



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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October 1, 2008

OAG—8—08

Mr. Thomas D. Wiensch
Assistant Corporation Counsel
Oneida County
Post Office Box 400
Rhinelander, WI 54501-0400

Dear Mr. Wiensch:

You have submitted a letter and enclosures requesting my opinion on several questions related to mutual assistance requests between a law enforcement agency operated by a Wisconsin Indian tribe and a law enforcement agency operated by the State of Wisconsin or a political subdivision of the state.

According to the materials that have been submitted, on September 18, 2006, you sent a memorandum to the Oneida County Sheriff's Department expressing the view that tribal law enforcement agencies are not included within the coverage of Wis. Stat. § 66.0313, which governs mutual assistance requests among law enforcement agencies. On January 9, 2007, attorney Barry LeSieur of the Lac du Flambeau Band of Lake Superior Chippewa Indians ("Band") sent you a letter expressing the view that tribal law enforcement agencies are covered by Wis. Stat. § 66.0313. A copy of that letter was also sent to my office, with a request for an opinion on the disputed question. You replied to attorney Barry LeSieur's letter on January 28, 2008, and raised several additional issues. You also sent a copy of that letter to my office, with a request for an opinion on the various issues under discussion. Finally, you confirmed that opinion request in your letter to me of February 20, 2008.

The first and main question to be considered is whether tribal law enforcement agencies are included within the coverage of Wis. Stat. § 66.0313. That statute provides as follows:

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.

Wis. Stat. § 66.0313. In addition, Wis. Stat. § 165.83(1)(b), which is incorporated by reference in the above statute, defines a “[l]aw enforcement agency” as “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.”

The language of the above provisions, when construed together, compels the conclusion that a tribal law enforcement agency is not a “law enforcement agency” for mutual assistance purposes under Wis. Stat. § 66.0313. An Indian tribe is neither a state nor a political subdivision of a state. *See Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (quoting F. Cohen, *Handbook of Federal Indian Law* 664-65 (1982)) (“Indian tribes are not states of the union within the meaning of the Constitution . . .”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 189 (1982) (distinguishing Indian tribes from states and their subdivisions); *Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.”). Accordingly, a tribal law enforcement agency is not an agency of “the state or a political subdivision of the state” within the meaning of Wis. Stat. § 165.83(1)(b) and thus cannot be deemed a “law enforcement agency” for purposes of Wis. Stat. § 66.0313.

This conclusion is reinforced by the fact that subsection (1)(e) of Wis. Stat. § 165.83 contains an express definition of a “[t]ribal law enforcement agency” that is separate from the definition of “[l]aw enforcement agency” in subsection (1)(b) of the same statute. The existence of that separate definition shows conclusively that tribal law enforcement agencies were not intended to be implicitly included within the definition of “[l]aw enforcement agency” in Wis. Stat. § 165.83(1)(b). When the Legislature, in 1999 Wisconsin Act 150, sec. 81, expressly incorporated the definition of “[l]aw enforcement agency” from Wis. Stat. § 165.83(1)(b) into Wis. Stat. § 66.0313, it did not similarly incorporate the existing, separate definition of “[t]ribal law enforcement agency” from Wis. Stat. § 165.83(1)(e). This provides compelling evidence that the Legislature did not intend for a tribal law enforcement agency to be considered a “law enforcement agency” for mutual assistance purposes under Wis. Stat. § 66.0313.

In contrast to the above view, the Band’s attorney has taken the position that Wis. Stat. § 66.0313 does apply to tribal law enforcement agencies whose officers exercise state law enforcement powers on their reservations pursuant to Wis. Stat. § 165.92(2)(a) and (b). Under the latter statute, a tribal law enforcement officer who meets the state’s certification requirements for law enforcement officers under Wis. Stat. § 165.85(4)(b)1., (bn)1., and (c) “shall have the same powers to enforce the laws of the state and to make arrests for violations of such laws that

sheriffs have, including powers granted to sheriffs under ss. 59.27 and 59.28 and under the common law[.]” Wis. Stat. § 165.92(2)(a). Wisconsin Stat. § 59.28, in turn, provides as follows:

Peace maintenance; powers and duties of peace officers, cooperation.

(1) Sheriffs and their undersheriffs and deputies shall 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.

(2) County law enforcement agencies may request the assistance of law enforcement personnel or may assist other law enforcement agencies as provided in ss. 66.0313 and 66.0513.

Wis. Stat. § 59.28. According to the Band’s attorney, the power under Wis. Stat. § 59.28(2) to assist or request assistance from another law enforcement agency as provided in Wis. Stat. § 66.0313 is thus included in the powers that are granted to a qualified tribal law enforcement officer under Wis. Stat. § 165.92(2)(a).

I respectfully disagree with that conclusion. Wisconsin Stat. § 66.0313 purports to authorize a “law enforcement agency,” within the meaning of that statute, to act outside the boundaries of its usual territorial jurisdiction when responding to a request for assistance from another law enforcement agency. In contrast, the powers granted to qualified tribal law enforcement officers under Wis. Stat. § 165.92(2)(a) are expressly limited to being exercised “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.” Wis. Stat. § 165.92(2)(b). The grant of power under Wis. Stat. § 165.92(2)(a) and (b) thus is not broad enough to allow a tribal law enforcement agency to assist a non-tribal law enforcement agency within the latter’s territory, as contemplated by Wis. Stat. § 66.0313. It follows that the Legislature cannot have intended Wis. Stat. § 66.0313 to apply to a tribal law enforcement agency—even when that tribal agency is empowered to act pursuant to Wis. Stat. § 165.92(2)(a) and (b).

Furthermore, it would be contradictory to maintain that tribal law enforcement officers have the power to assist or request assistance from another law enforcement agency as provided in Wis. Stat. § 66.0313 when, as already shown, tribal law enforcement agencies have been specifically omitted from the definition of “law enforcement agency” that the Legislature chose to use in Wis. Stat. § 66.0313. It is a well-established principle of statutory construction that, where one statute deals with a subject in general terms and another statute deals with a part of the same subject in a more specific way, the two statutes should be harmonized, if possible, and if there is any conflict between them, the more specific statute will prevail. *State v. Amato*,

126 Wis. 2d 212, 217, 375 N.W.2d 75 (Ct. App. 1985) (citing 2A Sutherland, *Statutory Construction* § 51.05 (4th ed. 1973)). Applying that principle here, the more specific definition of “law enforcement agency” for purposes of mutual assistance in Wis. Stat. § 66.0313 must prevail over the more general grant of law enforcement and arrest powers to tribal law enforcement officers in Wis. Stat. § 165.92(2)(a).

Likewise, the language of Wis. Stat. § 59.28(2) only purports to give county law enforcement agencies the power to assist or request assistance “as provided in” Wis. Stat. § 66.0313. In other words, Wis. Stat. § 59.28(2) cannot be read as granting any power that is not contained in Wis. Stat. § 66.0313. It follows, once again, that any potential conflict must be resolved in favor of Wis. Stat. § 66.0313 which, for the reasons already given, does not apply to tribal law enforcement agencies.

For all of the above reasons, it is my opinion that tribal law enforcement agencies are not included within the coverage of Wis. Stat. § 66.0313.

The second issue raised in your letter is whether there is any tension between the various statutes discussed above and Wis. Stat. § 165.90, which provides for written agreements establishing cooperative law enforcement programs between tribal and county law enforcement agencies. I see no such tension. There is nothing in the language of Wis. Stat. § 165.90 that would preclude a county and a tribe that has a reservation located wholly or partially within that county from including terms related to mutual assistance requests in a written agreement under that statute. More generally, Wis. Stat. § 66.0301, allows any municipality in the state (including a county) to “contract with other municipalities and with federally recognized Indian tribes and bands in this state, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.” Wis. Stat. § 66.0301(2).

The permissible terms of such an intergovernmental agreement are limited, however, by the statutory provision that “[i]f 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.” *Id.* In other words, an intergovernmental agreement between a tribe and a Wisconsin municipality cannot authorize a tribal or municipal agency to act outside the limits of its usual jurisdiction. In my opinion, the same jurisdictional principle would apply to agreements establishing tribal-county law enforcement programs under Wis. Stat. § 165.90. Accordingly, in any intergovernmental agreement entered under either Wis. Stat. §§ 66.0301 or 165.90, tribal and county law enforcement agencies could agree to provide mutual assistance only in circumstances in which the assisting law enforcement officers would have legal authority to act deriving from some source other than the intergovernmental agreement itself.

For example, Public Law No. 280, 67 Stat. 588-89 (1953), codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, allows Wisconsin law enforcement agencies (including county and other municipal agencies) to exercise jurisdiction over all crimes committed in Indian country within

this state (except the Menominee reservation). 18 U.S.C. § 1162(a); *State v. Webster*, 114 Wis.2d 418, 436-37, 338 N.W.2d 474 (1983). Accordingly, county law enforcement officers in Wisconsin have jurisdiction to assist tribal law enforcement officers with criminal law matters in reservation territory located within their own county. In addition, Wis. Stat. § 175.40 authorizes any peace officer to act anywhere in the state under the specific, limited circumstances enumerated in that statute—*e.g.*, when in fresh pursuit, on border highways, and when responding to certain dangerous emergency situations or a felony in progress.

Tribal law enforcement officers do not have an equally broad grant of jurisdiction to act outside tribal territory. As previously noted, Wis. Stat. § 165.92 generally authorizes qualified tribal officers to exercise state law enforcement powers only within their reservation. A tribal officer who is empowered to act under Wis. Stat. § 165.92, however, is a “peace officer” within the meaning of Wis. Stat. § 175.40 and thus may act outside his or her reservation under the specific, limited circumstances enumerated in that statute. *See* Wis. Stat. § 175.40(1)(c). In addition, sheriffs may call to their aid such persons or powers of their respective counties as they consider necessary for the purpose of preserving the peace therein. Wis. Stat. § 59.28(1). Sheriffs also have statutory authority to appoint deputies, consistent with any other applicable legal requirements. *See* Wis. Stat. § 59.26(1)-(2). Accordingly, a sheriff could, in appropriate circumstances, call for the aid of tribal officers within the county or cross-deputize tribal officers, thereby vesting them with county jurisdiction.

The third issue raised in your letter is whether the provision of assistance under Wis. Stat. § 59.28 is mandatory. The repeated use of the word “may” in Wis. Stat. § 59.28(2) indicates that decisions to request or provide law enforcement assistance under that statute are discretionary, and not mandatory, in nature. As noted in response to your first question, however, it is my opinion that the mutual assistance power granted to county law enforcement agencies by Wis. Stat. § 59.28(2) is not one of the powers conferred upon tribal law enforcement officers under Wis. Stat. § 165.92(2)(a). This does not mean that tribal law enforcement officers never have the power to provide assistance to county officers, but it does mean, as already noted, that such assistance may be provided only in circumstances in which the assisting tribal officers have legal authority to act derived from some source in addition to the county’s request for assistance itself. Tribal and county agencies with a history of cooperating consistent with their respective jurisdictions are encouraged to continue their established practices. I am unaware of any provision of law, however, that would make county-tribal mutual assistance legally mandatory.

The fourth issue raised in your letter is whether, if Wis. Stat. § 66.0313 does not apply to tribal law enforcement agencies, there are other means for county and tribal law enforcement agencies to engage in mutual assistance, either by establishing a county-tribal law enforcement program under Wis. Stat. § 165.90 or in some other way. As I have already discussed in response to the second issue above, an intergovernmental agreement under Wis. Stat. § 66.0301 or a county-tribal cooperative law enforcement agreement under Wis. Stat. § 165.90 may include provisions for mutual assistance in circumstances in which the assisting law enforcement officers

have legal authority to act deriving from some source other than the agreement itself—*e.g.*, state officers acting pursuant to Public Law No. 280 or state or tribal officers acting pursuant to Wis. Stat. § 175.40 or to a call for assistance or cross-deputization by a sheriff.

The fifth issue raised in your letter is whether the provisions in Wis. Stat. § 66.0313 related to the payment of defense costs or judgments against a law enforcement officer under Wis. Stat. §§ 895.35 and 895.46 also apply to tribal law enforcement agencies and their officers. The answer given above to your first question requires that this question be answered in the negative. Because Wis. Stat. § 66.0313 does not apply to tribal law enforcement agencies, it follows that the portions of that statute dealing with the payment of defense costs or judgments under Wis. Stat. §§ 895.35 and 895.46 also do not apply to those agencies.

In addition, the plain language of Wis. Stat. § 895.35(1) itself expressly applies only to officers of a city, town, village, school district, or county. Likewise, the plain language of Wis. Stat. § 895.46(1) applies only to public officers or employees of “the state or [a] political subdivision [of the state].” Tribal law enforcement officers, as such, are not officers of a city, town, village, school district, or county. Nor are they officers or employees of the state or a political subdivision of the state. By their own terms, therefore, Wis. Stat. §§ 895.35 and 895.46 do not apply to tribal law enforcement agencies and their officers. Accordingly, it would be advisable for any mutual assistance agreement between tribal and non-tribal law enforcement agencies to include provisions expressly addressing the payment of defense costs or judgments against tribal and non-tribal law enforcement officers who act pursuant to that agreement.

The sixth issue raised in your letter is whether Public Law No. 280 gives a county sheriff in Wisconsin the power to enforce county and municipal ordinances, in addition to state statutes, on a tribal reservation. It is unclear whether you are asking only about criminal law enforcement jurisdiction, which is governed by 18 U.S.C. § 1162, or whether you are also asking about civil jurisdiction, which is governed by 28 U.S.C. § 1360. Such a request should ordinarily include relevant facts on which a legal analysis may rest. More generally, questions submitted to the Attorney General’s Office from district attorneys or county corporation counsel should include the requester’s own conclusion on the question presented and should set forth the reasoning upon which that conclusion is based, including an analysis of all relevant authorities that support or oppose that conclusion. *See* 77 Op. Att’y Gen. Preface (1988). Absent relevant facts and your

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preliminary analysis and conclusions, I cannot address this issue but will be happy to do so should this information be part of a follow-up request.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

J.B. Van Hollen
Attorney General

JBVH:TCB:rk