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I N V E S T I G A T O R Y A U T H O R I T Y F O R S T A T E
C R I M E S I N I N D I A N C O U N T R Y

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I N T R O D U C T I O N

The Oklahoma Indian Affairs Commission lists thirty-nine different Indian Tribal Nations with offices in Oklahoma. Jurisdiction for crimes committed within Indian Country is a convoluted, complex, and unsettled issue faced by Oklahoma law enforcement officials across the state. It is subject to the interplay of state, federal, and tribal law. It is often dependent upon the tribal status, or lack thereof, of both the offender and the victim, and the exact nature and location of the crime. This issue of the *Legal Eagle* explores the investigative authority of non-Indian/state law enforcement officers in “Indian Country” **for crimes for which investigative and prosecutorial authority and jurisdiction clearly rests with state authorities.** It does not seek to explore in detail the first necessary determination of whether jurisdiction for a particular offense rests with state, federal, or tribal authorities.

A summary quick reference summary guide for determining such issues is provided in Appendix I of this issue, but law enforcement officials should always consult with their legal advisors should they have any doubt or question about their jurisdiction and authority in a particular situation.

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“Indian country” is defined in 18 U.S.C. § 1151(a)-(c) to include:

- (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.

Investigative authority of non-Indian/state investigators while in Indian Country for crimes for which they have jurisdiction is equally complicated

and convoluted. It is so complicated that even courts struggle with what the law really is. *See Ross v. Neff*, 905 F.2d 1349. Thus, law enforcement officials should always confer with their legal advisors before undertaking any investigatory action on Indian Land. However, some general rules have emerged in determining investigative authority for non-Indian investigators who find themselves in Indian Country

If Congress has granted general criminal jurisdiction in Indian Country to the state, state officers have the same jurisdiction in Indian country as they do in the rest of the state. General criminal jurisdiction has been given to some states through 18 U.S.C. §§ 1162, 3243. Oklahoma has not been granted criminal jurisdiction by Congress. Congress created a way for states to acquire criminal jurisdiction without tribal consent through Pub.L. No. 83-280, 67 Stat. 588 (1953), known commonly as Public Law 83-280. Oklahoma did not act upon that law, and now Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326 (1970), requires consent of the affected Indian tribes. Oklahoma has still not acted to assume jurisdiction through this extra procedure. *Ross v. Neff*, 905 F.2d 1349, 1352. Since Oklahoma has not expressly been given general criminal jurisdiction or acted pursuant to congressional authorization, there is no general local jurisdiction for investigatory acts in Indian Country. *Id.*

However, the Supreme Court has held that states have not lost their jurisdiction by federal law on Indian Country of crimes committed outside of Indian Country. *Nevada v. Hicks*, 533 U.S. 353, 355-6 (2001). Federal law does not prescribe or suggest that state officers cannot enter into Indian Country to investigate or prosecute crime committed outside of Indian Country. *Id.*

S E R V I C E O F S E A R C H W A R R A N T S

For service, there appears to be two primary concerns. The first consideration is whether the state has jurisdiction over the underlying offense. The second is whether the tribe has provisions within its tribal code regarding state service of process.

There is a split among the courts of the United States as to a state's ability to act in Indian-country. However, the majority trend is to allow state service of process, search warrants, and arrest warrants in Indian country if the state has jurisdiction of the underlying offense and the tribal code has no provision regarding service of state process. If the tribal code does have provisions regarding state service of process, those should be followed. To determine state authority for service of process in Indian country, courts usually use the infringement test set out in *Williams v. Lee*, 358 U.S. 217 (1954). *See, e.g., State Securities, Inc., v. Anderson*, 506 P.2d 786, 788 (N.M. 1973); *Little Horn State Bank v. Stops*, 555 P.2d 211, 213 (Mont. 1976), *cert. den.*, 431 U.S. 924 (1977). The infringement test states, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220.

Nevada v. Hicks is the major Supreme Court case discussing searches by state officers in Indian country; however, the actual holding addressed whether the tribal court could regulate the conduct of state officers executing state search warrants by bringing them into tribal court as defendants in civil law suits, making them vulnerable to penalties for violation of the civil rights of tribes or tribal members. 533 U.S. 353 (2001). Even though the court dealt with tribal court jurisdiction over civil claims, the analysis of state criminal investigative jurisdiction was essential to its holding. *Id.* at 357-65. Significantly, the court held that states retain jurisdiction to execute state criminal process in Indian country for off-reservation

crimes. *Id.* at 363. Process was defined as, “any means used by a court to acquire or exercise its jurisdiction over a person or over specific property.” *Id.* at 364 (quoting *Black's Law Dictionary* 1084 (5th ed. 1979)). The reasoning was that allowing service of state process in Indian Country is necessary to preventing such areas from becoming “an asylum for fugitives from justice.” *Id.* The Court found tribal authority to regulate state officers executing process related to the off-reservation violation of state law was not essential to tribal self-government or internal relations. *Id.* The Court also found that the state’s interests in execution of process are considerable and does not impair tribal self-government any more than federal enforcement of federal law impairs state government. *Id.*

Oklahoma State Courts have not issued a decision directly on point. Based upon similar reasoning within a civil case, however, Oklahoma law appears to be consistent with the general rule that a state may issue and execute search warrants within Indian-country if the state has jurisdiction over the underlying offense and there are no tribal code provisions regarding how to execute such state search warrants. In *LeClair v. Powers*, the Oklahoma Supreme Court stated, “Indian country is not a federal enclave off limits to state process servers.” 632 P.2d 370, 374 (Okla.1981). The Court held that service of state process in Indian country did not interfere with self-governing activities of the Indian tribe because it did not violate a governing provision of the tribal code. *Id.* at 375–76. In *LeClair*, service of process was executed in a divorce proceeding on a husband in an Indian hospital. *Id.* at 372. The state court had jurisdiction over the husband, even though he was an Indian allegedly residing on Indian land during the pendency of the proceedings, because the parties did not live on Indian country during their marriage. *Id.* at 373–4. It was also unsettled whether the wife was Indian. *Id.* at 374. Based upon *LeClair* and *Hicks*, it appears Oklahoma non-Indian investigators likely can execute search warrants within Indian country as long as state courts have jurisdiction of the underlying offense and there are either no related tribal code provisions, or as long as those established tribal procedures are followed.

The Idaho Supreme Court held that a state court had jurisdiction to issue a search warrant to be executed in Indian country for a crime allegedly committed by a tribal member off Indian Country. *State v. Mathews*, 986 P.2d 323 (Idaho 1999), *cert denied*, 528 U.S. 1168 (2000). The Court found tribal sovereignty was not infringed by the state court when it issued a search warrant that was executed in Indian Country because the state had jurisdiction over the underlying crime, an off-reservation murder, and tribal law did not have procedures for executing the warrant within Indian Country. *Id.* at 337. The Court also found no federal preemption because no federal law existed regarding service of state search warrants in Indian Country. *Id.* at 337.

Other states also allow service by state officials under similar reasoning. *Landreman v. Martin*, 530 N.W.2d 62 (Wis.App.1995); *In re M.L.S.*, 458 N.W.2d 541 (Wis.App.1990) (state has a compelling interest in enforcing its service of process procedures in cases where it has subject matter and personal jurisdiction over an Indian residing on the reservation who has violated a law off the reservation and returns to the reservation); *Little Horn State Bank v. Stops*, 555 P.2d 211 (Mont. 1976), *cert. den.*, 431 U.S. 924 (1977) (service of process on an Indian on the reservation did not infringe upon tribe’s right to self government); *State Securities, Inc., v. Anderson*, 506 P.2d 786 (N.M. 1973) (state court could obtain jurisdiction over Indians while on reservation, for off-reservation conduct, by issuing and serving process on them while they were on the reservation).

The Tenth Circuit appears to also follow the general rule. In *United States v. Baker*, 894 F.2d 1144, 1147 (10th Cir.1990), the Tenth Circuit suppressed evidence because the county district court exceeded

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its jurisdiction when it issued a search warrant for property on tribal Indian Country because the state had no jurisdiction over the underlying offense being prosecuted, including authority to execute a search warrant. In *Baker*, the conduct occurred on the reservation and was a violation of federal law. Thus, investigative and prosecution authority rested with federal authorities. Had investigative and prosecution authority rested with the state because the crime occurred outside of Indian Country, the execution of the warrant would have been authorized.

Not all jurisdictions agree with the general rule. See, e.g., *Francisco v. State*, 556 P.2d 1, 2 (Ariz. 1976) (deputy sheriff had no authority to personally serve process on an Indian in Indian country); *Martin v. Denver Juvenile Ct.*, 493 P.2d 1093, 1094 (Colo. 1972) (state's courts do not have jurisdiction over an Indian served on a South Dakota reservation by South Dakota authorities, because "sheriffs and their deputies in [South Dakota] have no authority within the closed portion of a reservation over enrolled Indians therein."). In South Dakota, state officials have no jurisdiction to serve process on Indians in Indian country. *Bradley v. Deloria*, 587 N.W.2d 591, 593 (S.D. 1998).

A R R E S T W A R R A N T S

The exact issue of validity of an arrest warrant executed by state officers in Indian country has not been addressed in Oklahoma, but based upon the same reasoning and with the same constraints as applies to search warrants, arrest warrants are also likely valid in limited circumstances. Again, the state would need to have jurisdiction of the underlying crime, and tribal code procedures would need to be followed if they exist.

In June of 2010, the New Mexico Supreme Court discussed *Nevada v. Hicks* in depth, finding it supported a state officer's authority to investigate an off-reservation crime while in Indian-country. *State v. Harrison*, 238 P.3d 869, 878. The reasoning was that the term "process" encompasses all state criminal process or procedure. *Id.* (citing *Black's Law Dictionary* 1325 (9th ed. 2004)). In *Harrison*, a county officer stopped an Indian defendant's vehicle in Indian country after he observed him speeding and throw a clear bottle with yellow liquid out of the window. *Id.* at 880. The officer also conducted field sobriety tests which the Court held didn't violate tribal sovereignty. *Id.* at 869. Ultimately, the Court found the traffic stop to determine the scope of authority to investigate, and the following investigation, were legal. *Id.* The man was later arrested after the deputy secured a warrant which was executed in compliance with tribal code procedures. *Id.* at 511. These procedures did not violate tribal sovereignty. *Id.*

Montana has addressed the validity of a state issued arrest warrant. The Montana Supreme Court held that execution of a state arrest warrant by a state officer for an Indian in Indian country was valid in absence of tribal court regulations regarding the procedure. *State ex rel. Old Elk v. District Court of Big Horn*, 552 P.2d 1394, 1398 (Mont. 1976). The offense had been committed outside of Indian Country, giving jurisdiction to the state. It appears that where no tribal procedure exists, there cannot be an infringement upon tribal sovereignty.

O T H E R I N V E S T I G A T I V E A C T S

Oklahoma Courts have not directly addressed whether an Indian may be arrested by state officers in Indian country when the officers are in hot pursuit and the crime was committed off of Indian country. The Tenth Circuit, addressing an Oklahoma case, held that a state officer making a warrantless arrest for public intoxication of an Indian in Indian country did not have jurisdiction to do so. *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). Although the Court stated that an arrest outside of an officer's jurisdiction violates the Fourth Amendment, in a footnote the Court stated, "We do not in this opinion intend to cast doubt upon the constitutional validity of extra-jurisdictional arrests made by police officers in 'hot pursuit.'" *Id.* at n. 6. It seems unclear whether non-Indian officers in hot pursuit of an Indian defendant, who has committed a crime off Indian country, may continue to arrest that defendant when he enters Indian country. Courts that have addressed the issue seem to look at whether the tribal code has provisions for extradition. If so, then the state generally must follow those procedures and may not make an arrest, even in hot pursuit, without violating tribal sovereignty.

Other states have addressed the hot pursuit issue. The New Mexico Supreme Court gave an in depth analysis on the issue in 2010. The Court ultimately found that where valid extradition procedures exist, the arrest of an Indian in Indian country is illegal, regardless of fresh pursuit or if state interests are great due to the seriousness of the crime involved. *State v. Harrison*, 238 P.3d 869, 877 (N.M. 2010) (citing *City of Farmington v. Benally*, 892 P.2d 629, 632 (N.M.App.,1995); *State v. Yazzie*, 777 P.2d 916, 918 (N.M.App.,1989)). The Court reasoned that whether state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure. *Id.* South Dakota has found state officers do not have authority to pursue Indians onto reservations and continue to gather evidence unless they have tribal consent or a warrant. *South Dakota v. Cummings*, 679 N.W.2d 484, 489 (S.D. 2004).

Arizona found an arrest of a tribal member made on a reservation after close pursuit did not interfere with tribal sovereignty because the state did not have an extradition agreement with the tribe, and no tribal laws existed regarding state authority to arrest a tribal member in a close pursuit situation. *State v. Lupe*, 889 P.2d 4 (Ariz. Ct. App. 1994). Montana found a state officer had jurisdiction to arrest an Indian defendant on an Indian reservation after hot pursuit for a reckless driving charge the officer observed within his jurisdiction off Indian country. *City of Cut Bank v. Bird*, 38 P.3d 804 (Mont. 2001). The Ninth Circuit has also held that a police officer who observes a traffic violation within his jurisdiction may pursue the offender into Indian country to make the arrest, based upon the hot pursuit doctrine. *United States v. Patch*, 114 F.3d 131, 134 (9th Cir. 1997). The Ninth Circuit did not address whether the tribe had extradition procedures.



Because the Supreme Court stated that nothing in the federal scheme restricts officers from entering a reservation to investigate or prosecute violations of state law occurring outside of Indian Country, it appears that validity of arrests made in hot pursuit will turn on the infringement test and tribal sovereignty. If no extradition procedures or related tribal provisions exist, then arrests in hot pursuit will likely be valid.

It appears that a valid *Terry* stop may be made of vehicles in Indian country breaking state law, in order for an officer to determine if he has jurisdiction. *United States v. Patch*, 114 F.3d 131 (9th Cir. 1997); *State v. Harrison*, 238 P.3d 869, 877 (N.M. 2010). Those courts reasoned that without a brief stop to determine one thing, whether the person is a tribal member, it is impossible for the state officer to know whether he or she has jurisdiction. *Id.*

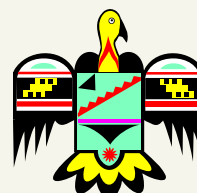
CROSS-DEPUTIZATION AGREEMENTS

Some of the issues involved with jurisdiction in Indian country can be dealt with through cross-deputization agreements. Such agreements can extend jurisdiction to non Indian authorities in the Indian Country of a particular tribe agreeing to the same. A list of agreements, Secretary of State filing numbers, and filing or effective dates can be found at the Oklahoma Indian Affairs Commission's website. Resources and links to find tribal codes can also be found at the Oklahoma Indian Affairs Commission's website. <http://www.ok.gov/oiaac>.

PROSECUTION VENUE

For crimes in Oklahoma Indian country subject to federal jurisdiction, federal courts will generally acquire subject matter jurisdiction through 18 U.S.C. §§ 13, 1151-1153. Venue will be proper under which district and division the conduct took place in, thus which district and division the Indian country is located in. *See* 28 U.S.C. § 116. Indians committing crimes listed under the Major Crimes Act are tried in the same courts as anyone else violating laws within exclusive federal jurisdiction. 18 U.S.C. § 3242.

For crimes under state jurisdiction, the proper court is whichever court would normally have venue over the conduct, likely the district court in the county where the offense is committed. There appears to be no special rules regarding particular venue with regard to offenses that the state has jurisdiction over. Thus, when dealing with defendants for crimes committed off Indian country, regular rules regarding proper courts for prosecution apply. Venue is likely to be determined pursuant to statutory provisions, elements of the crime(s), and the Oklahoma Constitution.



Appendix I Quick Reference to Jurisdiction for Crimes Committed within Indian Country

The first consideration is whether the offense was committed within Indian country as defined by 18 U.S.C. § 1151. Indian country generally includes tribal trust lands, dependent Indian communities, and Indian allotments where Indians still hold title. If the offense was not committed within Indian country, normal rules of jurisdiction apply.

If the crime was committed within Indian country, then what is the status of the victim(s) and defendant(s), and what was the nature of the crime? The following chart can be used to assist these two questions.

INDIAN COMMITTING CRIME IN INDIAN COUNTRY

VICTIM CRIMES	An offense against the person or property of a victim:	Jurisdiction
Indian Victim	Major Crimes Act offenses: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in 18 U.S.C. Sect. 1365), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under sec. 661 [theft] of Title 18	Federal
Indian Victim	All remaining crimes in tribal code, or in absence of tribal code code, 25 C.F.R. Pt. 11	Federal
Non-Indian Victim	Major Crimes Act Crimes	Federal
Non-Indian Victim	All remaining crimes in state code (with no federal statute for offense) under the Assimilative Crimes Act and Indian Country Crimes Act, 18 U.S.C., Sec. 13, 1152	Federal
Non-Indian Victim	All remaining crimes in tribal code, or in absence of tribal code, 25 C.F.R. Pt. 11	Tribal



INDIAN COMMITTING CRIME IN INDIAN COUNTRY

VICTIMLESS CRIMES	No victim's person or property involved in the crime	Jurisdiction
	Crimes in state code (where no federal statute for the offense) under Assimilative Crimes Act, 18 U.S.C., Sec. 13, 1152	Federal
	Crimes in tribal code, or in absence of tribal code, 25 C.F.R., Pt. 11	Tribal
FEDERAL CRIMES OF GENERAL APPLICABILITY	Federal Crimes of General Applicability to All Persons See individual statutes	Federal

NON-INDIAN COMMITTING CRIME IN INDIAN COUNTRY

VICTIM CRIMES	An offense against a person or property of a victim	Jurisdiction
Indian Victim	Indian Country Crimes Act (general laws of the United States. For example, arson [18 U.S.C., Sec. 81], assault [18 U.S.C., Sec. 113], domestic violence [18 U.S.C., Sec. 2261], larceny [18 U.S.C., Sec. 661], receiving stolen property [18 U.S.C., Sec. 662], murder [18 U.S.C., Sec. 1111], manslaughter [18 U.S.C., Sec. 1112], kidnapping [18 U.S.C., Sec. 1201], robbery [18 U.S.C., Sec. 2111], and sexual abuse [18 U.S.C., Sec. 2241-2248])	Federal
Indian Victim	All remaining crimes in state code (with no federal statute for offense) under the Assimilative Crimes Act and Indian Country Crimes Act, 18 U.S.C. Sec. 13, 1152)	Federal
Non-Indian Victim	All crimes within state code, <i>U.S. v. McBratney</i> , 104 U.S. 621	State
VICTIMLESS CRIMES	No victim's person or property involved in the crime	State
FEDERAL CRIMES OF GENERAL APPLICABILITY	Federal Crimes of General Applicability to All Persons See Individual Statutes	Federal