OPINION
65-119

October 18, 1965 (OPINION)

Mr. John B. Hart

State's Attorney

Rolette County

RE: Indians - Mentally Ill - Authority to Commit

This is in response to your letter in which you make reference to an opinion issued by this office on June 22, 1954, and a conference held at Washington, D.C., on September 24, 1965 between the Department of Interior, the Department of Health, Education and Welfare, and this office, which you also attended. You further state that it is your understanding that, as a result of said conference, the opinion referred to would be modified, reversed or given a different interpretation. You further state: "If the current ruling of your office is based on Chapter 242 of the Session Laws of 1963, it is requested you outline the procedures to be followed by the Rolette County Mental Health Board in committing (1) Indians who reside (or have domicile) within the exterior boundaries of the Turtle Mountain Indian Reservation, and (2) Indians who reside (or have domicile) in Rolette County, but outside the exterior boundaries of the Turtle Mountain Indian Reservation." You then ask the following questions:

1. What authority does the person designated by the Rolette County Mental Health Board (25-03-13-1) have to enter the Turtle Mountain Indian Reservation and detain (25-03-12-2) custody of a proposed Indian patient living on the reservation?

2. Is it within the authority of the Rolette County Mental Health Board to designate the Superintendent of the Turtle Mountain Indian Reservation or the senior Public Health Service physician at Belcourt as the person to arrange for the proposed patient's transportation to the State Hospital (25-03-11-8 and 25-03-13-1) or detention (25-03-13-2) pending the patient's removal to the State Hospital?

3. What authority does the Sheriff of Rolette County or other state officials have to serve subpoenas (25-02-16-2) or notice (25-03-11-2) issued by the Rolette County Mental Health Board to a proposed patient, witness or Public Health Service physician residing within the exterior boundaries of the Turtle Mountain Reservation?

". Under Section 25-03-11-1 and 3) can the Rolette County Mental Health Board accept and use the certificates and reports of physicians employed by the Public Health Service, but who do not have or need a state license to practice medicine on the reservation?

". What remedy is available to the Rolette County Mental Health Board to compel obedience to subpoenas issued where the one subpoenaed actually resides within the exterior boundaries of the Turtle Mountain Indian Reservation?

6. Where a proposed Indian patient lives and has a domicile within the exterior boundaries of the Turtle Mountain Indian Reservation, what period of time (day, week, year), if any, must such proposed patient live outside the reservation before the Rolette County Mental Health Board has commitment jurisdiction without the proposed Indian patient's guardian consenting to State civil jurisdiction under Chapter 242, Session Laws of 1963?"

The opinion to which you refer asked two main questions as to whether or not the State had jurisdiction on the following: (1) An insane Indian whose residence is in the County but not on the Indian reservation and (2) an insane Indian who resides on the Turtle Mountain Indian Reservation in this county. The second question was answered in the negative. The first question was primarily discussed and offered some suggestions as to the procedure to be followed.

There appears to have been considerable correspondence as to the second question, and on December 2, 1959, this office in a letter to Mr. Storman clarified its position in the last paragraph of said letter which concluded that an Indian who has severed his tribal relations is no longer an Indian as referred to in the law. This conclusion obviously means that the State has jurisdiction on and over Indians who do not reside on the reservation and have severed their tribal relations. This conclusion is fortified by the decision of the North Dakota Supreme Court In re Holy-Elk-Face, 104 N.W.2d. 308. In this case the Court Per Curiam on July 14, 1960, said that the District Court had jurisdiction over minor children to sever and terminate the parental rights of such children where the mother and children were residents of the county and the father was a resident of another state. It should be specifically noted that neither the mother nor the father resided upon any Indian reservation. With reference to one of the children involved, the father was unknown. This case was decided before the enactment of Chapter 242 of the 1963 Session Laws, which is now Chapter 27-19 of the North Dakota Century Code.

After the enactment of this law the North Dakota Supreme Court in 1963 in the case of In re Whiteshield, 124 N.W.2d., 694, held that the State did not have jurisdiction to terminate parental rights of Indian parents to their minor children where the parents resided on an Indian reservation. The two cases can be readily distinguished on the basis that the former involved Indians which did not live on Indian reservations, whereas the latter involved Indians who resided on Indian reservations. In addition to this, the later case was decided after the enactment of Chapter 242 (Chapter 27-19, North Dakota Century Code). The Court, in effect, held that by the enactment of such legislation the State completely disclaimed jurisdiction over civil causes of action arising on an Indian reservation, unless the Indians themselves have acted to accept jurisdiction in the manner provided by statute.

Consequently, the opinion of June 22, 1954, as to the second question, needs modification on the basis of the new legislation and not on the basis of revised legal concept. The opinion referred to was issued prior to the enactment of Chapter 27-19 of the North Dakota Century Code. However, as the Court pointed out In re Whiteshield, a different result came about because of the enactment of Chapter 242 of the 1963 Session Laws. It is in this respect that the opinion of June 22, 1954, now no longer is controlling.

The answers and discussions of the questions submitted must take into consideration and, out of necessity, must be predicated, at least in part, on Chapter 242 (Chapter 27-19 of the North Dakota Century Code) and its provisions.

The law referred to provides the manner in which jurisdiction of the State of North Dakota may be extended on civil causes of action arising on Indian reservations. It provides a manner in which such jurisdiction may be exercised and the conditions under which jurisdiction is granted. Initially, it provides for a manner of acceptance (section 27-19-02). It then provides how individuals may accept State jurisdiction and what effect such individual acceptance will have on the State jurisdiction, (section 27-19-05).

Section 27-19-06 of the North Dakota Century Code provides as follows:

> 27-19-06. ACCEPTANCE BY GUARDIAN. - A guardian appointed by the tribal court or Court of Indian Offenses may consent to state civil jurisdiction for his ward provided he is authorized to do so by the tribal court or Court of Indian Offenses."

Section 27-19-08 of the North Dakota Century Code provides as follows:

> 27-19-08. LIMITATIONS UPON JURISDICTION. - Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. The civil jurisdiction herein accepted and assumed shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children or other dependents." (Emphasis supplied.)

Section 27-19-13 of the North Dakota Century Code provides the manner in which an individual who has accepted State civil jurisdiction may withdraw such acceptance. It should be noted that a subsequent

withdrawal will not affect those causes of action which arose prior to the withdrawal, nor does it affect contractual obligations.

As to the questions under consideration, assuming that the provisions of Chapter 242 (Chapter 27-19 of the North Dakota Century Code) will be employed, it becomes obvious that close cooperation between agencies concerned with Indian affairs, tribal courts or Courts of Indian Offenses, and State governmental agencies and counties must exist. In this respect, the memorandum of understanding between the State Public Welfare Board and the United States Public Health Service, dated February 28, 1958, is still in effect and constitutes evidence of such cooperation, which is an absolute necessity.

As to the procedure to be followed by county mental health boards in committing Indians who reside within the exterior boundaries of an Indian reservation, it is essential that a guardian be appointed by the Court of Indian Offenses or tribal courts before any proceedings are attempted by the county mental health board, unless the Indian in question had individually accepted State jurisdiction. It also becomes necessary that the guardian advise the county mental health board of his appointment and be prepared to submit proof of such appointment. The guardian must then, if he has not yet done so, accept State jurisdiction on behalf of his ward - in this case the Indian living on an Indian reservation. The acceptance, either by guardian on behalf of the ward, or by the individual himself, gives the State jurisdiction of all civil causes whether they arise within or off the Indian reservation or Indian country, (section 27-19-01 of the North Dakota Century Code). It should be noted, however, that the acceptance of jurisdiction or the acquisition of jurisdiction through any one of the statutory procedures shall not act so as to deprive the Indians of any services or benefits extended by health, welfare, educational or other governmental services commonly afforded to those individuals on Indian reservations or in Indian country.

In the instant matter, we are not concerned with partial jurisdiction or limited jurisdiction (in certain areas) as was the case in In re High Pine, 99 N.W.2d. 38 and in In re Hawkins Petition, 125 N.W.2d. 839. (South Dakota cases). The assumption of jurisdiction under Chapter 242 (Chapter 27-19 of the North Dakota Century Code) is complete. This is the effect of the law in question. We are bound to accept such law as being constitutionally valid until four of the five members of the North Dakota Supreme Court declare otherwise.

To somewhat distinguish between an Indian merely designating a race and an Indian residing upon the reservation who is subject to the tribal laws, we will refer to the Indian residing upon the reservation who is subject to such tribal laws as a "reservation Indian." This distinction is made only for emphasis.

Basically, the State of North Dakota, which would include the county mental health board, has no jurisdiction over a "reservation Indian" unless such Indian has accepted jurisdiction as provided for by Chapter 242 or a legal guardian has been appointed pursuant to and under the authority of the tribal courts or Court of Indian Offenses. The county mental health board, when confronted with a person who conducts himself in such a manner so as to put into operation any of the provisions of Chapter 25-03 of the North Dakota Century Code as

pertaining to involuntary commitments, and such person is a "reservation Indian", should first determine whether or not it has jurisdiction under the provisions of Chapter 242. It is advisable in instances where the "reservation Indian" had individually accepted jurisdiction recently that such acceptance be viewed carefully to determine whether or not such "reservation Indian" was or was not in possession of his mental faculties so as to enable him to legally accomplish an acceptance of jurisdiction.

In cases of doubt, it would be advisable for the county mental health board to advise that an appointment of a guardian be accomplished before proceeding under the provisions of Chapter 25-03. In instances where it is clearly established that the "reservation Indian" was not in full possession of his mental faculties, such appointment of guardian is a prerequisite before any proceedings can be had, on the basis that the acceptance was not valid and jurisdiction has not been obtained. However, where there is no question as to the mental ability of the subject "reservation Indian" at the time he accepted jurisdiction, the county mental health board may proceed under the provisions of Chapter 25-03. Once jurisdiction is lodged, jurisdiction is complete under the provisions of Section 27-19-01 of the North Dakota Century Code, which amongst other things, provides as follows:

> * * * Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within the state."

Thus, in response to your first question, it is our opinion that the county mental health board has authority to enter the Turtle Mountain Indian Reservation and detain custody of a "reservation Indian" patient living on the reservation if the health board has jurisdiction by either of the two methods discussed under Chapter 242 (Chapter 27-19). Such authority and jurisdiction includes the authority to carry out the provisions of Section 25-03-13 of the North Dakota Century Code.

In response to your second question, it is our opinion that the county mental health board can designate the superintendent of the Turtle Mountain Indian Reservation or the senior public health service physician as the person to take charge of the patient and transport same to the State Hospital, or to retain said patient for transportation to the State Hospital. This is all on the assumption that the "reservation Indian" is subject to State jurisdiction under the provisions of Chapter 242 (Chapter 27-19 of the North Dakota Century Code).

In response to your third question, it is our opinion that the sheriff of a county, or any other State official, has the authority to serve subpoenas (Section 25-02-16) or notices (Section 25-03-11) issued by the county mental health board, acting pursuant to the provisions of Chapter 25-03 of the North Dakota Century Code, on witnesses or public health service physicians residing within the exterior boundaries of an Indian reservation. Such procedures are

classified as service of process and have always been permissible on Indian reservations. Service of process in itself does not involve jurisdiction in its true sense. However, if the subpoena is to be served upon a witness or some other person who is a "reservation Indian" who has not accepted jurisdiction by the means provided for under Chapter 242 (Section 27-19 of the North Dakota Century Code), the service would be valid but it is doubtful that such "reservation Indian" could be compelled under penalty of law to respond to such subpoena. It is suggested that where the witness or person to be summoned is a "reservation Indian" who has not accepted jurisdiction, that the authority of the tribal courts be used or the Court of Indian Offenses if such is available. If, under their laws, the "reservation Indian" cannot be compelled to attend, it is doubtful that the "reservation Indian" can be compelled to attend as a witness on a hearing before the county mental health board.

In response to your fifth question, we wish to state that this has been answered in the response to your third question. The full cooperation of the Indian agencies and other governmental agencies are required if the witnesses involved are "reservation Indians" who have not accepted jurisdiction under the provisions of Chapter 242, (Chapter 27-19 of the North Dakota Century Code).

In answer to your sixth question, it is our opinion that no specific time in itself will control in determining whether or not a "reservation Indian" has moved off the reservation so as to have severed his tribal relations and is subject to State jurisdiction without following the acceptance procedure set out in Chapter 242 (Chapter 27-19 of the North Dakota Century Code). This question is comparable to the subject of residence and can be resolved only from the individual facts. Time in itself is not controlling, but is one of the elements to be considered. It would appear that intent coupled with an overt act is controlling. Thus, it is possible that a "reservation Indian" who has moved off the reservation but still resides nearby the reservation can still be considered the same as a "reservation Indian", if it can be shown or if the facts indicate that the subject person did not intend to sever his tribal relations and, in fact, did not sever same. Basically, a "reservation Indian" upon leaving the reservation and residing outside becomes subject to all of the laws of the state in which he may be. He is considered to be the same as any other person, unless it can be established that his leaving was only temporary and was still subject to the Indian tribal courts. It would seem that the burden is on the Indian to establish this. It would be our advice that the county mental health board treat Indians who are out of the reservation in the same manner as other residents of the State until such time as the courts determine otherwise. If there is any doubt, the same procedure as employed with "reservation Indians" can be employed.

You also ask about the procedures to be followed pertaining to Indians who reside in Rolette County outside of the exterior boundaries of an Indian reservation. It is our suggestion that the county mental health board consider Indians living in Rolette County but outside of the Indian reservation in the same light and in the same manner as residents of Rolette County, except possibly as to the expense involved under the understanding agreement referred to herein.

HELGI JOHANNESON

Attorney General