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Criminal Jurisdiction in Indian
Country: The Solution of Cross
Deputization

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Introduction

Jurisdiction in Indian Country is a complicated field, made more so by federal laws, policies and court decisions. Police officers in the field are asked to navigate a formidable body of law to determine what authority they may or may not have in a wide variety of situations. Officers, who must treat every routine traffic stop as a potentially life threatening situation, must consider the location of an alleged crime, their present location, the political identity of the alleged perpetrator, the political identity of the alleged victim and the nature of the alleged crime before determining what action, if any, they are authorized to take.

Many agencies have attempted to ameliorate the problem of providing effective law enforcement in Indian country by entering into cooperative agreements with surrounding jurisdictions. These agreements expand the authority of officers who would ordinarily not be able to enforce certain laws against certain individuals. Cooperative arrangements including Deputization, Cross-Deputization or Mutual Aid agreements have proved instrumental in streamlining the exercise of law enforcement in Indian Country; allowing officers to more effectively perform their duties of protecting the public from crime.

This paper will analyze cross deputization agreements generally, specifically focusing on the issues of cross deputization in Michigan. Part I summarizes Federal Indian law and state criminal jurisdiction in Indian Country generally; Part II examines the structure of law enforcement agencies in Indian Country; Part III analyzes the use of cross-deputization generally including barriers to negotiation; Part IV discusses cooperative agreements in Michigan including the legal authority to enter into these agreements and barriers to do so; and Part V concludes by reiterating the importance of streamlined law enforcement in Indian Country and emphasizing how the absence of an agreement between Michigan Tribes and the State Police hampers that objective; and suggests possible solutions tribes can pursue.

I. Examining Current Criminal Jurisdiction in Indian Country: Consideration of Issues

A. Definition of Indian Country

All questions relating to criminal jurisdiction and Indians must first begin with consideration of whether the alleged crime occurred in Indian Country. Where the site of the crime is Indian Country, federal law, through a combination of statutes and case law, provides a set of rules that recognize tribal criminal jurisdiction. In some cases, federal law also recognizes that states of exclusive criminal jurisdiction over certain crimes in Indian Country. When the site of a crime is not Indian Country, ordinary rules regarding state and federal criminal jurisdiction apply. Therefore, an officer must initially determine whether he is operating in Indian Country. The term “Indian Country is defined in 18 U.S.C. § 1151 as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹

While this appears straight forward, the allotment² of Indian lands and the subsequent settlement of large portions of reservations lands by non-Indians created a confusing pattern of checkerboarded land ownership in Indian Country.³

¹ 18 U.S.C. § 1151 (2006).

² 24 Stat. 388 (1887); William C. Canby, Jr., *American Indian Law in a Nutshell* 21 (2004)(the General Allotment Act has been characterized as “... the most important and the most disastrous piece of Indian legislation in United States history...”).

³ See generally, Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 508-13 (1976) (discussing the General Allotment Act stating “These programs altered the traditional communal ownership patterns for Indian lands by allotting and patenting specified [parcels] of land both within and without Indian reservations to individual Indians either in trust or in fee. For a time, these programs created problems of “checkerboard” jurisdiction within particular reservations, as provisions in these acts vested the states with jurisdiction over allotted lands. Moreover, since the Indian Reorganization Act of 1934 had indefinitely extended the trust period of lands still held under these allotment programs, many parcels of land might have been left effectively in a checkerboard jurisdiction limbo.”).

The fact that reservation lands have been opened up for settlement by non-Indians does not mean the land is no longer Indian Country. However, Congress has the power to rescind the reservation status of the lands. Some courts have held that Congress demonstrated such intent when it opened large portions of some reservations to heavy settlement by non-Indians. Perhaps the clearest articulation of how courts consider questions of diminishment is found in *Solem v. Bartlett*.⁴

In *Solem*, the Court decided that language in a statute providing for the sale of surplus lands following allotment didn't necessarily evidence intent to diminish. The Court declined to hold that language in the statute referring to the lands being sold as "the public domain" and referring to the unsold lands as "the reservation thus diminished" demonstrated intent to diminish the reservation.⁵ As evidence of diminishment, the Court focused on the way interested governments had treated the land, the present demographic make-up of the land, and the way in which the land transaction was arranged at the time.⁶

Recently, the Court articulated a two part test for determining whether land might qualify as Indian Country under the dependent Indian community prong of the statutory definition. In *Alaska v. Native Villages of Venetie Tribal Government*,⁷ the Court held that land qualified as a dependent Indian community if it had been set aside by the federal government for the use of Indians and that the community involved must be, to a certain degree, dependent on the federal government.⁸ The Court referred to these requisites as "federal set aside" and "federal superintendence" respectively.⁹

⁴ 465 U.S. 463 (1984). *But see, South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (holding that Congress evidenced intent to diminish the boundaries of the original Yankton Reservation by interpretation of language of an 1894 surplus lands act, providing that the tribe will "cede, sell, relinquish and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation" for a payment of \$600,000).

⁵ 465 U.S. 463 at 475.

⁶ *Id.* at 471-72.

⁷ 522 U.S. 520 (1998).

⁸ *Id.*

⁹ *Id.* at 531.

B. Congressional Acts: Sources of Federal Jurisdiction in Indian Country

1. Indian Country Crimes Act (“ICCA”)

In 1817 when Congress originally passed the Indian Country Crimes Act (ICCA),¹⁰ it was generally assumed that state law was inapplicable to Indian Country. The ICCA purported to provide federal punishment for all crimes committed by non-Indians in Indian Country and some crimes committed by Indians against non-Indians. Because of recent developments in Indian law, the ICCA presently functions to allow the federal prosecution of crimes by non-Indians against Indians and non-major crimes by committed by Indians against non-Indians. While Congress probably intended for the ICCA to provide for application of federal jurisdiction to all crimes committed by non-Indians in Indian Country,¹¹ two decisions of the Supreme Court have restricted its scope as applied to non-Indians. For federal law to apply via the ICCA, the alleged victim of a crime committed by a non-Indian must be an Indian, and the victim’s identity must be an element proved in court.¹²

The ICCA also does not apply to crimes committed by Indians against Indians, crimes committed by Indians that have been punished by the tribe, crimes over which a treaty gives exclusive jurisdiction to the tribe, and victimless crimes committed by Indians. As discussed below, another federal law subjects Indians to federal jurisdiction for specified crimes, the Major Crimes Act.

2. Assimilative Crimes Act

The Assimilative Crimes Act¹³ fills in gaps in criminal law that would otherwise exist in exclusively federal areas such as federal forts and arsenals. The provision effectively borrows most of state criminal law and applies it through the federal law to areas under federal jurisdiction, such as special maritime areas under the jurisdiction of the United States. The Assimilative Crimes Act is important to federal Indian law

¹⁰ 18 U.S.C. § 1152 (1817)(the ICCA is also referred to as the General Crimes Act (GCA) and the Federal Enclaves Act (FEA)).

¹¹ Canby *supra* note 2, at 159.

¹² *See, Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

¹³ 18 U.S.C. § 13 (1825).

because it is one of the general laws of the United States that reaches into Indian Country via the Indian Country Crimes Act.

3. Major Crimes Act

Congress passed the Major Crimes Act¹⁴ in 1885 as a direct reaction to the Supreme Court's decision in *Ex parte Crow Dog*,¹⁵ where the Court held that federal courts had no jurisdiction over a tribal member who killed another tribal member in Indian Country. The statute provides for federal jurisdiction over an Indian who commits one of several enumerated crimes including: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under §661 of title 18.¹⁶

According to 18 U.S.C. §3242, a supplemental jurisdictional statute, Indians prosecuted under the Major Crimes Act must be tried in the “same courts and in the same manner as are all other persons committing such offenses within the exclusive jurisdiction of the United States.”¹⁷ One problem presented by this statute is whether an Indian can plea-bargain by pleading guilty to a lesser included offense when being tried under the Major Crimes Act. A plain reading of §3242 suggests that this should be allowed, but the court would not have jurisdiction over the lesser included offenses if its jurisdiction was only conferred by the Major Crimes Act.

The Supreme Court has held that a jury should be instructed that it may convict an Indian of a lesser included offense when tried under the Major Crimes Act.¹⁸ Lower courts have disagreed as to the plea-bargaining issue and the Supreme Court has not yet resolved it.¹⁹

¹⁴ 18 U.S.C. § 1153 (1885).

¹⁵ 109 U.S. 556 (1883).

¹⁶ 18 U.S.C. § 1153 (1885).

¹⁷ 18 U.S.C.A. § 3242 (1885).

¹⁸ *Keeble v. United States*, 412 U.S. 205 (1973).

¹⁹ *See, United States v. John*, 587 F.2d 683 (5th Cir. 1979); *Felicia v. United States*, 495 F.2d 353 (8th Cir. 1974).

4. Federal Crimes of Nationwide Applicability

Federal criminal statutes of national applicability apply in Indian Country. Some examples include federal narcotics laws, statutes punishing theft from the United States mail and treason.²⁰ Since these federal crimes are applicable to Indian Country by their own terms, they apply to Indian against Indian crimes occurring in Indian Country, unlike crimes made punishable in federal courts by the ICCA. The Second Circuit suggested in *United States v. Markiewicz*²¹ that crimes of nationwide applicability apply to crimes committed by Indians against Indians only if the crimes are “peculiarly Federal” in nature and when prosecution would serve an important federal interest.²² However, no other circuit has imposed this requirement.²³

5. Public Law 280

In 1953, Congress attempted to change the division of criminal jurisdiction in Indian Country by passing what is commonly referred to as Public Law, or P.L., 280.²⁴ Public Law 280 initially granted five states civil and criminal jurisdiction in Indian Country and gave the remaining 45 states the option to adopt it.²⁵ Both states and tribes resented this Congressional action. States resented being given the responsibility of enforcing criminal law in Indian Country with no commensurate funding and tribes resented the move as an encroachment on their sovereignty. In 1968, Congress passed the Indian Civil Rights Act²⁶ which allowed states to retrocede jurisdiction to the federal government and prevented any new states from adopting Public Law 280 without tribal consent.²⁷

Public Law 280 mandated that, where its application was mandatory, the ICCA and Major Crimes Act no longer applied. If however, the state had merely opted in to

²⁰ See, Canby, *supra* note 2, at 153-155 (discussing Federal Crimes of National Applicability which are “effective throughout the nation, and they apply in Indian country to all persons, whether or not Indian.”).

²¹ 978 F.2d 786 (2d Cir. 1992).

²² *Id.* at 800.

²³ Canby, *supra* note 2, at 155.

²⁴ 67 Stat. 588 (1953), as amended, 18 U.S.C.A. §§ 1161-62, 25 U.S.C.A. §§ 1321-22, 18 U.S.C.A. § 1360 (1953).

²⁵ Canby, *supra* note 2, at 27 (P.L. 280 “extended state civil and criminal jurisdiction to Indian country in five specified states: California, Nebraska, Minnesota (except the Red Lake reservation), Oregon (except Warm Springs reservation), and Wisconsin. Alaska was added in 1958.”).

²⁶ 82 Stat. 77, 25 U.S.C.A. § 1301 et seq. (1968).

²⁷ Canby, *supra* note 2, at 30.

Public Law 280, the ICCA and Major Crimes Act were not repealed. Although Public Law 280 clearly substitutes state jurisdiction for federal jurisdiction, it is unclear how it affects tribal criminal jurisdiction. Michigan was not one of the original Public Law 280 states nor did it later opt into the law.²⁸ For that reason this paper will not delve into the jurisdictional difficulties presented by P.L. 280 and the tribes subject to it.

C. Metes and Bounds of Tribal and State Criminal Jurisdiction

1. Tribal Criminal Jurisdiction

Tribes have exclusive jurisdiction to punish non-major crimes committed by Indians against other Indians in Indian Country.²⁹ In addition, tribes retain inherent authority to exercise jurisdiction over non-member Indians.³⁰ Tribes also have criminal jurisdiction over non-major crimes committed by Indians against non-Indians in Indian Country, but this jurisdiction is concurrent with the federal courts pursuant to the Indian Country Crimes Act. Tribes also possess criminal jurisdiction, concurrent with the federal government, over major crimes committed by Indians in Indian Country,³¹ but this jurisdiction is severely limited by the Indian Civil Rights Act of 1968. The ICRA limits sentences imposed by tribal courts to one year imprisonment and limits fines imposed by tribal courts to \$5,000.³²

However, the Court has held in *Oliphant v. Suquamish Indian Tribe*³³ that tribes cannot exercise jurisdiction over non-Indians because such jurisdiction would be inconsistent with their dependent sovereign status.³⁴ In addition, courts have held that

²⁸ See, Ada Pecos and Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://www.aidainc.net/Publications/pl280.htm> (stating “Congress gave six states ... California, Minnesota, Nebraska, Oregon, Wisconsin and ... Alaska ... extensive criminal and civil jurisdiction over tribal lands within the affected states.”).

²⁹ See, Canby *supra* note 2, at 135 (stating “Non-major crimes by Indians were within the exclusive jurisdiction of the tribes, and remain so today ...”).

³⁰ *United States v. Lara*, 539 U.S. 987 (2003).

³¹ *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (“A tribal court, which is in compliance with the Indian Civil Rights Act is competent to try a tribal member for a crime also prosecutable under the Major Crimes Act.”).

³² 25 U.S.C. § 1302(7).

³³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³⁴ *Id.*

tribes do not have the power to exclude federal officers carrying out their duties if their duties carry them into Indian Country.³⁵

2. State Jurisdiction

States have exclusive jurisdiction over crimes committed by non-Indians against non-Indians even if they occurred in Indian Country.³⁶ Victimless crimes committed by non-Indians in Indian Country are also within the exclusive jurisdiction of the state.³⁷

States generally have no criminal jurisdiction over any crimes committed in Indian Country by Indians; however, in one instance the Ninth Circuit held that states can prosecute Indians for violation of state laws regarding liquor sales in Indian Country.³⁸

II. Current Law Enforcement in Indian Country

Tribal law enforcement departments are organized in various ways. The structure of the law enforcement in Indian Country affects what types of agreements are necessary with other jurisdictions to provide effective law enforcement. This section will discuss law enforcement agencies in Indian Country and the nature of cross deputization agreements that aid those agencies in providing effective law enforcement.

A. Law Enforcement Agencies

As previously discussed, criminal jurisdiction in Indian Country depends on many factors, including where the crime was committed, who committed the crime and the nature of the crime committed.³⁹ Depending on these factors, any number of law enforcement agencies may have jurisdiction to arrest offenders or conduct investigations. For example, the Federal Bureau of Investigation (“FBI”) has authority⁴⁰ to investigate

³⁵ *United States v. White Mountain Apache Tribes*, 784 F.2d 917 (9th Cir. 1986).

³⁶ *See, Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881)

³⁷ *Solem*, 465 U.S. at 465 n. 2.

³⁸ *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994).

³⁹ Stewart Wakeling, Miriam Jorgensen et al., *Policing on American Indian Reservations: A Report to the National Institute of Justice*, July 2001, available at <http://www.ncjrs.gov/pdffiles1/nij/188095.pdf> (last visited 3/27/08).

⁴⁰ FBI’s website on Indian Country Crime at <http://www.fbi.gov/hq/cid/indian/safetrails.htm> (“The FBI derives its criminal jurisdiction in IC from the IC Crimes Act (18 U.S.C. 1152), The Major Crimes Act (18 U.S.C. 1153) and the Assimilative Crimes Act (18 U.S.C. 13)”) Furthermore, “FBI responsibility and jurisdiction for the investigation of federal violations in Indian Country under the Indian Country Crimes

certain major crimes “committed by Indians against the persons or property of Indians and non-Indians, all offenses committed by Indians against the person or property of non-Indians and all offenses committed by non-Indians against the persons or property of Indians.”⁴¹

Similarly, the Indian Law Enforcement Reform Act⁴² establishes a Branch of Criminal Investigations within the Division of Law Enforcement (“DLE”) of the Bureau of Indian Affairs, which “shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian Country.”⁴³ The responsibilities of the DLE includes “the enforcement of federal law and with the consent of the Indian tribe, tribal law; and in cooperation with appropriate federal and tribal law enforcement agencies; the investigation and presentations for prosecution of cases involving violations of 18 U.S.C §1152 and §1153 within Indian Country.” These police departments are administered by the BIA itself and the staffers in these departments are considered federal employees.⁴⁴

In addition to Federal sources of law enforcement, tribes are increasingly forming their own tribal police departments to enforce tribal laws against Indians on the reservation. The types of policing models in Indian country vary depending on whether the Tribe as its own police force or relies on the BIA to provide law enforcement services. The most common administrative arrangement on reservations⁴⁵ are departments organized under the §638 contracting provision of the Indian Self-Determination & Education Assistance Act (“ISDEA”).⁴⁶ The Act allows tribes to organize their own government functions, including law enforcement services, through an agreement with the BIA. Police departments organized under this act are nicknamed “638’ed” departments and are administered by tribes under contract with the BIA’s

Act or Major Crimes Act is statutorily derived from Title 28 USC Section 533, pursuant to which the FBI was given investigative responsibility by the Attorney General.”)

⁴¹ Memorandum of Understanding between the United States Department of Interior, Bureau of Indian Affairs and the United States Department of Justice Federal Bureau of Investigation, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00676.htm (last visited 3/27/08).

⁴² 25 U.S.C. 2801 et seq. (1990).

⁴³ Memorandum *supra* note 41.

⁴⁴ *Id.*

⁴⁵ Wakeling et al, *supra* note 39.

⁴⁶ 25 U.S.C.A. § 450 et seq. (1975).

Division of Law Enforcement Services.⁴⁷ Officers of this type of department are considered tribal employees.

Other less common police departments in Indian Country include those that “receive funding from the auspices of the self-governance amendments to PL 93-638 and departments that are funded completely with tribal money.”⁴⁸ These arrangements allow for “much more control over governmental functions than is permitted under 638 contracts.”⁴⁹

The overlapping jurisdictional authority of these various agencies can compound the task of enforcing criminal jurisdiction on Indian land. For example, a tribal law enforcement officer has no authority to arrest a non-Indian violating state law on the reservation. Furthermore, state officers cannot respond to calls involving Indians on tribal land. Additionally, tribal law enforcement officers, without special authority, cannot enforce federal laws on reservation land. In all of these instances, an officer attempting to exercise authority outside of their jurisdiction has no more authority than a normal citizen doing the same.

III. Cross-deputization Agreements: One Solution for Jurisdictional Confusion

To help remedy these jurisdictional gaps, many agencies have entered into agreements which prescribe terms for shared authority in and around Indian country.⁵⁰ Deputization agreements give tribal, federal, state or city law enforcement officials power

⁴⁷ Wakeling et al, *supra* note 39.

⁴⁸ *Id.* Tribal police departments get their funding from several sources. They can be funded by allotments from tribal resources or by general law enforcement funding allocations like the Community Oriented Policing Services (COPS). They are also funded by tribally specific funding like the 1994 Tribal Self-Government Programs, the Indian Self-Determination and Education Assistance Act of 1975, PL 638 and the Indian Self-Governance Act of 1994.

⁴⁹ *Id.*

⁵⁰ Cross Deputization Agreements exist in many contexts. For example, local law enforcement officials can be deputized with Immigration and Customs Enforcement powers so that they may aid in enforcing immigration laws, *see*, Deborah Bulkeley, *Local Tabs on Illegals urged*, Desert Morning News, January 16, 2008, available at <http://deseretnews.com/article/1,5143,695244507,00.html> (last visited 3/27/08). Another example involves a Michigan Statute authorizing the boards of “public 4-year institutions of higher education to grant higher certain powers and authority to their public safety officers; to require those public safety officers to meet certain standards; to require institutions of higher education to make certain crime reports.” *See*, Public Safety Officers, Act 120 of 1990, available at [http://www.legislature.mi.gov/\(S\(jy1att55m2hcmyvqyliktmk\)\)/mileg.aspx?page=getObject&objectName=mcl-Act-120-of-1990](http://www.legislature.mi.gov/(S(jy1att55m2hcmyvqyliktmk))/mileg.aspx?page=getObject&objectName=mcl-Act-120-of-1990) (last visited 3/27/08).

to enforce laws outside their own jurisdictions regardless of the identity of the perpetrator, thus simplifying the exercise of criminal jurisdiction.⁵¹ These agreements take many forms depending on the agencies contracting jurisdiction. Though the practice of entering into cross-deputization agreements in Indian country is not yet commonplace, there are many such agreements across the country.⁵² Sometimes, tribal police enter into agreements with the state, county or city that are geographically close to their land. Other times, the tribe itself may not have its own police force, in which case the Bureau of Indian Affairs (“BIA”) is in charge of policing the reservation and may negotiate with other local law enforcement agencies for aid.

In all of the agreements the intent of the agencies is clear: to work together to cooperatively enhance public safety efforts in and around Indian country. To that end, the exact terms of the agreements vary depending on the specific challenges and needs of each jurisdiction. Repeatedly, the agreements concern the scope of powers of each agency regarding arrests, issuing of citations, search warrants and interrogations; the agencies respective powers in emergency or non-emergency situations; immunity; indemnification; liability insurance and the resolution of disputes arising under the agreement.

A. Cross Deputization Agreements: Who They Involve, How They Are Achieved

Deputization agreements are negotiated in various circumstances and contain elements such as: a purpose statement, duties and obligations, jurisdiction, identification of geographic areas, incarceration and prosecution, exchange of information and communication, personnel and equipment, indemnification, liability, dispute resolution, sovereign immunity, binding/non-binding, severability and termination.⁵³

1. Negotiation: Who is involved, what are the barriers?

⁵¹ Another type of cooperative agreement called “mutual aid” agreements provide for mutual assistance between law enforcement agencies only giving police the authority to act outside of their jurisdiction in certain circumstances.

⁵² Eileen Luna-Firebaugh, *Tribal Policing: Asserting Sovereignty, Seeking Justice* 46 (2007).

⁵³ Paul Stenzel, *MOUs and MOAs: A Cooperative Approach to Law Enforcement on the Reservation*, 17th Annual Multi-Jurisdictional Conference, November 5 2005 at <http://www.paulstenzel.com/multi-j-110305.pdf>.

Cross deputization agreements are often the product of intense and complicated negotiations between local and tribal authorities. Often there are many barriers that arise during negotiations. It appears that every element of an agreement mentioned above can become a barrier, though some elements of the agreement are more contentious than others. Some of the more adversarial elements are the geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements and sovereign immunity.⁵⁴

a. Barriers: Cultural Differences and Years of Neglect

Traditionally, there has been reluctance on the part of tribes to give state or local police authority in Indian Country.⁵⁵ Important reasons for this reluctance include both the years of abuse of power by local non-tribal authorities and years of neglect by non-tribal police.⁵⁶ In addition, non-tribal police departments can be insensitive to tribal cultural or lack of cultural awareness. As one commentator writes, “[h]istorically, tribal leaders have withheld law enforcement authority from County Deputy Sheriffs due to a lack of awareness of . . . tribal customs, culture and traditions, a lack of culturally relevant training courses, and a lack of expertise in the tribal court system.”⁵⁷

An additional issue is the philosophical difference between the tribal police force and the state or county police force. States use what has been called the professional

⁵⁴ See, James May, *California Mediates Cross-Deputization*, Indian Country Today, December 26, 2001 at <http://www.indiancountry.com/content.cfm?id=1009220744> (last visited 3/27/08)(discussing the various concerns surrounding negotiations to cross-deputize Indian police officers in California).

⁵⁵ Interview with Candy Tierney, general counsel for Bay Mills Indian Community, Brimley, Michigan (February 2008)(For example, the law enforcement agreement between the Bay Mills Indian Community and the Chippewa County Sheriff only provides for the deputization of tribal officers to enforce state law and does not allow for authority of county sheriff officers to enter tribal land to enforce tribal or state law. An interview with Bay Mills general council, Candy Tierney, revealed that this limitation was due to general distrust and historical resentment on the part of tribal members toward non-Indian law enforcement authority.).

⁵⁶ Luna-Firebaugh, *supra* note 52, at 24, 46 (one historical example of an abuse of power is the killing of Sitting Bull in 1890 by U.S. police employees of the U.S. government. Sitting Bull was killed after he surrendered for practicing the Ghost Dance religion. This situation “is often cited as evidence to support the contentions that police, and the policing of Indian communities are suspect and not in the best interest of Indian peoples.” Another U.S. policy that has increased mistrust was the removal of Indian Children by government police for the purpose of placing them in boarding schools in the 1880s and 1890s.).

⁵⁷ Kelly Dedel Johnson, Ph.D, *Challenges for Implementing Collaborative Law Enforcement Programs in Tribal Jurisdictions: Lessons Learned from the Uintah County’s Cross-deputization Program*, Vol. 2 Issue 3 Tribal Justice Today 14, available at <http://www.tribalresourcecenter.org/aboutus/newsletter62003.pdf> (last visited 3/27/08).

model of policing.⁵⁸ The professional model has a strong focus on investigating and responding to criminal behavior. It also focuses on preventing crime through the use of vehicle patrols. There is “centralized organizational hierarchy, insulation between the police and community and political leaders.”⁵⁹ Tribal police departments who adopt this model find that there is a “mismatch between police and the community priorities and between police methods and tribal norms and values.”⁶⁰ In a study issued in 2001, tribal members demonstrated a consensus in desiring more involvement by law enforcement personnel in community activities, more contact with the community related to education, and additional contact with the community unrelated to times of crisis.⁶¹

One newspaper article illustrates the problems of having non-tribal authorities responsible for enforcing laws on tribal lands. In an article written for the Denver Post, Michael Riley documented numerous instances of the FBI failing to enforce laws within Indian country.⁶² Riley discussed an assault that occurred on the Fort Peck reservation in Montana where a man broke his girlfriend’s jaw. The U.S. attorney, who is responsible for enforcing crimes of this nature, determined that the conduct did not qualify as “serious bodily injury” and the case was not prosecuted. The tribal prosecutor reported to Riley that the same man had committed several other crimes since the assault on his girlfriend. Other individuals on the Blackfeet reservation experienced similar neglect of law enforcement in their communities; more than year after reporting that she had been raped by her neighbor, tribal resident Maria Kennerly had not heard any information regarding the investigation of the case and her assailant was still living next door to her.

Riley also stated that “[a] General Accounting Office report in the 1980s found that the farther a reservation was from an FBI field office, the higher the percentage of felony prosecutions that were declined.”⁶³ Additionally he writes,

[b]etween 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime. As prosecutors and investigators triage scarce resources or focus on new priorities

⁵⁸ Wakeling et al, *supra* note 39.

⁵⁹ *Id.* at 42.

⁶⁰ *Id.* at 46.

⁶¹ Wakeling et al, *supra* note 39.

⁶² Michael Riley, *Promises, Justice Broken*, The Denver Post, November 21, 2007, available at http://www.denverpost.com/ci_7429560 (last visited 2/1/08).

⁶³ *Id.*

such as terrorism, hundreds of serious cases of aggravated assault, rape and child sexual abuse occurring on reservations are sent instead through tribal misdemeanor courts.⁶⁴

b. Barriers: Liability of Officers

In addition, the liability of officers in lawsuits can be a barrier to reaching an agreement. In 2001, the liability of police officers in malpractice suits was a major roadblock in reaching an agreement between tribes in California and the California Sheriff's Department.⁶⁵ Tribes wanted to limit liability to five million dollars, while the sheriff's department argued for unlimited liability.⁶⁶ One reason that the liability issue receives such attention is that liability of tribal officers could involve a waiver of sovereign immunity. For example, agreements in Oklahoma and Humboldt County, California provide for the assumption of tribal officer's liability by the county. In exchange, tribes gave a limited waiver of sovereign immunity.⁶⁷

c. Barriers: Training Differences

An additional barrier is the difference between the training received by state and tribal law enforcement officers. It is common for tribal officers to not be state certified.⁶⁸ In Michigan, the Michigan Commission on Law Enforcement Standards ("MCOLES") sets the minimum requirements that must be met by each law enforcement applicant prior to that individual being certified, employed or licensed as a law enforcement officer.⁶⁹ These standards include requirements related to age, hearing, vision, physical fitness, and police training.⁷⁰ Due to the lack of certification many state law enforcement agencies do not "recognize tribal law enforcement training as adequate and will not cooperate with

⁶⁴ *Id.* See also, Michael Riley, *Path to Justice Unclear*, The Denver Post November 14, 2007, available at http://www.denverpost.com/ci_7454999; Michael Riley, *Principles, Politics Collide*, The Denver Post November 14, 2007 at http://www.denverpost.com/ci_7446439 (last visited 3/27/08); and Michael Riley, *Justice: Inaction's Fatal Price*, The Denver Post November 13, 2007, available at http://www.denverpost.com/ci_7437278 (last visited 3/27/08).

⁶⁵ May, *supra* note 54.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Eileen Luna-Firebaugh, *supra* note 52, at 40.

⁶⁹ Information related to the Michigan Commission on Law Enforcement is available at <http://www.michigan.gov/mcoles/0,1607,7-229-41624-150169--,00.html>.

⁷⁰ *Id.*

them in a collegial manner on-site at an incident.”⁷¹ The difference in training is also a barrier to allowing tribal police officers to act outside of Indian Country.⁷² Most often a tribal officer will need to be certified to engage in law enforcement activities outside of Indian Country.⁷³ In order to obtain a state certificate the officer must obtain training at a state authorized law enforcement facility. Often this training is difficult or impossible to obtain due to financial constraints or the personal characteristics of the trainee.⁷⁴

d. Barriers: Authority to Enter into Cross-Deputization Agreements

Both the local or state government and tribal government require authority to enter into inter-governmental agreements. “Federal statutes and case law restrict the lawful authority of tribes and states to make binding agreements between themselves, and prohibit almost all tribal-state compacts absent approval by the Secretary of Interior.”⁷⁵ However, some legislation exist that either mandates or strongly encourages tribal-state agreements.⁷⁶ Tribes “[u]sually need [a] tribal ordinance or resolution authorizing any grant of authority to outside law enforcement agents.”⁷⁷ Additionally there needs to be “[s]tatutory authority for state and/or local unit of governments to enter agreements or grant powers to Tribes and tribal officers.”⁷⁸

For example, the preamble to the 2001 “Law Enforcement” agreement between the Hannahville Indian Community and the County of Menominee states that the tribe’s constitution is the basis for its authority to enter into the agreement.⁷⁹ In regards to the

⁷¹ Dedel, *supra* note 57.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (Obtaining training “is often a problem in Indian Country, where funding for off-site training, particularly for a long period of time, may be unavailable. Also, individual officers may not be eligible for state certification due to educational standards or other issues, including criminal or personal background or physical competency.”).

⁷⁵ Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999).

⁷⁶ See, e.g. Indian Child Welfare Act, 25 U.S.C.A. §§ 1901-1963 (1978); Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (1988).

⁷⁷ Stenzel, *supra* note 53.

⁷⁸ *Id.*

⁷⁹ Law Enforcement Agreement between the Hannahville Indian Community And The County Of Menominee, January 1, 2001, *available at* http://www.ncai.org/ncai/resource/agreements/mi_law_law_enforcement_agreement_between_hannahville_indian_community_and_menominee_county_january_2001.pdf (last visited 3/27/08) (“The Tribe is authorized to enter agreements with state, local and federal governments Pursuant to Article V Section 1(9)

county's authority, the agreement cites to MCL 28.601 et seq., Commission of Law Enforcement Standards Act.⁸⁰ The Little Traverse Bay Band of Odawa Indians and the County of Charlevoix entered into an Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance pursuant to the Urban Cooperation Act.⁸¹ The agreement states that the tribe has authority to enter into such agreements under Article VII (1)(b) of the Tribal Constitution, which states that the "Legislative leader shall . . . [m]ake recommendations to the Tribal Council on the matter of laws, statutes, programs, or policies that would be of interest or benefit to the Little Traverse Bay Bands of Odawa Indians."⁸² The County's authority is stated as "State law as well as the Urban Cooperation Act."⁸³

2. Negotiating the Barriers: A Case Study⁸⁴

The barriers detailed above can be obstacles, but are also open to negotiation. One example of a tribe and local government overcoming those barriers and entering into a mutually beneficial agreement is the agreement between the Little Traverse Bay Bands of Odawa Indians (LTBB) and their neighboring counties of Charlevoix and Emmet.

Before entering into a cross-deputization agreement with the counties of Emmet and Charlevoix, the LTBB Tribal Council had passed a resolution allowing non-tribal law enforcement to come onto Indian Country in the event of an emergency. In order to broaden the jurisdictional capabilities of Tribal Police and close jurisdictional gaps, in the late 1990's, Jeff Cobe, Chief of Police of the LTBB of Odawa Indians, approached law enforcement offices in counties around tribal land to negotiate a cross-deputization agreement. The idea was to create seamless law enforcement in and around LTBB lands.

of the Tribe's constitution. The County is authorized by Section MCL 28.601 et. seq. to enter into agreements with other governmental units.").

⁸⁰ Mich. Comp. Laws Ann. § 28.601 et seq. (2007).

⁸¹ Preamble, Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance between the Little Traverse Bay Band of Odawa Indians and the County of Charlevoix. December 2003 ("LTBB is authorized to enter into agreements with federal, state and local governments under Article VII (1)(b) of the Tribal Constitution as well as the Urban Cooperation Act. The county of Charlevoix is authorized to enter into agreements under State law as well as the Urban Cooperation Act.")(on file with author).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Interview with James Branskey, general counsel for Little Traverse Bay Bands of Odawa Indians, Harbor Springs, Michigan (February 2008).

The initial contact met with some resistance. However, Chief Cobe had good credibility with the local sheriff⁸⁵ which helped facilitate the discussion.⁸⁶ Initially, the tribe pushed for an agreement which would give their officers authority to enforce state laws within their reservation boundaries.⁸⁷ However, this proposition became a major stumbling block in the negotiations,⁸⁸ and the issue was put aside in order to focus on other concerns. After agreeing to put aside the issue of reservation boundaries, there were a series of meetings between the Tribal police department, the Tribal attorney, the County Sheriff and prosecutor. In their final forms, the agreements limit the geographic scope to LTBB trust lands. Despite this concession, all the parties were pleased with the outcome of the agreements. Though the terms of the agreement expire December 31 of 2008, it is anticipated that the agreements will be resigned in their current form due to the overall consensus of their success.

IV. Cross-Deputization⁸⁹ in Michigan

There are twelve federally recognized tribes in Michigan.⁹⁰ Of those tribes, ten operate their own law enforcement departments.⁹¹ Of the ten tribes that maintain tribal law enforcement departments, nine have agreements with a local jurisdiction or

⁸⁵ The Emmet county agreement was negotiated first; followed by the Charlevoix county agreement.

⁸⁶ Branksey Interview, *supra* note 84 (the level of trust between the Tribal and Local police departments seems to be an important aspect of negotiating these types of agreements. In particular, tribal attorney James Branksey noted that Chief Cobe had a “bridge-building capability” which helped get everyone on the same page in terms of providing public safety).

⁸⁷ <http://www.ltbbodawa-nsn.gov/TribalHistory.html> (the LTBB’s “historically delineated reservation area, located in the north-western part of Michigan’s Lower Peninsula, encompasses approximately 336 square miles of land within the two counties.”).

⁸⁸ The reservation land issue actually stalled the negotiations for a couple years before it was put aside.

⁸⁹ Not all agreements are cross-deputization agreements; some allow only for the deputization of one department’s officers and not the other’s. One example is the Bay Mills agreement with Chippewa County which allows for the deputization of tribal officers to enforce state law, but not vis-versa.

⁹⁰ These include: The Bay Mills Chippewa Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Potawatomi Indian Community, Huron Potawatami Indians, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Odawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-e-be-nash-she-wish Band of Potawatomi Indians, Pokagon Band of Potawatomi Indians, Saginaw Chippewa Indians and Sault Ste. Marie Chippewa Indians.

⁹¹ Information from comments made by Bill Gregory at *Criminal Jurisdiction in Indian Country* Panel sponsored by the Indigenous Law & Policy Center, February 28, 2001.

local police.⁹² These agreements take the form of deputization of tribal officers by the county sheriff,⁹³ as well as cross deputization of tribal and county officers to enforce each other's laws under certain limitations.⁹⁴ However, there is no state-wide agreement providing for the deputization of tribal police.

A. Authority for Cross Deputization Agreements in Michigan

In Michigan, it appears that statutory authority exists to allow state police to enter into agreements with tribal police departments. Despite this authority, there is no such agreement⁹⁵ and law enforcement cooperation remains on the local level.⁹⁶

1. Legal Authority for the State: MCL 28.601 and MCL 51.70

MCL 28.609 sets out the minimum standards by which a law enforcement officer of a Michigan Indian Tribe can exercise peace officer authority in the state. The first requirement is that the tribal police officer be certified under the act.⁹⁷ Additionally the tribal officer has to be one of the following:

- (1) deputized by the sheriff of the county in which the trust lands of the Michigan Indian tribe employing the tribal law enforcement officer are located, or by the sheriff of any county that borders the trust lands of that Michigan Indian tribe, pursuant to section 70 of 1846 RS 14, MCL 51.70;
- (2) appointed as a police officer of the state or a city, township, charter township or village that is authorized by law to appoint individuals as police officers.⁹⁸

The deputization or appointment of the tribal officer described above has to be in writing that is incorporated into a self-determination contract, grant agreement or cooperative agreement between the Secretary of the Interior and the tribal government

⁹² According to Mr. Gregory, only one tribe, Little River Band of Ottawa Indians, does not have a local law enforcement agreement with surrounding jurisdictions.

⁹³ See, Deputization Agreement between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County; and Law Enforcement Agreement between the Bay Mills Indian Community and the Chippewa County Sheriff (on file with author).

⁹⁴ Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet (on file with author).

⁹⁵ There is not a long term cooperative agreement between the MSP and Tribal police in Michigan. There have, however, been short-term agreements under the Urban Cooperation Act to help police specific events such as the Cherry Festival in Traverse City (interview with John Petoskey).

⁹⁶ Most deputization agreements are with the county sheriffs.

⁹⁷ MICH. COMP. LAWS § 28.609(7)(a)(YR).

⁹⁸ *Id.* at § 28.609(7)(b)(i-ii).

employing the officer.⁹⁹ Section 28.609 is often cited as giving the county authorization to enter into cooperative agreements with tribal law enforcement.¹⁰⁰

MCL 51.70 gives sheriffs the authority to appoint “1 or more deputy sheriffs at the sheriff’s pleasure.”¹⁰¹ This statute also gives the sheriff authority to deputize “persons ... by an instrument in writing, to do particular acts, who shall be known as special deputies ...”¹⁰² These appointments by the sheriff can be revoked at any time.¹⁰³ This statute is cited in agreements as authority for the sheriff to appoint special deputies.¹⁰⁴

2. Legal Authority for the State: Michigan Attorney General Opinion

In 1973 the Michigan Attorney General wrote an opinion in response to a request from Col. John R. Plants of the Michigan State Police, addressing whether state police agencies are authorized to collaborate with tribal police agencies.¹⁰⁵ The Attorney General at the time, Frank J. Kelley, concluded that “[a] duly established Indian reservation police force is in every respect a fully authorized and legitimate police unit. State, county and local police forces may freely enter into inter-agency arrangements with Indian police units and may engage in other kinds of cooperative efforts which may seem advisable and practicable.”¹⁰⁶ The Attorney General’s opinion referenced MCLA 28.6¹⁰⁷ and determined that “[u]nder this provision the Department of State Police may take the initiative in coordinating the efforts of local, county, and state law enforcement

⁹⁹ *Id.* at § 28.609(7)(d).

¹⁰⁰ *See, e.g.* Law Enforcement Agreement Between the Hannahville Indian Community and the County of Menominee; Law Enforcement Agreement between the Bay Mills Indian Community and the Chippewa County Sheriff (on file with author).

¹⁰¹ MICH. COMP. LAW ANN. §51.70.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.*, Interlocal Agreements for Deputization and Mutual Law Enforcement Assistance between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet and Charlevoix; Deputization Agreement between the Grand Traverse Band of Ottawa and Chippewa Indians and Sheriff of Leelanau County (on file with author).

¹⁰⁵ MI Att’y Gen. Op. No. 4803 (October 29, 1973) *available at* <http://www.ag.state.mi.us/opinion/datafiles/1960s/op04087.pdf> (last visited 3/27/08).

¹⁰⁶ *Id.*

¹⁰⁷ MICH. COMP. LAW ANN. §28.6 (the commission of the state police “shall formulate and put into effect plans and means of cooperating with the local police and peace officers throughout the state for the purpose of the prevention and discovery of crimes and the apprehension of criminals. Local police and peace officers shall cooperate with the commissioner in those plans and means.”).

unites to cooperate with the new tribal forces.”¹⁰⁸ Thus, it appears that as early as 1973 there was authority in Michigan to enable the State police to enter into cooperative agreements with Tribal police departments.

3. Legal Authority for the State: The Urban Cooperation Act

The Urban Cooperation Act of 1967¹⁰⁹ was intended

to provide for interlocal public agency agreements; to provide standards for those agreements and for the filing and status of those agreements; to permit the allocation of certain taxes or money received from tax increment financing plans as revenues; to permit tax sharing; to provide for the imposition of certain surcharges; to provide for additional approval for those agreements; and to prescribe penalties and provide remedies.¹¹⁰

Indian tribes are included under the definition of “public agency.”¹¹¹ To fall under the definition the tribe must be recognized by the federal government before the year 2000 and also exert governmental authority over land in the state of Michigan. Indian tribes were included under the definition of public agency in the 2001 proposed amendment to the Act.¹¹² One of the reasons cited for amending the Act to include Indian tribes in the definition of “public agency” was law enforcement concerns surrounding the Cherry Festival in Traverse City.¹¹³ The State House of Representatives analysis of the amendment discussed events to be held at the Turtle Creek entertainment facility and difficulties for tribal officers to enforce law against non-Indian attendees of the festivities.¹¹⁴ The analysis states “the tribe would like to enter into an agreement with the state police so that tribal officers can be deputized to have arrest powers over non-Native visitors, but there is no legal authority to do so.”¹¹⁵ Thus, the amendment served to give legislative authority for “state police [to] enter into agreements with Tribal

¹⁰⁸ MI Att’y General opinion *supra* note 102.

¹⁰⁹ MICH. COMP. LAW ANN. § 124.502, 1967, Ex. Sess., Act 7, Eff. Mar. 22, 1968.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 124.502(e).

¹¹² 2002 Mich. Legis. Serv. P.A. 439 (S.B. 112). Effective date June 13, 2002.

¹¹³ House Legislative Analysis, Senate Bill 112, June 4, 2002 at <http://legislature.mi.gov/doc.aspx?2001-SB-0112>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

authorities.”¹¹⁶ These agreements would allow for the deputization of tribal officers and state police to enforce each other’s laws against anyone.

In addition to Indian tribes, other types of entities included under the public agency definition are counties, cities, villages, townships, charter townships, school districts, single and multipurpose special districts, single or multipurpose public authorities. This Act gives local governments authority to enter into agreements with tribes “to exercise any power or authority that each party could exercise separately on its own,”¹¹⁷ without having to first get permission from the state.

Section 124.505 of the Act outlines the requirements for agreements entered into pursuant to a contract.¹¹⁸ The Act has 15 clauses that the contract may contain, including: the purpose for the agreement, the duration of the agreement, and the financial obligations of the parties. One of the stated purposes of the Act was to provide for a uniform procedure for filing agreements. Section 124.501(4) states that “[p]rior to its effectiveness, an interlocal agreement shall be filed with the county clerk of each county where a party to the agreement is located and with the secretary of state.” Whether this provision has been complied with has yet to be determined.

After the amendment, LTBB cited the Act as authority to enter into agreements with Emmet and Charlevoix counties.¹¹⁹

Thus, it appears from analyzing the sources of authority in Michigan that an agreement between the Michigan State Police and tribal law enforcement is not precluded by law. Despite this authority, all law enforcement agreements in Michigan are entered into at the local level. The following section analyses the possible benefits of a state level solution and concerns that have prevented that from happening thus far.

B. Benefits of Agreements between State Police and Tribes

In evaluating whether an agreement at the state level would be beneficial to overall law enforcement, it is important to discuss what such an agreement would

¹¹⁶ *Id.*

¹¹⁷ Center for Local, State, and Urban Policy, University of Michigan, *available at* <http://www.closup.umich.edu/research/projects/reggov/regionalgov-background.php> (last visited 3/27/08).

¹¹⁸ “A joint exercise of power pursuant to this act shall be made by contract or contracts in form of an interlocal agreement.” MICH. COMP. LAWS 125.501 Urban Cooperation Agreement § 124.505 (1967).

¹¹⁹ *See, e.g.*, LTBB agreement with Emmet and Charlevoix counties (on file with author)..

authorize tribal police to do. In general, State police have statewide authority to conduct law enforcement activities and criminal investigations. They perform functions outside the jurisdiction of the county sheriff, such as enforcing traffic laws on state highways and interstate expressways, overseeing the security of the state capital complex, protecting the governor, training new officers for local police forces too small to operate an academy, providing technological and scientific support services, and helping to coordinate multi-jurisdictional task force activity in serious or complicated cases in those states that grant full police powers statewide.

One desirable advantage for tribes entering into agreements with the State police is the non-expiring nature of such agreements. County sheriffs are elected to 4 year terms only. As a consequence, officers deputized by a county sheriff have to be sworn in again when a new sheriff takes office. The new sheriff could simply refuse to honor the previous agreement which would have deleterious effects on providing law effective law enforcement. Administratively it is easier to have one agreement on a state-level than multiple agreements with various county sheriffs.

In addition, a state-wide solution would provide back-up authority for tribal officers to enforce state laws against non-Indians in the tribe's enforcement area in the event that the local or county sheriff is uncooperative. For political reasons or general distrust, a sheriff may decline to deputize a tribal official.¹²⁰ If a sheriff declines to deputize tribal officers, they have no authority to enforce state laws against non-Indians. Thus, a state-wide agreement could ensure that tribal authority is insulated against an individual sheriff's distrust or dislike of tribal officials.

Also, a state-wide agreement could aid in the enforcement of hunting and fishing laws outside the counties where tribes have trust land. As the law stands, sheriffs can only deputize tribal officers to enforce state law if the tribe has trust land in or bordering the sheriff's county. However, matters involving tribal members such as treaty rights occur in areas broader than the reservation.¹²¹ For example, when LTBB officers are enforcing hunting or fishing regulations off the reservation they sometimes come upon

¹²⁰ Tierney, Interview *supra* note 55.

¹²¹ *Id.*

dangerous situations involving non-Indians and are unable to do anything about it.¹²² Furthermore, this jurisdictional gap means that the Tribal officers in the field have no liability protection as law enforcement officers.¹²³ This issue could perhaps be resolved with a deputization agreement with the state allowing for Tribal Officers to respond to this and other situations while in various parts of the state.¹²⁴ However, the National Resource and Environmental Protection Act would have to be amended before tribal conservation officers can be deputized to enforce treaty rights throughout the state.¹²⁵ The 2007 Inland Settlement Consent Decree allows for tribal officers to “stop hunters and fisherman in the field in order to determine whether they are tribal members” and “to the extent they are deputized under applicable law, enforce state regulations with respect to non-Tribal members.”¹²⁶

Thus, there are various benefits of a state-wide solution for deputization of tribal officers. Despite these benefits, various concerns have prevented a state-wide solution and have kept law enforcement agreements at a local level.

C. Concerns of State Officials Regarding a State-Wide Solution to Deputization of Tribal Officers

Law enforcement agencies in Michigan are generally eager to cooperate with one another to provide optimal law enforcement to their citizens.¹²⁷ It appears that the major concerns rest with the lawyers who perceive the possible liability issues these agreements can create.¹²⁸ It is the job of the Attorney General’s office to protect the State sheriffs regarding these issues. Thus, there are several issues of concern for the Attorney

¹²² In this situation, a Tribal police officer has no more authority than an ordinary citizen and must dispatch a State police officer and wait for them to arrive.

¹²³ Branskey, Interview, *supra* note 84.

¹²⁴ The Department of Natural Resources has maintained that it would require state legislation to allow it to deputize tribal conservation officers.

¹²⁵ Interview with John Wernet, Deputy Legal Counsel to Governor Granholm, Lansing, Michigan (February 2008).

¹²⁶ 2007 Inland Settlement Consent Decree, XXIV § 24.6, *available at* <http://turtletalk.files.wordpress.com/2007/11/consent-decree.pdf> (last visited 3/27/08).

¹²⁷ Interviews with Candy Tierney, *supra* note 55, and John Wernet, *supra* note 127, revealed a general consensus that law enforcement agencies generally want to cooperate with each other to the fullest extent possible. For example, the Keweenaw Bay Indian Community has informal agreements with local law enforcement to provide for assistance. Furthermore, it appears that the State Police lobbied to get the Urban Cooperation Act amended to include Indian Tribes in the definition of “public agency” so as to facilitate intergovernmental agreements.

¹²⁸ Wernet, Interview, *supra* note 127.

General's office regarding a state-wide agreement with tribal police. These concerns mirror the barriers detailed above, which indicates they could be solved through negotiations between the state and tribe. The concerns include: the constitutionality under the Michigan Constitution of deputizing tribal officers; the training or qualification requirements of deputized tribal officers; the liability of the sheriffs regarding conduct of tribal officers; and the command and control of tribal officers acting as special deputies.¹²⁹

One reason given in interviews with the authors as to why a state-wide agreement has not been achieved is because it would be unconstitutional under the state constitution.¹³⁰ In many circumstances, tribal officers are cross-commissioned by the BIA to enforce federal laws and thus are considered federal officers.¹³¹ For this reason, it could be interpreted unconstitutional have tribal officers deputized as both federal and state officials.¹³²

Another concern of the A.G.'s office is the training and qualifications required of tribal officers as opposed to state-certified officers. However, this concern seems to be ameliorated by amendments to MCL §28.609 in 1994, prescribing the exact training and requirements necessary for a tribal police officer to receive peace officer status.¹³³

Liability of state police for actions of deputized tribal officers is another concern of a state-wide agreement. For example, if a state officer assists a tribal officer on a tribal matter; would they be liable for suit in a tribal court? Likewise, if a tribal officer comes to the aid of a state officer outside tribal jurisdiction; could they be personally liable if they are sued? These are important concerns for the attorneys that seek to protect their officers from personal liability in carrying out their duties.

Lastly, there are concerns that a state-wide agreement would not be conducive to clarifying issues of command and control which involves who can tell officers what to

¹²⁹Tierney, interview *supra* note 55; Wernet, interview *supra* note 127.

¹³⁰ MI. Const. of 1850, *available at*

<http://www.legislature.mi.gov/documents/historical/miconstitution1850.htm> (last visited 3/27/08).

¹³¹ For example, LTBB Tribal officers are commissioned by the BIA to enforce federal laws on tribal land. *See*, LTBB of Odawa Indians Deputization Agreement with Secretary of the Interior, *available at* [http://www.ncai.org/nci/resource/agreements/Little%20Traverse%20Bay%20Bands%20BIA%20Deputati on%20Agreement.pdf](http://www.ncai.org/nci/resource/agreements/Little%20Traverse%20Bay%20Bands%20BIA%20Deputati%20Agreement.pdf) (last visited 3/27/08).

¹³² Tierney, interview *supra* note 55 (this is not an official opinion of the Attorney General thus it is hard to ascertain which provision of the Michigan Constitution would be violated by such deputizations.).

¹³³ *See, supra* section III (A)(1) discussing MCL 28.609.

do. Law enforcement operates in a military style command and control system. The efficiency of this system could be compromised by having more than one officer in charge of instructing a tribal (or state) law enforcement officer on how to carry out their job.¹³⁴

Thus, despite the apparent legislative authority for state police to enter into agreements with tribal departments, these concerns have led the Attorney General to take the stance that the state police are unable to do so. For now the opinion seems to be that these agreements are best left to the local level where cooperative relationships are more equipped to deal with local concerns and resources can be better shared.¹³⁵ It appears the issue of a state-wide solution for deputization of tribal officers has not been revisited in 5 to 6 years.

D. Possible Solutions: Looking to Other States for Examples of a Legislative Fix

Other states have found that statutory-deputization is a better solution for enabling Tribal officers to enforce state law than deputization or cross-deputization agreements alone. For example, the Washington Legislature is considering a bill that would give tribal police officers that met certain standards the authority to arrest non-Indians on tribal land.¹³⁶ House Bill 2476 passed both the House and Senate in February and March, respectively, and is awaiting the signature of Governor Christine Gregoire.¹³⁷

The Washington bill has certain requirements in order for tribal police to have arrest authority over non-Natives. First, “a tribal department will have to be certified by the Criminal Justice Training Commission in Burien, to show that each officer was trained to commission’s standard.”¹³⁸ Then, a tribe will have to submit that certification along with proof of insurance to the Washington Office of Financial Management.¹³⁹ If

¹³⁴ Wernet, interview *supra* note 127.

¹³⁵ *Id.*

¹³⁶ The Seattle Times, Editorial, *Expand Tribal Police Authority*, February 11, 2008, available at http://seattletimes.nwsourc.com/html/editorialsopinion/2004172750_tribed11.html?syndication=rss (last visited 3/27/08).

¹³⁷ Josh Farley, *Bill to Expand Tribal Police Authority Clears Senate*, Kitsap Sun, March 7, 2008, available at <http://www.kitsapsun.com/news/2008/mar/07/bill-to-expand-tribal-police-authority-clears/> (last visited 3/27/08). See also, *Washington Tribal Police Bill Awaits Signature*, Indianz.com, March 18, 2008, available at <http://www.indianz.com/News/2008/007688.asp> (last visited 3/27/08).

¹³⁸ *Id.*

¹³⁹ *Id.*

the tribe is approved, within a year they would have to seek a memorandum of understanding with neighboring law enforcement to “set ground rules for how the tribal and non-tribal agencies would cooperate.”¹⁴⁰ If the tribal police and local authorities could not come to an agreement within a year, a binding arbitration would begin, with the arbitrator deciding which side has a more reasonable proposal.¹⁴¹ The authority provided by the act extends only to the exterior boundaries of the reservation or “outside the exterior boundaries of the reservation” under certain circumstances.¹⁴²

In addition, the bill would require tribal officers acting under peace officer authority in arresting non-Indians on tribal land to waive sovereign immunity in the event of a legal challenge. The legislation also specifies that tribal court authority is not extended and that Indians cited outside the reservation boundaries could be referred to state court.¹⁴³

Thus, the bill addresses concerns such as training, liability insurance and sovereign immunity. Once Tribes submit evidence of certification and insurance, the local authorities are required to enter into agreements with the tribes within a year. If the agreement doesn’t come to fruition, a binding arbitration ensures that some compromise is reached. Thus, the bill essentially makes it mandatory that local law enforcement cooperate with tribal police departments. Similar legislation exists in Arizona, Oklahoma, Kansas¹⁴⁴ and New Mexico.¹⁴⁵

Putting aside any constitutional issues that may or may not apply in Michigan, it seems like a legislative solution could be a viable option for providing a state-wide solution to jurisdictional gaps. Indeed, the legislation in Washington seems to address at

¹⁴⁰ *Id.*

¹⁴¹ Rob Carson, *Tribal Police Hopeful for Increased Authority Against Non-Indians*, The News Tribune, March 25, 2008, available at <http://www.thenewstribune.com/news/local/story/311756.html> (last visited 3/27/08).

¹⁴² These circumstances include “with consent of the local sheriff; in response to an emergency involving threat to human life or property; in response to a request for assistance pursuant to a mutual law enforcement assistance agreements; when transporting a prisoner; when the officer is executing an arrest or search warrants; or when an officer is in fresh pursuit.” Washington State House of Representatives, Bill Analysis, HB 2476, January 18, 2008, available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/2476.HBA%2008.pdf> (last visited 3/27/08).

¹⁴³ Seattle Times Editorial, *supra* note 136.

¹⁴⁴ Rob Carson, *Tribal Police Bill Stirs Up Dissent*, The News Tribune, January 19, 2008, available at <http://www.thenewstribune.com/news/local/story/259063.html> (last visited 3/27/08).

¹⁴⁵ Manual Valdes, *Bill Would Expand Tribal-Police Authority*, The Seattle Times, January 31, 2008, available at http://seattletimes.nwsourc.com/html/politics/2004155584_tribalpolice31m.html (last visited 3/27/08).

least two of the concerns of the state, namely training and liability. Thus, adopting the same kind of measure in Michigan would appease those concerns as well as create a presumptive validity of Tribe's authority to affect law enforcement within reservation boundaries.

E. Other Options for Tribes

In addition to a possible legislation fix, Michigan tribes have other options if they decide that an agreement with the state police is an important goal for tribal law enforcement.

First, tribes can continue to pursue an agreement with state police on a government to government basis with the presumption that these agreements are permissible under Michigan law. It appears that the authority does exist in Michigan for the state police to enter into agreements with Tribes for cooperative law enforcement.¹⁴⁶ The Attorney General's opinion in 1973 lending support to this authority is still good law and has not been expressly contradicted by a subsequent opinion. Whatever stance the Attorney General now has on the validity of state-tribal agreements must be informal and undocumented. Thus from a formal standpoint, there is no contradicting authority to invalidate the ability of the state police from entering into these types of agreements with tribes.

In addition, legislation in Michigan lends support to the argument that state police are permitted to enter into agreements with tribes.¹⁴⁷ MCL §28.609 contains requirements tribal police must meet in order to obtain peace officer status. Furthermore, MCL §51.70 permits the sheriff to appoint special deputies. The Urban Cooperation Act strengthens the legality of a state-tribal agreement by including Tribes in the entities permitted to enter into inter-governmental agreements. Thus, there is ample authority for Tribes to seek an agreement.

However, given the unstated reluctance of the Attorney General's office to support such agreements, tribes may have to pursue other options. First, tribes may

¹⁴⁶ See, *supra* section IV. (A) discussing authority in Michigan.

¹⁴⁷ *Id.*

contact the Michigan State Police First Lieutenant Grey Zarotney,¹⁴⁸ and express a desire to revisit the issue. If this contact does not result in desirable action, tribes can also contact John Wernet of the Governor's office. Additionally, tribes can address the issue to state officials at the annual summit of Michigan and Tribal governments.¹⁴⁹

Thus, if tribal governments decide that law enforcement would be better served by a state-tribal agreement as well as local agreements, there are several options that can be weighed and pursued to that end.

IV. Conclusion

Tribal-State relations in Michigan have vastly improved over the last 15 years. As more trust and understanding is fostered between tribal, state and local governments, cooperative agreements are becoming more commonplace. Indeed, the use of cooperative law enforcement agreements at the local level is widespread in Michigan, greatly simplifying the duties of officers.

Despite the benefit of these agreements, situations still exist that might hamper law enforcement efforts in Indian communities. The local sheriff is under no obligation to deputize tribal officers. Thus, the deputization is at the sheriff's pleasure and a change of office, general dislike or distrust may impair the ability of tribal law enforcement officers to receive special deputy status. For these and other reasons, a state wide solution or state police agreement might be a desirable option to reinforce tribal law enforcement authority to enforce state laws against non-Indians on reservation land.

The advantages of a state wide solution for tribal law enforcement is up to each tribe as sovereigns weighing what is best for their communities. Despite the apparent authority in Michigan of state-tribal agreements as evidenced by the Attorney General opinion and statutes, the issue of a state police agreement or a state legislative fix has not been revisited for many years. This could be due to the perception that the solutions at the local level are working for tribal communities. However, tribes have options should they decide to revisit the issue, including: pursuing a legislative fix; opening negotiations with

¹⁴⁸ Mr. Zarotney is the Michigan State Police contact for tribal issues.

¹⁴⁹ The summit, an annual government to government meeting between the Governor and tribal leaders, typically falls annually in May.

the state police; and addressing the issue with the governor's office or at the annual summit.