



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR SPENCER COGGS

FROM: David L. Lovell, Senior Analyst

RE: Background and Policy Options Related to the Opinion of the Attorney General on the Subject of Law Enforcement Mutual Assistance Between Tribal and County or Municipal Law Enforcement Agencies

DATE: August 21, 2009

On October 1, 2008, Attorney General J.B. Van Hollen issued a formal opinion, OAG 8-08, stating that the state's law enforcement mutual assistance statute, s. 66.0313, Stats., does not apply to tribal law enforcement agencies. In testimony to the Special Committee on State-Tribal Relations on December 16, 2008, St. Croix Tribal Police Chief Frank Taylor and Burnett County Sheriff Dean Roland indicated that the opinion caused their departments, with a history of mutual assistance, to reconsider their authority to assist one another and raised questions of liability and other matters if they were to do so. As a result, they said, cooperation between their agencies had been greatly curtailed. Additional information indicated that other tribal and county departments were having similar experiences.

Chief Taylor and Sheriff Roland indicated that they were negotiating an agreement to allow their agencies to assist each other without the need to rely on s. 66.0313. In testimony to the Special Committee on June 4, 2009, Chief Taylor indicated that the St. Croix-Burnett County agreement was close to completion, but appeared to be stalled. Additional information indicated that negotiations for an agreement between the Lac Courte Oreilles Band of Lake Superior Chippewa and Sawyer County had progressed to a similar point but not reached completion.

At the June 4 meeting, Oneida Tribal Police Chief Rich VanBoxtel and Menominee Tribal Police Chief Mark Waukau suggested that, in light of the experience to date, the Special Committee should look at statutory solutions as a "backstop" to negotiated agreements. You, as Chair of the Special Committee, stated that you would form a working group to follow up on this suggestion.

This memorandum provides background and policy options to facilitate the discussion of that working group.

BACKGROUND

Mutual Assistance Statute

The mutual assistance statute at question is the following:

66.0313 Law enforcement; mutual assistance.

(1) In this section, "law enforcement agency" has the meaning given in s. 165.83 (1) (b).

(2) Upon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28 (2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision. For purposes of ss. 895.35 and 895.46, law enforcement personnel, while acting in response to a request for assistance, shall be deemed employees of the requesting agency.

(3) The provisions of s. 66.0513 apply to this section.

The definition of "law enforcement agency," referenced in the statute, is the following:

165.83 (1) (b) "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.

Section 66.0313 references four other additional statutes, three of which are pertinent to this discussion.

1. Section 66.0513, Stats., states that a law enforcement officer providing law enforcement services outside his or her territorial jurisdiction, upon order of the Governor, sheriff, or other superior officer or in response to a request for assistance from the other jurisdiction, is entitled to the same wage, salary, pension, worker's compensation, and all other service rights for this service as for service within his or her territorial jurisdiction. It also states that the agency that employs the officer is responsible for all wage and disability payments, pension and worker's compensation claims, damage to equipment and clothing, and medical expense arising from such service outside his or her territorial jurisdiction, but that the requesting agency must reimburse the employing agency for these costs.
2. Section 895.35, Stats., requires that, in general and with important exceptions, if a law enforcement officer is subject to criminal charges as a result of executing his or her official duties, the municipality employing the officer must reimburse the officer's legal expenses in connection to the proceeding.

3. Section 895.46, Stats., requires that, in general and with important exceptions, if any public officer or employee is subject to any proceeding as a result of executing his or her official duties, the state agency or municipality employing the officer or employee must pay reasonable attorney fees and other costs of defending a civil, but not criminal, action and any damages or costs entered against the officer or employee.

Section 66.0313, then, taken together with the cross-referenced statutes, states that:

1. The personnel of one law enforcement agency may respond to a request for assistance from another law enforcement agency.
2. When providing such assistance, a law enforcement officer is treated as:
 - a. An employee of his or her regular employing agency for purposes of wage and disability payments, pension and worker's compensation claims, damage to equipment and clothing, and medical expense arising from such service outside his or her territorial jurisdiction, although the agency requesting assistance must reimburse the employing agency for these costs.
 - b. An employee of the requesting agency for purposes of legal expenses and judgments arising from the officer's official actions while providing the requested assistance.

Attorney General's Opinion

The Attorney General's opinion is reproduced in Attachment 1, along with pertinent correspondence. It is in response to a number of questions posed by Thomas Wiensch, Assistant Corporation Counsel for Oneida County, two of which are at the heart of the opinion.

Attachment 2 reproduces testimony that Thomas Bellavia, Assistant Attorney General, Wisconsin Department of Justice, presented to the Special Committee on State-Tribal Relations on December 16, 2008. (Attachments 3 and 4 reproduce selected statutory definitions and the text of selected statutes, respectively, pertinent to the current discussion.) The testimony discusses what the opinion does and does not say and emphasizes options apart from s. 66.0313 for tribal and county or municipal law enforcement agencies to provide mutual assistance. This memorandum will not repeat Mr. Bellavia's very concise summary, but will briefly state the conclusions to the two key questions.

Are tribal law enforcement agencies included within the coverage of s. 66.0313?

The opinion concludes that tribal law enforcement agencies are *not* included within the coverage of s. 66.0313. It reaches this conclusion based on an analysis of definitions of terms used in this and related statutes, the legislative history of those statutes, and pertinent federal case law.

If tribal law enforcement agencies are not included within the coverage of s. 66.0313, are there other means for county and tribal law enforcement agencies to engage in mutual assistance?

Perhaps more important than its conclusion with regard to the first question, the opinion concludes that there are a number of means other than s. 66.0313 for county and tribal law enforcement agencies to engage in mutual assistance. It identifies as such means agreements under s. 66.0301, *Intergovernmental cooperation*, and joint program plans under s. 165.90, *County-tribal law enforcement programs*, but notes that an agreement is limited to the extent that the officers involved already have law enforcement authority in the circumstances contemplated by the agreement. The text of ss. 66.0301 and 165.90 is reproduced in Attachment 4.

Authority of Tribal Police Officers to Enforce State Laws

Tribal law enforcement officers do not have intrinsic authority to enforce state laws. However, three mechanisms exist by which a tribal police officer may acquire this authority. All of these mechanisms are limited in their scope, and no two apply to the same set of circumstances. Note also that these mechanisms grant authority to individual officers; while the authority may be contingent upon actions taken by the police department or tribe employing the officer, they do not give any expanded authority or jurisdiction to the tribe or the department.

Section 165.92, Stats.

Under s. 165.92, Stats., which is reproduced in Attachment 4, a tribal police officer may acquire the authority to enforce any state law 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 and to transport a person arrested under that authority to the county jail or other detention facility.

To acquire this authority, the officer must do all of the following:

1. Meet the training standards that apply to police officers under s. 165.85 (4) (b) 1., (bn) 1. and (c), Stats.
2. Agree to perform the duties of a police officer specified under s. 165.85 (3) (c), Stats.

The statute specifies that, in general, the tribe that employs an officer is liable for all acts of the officer while acting within the scope of his or her employment and neither the state nor any political subdivision of the state may be held liable for any action of the officer taken under the authority granted by the statute. For an officer to exercise this authority, the governing body of the tribe that employs the officer must do one of the following:

1. Adopt and have in effect a resolution that includes a statement that the tribe waives its sovereign immunity to the extent necessary to allow the enforcement in the courts of this state of its liability for any action of the officer taken under this authority.
2. Adopt a resolution that does not include a statement as described in 1., but that will reasonably allow the enforcement in the courts of this state of the tribe's liability for any action of the officer taken under this authority.

Section 175.40, Stats.

Section 175.40 (6) and (6m), Stats., authorize peace officers outside of their territorial jurisdiction to make certain arrests and to provide aid or assistance; s. 175.40 (6) applies to on-duty officers, and s. 175.40 (6m) applies to off-duty officers. As defined in these statutes, “peace officer” includes a tribal law enforcement officer who is empowered to act under s. 165.92. The text of these statutes is reproduced in Attachment 4.

Under s. 175.40 (6), a peace officer 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 apply:

1. The officer is on duty and on official business.
2. The officer is taking action that he or she would be authorized to take under the same circumstances in his or her territorial jurisdiction.
3. The officer is acting to respond to any of the following:
 - a. An emergency situation that poses a significant threat to life or of bodily harm.
 - b. Acts that the officer believes, on reasonable grounds, constitute a felony.
4. The officer is acting in compliance with the employing agency’s policies described below.

In order to allow a peace officer to exercise this authority, the peace officer’s supervisory agency must adopt and implement written policies regarding the arrest and other authority under this subsection, 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.

The statute specifies that, for purposes of civil and criminal liability, any peace officer exercising this authority is considered to be acting in an official capacity.

Section 175.40 (6m) differs from sub. (6) in several significant ways:

1. It applies to an off-duty officer outside of his or her territorial jurisdiction.
2. It authorizes the officer to act in response to an emergency that poses a threat to life or limb, but not to a felony in progress.
3. It requires that the employing agency’s written policies address all of the following specific topics:
 - a. Reasonable responses to an emergency situation.
 - b. Arrests made in response to an emergency situation.

- c. Notification of and cooperation with a law enforcement agency of another jurisdiction regarding arrests made and other actions taken in the other jurisdiction.
4. It specifies all of the following:
 - a. For purposes of civil and criminal liability and for purposes of s. 895.46 (described earlier), an officer acting under this subsection is considered to be acting in an official capacity as an officer of the state, state employee, or agent of the state.
 - b. For purposes of worker's compensation, the officer is considered to be an employee of the state and the officer is eligible for the same benefits as if the officer had sustained the injury while performing services growing out of and incidental to the officer's employment with the employing supervisory agency.
 - c. The officer is considered to be performing his or her duty and engaging in his or her occupation.

Deputization

Sheriffs have broad authority under the statutes and common law to appoint deputies. In addition to the deputies who make up the corps of the sheriff's department, "[t]he sheriff or the undersheriff may also depute in writing other persons to perform particular acts." [s. 59.26 (5), Stats.] Under this authority, sheriffs may, and some sheriffs do depute qualified officers employed in tribal police departments. Apart from this simple statement, though, the statutes say very little about persons deputized under this authority.

Authority of County and Municipal Law Enforcement Officers

Authority to Enforce State Law

County and municipal officers have law enforcement authority within their home territory and, under s. 66.0313, may respond to a request for assistance outside their territory and, under s. 165.70 (6) and (6m), may respond to an emergency situation or a felony in progress outside their territory under specified circumstances. In addition, a sheriff has the power to deputize the officers of another law enforcement agency, giving those officers authority to act in the sheriff's territory to the extent of the deputization.

With the enactment of 1953 Public Law 280 (PL 280), Congress transferred its jurisdiction over crimes in Indian Country to the states. PL 280 applies only to certain states and, in some states, only to certain tribes. In Wisconsin, PL 280 applies to all of Indian Country except for the Menominee Reservation and trust lands held for the Menominee Tribe. Consequently, in Wisconsin, where the reservation or trust lands of a tribe other than the Menominee Tribe overlap the territory of a county or municipal law enforcement agency, the officers of that agency have jurisdiction over all persons, Indian and non-Indian, with regard to all crimes specified in state law.

On the Menominee Reservation and other Menominee trust lands, jurisdiction over crimes involving American Indian persons remains with the Federal Marshall's Service, while county and municipal law enforcement agencies have jurisdiction in cases involving only non-Indian persons.

Authority to Enforce Tribal Law

The authority of a county or municipal officer to enforce tribal law depends entirely on the laws of the tribe in question. Presumably, as part of a mutual assistance agreement, a tribe could authorize the officers of the cooperating agency to enforce its laws.

Costs and Liabilities

The various statutes described above, including s. 66.0313, spell out some of the important terms of an officer acting under the specific authority. While they do not all address all of these items, they variously address who is responsible for the officer's salary and benefits, costs associated with the officer's actions, the duty to defend an officer in a legal action arising out of his or her acts, and indemnification for the cost of damages or civil penalties ordered under such an action.

As Table 1 shows, mutual assistance under s. 66.0313 requires the requesting agency to bear all costs, ultimately. Under all other authorities, it appears that most of these costs are borne by the employing agency. Responsibilities for the costs of defending an officer in court and indemnification for damages and civil penalties, though, varies between these statutes. The mutual assistance statute assigns these costs to the requesting agency; for a tribal officer enforcing state law under s. 165.92, it is the employing agency or tribe; for an on-duty officer outside the officer's home territory acting under s. 175.40 (6), it is the employing agency; and for an off-duty officer outside the officer's home territory acting under s. 175.40 (6m), it is the state. Note that, in the cases of tribal officers enforcing state law, these assignments may be changed by mutual agreement between two law enforcement agencies; although not stated in the statute, legal counsel for the League of Wisconsin Municipalities has argued that the same may be true with regard to mutual assistance under s. 66.0313.

As is also shown in Table 1, the statutes do not provide this kind of detailed guidance for the assignment of costs and liabilities under deputization. How these would be allocated is based on case law and, potentially, the terms of any agreement between municipalities. If there is a dispute or if a claim is made, determination of who bears what costs and liabilities may ultimately be determined by a court. The outcome of such a case is likely to be very fact-specific, and so hard to characterize.

ELEMENTS OF A POLICY

The differences in the ways in which the several statutes summarized above allocate costs and liabilities no doubt reflect varying policy motivations of the Legislature related to the specific situations being addressed. The fact that the statutes are specific in these matters, though, may reflect more on the uncertainty associated with the deputization scenario. Certainly, in creating the several mechanisms to allow law enforcement assistance, the Legislature wanted to ensure that the mechanisms would be used. It appears likely that the Legislature sought to reduce the uncertainty about the costs and liabilities a law enforcement agency would face in determining how and when to provide assistance to another agency by specifying which agency should bear those costs and liabilities.

Table 1

Assignment of Costs and Liabilities Related to an Officer Acting Under Specified Sources of Law Enforcement Authority

	s. 66.0313 Mutual assistance between subunits of the state	s. 165.92 Tribal officer enforcing state law on reservation	s. 175.40 (6) On-duty peace officer out of home territory; emergencies and felonies in progress	s. 175.40 (6m) Off-duty peace officer out of home territory; emergencies only	Deputization by sheriff
Salary and benefits, including retirement benefits	Employing agency but reimbursed by requesting agency	Statute silent; presumably employing agency	Statute silent; presumably employing agency	Statute silent; presumably employing agency	Statutes silent; presumably, employing agency
Costs related to injury or damage to equipment or clothing	Employing agency but reimbursed by requesting agency	Statute silent; presumably employing agency	Statute silent; presumably employing agency	Statute silent; presumably employing agency	Statutes silent; depending on facts, could be either agency, or shared
Worker's compensation	Employing agency but reimbursed by requesting agency	Statute silent; presumably employing agency	Statute silent; presumably employing agency	"Considered employee of state;" same benefits as with employing agency	Statutes silent; depending on facts, could be either agency, or shared
Cost of defending an action arising out of providing assistance	Requesting agency	Employing agency; depends on laws of respective tribes	Employing agency	The state	Statutes silent; presumably, deputizing agency; depending on facts, could be shared
Damages or civil penalties for an action arising out of providing assistance	Requesting agency	Employing agency; depends on laws of respective tribes	Employing agency	The state	Statutes silent; presumably, deputizing agency; depending on facts, could be shared

Based on this reasoning, it would appear that a policy that successfully facilitates mutual assistance between tribal and county or municipal law enforcement agencies should address the following three issues.

Authority to Respond to a Request for Assistance

Fundamental to providing assistance is the authority to exercise law enforcement powers in the specific circumstances, so a mechanism for granting that authority is an obvious necessity. As described above, under current law, which officers have authority to act in individual circumstances and how an officer can acquire authority varies based on the agency employing the officer and the place where the assistance is requested. A legislative proposal could rely on existing mechanisms for granting this authority or create a new mechanism.

Authority of Tribal Officers

Under current law, for assistance on the reservation of the tribe that employs the officer, a tribal officer could acquire the authority to respond via s. 165.92; for assistance off-reservation, the only current mechanism is deputization.

A new law could specify that a tribal officer who is authorized to act under s. 165.92 may respond to a request for assistance from any county or municipal law enforcement agency.

Authority of County or Municipal Officers

Under current law, county and municipal law enforcement officers have law enforcement authority within their home territory and may respond to a request for assistance under s. 66.0313. Thus, under his or her inherent authority, a sheriff may respond to a request from a tribe for assistance within the sheriff's home county, but the provisions of s. 66.0313 do not apply to this response. If the requested assistance is in a neighboring county, the sheriff does not have the authority to respond but can acquire that authority through a request for assistance from the sheriff of that county. This is more than a hypothetical case, as several Indian reservations in Wisconsin cross county lines.

A new law could specify that a sheriff may respond to a request for assistance from a tribal police department in another county. Such a policy, though, could be seen as an infringement of the powers of the sheriff of the county where the assistance is requested.

As an alternative, a new law could also specify that a sheriff may respond to a request for assistance from a tribal police department in another county if the request is made through the dispatcher of the county in which the assistance is requested, or if the sheriff of that county otherwise authorizes the response. This, however, could be too cumbersome for situations in which a prompt response is required; further, it really is only a restatement of current law.

Costs Associated with Responding

Under the current mutual assistance law, the cost associated with responding, primarily costs related to personnel and equipment, are borne ultimately by the requesting agency. Under the other scenarios described above, it appears that these costs rest with the employing agency.

A new law could take either of these approaches. Note, however, that the state does not have the authority to impose requirements on American Indian tribes, due to their sovereignty. Thus, a new law could not simply state that a tribe that requests and receives assistance from the sheriff must compensate the sheriff for the costs associated with responding. An alternative is to make the authority to participate in mutual assistance contingent on the tribe's accepting responsibility for such costs. This could be accomplished through intergovernmental agreements or through a general statute similar to s. 165.92, stating that a tribe may request and receive assistance only if it agrees to reimburse the responding agency's costs and has adopted a resolution waiving its sovereign immunity to the extent necessary to allow enforcement of this agreement.

Liability for Actions of Responding Officer

Liability for the actions of an officer comes down to a matter of costs, too--the costs of defending and indemnifying an officer. Current law is quite varied in its treatment of this under the several laws described above. Like costs associated with responding, these costs could be assigned in various ways. Also like costs associated with responding, it is the mechanism for enforcing the assignment of costs in light of tribal sovereignty that is challenging, and the same options are available.

POLICY OPTIONS

The options identified above for addressing the foregoing elements of a policy could be combined in various ways to craft a new law. No doubt, there are additional options not presented above, and additional ways of crafting a new law not presented in this section. Rather than being an exhaustive catalogue of options, this section is intended to be a starting point for discussion of this topic, presenting a limited number of options. It is hoped and expected that participants in that discussion will identify additional options.¹

For ease of discussion, this section is written as an outline of drafting instructions, presenting multiple options. The bulk of the policy choices are found in Part II of the outline.

I. **Definitions:** Use all terms as defined in current law.

NOTE: See Attachment 3 for a list of current definitions.

II. **Authority to Respond to a Request for Assistance.**

A. Tribal officers.

1. **OPTION 1:** Specify that a tribal law enforcement officer may respond to a request for assistance from a law enforcement agency anywhere in the state.

¹ The option of mutual assistance under an agreement negotiated pursuant to s. 66.0301 is an option that does not require legislation and so will not be addressed here except to note that it would appear to be advisable in such an agreement to address the same elements identified in this memorandum for inclusion in a legislative policy.

2. OPTION 2: Specify that a tribal law enforcement officer may respond to a request for assistance outside the officer's home jurisdiction if the officer's employing agency has an agreement with the requesting agency that does the following:
 - a. Authorizes the officer to respond.
 - b. Assigns responsibility for any or all of the costs under III. and IV. of this outline.
3. Condition either option on one or more of the following:
 - a. The responding officer must be empowered to act under s. 165.92. [Based on parallel provisions in s. 175.40 (6) and (6m).]
 - b. The tribe has accepted any financial responsibilities assigned to it under III. and IV. of this outline and has adopted a resolution waiving its sovereign immunity to the extent necessary to enforce those responsibilities in state courts. [Based on parallel provisions in s. 165.92.]

B. County and municipal officers.

1. OPTION 1: Specify that a county or municipal officer may respond to a request for assistance from a tribal law enforcement agency anywhere in the state.
2. OPTION 2: Specify that a county or municipal officer may respond to a request for assistance from a tribal law enforcement agency in another jurisdiction if the chief law enforcement officer of the other jurisdiction has approved the response.
3. OPTION 3: Specify that a county or municipal officer may respond to a request for assistance from a tribal law enforcement agency in another county if the officer's employing agency has an agreement with the requesting agency that does the following:
 - a. Authorizes the officer to respond.
 - b. Assigns responsibility for any or all of the costs under III. and IV. of this outline.

III. *Costs Associated with Responding*

A. Officer's salary, benefits, etc.

1. Employing agency.
2. Responding agency.

NOTE: In this item and the remaining items of this outline, a policy choice is presented – either the employing agency or responding agency or the responding agency is made responsible for the specified costs.

- B. Costs associated with injury to officer, including medical expenses and worker’s compensation.
 - 1. Employing agency.
 - 2. Responding agency.

- C. Costs associated with damage to the property or equipment of the officer or the employing agency.
 - 1. Employing agency.
 - 2. Responding agency.

IV. Liability for Actions of Responding Officer

- A. Cost of defending an action against an officer arising out of providing assistance.
 - 1. Employing agency.
 - 2. Responding agency.

- B. Indemnification of officer for damages or civil penalties for an action against an officer.
 - 1. Employing agency.
 - 2. Responding agency.

If you have any questions regarding the Attorney General’s opinion, the drafting options presented in this memorandum, or any other aspect of this subject, please contact me at the Legislative Council staff offices.

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Attachments