Law Enforcement in Indian Country: The Struggle for a Solution

Jonathan Mills and Kara Brown[1]

I. Introduction

The nation's Indian reservations are suffering from a "public safety crisis."[2] Staggering homicide rates, high levels of juvenile crime and gang activity, child abuse, substance abuse and myriad other problems plague the over 1.4 million people who populate Indian reservations in the United States.[3] The Executive Committee on Indian Country Law Enforcement Improvements, created in response to a White House directive, has labeled the law enforcement problems in Indian Country as "severe," and acknowledged that "the most glaring deficiency is a chronic lack of law enforcement resources . . . ."[4]

Some of the statistics discussed in the Executive Committee report are particularly revealing:

> While nationwide violent crime rates declined significantly between 1992 and 1996, homicides in Indian Country rose sharply. Some Tribes have murder rates that far exceed those of urban areas known for their struggles against violent crime. In 1995, for example, the murder rate on Ft. Peck reservation in Montana was more than twice that of New Orleans, one of the most violent cities in the United States. During 1996, the people on America's largest reservation, the Navajo Nation, endured 46 non-negligent homicides, resulting in a rate which would place it among the top 20 most violent cities.
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> Other violent crimes, such as gang violence, domestic violence, and child abuse have paralleled the rise in homicides. During fiscal years 1994-1996, 84 percent of the FBI Indian Country cases opened (4,334) involved crimes of violence (48%) or the sexual or physical abuse of a minor child (36%). Violent Indian gangs, who model themselves after their urban counterparts, are a frightening new reality on many reservations. Drug abuse now has been added to the problems caused by alcohol.[5]

As alarming as these statistics are, they may not even adequately capture the current crisis on the nation's reservations. The Executive Committee acknowledged concerns that "available statistics understate the magnitude of the problem in many areas of Indian Country,"[6]

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[1] John Hendrickson also contributed to this report.

[2] *See Executive Summary, Report of the Executive Committee for Indian Country Law Enforcement Improvements, Final Report to the Attorney General and the Secretary of the Interior* (U.S. Department of Justice, Criminal Division, October 31, 1997) , *available at* http://www.usdoj.gov/otj/icredact.htm (last visited June 1, 2001).

[3] *See id.*

[4] *See id.*

[5] *Id.* at 8.

[6] *Id.*

a concern echoed by a recent Department of Justice Inspector General Report on criminal justice in Indian Country.[7]

Many of these same problems have plagued Indian reservations for decades. Indeed, it was concerns of "lawlessness" on Indian reservations that ostensibly prompted the passage of Public Law 280 in 1953, ceding to five states, including California, law enforcement authority over Indian reservations within their borders.[8] While Public Law 280 has changed the way California deals with Indian reservations within its borders, it has not alleviated the problems that exist there. Legal scholarship and anecdotal evidence indicate that the law enforcement problems discussed above exist on some of California's 109 reservations as well.[9]

Law enforcement problems on California's reservations, as in other states, stem in part from limited resources and jurisdictional confusion. Many reservations are geographically remote and involve enormous tracts of sometimes non-contiguous land. Because Indians generally do not pay taxes, local law enforcement must provide additional law enforcement services without the benefit of additional tax revenue. Local authorities are thus limited in their ability to effectively patrol reservations and are sometimes unable to quickly respond to emergency situations. Confusion over jurisdiction compounds these problems.

Similarly, many tribes lack the resources to establish and operate their own law enforcement agencies. Those that do must contend with the same geographical and jurisdictional problems facing local authorities. Tribal law enforcement officers are further hampered by their limited authority over non-Indians – they may detain, but not arrest, non-Indians on reservations, and they may not pursue non-Indians off-reservation. Tribal officers also lack access to the California criminal background check database, which can make traffic stops and other situations much more dangerous.[10]

Like the federal government and other states around the country, California is working to improve law enforcement on reservation lands. Efforts include: deputizing tribal officers to enable them to enforce state law on reservation lands; entering into cross-deputization agreements which allow county officers to enforce tribal law and tribal officers to enforce state law; contracting for additional law enforcement services; increasing funding for law enforcement; and various hybrid programs. In December 2000, the State Attorney General's Office sponsored a three-day meeting between state and tribal law enforcement officials to

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[7] *Id.* (*quoting* Report No. 96-16, September 1996, finding that "there is a pervasive lack of reliable statistics in Indian Country").

[8] *See* 18 U.S.C. § 1162 (2000); *see also*, *Bryan v. Itasca County*, 426 U.S. 373, 379-80 (1976) (stating "[t]he primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement"). *See generally*, Carole Goldberg-Ambrose, *Public Law 280 and the Problem of "Lawlessness" in California Indian Country*, in PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (UCLA 1997) 1-44.

[9] *See generally*, Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, *supra* note 7; Nancy Thorinton, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments*, 31 McGeorge L. Rev. 973 (2000); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627 (1998). Research did not reveal crime statistics for California reservations.

[10] *See* Benjamin Spillman, *Tribes Strive for Broader Jurisdiction*, The Desert Sun, Nov. 26, 2000, *available at* http://www.thedesertsun.com/news/stories/local/9752200330.shtml (last visited June 8, 2001).

discuss ways to improve reservation safety.[11] A bill addressing some of the concerns raised at this conference is currently pending in the California legislature.[12]

In response to a request by the California Research Bureau, this paper outlines the legal framework governing law enforcement on Indian reservations in California and discusses various approaches to improving reservation safety. It also briefly discusses the procedure by which California could return jurisdiction over reservations to the federal government ("retrocession").

II. Legal Framework Governing Law Enforcement on Indian Reservations

Indian tribes possess an inherent sovereignty that can only be diminished by treaty or act of Congress.[13] Intrinsic in this sovereignty is a tribe's power to create and administer a criminal justice system.[14] Indian tribes have criminal jurisdiction over their members within the limits of the reservation, subordinate only to the expressed limitations of federal law.[15] Indian tribes do not have inherent criminal jurisdiction to arrest, try and punish non-Indians and may not assume such jurisdiction unless specifically authorized to do so by Congress.[16] Prior to the passage of P.L. 280, the federal government shared law enforcement responsibility with tribal officials over all of the nation's reservations.

In 1953, Congress passed P.L. 280, ceding to five states ("mandatory states") jurisdiction over Indian reservations within their borders and giving other states the option of assuming such jurisdiction. This replaced the federal jurisdiction system that had previously been in place. P.L. 280 provides, in part:

> [e]ach of the States listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory [.][17]

As a result of P.L. 280, California has jurisdiction over almost all violations of state criminal laws that occur on reservation lands.[18] California may not enforce laws that are regulatory rather than criminal[19] and federal laws of general applicability continue to apply to

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[11] *See* James May, *California Tribal Law Enforcement Studied*, Indian Country, Dec. 13, 2000, *available at* http://www.indiancountry.com/articles/headline-2000-12-13-04.shtml (last visited June 10, 2001).
[12] *See* S.B. 911 (Alarcon), (as amended April 16, 2001), available through http: //www.leginfo.ca.gov (last visited June 12, 2001).
[13] *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975) (citations omitted).
[14] *Id.*
[15] *Id.* (*quoting* F. Cohen, Handbook of Federal Indian Law 148 (1942 ed. as republished by the University of New Mexico Press)).
[16] *See Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978).
[17] 18 U.S.C.A. § 1162 (a) (2000).
[18] P.L. 280 also deals with civil jurisdiction, which is beyond the scope of this paper.
[19] *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (If the intent of a state law is to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction over Indian reservations, but

California's Indians unless there exists some treaty right that exempts the Indian from the operation of the particular statute in question.[20]

P.L. 280 did not divest Indian tribes of their inherent authority to operate tribal law enforcement agencies and enforce tribal laws.[21] Indeed, as "new streams of wealth" flow to Indian reservations through casinos, California tribes are increasingly able to create and operate their own police departments.[22] According to newspaper accounts, "[o]f about 100 California tribes, at least nine have full-fledged police departments, and many others have rangers or security forces."[23] Tribal authority, as well as the jurisdiction and sentencing power of tribal courts, is severely limited, however. While tribal officers may enforce tribal criminal law against Indians on reservations, they have little authority over non-Indians on reservation lands. They may detain, but not arrest, non-Indians who they suspect of violating the law, and must turn them over to state or local authorities.[24] There are limits to the amount of time tribal officials may hold non-Indians while waiting for local authorities to arrive; if local authorities do not arrive in time, tribal officials must release the suspect or face suit for false imprisonment.[25] The power of tribal officers over non-Indians on reservation lands has been described as essentially a citizen's arrest power.[26]

Unlike their state and local counterparts, state law generally treats tribal officers as ordinary citizens when they are on non-reservation lands.[27] They must comply with traffic laws, restrictions on vehicle markings, and other laws, while off-reservation.[28] Thus, tribal officers must cover their emergency light bars and comply with speed limits when traveling on non-reservation lands, even if in pursuit of a suspect or responding to an emergency on a part of the reservation that calls for use of non-reservation roads.[29] They have no authority over non-Indians off-reservation and may not pursue non-Indians off the reservation. Some complain that they must watch helplessly as violators speed off the reservation in defiance of tribal authority.[30]

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if the state law generally permits conduct at issue, subject to regulation, it must be classified as "civil/regulatory" and Public Law 280 does not authorize its enforcement on an Indian reservation).

[20] *See United States v. Stone*, 112 F.3d 971 (8th Cir. 1997).

[21] While P.L. 280 does not make this explicit, this notion has been generally accepted. The Ninth Circuit stated, "as a general proposition, we have little difficulty in concluding that an Indian tribe may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power." *Ortiz Barraza*, 512 F.2d at 1179.

[22] *See* Deborah Sullivan Brennan, *Tribes Seek More Power for Their Police Forces Security: Coalition is Negotiating with State, U.S to Give Their Officers Full Law Enforcement Authority*, L.A. Times, Dec. 27, 2000 at A-3, 2000 W.L. 25930812 [hereinafter Brennan, *Tribes Seek More Power*].

[23] *Id.*

[24] *See Cabazon Band of Mission Indians et al. v. Smith*, 34 F.Supp.2d 1195, 1199 (C.D. Cal. 1998).

[25] Brennan, *Tribes Seek More Power, supra* note 22. "Tribal officers can hold suspects for only a limited time without risking charges of illegal imprisonment. If sheriff's deputies are occupied when that time elapses, tribal police must release the suspects." *Id.*

[26] *See id.*

[27] *See generally*, *Cabazon Band of Indians v. Smith*, 34 F. Supp. 2d 1201 (C.D. Cal. 1998), *aff'd*, 249 F.3d 1101 (9th Cir. 2001).

[28] *See id.*

[29] *See id.*

[30] *See* Brennan, *Tribes Seek More Power, supra* note 22. The article cites Cabazon tribal police officers' accounts of chasing drunk drivers only to see them careen off the reservation in defiance and of ticketing midnight dumpers who ditch illegal loads of trash and then skip their court dates with impunity. "We can't chase these criminals off the

One newspaper article recounts driving behind a reservation power plant toward a tribal burial site, where a tribal officer points to old furniture, beer cases, even an abandoned hot tub left by illegal dumpers. Officers cite offenders, but the tribal court has no binding power over non-tribal members.[31] Tribal officers complain that this diminished authority limits their ability to preserve reservation safety,[32] and provides no real deterrent for non-Indian offenders.[33]

A further impediment to tribal authority is the limited sentencing power of tribal courts. An Indian tribe, in exercising the powers of self-government,[34] may not impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both.[35] Tribal courts may exercise criminal jurisdiction over all Indians[36] and they retain this ability even if the federal or California government has already exercised jurisdiction, and vice versa.[37] Dual prosecution is allowed because tribal governments are separate sovereigns entitled to vindicate their own public policies, even if they are the same as those of the federal or a state government.[38]

A recent dispute between the Cabazon Band of Mission Indians and local law enforcement authorities illustrates some of the law enforcement problems that can arise in Indian Country.[39] A dispute first arose regarding the proper scope of law enforcement jurisdiction on

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reservation," Cabazon Tribal Police Chief Paul Hare explained, "All we can do is advise other law enforcement agencies [of the crime]. So a lot of people commit these crimes and get away." *Id*

[31] *.Id.*

[32] *Id.*

[33] *Id.*

[34] The "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, *to exercise criminal jurisdiction over all Indians*[.]" 25 U.S.C. § 1301 (2) (2000) (emphasis added). "Indian" is defined, for purposes of this subchapter, as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 ([Indian Major Crimes Act)] if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C.A. § 1301(4) (2000). Generally speaking, the test of whether a person is an "Indian" for criminal jurisdiction purposes under the Indian Major Crimes Act turns on whether a person has some Indian blood and whether the person is recognized as an Indian, and the second part involves evaluation of several factors: the most important, but not essential, factor is whether the person is enrolled in a tribe, and other factors are whether the Government has, either formally or informally, provided the person with assistance reserved only to Indian, whether the person enjoys the benefits of tribal affiliation, and whether he is socially recognized as an Indian because he lives on the reservation and participates in Indian social life. *U.S. v. Driver*, 755 F. Supp. 885 (D. S.D. 1991), *aff'd*, 945 F.2d 1410, *cert. denied*, 502 U.S. 1109.

[35] *See* 25 U.S.C. § 1302(7) (2000).

[36] *Id.*

[37] *See United States v. Wheeler*, 435 U.S. 313 (1978) (holding that Navajo Tribe, in criminally punishing a tribal member for violating tribal law, acted as independent sovereign rather than an arm of the federal Government, so that a subsequent federal prosecution for a federal crime arising out of same incident was not barred by double jeopardy clause); *see also, Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (holding that tribe member's acquittal in district court on a charge of voluntary manslaughter under the Major Crimes Act did not deprive the tribal court of jurisdiction over the offense).

[38] *See id.*

[39] *See Cabazon Band of Mission Indians*, 34 F.Supp.2d 1195 (C.D. Cal. 1998) (holding that P.L. 280 did not divest Indian tribe of its inherent authority to operate a tribal law enforcement agency) and *Cabazon Band of Mission Indians*, 34 F.Supp.2d 1201 (C.D. Cal. 1998) (holding that general, non-discriminatory regulations governing

and off the reservation. The Cabazon Band had created a tribal Public Safety Department to provide civil and criminal law enforcement services on the Cabazon reservation.[40] County officials argued that the tribe lacked authority under P.L. 280 to create and maintain a tribal police department because P.L. 280 gave exclusive law enforcement authority to the state. Tribal officials, on the other hand, argued that they had inherent authority to operate a tribal law enforcement agency with the power to enforce tribal criminal law against Indians on its reservation and to arrest Indians and non-Indians alike for suspected offenses committed on the reservation for the purpose of transporting them to California police agencies in cases where the tribe lacks the jurisdiction (or ability) to try and punish such offenses.[41]

The court agreed with the tribe that P.L. 280 did not divest tribes of their inherent authority to create and operate tribal law enforcement agencies. Citing case law, the court examined the scope of tribal authority:

> The Ninth Circuit has directly held that "Public Law 280 was designed not to supplant tribal institutions, but to supplement them." The Ninth Circuit has declared: "The Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute."
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> The Ninth Circuit has also sustained the right of tribes to maintain tribal police forces to aid in the enforcement of tribal law. In addition to the power to exclude trespassers from tribal lands, the Supreme Court made clear that tribal law enforcement authorities have the power to restrain persons who breach the peace on the reservations, and that "[w]here jurisdiction to try and punish the offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities."
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> It is well settled that tribes may also exclude persons from the reservation who violate tribal or other applicable laws. Although tribal courts may not exercise criminal jurisdiction over non-Indians, Indian tribes may assert criminal jurisdiction over Indians on reservations.[42]

In light of case law, the court rejected defendants' argument that P.L. 280 should be read as divesting the Cabazon Band of its inherent authority to establish a police force with jurisdiction to enforce tribal criminal laws against Indians and to detain and turn over to state or local authorities non-Indians who commit suspected offenses on the reservation.[43]

In a related case, the Cabazon tribe argued that county officials improperly stopped and cited tribal officers who, in pursuit of suspects located in non-contiguous portions of the reservation, used public roads while driving marked vehicles equipped with emergency light

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operation of vehicles on public highways not located in Indian Country did not create an undue or excessive burden on tribe's ability effectively to perform its on-reservation law enforcement functions).

[40] *Cabazon Band of Mission Indians*, 34 F.Supp.2d at 1196.

[41] *Id.* at 1199.

[42] *Id*. (citations omitted).

[43] *Id*. at 1200.

bars.[44] While county officials allowed tribal officers to use public highways to access remote portions of the reservation, they insisted that the tribal officers cover their emergency light bars while using such roads. The court upheld the county's actions based on California law, which only allows specified vehicles to operate as "emergency vehicles" entitled to the use of emergency light bars (which did not include tribal police vehicles) and because the court found that enforcing the California Vehicle Code restrictions against tribal officers did not interfere with tribal law enforcement officers' ability to enforce tribal law.

The chart below summarizes the division of criminal jurisdiction on California reservations:

CRIMINAL JURISDICTION ON RESERVATIONS IN CALIFORNIA		
Crime by Parties	**Jurisdiction**	**Authority**
Crimes by Indians against Indians	Tribal and/or state (both may exercise jurisdiction).	18 U.S.C. § 1162(a) (2000); *Cabazon Band of Mission Indians v. Smith*, 34 F.Supp.2d 1195, 1201 (C.D. Cal. 1998).
Crimes by Indians against non-Indians	Tribal and/or state (both may exercise jurisdiction).	
Crimes by non-Indians against Indians	State (exclusive).	18 U.S.C. § 1162(a) (2000); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
Crimes by non-Indians against non-Indians	State (exclusive).	
Crimes by non-Indians without victims	State (exclusive).	

III. Tribal Sovereignty

As noted above, tribes are considered quasi-sovereign nations whose authority can only be diminished by treaty or federal action. Indian tribes "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[45] Sovereign immunity prevents a court from entering orders against the tribe itself in the absence of an effective waiver, but it does not prevent a court from adjudicating the rights of individual tribal members over whom it properly obtained personal jurisdiction.[46] Congress has the power to modify this immunity[47] but it must do so unequivocally; a waiver of immunity will not be

[44] *See Cabazon Band of Mission Indians*, 34 F.Supp.2d 1201. Because the Cabazon Indian Reservation is made up of four separate sections of land, with approximately thirteen road miles separating the most distant sections, it is not possible to drive between the different sections without leaving the reservation. In order for the Cabazon Public Safety Department to provide law enforcement services to all sections of the reservation, the Department's vehicles must leave the reservation and drive across sections of public highways located in the County of Riverside which are non-Indian lands. *Id.* at 1203.

[45] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing cases).

[46] *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165 (1977).

[47] *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). Tribal immunity is a matter of federal law and is not subject to diminution by the States. *Id.* at 756 (citations omitted).

implied.[48] Similarly, a tribe may waive its immunity,[49] but it must do so explicitly; a waiver will not be implied.[50] A tribe may waive its sovereign immunity by contract.[51] Tribal immunity from suit applies in both state and federal court[52] and extends to claims for declaratory and injunctive relief, not merely damages.[53] It is not defeated by a claim that the tribe acted beyond its power.[54] Tribes are not immune from suits by the United States,[55] although the United States remains immune from suit in tribal court.[56]

While it is well established that tribes have immunity from suit, it is less clear which individual members of the tribe (or non-members employed by the tribe) share this immunity. The Ninth Circuit has stated that the sovereign immunity of a tribe extends to tribal officials when they act in their official capacity and within the scope of their authority.[57] At least in the Ninth Circuit, one need not be a member of the tribe to be a "tribal official" for the purposes of sharing in the tribe's sovereign immunity.[58] However, the term "tribal official" generally connotes one who performs some type of high level or governing role within the tribe. Thus, tribal sovereignty could be invoked by the general counsel of the Navajo Tribe, who was not himself a Navajo, but who played a key role in advising members of the tribal council.[59] Similarly, in *Hardin v. White Mountain Apache Tribe*, the Ninth Circuit held individual tribal officials immune from liability where the tribe itself was immune and where the individual officers were acting within the scope of their delegated authority.[60] Thus, the court upheld a finding of sovereign immunity in favor of tribal police officers who had forcibly removed a man

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[48] *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58-59 ("It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'") (citation omitted) (refusing to find a congressional waiver in the passage of the Indian Civil Rights Act of 1968); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (where federal statute, such as the Hazardous Materials Transportation Act, clearly indicates that it applies to Indian tribes, tribal sovereign immunity cannot bar enforcement of the statute).

[49] *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

[50] *See Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 196); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993); *but cf. Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc*., 86 F.3d 656, 659-60 (7th Cir. 1996).

[51] *Nenana Fuel Co. v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992).

[52] "Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants." *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (citing cases).

[53] *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

[54] *Id.*

[55] *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

[56] *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

[57] *Imperial Granite Co*., 940 F.2d at 1271.

[58] *Id.*

[59] *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968) (*cited in Baugus*, 890 F.Supp. at 911).

[60] *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)*; but see, Turner v. Martire,* 99 Cal.Rptr.2d 587, 590 (Cal. Ct. App. 2000) (stating that *Hardin* cannot be construed as holding that immunity extends to tribal police because, although the caption of the opinion indicates that the tribal police department was named as a defendant, the opinion does not state whether individual police officers were named, nor does it address specifically the issue of whether tribal police should be immune).

from his home after the tribal council had decided to exclude him permanently from the reservation. [61]

In contrast, a non-tribal member, employed by a tribe to provide security, who worked for the tribe, was paid by the tribe, and performed his duties under the tribe's directions and authority, was not a tribal official entitled to share in the tribe's sovereign immunity.[62] In *Baugus v. Brunson*, the court rejected the sovereign immunity claim of a non-tribal member, employed by a tribe to provide security at a casino, who was sued by an individual whom he had subjected to a citizen's arrest.[63] The security officer argued that he was a tribal officer acting within the course and scope of his tribal authority, and was thus protected by the sovereign immunity of the Tribe. The court disagreed, finding that the officer was not a tribal official, despite the fact that he worked for and was paid by the tribe, and performed his duties under the Tribe's direction and authority. The court stated that "[t]he mere fact that [defendant] was acting as an agent for his employer, the Tribe, does not cloak him with the Tribe's immunity."[64] In reaching its conclusion, the *Baugus* court distinguished *Hardin* on the basis that the tribal officers in that case were carrying out a direct order from the tribal council.[65] Furthermore, they explained, in *Hardin*, the officers were carrying out a function at the very core of tribal sovereignty (evicting a person who had been banished from the reservation). The court explained that this defendant, by contrast, was a non-member who was providing private security for a casino operated by the Tribe. "While the Ninth Circuit has recognized that a tribe's sovereign immunity extends to commercial operations, no similar ruling has extended this immunity to the individual employees of such an enterprise.[66] In sum, the court concluded, "nothing cited by either party supports the conclusion that a casino security officer, even one with supervisory authority, is a 'tribal officer' for purposes of sharing tribal immunity."[67]

One California court has held that sovereign immunity does not extend to tribal law enforcement officers.[68] In *Turner v. Martire*, the court rejected a sovereign immunity claim of tribal police officers who had allegedly assaulted and improperly detained plaintiffs while on-duty at the reservation's casino. The court engaged in an extensive discussion of the scope of tribal sovereignty before concluding that defendants did not qualify as "tribal officials" entitled to share in the tribe's immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," the court explained, "[a]t the same time, the United States Supreme Court has repeatedly stated that tribal immunity generally 'does not immunize the individual members of the tribe.'"[69] The court reviewed the purposes of tribal immunity ("to encourage tribal self-sufficiency and tribal development") and concluded that:

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[61] *Id*.
[62] *Baugus v. Brunson*, 890 F.Supp. 908 (E.D. Cal. 1995).
[63] *Id*..
[64] *Id*. at 912.
[65] *Id*. at 911.
[66] *Id*. at 911-12 (citation omitted).
[67] *Id*. at 912.
[68] *See Turner*, 99 Cal. Rptr.2d 587.
[69] *Id.* at 589 (citations omitted).

> [t]he kinds of core governmental functions which most directly affect tribal self-sufficiency and development are virtually certain to involve policymaking and the exercise of discretion. Declining to extend immunity to individuals who do not perform such functions will not inhibit the purposes of the doctrine.[70]

The court continued:

> Defendants have not persuaded us that they should enjoy a degree of immunity not enjoyed by police officers at common law, not enjoyed by federal officials at common law (and only enjoyed by them under statute in view of the availability of a direct action against the government), and not enjoyed by state employees, including law enforcement officers. We therefore reject their contention that all they must show to establish immunity is that they acted within the scope of their authority. Rather, we conclude that, to qualify as "tribal officials" for immunity purposes, defendants must also show that they performed discretionary or policymaking functions within or on behalf of the Tribe, so that exposing them to liability would undermine the immunity of the tribe itself.[71]

The court did not foreclose the possibility that defendants could establish that they were entitled to immunity on remand.

The court also analyzed whether the acts of the tribal police in this case could be considered "within the scope of their authority." The court found that defendants presented no evidence as to the scope of their authority as tribal law enforcement officers. "In particular," the court explained, "the record does not indicate whether defendants were authorized to use force or detain or arrest visitors, and, if so, under what circumstances."[72] Absent such evidence, the court concluded, there was no basis for the lower court's finding that defendants acted within the scope of their authority for immunity purposes. The court also pointed out that a tribal officer may forfeit immunity where he or she acts out of personal interest rather than for the benefit of the tribe.[73]

Tribal sovereignty issues clearly play an important role in liability questions that arise when tribes enter into law enforcement agreements with county officials. Some tribes worry that entering into certain types of agreements will eliminate or diminish their sovereign immunity. Law enforcement officials, on the other hand, do not want to be held responsible for the activities of tribal officers.[74] While entering into individual agreements can clarify immunity issues and resolve liability questions, these issues become murky when considering statewide deputization of tribal officers.

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[70] *Id*. at 592 (citations omitted).
[71] *Id*. at 595.
[72] *Id*. at 596 (citation omitted).
[73] *Id*. (citation omitted).
[74] *See* Brennan, *Tribes Seek More Power, supra* note 22. "Any plan should hold tribal police to the same standards as other officers, sheriffs say. It should provide means for citizens injured due to police misconduct to get redress, they say, noting that tribes are immune to civil litigation under U.S. law. And it should map out how tribal officers, whose pay comes largely from casino revenues, would fairly probe crimes associated with such businesses. *Id*.

The Humboldt Sheriff's Office and the Hoopa Valley Tribe entered into a Joint Powers Agreement that serves as an example of how immunity and liability questions can be resolved by agreement. That agreement provides, in relevant part:

> 13. Insurance – The County of Humboldt shall reimburse the Tribe for the costs of insurance coverage of personnel and equipment traceable to assisting the Humboldt County Sheriff's Office in compliance with this Joint Powers Agreement. Each of the parties shall maintain police professional liability insurance or personal injury insurance or both to cover police officers' actions in the course of duty. This insurance should extend to reserve agents and mutual aid agreements. Any changes in coverage will be made only after 90 days notice to the other party. In addition, each party shall communicate the proof of insurance documents to each other.
>
> . . . .
>
> 16. Indemnification – The parties shall indemnify and hold each other harmless against any suits or other proceedings related to the performance of law enforcement activities by each party's personnel on behalf of and [at] the request of the other party.
>
> 17. Sovereign Immunity – This agreement is not intended nor shall it be so interpreted to be a waiver of sovereign immunity of the Hoopa Valley Tribe or Humboldt County, or their employees, officials and agents.[75]

In contrast, S.B. 911, which contemplates statewide deputization, illustrates some of the difficulties that can arise with sovereign immunity and liability issues. That bill would require tribal law enforcement agencies not subject to the Federal Tort Claims Act to maintain a liability insurance policy of not less than one million dollars to cover any liability arising from the enforcement of state criminal law pursuant to the authority granted by the bill.[76]

Questions have arisen whether the state may unilaterally impose such an obligation on Indian tribes and whether the specified insurance coverage will allow injured plaintiffs complete recovery. As the Senate staff analysis of the bill points out:

> It may or may not be that the state can unilaterally impose any obligation on tribal law enforcement agencies by such a statute. Nor may it be clear how that limit would interact with lawsuits against public agencies which are related to the tribal law enforcement activity, whether through the certification process or other local agencies. Any persons who violated California law and were arrested by tribal

[75] Joint Powers Agreement between the Hoopa Valley Tribe and the County of Humboldt (May 30, 1995) (attached as Appendix A).

[76] The bill specifically provides that nothing in its provisions "shall be construed to impose liability upon nor to require indemnification by the State of California, or any political subdivision or public agency thereof, for any act performed by tribal law enforcement officers recognized as having peace officer powers pursuant to this section. Every tribal law enforcement agency that is not subject to the Federal Tort Claims Act shall maintain a liability insurance policy of not less than one million dollars ($1,000,000) to cover any liability arising from the enforcement of state criminal law pursuant to the authority granted by this section."

> police with California peace officer powers would be taken to county jails and booked and prosecuted by local district attorneys. It also may be that the one million dollar limit is not sufficient to guarantee that an injured party is made whole or that tribal law enforcement agencies would be appropriately influenced to carry out their functions without subjecting the agency to claims for wrongful acts.[77]

The U.S. Supreme Court has expressed doubts about the continued viability of the tribal sovereignty doctrine. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court upheld tribal immunity based on court precedent, but explained:

> There are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity]. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. It our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.[78]

"These considerations," the Court explained, "might suggest a need to abrogate tribal immunity, at least as an overarching rule."[79]

IV. Possible Solutions

Other states, as well as localities within California, have taken a variety of approaches to improving law enforcement on Indian reservations and surrounding areas. These approaches can be categorized as: deputization/cross-deputization agreements, statutory deputization, security contracts, increased funding, and hybrid programs. Each is discussed below.

A. Deputization Agreements/Cross-Deputization Agreements

1. Deputization Agreements

A sheriff of a California county that borders a reservation may deputize tribal law enforcement officers who complete a training program established by the California Commission on Peace Officers Standards and Training ("POST training") through an agreement with a tribe.[80] Deputized officers then become California peace officers with the same powers as other deputy sheriffs, including the ability to:

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[77] Legislative Analysis of S.B. 911 (as amended April 16, 2001) at 25-26, available through http://www.leginfo.ca.gov (last visited August 8, 2001).
[78] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 758 (1998) (citations omitted).
[79] *Id.*
[80] *See* Cal. Penal Code §§ 830.6 (b), 832.6(a) (1) (West 2000).

- enforce state law by pursuing and arresting non-Indian suspects on reservation lands and in the jurisdiction that has agreed to deputization;
- carry firearms and other law enforcement equipment (e.g. wooden batons) used by deputy sheriffs on to non-reservation lands;[81] and
- apply for and receive access to the CLETS background check network.[82]

2. Cross-Deputization Agreements

Cross-deputization agreements allow tribal officers to enforce state law, and local law enforcement officials to enforce tribal law, under specified conditions. The Humboldt County Sheriff and the Hoopa Valley Tribe have entered into an agreement of this type.[83] The agreement provides that the county must, in compliance with California Penal Code §§ 830.6 and 830.8, deputize Hoopa Tribal Police on completing the training course for deputy sheriffs prescribed by the Commission on Peace Officer Standards and Training or an equivalent federal training course, and upon approval of the Sheriff, not to be unreasonably withheld or delayed, and upon passing a standard background check.[84] Similarly, the Tribe must deputize Humboldt County deputy sheriffs upon completion of a course in Hoopa Tribal law and history.[85] The agreement also provides that, where practical, the Humboldt County deputy sheriffs must complete a course of training in cultural and racial diversity emphasizing Hoopa Tribal culture, prior to being assigned to duties on the reservation.[86]

Hoopa Valley Tribal Police are authorized and permitted to carry out inquires in support of civil or criminal investigations on reservation and, upon request of the Humboldt County

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[81] *See* Cal. Penal Code §§ 830.1, 12002, 12025, 12031 (West 2000).
[82] *See* Cal. Gov't. Code § 15150 *et seq*. (West 2000).
[83] *See* Joint Powers Agreement between the Hoopa Valley Tribe and the County of Humboldt. The parties entered into this agreement in recognition of the following:

1. That the safety and health of persons resident on the Hoopa Valley Indian Reservation are enhanced by close cooperation and continuous communication between the Hoopa Valley Tribal Police and the Humboldt County Sheriff's Office;

2. That the unique culture and history of the Hoopa Valley Tribe, the geographic remoteness of the Hoopa Valley Indian Reservation, and a structure of Tribal and federal Indian laws at times make it exceptionally difficult for Humboldt County deputy sheriffs to carry out their peace officer duties enforcing state law on the Hoopa Valley Indian Reservation;

3. That, consistent with important principles of Hoopa Tribal sovereignty and self-governance, it is the desire and the policy of the Tribe and the County that the Tribe exercise authority respecting the protection of persons and property on the Hoopa Valley Indian Reservation; and

4. That drugs, burglaries, car thefts, adolescent crime and domestic violence are increasing at a time when Humboldt County is allocating fewer law enforcement resources to the Hoopa Valley Indian Reservation.

Id. at 1.
[84] *Id*. at 2.
[85] *Id*.
[86] *Id*.

Sheriff's Office, off reservation in Humboldt County.[87] The agreement also provides that the Tribal Police will have access to CLETS, among other criminal information databases and computerized information systems.[88]

This approach appears to be working in Humboldt County. According to Humboldt County Sheriff Dennis Lewis, deputizing Hoopa Valley tribal officers has benefited both law enforcement forces.[89] "The advantage to [tribal police]," he explained, "is that they can take prompt, corrective action. If arrest is necessary, they can do that. The advantage to me," he continued, "is [that] it helps me do my job."[90]

Although tribes may have to absorb some costs associated with POST training, a cross-deputization agreement tends to be relatively inexpensive, especially when compared with the greater costs associated with paying for additional local law enforcement personnel through a security contract. Many tribes cannot enter into cross-deputization agreements, however, because they do not have their own police forces.

B. Statutory Deputization

California is considering legislation that would authorize the deputization of qualified tribal police officers as California peace officers.[91] In order to be deputized, the tribal law enforcement agency employing the officer must first be authorized by tribal law to enforce state criminal law. Then, both the employing agency and the tribal officers must be POST-certified. If these requirements are met, the tribal officer's authority would extend to:

> 1. Any public offense under state or tribal law, committed, or that the officer has probable cause to believe has been committed, within the Indian country of the tribe that employs the peace officer.
>
> 2. Any public offense under state or tribal law[92] committed in the peace officer's presence, or that the officer has probable cause to believe has been committed, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense.
>
> 3. Any situation in which the tribal police officer is requested by a California peace officer or California law enforcement agency to respond to a call for assistance.[93]

Deputized tribal officers would be allowed to carry wooden batons or other law enforcement equipment; carry firearms – loaded and concealed – while on-duty; their vehicles

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[87] *Id*. at 4.
[88] *Id*.
[89] *See* Brennan, *Tribes Seek More Power*, *supra* note 22.
[90] *Id*.
[91] *See* S.B. 911 (Alarcon), available through http://www/leginfo.ca.gov.
[92] Both references to "or tribal law" are to be deleted by the author in future amendments. *See* Legislative Analysis of S.B. 911 at 15.
[93] *Id*.

would be considered "authorized emergency vehicles," under state law; and they would gain access to CLETS.

S.B. 911 would also require POST to develop and distribute guidelines for all law enforcement officers in California that include instruction on jurisdictional issues arising in Indian country; the Indian Child Welfare Act, and how it applies to Indians residing in California; and political differences between Indian and non-Indian citizens with respect to sovereignty, citizenship status, and cultural heritage. All law enforcement officers approved by POST would be required to complete a refresher course every five years, or on a more frequent basis if deemed necessary, "in order to keep current with changing legal and cultural trends in Indian Country." S.B. 911 would not affect any currently existing cross-deputization agreements, nor would it affect the ability of a tribe and a local government to enter into cross-deputization agreements separate and apart from the cross-deputization provisions of S.B. 911.

Numerous concerns have been voiced regarding this proposed arrangement and they are set out in detail in the legislative analysis of S.B. 911.[94] Complaints have arisen from members of California's diverse group of Indian tribes as well as from sheriff organizations.[95]

As with deputization and cross-deputization agreements, statutory deputization is only a theoretical proposition for tribes that lack funds to maintain their own police departments. It does not appear, therefore, that the deputization provisions of S.B. 911, if enacted, would relieve the law enforcement shortage that exists on many of California's reservations.

C. Security Contracts

A city or county may enter into a contract with an Indian tribe for provision of police or sheriff protection services for the Indian tribe, either solely on Indian lands, or on the Indian lands and territory adjacent to these Indian lands.[96] This solution is typically used to protect one facility (e.g., a casino) and is usually more costly than cross-deputization because it involves paying for new personnel rather than expanding the authority of existing personnel. Thus, only tribes that have sufficient funds from gaming or another source may effectively use a security contract.

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[94] *See* Legislative Analysis of S.B. 911 (as amended April 26, 2001).

[95] The Califomia Sheriffs' Association, for example, "has expressed concern that tribal police departments are lacking in the quality and standards other public law enforcement agencies must maintain." *Id.* Some Indian tribes, on the other hand, "worry that accepting the conditions in the legislation will infringe on their rights as sovereign nations." Michael Gardner, *Indian Tribes Press for More Police Powers – Bill Would Expand Authority of Officers on Reservations*, San Diego Union & Trib., May 9, 2001, at A1, 2001 W.L. 6459211. According to newspaper accounts, sponsors of SB 911 say about 70 tribes support the bill "but some of that backing is soft and depends on how key issues are worked out." *Id.*

[96] *See* Cal. Govt. Code § 54981.7 (West 2000); *see also Municipal Services Agreement between the Lytton Band of Pomo Indians and the City of San Pablo* (City provides police and other services to Lytton Band casino in exchange for payment from the Band).

D. Additional Funding

A mandatory P.L. 280 state may appropriate funds for separate or cooperative use by a tribe and/or a local law enforcement entity.[97] For example, Wisconsin provides funds to counties and tribes for law enforcement activities on and near reservations. As of June 2000, Wisconsin provided "$1,050,000 annually for law enforcement grants to [the eleven tribes in the state] and $250,000 annually for law enforcement grants to counties that are neighbors to reservations but that do not have cooperative law enforcement agreements."[98] Wisconsin also allows a county and tribe to submit plans and receive funding for a joint law enforcement program. Wisconsin's overall approach to state-local-tribal law enforcement issues is discussed in more detail below.

E. Hybrid Programs

A state may choose to combine elements of various approaches to form a hybrid program. For example, Wisconsin's hybrid features: (1) funding of county and tribal law enforcement efforts in their separate capacities;[99] and (2) a legal framework through which the state provides grants for tribal-county law enforcement partnerships that operate under a cooperative agreement that sometimes includes cross-deputization.[100] The latter allows a tribe and county containing part of the tribe's reservation to receive funds by jointly entering into an agreement creating a cooperative county-tribal law enforcement program (the "program"); drafting, with the assistance of the Wisconsin Department of Justice ("WDOJ"), a plan outlining the program; and submitting and receiving approval for the plan from the WDOJ.[101] The WDOJ reports annually to the Wisconsin legislature, governor, and a special committee on state-tribal relations about "the performance of cooperative county-tribal law enforcement programs receiving [state] aid".[102] In 1999, it reported the following:

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[97] *See, e.g.*, David L. Lovell, Senior Analyst, Wisconsin Legislative Staff, *Wisconsin's County-Tribal Law Enforcement Program*, (June 27, 2000) (on file with authors).

[98] *Id.*

[99] *See id.*

[100] *See* Wis. Stat. § 165.90 (2000); *see also*, *Wisconsin's County-Tribal Cooperative Law Enforcement Program*, *supra* note 96.

[101] *See id.* The plan submitted to the Wisconsin Department of Justice must include: a description of the proposed cooperative county-tribal law enforcement program for which funding is sought, including information on the population and geographic area or areas to be served by the program; the program's need for funding and the amount of funding requested; the governmental unit that shall administer aid received and the method by which aid shall be disbursed; the types of law enforcement services to be performed on the reservation and the persons who shall perform those services; the person who shall exercise daily supervision and control over law enforcement officers participating in the program; the method by which county and tribal input into the program planning and implementation shall be assured; the program's policies regarding deputization, training and insurance of law enforcement officers; the record-keeping procedures and types of data to be collected by the program; and any other information required by the department or deemed relevant by the county and tribe submitting the plan. Wis. Stat. §165.90(2) (2000). Decisions regarding funding are made annually. Wis. Stat. §165.90 (2000). Thus, the county and tribe must jointly submit and receive approval of a plan for each year in which they seek to receive funding. *See id*. County-tribal partnerships seeking continued funding must also submit a report discussing law enforcement activities on the reservation for the prior year. *See* Wis. Stat. §165.90(4)(b) (2000). Approval of a program plan and the amount of aid received depends upon the population of the reservation area to be served by the program; the complexity of the law enforcement problems that the program proposes to address; and the range of services that the program proposes to provide. *See* Wis. Stat. §165.90(3)(m) (2000).

[102] *See* Wis. Stat. §165.90(5) (2000).

> As of [1999], 17 county-tribal pairs participated in the program. The joint program plans vary considerably in their design and in the apparent level of county-tribal cooperation involved. The plans that appear to involve the greatest level of cooperation use the grants to fund tribal law enforcement agencies, usually in the form of support of tribal officers' salaries. These plans call for the deputization of tribal officers by the county sheriff, enabling the officers to enforce state as well as tribal laws, and create joint committees to oversee the programs. Other plans, particularly those involving tribes that do not have law enforcement agencies, primarily enhance the ability of the sheriff to provide law enforcement services on the reservation. The level of cooperation apparent in these plans varies. Some create joint oversight committees, call for the recruitment of American Indian deputies by the sheriff, enable county deputies to enforce tribal laws and in other ways directly address law enforcement concerns of the tribes involved. Others provide resources to the sheriff with little apparent tribal involvement. In addition to funding officers' salaries, most of the grants are used to fund programs addressing juvenile delinquency and alcohol and other drug abuse. Several plans also use grant funds for officer training and for equipment.[103]

In short, Wisconsin's plan offers a monetary incentive for county-tribal cooperation while giving each county-tribe pair the ability to tailor a plan to fit its unique needs.

> According to officials, the program has resulted in significant benefits:
>
> [T]he modest grants under the program do not go far toward addressing the complex law enforcement needs of reservations. Still, this assistance is significant. Regularly scheduled patrols on the busiest nights where previously there were no patrols is a major improvement, as is expanding tribal police from three to four officers or adding a native deputy to the sheriff's department. These developments mean that communities involved and the state as a whole enjoy improved law enforcement services.
>
> Where there is a tribal law enforcement agency, joint dispatch, mutual aid agreements and other forms of cooperation lead to service that is greater than the tribe and the county could provide individually. What is more, aid provided by the tribe to the county may be of as much value as aid provided to the tribe. Even where there is not a tribal agency, law enforcement is improved through cooperation in such areas as planning, setting priorities for law enforcement activities and information sharing.
>
> Another benefit comes from requiring cooperation between tribes and local governments. Tribes have long dealt with the federal government, under their trust relationship, and more recently have learned to work with state governments under devolution. However, local government is where a great deal of the action

[103] *Wisconsin's County-Tribal Cooperative Law Enforcement Program*, *supra* note 96.

> is in service delivery and other governmental functions. In addition, local communities are tribes' closest neighbors. Consequently, there is a great need for coordination and cooperation between tribes and local governments. There are also ample opportunities for conflicts and jurisdictional disputes. In particular, the tribes and counties in Wisconsin have a checkered history. It is important, then, to find ways to foster cooperation at this level, and this program does so.
>
> A further benefit of the program is that successful cooperation in one area strengthens relations in other areas . . . .[104]

Wisconsin's county-tribal cooperative arrangement initially began as a pilot program funded by a surcharge on fines stemming from non-moving violations of state, county, and municipal ordinances. The program is now funded by funds received under state-tribal gambling compacts and is available to all county-tribe pairs that meet the requirements discussed above.

V. Common Concerns that Proposed Solutions Should Address

The following is a sampling of the many common concerns that any proposed solution to jurisdictional issues should likely take into account:

Liability and Sovereign Immunity Issues: to the extent possible, the tribe and county should outline, consistent with California and federal law, who will be liable for the actions taken by tribal and local law enforcement officers and whether or to what degree or under what circumstances the tribe will agree to waive its tribal immunity

Insurance and Workers' Compensation: the amount of insurance and/or workers' compensation, if any, required of the tribe and county by California and federal law (e.g., who is responsible for insuring cross-deputized officers, the equipment they use, and various facilities).

Indemnification: any reimbursement by the tribe to the county or vice-versa of legal and other expenses incurred under the special arrangement, assumption of legal defense duties.

Jurisdictional Roles and Boundaries: the jurisdictional roles and boundaries need to be as clear as possible. Parties can facilitate this by providing copies of relevant laws to each other and designating whether their officers should enforce tribal law, state law, or both in a specific situation.

Legal Authority: the state/local body's authority flows from a state law, while the tribe's authority usually comes from a provision in the tribe's constitution.

Services to be Performed: the services to be performed by local and tribal law enforcement authorities (e.g., enforcement of state and/or tribal law).

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[104] *Id.*

Persons to Perform the Services: sheriff's deputies, tribal law enforcement officers.

Joint Scheduling: if feasible, local authorities and the tribe should develop a schedule that will afford the most coverage.

Daily Supervision and Control: who will be responsible for daily supervision and control and over which activities.

Communication: communication regarding employment decisions. Could form a board having members from both the tribe and the county, or have direct communication between police chiefs, or other officials.

Revocation, Suspension, Discipline, and Grievances: Circumstances under which and procedures for suspending/revoking a tribal deputy's cross-deputization privilege. Jointly review the reason for suspension and forward to tribal law enforcement chief.

Continual Tribal and County Input into Planning and Implementation: the various tribal authorities should meet, (e.g., the tribal council, board of supervisors or city council, tribal and county police departments, and district attorney).

Training: the amount and type of training required for tribal officers in general and those seeking cross-deputization, and special training in tribal law and culture for local law enforcement officers who have a reasonable possibility of significant activity on reservation lands.

Access to Background Check Databases: access, to the extent feasible, for cross-deputized tribal law enforcement officers.

Records, Statistics, and other Information: within the bounds of current law, sharing reports, statistics, and other information to improve law enforcement efforts on and off reservation lands.

Fines: apportionment of fines.

Joint Activities in Communities on and near Reservations: any joint law enforcement activities on and near reservations, including crime prevention efforts and issuing periodic reports or newsletters.[105]

To avoid needless litigation, any solution should also include a procedure for resolving disputes between the tribe and the county. For example, in the security contract between the Lytton Band of Pomo Indians and the City of San Pablo, the Band and the City agreed to waive their immunity and attempt to settle disputes first through arbitration and, if that fails, through

[105] *See generally, Cooperative Tribal/County Law Enforcement Agreement: Shawano County and Stockbridge-Munsee Community* (Jan. 1, 2000); Joint Powers Agreement Between the Hoopa Valley Tribe and the County of Humboldt.

litigation.[106] The county and tribe should also leave open options short of arbitration such as negotiation and mediation.

The provisions of any proposed law, agreement, or contract should give counties and tribes enough room to tailor a solution to meet their needs without requiring completion of unneeded training. SB 911, for example, tailors the authority of statutorily deputized tribal law enforcement officer to specific situations, such as where the officer knows or has probable cause to believe that a violation of state or tribal law has occurred on the reservation. On the other hand, the SB 911 requirement that *all* law enforcement officers trained by POST to receive instruction and refresher courses on Indian law and culture which may be overly broad because many law enforcement officers may not have to deal with these issues.

VI. Retrocession

When a P.L. 280 state retrocedes jurisdiction to the federal government over any or all of the reservations within its borders and the federal government accepts such retrocession, jurisdiction over reservation crimes involving Indians is returned to the federal government. Jurisdiction then operates as it does in non-P.L. 280 states where only federal and/or tribal governments can claim jurisdiction over a crime committed by or against an Indian on an Indian reservation.[107]

Congress established the following process to allow states to return jurisdiction over reservations to the federal government: (1) a state submits an application for retrocession to the federal government which specifies the reservations over which the state wishes to retrocede jurisdiction (a state need not retrocede all reservations within its borders); and (2) the federal government decides whether or not to accept the retrocession.[108]

Whether initiation of retrocession requires action by the governor, the legislature, or both, is a matter of dispute.[109] Regardless of the state body that initiates the process, a retrocession is valid if the Secretary of the Interior approves it. The federal government is not obliged to treat a retrocession application as a package deal; it may choose to accept retrocession of some reservations and reject others.[110] Retroceded reservations revert to the jurisdictional arrangement that exists in non-P.L. 280 states. California law would still apply to victimless crimes committed by non-Indians and crimes committed by non-Indians against non-Indians. In other situations, however, the federal rather than the state government law would apply and federal agents would enforce federal criminal laws on Indian reservations. The Indian Country Crimes Act and the Indian Major Crimes Act are the heart of that system.

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[106] *See Municipal Services Agreement*, *supra* note 95, at 30-31.

[107] P.L. 280 (1) exempted California and other mandatory P.L. 280 states from the Indian Major Crimes Act and other federal laws aimed specifically at reservations, and (2) required those states to apply and enforce their criminal laws on reservations within their respective state borders.

[108] *See* 25 U.S.C. § 1323 (2000).

[109] *See Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976) (discussing validity of Washington state retrocession), *rev'd on other grounds*, 435 U.S. 191; *United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979) (also discussing Washington state retrocession); *United States v. Brown*, 334 F.Supp. 536 (Neb. 1971) (discussing validity of Nebraska's retrocession).

[110] *See Omaha Tribe of Nebraska v. Village of Walthill*, 460 F.2d 1327 (8th Cir. 1972).

The Indian Country Crimes Act applies the general laws of the United States to crimes committed in Indian Country and provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[111]

The Indian Major Crimes Act gives the federal government jurisdiction over Indians who commit certain major felonies, such as murder, rape, assault, and robbery, and provides:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.[112]

As in mandatory and optional P.L. 280 states, tribes may punish Indians for offenses, even if the federal or state government has already done so. However, as in P.L. 280 states, the sentencing power of tribal courts in non-P.L. 280 states is no more than one year of imprisonment, a fine no greater than $5,000, or both.[113] For Indian country crimes involving only non-Indians, longstanding precedents of the Supreme Court hold that state courts have exclusive jurisdiction despite the terms of § 1152.[114]

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[111] *See* 18 U.S.C. § 1152 (2000).
[112] *See* 18 U.S.C. § 1153 (2000).
[113] *See* 25 U.S.C. § 1302(7) (2000).
[114] *Duro v. Reina*, 495 U.S. 676 (1990) (citing cases) (holding that Indian tribe could not assert criminal jurisdiction over a non-member Indian); the U.S. Congress subsequently enacted legislation giving tribes criminal jurisdiction over all Indians, regardless of their membership in a particular tribe. *See* 25 U.S.C. § 1301 (2000).

The following chart outlines the jurisdictional arrangement in non-P.L. 280 states:

CRIMINAL JURISDICTION ON RESERVATIONS IN NON-P.L. 280 STATES		
Crime by Parties	**Jurisdiction**	**Authority**
"Major" Crimes by Indians against Indians	Tribal and/or federal (concurrent)	18 U.S.C. § 1153 (2000).
Other Crimes by Indians against Indians	Tribal (exclusive)	18 U.S.C. § 1153 (2000).
Crimes by Indians against non-Indians	Tribal and/or Federal (concurrent)	18 U.S.C. § 1152, 1153 (2000).
Crimes by Indians without victims	Tribal (exclusive)	*U.S. v. Quiver*, 241 U.S. 602, 605-06 (1916) (adultery); *Ex parte Mayfield*, 141 U.S. 107 (1891) (adultery; tribal treaty specified tribal jurisdiction over certain crimes); *but see, United States v. Thunderhawk*, 127 F.3d 705 (8th Cir. 1997).
Crimes by non-Indians against Indians	Federal (exclusive).	18 U.S.C. § 1152 (2000).
Crimes by non-Indians against non-Indians	State (exclusive).	*U.S. v. McBratney*, 104 U.S. 621 (1881).
Crimes by non-Indians without victims	State (exclusive)	*Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1984).

VII. Conclusion

Addressing the public safety crisis that exists on many of the nation's Indian reservations is a pressing and complicated problem. Surmounting jurisdictional and geographical boundaries will play a large role in formulating effective solutions and understanding the complicated patchwork of federal, state, and tribal laws is a necessary first step.