

MOUs and MOAs: A Cooperative Approach to Law Enforcement on the Reservation

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- Why are these agreements needed?
 - Statistics show crime in Indian country is high.
 - Absent hot or fresh pursuit or exigent circumstances, extra-jurisdictional arrest is presumptively unreasonable. Ross v. Neff, 905 F.2d 1349, 1354 & n.6 (10th Cir. 1990).
 - Indian reservations can be a patchwork of jurisdictional authority. (See criminal jurisdiction table below.)
 - Crime and criminal actors often do not confine themselves to one legal jurisdiction.
 - Examples:
 - U.S. v. Medearis, 2002 DSD 31 (suppressing evidence due to lack of authority of tribal officers off-reservation); (See U.S. v. Medearis, 380 F.3d 1049 (8th Cir. 2004) for facts of case.)
 - South Dakota v. Cummings, 2004 S.D. 56, 679 N.W.2d 484 (Suppressing evidence due to lack of state authority in Indian country.)
 - Compare/contrast Medearis (tribal authorities w/o jurisdiction) with Cummings (state authorities w/o jurisdiction).

- Arizona v. Nelson, 90 P.2d 206 (Ariz.App.Div. 2004) (drunk driving case; court denied motion to suppress due to AZ statute).
 - Forming Cooperative Agreements
 - Tribal authority – Usually need tribal ordinance or resolution authorizing any grant of authority to outside law enforcement agents. Include authorization for negotiation and conclusion of agreement.
 - Statutory authority for state and/or local unit of governments to enter agreements or grant powers to Tribes and tribal officers.

Examples:

 - **Wisconsin:** Wis. Stat. § 165.90 authorizes aid to counties where county and tribe have a cooperative county-tribal law enforcement program. (See also, Wis. Stat. § 165.92 permitting tribal officers to be empowered to enforce state law after officer completes required training and tribe agrees to liability provisions.)
 - **Minnesota:** Minn. Stat. §§ 626.90, 626.91, 626.92 and 626.93 (Upon meeting certain requirements, Minnesota tribes can appoint peace officers with the same powers as MN peace officers.)
 - **Kansas:** Kansas Attorney General Opinion No. 99-28 interprets K.S.A. 19-805 to permit local sheriff's to deputize tribal officers to enforce state law within parameters set by the sheriff.
 - **California:** Cal. Penal Code §§ 830.6(b), 832.6(a)(1). Tribal law enforcement officers can be appointed to enforce state law if they have met training criteria for peace officers.
 - **Nevada:** NRS 171.1255 authorizes tribal law enforcement to issue arrest or issue citations to non-Indians on Reservations without any agreement with local units of government. (See also, Nevada AG Opinion No. 2003-07).
 - **Arizona:** Arizona statute ARS § 12-3874(A) authorizes tribal law enforcement officers to act as peace officers.

- **New Mexico:** N.M.S.A. 1978, Section 29-1-11(B)(Tribal police officers can be commissioned by the chief of the New Mexico State Police.)
 - Topics:
 - One-way deputization
 - Employment
 - Deputization
 - Control / command
 - Cross deputization
 - Mutual aid
 - Fresh pursuit
 - Cooperative efforts – (See e.g. Mahnomen County Cooperative Law Enforcement Agreement with White Earth Band of Chippewa.) (Go to: <http://www.nhtsa.dot.gov/people/outreach/safedige/winter2001/win2001-1.html>)
 - Elements:
 - **Purpose statement** – Simple but important statement by the parties about the purpose of the agreement. Identify intent and goals.
 - **Duties and Obligations** – What does each party have to actually do under the agreement? Forces the parties to articulate what they expect of each other.
 - **Jurisdiction** – What effect, if any, does the agreement have on the respective jurisdiction of each party?
 - **Identify geographic areas as needed** – If officers are being cross-deputized, where does the agreement apply?
 - **Incarceration and prosecution** – What arrangements, if any, are being made for defendants who are apprehended by one jurisdiction but may be turned over to the other for incarceration and prosecution?
 - Who will be cited into which courts?
 - **Exchange of information and communication**
 - Joint or shared dispatch system
 - Court appearances
 - Administrative information
 - **Personnel and equipment** – Will there be any sharing of personnel and equipment? Identify specifics.

- **Indemnification** – Is one party going to indemnify the other for the acts of the party’s officers?
 - **Liability** – If officers are being cross-deputized, how is the potential liability being allocated between the tribe and the local unit of state government?
 - **Dispute Resolution** – How will disputes be resolved? Mediation is a popular choice.
 - **Sovereign Immunity** – The agreement should clarify whether a waiver is being given by the state, county or Tribe.
 - **Binding / Non-Binding** – Is the agreement intended to be binding? (See discussion of MOUs and MOAs below.)
 - **Severability** – If one section is ruled invalid, does the rest of the agreement still stand or does it all fall?
 - **Termination** – When or how does the agreement end? Can a party end the agreement? Can either party terminate without cause? How many days notice are required?

- What is the legal status of MOUs and MOAs?
 - A **memorandum** is an informal record, note or instrument intended to document something in writing.
 - An **understanding** is usually an informal term indicating something less than a full meeting of the minds unless accompanied by a more concrete statement of the parties.
 - An **agreement** is a meeting of the minds, coming together on the terms of a proposition; *an agreement is not necessarily synonymous with a contract.*
 - An agreement may not have the elements of contract: offer, acceptance and consideration.
 - In Johnson International, Inc. v. City of Phoenix, 192 Ariz. 466, 967 P.2d 607 (App. 1998), the court refused to enforce a memorandum of understanding of the parties’ intentions regarding a potential development agreement that included the following language: "This memorandum is not intended to be the final agreement or to include all of the material terms, which shall be subject to further negotiations, and it shall not be binding on either party." *Id.* at 468, ¶ 5, 967 P.2d at 609. The

court held that the memorandum could not, by itself, be a promise because its clear language precluded that interpretation. Id. at 474, ¶ 51, 967 P.2d at 615.

- Corporate agreements usual memorialize a future intent to enter a deal or project.
- Government-to-government agreements are more like contracts in that each party expects the other to follow through and meet the requirements of the agreement.
- Be sure to document the level of commitment desired in the MOU or MOA.

CRIMINAL JURISDICTION ON RESERVATIONS IN NON-PL 280 STATES

Crime by Parties	Jurisdiction	Statutory Authority
Major Crimes by Indians against Indians	Tribal and/or federal (concurrent)	18 U.S.C. § 1153
Other crimes by Indians against Indians	Tribal (exclusive)	18 U.S.C. § 1153
Crimes by Indians against non-Indians	Tribal and/or Federal (concurrent)	18 U.S.C. § 1152
Crimes by Indians without victims	Tribal (exclusive)	
Crimes by non-Indians against Indians	Federal exclusive	18 U.S.C. § 1152
Crimes by non-Indians against non-Indians	State (exclusive)	
Crimes by non-Indians without victim	State (exclusive)	

- Negotiation approaches
 - Get broad authority from political bodies to negotiate subject to final approval from tribal council / county board, etc.
 - Start staff to staff – less at stake; political leaders can come in and correct “misunderstandings” or “disagreements.”
 - Identify common ground – safety, security, preventing and fighting crime.
 - Economics – parties will likely benefit economically by sharing resources.

- Politics
 - Tribal leaders: On some reservations, politically challenging to grant non-tribal law enforcement the right to arrest and/or cite tribal members on the Reservation.
 - Citations should be in to tribal court.
 - Local sheriff: Knows that tribal officers may be under scrutiny; will likely only deputize a tribal officer who meets state standards.
 - Benefit for county and tribe is more resources at little or no cost.

- RESOURCES:
 - National Congress of American Indians (NCAI) web site has dozens of examples of law enforcement agreements from around the country. See www.ncai.org. (Go to the Research Center and then the page for the State-Tribal Relations Initiative.)