

Remarks of Assistant Attorney General Thomas C. Bellavia 12-16-08

My name is Tom Bellavia and I am an Assistant Attorney General with the Wisconsin Department of Justice and a member of this committee's Technical Advisory Committee. I was also involved in drafting the Wiensch AG Opinion that is one of the topics for discussion this afternoon, so I have been asked to brief the committee on just what that opinion does and does not say. I thank the members of the committee for this opportunity.

The Wiensch opinion deals with two main questions. First, does the state law enforcement mutual aid statute apply to tribal law enforcement agencies? And second, if it does not, are there other methods by which tribal and non-tribal agencies may assist each other? In a nutshell, the AG opinion answered "no" to the first question and "yes" to the second.

The reasons for concluding that the mutual aid statute does not apply to tribal agencies are explained in the opinion and I'm not going to repeat them today. But I would like to address the legal consequences of that conclusion.

To understand those consequences, one has to consider just what the mutual aid statute does. It does two things:

First, it provides that those law enforcement agencies covered by the statute are authorized to act outside their usual territorial jurisdiction when responding to a request for assistance from another covered law enforcement agency. Because the statute does not apply to tribal agencies, this statutory expansion of jurisdiction is not available in situations involving assistance between a tribal agency and a non-tribal agency.

It does *not* follow, however, that tribal and non-tribal agencies may not lawfully assist each other. It simply means that they only may do so in situations in which the assisting officers (whether tribal or non-tribal) have jurisdiction to act that is derived from some legal source other than the jurisdictional provision in the mutual aid statute.

The second thing that the mutual aid statute does is to provide that an officer who renders assistance under that statute shall be treated as an employee of the requesting, rather than the assisting, law enforcement agency for legal defense and liability purposes. Because the mutual aid statute does not apply to tribal agencies, this provision also is not available in situations involving assistance between a tribal agency and a non-tribal agency.

Again, this does not affect the ability of tribal and non-tribal agencies to lawfully assist each other. It simply means that, if they do so, the allocation of responsibility for defense and liability costs may be uncertain unless the two agencies have entered into a contractual agreement governing that allocation.

But what I want to emphasize the most here today is the second major point in the AG opinion, which is that the inapplicability of the mutual aid statute to tribal law enforcement agencies does not preclude tribal and non-tribal agencies from assisting each other, as long as the assisting officers (whether tribal or non-tribal) have jurisdiction to act under the specific circumstances in which the request for assistance is made.

That jurisdiction cannot be derived from the mutual aid statute because, as just noted, that statute does not apply to tribal agencies. It is necessary, therefore, to look at other provisions of law that affect the jurisdiction of tribal and non-tribal agencies. The AG opinion refers to four pertinent jurisdictional provisions:

The first is § 165.92, which provides that tribal police officers who meet the state's certification requirements for police officers shall have state law enforcement jurisdiction on their own reservations. It follows that a tribal agency operating under that statute may respond to (or assist in dealing with) any incident occurring on the reservation.

That statutory grant of jurisdiction, however, is territorially limited to the tribe's own reservation. Section 165.92, therefore, does not give a tribal agency jurisdiction to respond to (or assist in dealing with) an off-reservation incident. Tribal officers, therefore, may not render aid off their own reservation unless they have some other grant of jurisdiction to act in the particular situation. (I'll have more to say about that in a moment)

The second jurisdictional provision discussed in the AG opinion is federal PL-280, which, as you know, allows state and local law enforcement agencies in Wisconsin to exercise jurisdiction over all crimes occurring in Indian country within this state (except the Menominee reservation). It follows that a state or local agency may respond to (or assist in dealing with) any incident occurring on a PL-280 reservation, as long as that incident is also within the agency's normal territorial jurisdiction. For example, a county sheriff's department may respond to (or assist with) an incident that occurs on a reservation located within that county.

The third jurisdictional provision mentioned in the opinion is § 175.40, which authorizes any peace officer—defined as including a state-certified tribal officer—to act anywhere in the state under specified circumstances that include: fresh pursuit situations, situations located on border highways between two jurisdictions, situations involving a dangerous emergency, and situations involving a felony in progress. It follows that, where there is an off-reservation incident that falls into any of those categories, a tribal police agency may respond to (or assist in dealing with) that incident.

It should be noted, however, that an agency may act outside its usual territory under § 175.40 only if it has adopted written policies specified in that statute, including a policy for notifying and cooperating with the local law enforcement authorities.

The fourth relevant source of jurisdiction is deputization by the sheriff of the county where the incident in question occurs. Such deputization is authorized by the statutes that allow a sheriff to deputize a person in writing to perform particular acts and to call for aid from any person or power in the sheriff's county. Such a deputization may grant to a tribal police officer the power to act in areas of the county that are not within the tribe's reservation. Where such a deputization is in effect, a tribal police officer may respond to (or assist in dealing with) an *off-reservation* incident—as long as the officer's actions are consistent with the terms of the deputization.

In closing, I would like to emphasize two things that the Wiensch AG opinion does *not* do and one thing that it *does* do:

First, the opinion does not place limits upon the ability of tribal and non-tribal police agencies to assist one another by performing activities that do not themselves require the powers of a certified law enforcement officer. For example, the opinion does not affect the ability of tribal and non-tribal agencies to assist each other in serving subpoenas, in providing administrative assistance, in sharing equipment (as long as all other applicable legal requirements are met), or in planning (as opposed to executing) a law enforcement action. Those kinds of activities are unaffected by this AG opinion.

Second, at least with regard to PL-280 reservations, the opinion does not limit the ability of tribal police to *request and receive* assistance from the local sheriff in dealing with an *on-reservation* incident. Nor does it limit the ability of tribal police to *provide* assistance to the local sheriff in dealing with an *on-reservation* incident.

Third, the one jurisdictional limitation that the opinion clearly *does* impose on mutual aid between tribal and non-tribal agencies is this: it says that a tribal agency may not respond to an *off-reservation* incident or to a request for assistance in dealing with an *off-reservation* incident *unless* the tribal officers *either* have been deputized to act off-reservation by the local sheriff or the incident in question falls within § 175.40 and the tribal agency has adopted the policies required by that statute.

That concludes my prepared remarks. Again, I thank you for this opportunity.