FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ERIC BRUCE FOWLER, *Defendant-Appellant.*	No. 21-30172 D.C. No. 4:20-cr-00030- BMM-1 OPINION

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Argued and Submitted June 9, 2022
Seattle, Washington

Filed September 13, 2022

Before: Sandra S. Ikuta and Eric D. Miller, Circuit Judges, and Dean D. Pregerson,[*] District Judge.

Opinion by Judge Miller

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[*] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed the district court's denial of Eric Fowler's motion to suppress evidence discovered as a result of a traffic stop made by a Montana state trooper while Fowler, a member of an Indian tribe, was driving on a highway that runs through the Fort Peck Indian Reservation.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have a cross-deputization agreement with the State of Montana under which the Tribes have agreed to commission state police to act as tribal police where there is a gap between their respective criminal jurisdictions. Fowler challenges the validity of the cross-deputization agreement.

He first argues that the Tribes lack the inherent sovereign authority to enter into a cross-deputization agreement with the State of Montana. Rejecting this argument, the panel emphasized that the cross-deputization agreement deputizes state officers to enforce tribal law, not state law, and emphasized that Congress has expressly provided for the Tribes' authority to enter into such compacts.

Fowler also argued that the Tribes explicitly conditioned the cross-deputization agreement on federal approval, which they did not receive. The panel did not read the agreement's use of the word "approve" as giving the Bureau of Indian Affairs veto power over the agreement. The panel

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

distinguished this cross-deputization agreement from Special Law Enforcement Commission agreements to deputize tribal officers to enforce federal law in Indian country—agreements that do require federal approval. The panel declined to ascribe to the Tribes or the State an intent to condition their agreement—which neither deputizes non-federal officers to enforce federal law nor deputizes federal officers to enforce tribal law—on federal approval when neither party ever manifested such an intent. The panel wrote that even if the lack of a signature from the BIA representative on the 2003 amendment to the agreement impaired the validity of the amendment, it would not invalidate the trooper's commissioned status.

The panel wrote that the trooper's failure to carry an identification card was plainly a violation of the agreement. The panel noted, however, that none of the sovereign parties to the agreement appears to consider the violation sufficiently serious to seek any remedy for it, and explained that the Fourth Amendment does not strip the Tribes of the sovereign authority to decide how—or whether—to enforce the provisions of their own agreements.

COUNSEL

Megan M. Moore (argued), Watson Law Office PC, Bozeman, Montana, for Defendant-Appellant.

Leif M. Johnson (argued), United States Attorney; Jeffrey K. Starnes, Assistant United States Attorneys; United States Attorney's Office, Billings, Montana; for Plaintiff-Appellee.

OPINION

MILLER, Circuit Judge:

While driving on a highway that runs through the Fort Peck Indian Reservation in eastern Montana, Eric Fowler was stopped by a Montana state trooper. The stop led to the discovery of evidence that in turn led to federal criminal charges. Fowler is a member of an Indian tribe, and he argues that the state trooper lacked jurisdiction to stop him on the Reservation. But the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have a cross-deputization agreement with the State of Montana under which the Tribes have agreed to commission state police to act as tribal police where there is a gap between their respective criminal jurisdictions. Under that agreement, the state trooper who stopped Fowler was permitted to enforce tribal law, not just state law. We reject Fowler's challenges to the validity of the agreement, and we affirm the judgment of the district court, which denied Fowler's motion to suppress the evidence against him.

In the early 2000s, the Fort Peck Tribes entered into a cross-deputization agreement with the State of Montana and various local governments. The agreement authorized state

and local law-enforcement officers to be deputized to enforce tribal law against Indians on the Reservation, and, conversely, it allowed tribal officers to be deputized to enforce state law there. Specifically, the agreement provided that "certain officers of the local jurisdictions and [the Montana Highway Patrol] will be appointed as commissioned law enforcement officers of the Tribes" and, when acting within the Reservation, "shall have the same authority to arrest Indians for violations of Titles III and IX of the Tribal code and shall have the same authority to issue citations and/or summonses and to accept bond as officers of the Tribes." It also provided that officers commissioned under the agreement "must wear their insignia, if issued, and carry . . . identification cards with them at all times while acting under the authority of the commissioning agency."

In March 2000, the Tribal Executive Board formally adopted the cross-deputization agreement, and by the next month all parties to the agreement had signed, including the Bureau of Indian Affairs (BIA) of the Department of the Interior. An amendment followed in 2003 to add Valley County, Montana, to the agreement; the amendment made no substantive changes. But although the 2003 amendment stated that the BIA would be a party, the relevant official from the BIA did not sign. In 2016, the BIA wrote to the Tribes to say that because the federal government was not part of the 2003 agreement, none of the cross-deputized officers would be treated as deputized federal employees under the BIA's Special Law Enforcement Commission program, which allows designated officers to enforce federal law in Indian country. *See* 25 C.F.R. § 12.21.

Meanwhile, in 2014, the Tribes passed a resolution designating Trooper David Moon of the Montana Highway Patrol for cross-deputization and resolving that Moon be

"grant[ed] tribal arrest authority." Although Trooper Moon's authority was initially set to expire the following year, another tribal resolution made it "continuous . . . until the end of [his] employment."

On May 5, 2019, Trooper Moon was patrolling a stretch of U.S. Highway 2 that passes through the Fort Peck Reservation. Trooper Moon did not have an identification card to indicate that he had been cross-deputized, but he did wear a badge on his uniform to that effect. When he saw a Ford F-150 that lacked a license plate or temporary tag, Trooper Moon made a traffic stop. At some point during the encounter—the record does not reveal precisely when or how—Trooper Moon established that the driver, Fowler, was a tribal member.

Trooper Moon learned from a dispatcher that Fowler was registered as a violent offender and had a revoked driver's license. Trooper Moon gave Fowler a warning for driving without a license plate and issued citations for driving without a license, driving without insurance, and driving without a seatbelt. The citations charged Fowler with violations of tribal law and commanded him to appear in tribal court.

Trooper Moon impounded the vehicle. Before leaving, Fowler asked Trooper Moon to retrieve his coat from the truck. When Trooper Moon reached into the vehicle, he noticed a marijuana grinder in the pocket of the car door. Trooper Moon then had a dog sniff the vehicle. The dog alerted, and Trooper Moon subsequently sought and obtained a tribal search warrant for the truck. The search turned up a rifle and a sawed-off shotgun.

Fowler was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C.

§ 922(g)(1), and one count of possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d), based on the firearms seized from the truck. Fowler moved to suppress the evidence from the stop. After the district court denied that motion, Fowler entered a conditional plea of guilty to the section 922(g)(1) count, reserving his right to appeal. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. He now appeals the denial of the suppression motion, which we review de novo. *United States v. Ngumezi*, 980 F.3d 1285, 1287 (9th Cir. 2020).

The cross-deputization agreement was designed to address one of the many jurisdictional gaps in Indian country: While tribes have inherent authority to enforce tribal law against Indians on a reservation, they "lack inherent sovereign power to exercise criminal jurisdiction over non-Indians." *United States v. Cooley*, 141 S. Ct. 1638, 1641, 1643 (2021); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Instead, tribal police encountering "a non-Indian on a public right-of-way that runs through an Indian reservation" have the authority only "to detain temporarily and to search" the suspect "prior to the suspect's transport to the proper nontribal authorities for prosecution." *Cooley*, 141 S. Ct. at 1641. Conversely, state law-enforcement officers have the authority to enforce state traffic laws against non-Indian travelers on highways in a reservation. *See Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990), *superseded by statute on other grounds by* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in United States v. Lara*, 541 U.S. 193 (2004); *see also United States v. McBratney*, 104 U.S. 621 (1881). But they do not have the same authority to arrest tribal members. *See United States v. Patch*, 114 F.3d 131, 133–34 (9th Cir. 1997); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459

(2020). And until a driver is stopped, "it is impossible for [the] officer to tell who is operating an offending vehicle." *Patch*, 114 F.3d at 133–34.

Fowler seeks to pry that gap back open by challenging the validity of the cross-deputization agreement. Without the agreement, Trooper Moon would not have had authority to proceed with the traffic stop once he learned that Fowler was an Indian. Fowler has two theories: (1) the Tribes lack authority to deputize state law-enforcement officers to enforce tribal law or, in the alternative, (2) the Tribes explicitly conditioned the cross-deputization agreement on federal approval, which they did not receive. We find neither persuasive.

Fowler's first theory is that the Tribes lack the inherent sovereign authority to enter into a cross-deputization agreement with the State of Montana. He begins with the premise that "there is no mechanism provided by law that permits state law enforcement officers to exercise criminal jurisdiction over Tribal members" in these circumstances. Whatever the merits of that premise, it does not support Fowler's conclusion. Fowler conflates the exercise of state jurisdiction on the Reservation with the exercise of the Tribes' own authority. The cross-deputization agreement does not grant the State of Montana authority to enforce its own criminal laws on the Fort Peck Reservation. Instead, it allows certain state actors to enforce certain *tribal* laws. Specifically, it confers the "authority to arrest Indians for violations of Titles III and IX of the Tribal code and . . . the same authority to issue citations and/or summonses and to accept bond as officers of the Tribes." David Moon may happen to be State Trooper Moon, an employee of the State of Montana, but in his arrest and search of Fowler, he acted under the authority of the Tribes—not Montana.

The inherent sovereignty of a tribe "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). But the tribe itself, as a political entity, cannot investigate crimes or arrest offenders; only individuals can do that. The right to enforce tribal law necessarily includes the right to select those individuals—whether they are employees of the tribe, private contractors, or, as here, employees of another sovereign. *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). To be sure, "tribal authority remains subject to the plenary authority of Congress," *Cooley*, 141 S. Ct. at 1643, and it has also been limited "by implication as a necessary result of [tribes'] dependent status," so that, for example, tribes "cannot enter into direct commercial or governmental relations with foreign nations," *Wheeler*, 435 U.S. at 324, 326. For that reason, the Fort Peck Tribes presumably could not agree to let the Royal Canadian Mounted Police enforce tribal law on the Reservation. But nothing in the Tribes' dependent status precludes them from entering into such an agreement with the State of Montana.

Nor does anything in federal law. Fowler relies on 25 U.S.C. § 1326, which prescribes a mechanism by which a State may assume jurisdiction to enforce state criminal laws against Indians in Indian country. But, again, the cross-deputization agreement deputizes state officers to enforce tribal law, not state law. Section 1326 is therefore inapplicable here.

In fact, Congress has expressly provided for the Tribes' authority to enter into compacts such as the cross-deputization agreement. In the Indian Reorganization Act of 1934, Congress authorized tribes to adopt constitutions, and it provided that, "[i]n addition to all powers vested in any

Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the . . . [power] to negotiate with the Federal, State, and local governments." 25 U.S.C. § 5123(a), (e). The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation did just that, authorizing agreements with federal, state, and local governments "on all activities which may affect the Tribes." Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, art. VII, § 1. The cross-deputization agreement is a permissible exercise of the Tribes' sovereign authority to negotiate an agreement with the State of Montana.

That brings us to Fowler's second theory, which is that the agreement was written in such a way as to disclaim the Tribes' authority to compact with the State without federal approval. According to Fowler, because the Tribes made the BIA a party to the agreement with "approval" power, and the state troopers were designated as federal employees in the agreement, the agreement was conditioned on the approval of the BIA. Because the BIA's representative did not sign, the agreement must be invalid. We disagree.

Both the 2000 agreement and the 2003 amendment begin with a recitation of the signatories' respective authority to enter into the agreement. It says that the Tribes are authorized to compact by their own constitution and bylaws, the State by sections 18-11-101 to -112 of the Montana Code, and the federal government by "the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801 to -2804, [which] provides the Secretary of the Interior with the authority to enter into *and approve* such cooperative law enforcement agreements." (emphasis added). We do not read the use of the word "approve" as giving the BIA veto power over the agreement. In drafting the agreement, the Tribes

seem to have conflated the requirements of *any* cross-deputization agreement (no matter which sovereigns are involved) with those of the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2815. That statute allows the BIA—which traditionally has been responsible for the enforcement of federal criminal statutes on tribal lands—to enter into cross-deputization agreements (called Special Law Enforcement Commission agreements) to deputize tribal officers to enforce federal law in Indian country. *Id.* §§ 2801–04. Such agreements require federal approval.

But the cross-deputization agreement is not a Special Law Enforcement Commission agreement. It is a compact between the Tribes and the State, and it neither deputizes non-federal officers to enforce federal law nor deputizes federal officers to enforce tribal law. Consistent with that understanding, both the Tribes and the State have deputized officers under the agreement for two decades even though the BIA did not sign it, and they continued to do so even after the BIA made clear that the deputized officers would not be treated as federal employees. We will not ascribe to the Tribes or the State an intent to condition their agreement on federal approval when neither party ever manifested such an intent. *Cf. J.A. Jones Constr. Co. v. Plumbers & Pipefitters Local 598*, 568 F.2d 1292, 1294–95 (9th Cir. 1978) (reasoning that even a non-signing party may be bound by a contract "if he accepts it and both act in reliance on it as a valid contract" (quoting *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 315 F.2d 695, 699 (3d Cir. 1963))).

In any event, even if the lack of a signature from the BIA representative on the 2003 amendment impaired the validity of that amendment, it would not invalidate Trooper Moon's commissioned status. The 2003 amendment sought only to add Valley County to the 2000 agreement. Everyone else—

including the BIA—had signed the 2000 agreement, and the 2003 amendment made no substantive changes to it. The agreement executed in 2000 would not evaporate merely because some of the parties tried and failed to join Valley County as a party. Accordingly, Trooper Moon could be deputized under the 2000 agreement regardless of whether the 2003 amendment required the Secretary's approval.

In sum, because the cross-deputization agreement was valid, Trooper Moon was validly deputized to enforce tribal law, and he had jurisdiction to seize and search Fowler's truck. We therefore need not decide whether the Fourth Amendment would have been violated—or what the appropriate remedy might be—if Trooper Moon had lacked jurisdiction to seek a tribal search warrant. *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1173–75 (9th Cir. 2005).

Finally, Fowler observes that the cross-deputization agreement mandates that all cross-deputized state officers be issued and carry identification cards identifying the commissioning agencies for which they are authorized to act. The Tribes did not issue Trooper Moon an identification card until after the stop at issue here. Trooper Moon's failure to carry an identification card was plainly a violation of the agreement, but none of the sovereign parties to the agreement appears to consider the violation sufficiently serious to seek any remedy for it. Fowler does not explain why that provision of the agreement should be read to create judicially enforceable individual rights, *cf. Medellin v. Texas*, 552 U.S. 491, 505 (2008), or why the appropriate enforcement mechanism would be the suppression of evidence, *cf. Herring v. United States*, 555 U.S. 135, 140–41 (2009); *Virginia v. Moore*, 553 U.S. 164, 176 (2008). The Fourth Amendment does not strip the Tribes of the sovereign

authority to decide how—or whether—to enforce the provisions of their own agreements.

AFFIRMED.