ATTORNEY GENERAL OPINION NO. 95-04

To: Honorable Gaylen L. Box
Magistrate Judge
Sixth Judicial District
P.O. Box 4887
Pocatello, ID 83201

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. What is necessary to confer lawful authority on tribal law enforcement officers to arrest tribal members on tribal arrest warrants outside the reservation?

2. What is necessary for state law enforcement agencies to arrest under the authority of tribal court warrants?

CONCLUSION

1. State statutory authority to recognize tribal warrants, together with deputization of tribal law enforcement officials, would be required for tribal officers to arrest tribal members on tribal warrants beyond the external boundaries of the reservation.

2. State statutory authority, together with an agreement with the affected tribe, would be sufficient to grant state law enforcement officers authority to effect an arrest based on a tribal court warrant.

ANALYSIS

Overview:

Indian tribes are sovereign nations which exist within the external boundaries of the states of the United States at the pleasure of the United States Congress. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), and its progeny. The control of Congress over the Indian tribes is plenary. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. McIntosh, 21 U.S. 543 (1823). Generally, by act of Congress and historical interpretation, Indian tribes have jurisdiction over their own members and non-member Indians within the external boundaries of their reservation. This jurisdiction is limited by withdrawals of jurisdiction by Congress in acts such as the Major Crimes Act (18 U.S.C. § 1152) and Public Law 280. At present, Indian tribes have jurisdiction over

their members in criminal matters that would amount only to misdemeanors or infractions under state law.

Indian reservations exist within the external boundaries of the states. Therefore, except where limited by congressional act or necessarily intrinsic tribal authority, state law enforcement officers may exercise enforcement jurisdiction within the external boundaries of Indian reservations.[1] *See, e.g.,* State ex rel. Old Elk v. District Court, 552 P.2d 1394 (Mont. 1976), *appeal dismissed* 429 U.S. 1030 (1976) (state law enforcement officers had authority to arrest Indian tribal member on reservation where tribe had no extradition ordinance controlling such arrest); Davis v. Muellar, 643 F.2d 521 (8th Cir. 1980), *cert. denied* 454 U.S. 892, 102 S. Ct. 387, 70 L. Ed. 2d 206 (court did not lose jurisdiction over Indian tribal member who was arrested on the reservation in violation of tribal extradition ordinance, however, if challenge had been brought prior to removal of the member from the reservation, court would have honored the tribal ordinance). The converse is not true. Indian tribes have no authority or jurisdiction beyond their external boundaries.[2] Therefore, a grant of state law authority is required to permit the recognition of Indian tribal court warrants outside the boundaries of Indian reservations.

Question No. 1:

As a general rule, a warrant for arrest issued in one jurisdiction has no force or authority in a foreign jurisdiction. Street v. Cherba, 662 F.2d 1037, 1039 (4th Cir. 1981); State v. Bradley, 106 Idaho 358, 360, 679 P.2d 635, 637 (1983), *cert. denied*, 464 U.S. 1041 (1984); Holbird v. State of Oklahoma, 650 P.2d 66, 70 (Okla. Crim. App. 1982). For this reason, states have executed interstate compacts for detaining and extraditing persons charged in other states. *See* Idaho Code § 19-4514 and related provisions. States enact provisions permitting officers of foreign states to continue fresh pursuit into the home state. *See* Idaho Code § 19-701; *see also* Idaho Code § 19-701A (granting authority to Idaho police officers to pursue offenders into other political subdivisions of the state). No such compacts or agreements have been entered into between the State of Idaho and Indian tribes residing within the state.

Only one case was discovered which suggests otherwise. In the case of Schauer v. Burleigh County, 1987 WL 90271 (D.C. N. Dak. 1987), the Turtle Mountain Tribal Court issued an arrest warrant for the plaintiff charging she abducted her minor children without the consent of their legal guardian. The charge was the equivalent of a state court misdemeanor. No challenge to the validity of the warrant was made. The warrant was given to the Burleigh County Sheriff's Office which, after substantial discussion, effected the arrest, off the reservation, and took the plaintiff to the county jail where she posted $150 bond two hours later. There was no formal compact, statute or agreement which provided for execution of tribal warrants by state officers. The plaintiff subsequently brought an action under 42 U.S.C. § 1983 in federal court alleging her

arrest by county officials off the reservation was in violation of her constitutional rights. The county moved for summary judgment which was granted by the court.

The court saw the issue as two-fold: first, whether execution of the warrant violated state law and, second, whether execution of the warrant violated the plaintiff's civil rights. On the first issue, the court cited cases finding arrests by state officers within Indian reservations to be valid and analogized to those cases to find that the arrest by state officers based on a tribal warrant would not violate North Dakota law.

The court then turned to the question of whether the arrest violated the plaintiff's constitutional rights. The court first found that the Fourth Amendment does not prohibit an arrest for a non-felony, not committed in the officer's presence, based on probable cause, even though such arrests may not be in accord with state law. The court then noted that the officers who arrested the plaintiff had probable cause to make the arrest because of their knowledge of the tribal court warrant. Therefore, the court found, the arrest of the plaintiff did not violate her civil rights.

Importantly, the question before the court was limited to whether the plaintiff's civil rights had been violated. Had the matter arisen on a petition for *habeas corpus*, or on appeal of a criminal conviction, or even on a motion to suppress evidence discovered in the course of the plaintiff's arrest, the matter could have been decided differently.

Unfortunately, the first part of the court's decision does not withstand scrutiny. Because states and Indian tribes are not equivalent sovereigns, the fact that state officers may have authority to arrest on the reservation for off-reservation crimes does not mean that tribal officials may arrest off the reservation for on-reservation crimes. There is simply no basis to extend tribal authority to execute arrest warrants beyond the external boundaries of the reservation.[3]

Question No. 2:

The best solution to the problem, as it now exists, is legislation which grants state officers authority to detain persons named in tribal court arrest warrants and deliver them to the custody of tribal officers. For example, the state of Maine has enacted a simple provision that permits state courts to take cognizance of tribal warrants:

> Judges of District Courts shall have all authority and powers now granted by law to judges of municipal courts, provided that no Judge of the District Court may sit as the trial judge in any case arising from a complaint to such judge and warrant of arrest resulting therefrom, unless by consent of the defendant.

> When a complaint charging a person with the commission of an offense, or a duly authenticated arrest warrant issued by the Tribal Court of the Passamaquoddy Tribe or the Penobscot Nation, is presented to any Judge of the District Court, to a justice of the peace or to any other officer of the District Court authorized to issue process, the judge, justice of the peace or other officer shall issue a warrant in the name of the District Court for the arrest of such person, in that form and under the circumstances that the Supreme Judicial Court by rule provides. The justice of the peace or other officer does not have authority to preside at any trial, and may not appear as counsel in any criminal case in which that officer has heard the complaint. A clerk of the District Court may accept a guilty plea upon payment of fines as set by the judge.

15 M.R.S.A. § 706 (1994) (emphasis added). South Dakota, on the other hand, has enacted a comprehensive statute governing "Extradition of fugitive Indians." *See* Title 23, Chapter 24B, South Dakota Codified Laws. Either of these approaches would be effective to grant state officers authority to recognize Indian tribal warrants.

Alternatively, legislation now in place may be sufficient to support a compact between the affected state jurisdictions and Indian tribes to recognize tribal warrants. Idaho Code § 67-4002 provides as follows:

> Any public agency as defined in section 67-2327, Idaho Code, or the state of Idaho or any of its political subdivisions may enter into agreements with the Indian tribes enumerated in section 67-4001, Idaho Code, for transfer of real and personal property and for joint concurrent exercise of powers provided such agreement is in substantial compliance with the provisions of sections 67-2327 through 67-2333, Idaho Code. No power, privilege or other authority shall be exercised under the authority of this chapter where otherwise prohibited by the constitution of the state of Idaho or the constitution or laws of the United States government. Additionally, the provisions of this chapter shall not be deemed to amend, modify, or repeal the provisions of chapter 51, title 67, Idaho Code (public law 280).

Idaho Code § 67-4002 (emphasis added). This section would permit any compact which would not violate the constitution or other specific laws of the state or federal government. Presumably, therefore, this section would permit an agreement for affected jurisdictions to detain persons subject to tribal court arrest warrants, at the request of the tribe, and deliver them to tribal officers. The procedures for such exercise of power could be specified by the agreement.

There are some unanswered questions in using Idaho Code § 67-4002 to support such an agreement. For example, Idaho law does not permit an arrest for a misdemeanor not committed in the presence of the arresting officer. Idaho Code § 19-603. Idaho Code § 67-4003 provides, in part, as follows:

> Nothing in this chapter shall be interpreted to grant to any . . . Indian tribe . . . the power to increase . . . governmental power of . . . the state of Idaho . . . .

Idaho Code § 67-4003. Would a tribe's grant of authority to state officers to arrest for misdemeanor tribal offenses based on a tribal court warrant be in excess of this limitation, or merely the grant to state officers of the same authority already exercised by tribal officers on the reservation? Such questions are not subject to easy answers. To avoid such ambiguities, new legislation with statewide application is probably the best solution.

AUTHORITIES CONSIDERED

1. Idaho Code:

Idaho Code § 19-4514.
Idaho Code § 19-603.
Idaho Code § 19-701.
Idaho Code § 19-701A.
Idaho Code § 67-4002.
Idaho Code § 67-4003.

2. U.S. Supreme Court Cases:

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

De Coteau v. District Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

Johnson v. McIntosh, 21 U.S. 543 (1823).

Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

3. Idaho Cases:

State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1983), *cert. denied* 464 U.S. 1041 (1984).

4. Federal Cases:

Davis v. Muellar, 643 F.2d 521 (8th Cir. 1980), *cert. denied* 454 U.S. 892, 102 S. Ct. 387, 70 L. Ed. 2d 206.

Schauer v. Burleigh County, 1987 WL 90271 (D.C. N. Dak. 1987).

Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

Street v. Cherba, 662 F.2d 1037 (4th Cir. 1981).

5. Other Cases:

Holbird v. State of Oklahoma, 650 P.2d 66, 70 (Okla. Crim. App. 1982).

State ex rel. Old Elk v. District Court, 552 P.2d 1394 (Mont. 1976), *appeal dismissed* 429 U.S. 1030 (1976).

6. Other Authorities:

15 M.R.S.A. § 706 (1994).

Arizona Attorney General Opinion I88-131, 1988 Ariz. Op. Atty. Gen. 177, 1988 WL 249704 (December 30, 1988).

Title 23, Chapter 24B, South Dakota Codified Laws.

Wisconsin Attorney General Opinion 10-81, 70 Wis. Op. Atty. Gen. 36, 1981 WL 157222 (March 11, 1981).

DATED this 13th day of October, 1995.

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Analysis by:

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[1] Territoriality is not a basis for exclusive Indian jurisdiction. Rather, the question is whether state action infringes on the right of tribal Indians to make their own laws and be governed by them. De Coteau v. District Court, 420 U.S. 425, 444-46, 95 S. Ct. 1082, 1092-94, 43 L. Ed. 2d 300 (1975); Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 270-71, 3 L. Ed. 2d 251 (1959).

[2] A very limited exception to this rule is recognized in the case of Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). In Settler a Yakima Tribe member was arrested at an off-reservation tribal fishing site for violation of tribal fishing ordinances and brought a *habeas corpus* proceeding in federal court. The court found that the 1855 treaty creating the Yakima Reservation reserved to the tribe the right to fish "at all usual and accustomed places." Since the tribe had the right to regulate members' exercise of tribal fishing rights, it had authority to arrest tribal members at "usual and accustomed" fishing sites. The court noted the narrowness of its holding:

> Our holding that the Yakima Indian Nation may enforce its fishing regulations by making arrests and seizures off the reservation is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations. The arrest and seizure of fishing gear must be made at "usual and accustomed places" of fishing, and only when violations are committed in the presence of the arresting officer. Tribal officers patrolling off-reservation sites are subject to all reasonable regulations that may be imposed by the State of Washington for the orderly conduct of inspections, arrests and seizures.

Settler, 507 F.2d at 240 (emphasis added). This exception, of course, provides no authority for service of tribal arrest warrants away from the Fort Hall Indian Reservation.

[3] At least two other states' attorneys general agree with this conclusion. *See* Arizona Attorney General Opinion I88-131, 1988 Ariz. Op. Atty. Gen. 177, 1988 WL 249704 (December 30, 1988); Wisconsin Attorney General Opinion 10-81, 70 Wis. Op. Atty. Gen. 36, 1981 WL 157222 (March 11, 1981).