

LETTER OPINION
97-L-117

July 30, 1997

Mr. Wade G. Enget
Mountrail County State's Attorney
PO Box 369
Stanley, ND 58784-0369

Dear Mr. Enget:

Thank you for your letter asking for an interpretation of N.D.C.C. § 57-27-02 on four questions you pose concerning service of notice of expiration of the period of redemption after issuance of a tax sale certificate.

N.D.C.C. § 57-27-02 provides, in part:

. . . .

2. If the current assessment records show that a residential building is located on the property, the county auditor shall deliver the notice of expiration of the period of redemption to the sheriff who shall serve it or cause it to be served personally upon the owner, if known to be a resident of this state. If the owner is a nonresident of this state, the sheriff shall serve the notice by certified mail addressed to the owner at the owner's last known post-office address and determine whether personal service upon any person is required under subsection 4. If the current assessment records show that no residential building is located on the property, the auditor shall serve the notice by certified mail addressed to the owner at the owner's last known post-office address. If service is made by certified mail under this subsection, service must also be made by publication once in each week for three consecutive weeks in the official county newspaper. If notice is published under this section, it must contain the description and any street address of the property. However, the failure to include the street address in the notice does not affect the validity of the notice.

3. Within ten days after a request by the county auditor, the register of deeds and the clerk of the district court shall furnish the county auditor with a certified list giving the names and addresses of all persons who appear to be interested as owners, mortgagees, lienholders, or otherwise in the property except a person whose only interest is in a mineral interest that was severed from the surface estate before the filing of any unsatisfied lien or mortgage or before January first of the year following the year for which the taxes were levied and to which the tax sale certificate issued or deemed to have been issued relates, upon whom the notice of the expiration of the period of redemption must be served.
4. The notice must be served personally upon any person actually residing upon the property covered by a tax sale certificate and upon any tenant or other person entitled to the possession of the property as may appear from the records of the register of deeds.
5. The county auditor shall serve the notice of the expiration of the period of redemption upon each mortgagee, lienholder, and other person with an interest in the property except a person whose only interest is in a mineral interest that was severed from the surface estate before the filing of any unsatisfied lien or mortgage or before January first of the year following the year for which the taxes were levied and to which the tax sale certificate issued or deemed to have been issued relates, and upon whom personal service is not required by this section, as shown by the records of the register of deeds or the clerk of the district court of the county. The notice must be served by certified mail.

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N.D.C.C. § 57-27-02(2) requires the county auditor to determine from current assessment records whether a residential building is located on the property in question. If that determination is made in the affirmative, the county auditor delivers the notice of expiration of the period of redemption to the sheriff who is required to serve "or cause it to be served" personally upon the owner, if known to be a

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resident of this state. N.D.C.C. § 57-27-02(4) requires the notice to be served personally upon any person actually residing on the property covered by the tax sale certificate and upon any tenant or other person entitled to possession of the property as may appear from the records of the register of deeds.

You ask who must make the determination on whether a tenant or other person actually resides on the property covered by a tax sale certificate. From the above provisions, it is my opinion that the sheriff must determine if any person actually resides upon the property covered by the tax sale certificate and serve or cause to be served personally on that person the notice of expiration of the period of redemption.

If a residential building is located on the property, the sheriff must personally serve or cause to be served on the owner the notice of expiration if the owner is known to be a resident of the state. Because an owner might not actually live on the property in question, the sheriff must determine whether either the owner, a tenant or other person entitled to the possession of the property as may appear from the records of the register of deeds, or some other person is actually residing upon the property in order to fulfill all of the potential service requirements for persons interested in the property.

You also ask whether the auditor or some other county official must personally inspect the property to determine if anyone actually resides on the property, or whether they may rely on the records of the register of deeds. The above-noted portions of N.D.C.C. § 57-27-02 permit the county auditor to rely on assessment records to determine the presence of residential buildings located on the property. N.D.C.C. § 57-27-02(2). Those provisions also permit reliance on the records of the register of deeds to determine if there is "any tenant or other person entitled to the possession of the property as may appear from the records of the register of deeds." N.D.C.C. § 57-27-02(4). However, for determining whether there is "any person actually residing upon the property covered by the tax sale certificate" a personal inspection is required. As noted earlier, personal service of the notice of expiration of the tax sale certificate may be required on the record title owner as determined by the auditor, on a tenant or other person entitled to possession of the property as may appear from the records of the register of deeds, and on any person actually residing upon the property. Because assessment records and real property records maintained by the register of deeds do not show whether the property

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is actually occupied by anyone, it is my opinion that the property must be personally inspected to make that determination and that the personal inspection should be made by the sheriff.

Personal service of documents within the boundaries of Indian reservations upon enrolled members of the local tribe remains an unsettled issue. In an opinion to the Rolette County State's Attorney, I discussed the complexities of the subject and described the split of authority thereon between the various jurisdictions. I am attaching to this opinion, and incorporating herein, 1994 N.D. Op. Att'y Gen. L-245 upon which you should rely in advising your county sheriff in obtaining personal service of enrolled tribal members residing on the reservation of the tribe in which enrolled. Since that opinion, a Wisconsin court has held that state service of process upon an Indian in Indian country does not infringe upon tribal sovereignty. Landreman v. Martin, 530 N.W.2d 62 (Wis. Ct. App. 1995). Despite this decision, the law in this area is still too unsettled for me to conclude with confidence that a sheriff's on-reservation service upon an Indian is proper. In the instant case, the sheriff is required to make personal service under certain circumstances, so cooperation of tribal authorities should be sought, and the degree of and extent of any assistance provided, or the refusal to provide services and assistance, should be thoroughly documented by the sheriff.

Your last question concerns whether the sheriff may designate another process server to serve the notice of expiration of the period of redemption. For purposes of personal service, subsection 2 of N.D.C.C. § 57-27-02 provides that after the county auditor determines the existence of a residential building on the property, the auditor delivers the notice to the sheriff "who shall serve it or cause it to be served personally." In addition to the personal service required on the owner under subsection 2 of N.D.C.C. § 57-27-02, subsection 4 of that section requires the notice to be served personally on any person actually residing on the property and on any tenant or other person entitled to the possession of the property as appears from the records of the register of deeds. It is my opinion that the personal service required in subsection 4 relates back to the duties of the sheriff to make personal service under subsection 2.

For your question, the significant language is "or cause it to be served." In State v. Stockwell, 134 N.W. 767 (N.D. 1912), the North Dakota Supreme Court opined on the meaning of the phrase "or cause to be examined" where the Superintendent of Public Instruction was to examine certain teacher answer papers for teacher's certificate

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examinations. The Supreme Court declared that language to mean that it was the duty of the Superintendent to discharge the responsibility either by doing it himself or causing the performance of the work by others. The court stated that the phrase "or cause to be examined," where the officer in question is required to examine or cause to be examined the teacher's answer papers, "is as regards official action the equivalent of the individual performance of it by the officer." 134 N.W. at 779.

Consequently, the duty of the sheriff to make personal service of the notice of expiration of the period of redemption under subsections 2 or 4 of N.D.C.C. § 57-27-02 may be performed either by the sheriff in person or by others the sheriff causes to perform the service, and the sheriff's duty is discharged by either doing the service personally or by causing the performance of the service by another. It is therefore my opinion that a sheriff required to make personal service under N.D.C.C. § 57-27-02 may perform the work personally or may cause the service to be made by others in the sheriff's employ or by some other process server whose services are hired by the sheriff. The identity of a sheriff's designee for performing service could be decisive on the issue of validity of service on a reservation, based on whether the tribe recognizes the designee as having authority on the reservation.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
Enclosure