



United States Government Accountability Office
Washington, DC 20548

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Congressional Requesters

Subject: Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds

The Tribal Law and Order Act of 2010 (TLOA) recognizes that instances of crime have increased on Indian reservations, and concerns have been raised as to whether tribal courts are able to impose sentences stringent enough to help deter such criminal activity.¹ Prior to the enactment of TLOA, federal law limited tribal courts to imposing prison terms of no greater than 1-year per offense for convicted defendants. We reported in February 2011 that tribal officials said that the 1-year limit on prison sentences did not serve as an effective deterrent against criminal activity and may have contributed to the high levels of crime and repeat offenders in Indian country.² We also reported that, as a result of the limited sentencing authorities of tribal courts, tribes will often rely on the federal government to investigate and prosecute more serious offenses, such as homicide, because a successful federal prosecution of such offenders could result in a lengthier prison sentence and better ensure justice for victims of crime in Indian country. However, acknowledging that tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country, TLOA states that its purpose is to, among other things, empower tribal governments to effectively provide public safety and reduce the prevalence of violent crime in Indian country. For example, TLOA authorizes tribal courts to impose upon certain convicted defendants terms of imprisonment of up to 3 years per offense, provided the tribes afford certain rights to defendants, which are discussed below.

We reported in May 2012 on the extent to which the Department of Justice (DOJ) and the Bureau of Indian Affairs (BIA) within the Department of the Interior (DOI) provide federal funding and other assistance that may be used to support indigent defense, including in Indian country.³

¹See Pub. L. No. 111-211, tit. II, § 202, 124 Stat. 2258, 2262-63 (2010) (recognizing, for example, that Indian tribes have faced significant increases in instances of domestic violence, burglary, assault, and child abuse as a direct result of increased methamphetamine use on Indian reservations).

²GAO, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*. GAO-11-252 (Washington, D.C.: Feb. 14, 2011). "Indian country" refers to all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all existing Indian allotments, including any rights-of-way running through an allotment. See 18 U.S.C. § 1151.

³GAO, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*. GAO-12-569 (Washington, D.C.: May 9, 2012). We used "indigent defense" to refer to any direct and indirect activities that help ensure indigent defendants are afforded counsel in criminal cases. These activities may include hiring public defenders, investigators, or other support staff; providing training for public defenders; making technological improvements in defenders' offices or systems; or providing loan repayments to help retain public defenders.

Federal law does not entitle an indigent Indian defendant prosecuted in a tribal court to a licensed defense attorney provided at the tribal government's expense unless a sentence in excess of 1-year per offense as authorized under TLOA is sought. Therefore, as part of our indigent defense review and in response to your request, we asked tribes about their plans to implement this as well as the other requirements necessary to exercise TLOA's new sentencing authority. Specifically, this report addresses the following questions:

(1) To what extent did selected tribes report that they exercise, or have plans to exercise, TLOA's new sentencing authority, and that they implement, or have plans to implement its associated requirements, and what challenges, if any, did the selected tribes report in doing so?

(2) What types of assistance did federal agencies report that they provide to assist tribes in exercising TLOA's new sentencing authority, and what, if any, federal assistance did selected tribes report that they would like to receive?

To answer both objectives, we surveyed all 171 tribes (out of the 566 federally-recognized tribes as of January 3, 2012) that (1) reported allocating Tribal Priority Allocations (TPA)—federal funding that BIA distributes to tribes and that tribes may allocate to a variety of activities—to their tribal courts (referred to as the "Tribal Courts TPA") (142 out of 171), (2) were awarded the Edward Byrne Memorial Justice Assistance Grant (JAG) by DOJ (2 out of 171), or (3) both allocated funding to their Tribal Courts TPA and received JAG funding (27 out of 171) in any fiscal year from 2005 through 2010.⁴ We selected these tribes because they allocated federal funding to their Tribal Courts TPA, and therefore operated tribal courts during this time period. In addition, we selected these same tribes for surveys we conducted from December 2011 through February 2012 for the purposes of our review of the extent to which federal funding is used to support state, local, and tribal indigent defense services.⁵ In developing the two questionnaires sent to Tribal Courts TPA and JAG recipients, we consulted with 2 tribal associations and pre-tested the questionnaires with 4 tribes. In our surveys, we asked the tribes about their plans to exercise the new sentencing authority TLOA provides. Generally, tribal court officials such as the chief judge, court administrator, or court clerk completed the questionnaire. We attempted to contact nonrespondents multiple times by email, phone, and fax during the survey to encourage them to complete and submit the questionnaire, and conducted abbreviated phone interviews on key questions with a subset of those tribes. Of the 171 tribes, 109 responded to the section of our surveys regarding TLOA's new sentencing authority, thus resulting in a 64 percent response rate. (See encl. I for our survey questions and results.) Because we surveyed only those tribes that allocated or received federal funding for their tribal courts, and not all of them responded, the results from this survey cannot be generalized to all tribes; however, the responses provided us with information on the perspectives of selected tribes' plans to exercise the new sentencing authority.⁶ We also interviewed the following entities regarding the impact of

⁴BIA publishes a list of all Indian tribes that are recognized and eligible to receive funding and services from BIA by virtue of their status as Indian tribes (referred to as "federally-recognized tribes"). We sent one survey to tribes that reported allocating TPA funding to Tribal Courts, and a separate survey to tribes that received JAG. For tribes that received both surveys, we asked that one representative from the tribe complete the section related to TLOA. We did not include Courts of Indian Offenses (referred to as "CFR courts") in our survey of tribal courts because CFR courts constitute direct services administered by BIA officials. Based on discussions with BIA officials, we also did not include tribal courts in BIA's Alaska region.

⁵See GAO-12-569.

⁶In addition, the target population was tribes using BIA or DOJ funding, and not all tribes. For example, in some instances, tribes may operate tribal courts without receiving JAG funding or allocating funding to the Tribal Courts TPA.

the new sentencing authority on tribal public safety and justice programs: BIA officials responsible for activities related to tribal courts; DOJ officials responsible for advising the department on tribal matters, interacting with tribes, and administering tribal grant funding; tribal experts, such as officials from the National Congress of American Indians (NCAI), because it serves as the major national tribal government organization; and tribal court officials at 3 tribes we visited, at 2 additional tribes with which we pretested our survey, and at 9 other tribes because they reported allocating federal funding for indigent defense in our survey. In selecting the tribes we visited or with which we conducted pretests, we considered diversity across factors such as their location, the amount and type of federal funding they received, and whether the tribe employed a public defender to help ensure that we obtained a range of perspectives. The views of these tribes are not generalizable, but provide valuable insights into selected tribes' decisions to exercise the new sentencing authority.

We conducted this performance audit from February 2012 through May 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results in Brief

Among the tribes that responded to our survey (109), none reported that they were exercising TLOA's new sentencing authority, and, in open-ended responses, many tribes (86 of 90, or 96 percent) reported challenges to exercising this authority due to funding limitations. Tribes were relatively evenly split among those that reported that they have plans to exercise the new authority (36 of 101, or 36 percent); that they did not know the tribe's plans to exercise the new authority (34 of 101, or 34 percent) because, for instance, the tribal council has not yet made a decision; and that they did not have plans to do so (31 of 101, or 31 percent).⁷ In addition, 64 percent of selected tribes (70 of 109) reported implementing at least half of the requirements necessary for exercising the new sentencing authority, but reported challenges in implementing other requirements. Specifically, these tribes most frequently reported implementing the requirement to maintain a record of the criminal proceeding, and least frequently reported providing the defendant a licensed defense attorney. For example, 8 tribes that described challenges to exercising the new sentencing authority reported challenges with the costs of implementing the requirements associated with the sentencing authority. In particular, 3 tribes reported challenges with the costs of providing a licensed judge with sufficient legal training as required under TLOA. As a result, tribal courts may be unable to impose prison sentences of over 1 year to 3 years per offense—as TLOA provides—and possibly provide a more effective deterrent to criminal activity in Indian country.

DOJ and BIA provide funding and technical assistance to tribes that can be used to help them exercise the new sentencing authority, and tribes reported that they desire additional funding and technical assistance from the federal government for this purpose. However, tribes do not always have a clear understanding about their eligibility for federal funding sources available to help them exercise the new sentencing authority. In its fiscal year 2011 solicitation for the Tribal Civil and Criminal Legal Assistance (TCCLA) grant, DOJ stated that consistent with its authorizing statute, eligibility is "limited to tribal and non-tribal non-profit (Internal Revenue Code (I.R.C.) § 501(c)(3)) entities that provide legal assistance services for federally recognized

⁷The total does not equal 109 because, although 109 tribes responded to our survey, 8 did not respond to this question.

Indian tribes, members of federally recognized Indian tribes, or tribal justice systems pursuant to the federal poverty guidelines.”⁸ However, 6 of the 9 tribes or tribal entities that applied for TCCLA in fiscal year 2011 were ineligible—because they were not 501(c)(3) non-profit entities—yet DOJ did not explain to the tribes that they were ineligible for funding because they were not such entities. As a result, these tribes used resources to prepare applications explaining their intended use of the funding—which, for 4 of the 6 tribes, was to meet requirements necessary for exercising the new sentencing authority—when they were not eligible for the funding. DOJ officials agreed that they could update the letter used to inform applicants that they were not selected for funding to make it clearer that only 501(c)(3) nonprofit entities are eligible. Further, internal control standards state that agency management should ensure that there are adequate means of communicating with external stakeholders that may have a significant impact on the agency achieving its goals.⁹ By taking actions to better clarify that applicants must be 501(c)(3) non-profit entities to be eligible for TCCLA, both during the application process and when applicants are notified of their ineligibility, DOJ could better ensure that the tribes and DOJ will not use resources to prepare, review, and deny applications for grants for which tribes or certain tribal entities are not eligible. Moreover, tribes would also be better positioned to make informed decisions about the available funds to pursue.

We are recommending that DOJ take actions—both during the application process and when applicants are notified of their ineligibility—to better clarify the circumstances under which applicants, including tribes or tribal entities, are eligible or ineligible for TCCLA funds. DOJ concurred with the recommendation.

Background

Whether or not tribes have jurisdiction to investigate and prosecute crimes that occur in Indian country depends on various factors, including the nature of the crime, whether or not the alleged offender or victim is Indian, and whether jurisdiction has been conferred on a particular entity by, for example, federal treaty or statute.¹⁰ As a general principle, the federal government recognizes Indian tribes as “distinct, independent political communities” that “remain a separate people, with the power of regulating their internal and social relations,” which includes enacting substantive law over internal matters and enforcing that law in their own forums.¹¹ The federal government, however, has authority to regulate or modify the power of self-government that tribes otherwise possess, and has exercised this authority to establish an intricate web of jurisdiction over crime in Indian country.¹² For example, tribal and federal jurisdiction is generally

⁸TCCLA provides funding and technical assistance to assist tribal jurisdictions in improving their justice systems. See e.g. 25 U.S.C. § 3663 (authorizing tribal criminal assistance grants).

⁹See GAO, *Internal Control: Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

¹⁰For example, the Major Crimes Act, as amended, provides the federal government with criminal jurisdiction over Indians charged with felony-level offenses enumerated in the statute. See 18 U.S.C. § 1153. Such felony-level offenses include murder; manslaughter; maiming; felony provisions of the Sexual Abuse Act of 1986, as amended, incest; assault with intent to commit murder; burglary; and robbery, among others.

¹¹See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). See also 25 U.S.C. § 1301(2) (defining an Indian tribe’s power of self-government).

¹²See *United States, v. Lara*, 541 U.S. 193, 200-01 (2004) (referencing the Indian Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, and the Treaty Clause, U.S. CONST. art II, § 2, cl. 2, as authority for the federal regulation of Indian affairs). The General Crimes Act, the Major Crimes Act, and Public Law 280 are the three federal laws central to the exercise of criminal jurisdiction in Indian country. See 18 U.S.C. §§ 1152 (codifying the General Crimes Act, as amended), 1153 (codifying the Major Crimes Act, as amended), and 1162 (codifying Public Law 280, as amended).

concurrent, meaning both the tribal governments and federal government, independent and exclusive of the other, may prosecute the alleged offender, where the alleged offender is Indian but the victim is non-Indian. Federal jurisdiction is generally exclusive where the alleged offender is non-Indian and the victim is Indian; and depending on the nature of the crime, tribal jurisdiction may be exclusive where the alleged offender and the victim are Indian.¹³

Tribes, which retain limited, inherent sovereignty, are not bound by restraints placed upon the federal or state governments through the Bill of Rights or other amendments to the U.S. Constitution.¹⁴ When a tribal government exercises its jurisdiction to prosecute an Indian offender, however, it must do so in accordance with the Indian Civil Rights Act (ICRA). Enacted in 1968, ICRA limited the extent to which tribes may exercise their powers of self-government by imposing conditions on tribal governments similar to those found in the Bill of Rights to the U.S. Constitution.¹⁵ For example, ICRA extends the protections of free speech, free exercise of religion, and due process and equal protection under tribal laws.¹⁶ Tribes must also afford a defendant the rights to a speedy and public trial, to be informed of the nature and cause of the accusation, and to be represented by counsel at the defendant's own expense, among other things.¹⁷ ICRA also governs the sentencing authority tribes may exercise over convicted Indian offenders. Prior to the enactment of TLOA, ICRA provided that tribes could only sentence a convicted defendant to a term of imprisonment not to exceed 1-year per offense. With the enactment of TLOA in July 2010, tribal courts are able to impose upon convicted defendants, in defined circumstances, terms of imprisonment not to exceed 3 years for any offense.¹⁸

To exercise the new sentencing authority, however, tribes must have met the following requirements:

- afford the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;
- if the defendant is indigent, provide the defendant with a licensed defense attorney at the tribe's expense;¹⁹

¹³The exercise of criminal jurisdiction by state governments in Indian country may be generally summarized as being limited to two instances—where both the alleged offender and victim are non-Indian, or where a federal treaty or statute confers, or authorizes a state to assume, criminal jurisdiction over Indians in Indian country.

¹⁴See *Santa Clara Pueblo*, 436 U.S. at 55-58 (explaining that tribes, as separate sovereigns preexisting the Constitution, “have historically been regarded as unconstrained by those constitutional provisions specifically as limitations on federal or state authority” and that through 25 U.S.C. § 1302 (enacted as amended through Indian Civil Rights Act), “Congress acted to impose certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment”).

¹⁵See Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. §§ 1301-41).

¹⁶See 25 U.S.C. § 1302(a)(1), (8).

¹⁷See 25 U.S.C. § 1302(a)(6).

¹⁸A term of imprisonment in excess of 1 year may be imposed upon a convicted defendant if the defendant had been previously convicted of the same or a comparable offense by any jurisdiction in the United States (e.g., federal or state) or if the defendant is being prosecuted for an offense comparable to an offense that, in any U.S. or state jurisdiction, may be punishable by more than 1 year of imprisonment. See 25 U.S.C. § 1302(b)(1)-(2). Further, the maximum term of imprisonment that may be imposed in a criminal proceeding (i.e., where a defendant is charged with multiple offenses,) is 9 years. See 25 U.S.C. § 1302(a)(7)(D).

¹⁹Specifically, such an attorney must be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. See 25 U.S.C. § 1302(c)(2).

- ensure that a judge licensed to practice law in any jurisdiction in the United States presides over the proceeding;
- ensure that the judge has sufficient legal training to preside over criminal proceedings;
- prior to charging the defendant, make publicly available the tribal government's criminal laws and rules of evidence and criminal procedure; and
- maintain a record of the criminal proceedings, including an audio or other recording of the trial proceedings.

In addition, TLOA established the Indian Law and Order Commission (Commission), which is responsible for conducting a comprehensive study of law enforcement and criminal justice in tribal communities.²⁰

DOI and DOJ are the two primary federal agencies that provide support to federally-recognized tribes to, among other purposes, help them administer justice. Within DOI, BIA is responsible for supporting tribes in their efforts to ensure public safety and administer justice within their reservations as well as to provide related services directly or through contracts or compacts with federally-recognized tribes.²¹ To that end, BIA's Office of Justice Services—which was established by TLOA—supports tribal law enforcement, detention, and court programs.²² Within the Office of Justice Services, the Division of Tribal Justice Support for Courts works with tribes to establish and maintain tribal judicial systems. This includes conducting assessments of tribal courts and providing training and technical assistance on a range of topics, including establishing or updating law and order codes. Further, BIA distributes funding that tribes may allocate to their tribal courts through its Tribal Courts TPA. All federally-recognized tribes are eligible to receive TPA funds.²³ DOJ provides grant funding, training, and technical assistance to federally-recognized tribes to enhance the capacity of tribal courts, among other tribal justice programs, through its Office of Justice Programs. This includes JAG, a formula grant program that is a source of federal justice funding to state, local, and tribal governments. In addition, pursuant to TLOA, the Attorney General established the Office of Tribal Justice within DOJ to facilitate coordination for federally-recognized tribal governments and tribal organizations seeking assistance or information from DOJ on issues related to public safety and justice in Indian country.²⁴

²⁰See Pub. L. No. 111-211, tit. II, § 235, 124 Stat. at 2282-86 (establishing the Commission and, among other things, mandating that it submit a report to the President and Congress no later than 2 years after enactment of TLOA (enacted July 29, 2010) detailing the findings and conclusions of the Commission and recommendations for legislative and administrative actions the Commission considers appropriate).

²¹Through the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, as amended, the federal government established a policy of Indian self-determination whereby tribes, with the support and assistance of the federal government, would be afforded an “effective and meaningful” role in planning, conducting, and administering programs and services previously administered by federal entities. See 25 U.S.C. § 450a. Tribes generally obtain funding to assume these functions pursuant to self-determination contracts or self-governance compacts negotiated and entered into with BIA. See 25 U.S.C. §§ 450h, 458cc. Self-governance compacts differ from self-determination contracts in that such compacts afford tribes more flexibility in how the agreed upon funding may be utilized.

²²See 25 U.S.C. § 2802.

²³In fiscal year 2011, tribes could choose to allocate BIA funding to 34 TPA activities, including social services, natural resources management, and tribal courts.

²⁴See 25 U.S.C. § 3665a.

A Third of Selected Tribes Plan to Exercise TLOA's Sentencing Authority, but Tribes Most Frequently Reported That They Did Not Have Funds to Do So

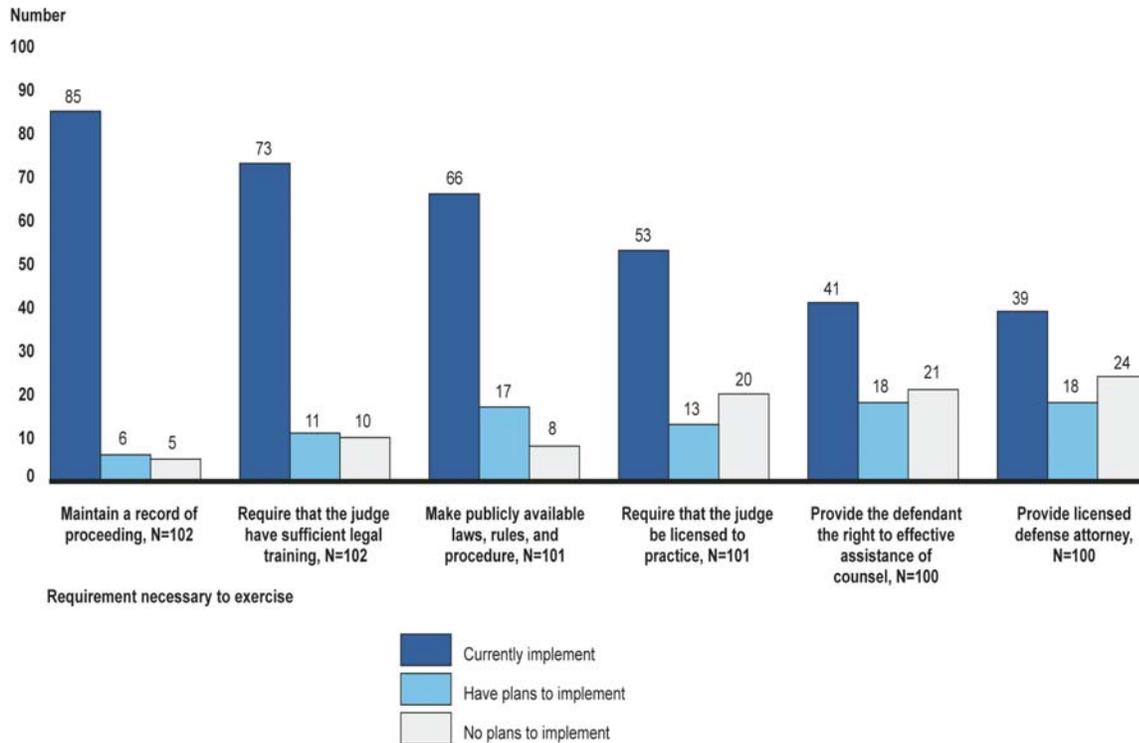
None of the 109 tribes that responded to our survey reported that they were currently exercising the new sentencing authority. Among these tribes, 36 of 101 (36 percent) reported that they have plans to exercise the new authority; 34 of 101 (34 percent) reported that they did not know the tribe's plans to exercise the new authority because, for instance, the tribal council has not yet made a decision; and 31 of 101 (31 percent) reported that they did not have plans to do so.²⁵ A tribal official who reported that his tribe has plans to exercise the new authority stated that the tribe decided to do so because the authority permitted the tribe the flexibility to sentence for 3 years if necessary. Specifically, the official stated that because the reservation is near a metropolitan area, the tribe encounters many cross-jurisdictional crimes—such as gang activity—and the authority to sentence up to 3 years would allow the tribe to more effectively control crime.

Although tribes did not report exercising the new sentencing authority, 64 percent of these tribes (70 of 109) reported that they currently implement at least half of the associated requirements for exercising the new sentencing authority. These tribes most frequently reported maintaining a record of the criminal proceeding and least frequently reported providing the defendant a licensed attorney. For example, officials from one tribe reported difficulty attracting licensed attorneys to work for the tribe who are knowledgeable about Indian law. Another tribe reported that its judges are not law-trained and that only males are allowed to serve as judges.²⁶ Figure 1 shows, for each requirement necessary to exercise the new sentencing authority, the number of tribes that reported they were currently implementing the requirement, have plans to implement it, or have no plans to do so.

²⁵The total does not equal 109 because, although 109 tribes responded to our survey, 8 did not respond to this question.

²⁶As we reported in February 2011, some tribes do not require that judges be law-trained or licensed to practice law. Rather, in many instances, qualifications to serve as a tribal judge may only include that the individual be a member of the tribe and meet any residency or age requirements established by the tribe.

Figure 1. Number of Surveyed Tribes That Reported Implementing Requirements Necessary to Exercise TLOA’s Sentencing Authority



Source: GAO analysis of survey responses.

Note: Some tribes answered “don’t know” or did not provide an answer, so each item does not total 109.

Tribes that described challenges to exercising the new sentencing authority most frequently identified limited funding (86 of 90, or 96 percent). For instance, 8 of these 90 tribes identified challenges with the costs of implementing the requirements associated with the sentencing authority. In addition, 12 of the 90 (13 percent) tribes reported that the costs associated with longer sentences presented a challenge to exercising the new sentencing authority. For instance, 1 tribe stated that although the tribe implements all requirements necessary for exercising the new authority, it has chosen not to do so because it does not have the funding to support other activities that would result from implementing the new sentencing authority, such as probation. Moreover, 3 of the 90 tribes reported challenges with the costs of hiring a licensed, law-trained judge. For example, 1 tribe reported that it has maintained a very effective criminal and civil justice system for the past 40 years—which has never had or required a law-trained judge to preside over the court system—and that the costs associated with hiring a law-trained judge from outside of the community would be unreasonable. Furthermore, in our indigent defense review, 52 percent (24 of 46) of tribes that reported they did not provide indigent defense services in any year from fiscal years 2005 through 2010 also reported that they did not have sufficient funding to provide these services.²⁷

In addition, 36 of 90 (40 percent) tribes identified limitations of their tribal codes and constitutions as a challenge to exercising the new sentencing authority, and 33 of 90 (37 percent) tribes reported that their tribal codes would need to be revised to take advantage of the new sentencing authority. For example, 1 tribe reported that the tribe’s constitution sets forth minimal requirements for tribal court judges, which would not meet the requirement of a

²⁷GAO-12-569.

licensed, law-trained judge necessary to exercise the new sentencing authority. Another tribe reported that its tribal constitution currently limits the tribal court's sentencing authority to 1 year. One of these tribes estimated that it would take at least 1 year for its council to approve rewriting the tribal codes and another year to rewrite them.

In addition to tribes, officials from DOJ's Office of Tribal Justice, the Indian Law and Order Commission (Commission), NCAI, and BIA also identified factors that could help to explain why tribes do not have plans to exercise the new sentencing authority. For example, consistent with statements made by an official from the Office of Tribal Justice, some tribes may be planning to exercise the authority, but have not currently done so because they may be waiting to see whether tribes that have exercised the authority have been subject to litigation as a result or whether such sentences will withstand appeal. In addition, officials from NCAI and BIA reported that some tribes may view the new sentencing authority and the associated requirements as incompatible with traditional notions of tribal justice. For example, an official from NCAI stated that some tribes have a fundamental opposition to incarceration as a means of punishment and instead choose traditional means of justice that incorporate healing and rehabilitation, as opposed to detention. Moreover, a BIA official stated that the process for tribes to update tribal codes and constitutions to reflect provisions in TLOA will take time and money.

DOJ Could Clarify Eligibility for Funding It Provides to Tribes, and Tribes Reported That More Funding and Training Would Help Them Exercise TLOA's Sentencing Authority

BIA and DOJ Provide Funding and Technical Assistance to Tribes, but DOJ Could Clarify Tribes' Eligibility for Funding

Both BIA and DOJ provide funding that tribes could use to help meet the necessary requirements for exercising the new sentencing authority. According to BIA officials, tribal courts receive funding through BIA's annual Tribal Courts TPA distributions in the form of contracts or compacts.²⁸ Tribes select among available TPAs, such as tribal courts and social services, and then determine how much BIA funding to allocate to each of these TPAs. Further, tribes may generally reallocate funding from one TPA activity to another according to their needs. For example, a tribe needing more funds for tribal courts than for natural resources management may move funds to meet those needs. In fiscal year 2011, 141 tribes allocated \$24.7 million of BIA contracts and compacts to their tribal courts for salaries and related administrative costs of judges, prosecutors, public defenders, court clerks, probation officers, juvenile officers, and other court support staff through the Tribal Courts TPA. In addition, DOJ officials identified the Coordinated Tribal Assistance Solicitation (CTAS) as a resource for tribes that reported needing additional funding to exercise the new sentencing authority. In fiscal year 2011, DOJ awarded, through CTAS, \$82 million to tribal justice system and juvenile justice programs that could be used to exercise the new sentencing authority, such as maintaining a record of the criminal proceeding and hiring court-appointed defenders for juvenile offenders.²⁹

²⁸In addition, BIA provides direct services operations for those tribes that choose not to operate the program themselves, such as tribes that use CFR courts.

²⁹In fiscal year 2010, DOJ awarded \$25 million to tribes through the Tribal Court Assistance Program (TCAP), and \$1.1 million through the Tribal Juvenile Accountability Discretionary Grant (TJADG). Starting in fiscal year 2010, TCAP and TJADG were rolled into CTAS, which includes one solicitation for 10 previously separate grant programs. The purpose areas related to justice systems include justice systems and alcohol and substance abuse, corrections and correctional alternatives, and violence against women. The purpose areas related to juvenile systems include juvenile justice and tribal youth courts.

In addition, DOJ and BIA provide training and other assistance to tribes, which could assist them in exercising the new sentencing authority. For instance, DOJ (through Access to Justice and the U.S. Attorneys' Offices), BIA, and the Administrative Office of the U.S. Courts' (AOUSC) Offices of Defender Services (through the federal public defender offices) have partnered to develop the Tribal Court Trial Advocacy Training Program, which consists of a series of trainings for tribal court personnel, including defenders, prosecutors, and judges.³⁰ According to a DOJ official involved in the training, this training could help tribes meet the requirement in TLOA that a judge presiding over the criminal proceeding have sufficient legal training. The first such training occurred in August 2011, and the second in March 2012. According to DOJ and BIA officials, an additional six trainings are planned through January 2013. In addition, BIA provides court recording devices to tribes, which could help tribes in implementing the requirement to maintain a record of criminal proceedings. According to BIA officials, as of May 2012, BIA provided over 60 recording devices for tribal courts and plans to provide an additional 15 to tribes that requested the device.

Moreover, a DOJ official stated that the Tribal Civil and Criminal Legal Assistance (TCCLA) grant could be used to support tribes' efforts to exercise the new sentencing authority. In particular, certain types of tribes (which we discuss below) could use funding in one of the grant categories—Category 2, which is available for criminal legal assistance—to hire a law-trained public defender. However, tribes were not always clear on whether they met eligibility requirements for the grant.³¹ The statute establishing TCCLA states that eligibility is limited to nonprofit entities, as defined under section 501(c)(3) of the Internal Revenue Code. DOJ's fiscal year 2010 TCCLA solicitation did not specify that eligibility was limited to 501(c)(3) nonprofit entities, but DOJ adjusted its fiscal year 2011 TCCLA solicitation to include that eligibility for TCCLA is "limited to tribal and non-tribal non-profit (Internal Revenue Code (I.R.C.) § 501(c)(3)) entities that provide legal assistance services for Indian tribes, members of Indian tribes, or tribal justice systems pursuant to federal poverty guidelines."³² DOJ grant program officials stated that they made this change because their Office of General Counsel indicated that the statute limited eligibility to 501(c)(3) nonprofit entities. However, this phrasing could be read as "tribal entities" and "non-tribal non-profit (Internal Revenue Code (I.R.C.) § 501(c)(3)) entities" are eligible for the funding, and as not restricting eligibility to "tribal non-profit (Internal Revenue Code (I.R.C.) § 501(c)(3)) entities." For instance, even after DOJ changed the solicitation language, an official from one tribe reported applying in fiscal year 2011 for TCCLA because, based on eligibility requirements, the individual understood that, as a division of tribal government, the individual's office qualified as a tribal entity when it was actually ineligible because it was not a 501(c)(3) entity. Of the nine tribal governments or tribal entities that applied for TCCLA in fiscal year 2011, six were uncertain about their eligibility and applied, despite not being 501(c)(3) nonprofits, and were denied by DOJ. As a result, six tribes

³⁰The AOUSC serves the federal judiciary in carrying out its constitutional mission to provide equal justice under law through a wide range of administrative, legal, financial, management, program, and information technology services to the federal courts. The U.S. Attorneys are the chief federal law enforcement officers in their districts, responsible for federal criminal prosecutions and civil cases involving the United States government.

³¹The other TCCLA categories are Category 1: Tribal Civil Legal Assistance Grants and Category 3: Tribal Justice Advocacy Training and Technical Assistance. Although Category 3 grants could be used to support tribes' efforts to exercise TLOA's sentencing authority, applicants are limited to national or regional membership organizations and associations whose membership section consists of judicial system personnel within tribal justice systems.

³²The fiscal year 2010 solicitation stated that eligibility is "limited to tribal and non-tribal non-profit entities that provide legal assistance services for Indian tribes, members of Indian tribes, or tribal justice systems pursuant to federal poverty guidelines."

expended resources to apply for TCCLA although they were ineligible, and four of these tribes planned to use the funding to exercise the new sentencing authority.

In addition to these tribes being uncertain about their eligibility when applying for TCCLA, certain tribes continued to be uncertain about their eligibility even after receiving a letter from DOJ explaining why they were not selected for funding. In particular, of the 3 tribes we interviewed regarding TCCLA all 3 reported that after they received this letter from DOJ, they still did not understand why they were ineligible. The letters sent to these tribes stated that the tribes were not eligible because they were not nonprofit entities. What the letters did not explain was that the tribes were ineligible because they are not 501(c)(3) nonprofit entities. DOJ officials agreed that the letter could be updated to clarify that only 501(c)(3) nonprofit entities are eligible. Internal control standards state that agency management should ensure that there are adequate means of communicating with external stakeholders that may have a significant impact on the agency achieving its goals.³³ By taking actions to better clarify TCCLA's eligibility requirements both during the application process and when applicants are notified of their ineligibility, DOJ could better ensure that neither the tribes nor DOJ will use resources to prepare, review, and deny applications for grants for which tribes are not eligible, and consequently enable tribes to make informed decisions about funding sources.

Tribes Reported That More Funding and Training Would Be Beneficial

While DOJ and BIA provide funding, training, and technical assistance, tribes that responded to our survey and identified assistance they would like to receive from the federal government (86 of 109) most frequently reported that more of this type of support from the federal government would help them exercise the new sentencing authority.

- For instance, tribes reported that they would like to build or expand a detention facility on the reservation (10); receive additional funding to employ a licensed attorney to provide indigent defense services (2); and hire a licensed, law-trained judge (2), among other things.
- In addition, 15 tribes reported that they would like technical assistance and guidance on the new sentencing authority and the necessary requirements. For example, 1 tribe identified assistance such as guidance from BIA and local U.S. Attorneys' Offices regarding how to implement the new sentencing authority.
- Eleven tribes also identified instances where the federal government could share information to help tribes exercise the new sentencing authority, such as by developing a fact sheet.

Both DOJ and BIA have taken actions to increase funding and training to tribes in this area. In its fiscal year 2012 CTAS solicitation, DOJ officials reported that they made a number of changes to reflect tribes' needs for additional resources with the passage of TLOA. For instance, DOJ added the implementation of enhanced authorities and provisions under TLOA as a goal under the justice systems, and alcohol and substance abuse purpose area. In addition, DOJ also announced a new program for fiscal year 2012, the Tribal Justice System Capacity Building Training and Technical Assistance program, which seeks to enhance tribal justice information sharing and meet tribal justice system capacity building needs, among other things.³⁴ Further, in its fiscal year 2013 budget justification, BIA recognized tribes' need for

³³See GAO/AIMD-00-21.3.1.

³⁴Moreover, DOJ's Bureau of Justice Statistics is developing a national survey on tribal courts to be fielded in fiscal year 2013. DOJ officials stated that they intend to use the results from the survey to inform policy decisions, but

additional resources, and asked for \$1 million in additional Tribal Courts TPA funding to help meet that need.³⁵ In particular, to support the new sentencing authority given to tribal courts in TLOA, BIA requested additional funding to be used for tribal court staff salaries, among other things. According to BIA, tribal court systems were struggling financially to operate under the pre-TLOA requirements, and implementation of TLOA requires additional resources. For example, according to BIA's budget justification, should a tribal court exercise the sentencing authority extended by TLOA, additional training on developing tribal sentencing guidelines will be required for tribal court judges and other personnel. BIA expects that the amount of funding requested would significantly improve the ability of the tribal courts to effectively implement TLOA, among other things. In addition, BIA has partnered with the National Judicial College to provide scholarships in 2012 and 2013 for two members of each of the 141 tribal courts that allocate to the Tribal Courts TPA to each attend two courses.³⁶ These courses could include Appellate Skills for Tribal Judges and Advanced Tribal Court Management. Moreover, according to BIA, it has established a new process for conducting tribal court reviews that will allow it to assess the unmet needs of tribal courts, including those related to the implementation of the requirements necessary to exercise TLOA's new sentencing authority, by the end of 2013.

Conclusions

The new sentencing authority under TLOA provides tribal courts with the opportunity to impose sentences of more than 1 year to 3 years per offense and possibly provide a more effective deterrent to criminal activity in Indian country. Tribes reported that funding and technical assistance from DOJ and BIA could assist them in exercising the new authority. However, some tribes expressed uncertainty regarding their eligibility for certain funds. Specifically, DOJ did not inform tribes that applied for TCCLA grants, which could be used to help meet the requirements necessary to exercise the new sentencing authority, that they were deemed ineligible because they were not 501(c)(3) nonprofit entities. By taking actions to better clarify that applicants must be 501(c)(3) nonprofit entities to be eligible for TCCLA, both during the application process and when applicants are notified of their ineligibility, DOJ could better ensure that the tribes and DOJ will not use resources to prepare, review, and deny applications for grants for which tribes or certain tribal entities are not eligible.

Recommendation for Executive Action

To help ensure that tribes better understand which grant resources could assist tribes in exercising the new sentencing authority, we recommend that the Assistant Attorney General of the Office of Justice Programs take actions—both during the application process and when applicants are notified of their ineligibility—to better clarify the circumstances under which applicants, including tribes and tribal entities, are eligible or ineligible for TCCLA funds.

because the survey is still being developed, they could not provide specific details regarding how the information will be used.

³⁵Tribes, however, have the authority to move funds out of the Tribal Courts TPA into other TPA activities, such as social services.

³⁶The National Judicial College offers programs to judges nationwide to improve the delivery of justice and advance the rule of law through a disciplined process of professional study and collegial dialogue. Since June 2002, it has included curricula aimed at the challenges facing tribal courts.

Agency Comments and Our Evaluation

We provided a draft of this report for review and comment to DOJ and DOI. In addition, we provided relevant sections of the report to NCAI and the Commission. We received written comments from DOJ, which are reprinted in full in enclosure II. In its written comments, DOJ concurred with the recommendation that it take actions to better clarify the circumstances under which applicants, including tribes and tribal entities, are eligible or ineligible for TCCLA funds, and identified several actions that the Office of Justice Programs has taken and will take to do so. These actions include updating the fiscal year 2012 TCCLA solicitation to clarify eligibility language, revising language in letters sent to fiscal year 2012 TCCLA applicants that were not selected for funding to explain why they were ineligible, and developing a web page to provide information on resources for legal assistance and indigent defense services and activities available for tribes. These actions, when implemented, should address the intent of our recommendation. In an email dated May 17, 2012, DOI's liaison stated that DOI does not have written comments to include in our report. DOJ, DOI, and the Commission also provided technical comments, which we incorporated throughout the report as appropriate.

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We are sending copies of this report to the appropriate congressional committees, the Attorney General and the Secretary of the Interior. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>. If you or your staff have any questions about this report, please contact me at (202) 512-8777 or larencee@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in enclosure III.



Eileen R. Larence
Director, Homeland Security and Justice Issues

Enclosures - 3

List of Requesters

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable John Thune
United States Senate

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

The Honorable Robert C. Scott
Ranking Member
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
House of Representatives

The Honorable Jerrold Nadler
Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
House of Representatives

Enclosure I: Survey Questions and Responses

To gather information on whether tribes are implementing the Tribal Law and Order Act's (TLOA) new sentencing authority, we surveyed all 171 tribes that received federal funding that could have been used for indigent defense in any fiscal year from 2005 through 2010. In particular, we conducted a web-based survey to tribes that (1) reported allocating Tribal Priority Allocations (TPA)—federal funding that the Bureau of Indian Affairs (BIA) distributes to tribes and that tribes may allocate to a variety of activities—to their tribal courts (referred to as the “Tribal Courts TPA”) (142 out of 171), (2) were awarded the Edward Byrne Memorial Justice Assistance Grant (JAG) by the Department of Justice (2 out of 171), or (3) both allocated funding to their Tribal Courts TPA and received JAG funding (27 out of 171) in any fiscal year from 2005 through 2010. We sent one survey to tribes that reported allocating TPA funding to Tribal Courts, and a separate survey to tribes that received JAG. For tribes that received both surveys, we asked that one representative from the tribe complete the section related to TLOA. We received responses from 109 tribes, for a response rate of 64 percent; however, not all 109 respondents answered every question. Our survey was composed of closed- and open-ended questions. In this enclosure, we include all the survey questions and aggregate results of responses to the closed-ended questions related to TLOA; we do not provide information on responses provided to the open-ended questions.³⁷

³⁷Both surveys contained five sections: (1) awareness of allowable uses of funding; (2) allocation of funding for indigent defense; (3) conditions influencing whether funding was allocated for indigent defense; (4) likelihood of allocating 2011 funding for indigent defense; and (5) TLOA. For survey results and questions from the non-TLOA sections, see *Indigent Defense: Surveys of Grant Recipients, Select Tribes, and Indigent Defense Providers*, GAO-12-661SP (Washington, D.C.: May 2012). For a more detailed discussion of our survey methodology, see GAO-12-569.

Enclosure I: Survey Questions and Responses

Section V: Tribal Law and Order Act

The Tribal Law and Order Act of 2010 (TLOA) provides for new sentencing authority for Indian Tribes, but included several requirements—some related to indigent defense—that must be fulfilled before that authority may be exercised. (TLOA, Pub. L. No. 111-211, among other things, amended the Indian Civil Rights Act of 1968, Pub. L. No. 90-284.)

1. Does your Tribe currently, or have plans to, exercise the new sentencing authority provided by TLOA?

	Number of Respondents
<input type="checkbox"/> Currently exercise	0
<input type="checkbox"/> Have plans to exercise	36
<input type="checkbox"/> No plans to exercise	31
<input type="checkbox"/> Don't know	34
Total	101

Enclosure I: Survey Questions and Responses

2. Listed below are the TLOA requirements for exercising the new sentencing authority. Regardless of whether your Tribe plans to exercise the new sentencing authority, does your Tribe currently, or have plans to, implement any of the following?

TLOA requirements for exercising new sentencing authority	Does your Tribe currently, or have plans to, implement this requirement?	Number of Respondents
a. Provide the defendant the right to effective assistance of counsel at least equal to that guaranteed in the U.S. Constitution.	<input type="checkbox"/> Currently implement	41
	<input type="checkbox"/> Have plans to implement	18
	<input type="checkbox"/> No plans to implement	21
	<input type="checkbox"/> Don't know	20
	Total	100
b. Provide an indigent defendant the assistance of a defense attorney licensed to practice by any U.S. jurisdiction, at the expense of the Tribal government.	<input type="checkbox"/> Currently implement	39
	<input type="checkbox"/> Have plans to implement	18
	<input type="checkbox"/> No plans to implement	24
	<input type="checkbox"/> Don't know	19
	Total	100
c. Require that the judge presiding over the criminal proceeding have sufficient legal training to preside over criminal proceedings.	<input type="checkbox"/> Currently implement	73
	<input type="checkbox"/> Have plans to implement	11
	<input type="checkbox"/> No plans to implement	10
	<input type="checkbox"/> Don't know	8
	Total	102
d. Require that the judge presiding over the criminal proceeding be licensed to practice law in any U.S. jurisdiction.	<input type="checkbox"/> Currently implement	53
	<input type="checkbox"/> Have plans to implement	13
	<input type="checkbox"/> No plans to implement	20
	<input type="checkbox"/> Don't know	15
	Total	101
e. Prior to charging the defendant, make publicly available the Tribe's criminal laws, rules of evidence, and rules of criminal procedure.	<input type="checkbox"/> Currently implement	66
	<input type="checkbox"/> Have plans to implement	17
	<input type="checkbox"/> No plans to implement	8
	<input type="checkbox"/> Don't know	10
	Total	101
f. Maintain a record of the criminal proceeding, including an audio or other recording.	<input type="checkbox"/> Currently implement	85
	<input type="checkbox"/> Have plans to implement	6
	<input type="checkbox"/> No plans to implement	5
	<input type="checkbox"/> Don't know	6
	Total	102

Enclosure I: Survey Questions and Responses

3. What challenges, if any, may affect your Tribe's ability to exercise the new sentencing authority under TLOA? For example, challenges may include funding, changing Tribal codes, increasing jail capacity, etc.

4. If you have any additional comments or would like to explain any of your answers on TLOA's sentencing authority, please provide them in the box below.

5. What assistance, if any, would your Tribe like to receive from the United States government to help your Tribe exercise the new sentencing authority provided by TLOA?

Enclosure II: Comments from the Department of Justice



U.S. Department of Justice

Office of Justice Programs

91 MAY 2012

Washington, D.C. 20531

Ms. Eileen Larence
Director
Homeland Security and Justice Issues
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Larence:

Thank you for the opportunity to review and comment on the draft Government Accountability Office (GAO) report entitled, "Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds," (GAO-12-658R). The U.S. Department of Justice (Department) appreciates GAO's work on this review.

The draft GAO report contains one Recommendation for Executive Action to the Department, which is restated in bold text below and is followed by our response. The Office of Justice Programs' Bureau of Justice Assistance (BJA) has already undertaken several activities to address the Recommendation in this report.

To help ensure that tribes better understand which grant resources could assist tribes in exercising the new sentencing authority, we recommend that the Assistant Attorney General of the Office of Justice Programs take actions-both during the application process and when applicants are notified of their ineligibility-to better clarify the circumstances under which applicants, including tribes and tribal entities, are eligible or ineligible for TCCLA funds.

The Office of Justice Programs (OJP) agrees with the Recommendation for Executive Action. Beginning in late calendar year 2011, BJA received feedback from the field that the language in prior years' Tribal Civil and Criminal Legal Assistance (TCCLA) solicitation was not clear on eligibility requirements under categories 1 and 2. In the TCCLA solicitation, under categories 1 and 2, applicants are limited to tribal and non-tribal non-profit (Internal Revenue Code (I.R.C.) § 501(c)(3)) entities, including tribal enterprises and educational institutions, that provide legal assistance services for federally recognized Indian tribes, members of federally recognized Indian tribes, or tribal justice systems pursuant to federal poverty guidelines. As a result, BJA proactively developed strategies to address these concerns.

Enclosure II: Comments from the Department of Justice

In Fiscal Year (FY) 2012, BJA undertook the following efforts to make eligibility requirements under the TCCLA solicitation more transparent.

- **TCCLA Eligibility Language**

For the FY 2012 TCCLA solicitation, BJA ensured that the eligibility language clearly reflected what is required in the statute – “non-profit entities, as defined under section 501(c)(3) of the Internal Revenue Code of 1986.” In addition, BJA further expanded on this language to clarify that eligible organizations include tribal educational institutions (public, private, and tribal colleges and universities).

- **Notification of Why the Applicant is not Eligible**

For each solicitation, BJA will issue letters to all applicants whose applications are not sent forward to peer review after the basic minimum review (BMR) process; this includes applicants determined to be ineligible under the relevant solicitation. In FY 2012 under the TCCLA solicitation, BJA began notifying applicants after BMR that they were eliminated at BMR because they were not a 501(c)(3) non-profit organization or entity. Additionally, based upon feedback that BJA received from the field, BJA revised the language in its denial letters to ineligible applicants under the FY 2012 TCCLA solicitation to further state that applicants were not eligible because the applicant *“is not a nonprofit with a tax status of 501(c)(3). Please note that the 501(c)(3) status is mandated in the statute which authorized funding for this solicitation, Public Law 106-559.”*

- **Resource Information**

To proactively promote these resources to the field, BJA has asked its TCCLA Training and Technical Assistance provider to develop a webpage on the BJA website, which will provide information on resources (public and private) for legal assistance and indigent defense services and activities available for tribes. BJA anticipates that this will include information on accessing public and private resources for Indian tribes working to obtain a 501(c)(3) non-profit status.

In addition, because tribal nations are not eligible as applicants under TCCLA, BJA also explored and clarified other resources that tribes can seek under the Consolidated Tribal Assistance Solicitation (CTAS) to support legal assistance activities. Created in FY 2010, CTAS consolidates most of the Department’s tribal government-specific criminal and juvenile justice assistance programs administered by OJP, the Office on Violence Against Women, and the Office of Community Oriented Policing Services under one solicitation. Through CTAS, tribes can apply for funding for many of their criminal and juvenile justice needs with one application.

Enclosure II: Comments from the Department of Justice

In the FY 2012 CTAS, BJA added language to emphasize that tribes seeking to fund indigent legal services should seek this funding under CTAS, rather than TCCLA. BJA added language under Purpose Area 3, Justice Systems and Alcohol and Substance Abuse, which confirms that allowable activities include legal assistance and indigent defense services and activities (see page 10 in the FY 2012 CTAS, which can be found at <http://www.justice.gov/tribal/ctas2012/ctas-solicitation.pdf>).

If you have any questions regarding this response, you or your staff may contact Maureen Henneberg, Director, Office of Audit, Assessment, and Management, at (202) 616-3282.

Sincerely,



Mary Lou Leary
Acting Assistant Attorney General

cc: James H. Burch, II
Deputy Assistant Attorney General
for Operations and Management

Denise O'Donnell
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Access to Justice

OJP Executive Secretariat
Control Number 20120552

Enclosure III: GAO Contact and Staff Acknowledgments

GAO Contact

Eileen R. Larence, (202) 512-8777 or larencee@gao.gov

Staff Acknowledgments

In addition to the contact named above, Kristy Brown, Assistant Director; Jill Verret, Analyst-in-Charge; and Alicia Loucks, Analyst, managed this assignment. Michele Fejfar, Heather Hampton, Christine Hanson, Thomas Lombardi, Carl Ramirez, and Jerome Sandau also made significant contributions to the work.

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