

## **Practical Realities of Criminal Enforcement in Indian Country**

Traci J. Whelan  
Assistant United States Attorney  
ISB Indian Law Section  
May 1, 2020

### **I. ISB Indian Country Section**

- A. People in this section are well aware of the issues regarding criminal jurisdiction which involves who committed which crimes where..ie, Indian vs. Non Indian, Major Crime, etc. When Julie asked me to speak we decided it should be about the actual realities of criminal enforcement. So hopefully that will hold interest for you all.

### **II. Who Can Arrest?**

- A. Idaho does not recognize Tribal Officers as Peace Officer unless deputized by sheriff or police chief.
- B. Idaho Code Section § 19-5101.
  - 1. (1)(d) "Peace officer" means any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. "Peace officer" also means an employee of a police or law enforcement agency of a federally recognized Indian tribe who has satisfactorily completed the peace officer standards and training academy and has been deputized by a sheriff of a county or a chief of police of a city of the state of Idaho.
  - 2. (1)(e) "Political subdivision" means any city or county.
  - 3. (4) No peace officer shall have or exercise any power granted by any statute of this state to peace officers unless such person shall have been certified by the council within one (1) year of the date on which such person commenced employment as a peace officer, except in cases where the council, for good cause and in writing, has granted additional time to complete such training.

### **III. Does it Matter?**

- A. Idaho Code 19-603
- B. When peace officer may arrest. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
  - 1. For a public offense committed or attempted in his presence.
  - 2. When a person arrested has committed a felony, although not in his presence.
  - 3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he has committed a felony.
6. When upon immediate response to a report of a commission of a crime there is probable cause to believe that the person has committed a violation of section 18-901 (assault), 18-903 (battery), 18-918 (domestic violence), 18-7905 (first-degree stalking), 18-7906 (second-degree stalking), 39-6312 (violation of a protection order), 18-920 (violation of a no contact order), or 18-3302I (threatening violence upon school grounds — firearms and other deadly or dangerous weapons), Idaho Code.

**IV. Similarly, Tribal Codes Do Not Recognize Non-Tribal Police Officers Authority on Reservation With Regards to Indians**

- A. Nez Perce Tribal Code 1-1-1 (n) and 2-3-1 (i) definition
  1. "Tribal Police Officer" means BIA law enforcement officers, tribal police officers, or other peace officers authorized by the Nez Perce Tribe to enforce the laws of the Tribe.
- B. Kootenai Tribe
  1. 3-5.01 Arrests by Law Enforcement. No tribal law enforcement officer shall arrest any person for any offense defined in this Code or by federal law except when the officer has a warrant commanding him to apprehend such person, or the offense occurs in the presence of the arresting officer, or he has probable cause to believe that the person arrested has committed an offense.
  2. Officers not cross-deputized are not recognized as having authority on the Reservation under Tribal law. The only recognized police service authorities on the Reservation under Tribal law are the Tribal PD, Boundary County Sheriff's Office pursuant to the Contract Law Enforcement Agreement (which designates them Tribal police when entering the Reservation) and Bonners Ferry City PD officers that are cross-deputized by the BCSO when performing functions as cross-deputized BCSO.

**V. What Are the Practical Effects?**

- A. DUI
- B. Domestic Violence
  - 1. *United States v. Becerra-Garcia*, 397 F.3d 1167 (9<sup>th</sup> Cir. 2005) (other officers can detain if Tribal police authorized him to detain suspects until their arrival on scene.)
- C. Assault on Police Officers
  - 1. *United States v. Warden*, No. 313PO00211EJLCWD, 2016 WL 5867050, at \*1 (D. Idaho Oct. 6, 2016), aff'd sub nom. *United States v. Wesley*, 722 F. App'x 709 (9th Cir. 2018)
- D. Disrespect from Citizens

**VI. The Practical Realities of Prosecution**

- A. Tribal court convictions not counted for criminal history and often not entered into NCIC.
- B. Federal court prosecution do not ever go away absent a presidential pardon.
- C. No diversionary courts in federal system.
- D. Jail/prison is almost guaranteed with federal court conviction.

**VII. Other Discussion Points**

- A. *U.S. v. Cooley*, March 21, 2019