LETTER OPINION
94-L-245

September 19, 1994

Ms. Mary K. O'Donnell
Rolette County State's Attorney
P.O. Box 1079
Rolla, ND 58367-1079

Dear Ms. O'Donnell:

Thank you for your letter asking whether a county sheriff may enter the Turtle Mountain Reservation to serve a notice of levy upon an Indian residing on the reservation. This response to your letter assumes that the state court issuing the judgment had jurisdiction over the matter and the parties. It also assumes that the Indian being served is a member of the Turtle Mountain Band of Chippewa, rather than a member of another tribe. On a reservation, state authority over a nonmember Indian is more extensive than that over tribal members. See Duro v. Reina, 495 U.S. 676, 686 (1990); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160-61 (1980).

In addressing the issue of state authority to make an on-reservation service of process the courts typically apply the "infringement test" of Williams v. Lee, 358 U.S. 217 (1954). See, e.g., Wildcatt v. Smith, 316 S.E.2d 870, 874, 877 (N.C. Ct. App. 1984); Little Horn State Bank v. Stops, 555 P.2d 211, 213 (Mont. 1976), cert. denied, 431 U.S. 924 (1976); State Securities, Inc., v. Anderson, 506 P.2d 786, 788 (N.M. 1973); Martin v. Denver Juvenile Ct., 493 P.2d 1093, 1094 (Colo. 1972). This 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 v. Lee, 358 U.S. at 220.

Courts have split in their decisions regarding the service of process by a sheriff upon an Indian in Indian country.

After finding the state court had jurisdiction in a debt collection action, the New Mexico Supreme Court held "that process may be served on Indians while they are within the boundaries of the reservation." State Sec. Inc. v. Anderson, 506 P.2d 786, 789 (N.M. 1973). In Bad Horse v. Bad Horse, 517 P.2d 893 (Mont.), cert. denied, 419 U.S. 847 (1974), overruled on other grounds, In re Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981), the defendant in a divorce action was served with the summons and complaint on the Fort Peck Indian Reservation by a state process server. Id. at 894. Since Montana courts had jurisdiction over the divorce action, the court held state service on the reservation was lawful. Id. at 897.

Two years later the Montana Supreme Court again considered the issue in Little Horn State Bank, 555 P.2d 211. The court held that allowing a sheriff to enforce, on the Crow Indian Reservation, a state judgment by a writ of execution did not infringe upon the tribe's right to make its own rules and be governed by them. While the court ruled that the "crucial fact" was that subject matter jurisdiction was with the state court, it also stated:

> The Crow Tribe provides no means of enforcing state court judgments, no method of attaching property of the state judgment debtor, and is not subject to the full faith and credit clause as sister states are. Until the Crow Tribe has provided a means of such enforcement or acted in some manner within this area, we fail to see how tribal self-government is interfered with by assuring that reservation Indians pay for their debts incurred off the reservation.

Id. at 214. It is unclear what significance the lack of the availability of tribal assistance had in the court's decision. Certainly, if the law of the Turtle Mountain Band of Chippewa does not allow tribal authorities to aid a sheriff in the service of a notice of levy, service by the sheriff is more likely

to be held valid. This is consistent with the concept that in tribal/state jurisdictional disputes, state jurisdiction is more likely to be upheld if the tribe does not itself have a tradition of asserting jurisdiction over the activity. E.g., Rice v. Rehner, 463 U.S. 713, 719-20 (1983). See also Wildcatt, 316 S.E.2d at 877 (a state default judgment did not infringe on tribal sovereignty because the tribe chose not to exercise its right of self-government in this area).

In LeClair v. Powers, 632 P.2d 370 (Okla. 1981), a court held that the state court had jurisdiction to hear a divorce case and service of the summons and complaint on the defendant in Indian country was valid. Id. at 373, 376. The court also made a statement that is similar to that made by the Montana court in Little Horn State Bank. The Oklahoma court stated: "Petitioner specifies no particular [federal] provision nor has any separate resolution of the tribe whose self-government was purportedly interfered with been brought to our attention." Id. at 376.

Disapproving of state service upon Indians in Indian country are the courts in Arizona and Colorado. In Francisco v. State, 556 P.2d 1, 2 (Ariz. 1976), the court held that a deputy sheriff had no authority to personally serve process on an Indian in Indian country. See also Tracy v. Superior Ct., 810 P.2d 1030, 1043 (Ariz. 1991), and Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1112-13 (Ariz. 1989). The Colorado Supreme Court has ruled that its 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." Martin v. Denver Juvenile Ct., 493 P.2d 1093, 1094 (Colo. 1972). The court did not explain what it meant by a "closed" reservation.

There are no North Dakota decisions on the authority of sheriffs to serve process upon Indians in Indian country. There is, however, North Dakota authority on a related issue. In Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968), the court ruled that a county sheriff may enter a reservation and without a warrant arrest an Indian for a felony committed off the reservation.

After a somewhat perfunctory analysis, the court found the sheriff's action did not interfere with tribal self-government. Id. at 467. The court stated that "what is involved is whether the state courts will be able to be effective in performing their functions, or whether they will become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended." Id. at 465.

The power of states to arrest Indians in Indian country for offenses committed elsewhere, however, is "[a] source of some controversy." Conf. of W. Attorneys General, American Indian Law Deskbook 96 (1993) (hereafter cited as "Indian Law Deskbook"). Some authorities deny that states have such power. E.g., Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970); Benally v. Marcum, 553 P.2d 1270 (N.M. 1976); Steven Pevar, The Right of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights 147 (2d ed. 1992); Cohen at 357. At least one jurisdiction besides North Dakota has found that state law enforcement officers may arrest Indians in Indian country. State ex rel. Old Elk v. Dist. Ct., 552 P.2d 1394, 1397 (Mont. 1976) (but implying it would have reached a different result if the tribe had an extradition law). See also American Indian Law Deskbook at 197 ("If extradition procedures do not exist or extradition is denied on grounds unrelated to those generally governing extradition, applicable preemption principles suggest that a state has the power to make the arrest even without tribal consent").

It is questionable whether the North Dakota Supreme Court would issue the same kind of decision it did in Fournier were it presented with similar facts today.[1] More recent decisions express less inclination to find

[1]It should be noted that at issue in Fournier was the Fort Totten Reservation. Federal law gives North Dakota significant criminal jurisdiction on that reservation. Act of May 31, 1946, ch. 279, 60 stat. 229; State v. Hook, 476 N.W.2d 565 (N.D. 1991). This makes the Fort Totten Reservation and North Dakota's criminal jurisdiction on it unique among North Dakota reservations.

state authority on reservations. E.g., Davis v. Director, North Dakota Dept. of Transportation, 467 N.W.2d 420 (N.D. 1991). Further, at least one member of the Eighth Circuit Court of Appeals has stated that state officers cannot enter the Turtle Mountain Reservation to arrest and remove Indians. Davis v. Muellar, 643 F.2d 521, 534 (8th Cir.) (McMillian, J., dissenting), cert. denied, 454 U.S. 892 (1981). The majority in Davis, in dicta, also seemed inclined to reject the rule of Fournier. Id. at 527. Furthermore, today most reservations have professional law enforcement agencies and personnel as well as extradition statutes. E.g., Turtle Mountain Code of 1976, Section 1.0710; Devils Lake Sioux Law and Order Code, Title 3, Chapter 9. Thus, the state is not, as the Fournier court stated, "helpless." Instances of cooperation between state and tribal officials are described in Davis, 467 N.W.2d 420, State v. Hook, 476 N.W.2d 565 (N.D. 1991), and Davis v. Muellar, 643 F.2d 521, 524. However, even if the court were to overrule Fournier, it does not follow that the court would invalidate the serving of civil process on a reservation. Serving civil papers on an Indian and then leaving the reservation is less intrusive upon tribal interests than is arresting an Indian and taking the Indian into custody for transportation off the reservation.

Based on the decisions from Montana, Oklahoma, and New Mexico, as well as Fournier, there is authority for allowing a sheriff to serve a notice of levy on an Indian in Indian country. Such service, if challenged, however, may not be held valid since the case law is split and since the thinking of courts today may differ from the time the supportive decisions were issued. If the sheriff chooses to serve notices of levy in person, I suggest that the notices be served in cooperation with tribal authorities. If cooperation is not forthcoming, a challenge to service by the sheriff is less likely to succeed. Service of civil process from a state court with jurisdiction may not amount to a severe enough intrusion upon tribal self-government to be held invalid. Also, the state interest in ensuring the effectiveness of its courts would likely outweigh any interference with the tribal interest in self-government.

The jurisdictional problems also can be avoided, however. The notice of levy statute directs "the sheriff or other officer" to serve the notice "in the same manner as a summons is served in accordance with the North Dakota Rules of Civil Procedure." N.D.C.C. ? 28-21-12. One of these methods allows service by registered mail. N.D.R. Civ. P. 4(d)(2)(A)(iv). Were the sheriff to mail the notice of levy, the jurisdictional issue is avoided. By using the United States mail, the sheriff would not enter the reservation and would not infringe on tribal self-government. This was the holding in Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1112-13 (Ariz. 1989), in which the defendant was a tribal corporation. The court held that the state trial court had jurisdiction over the dispute and that service by mail of the summons and complaint upon the defendant was valid. The service was in accordance with state rules of civil procedure. See also Begay v. Roberts, 807 P.2d 1111, 1118 (Ariz. App. 1990) and In re M.L.S., 458 N.W.2d 541, 542-43 (Wis. App. 1990).

Another way to avoid the jurisdictional problem is to have the notice of levy served by tribal law enforcement officers. The statute does not restrict service to sheriffs. It states that service is to be by the "sheriff or other officer." N.D.C.C. ? 28-21-12. In Francisco v. State, 556 P.2d 1 (Ariz. 1976), the court, in dicta, noted that an otherwise invalid sheriff's service upon an Indian in Indian country "could have validly been effected through the Papago Indian authorities who are vested with power to serve process pursuant to tribal law." Id. at 2 n.1. I assume Turtle Mountain authorities are also vested with such powers. Cohen's Handbook of Federal Indian Law 361 (rev. ed. 1982) (hereafter cited as "Cohen") states: "If a state court has subject matter jurisdiction over a claim against an Indian, service in Indian country by either tribal police or a private server should be valid."

In summary, you may wish to advise the Rolette County Sheriff that the jurisdictional problem can be avoided by using the mail. If the sheriff prefers to personally serve notices of levy, the sheriff should seek to do so in cooperation with tribal authorities. If tribal authorities do not cooperate, the sheriff's service of the notice of levy will have a higher

probability of being held valid.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cmc/dmm