

Considerations and Suggested Practices for Implementing Sexual Assault Response Reform on Tribal Lands

Federally recognized tribes throughout the United States are eligible to receive federal funding in support of sexual assault response reform through the Bureau of Justice Assistance (BJA) National Sexual Assault Kit Initiative (SAKI). However, the ability for most tribes to obtain and use these funds is impacted by limited resources and logistical issues related to concurrent criminal jurisdiction. In writing this brief, SAKI collaborated with national tribal law and policy experts, state tribal community leaders and advocates, federal agencies with primary duty of care, and tribal medical service providers. This brief is not intended to fully capture all nuances associated with sexual assault investigations for every tribe. Rather, it acknowledges the difficulties presented to tribal governments seeking to use federal funding to address sexual violence on tribal lands and offers guidance for a collaborative approach to optimize resources in support of sexual assault response reform.

Criminal Jurisdiction

There are 574 federally recognized tribes throughout the United States (Bureau of Indian Affairs, n.d.-b). Each federally recognized tribe is a sovereign, self-governing state, meaning the tribe has the authority to create its own criminal code and to decide what crimes are prosecutable in tribal court (Bureau of Indian Affairs, n.d.-a). Historically, jurisdiction over crimes committed on tribal lands depended on the nature of the crime and was shared between the federal government and tribal entities. In 1953, the U.S. Congress enacted Public Law 83-280 (PL280), which granted certain states jurisdiction to investigate and prosecute crimes committed on tribal lands (Administration for Native

Americans, n.d.). This legislation divided federally recognized tribes into **PL280** tribes and **non-PL280** tribes.

Depending on the type of crime committed and whether the parties involved are tribal members, a PL280 tribe may have concurrent jurisdiction with that of the state in which it resides, meaning that the state may have primary criminal jurisdiction, but the tribe may also have the authority to charge its members in tribal court (Office of Tribal Justice, 2000).

Similarly, for non-PL280 tribes, federal jurisdiction may be concurrent to the tribe. If a tribal member sexually assaults another tribal member on tribal lands, concurrent jurisdiction allows for prosecution in both tribal and federal court. Because all federally recognized tribes are individual, sovereign states, the **dual sovereignty doctrine** means the concept of double jeopardy does not apply because the alleged perpetrator is subject to the laws of the U.S. federal government and the tribe separately and concurrently; one act can violate both governments' laws and be subject to prosecution by each (Office of Tribal Justice, 2000).

Determining what party has jurisdiction over a crime occurring on tribal lands and whether a crime will be charged concurrently is often hindered by miscommunication across agencies that creates confusion about investigative responsibilities (including victim engagement). The authority of a tribe to maintain criminal jurisdiction largely depends on whether the offender, victim, or both are tribal members, and the decision to concurrently investigate and prosecute a crime relies on the availability of resources. Table 1 summarizes concurrent jurisdiction considerations for both PL280 and non-PL280 tribes for crimes committed on tribal lands.

Table 1: Summary of Jurisdiction for Crimes Occurring on Tribal Lands of PL280 and Non-PL280 Tribes

Offender	Victim	Jurisdiction for PL280 Tribes	Jurisdiction for Non-PL280 Tribes
Non-tribal member	Non-tribal member	State jurisdiction is exclusive of federal and tribal jurisdiction	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-tribal member	Tribal member	<i>Mandatory</i> states have jurisdiction exclusive of federal and tribal jurisdiction. <i>Optional</i> states share jurisdiction with the federal government. There is no tribal jurisdiction.*	Federal jurisdiction is exclusive of state and tribal jurisdiction. See 18 U.S. Code (USC) § 1152 for more information.
Tribal member	Non-tribal member	<i>Mandatory</i> states have jurisdiction exclusive of the federal government but not necessarily of the tribe. <i>Optional</i> states have concurrent jurisdiction with the federal courts.*	If the offense is listed in 18 USC § 1153 , there is federal jurisdiction exclusive of the state but probably not of the tribe. If the offense is not listed in 18 USC § 1153, there is federal jurisdiction exclusive of the state but not of the tribe, under 18 USC § 1152.
Tribal member	Tribal member	<i>Mandatory</i> states have jurisdiction exclusive of the federal government but not necessarily of the tribe. <i>Optional</i> states have concurrent jurisdiction with tribal courts for all offenses and concurrent jurisdiction with the federal courts for all offenses listed in 18 USC § 1153 .*	If the offense is listed in 18 USC § 1153, there is federal jurisdiction exclusive of the state but probably not of the tribe. If not listed in 18 USC § 1153, tribal jurisdiction is exclusive.

*PL 280 required six states to assume full jurisdiction to investigate and prosecute crimes committed by or against Indians on tribal lands. These “mandatory PL280 states” are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. PL280 also permitted states to opt for a similar jurisdiction with federal approval (“optional states”).

Sources: Department of Justice, 2020; National Institute of Justice, 2008.

Training and Resources

In addition to jurisdictional issues, limited resources and training opportunities can also hinder a tribe’s ability to properly investigate and prosecute sexual assault cases. Each tribe has its own needs related to criminal investigations dependent upon the availability of tribal criminal justice entities, staffing to support those entities, funding, and access to training.

When a sexual assault is committed on tribal lands, access to victim services (e.g., tribal sexual assault nurse examiners [SANEs]) is often not immediate and can potentially require lengthy travel times. If a sexual assault kit (SAK) is collected, not every tribe has its own law enforcement agency to oversee the investigation. Of the 574 federally recognized tribes throughout the United States, there are only 258 tribal law enforcement agencies with at least one full-time sworn officer with the authority to make arrests (Bureau of Justice Statistics, n.d.). For those tribes with their own investigating agency, law enforcement personnel are often rotated out of their positions within months of arriving due to staffing shortages. In addition, limited funding restricts opportunities to train new investigators.

Suggested Steps toward Sexual Assault Response Reform on Tribal Lands

Tribal jurisdictions are eligible to apply for SAKI funding by responding to the [annual grant solicitation](#) issued by BJA. Because of the level of effort and skillsets needed to respond to such solicitations, tribal jurisdictions may consider it more efficient and appealing to take advantage of SAKI resources already available to them through current statewide sites (if applicable).¹ Given the many nuances of criminal jurisdiction and the variance in available resources, the activities that SAKI funds and resources can support will likely differ across tribes. For example, for a tribe with its own criminal code and criminal justice system, SAKI funds may be effective in supporting the creation of a tribal specific Sexual Assault Response Team (SART), whereas a tribe that relies on federal partners for investigating and prosecuting sexual assaults might best use SAKI funding to create a victim advocacy program to support tribal member victims. Regardless of jurisdiction, there may be opportunities for SAKI funds to pay personnel overtime to identify, inventory, and assess SAKs held in storage facilities and to submit them for testing by state or private laboratories.

¹To determine whether a tribal jurisdiction falls within the purview of a current statewide SAKI site, please visit <https://sakitta.org/sakisites/> or contact www.sakitta@rti.org

Table 2: Suggested MDT Members and Roles

Discipline	Role
<p>Law Enforcement Investigator(s) <i>Consider tribal, federal, state, and local police</i></p>	<ul style="list-style-type: none"> ◆ Provide information on current policies and procedures related to investigating sexual assaults on tribal lands. ◆ May provide insight into the scope of unsubmitted SAKs. ◆ Help identify gaps in services and training to support trauma-informed investigations. <p>If the tribe is PL280, a representative from state law enforcement should be present to relay the roles and responsibilities of the state. If the tribe is non-PL280, the assigned tribal Bureau of Indian Affairs or FBI liaison should relay the roles and responsibilities of the federal investigator.</p>
<p>Prosecutor(s) <i>Consider Assistant U.S. Attorney liaisons, state, and county prosecutors</i></p>	<ul style="list-style-type: none"> ◆ Provide insight into the legal process where parallel judicial systems are in place. ◆ Relay how DNA can support a sexual assault prosecution. ◆ Provide guidance on how SAKI funds may be used, including identifying potential legal barriers that should be considered before using federal funding for sexual assault investigations.
<p>Advocate(s) <i>Consider tribal victim advocates, state Coalition Against Sexual Assault (CASA) representatives, community-based advocates</i></p>	<ul style="list-style-type: none"> ◆ Provide guidance on current gaps in victim services and promotes support of victim services. ◆ Help provide referrals or delivery of services in concurrent jurisdictions.
<p>SANE(s) <i>Consider tribal SANEs, state SANE liaisons, and community-based SANEs</i></p>	<ul style="list-style-type: none"> ◆ Provide training on SANE collection process. ◆ Identify potential gaps in services. ◆ Support victim recovery.
<p>Representative(s) from current SAKI grantee agency <i>(if applicable)</i></p>	<ul style="list-style-type: none"> ◆ Provide information on SAKI funding and resources currently available to tribes through collaborative efforts with existing grantees. ◆ Provide guidance on how these resources may be used to support victim services and investigative activities.
<p>Others</p>	<p>As needed case by case, the MDT should draw in subject matter experts to enhance understanding.</p>

To determine how SAKI funds and resources can be applied to sexual assault response reform on tribal lands, it is recommended a multidisciplinary team (MDT) convene to (1) assess the current response to sexual assault crimes on tribal lands and (2) identify the investigative and prosecutorial needs. Table 2 lists suggested MDT participants and outlines each member’s role.

Suggested MDT communication strategies

The following questions can help guide the MDT’s conversation to determine the current procedures for sexual assault investigations and to identify gaps in this process:

- ◆ Are SAKs being collected? If so, by whom? What are the current criteria to collect and submit an SAK? What is the SAK collection process? Where are the SAKs sent after collection?
- ◆ Are there SAKs that have not been submitted for processing? If so, where are they and what barriers exist to submitting them for processing?
- ◆ What is the current statute of limitations for sexual assault? Are there concerns related to the statute of limitation that should be considered?
- ◆ Are victim services offered? If so, what types of victim services are currently available? When are these services offered, (e.g., when the SAK is collected or after)? Who offers these services (i.e., tribal services or services of a concurrent jurisdiction)?
- ◆ What does victim engagement for participation look like on tribal land?

- ◆ What laboratory is processing SAKs for Combined DNA Index System (CODIS) upload? How are the results of testing returned and to whom? If there are concerns with the current laboratory, can other laboratories be considered? What are the barriers to using other laboratories for SAK processing?
- ◆ Is there a current system in place to track SAKs through the testing process?
- ◆ Who is notified of CODIS hits in sexual assault investigations? How is this information preserved?
- ◆ What policies or protocols are in place regarding who follows up on CODIS hits?
- ◆ What trainings are needed to meet law enforcement investigative needs, increase and improve victim engagement, and improve evidence collection and retention?

Once gaps in the current response to sexual assault have been identified, the MDT can work to prioritize needs and develop both long-term and short-term strategies to address these needs by obtaining grant funding or through collaboration with a SAKI-funded agency.

Conclusion

BJA's nationwide SAKI program aims to support tribal agencies in pursuit of sexual assault response reform to ensure sustainable, trauma-informed, and victim-centered practices. Nuances such as concurrent jurisdictions and limited resources may impact the ability to apply for and/or use SAKI funding. A cross-collaborative effort between concurrent jurisdictions to identify current roles and responsibilities of all parties involved, as well as to identify gaps within the current investigative process, can provide a foundation for how agencies may be able to enhance the current response to sexual assault on tribal lands.

Authors

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Available Training and Resources for Tribal Jurisdictions

National Sexual Assault Kit Initiative: <https://sakitta.org/>

U.S. Indian Police Academy: <https://www.bia.gov/bia/ojs/indian-police-academy>

Other Funding Sources for Tribal Jurisdictions

SAKI overview: <https://bj.a.ojp.gov/program/saki/overview>

Tribal justice and safety grants: <https://www.justice.gov/tribal/grants>

U.S. Office on Violence Against Women, tribal affairs page: <https://www.justice.gov/ovw/tribal-affairs>

U.S. Office for Victims of Crime: <https://ovc.ojp.gov>

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