team

Michelle Rivard Parks

Assistant Director
Tribal Judicial Institute
University of North Dakota School of Law

Michelle Paquin Johnson (*Red Lake Band of Chippewa Indians*)

Legal Counsel
Red Lake Band of Chippewa Indians

Dorma L. Sahneyah (*Hopi*)

Chief Prosecutor
Hopi Tribe

Larry Seligman

Director of Public Safety
Pascua Yaqui Tribe

Hallie Bongar White

Executive Director
Southwest Center for Law and Policy

The Honorable James G. White (*Citizen Potawatomi Nation*)

Legal Director
Southwest Center for Law and Policy
Supreme Court Justice, Citizen Potawatomi Nation

Office on Violence Against Women Personnel in Attendance

Lorraine Edmo (*Shoshone-Bannock Tribes of Idaho*)

Tribal Deputy Director
Office on Violence Against Women
United States Department of Justice

Kathy Howkumi (*Pueblo of Nambe- Tewa*)

Program Manager, Tribal Unit
Office on Violence Against Women
United States Department of Justice

Beverly Fletcher

Program Manager, Tribal Unit
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United States Department of Justice

Kimberly Woodard

Program Manager, Tribal Unit
Office on Violence Against Women
United States Department of Justice

Southwest Center for Law and Policy Staff in Attendance

Cheryl Neskahi Coan (*Dine'*)

Director of Violence Against Women Training

Arlene O'Brien (Tohono O'odham Nation)

Program Manager

Special thanks to:

Shandi Sue Stoner *for her valuable assistance in preparing this report.*

Tohono O'odham Nation and Desert Diamond Hotel and Casino *for graciously hosting this event.*

III. Overview of the Sex Offender Registration and Notification Act, Title I of the Adam Walsh Act

The Sex Offender Registration and Notification Act ("SORNA"), Title I of the Adam Walsh Act, is the latest in a series of federal legislation addressing sex offender registration and notification

on a national level. SORNA sets national minimum standards for sex offender registration and notification that apply to all states, the principal United States territories, the District of Columbia, and Indian tribes. Jurisdictions are required to collect and share more comprehensive information about individual sex offenders and to impose strict penalties for failure to register. SORNA also sets forth a three-tier system for classification of sex offenders and expands the use of the National Sex Offender Registry (NSOR).

SORNA sets a floor, not a ceiling, for each jurisdiction's minimum requirements for registration and notification systems. Tribes, therefore, are free to adopt more stringent registration and notification requirements than those listed under the Act.

Under SORNA, jurisdictions are now required to maintain electronic databases of sex offender information that can be electronically transmitted to other jurisdictions and entities. Registration requirements are also retroactively applied to convictions that predate the Act. Non-compliance with SORNA is penalized by a reduction in federal "Byrne Justice Assistance Grant" funding.

SORNA creates an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (the "SMART office") located within the Office of Justice Programs of the United States Department of Justice. The SMART Office administers the standards for sex offender registration and notification. It will also develop and make available software tools to facilitate full implementation of the Act.

Tribes that elect to maintain their own registration and notification systems (as well as states and other jurisdictions) must submit their existing or proposed implementation plans to the SMART Office. The SMART Office will then make a determination as to whether the proposed systems are substantially in compliance with SORNA. Implementation plans must be submitted to the SMART Office no later than **April 27, 2009**.

All Tribes must be in substantial compliance with SORNA by **July 27, 2009**. The SMART Office has the authority to grant a 1 year extension for submission of SORNA implementation plans if a timely, written request has been filed with their office **no later than April 27, 2009**. A second 1 year extension may also be granted. Therefore, **July 27, 2011** is the absolute deadline for

Tribes and all other jurisdictions to receive certification that they are in substantial compliance with SORNA.

Important Dates

- July 27, 2007** – Deadline for Tribes to provide written notice to the SMART office that they elect to assume SORNA responsibilities or that they delegate those responsibilities to a state or states.
- April 27, 2009** – Deadline for submission of existing or proposed implementation plans establishing compliance with SORNA.
- Deadline for requesting the first 1 year extension from the SMART Office for submission of the implementation plan.
- July 27, 2009** – Deadline for certification from the SMART Office of substantial compliance with SORNA.

The SMART Office is authorized under federal law to cooperate with and to provide assistance to states, the principal U.S. territories, the District of Columbia, local governments, tribal governments, and public/private entities to ensure that sex offender registration and notification systems are in substantial compliance with the Act. They are a key partner and resource within the federal government for assistance in compliance with SORNA.

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A. SORNA Section 127: “Opt In/Opt Out”

Section 127 (a)(1) of SORNA provides some federally recognized Indian tribes a choice between:

- 1.) electing to carry out sex offender registration and notification functions on their own; or
- 2.) delegating those functions to a state or states within which the tribe is located.

July 27, 2007 was the deadline for Tribes to elect to become a SORNA registration jurisdiction or to delegate registration and notification functions to a state or states. The election to delegate or to become a SORNA registration jurisdiction must have been made by resolution or by other enactment of the Tribal council or comparable governmental body.

Sex offender registration and notification is automatically delegated to a state for those Tribes subject to 18 U.S.C. 1162 (“the six mandatory PL 280 states”). Delegation to a state is also automatic if a tribe failed to meet the July 27, 2007 deadline or if a tribe rescinds a previous election to function as a SORNA registration jurisdiction. The Attorney General of the United States may also delegate SORNA functions to a state after making a determination that a Tribe has not substantially implemented the requirements of SORNA and that it is not likely to become capable of doing so within a reasonable amount of time⁵.

If a Tribe delegates to a state, the state becomes fully responsible for carrying out SORNA registration and notification functions. It is important to note that **delegation to a state also requires Tribes to “provide access to its territory and such other cooperation and assistance as may be needed to enable [the state] to carry out and enforce the requirements of [SORNA].”**⁶

Tribes and states are free to enter into cooperative agreements to facilitate compliance with SORNA. For example, a Tribe may elect to enter into a Memorandum of Understanding with a state that delegates certain delineated registration or notification functions while retaining full criminal jurisdiction over sex offenders.

Unfortunately, the “non-mandatory states PL 280 jurisdictions” and CFR Courts were not addressed directly in the Act.

B. Sex Offender Convictions Under SORNA

SORNA defines a “sex offender” as a person required to register under the Act. For purposes of

⁵ SORNA Section 127 (a)(2)(C)

⁶ SORNA § 127(a)(1)(B).

SORNA registration, the term “conviction” encompasses a broad range of criminal offenses of a sexual nature under the laws of any United States jurisdiction. SORNA registration requirements apply to adults, to juveniles who have been prosecuted as adults, and to juveniles age 14 or older who have been adjudicated delinquent for an offense comparable to or more severe than the crime of aggravated sexual abuse⁷ under the federal code⁸. Specified offenses against a minor that are listed in Section 111(7) of SORNA also require registration.⁹

Tribal court convictions for sex offenses under the Act are generally to be given the same effect as convictions by other United States jurisdictions.

C. Tier I, II, and III Offenses

SORNA classifies convicted sex offenders in a three-tiered system: Tier I, Tier II and Tier III. This three-tiered system has implications for: (1) the required duration of registration; (2) the required frequency of personal appearances by sex offenders to verify registration information; and (3) information about Tier I offenders (convicted of offenses other than specified offenses against minors) that may be exempted from public website disclosure.

SORNA does not require jurisdictions to utilize its three-tiered system, nor does it require any other system of labeling, classifying, or categorizing sex offenders. SORNA requirements are met so long as sex offenders who are required to register are consistently:

- 1.) required to register for a period of time that meets or exceeds the duration required under SORNA; and

⁷ See: Section 111 (8) of SORNA, codified at 42 U.S.C. § 16911(8).

⁸ Aggravated sexual abuse under 18 U.S.C. §2241 of the federal code includes: knowingly causing another person to engage in a sexual act by using force against that other person; or threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim; or engaging in a sexual act with a person under the age of 12.

⁹ These include: kidnapping or false imprisonment of a minor; solicitation of a minor to engage in sexual conduct; use of a minor in a sexual performance; solicitation of a minor to practice prostitution; video voyeurism involving a minor; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor and related internet activities; and conduct, by its nature, a sex offense against a minor.

- 2.) required to submit to in-person appearances for verification at least as frequently as required under SORNA; and
- 3.) subject to public website disclosure that meets or exceeds the requirements under SORNA.

The SORNA three-tiered classification system is based upon the elements of the crime that resulted in a conviction. Tier I offenses include those offenses punishable by up to one year of imprisonment. Sex offenders under Tier I must register annually for 15 years¹⁰. Tier II and Tier III offenses include offenses punishable by a term of imprisonment greater than one year. Tier II sex offenders must register every six months for 25 years. Tier III sex offenders have lifetime registration requirements and must appear for an in-person verification at least every 3 months.

Registration must be in person. The sex offender must allow the jurisdiction to take a current photograph and must verify the information contained in the registry. Classification under the tier system is based upon the maximum penalty of imprisonment possible under the violated statute rather than on the actual punishment imposed by the court.

Tribal court convictions are initially classified as Tier I convictions under SORNA.¹¹ However, SORNA's three-tiered system sets only a minimum standard for classification. Tribes are free to enact legislation increasing the registration obligations of sex offenders under their own classification systems. For example: Tribes may pass legislation designating any conviction for a sex offense as a Tier II or Tier III conviction and/or may require lifetime registration for any sex offense conviction.

D. Required Registration Information and Locations

Section 114 of SORNA requires that, at a minimum, the following information be obtained from sex offenders and maintained in the jurisdiction's registry:

¹⁰ SORNA allows jurisdictions to reduce the registration period for a tier I sex offender by 5 years after maintenance of a clean record for 10 years and to terminate registration based on juvenile delinquency adjudications after the sex offender maintains a clean record for 25 years. SORNA §115(b)

¹¹ The maximum penalty that may be imposed for a tribal court conviction is up to one year of imprisonment and a fine of up to \$5,000 under the Indian Civil Rights Act of 1968.

- Names and Aliases
- Internet Identifiers and Addresses
- Telephone Numbers
- Social Security Number
- Residence, Lodging, and Travel Information
- Specific Description of Other Residence Information for Offenders with No Fixed Address
- Temporary Lodging Information
- Travel and Immigration Documents
- Employment Name and Address
- Information for Employees Without A Fixed Work Location
- Professional Licenses
- School Information
- Vehicle Information
- Date of Birth
- Physical Description
- Text of Registration Offense
- Criminal History and Other Criminal Justice Information
- Current Photograph
- Digitized Fingerprints and Palm Prints
- DNA Profile for Entry into Combined DNA Index System (CODIS)
- Photocopy of a Driver's License or Identification Card

The Attorney General is authorized to require additional information to be obtained from sex offenders and maintained in the registries at a later date.

SORNA's minimum standards require a sex offender to register in any jurisdiction in which he has his home, in any jurisdiction where he is an employee, in any jurisdiction where he is a

student, and in any jurisdiction in which he habitually lives (even if he is homeless or does not have a home or a fixed address in the jurisdiction).¹² A sex offender must register, by appearing in person, within 3 business days of changing his name, employment location, school location, or home.¹³

SORNA also mandates the sharing and disclosure of registration information to public websites, national databases, other jurisdictions, agencies responsible for conducting employment-related background checks (such as those under section 3 of the National Child Protection Act of 1993), schools, public housing agencies, social service entities serving minors, and volunteer organizations working with minors. Jurisdictions must maintain all required registration information in an electronic, digital format to facilitate the immediate sharing and disclosure of registration information.

E. Public Sex Offender Websites

Registry information about each sex offender must be made “available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public.”¹⁴ The information must have certain “field search capabilities” by name, county, city/town, zip code, and geographic radius. This is necessary to ensure compatibility with the National Public Sex Offender Registry (NPSOR). NPSOR is also known as the Dru Sjodin National Public Sex Offender Website (www.NPSOR.gov)¹⁵ that contains sex offender information accessible by the general public.

SORNA also requires posting of the following information on the public sex offender websites maintained by the states, Tribes, and other jurisdictions:

- The name of the sex offender, including any aliases.
- The address of each residence at which the sex offender resides or will reside.
- If the sex offender does not have any (present or expected) home address, other information about where the sex offender has his or her home or habitually lives. If

¹² SORNA Section 111(13)

¹³ SORNA Section 113(a)

¹⁴ SORNA Section 118(a)

¹⁵ These field search capabilities are mandated by SORNA Section 118(1).

current information of this type is not available because the sex offender is in violation of the requirement to register or is not able to be located, the website must note this.

- The address of any place where the sex offender is an employee or will be an employee.
- If the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The address of any place where the sex offender is a student or will be a student.
- The license plate number and a description of any vehicle owned or operated by the sex offender.
- A physical description of the sex offender.
- The sex offense for which the sex offender is registered and any other sex offense for which the sex offender has been convicted.
- A current photograph of the sex offender.

These public sex offender websites must also include:

- 1.) links to sex offender safety and education resources; and
- 2.) instructions on how to seek correction of erroneous information; and
- 3.) a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address and that any such action could result in civil or criminal penalties.

SORNA specifically prohibits posting the identity of a victim of a sex offense, the sex offender's social security number, any arrests not resulting in conviction, and the sex offender's travel and immigration document numbers on the public websites.

F. National Criminal Databases

SORNA requires jurisdictions to provide specific sex offender information to the National Sex Offender Registry (NSOR) or to "other appropriate databases¹⁶" as determined by the United States Attorney General. NSOR is the national database maintained by the Federal Bureau of Investigation (FBI). It compiles information obtained from Tribal, state, and other sex offender

¹⁶ SORNA Section 121(b)(1)

registration programs and makes that information available to law enforcement agencies nationally. NSOR is not accessible by the general public.

NSOR does not contain all of the sex offender information held by each jurisdiction. Rather, it may be necessary to look to other databases that the FBI manages, such as the National Crime Information Center (NCIC), to obtain additional information from the jurisdictions. Further, the United States Marshals Service (the lead federal agency charged with investigating registration violations) is also authorized to establish databases to assist in apprehending sex offenders who violate SORNA.

SORNA directs registration jurisdictions to provide the required sex offender information contained in their registries to:

- 1.) the Federal Bureau of Investigation (FBI);
- 2.) the United States Marshals Service; and
- 3.) “other appropriate databases” designated by the United States Attorney General.

IV. Indian Country Concerns

Roundtable participants identified a number of Indian Country concerns regarding the adoption and implementation of SORNA. As previously noted, Tribes were not consulted prior to the enactment of SORNA¹⁷. Yet, SORNA has a considerable impact on the exercise of Tribal sovereignty. Delegation of Tribal responsibilities under SORNA may result in significant state encroachment on to Tribal lands and may permit unprecedented state access to Tribal court, membership, and other records.

Implementation of SORNA will be expensive for Tribes. Federal funding may not be adequate to assist Tribes with the costs of hardware, software, training, analysis and processing of DNA samples, and personnel.

¹⁷ Executive Order 13175 - Consultation and Collaboration with Indian Tribal Governments, effective November 6, 2000, requires consultation and collaboration with Tribal officials in the development of federal policies that have “tribal implications” in order to strengthen the government-to-government relationship and to reduce the imposition of unfunded mandates on Tribes.

SORNA fails to address Title IX Section 905 of the Violence Against Women Act of 2005 (VAWA). That section of VAWA directs the Attorney General to contract with any Indian Tribe, Tribal organization, or Tribal non-profit organization to develop and maintain a national tribal sex offender registry and a national tribal protection order registry. SORNA does not address how NSOR, NPSOR, NCIC and other national registries and databases will complement or coordinate with the two tribal registries created pursuant to VAWA.

SORNA also requires Tribes to input specific sex offender information into national databases. Title IX, Section 905, of VAWA requires the United States Attorney General to permit tribal law enforcement agencies in sexual assault cases to enter information into and obtain information from the national criminal databases. However, most Tribes lack access to NCIC, NSOR, and other criminal databases necessary to protect their communities and to substantially comply with the SORNA requirements.

A. Amended Resolutions Or Letters From Tribal Governmental Leaders To The Smart Office Addressing Sovereignty Concerns

Tribes were not consulted prior to the adoption of SORNA. SORNA imposes a series of strict deadlines and rigorous demands upon Tribes. Failure to meet the deadlines and requirements results in forced delegation to the state(s), a serious infringement upon tribal sovereignty.

July 27, 2007 was the deadline for Tribes to file a resolution with the SMART Office opting to maintain their own sex offender registration and notification systems. Tribes that “opted in” by that deadline must now submit an implementation plan to the SMART Office (or submit a request for a 1 year extension) no later than April 27, 2009. The SMART Office must then review the Tribal implementation plan and certify that the plan is in substantial compliance with SORNA by July 27, 2009.

Five Tribes “opted out” of SORNA by voluntarily delegating responsibilities to the state(s) in resolutions filed with the SMART Office before July 27, 2007. Nine Tribes failed to file a resolution by July 27, 2007, resulting in an automatic delegation to the state(s).

The Attorney General of the United States may delegate SORNA functions to a state after making a determination that a Tribe has not substantially implemented the requirements of SORNA and that it is not likely to become capable of doing so within a reasonable amount time¹⁸. If the Attorney General or the Tribe delegates to a state, the state then becomes fully responsible for carrying out SORNA registration and notification functions. **Delegation to a state mandates that tribes “provide access to its territory and such other cooperation and assistance as may be needed to enable [the State] to carry out and enforce the requirements of [SORNA].”** This may include access to tribal court records, tribal membership records and any other tribal record likely to be relevant to the Act’s registry, notification and enforcement provisions. Even if a Tribe has tendered a timely resolution “opting in” (i.e. opting to maintain their own registration and notification system) and has timely submitted an implementation plan, they are still at risk of a determination by the Attorney General that delegation to the state(s) is appropriate. Automatic delegation to the states or delegation to the states by decision of the Attorney General results in significant infringement upon Tribal sovereignty.

Problem Solving - 1: Tribes that have “opted in” and have tendered resolutions to the SMART Office have the option of modifying or amending those resolutions to reflect their sovereignty concerns. SORNA does not expressly prohibit Tribal legislative bodies from submitting to the SMART Office amended/modified resolutions (or letters from tribal leaders) that object to SORNA’s federal mandates and to possible delegation of Tribal powers to the states.

Tribes utilizing this option may consider using language in the modified resolution or in the letter indicating that protection of women, children, and communities from sex offenders is a critical issue and that they will adhere to SORNA under protest. The modified resolutions or letters can also include language that SORNA was implemented without consultation with Tribes and that it infringes on Tribal sovereignty. The government-to-government relationship was not respected in the adoption of SORNA and SORNA does not reflect respect for Tribes who are in the best position to recognize the systems needed to protect the safety of their women, children, elders, and communities.

¹⁸ SORNA Section 127 (a)(2)(C)

Inclusion of the legislative history behind the Tribe's adoption of the "opt in" resolution can also be included. Memorializing each Tribe's sovereignty concerns and the decision making process utilized by the Tribes in adopting the SORNA resolution can serve as a roadmap for future tribal governmental leaders and generations.

Problem Solving - 2: Tribes unable to maintain their own registries and unwilling to delegate responsibility to the state(s) have the option of delegating responsibilities to another Tribe, Tribal non-profit corporation, or Tribal consortium. Delegation should be clearly memorialized with a Memorandum of Understanding, Memorandum of Agreement, or Inter-governmental Agreement filed with the SMART office.

Problem Solving - 3: It is critical for Tribal governmental leaders to be provided with technical information and training about the impact of SORNA on Tribal sovereignty as well as the requirements for substantial compliance with the Act. Tribal leaders should be fully informed about the consequences of delegation to the state(s). Information about the importance of preserving and memorializing legislative history should also be included in all training of Tribal leaders and communities.

A template or model for amending or revising tribal resolutions, amendments, and letters should be provided by the SMART Office or by the training and technical assistance providers. Each Tribe is unique. Therefore, these templates should provide suggestions or possible models that Tribes can adapt to reflect the individual concerns of each Tribe.

Technical assistance and training should be provided by the SMART Office as well as by technical assistance providers that are experts on tribal law and sovereignty. It should be widely available and should be delivered through a mix of national conferences, regional conferences, on-site training, teleconferences, web-based support, and telephone consultations.

B. Public Law 280

18 U.S.C. Section 1162 allows a state to exercise criminal jurisdiction over Tribes located within the "the six mandatory PL 280 states." Tribes located in "the six mandatory PL 280 states" include:

- Alaska** All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
- California** All Indian country within the State.
- Minnesota** All Indian country within the State, except the Red Lake Reservation.
- Nebraska** All Indian country within the State.
- Oregon** All Indian country within the State, except the Warm Springs Reservation.
- Wisconsin** All Indian country within the State, except Menominee

Tribes retain concurrent criminal jurisdiction with the state. However, lack of funding for Tribal court and criminal justice systems precludes many Tribes from exercising concurrent jurisdiction.

It is important to note that 18 U.S.C. Section 1162 does not give states civil regulatory authority over the Tribes. Sex offender registration and notification is generally a civil regulatory function¹⁹. However, SORNA now automatically delegates civil regulatory authority over sex offender registration and notification to the state(s) for those Tribes included in the above list.

SORNA, adopted without consultation with the Tribes, extends state power further into Indian Country in the six mandatory Public Law 280 states. It is possible that these “six mandatory Public Law 280 states” may now have access to Tribal court (and other) records and may now enter Tribal lands to implement the Act. SORNA is silent as to whether the affected Tribes retain concurrent civil regulatory authority with the states and may employ their own sex offender registration and notification systems.

Problem Solving- 1: Affected Tribes within the six mandatory Public Law 280 states have the option of tendering resolutions from Tribal legislative bodies or letters from Tribal leadership to

¹⁹ Smith v. Doe, 538 U.S. 84 (2003)

the SMART Office asserting concurrent civil regulatory authority with the state(s). However, these letters or resolutions should also state the Tribes' intent to substantially comply with SORNA's requirements.

Problem Solving - 2: SORNA specifically delegates registration and notification responsibilities to the state(s) for Tribes subject to 18 U.S.C. Section 1162. 18 U.S.C. Section 1162 is silent as to the PL 280 Tribes located in the "optional states" (e.g. Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington). Thus, delegation to the state(s) is not automatic for PL 280 Tribes located in the "optional states." PL 280 Tribes located in the "optional states" may still elect to "opt in" by tendering a resolution to the SMART Office indicating that they will maintain their own sex offender registration and notification systems that comply with SORNA.

Problem Solving - 3: Delegation to the state(s) under SORNA may give states unprecedented access to Tribal records and Tribal lands in order to implement the Act. Tribes subject to mandatory or voluntary delegation to the state(s) can clarify the extent of that access in a Memorandum of Understanding (MOU), Memorandum of Agreement (MOA), or Inter-Governmental Agreement (IGA) with their state counterparts. These agreements can make clear that the Tribe is a sovereign nation entering in an agreement with the state. As is standard legal practice, these documents should be signed by the designated Tribal leader or designated person from the Tribal legislative body. Effective dates, forum choice, choice of law, a clearly defined scope of the agreement, an expressly worded statement that sovereign immunity is not waived under the agreement, provisions for enforcement of the agreement, and other conditions can be included. Cooperative agreements will ensure effective implementation of SORNA's mandates, increase compliance by sex offenders, and improve community notification.

Problem Solving - 4: All states must tender implementation plans to the SMART Office for approval. State implementation plans will not be approved by the SMART Office unless they demonstrate substantial compliance with SORNA. Substantial compliance includes a showing that effective registration and notification procedures for Tribes have been included in the state implementation plan. To facilitate substantial compliance, Tribes should participate in the development of their state's implementation plan and should document and assert their concerns. Failure of a state to meet substantial compliance with SORNA may result in the federal government's withholding of 10-15% of the state's Edward Byrne grant funding. Tribes

may also notify the SMART Office if their concerns are not adequately addressed in the state's implementation plan.

Problem Solving - 5: A template or model for developing or revising Tribal resolutions or letters by Tribal governmental leaders for Public Law 280 Tribes is needed. These templates can serve as a model for Tribes in drafting their own resolutions or letters that reflect the individual concerns of each Tribe.

Technical assistance and training addressing the unique issues for Public Law 280 Tribes should be widely available. Delivery should be effectuated through a mix of national conferences, regional conferences, on-site training, teleconferences, web-based support, and telephone consultations. Technical assistance, training, and models/templates should be provided by the SMART Office and/or by technical assistance providers that are experts on Tribal law sovereignty and that work extensively in Indian Country.

C. Tribal Court Convictions

SORNA registration requirements apply to adults, juveniles who have been prosecuted as adults, and juveniles age 14 or older who have been adjudicated delinquent for an offense comparable to or more severe than the crime of aggravated sexual abuse²⁰ under the federal code²¹. Specified offenses against a minor listed in SORNA Section 111(7) also require registration.²² However, these registration requirements are “a floor and not a ceiling.”²³ Under SORNA, Tribes may expand the types of crimes for which conviction would require a person to register as a sex offender. Tribes may also choose not to classify convictions within a tier

²⁰ See: Section 111(8) of SORNA, codified at 42 U.S.C. §16911(8).

²¹ Aggravated sexual abuse under 18 U.S.C. §2241 of the federal code includes: knowingly causing another person to engage in a sexual act by using force against that other person; or threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim; or engaging in a sexual act with a person under the age of 12.

²² These include: kidnapping or false imprisonment of a minor; solicitation of a minor to engage in sexual conduct; use of a minor in a sexual performance; solicitation of a minor to practice prostitution; video voyeurism involving a minor; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor and related internet activities; and conduct, by its nature, a sex offense against a minor.

²³ The National Guidelines for Sex Offender Registration and Notification Final Guidelines June 2008, United States Department of Justice, Office of the Attorney General, p.6.

system or may classify all convictions as Tier III convictions requiring lifetime registration and community notification.

Tribal court convictions for sex offenses under SORNA are generally to be given the same effect as convictions by other United States jurisdictions. However, SORNA fails to recognize that Tribes maintain a sovereignty status higher than that of the states. It also fails to provide proper respect to Tribal courts by differentiating between Tribal sex offender convictions and convictions by other jurisdictions in one very important way. States may choose not to abide by the tier classification devised by the Tribe if that classification system differs from the three-tiered system set forth in SORNA. For example: A tribal court conviction for a sex offense may require registration for life. However, a state may choose to recognize the offense as a Tier I offense because the maximum penalty that can be imposed by a Tribe for the offense is up to one year of imprisonment. Conversely, if a person has been convicted of a Tier I sex offense in state court, a Tribe that requires lifetime registration for all sex offenders may require that offender to register with the Tribe for life if he relocates to, goes to school on, or is employed on their Tribal lands.

Problem Solving - 1: Tribes may adopt their own classification or tier system taking into consideration their community's resources, needs, and values. The Tribal classification or tier system can also expand the list of crimes for which conviction requires sex offender registration and notification.

Problem Solving - 2: Tribal court orders should be crafted to reflect the complexity of SORNA and the sentencing restrictions of the Indian Civil Rights Act of 1968. To ensure the widest possible enforcement of Tribal court orders, language should be included indicating whether the defendant had a right to counsel pursuant to Tribal law, was represented by counsel, or knowingly and voluntarily waived that right.

Orders should also contain the exact language of the Tribal criminal statute under which the sex offender was convicted and should cite to, whenever possible, any analogous federal criminal statute and the maximum possible penalty for that crime under federal law. It may be helpful to include a statement that a lengthier sentence of imprisonment for the crime would have been

imposed but for the sentencing restrictions of the Indian Civil Rights Act of 1968 prohibiting a sentence of greater than one year of incarceration.

Tribes that do not maintain a tier classification system or that maintain a system different than the three-tier system in SORNA should include in their orders the tier that the conviction falls in under SORNA.

Problem Solving - 3: If a Tribe desires greater recognition and enforcement of Tribal court sex offender convictions, it may modify its code to provide the right to indigent defense counsel for persons charged with sex offenses. Providing indigent defense is costly, but is a key factor in whether state jurisdictions will require registration and notification. Although not currently available, federal funding for Tribal indigent defense services for persons charges with sex offenses in Tribal courts would also ensure greater recognition and enforcement of Tribal sex offender convictions.

Problem Solving - 4: A template or model for Tribal court orders and for changes to Tribal codes providing the right to indigent defense counsel for persons charged with sex offenses is needed.

Technical assistance and training for Tribal court judges on effective drafting of orders should be widely available. Delivery should be effectuated through a mix of national conferences, regional conferences, on-site training, teleconferences, web-based support, and telephone consultations. Technical assistance, training, and models/templates should be provided by the SMART Office and/or by technical assistance providers that are experts on tribal law and sovereignty and that work extensively in Indian Country.

D. JUVENILE CONVICTIONS

SORNA requires registration for juveniles prosecuted as adults. However, it does not require registration for all juveniles adjudicated delinquent for sex offenses for which an adult sex offender would be required to register. Registration is only required for a defined class of older

juveniles adjudicated delinquent for specifically listed sexual assault and child molestation offenses²⁴.

Many Tribal courts seal or destroy juvenile records when juveniles turn the age of majority. Sealing juvenile Tribal court records does not change the status of the conviction under SORNA and does not erase any duty to register under the Act. States may have considerable access to tribal court juvenile records for Tribes that have delegated registration and notification powers to the state and for affected Tribes in the mandatory P.L. 280 states.

SORNA's registration requirements may be applied retroactively because sex offender registration and notification is a non-punitive, civil regulatory measure adopted for public safety purposes. SORNA applies to all sex offenders, including those whose convictions predate July 27, 2006 (the date SORNA was enacted). Thus, current tribal members adjudicated as juveniles who have had their records sealed many years ago may now find that they are required to register as sex offenders.

Problem Solving - 1: Training and technical assistance for tribal prosecutors, tribal court judges, and tribal leaders is critical to ensure substantial compliance with SORNA. To ensure compliance, the following issues should be addressed:

- The ramifications of trying juvenile sex offenders as adults in tribal courts.
- The lifetime registration consequences for juveniles tried for sex crimes which are comparable to 18 U.S.C. 2241.
- Possible state access to juvenile court records for sex offenders, including sealed records, if SORNA registration and notification responsibilities have been delegated to the state(s).
- The importance of carefully crafting tribal codes, court orders, policies, and procedures addressing the sealing and destruction of juvenile court records.²⁵

²⁴ See: Juveniles Required To Register Under SORNA: A Fact Sheet at http://www.ojp.gov/smart/pdfs/factsheet_sorna_juvenile.pdf

²⁵ Section 125(b) of SORNA notes that some jurisdictions may be unable to implement certain provisions of the Act because doing so would be in direct contradiction of their Constitution, as determined by a ruling of that jurisdiction's highest court. If a Tribal Constitution mandates the sealing or destruction of juvenile records, the United States Attorney General may still be able to make a determination that the

- The importance of carefully crafting tribal criminal codes that trigger registration and notification under SORNA.

Technical assistance and training should be delivered through a mix of national conferences, regional conferences, on-site training, teleconferences, web-based support, and telephone consultations. It should be provided by Indian Country legal experts with extensive experience drafting tribal codes, policies, protocols, and procedures.

E. NCIC, NSOR, and NPSOR

SORNA sets forth minimum requirements for registration jurisdictions to identify, collect, and properly disseminate sex offender information that is consistent, accurate, complete, and up to date. SORNA rests on two premises:

- 1.) All collected required information (including photographs, fingerprints, and palm prints) will be in an electronic, digital format; and
- 2.) Jurisdictions will be able to appropriately interface with the FBI's national databases (NSOR and NCIC) so that each jurisdiction's registry information on sex offenders can be obtained and tracked from one jurisdiction to another.

Section 905(a) of the Violence Against Women Act of 2005 authorizes Tribes to access and input information into federal criminal information in cases of domestic violence, dating violence, sexual assault, and stalking. Despite this federal law, most Tribes still lack access to NCIC and NSOR. The cost to the federal government of running T-1 lines to hundreds of Tribal law enforcement agencies is high. All states have T-1 lines, but routinely deny Tribal access. The cost of training, auditing, and certifying Tribal law enforcement agencies on NCIC is similarly high. However, there can be no substantial compliance with SORNA unless all participating jurisdictions are given full access to both NCIC and NSOR.

Tribe is in substantial compliance with SORNA if the Tribe has made good faith efforts to reconcile the Constitutional provision with SORNA and has made, or is in the process of implementing, reasonable alternative procedures or accommodations which are consistent with the purposes of the Act.

Some Tribes have been given partial access to NCIC whereby they are able to obtain information from NCIC, but are unable to input information into the database. This lack of information sharing puts communities nationwide at risk.

Some Tribes with good working relationships with neighboring state jurisdictions have creatively problem solved this issue by providing sex offender information to local sheriffs' offices for input into NCIC. This informal delegation of Tribal authority results in state control of Tribal information. It is temporary and is only a patchwork, partial solution to a greater problem. It may only be available to a small number of Tribes. Lack of full access to NCIC and NSOR for each participating Tribal law enforcement agency effectively treats Tribes as less-than-full partners in the nationwide effort to protect communities.

SORNA requires the federal government, states, Tribes, and territories to work together to create a seamless flow of electronic information. However, the federal government has failed to provide one of the partners, the Tribes, with the access to federal databases necessary to comply with SORNA.

Section 905(b) of the Violence Against Women Act of 2005 authorizes the establishment and funding of a national tribal sex offender registry and a national tribal protection order registry. These registries have not yet been designed or funded. SORNA fails to address how or if NPSOR, NCIC, and NSOR will coordinate with the two new Tribal registries. There is the potential that multiple registries and databases (i.e. NSOR, NPSOR, NCIC, the national tribal sex offender registry, and the national tribal protection order registry) may result in duplication of information or user error.

Problem Solving - 1: Full access to NCIC and NSOR for states, Tribes, territories, and the District of Columbia will ensure a seamless flow of electronic information and improve the safety of communities nationally. Tribes can comply with the mandates of SORNA once they are provided with the capability to input information (such as Tribal convictions) into and to obtain information from the federal databases.

Problem Solving - 2: T-1 lines providing access to the federal databases can be run directly to participating Tribal law enforcement agencies. Alternatively, full Tribal access to NCIC and

NSOR can be provided through existing state T-1 lines. Tribes that reach out to their states counterparts and are denied access to a state T-1 line should document and report this directly to the SMART office and to the FBI.

Problem Solving - 3: The Office on Violence Against Women (OVW) is required by law to hold an annual OVW-Tribal Consultation with the Tribes. This is an ideal opportunity for Tribes to have respectful, meaningful dialogue with federal law enforcement agencies (i.e. the FBI, the Office of the United States Attorney General, the United States Marshals, and the Bureau of Indian Affairs) about the effective sharing of sex offender information. Participation of the FBI, U.S. Attorney, U.S. Marshals, and the Bureau of Indian Affairs at the annual OVW-Tribal Consultation can open lines of communication and further implementation of SORNA.

Problem Solving - 4: Training and technical assistance should be provided to Tribes by Indian Country legal experts to develop templates for drafting MOUs, IGA, and MOAs between Tribes and states on T-1 line access. Additionally Tribal law enforcement should be provided with training and technical assistance so that they can fully meet all requirements for accessing and inputting information in to NCIC and NSOR.

Problem Solving - 5: Fully funding and implementation of the national tribal sex offender registry will increase compliance with SORNA. Dialog and discussion between the Tribes and relevant federal agencies (e.g. OVW, FBI, U.S. Attorney, etc.) will minimize the potential for user error or duplication of information between NSOPR, NCIC, NSOR, and the national tribal sex offender registry.

F. SORNA and Tribal Jurisdiction

Section 141(a) of SORNA enacted a new federal criminal offense for failure to register as a sex offender.²⁶ The new law imposes a penalty of up to 10 years in federal prison²⁷ for convicted sex offenders (required to register under SORNA) who knowingly fail to register or to update a registration. The new law applies only when federal jurisdiction is triggered such as 1.) when a

²⁶ 18 U.S.C. Section 2250

²⁷ A sentence of between 5 – 30 years of imprisonment may be imposed by the federal court if the offender commits a crime of violence.

sex offender has been convicted in federal court of a sex offense requiring registration and 2.) when a sex offender (required to register and/or to update registration) travels in interstate or foreign commerce, i.e. crosses state, tribal, or international borders. The U.S. Marshals Office is tasked with investigation and enforcement of the new federal law.

Section 113(e) of SORNA also requires that states, the District of Columbia, and the five principal U.S. Territories (but not Indian Tribes) enact laws imposing a maximum term of imprisonment greater than one year on sex offenders who fail to comply with SORNA's registration requirements. Tribes are specifically excluded from this provision of SORNA because the Indian Civil Rights Act of 1968 prevents tribes from imposing terms of imprisonment greater than one year²⁸.

Sex offender registration and notification is a civil regulatory power²⁹. The power to regulate necessarily includes the power to enforce that regulation. SORNA anticipates that Tribes will require registration of all sex offenders within their jurisdiction and that they will criminalize failure to comply with the Act. It is silent as to whether Tribes may criminally enforce failure to register against all sex offenders, including non-Indians.

However, Tribes may impose civil sanctions over non-Indians who fail to comply with SORNA's registration requirements. In order to exercise civil jurisdiction over a non-Indian sex offender who has failed to comply with SORNA, the offender must have entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or "other arrangements;³⁰" or the failure to register must threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe³¹. Regulation of sex offenders on tribal lands does have a direct effect on the political integrity, health, and welfare of the Tribe, regardless of whether the sex offender has entered into a consensual relationship with the Tribe or its members.

Among the civil remedies that may be imposed by Tribes against non-Indian sex offenders who fail to comply with SORNA and/or Tribal registration requirements are:

²⁸ The National Guidelines For Sex Offender Registration And Notification, Section XIII, *supra*

²⁹ *Smith v. Doe*, *supra*.

³⁰ *Montana v. United States*, 450 U.S. 544 (1981)

³¹ *Montana v. United States*, *supra*.

- Holding the sex offender in civil contempt of court, including the imposition of fines and/or detention until the sex offender substantially complies with registration requirements.
- Imposing monetary fines.³²
- Ordering community service including traditional forms of community service such as cutting wood for an elders' community center.
- Shaming the offender in order to publicize the sex offender's wrongdoing (e.g. requiring him to wear a sign for 30 days that says "I failed to register as a sex offender as required by Tribal and federal law.")
- Forfeiting property used in the commission of the crime (e.g. forfeiture proceedings against a vehicle used to transport the offender across state-Tribal borders where he was required to register.)
- Excluding or banishing the sex offender from Tribal lands.
- Civilly committing the sex offender to a mental health facility for an indeterminate amount of time or compelling him to receive mental health treatment³³.
- Ordering the sex offender to attend other forms of treatment or classes.
- Civilly arresting the sex offender and detaining him for a reasonable amount of time until the Tribal court can convene an evidentiary hearing to determine whether a violation has occurred.

Tribes may also exercise civil regulatory powers against sex offenders including: removing the name of the sex offender from the lease of a Tribal housing property; rescinding a business license with the Tribe; rescinding hunting or fishing licenses or privileges; and prohibiting employment with the Tribe.

³² The Indian Civil Rights Act mirrors the 8th Amendment to the United States Constitution in its prohibition against the imposition of *excessive* fines. 25 U.S.C. §1302 (7).

³³ The court must typically find, by clear and convincing evidence, that the person is an immediate danger to himself or others, prior to issuing the order, because of mental illness. Counsel must be provided (if the person cannot afford counsel) and due process must be complied with during the proceedings. The purpose of civil commitment must be to obtain treatment for a person with a mental disorder who, as a result of that disorder, is a danger to himself or others.

The civil commitment must be ordered pursuant to a hearing and the person must be allowed an independent psychiatric or psychological examination. It must be reviewed periodically. Treatment must be provided at the facility where the individual has been committed involuntarily. This civil remedy can be extremely expensive.

Problem Solving - 1: Tribal implementation plans submitted to the SMART Office for approval should carefully set out enforcement provisions to be used by the Tribe. Tribal implementation plans may include the right to appointed indigent defense counsel for sex offenders criminally charged with failure to register, meaningful appeals processes for offenders convicted of failing to register, and civil remedies for failure to register or to update registration.

Problem Solving - 2: The United States Marshals and all Tribes should develop effective collaborative relationships, policies, and procedures to ensure enforcement of the new federal crime of failing to register as a sex offender.

Problem Solving - 3: Tribes should update codes to ensure that criminal and civil jurisdiction may be exercised over sex offenders who fail to register or to update registration under Tribal law.

Problem Solving - 4: Training and technical assistance should be provided by Indian Country legal experts on code development and the development of SORNA implementation plans. Templates or models for code provisions and implementation plans should also be provided to Tribes. All training and technical assistance should be delivered through a mix of national conferences, regional conferences, on-site training, teleconferences, web-based support, and telephone consultations.

G. Legislation and Policy Recommendations

Federal Policy and Legislation: Congress can increase safety for communities nationwide and promote effective implementation of SORNA by recognizing Tribes as equal partners in the national response to sex offenders. Lifting the Indian Civil Rights Act of 1968's sentencing restrictions and clarifying Tribal enforcement powers under SORNA are important steps in honoring the role that Tribes play in keeping communities safe.

SORNA should be amended so that Tribal convictions are not assigned Tier I status by states, the 5 principal territories, and the District of Columbia. Rather, these jurisdictions should, at a

minimum, enforce the classification and tier system assigned to the sex offender by the Tribe. If this amendment is enacted, Tribes should receive training as to how this change would apply to juvenile convictions.

SORNA mandates substantial compliance of participating Tribal jurisdiction's registration and notification systems. Implementation of SORNA for Tribes can be costly. Under the federal trust responsibility, the federal government should provide Tribes with sufficient funding to cover the costs of hardware, personnel, training and other associated costs necessary for implementation of SORNA. Funding should supplement current levels of federal funding for Indian Country. The SMART Office will absorb the cost of developing and distributing software key to the implementation of SORNA implementation. However, it is imperative that the software be provided to the appropriate contact within each Tribe.

Some Tribes do not maintain their own Tribal courts and utilize CFR courts instead. SORNA does not mention CFR courts in the legislation. Clarification by Congress as to whether the Act applies to CFR court convictions is necessary.

The Bureau of Indian Affairs provides law enforcement for many Tribes. Federal legislation requiring annual in-service training on sexual assault, domestic violence, stalking, sexual abuse of elders, sexual abuse of persons with disabilities, and child sexual abuse will significantly improve the effective investigation of these crimes in Indian Country. The Office on Violence Against Women, Office of Victims of Crime, and other federal agencies sponsor training on these topics in Indian Country. BIA law enforcement could participate in these training events or develop their own training curricula.

The Bureau of Indian Affairs provides training and certification of Tribal law enforcement officers at their Academy in Artesia, New Mexico. There should be increased coordination between the BIA and state law enforcement certification agencies to promote cross-certification of Tribal law enforcement officers with the state.

Despite federal laws that mandate notification to victims and Tribal jurisdictions when a sex offender is released from federal custody, the Federal Bureau of Prisons routinely fails to inform

Tribes. Rather, the Federal Bureau of Prisons notifies the state only upon the sex offender's release. This endangers Tribal communities and violates SORNA.

The United States Attorney plays an important role in providing safety and justice for Tribal communities. It should prioritize prosecutions for sex offenders who violate the new federal law for failing to register or to update registration. The U.S. Attorney must be accountable to the Tribes that it serves. Tribes should be provided with a copy of the U.S. Attorney's Manual and an annual report containing the number of referrals made to the U.S. Attorney and the number of declinations issued by that office. Each office of the U.S. Attorney should designate an Indian Country contact and should designate an attorney within each office as a sex crimes prosecutor. Sex crimes prosecutors should not decline to prosecute simply because of delayed disclosure by victims or because no sexual assault forensic examination was performed.

Tribal, state, and federal courts in Arizona currently participate in a quarterly forum to develop policies, rules, and procedures based upon mutual respect and recognition. This type of multi-jurisdictional committee can be extremely effective in addressing issues or challenges related to implementation of SORNA. Law enforcement multi-jurisdictional committees can also assist with intelligence gathering and dissemination and in improved collaboration across jurisdictions.

The Indian Health Service (I.H.S.) is an additional federal agency that has failed to promote health, safety, and justice for Native victims of sex crimes. I.H.S. frequently fails to cooperate with the criminal justice system by not responding to requests to produce important forensic and other evidence to Tribal, state, and federal prosecutors. I.H.S. physicians and medical personnel routinely refuse to testify in Tribal sexual assault and sexual abuse cases. This makes it difficult or impossible for Tribal prosecutors to obtain convictions against sex offenders and jeopardizes the safety of Indian Country and communities across the nation.

There is a severe shortage of sexual assault nurse examiners at I.H.S. medical facilities. Few I.H.S. facilities are open 24 hours a day to treat and examine victims. Relatively few have implemented an effective referral system to neighboring healthcare facilities for timely administration of forensic examinations when those examinations are unavailable through I.H.S. The end result is that Indian victims are routinely denied sexual assault forensic examinations.

Perpetrators are not held accountable. Victim health and safety is compromised. Justice is denied to victims.

I.H.S. should be fully accountable to the Tribal communities and victims they serve. Increased funding and training for sexual assault nurse examiners is a sorely needed first step. Additionally, there needs to be a policy shift within the agency to prioritize the provision of services to victims of sex crimes. There must also be full cooperation with the criminal justice system. I.H.S. must be a collaborative partner, not a barrier, to obtaining safety, health, and justice in Indian Country.

IV. CONCLUSION

Tribal, federal, and state systems must always keep the focus on safety and dignity for Indian victims of sex crimes. The government to government relationship must be respected. SORNA was enacted to protect communities and to prevent sex crimes. Meaningful and respectful collaboration between jurisdictions can honor victims and can take our entire nation closer to achieving SORNA's goals.