February 15, 2010

Honorable Lawrence Wasden
Attorney General of the State of Idaho
700 W. Jefferson Street
P.O. Box 83720
Boise, Idaho 83720-0010

Re: House Bill 500 – State and Indian Tribal Cooperative Law Enforcement Act

Dear Attorney General:

The House Judiciary and Rules Committee is considering H500 which, under certain conditions, authorizes police officers employed by an Indian tribe within the State of Idaho to make arrests of, or issue citations to, non-tribal persons who commit offenses punishable under state law within the exterior boundaries of the Indian tribal reservation. The arrested or cited persons would in all cases be processed in state court, in accordance with the provisions of state law.

It has been suggested by some persons, in opposition to the legislation, that H 500 may be subject to a successful challenge under provisions of the Constitution of the United States and the Constitution of the State of Idaho. The contentions as to the possible unconstitutionality of the legislation have been stated as follows:

1. The tribal peace officers would not be under the authority of the state police or local sheriff and would not be accountable through any chain of command to any publicly elected official, and thus would be in violation of Art. IV, §20 of the Constitution of the State of Idaho.

2. The legislation would violate Art. XVIII, §6, by creating de facto sheriff's deputies without the authority of the sheriff.

3. The act would deprive non-tribal Idaho citizens of their right to representative government in violation of the Constitution of the United States, and, by Art. I, §§2 and 19, and Art. XVIII, §6, Constitution of the State of Idaho.

There may be other issues raised asserting constitutional questions of which I am not aware. However, I would appreciate receiving your informal opinion as to the potential success of challenges asserting constitutional issues with reference to the bill, if it were to be enacted.

Very truly yours,

Rep. Jim Clark
Chairman

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

February 23, 2010

The Honorable James W. Clark
Idaho House of Representatives
STATEHOUSE MAIL

Re: House Bill No. 500—State and Indian Tribal Cooperative Law Enforcement Act; Our File No. 10-31185

Dear Representative Clark:

You have requested the Attorney General's review of House Bill No. 500 ("HB 500"), which is entitled State and Indian Tribal Cooperative Law Enforcement Act and which would amend the definition of "peace officer" in Idaho Code § 19-5101 and add a new section to Title 67, Part 51 of the Code. This letter responds to your February 15, 2010 inquiry over the legislation's consistency with several provisions of the Idaho Constitution: Article IV, Section 20; Article XVIII, Section 6; and Article I, Sections 2 and 19. The brief analysis that follows is preliminary in nature given the time constraints attendant to its preparation and does not constitute the formal views of the Attorney General on the validity of the draft legislation. My reasoning and tentative conclusions would be subject to reassessment if, for example, the legislation was adopted and then subjected to judicial challenge.

I. HB 500

Under Idaho Code § 19-5101(d) as presently codified, the term "peace officer" includes "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." HB 500 proposes to amend this definition by adding two other routes to "peace officer" status for the law enforcement personnel of a federally recognized Indian tribe who have completed the academy. The first method encompasses law enforcement personnel of a tribe "that has elected, pursuant to section 67-5104, Idaho Code, to permit the police or law enforcement agency of the Indian tribe to enforce laws of the state of Idaho relating to public offenses committed within the exterior boundaries of such Indian tribe's reservation." The second method encompasses law enforcement personnel of a tribe "that has entered into a cooperative law enforcement agreement with a county sheriff relating to the enforcement of state and/or tribal laws within the exterior boundaries of the Indian tribe's reservation.

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The reference to Idaho Code § 67-5104 is to a new provision proposed to be added by HB 500. The provision is detailed but, in broad terms, allows the law enforcement personnel of any of the five federally recognized tribes located in Idaho to enforce within the particular tribe's reservation Idaho's laws "relating to public offenses." Tribes so authorizing must give 180 days' written notification to the sheriff, county commissioners and prosecuting attorney of each affected county and to the director of the Idaho State Police and must indicate willingness to commence negotiations with the sheriff and county commissioners over a cooperative agreement concerning enforcement matters. Section 67-5104(a) further provides that "[t]o the extent that agreements entered into between the Indian tribe and the local law enforcement agency expressly enlarge, diminish or limit the authority granted to an Indian tribe, its tribal law enforcement agency or its tribal peace officers pursuant to this section or other state law, the terms of such agreements shall govern the authority of the tribal law enforcement agency and its tribal peace officers to enforce state laws within the exterior boundaries of the affected Indian reservation." An electing tribe, absent an agreement to the contrary, must provide proof of comprehensive general liability insurance in the minimum amount of $2 million "for any and all claims, losses, actions and judgments arising out of the conduct of tribal peace officers resulting in damage to persons or property acting under authority granted in this section." § 67-5104(3). Once the tribe's election becomes effective, its "peace officers shall have all authority and duties given by Idaho law to peace officers of the state of Idaho" subject to any limiting terms in an agreement or certain other officer-specific disqualification grounds. § 67-5104(4).

HB 500 continues on to prescribe the circumstances under which a tribal law enforcement personnel, having acquired "peace officer" status, may effect arrests and certain responsibilities—including notifying the relevant county sheriff, delivering the arrestee to state custody for booking and detention, and assisting in investigatory and judicial activities as reasonably required—following an arrest. § 67-5104(6). The legislation restricts the geographical authority of the tribal "peace officer" to the employing tribe's reservation but authorizes fresh, or "hot," pursuit off reservation under certain circumstances. § 67-5104(7). It also specifically provides that tribal law enforcement personnel are not state or local government employees when discharging "peace officer" functions. § 67-5104(9). HB 500 disclaims any intent to affect the scope of existing tribal sovereignty or existing authority of state or local government officers to enforce Idaho law within a reservation. § 67-5104(10) & (11). A tribe may terminate an election upon 30 days' written notice to the affected county sheriff(s).

II. Legal Analysis

A. Article IV, Section 20

Article IV, Section 20 limits the number of "executive departments" of the State that may be established. *See* Att'y Gen. Op. 90-5 (discussing article's adoption and implementing legislation). HB 500 does not purport to create a new state agency. It instead redefines "peace officer" and provides a procedure, together with certain conditions, for Idaho Indian tribes to follow when they desire law enforcement personnel to obtain such status. Article IV, Section 20 does not require tribal "peace officers" to be "under the authority of the state police or local sheriff" or "accountable through [a] chain of command to any publicly elected [state or county] official."

B. Article XVIII, Section 6

Article XVIII, Section 6 provides in relevant part that "[t]he legislature by general and uniform laws shall, commencing with the general election in 1986, provide for the election biennially, in each of the several counties of the state, of county commissioners and for the election of a sheriff, a county assessor, a county coroner and a county treasurer, who is ex-officio public administrator, every four years in each of the several counties of the state" and designates the clerk of the district court as the ex-officio auditor and recorder. It prohibits creation of any other county offices. The provision additionally authorizes the county commissioners the authority to empower those officers "to appoint such deputies and clerical assistants as the business of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners."

Your letter indicates that some persons have suggested that HB 500 may violate this provision because the bill purportedly "creat[es] de facto sheriff's deputies without the authority of the sheriff." Section 67-5104(10), however, expressly disclaims any employment relationship between tribal "peace officers" and either the State or "any county or city situated within the exterior boundaries of the Indian reservation" where "peace officer" status is acquired under the proposed subparagraph (2) of § 19-5101(d) (pursuant to the involved tribe's election under § 67-5104) and not subparagraph (1) (pursuant to an appointment as a deputy sheriff) or subparagraph (3) (pursuant to a cooperative agreement with sheriff). The very definition of "peace officer" thus negates the reasonable likelihood of "de facto" deputy sheriff-status ever existing.

Although not specifically mentioned in your letter, a question may exist whether HB 500 improperly diminishes a county sheriff's constitutional powers insofar as it authorizes a tribe to effect arrests and subsequent temporary detention, once it has complied with the election requirements in § 67-5104, in the absence of a cooperative agreement with the particular county's sheriff or actual deputization. The Idaho Supreme Court has recognized that county sheriffs are "constitutional officers" and that duties attendant to their office as of the time of statehood "cannot be taken from the sheriff and given to any other officer or officers." *Monson v. Boyd*, 81 Idaho 575, 581, 348 P.2d 93, 96 (1959). The dispute in *Monson* was precipitated by Boise police officers' arrest of an individual who later contended such action was without probable cause or authority. In response to the claim that city police officers lacked authority to make the arrest notwithstanding their "peace officer" status and that only a sheriff or a deputy sheriff could do so, the Court reasoned in part that, based upon its review of relevant statutes, "[i]t is . . . apparent that that the duty of municipal police to enforce the criminal laws of the state was recognized by the makers of the constitution, and by the people in its adoption"—*i.e.*, that sheriffs and their deputies were not the only law enforcement personnel empowered to enforce state law as of time of statehood *Id.* It additionally rejected the arrestee's reliance on Idaho Code § 31-2227 which, then as it does now, provided in its opening sentence that "[i]rrespective of police powers vested by statute in state, precinct, county, and municipal officers, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." The Court reasoned that "[t]he effect of this statute is to place the duty of criminal law enforcement primarily upon the sheriff and prosecuting attorney" but did "not destroy or attempt to destroy the statutory or implied

constitutional authority and duty of other peace officers." 81 Idaho at 581, 348 P.2d at 96.

In other contexts where the scope of those duties attendant to a state officer's "constitutional" status has arisen, the Supreme Court has invalidated attempts to *transfer* responsibilities to another person or entity. However, as in *Monson*, has declined to accept the proposition that the Legislature may not authorize—in the absence of a contrary constitutional limitation—other persons or entities to perform like or related duties at least where it does "not prevent a constitutional officer from performing his constitutional duties." *Williams v. State Legislature*, 111 Idaho 156, 157, 722 P.2d 465, 466 (1986) (1986) (Legislature's funding of Legislative Auditor, rather than State Auditor, to perform post-audits infringed on the latter's constitutional duties); *compare Wright v. Callahan*, 61 Idaho 167, 179, 99 P.2d 961, 966 (1940) ("'[t]he Legislature cannot take from a constitutional officer a portion of the *characteristic* duties belonging to the office[] and devolve them upon an officer of its own creation'"), *with Smylie v. Williams*, 81 Idaho 335, 343, 341 P.2d 451, 455 (1959) (statute directing Bureau of Public Accounts to make no less than once each biennium an audit of every state fund was valid, since "[i]t is a ministerial duty which the legislature could lawfully confer upon any office of its own creation . . . [and] neither adds to, diverts from nor conflicts with the powers or duties of any constitutional office").

HB 500 does not attempt to displace county sheriffs' authority to enforce state law. Rather, consistent with the Legislature's authority to prescribe "peace officer" status, it expands the methods by which tribal law enforcement officers can secure such status. The enforcement duties of a sheriff whose county includes reservation land remain unchanged, and the sheriff is given discretion as to whether to enter into negotiations over a cooperative agreement and, if those negotiations occur, whether entry into a proposed agreement may assist in discharging those duties. I recognize that, unlike the city police in *Monson*, no territorial statutes provided for the designation of tribal law enforcement personnel as "peace officers," but the absence of designation is hardly unexpected given demographic and jurisdictional considerations then present. As the United State Supreme Court has observed, the scope of state authority in Indian country has evolved substantially over the last 180 years through both congressional and federal common law developments:

> At the outset, we reject-as did the state court-the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous. The conceptual of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, 6 Pet. 515, 556-561, 8 L. Ed. 483 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. . . . The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973) (some citations & footnote omitted). The key principle is that, regardless of how it chose to exercise its authority, the Legislature possessed at statehood, and possesses currently, broad discretion in determining the scope of the term "peace officer" and the conditions under which that status attaches. I therefore do not believe a substantial possibility exists that HB 500 would be held to violate Article XVIII, Section 6.

C. Article I, Sections 2 and 19

Article I, Section 2 of the Idaho Constitution provides that "[a]ll political power is inherent in the people" and that "[g]overnment is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature." Article I, Section 19 provides that "[n]o power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." Neither of those articles appears implicated by HB 500.

Any claim that the legislation embodies a "special privilege[]" under Article I, Section 2 for Idaho tribes likely would fail if litigated. The Idaho Supreme Court explained the meaning of the term "privilege" in *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976):

> In essence, this constitutional provision prohibits the Legislature from granting a special privilege or immunity to any party in such a fashion or manner that it cannot be subsequently modified, annulled or declared forfeited. A "privilege" is a particular or peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of others.

97 Idaho at 568, 548 P.2d at 68. HB 500 can hardly be construed as bestowing "a particular or peculiar benefit or advantage" since it simply authorizes a tribe to undertake the governmental *burden* attendant to carrying out a law enforcement. Also counseling against a "privilege" characterization is the fact that, if adopted, the legislation grants no such benefit or advantage which cannot be "modified" or "annulled" by a future Legislature; *i.e.*, the definition of "peace officer" and the enforcement-election option in the proposed § 67-5104 are subject to amendment or outright repeal.

No less significant is the need to show a "special" privilege—a requirement that connotes singling out a member of a similarly situated class of persons or entities. Indian tribes are *sui generis*. They have long been deemed to possess a unique form of sovereignty derived from their "domestic dependent nation" status. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831). The United States Supreme Court thus has held that they have a distinct and meaningful measure of territorial authority within Indian country set aside for their benefit. *See, e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (power to impose tax with respect to oil-and-gas extraction from tribal lands constituted "a necessary instrument of self-government and territorial management"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) ("[a]lthough no longer 'possessed of the full attributes of sovereignty,' they remain a

'separate people, with the power of regulating their internal and social relations'"); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) ("This Court has recognized limits on the authority of Congress to delegate its legislative power. . . . Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations'") (citations omitted). The existence of such quasi-sovereign status imbues tribes with a governmental character that separates them from purely private associations. Congress has recognized their governmental status in criminal law matters by encouraging reservation-related law enforcement agreements between the federal government, States and tribes in the 1990 Indian Law Enforcement Reform Act ("ILERA"), 25 U.S.C. §§ 2801–2809. Even without reference to ILERA, cooperative agreements in the law-enforcement area are commonplace and reflect a desire to leverage limited resources, provide increased protection for reservation residents and visitors, and ameliorate potential jurisdictional conflict.* In light of these considerations, it is unlikely that a court would find HB 500 to have conferred a "special" benefit on Idaho tribes for purposes of Article I, Section 2.

The right of suffrage protected under Article I, Section 19 centers on "'the right of a man to vote for whom he pleases.'" *Rudeen v. Cenarrusa*, 136 Idaho 560, 566, 38 P.3d 598, 604 (2001). Nothing in HB 500 addresses, much less diminishes, that right. I note further that, to the extent a claim of infringement on the right to representative government may be advanced under Article I, Section 19 or any other provision of the Idaho Constitution, the legislation—if adopted by the Legislature and not vetoed by the Governor—will have been authorized by Idaho citizens' duly elected officials. Such action would be, in other words, emblematic of a "representative government" functioning through its elected officials.

I hope that this letter addresses your request adequately. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn

* Nothing in the analysis above should be read to express any views on whether Indian tribes possess inherent retained authority to undertake arrest and detention actions for state-law violations insofar as non-Indians are involved.