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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: Joyce L. Kiel, Senior Staff Attorney

RE: Authority of Tribal Law Enforcement Officers to Enforce Criminal Laws

DATE: December 16, 2004

This Memo provides background information about the authority of tribal law enforcement officers to enforce criminal laws. It was prepared for the Special Committee on State-Tribal Relations in connection with the staff briefing and committee discussion of “Law Enforcement in Indian Country” that will occur at the committee meeting scheduled for December 17, 2004. It supplements Memo No. 3, *Criminal Jurisdiction in Indian Country* (12/10/04), which has been provided to committee members previously. Criminal jurisdiction, as discussed in Memo No. 3, basically addresses criminal adjudicatory jurisdiction, that is, which court system (tribal, state, federal, or more than one) has subject matter jurisdiction to adjudicate a crime.

In order to exercise criminal jurisdiction, the state, United States, and some American Indian tribes (tribes) have law enforcement officers.<sup>1</sup> The authority of those law enforcement officers, which may include the authority to investigate crimes and stop, detain, and arrest individuals in connection with crimes, is determined in the first instance by the laws of the government under whose auspices the officer functions. In addition, the U.S. Constitution and court decisions (case law) affect the authority of state and federal law enforcement officers, and federal law, including federal court decisions, affects the authority of tribal law enforcement officers. Further, if an officer is acting outside the boundaries of his or her territory or is acting to enforce the laws of a different government, the laws of the government in whose territory he or she is acting or whose laws he or she is enforcing affect the officer’s authority.

This Memo discusses: (1) the authority of tribal law enforcement officers to enforce tribal criminal laws in the tribe’s territory; (2) the authority of tribal law enforcement officers to enforce tribal

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<sup>1</sup> In this Memo, unless otherwise noted, a reference to a “state law enforcement officer” includes a law enforcement officer employed by the state or by a subdivision of the state, for example, a county or other municipality. However, such law enforcement officers do not have identical authority.

criminal laws outside the tribe's territory; and (3) the authority of tribal law enforcement officers to enforce state criminal laws in Wisconsin.

As a preliminary note, if permitted to do so by tribal law, a tribe may deputize a state law enforcement officer. The state law enforcement officer would then be empowered to enforce tribal law in the manner prescribed in the deputation, if the state law enforcement officer's employing entity authorized the officer to engage in such activities.

While this Memo discusses authority to enforce criminal laws, it should be noted that tribal law enforcement officers often have additional responsibilities.

### **AUTHORITY OF TRIBAL LAW ENFORCEMENT OFFICERS TO ENFORCE TRIBAL CRIMINAL LAWS IN THE TRIBE'S TERRITORY**

#### **Authority with Respect to Indians**

As noted in Memo No. 3, the Menominee Tribe of Wisconsin (Menominee Tribe) (which is not subject to Public Law 280) has authority to exercise criminal jurisdiction over American Indians (Indians) in certain circumstances, and the other federally recognized American Indian tribes and bands in Wisconsin (which are subject to Public Law 280) may have authority to exercise criminal jurisdiction concurrent with the state's criminal jurisdiction. If an Indian allegedly commits a violation of tribal law and if the Indian is on the tribe's reservation or off-reservation trust land (hereinafter referred to collectively as "reservation"), the authority of a tribal law enforcement officer to stop, detain, and arrest, and the jurisdiction of the tribal court to adjudicate the crime is controlled by tribal law (typically the tribe's constitution, statutes, and court decisions), as affected by any Congressional enactments (such as the federal Indian Civil Rights Act) and decisions of the federal courts. In addition, federal regulations may apply to tribal law enforcement officers operating under contract with the Bureau of Indian Affairs.

Wisconsin Statutes provide that if a tribal law enforcement officer *who is empowered to act under s. 165.92 (2) (a), Stats.* (as discussed below), has a boundary that is a highway, the officer may enforce any law or ordinance that the officer is otherwise authorized to enforce (tribal law with respect to Indians) by arrest or issuance of a citation on the entire width of the highway or on the entire intersection of such a highway with a highway located in an adjacent jurisdiction. [s. 175.40 (4), Stats.] Section 165.92 (2) (a), Stats., is the state statute that authorizes certain tribal law enforcement officers to enforce *state* laws under certain circumstances. As discussed below, there are many prerequisites before a tribal law enforcement officer is empowered to act under s. 165.92 (2) (a), Stats.

#### **Authority with Respect to Non-Indians**

As noted in Memo No. 3, the U.S. Supreme Court has held that tribal courts do not have jurisdiction to prosecute non-Indians for a violation of tribal criminal law. [*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).] However, that does not mean that tribal law enforcement officers have no authority with respect to non-Indians. As noted in Memo No. 3, the race of the alleged perpetrator and victim may be factors in determining which government or governments have criminal jurisdiction. As a practical matter, until a crime is investigated or a person suspected of violating a law is stopped, it is often difficult or impossible to know if a non-Indian is involved. Therefore, it seems likely that a court would uphold the authority of tribal law enforcement officers to engage in such

activities as conducting investigations and stopping individuals reasonably suspected of violating tribal law, even if the individual involved turns out to have been a non-Indian and cannot be prosecuted under tribal criminal law.<sup>2</sup>

Even when it is clear after an investigation or stop that a non-Indian may have violated tribal criminal law, that does not necessarily mean that tribal law enforcement officers have no authority. The U.S. Supreme Court has held that: “Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation and, if necessary, to eject them. Where jurisdiction to try and punish and offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.” [*Duro v. Reina*, 495 U.S. 676, 697 (1990).<sup>3</sup>] Case law has not made clear exactly how this ejection authority may be exercised,<sup>4</sup> including if this authority to transport non-Indians stops at the boundaries of the reservation or permits transportation to a contact point outside the reservation.

In *Strate v. A-1 Contractors*, the U.S. Supreme Court stated that it was not questioning in that case the authority of tribal police to patrol a public highway on the reservation, including a state highway, and detain and turn over to state officers an individual who was not a member of that tribe (including a non-Indian) if the non-member was stopped for conduct violating a state law. [Also see *Washington v. Schmuck*, 850 P.2d 1332, (Wash. Sup. Ct. 1993), *cert. denied*, 510 S. Ct. 931 (1993) (tribal police officer had authority to stop and detain a non-Indian who allegedly violates state and tribal law on a reservation until the individual could be turned over to state authorities).]

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<sup>2</sup> In *United States v. Boyles*, 57 F.3d 535, 538 n. 3 (7th Cir. 1995), the U. S. Court of Appeals for the 7th Circuit noted that Menominee tribal police officers began the initial investigation and turned information over to the Federal Bureau of Investigation for further investigation and prosecution in federal court under the federal Major Crimes Act. In *United States v. Patch*, 114 F.3d 121 (1997), *cert. denied* 522 U.S. 983 (1997), the U.S. Court of Appeals for the 9th Circuit held that a county law enforcement officer had authority to stop an individual in Indian country for an alleged traffic violation in Indian country to determine if the individual was a tribal member or not a tribal member, which would then determine if the officer had authority to arrest. (If a tribal member was involved, county procedure required the officer to notify the tribal police rather than make an arrest.) The court held that the officer had authority to make the stop in order to determine if the officer had authority to make an arrest. The cases suggest that an entity’s policing powers are greater than the entity’s criminal jurisdiction.

<sup>3</sup> The *Duro* court held that the tribe did not have criminal jurisdiction with respect to an Indian who was not a member of that tribe. Congress then passed Public Law 102-137 (commonly referred to as the *Duro* fix), in which Congress provided that an Indian tribe may exercise jurisdiction over all Indians (not simply their own tribal members) for violation of tribal criminal laws. Congress did not overturn the holding in *Duro* cited above.

<sup>4</sup> Other cases decided by the U.S. Supreme Court suggest that a tribe’s right to exclude individuals from a reservation may be limited to land that has not been alienated to non-Indians, that is, may be limited to land owned by or held in trust for the tribe or an Indian. [See *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997); also see *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993), and *Montana v. United States*, 450 U.S. 544 (1981).] Even if this power is more extensive, the U.S. Court of Appeals for the 8th Circuit held that a tribal court’s exclusion of a non-Indian from a reservation is subject to review in federal district court. [*Penn v. United States*, 335 F.3d 786 (8th Cir. 2003), rehearing and rehearing en banc denied in *Penn v. Landeis*, 2003 U.S. App. LEXIS 19960 (8th Cir. 2003), *cert. denied* in *Penn v. Bodin*, 124 S. Ct. 2014 (2004).] The relationship between the power to exclude and the power to eject is not clear.

## **AUTHORITY OF TRIBAL LAW ENFORCEMENT OFFICERS TO ENFORCE TRIBAL CRIMINAL LAWS OUTSIDE OF THE TRIBE'S TERRITORY**

Law enforcement authority is generally exercised only within a government's territory<sup>5</sup> and only to enforce that government's own laws. If an Indian allegedly violates a tribal criminal law and leaves the reservation or flees the reservation with a tribal law enforcement officer in fresh pursuit,<sup>6</sup> the question arises as to whether the tribal law enforcement officer has authority to exercise law enforcement authority off the reservation.

First, a determination of such authority is controlled by the laws of the tribe. A discussion of that authority and jurisdiction is beyond the scope of this Memo. Second, even if permitted by tribal laws, general principles of state sovereignty prohibit tribal law enforcement officers from exercising authority in the state outside the reservation, *except as authorized by the state*.

This part first discusses situations involving fresh pursuit off the reservation and then discusses situations that do not involve fresh pursuit off the reservation.

### **Fresh Pursuit**

Wisconsin statutes authorize fresh pursuit off the reservation by certain tribal law enforcement officers in certain circumstances. Section 175.40 (1) (c) and (2), Stats., provides, in pertinent part, that, for purposes of state civil and criminal liability, a tribal law enforcement officer *who is empowered to act under s. 165.92 (2) (a), Stats.*, may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance that the officer is authorized to enforce. Because a tribal law enforcement officer is empowered to enforce a tribal ordinance or law, a tribal law enforcement officer who is empowered to act under s. 165.92 (2) (a), Stats., may engage in fresh pursuit off the reservation to enforce tribal law if tribal law permits the officer to do so. As discussed below, there are many prerequisites before a tribal law enforcement officer is empowered to act under s. 165.92 (2) (a), Stats.

### **Other Than Fresh Pursuit**

If an individual who is suspected of violating tribal criminal law on the tribe's reservation has left the reservation and fresh pursuit is not involved (or if fresh pursuit would be involved but the tribal law enforcement officer is not empowered to act under s. 165.92 (2) (a), Stats.), it appears that tribal law

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<sup>5</sup> This is not always the case. For example, under treaties, the Chippewa have rights to hunt, fish, and gather in the ceded territories in northern Wisconsin, and the Chippewa Bands have authority to enforce their tribal laws which relate to these activities and apply to their tribal members (including exercising this authority through the Great Lakes Indian Fish and Wildlife Commission) in the ceded territory, including off their reservations.

<sup>6</sup> The term "fresh pursuit" refers generally to the pursuit of a fleeing suspect who crosses jurisdictional boundaries. In general, fresh pursuit involves pursuit without unreasonable delay, but does not necessarily involve immediate and continuous pursuit which is commonly referred to as "hot pursuit," independent of the crossing of jurisdictional boundaries. "Close pursuit" is defined in s. 976.04, Stats., as including fresh pursuit as defined by common law and also the pursuit of a person who has or is suspected of having committed a felony. This close pursuit statute applies to officials from another state who enter Wisconsin but does not apply to tribal law enforcement officers.

enforcement officers do not have the authority to travel off the reservation to stop the individual, arrest the individual (even if the individual is an Indian and subject to tribal arrest), and return the individual to the reservation for prosecution (even if the individual is an Indian subject to prosecution in tribal court). Aside from any provisions of tribal laws that may preclude such action, this prohibition is based on general principles of state sovereignty.

If the individual is an Indian and subject to tribal court jurisdiction, the question then arises as to whether state law enforcement officers may arrest such an individual and return him or her to the reservation for prosecution in the tribal court. There does not appear to be authority in state statutes for this. In 1981, then Attorney General Bronson La Follette issued an opinion stating that state law enforcement officers do not have statutory authority to execute warrants issued by the Menominee Tribal Court. [70 Op. Att’y Gen., 36, 36-38 (1981).<sup>7</sup>]

There do not appear to be constitutional impediments to amending state statutes to: (1) authorize state law enforcement officers to execute warrants issued by a tribal court; (2) authorize tribal law enforcement officers to arrest an Indian who is suspected of violating tribal law on the reservation and who has left and remains off the reservation; or (3) authorize extradition agreements with a tribe.<sup>8</sup> In fact, s. 976.07, Stats., authorizes the Wisconsin Attorney General to negotiate an extradition agreement with the Menominee Tribe. The state and the Menominee Tribe have not entered into such an agreement; however, the Menominee Tribe has passed an extradition ordinance that permits extradition of Indians from the Menominee Reservation to the state under certain circumstances.

### **AUTHORITY OF TRIBAL LAW ENFORCEMENT OFFICERS TO ENFORCE STATE CRIMINAL LAWS**

Several Wisconsin Statutes relate to the authority of tribal law enforcement officers to enforce *state* criminal laws in Wisconsin.<sup>9</sup> (However, prosecution is in the state court system.) ***These state statutes do not relate to the authority of tribal law enforcement officers to enforce tribal criminal laws on the tribe’s reservation. The latter authority is established as a matter of tribal law and federal law.*** The state statutes are as follows:

***Section 59.26 (5), Stats.*** This statute provides that a county sheriff or the undersheriff may depute in writing individuals (other than actual deputies) to perform particular acts. For example, a

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<sup>7</sup> The question was specific to the Menominee Tribe. It is not clear that any other tribe was attempting to exercise tribal criminal jurisdiction when the question was presented.

<sup>8</sup> Section 976.03, Stats., the uniform criminal extradition act, applies to extradition to other states (defined for that statute as any other state or organized or unorganized territory of the United States); s. 976.02, Stats., the uniform act for the extradition of witnesses in criminal actions, applies to extraditions to other states, any U.S. territory, and the District of Columbia; and s. 976.01, Stats., the uniform act for the extradition of prisoners as witnesses, applies to other states. None of these statutes clearly applies to tribes.

<sup>9</sup> This Memo does not discuss state statutes that do not directly address the law enforcement authority of tribal law enforcement officers. For example, it does not discuss the cooperative county-tribal law enforcement grant program, state training and certification available to tribal law enforcement officers, or their access to state criminal identification records.

tribal law enforcement officer could be deputized and authorized to enforce state laws in the same manner as a deputy, including making arrests for violation of state law.

**Section 59.28, Stats.** This statute provides that sheriffs, their undersheriffs, and their deputies must keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; for which purpose, and for the service of processes in civil or criminal cases and in the apprehending or securing any person for felony or breach of the peace they and every coroner and constable *may call to their aid such persons or power of their county as they consider necessary*. A tribal law enforcement officer may be called to aid in such situations and would be enforcing state laws.

**Section 165.92, Stats.** This statute provides that a tribal law enforcement officer (that is, a person who is employed by a tribe for the purpose of detecting and preventing crime and enforcing the tribes laws or ordinances and who is authorized by the tribe to make arrests of Indian persons for violations of the tribe's laws or ordinances) has the same powers to enforce **state** laws and make arrests for violations of **state** laws that county sheriffs have (that is, *is empowered to act under s. 165.92 (2) (a), Stats.*), **if** all of the following conditions are met:

1. The tribal law enforcement officer meets the requirements of: (a) s. 165.85 (4) (b) 1., Stats. (satisfactorily completing a law enforcement training program that meets certain criteria and is approved by the Law Enforcement Standards Board and being certified by the Board); (b) s. 165.85 (4) (bn) 1., Stats. (completing annual recertification training); and (c) s. 165.85 (4) (c), Stats. (meeting any other requirements established by the board by administrative rule).
2. The tribal law enforcement officer agrees to accept the duties of law enforcement officers under state law pursuant to s. 165.85 (3) (c), Stats., and then performs those duties.
3. The powers and duties are exercised or performed by the tribal law enforcement officer only on the reservation of the tribe or on trust lands held for the tribe or for a member of the tribe that employs the officer, or are exercised or performed off the reservation or trust land in any of the following situations: (a) the tribal law enforcement officer is in fresh pursuit under s. 175.40 (2), Stats.; (b) the tribal law enforcement officer is operating on a border highway or intersection under s. 175.40 (4), Stats.; (c) the tribal law enforcement officer is acting under s. 175.40 (6), Stats. (as described below); or (d) the officer is transporting the arrested person to the jail or other detention facility in the county in which the arrest took place or to another jail or detention facility agreed upon by the tribe and the county in which the arrest took place.
4. Liability issues are handled in one of the following ways: (a) the tribe that employs the tribal law enforcement officer is liable for all acts of the officer acting within the scope of his or her employment and neither the state nor any subdivision of the state is liable for any action of the officer who is enforcing state laws or performing the duties of law enforcement officers under state law; or (b) a joint cooperative county-tribal law enforcement program plan under s. 165.90 (2), Stats., or an agreement between the tribe and a political subdivision of the state provides some other allocation of liability.

However, if the tribe is partially or fully liable for the acts of the tribal law enforcement officer under (a) or (b), above, then the governing body of the tribe that employs the officer must adopt and have in effect a resolution that either: (a) includes a statement that the tribe waives its sovereign immunity to the extent necessary to allow enforcement in state court of the tribe's liability; or (b) the resolution does not include this waiver statement but the Wisconsin Department of Justice determines that the tribe's resolution will reasonably allow enforcement in state court of the tribe's liability.

**Section 175.40 (6), Stats.** This statute provides, in pertinent part, that a tribal law enforcement officer *who is empowered to act under s. 165.92 (2) (a), Stats.*, as discussed above, and is outside of his or her territorial jurisdiction may arrest a person or provide aid or assistance anywhere in the state if all of the following criteria are met: (a) the officer is on duty and on official business; (b) the officer is taking action that he or she would be authorized to take under the same circumstances in his or her territorial jurisdiction; (c) the officer is acting to respond to either of the following: (i) an emergency situation that poses a significant threat to life or of bodily harm; or (ii) an act that the officer believes, on reasonable grounds, constitutes a felony; and (d) the officer's supervisory agency has adopted and implemented written policies regarding the arrest and other authority specified in s. 175.40 (6), Stats., including at least a policy on notification to and cooperation with the law enforcement agency of another jurisdiction regarding arrests made and other actions taken in the other jurisdiction, and the officer complies with these policies.

**Section 968.07 (2), Stats.** This statute provides that a state law enforcement officer making a lawful arrest may command the aid of any person. It also provides that such a person has the same power as that of the state law enforcement officer. This statute does not give a tribal law enforcement officer authority to act independently, but it could apply to a tribal law enforcement officer who was at the scene of an incident. (Section 946.40, Stats., provides that it is a Class C misdemeanor (punishment by a fine not to exceed \$500; imprisonment not to exceed 30 days; or both) if a person, without a reasonable excuse, refuses or fails, upon command of a peace officer, to assist the peace officer. The person must know that the person is a peace officer, and the peace officer has to have authority to command such assistance (as under s. 968.07 (2), Stats.). The courts have not made clear whether this criminal statute can be enforced with respect to a tribal law enforcement officer.)

**Section 66.0301 (2) Stats.** This statute provides, in pertinent part, that unless a statute specifically excludes action under s. 66.0301, Stats., any municipality (which includes the state or any department or agency of the state; any city, village, town, or county; and certain other special purpose units of government) may contract with a tribe in Wisconsin to receive or furnish services or to jointly exercise any power or duty required or authorized by law. It further provides that if the municipal or tribal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. In light of several statutes that require certain municipalities to have their own law enforcement officers, it is not clear that s. 66.0301 (2), Stats., can be used by all municipalities to contract with a tribe to provide law enforcement services for the municipality. (Although a town apparently could so contract under s. 60.56 (1) (a) 3., Stats.) However, it appears that s. 66.0301 (2), Stats., could be used by the state, a state agency or department, county, village, town, or city to enter into a mutual aid agreement or memorandum of understanding with a tribe relating to law enforcement services.

**Case Law.** In addition to these statutes, Wisconsin case law provides for a citizen arrest in certain circumstances when a person is committing a felony or serious misdemeanor affecting a breach of the peace. [See *City of Waukesha v. Gorz*, 479 N.W.2d 221 (Wis. Ct. App. 1991).] This appears to permit a tribal law enforcement officer who is outside of his or her territory to make a citizen arrest on the same basis as other citizens. In addition, as noted above, the U.S. Supreme Court has stated that it was not questioning in the *Strate* case the authority of tribal law enforcement officers to patrol a public highway on the reservation, including a state highway, and detain and turn over to state officers a non-Indian stopped for conduct violating a state law.

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