

# CALIFORNIA INDIAN LEGAL SERVICES

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## MEMORANDUM

TO: Nick Martinez, Chief of Tule River Police Department  
FROM: Dorothy Alther, Legal Counsel  
DATE: March 8, 2011  
RE: Citizen Arrests

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This legal memorandum is in response to your request for my legal opinion on whether Tule River Police Officers should sign a citizen's arrest statement when delivering a person who has violated a state law to the local sheriff officer. My short answer is no.

First, a tribal law enforcement officer is not acting as a "private citizen" as that term is defined under federal law when the officer stops, detains, and turns a person over to sheriff officers. Secondly, by casting a tribal police officer as a "private citizen" while the officer is carrying out his/her official law enforcement duties removes the officer's tribal immunity and for tribal officer's holding a federal Special Law Enforcement Commission ("SLEC") it removes his/her Federal Tort Claims Act ("FTCA") coverage. Persons conducting a "citizen arrest" exposes themselves to civil tort liability and possibly 42 U.S.C. §1983 liability without a defense of "qualified immunity." Thirdly, forcing tribal law enforcement officers to sign a citizen's arrest statement undermines the officer's status as a law enforcement officer and his or her credibility in the eyes of local law enforcement.

### *1. Defining "citizen arrest"*

It is well established law that the Fourth Amendment (prohibits unreasonable searches and seizures) does not apply to "private citizens" conducting an arrest or searching and seizing evidence. However, if the citizen is found to be acting as an agent of the government his or her conduct will be tested against the Fourth Amendment. *U.S. v. Beccerra-Garcia*, 397 F.3d 1167 (9<sup>th</sup> Cir. 2005) The legal test used to determine whether the person is acting as citizen or agent of the government is: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search and/or seizure intended to assist law enforcement and did not act to further their own ends. *Beccerra-Garcia supra, U.S. v. Reed*, 15 F. 3d 928 (9<sup>th</sup> Cir. 1994)

In *Beccerra-Garcia* the Court was asked to determine whether two Tohono O'odham tribal rangers were acting as "private citizens" or government agents at the time they detained the defendant. The tribal rangers are a division of the Tohono O'odham Police Department. The rangers have less power than fully authorized tribal police officers and their main function is to patrol the reservation and report suspicious activity to the tribal police and U.S. Border Patrol. The rangers do not have the authority to stop a vehicle but do have the authority to detain a

vehicle that is already stopped until the arrival of tribal police officers who do have the authority to make an arrest. The defendant in the case had voluntarily stopped after being followed by the tribal rangers. The defendant quickly exited his vehicle and approached the rangers who asked for his identification. The defendant could not speak English and motioned to his van. The door of the van had been left open and when one of the rangers went to retrieve the defendant's identification he found 20 undocumented aliens in the back of the van. The rangers contacted tribal police who instructed the rangers to detain the defendant until they could arrive with the Border Patrol. The defendant was charged and convicted of conspiring to transport illegal aliens.

Interestingly the defendant did not challenge his detention on Fourth Amendment grounds, but instead argued that because the rangers had no arrest authority, they were acting as "private citizens" and the case was therefore subject to the state "citizen arrest" law. Under Arizona "citizen arrest" law, the defendant contended, there was no valid basis for a "citizen arrest" given the facts in defendant's case. The U.S. argued that the tribal rangers were acting as government agents and that the under the Fourth Amendment (applied to the rangers per the Indian Civil Rights Act) the detention was valid. The Court first asked whether the government knew of and acquiesced in the officer's activities and found that both the tribal police department and the Border Patrol acknowledged and endorsed the patrol activities of the rangers. Next the Court asked whether the rangers intended to assist law enforcement and were not acting to further their own ends. The Court found that the rangers detained the defendant to enforce tribal trespass laws not to affect a personal benefit. The Court concluded the rangers were not acting as "private citizens" and were in fact government agents subject to the Fourth Amendment.

Applying the two prong test used by the 9<sup>th</sup> Circuit Court of Appeals in *Beccerra-Garcia*, Tule River Police Officers are acknowledged and endorsed as law enforcement officers by the tribal government and are expected to keep law and order on the reservation. Further, Tule River Police Officers holding SLECs are acknowledged and endorsed as law enforcement officers by the federal government, Office of Justice Services. Tribal officer's encountering persons violating state law, detaining such person and delivering the person to the local sheriff are clearing doing so to assist law enforcement and not for their own ends. While clearly not "private citizens" when turning over state law violators, tribal law enforcement officers should refrain from signing a citizen arrest form due to the exposure of civil liability, as discussed below.

## ***2. Officer Liability and Immunity***

**Tribal Immunity:** When tribal law enforcement officers are enforcing tribal law and acting within the scope of their authority, they may invoke tribal sovereign immunity if sued. *Linneen v. Gila River Indian Community*, 276 F. 3d 489 (9<sup>th</sup> Cir. 2002), *Dry v. U.S.*, 235 F. 3d 1249 (10<sup>th</sup> Cir. 2000) This immunity is absolute and bars all claims, meaning once the officer is found to have acted within the scope of his or her duty and they are a tribal officer the case is dismissed.

**Federal Tort Claims Act ("FTCA"):** A tribal law enforcement officer holding a SLEC who is enforcing federal law and/or tribal law with the consent of the Tribe and is acting within the scope of their deputation agreement, may invoke the protection of the FTCA. What this means is if the officer is sued for either an unintentional tort (negligence) or intentional tort (assault, battery, false imprisonment, etc.) the federal government will substitute in as the

defendant and defend that case. The federal government may raise any defense the officer may have including invoking immunity. However, an officer's immunity under the FTCA is defined by the law of the state where the action is filed. *Holthusen Jr. v. U.S.*, 34 ILR 3402 (2007) In most cases this is "qualified immunity." "Qualified immunity" provides a defense to a tort claim under the FTCA if it is determined that:

1. The officer was performing a discretionary function (most police actions are discretionary); and
2. The officer's conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known.

The courts have found that "clearly established" law means in light of the preexisting law, the unlawfulness of the act is apparent and "reasonableness" is determined by "objective reasonableness." This means is that as long as the officer acted reasonably, even if erroneously, he or she is entitled to "qualified immunity."

**Bivens Action:** In a Bivens action a federal officer may be sued in his or her official capacity as a federal officer accused of intentionally violating the plaintiff's federal statutory or constitutional rights. A tribal officer holding a SLEC is subject to a Bivens action as they are deemed federal officers. The federal government will defend a tribal officer sued for violating a person's constitutional rights and the officer is entitled to "qualified immunity."

**Citizen Liability for Making Citizen Arrest:** A tribal officer acting as "private citizen" and conducting a "citizen arrest" pursuant to state law may be sued for the tort of false arrest and imprisonment and other torts and there is no immunity defense. See §1983 liability discussed below.

**Arrest Made Under §830.8(a):** Federal officers are granted immunity under state law from civil liability for **false arrest and imprisonment** if the arresting federal officer is acting within the scope of his or her authority and:

1. The arrest is lawful or the peace officer at the time of the arrest, had reasonable cause to believe the arrest was lawful;
2. The arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested; and
3. The arrest was made pursuant to the requirements of §§142, 837, 838 or 839.

But note the federal officer may be sued under §1983 for having violated the person's constitutional or statutory rights and for other torts such as assault and battery.

**42 U.S.C. §1983:** A tribal officer exercising California arrest authority under §830.8(a) could be subject to liability under §1983 for violation of rights protected by the U.S. Constitution or by federal law. 80 Ops. Cal. Atty. Gen.297 (1997) There is no cap on damages that can be awarded and the prevailing party is entitled to attorney fees and costs. It is my understanding that county counsel will defend the officer in a §1983 action, but whether this would hold true for a SLECCed tribal police officer acting under §830.8(a) remains to be seen. The officer may assert "qualified immunity" as defined above. However, the U.S. Supreme Court has held there is no "qualified immunity" for a private person carrying out state functions and sued under §1983. So arguably a tribal law enforcement officer forced to take a "citizen arrest" under state

law, could be sued under §1983 and not have the defense of “qualified immunity.” *Richardson v. McKnight*, 521 U.S. 399 (1997), *Wyatt v. Cole*, 504 U.S. 158 (1992)

In sum, tribal law enforcement officers should not sign a “citizen arrest” statement when he or she is turning a person over to the sheriff or other appropriate law enforcement authority because doing so prevents them from claiming tribal immunity and the protections under the FTCA. And most importantly it exposes the officer to civil liability and possibly §1983 liability without any immunity defense.

### **3. Tribal Police Officer’s Authority**

When a tribal police officer stops, detains and transports a person (Indian or non-Indian) to local law enforcement, the officer is acting under tribal inherent authority and U.S. Supreme Court case law. The Supreme Court in *Duro v. Reina*, 495 U.S. 676 (1990) held that although a tribe had no jurisdiction to arrest or try a non-member Indian, the tribe possesses the traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. Further, tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, officers may exercise their power to detain the offender and transport him to the proper authorities. [Emphasis added] The *Duro* decision reaffirmed the Supreme Court’s 1978 ruling in *Oliphant v. Suquamish*, 435 U.S. 191, that found that the tribe had no jurisdiction to try and punish a non-Indian, but the tribe had the power to detain and turn over the non-Indian violator to the governmental authorities who can prosecute.

In *Ortiz-Barraza v. U.S.*, 512 F.2d 1176 (9<sup>th</sup> Cir. 1975) the Court upheld the stop and conviction of the non-Indian defendant who had been detained by tribal officers and transported to the tribal police station until such time U.S. drug enforcement authorities could take custody. The Court specifically found that the tribal law enforcement officers had the inherent authority to stop and detain a non-Indian allegedly violating state or federal law on a public road running through the reservation.

State courts have also affirmed these federal holdings. The Supreme Court of Washington in *State of Washington v. Schmuck*, 121 Wash. 2d 373 (1993) upheld the stop and detention of a non-Indian by a tribal officer for DUI, finding the officer had the inherent authority to conduct the stop and detain the person until the state authorities could take custody. This holding was reaffirmed by the Supreme Court in *State of Washington v. Eriksen*, 241 P. 3d 399 (2010) which upheld the DUI conviction of a non-Indian who was stopped and detained by a tribal officer until the state authorities could arrive. In *Eriksen* the tribal officer pursued and stopped the defendant off the reservation. The court found the officer had the authority to continue “fresh pursuit” of motorists who break traffic laws on the reservation and then drives off the reservation. In *State of New Mexico v. Ryder*, 649 P. 2d 756 (N.M. 1982) the court also affirmed the defendant’s conviction finding the BIA Commissioned officer had the authority to stop and detain the defendant until an officer with state police authority could arrest the defendant.

Federal and state case law make clear that tribal law enforcement officers who stop, detain and transport a person for violation of state law are not acting as “private citizens” making “citizen arrests.” If the tribal officer with a SLEC is forced to make an arrest then the arrest should be made pursuant to §830.8(a) and again not as a “private citizen.”