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NO. 87376-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

MICHAEL ALLEN CLARK,
Petitioner.

STATE'S RESPONSE TO AMERICAN CIVIL LIBERTIES UNION
AND COLVILLE CONFEDERATED TRIBES' AMICUS CURIAE BRIEFS

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I. INTRODUCTION

Amici curiae, American Civil Liberties Union of Washington (ACLU) and Colville Confederated Tribes (CCT), relying upon secondary authorities and a concept of tribal sovereignty that is unsupported by the case law, ask this Court to suppress evidence seized pursuant to a validly issued warrant. Adopting the ACLU's and CCT's policy would place this Court in direct conflict with the United States Supreme Court's decisions in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), and *Utah & Northern Railway v. Fisher*, 116 U.S. 28, 6 S. Ct. 246, 29 L. Ed. 2d 542 (1885). It would conflict in principle with this Court's recent unanimous decision in *State v. Cayenne*, 165 Wn.2d 10, 195 P.3d 521 (2008). As shown by Amicus Washington Association of Prosecuting Attorneys, declaring trust property immune from service of process on behalf of Washington Courts could prevent both civil and criminal litigants from obtaining critical testimony, could deprive battered women of needed protection, and could reduce minority participation on juries.

The following is a brief response to selected points in the amicus briefs filed by the ACLU and CCT. Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be covered in the State's brief, in the brief filed by the Washington Association of Prosecuting Attorneys (WAPA), or in the materials cited

therein.

II. ISSUE PRESENTED

The sole issue before this Court is whether the United States Constitution requires a state police officer to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land within an Indian reservation? Suppl. Br. Pet. at 1. There is no dispute that the state court warrant is otherwise valid, and amici do not disagree that state court warrant concerned criminal activity over which the State has subject matter jurisdiction.

III. ARGUMENT

A. WASHINGTON STATE COURT PROCESS MAY BE LAWFULLY SERVED ANYWHERE WITHIN THE STATE OF WASHINGTON

Neither the United States Constitution, the Washington State Constitution, the Washington Enabling Act, nor any federal statute excises reservation lands from the territory of the State. To the contrary, “it is now clear, ‘an Indian reservation is considered part of the territory of the State.’” *Hicks*, 533 U.S. at 362, quoting U.S. Dept. Of Interior, Federal Indian Law 510, and n. 1 (1958). *Accord State v. Cayenne*, 165 Wn.2d 10, 15, 195 P.3d 521 (2008). State courts may serve court process within a reservation so long as the matter is one for which the state court has jurisdiction. *Nevada*

v. Hicks, supra (criminal process);¹ *Utah & Northern Railway v. Fisher, supra* (civil process). State court process that may be served within a reservation includes search warrants, when the State court's have jurisdiction over the criminal offense. *Hicks*, 533 U.S. at 363.

Both CCT and the ACLU devote significant portions of their briefs to Public Law 280 and Chapter 37.12 RCW. ACLU Amicus Brief, at 11-12; CCT Amicus Brief, at 3-11. Both Public Law 280 and Chapter 37.12 RCW post-date the Supreme Court's opinion authorizing service of territorial court process within an Indian reservation by more than 50 years. *Compare Utah & Northern Railway v. Fisher*, 116 U.S. 28, 6 S. Ct. 246, 29 L. Ed. 2d 542 (1885), *with* Pub. L. No. 83-280, 67 Stat. 588 (1953), and Laws of 1957, ch. 240, § 1. Public Law 280 does not contain any provision that limits the reach of state court process that was announced in the *Utah Northern Railway* case. *See Hicks*, 533 U.S. at 366 ("Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations

¹The ACLU and CCT both characterize *Hicks* as a plurality opinion and claim that its holding regarding service of process within a reservation is dicta. These arguments are contrary to the plain language of the case. *See generally* WAPA Amicus Brief at 7-8. Their arguments are similar to those rejected by the federal court in *Confederated Tribes and Bands of the Yakima Nation v. Holder*, No. CV-11-3028-RMP, 2012 U.S. Dist. Lexis 48586 (Apr. 4, 2012) (Denying the Nation's motion to reconsider the denial of the injunction on the grounds that the Nation will not prevail on the merits and stating that "The Nation's attempts to characterize the *Hicks* majority as a plurality or its relevant language as dicta are unconvincing."). This unpublished opinion is reproduced in WAPA Amicus Brief at B-7 to B-9.

of state law occurring off the reservation.”). No provision of Chapter 37.12 RCW prohibits state officers from entering trust property to serve state court process.

CCT claims that *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980), prevents the application of *Hicks* in Washington. CCT Amicus Brief at 3-5. *Powell*, in actuality, supports the State’s position.

In *Powell*, the trial court dismissed an action between an Indian and a non-Indian for lack of jurisdiction over the subject matter. 94 Wn.2d at 784. This Court first acknowledged that Washington had not expressly assumed jurisdiction over this particular action which would clearly have an impact on tribal property. *Id.* at 784-85. The Court determined that in such cases, the question of authority or power is whether state action infringes upon the right of reservation Indians to make their own laws and to be governed by them. *Id.* at 786. This is the same test that resulted in the *Hicks* Court concluding

that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations -- to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.

Hicks, 533 U.S. at 364.

CCT raises an irrelevant point when it asserts that Mr. Clark's theft of property from a non-Tribal business on a parcel of fee simple property located within the exterior boundaries of the reservation constituted "an offense against the Tribes." CCT Amicus Brief, at 12 n. 6. Tribal jurisdiction over a criminal offense does not deprive the State of jurisdiction over the same offense. *See State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002) (neither constitutional prohibitions upon double jeopardy nor the double jeopardy statute bars the State from prosecuting tribe member previously convicted in tribal court for similar offenses based upon same incident).

The amici arguments do not undermine the constitutionally relevant facts: the state court warrant was valid and concerned a crime over which the State has jurisdiction. Under *Hicks* and *Utah Northern Railway*, there is no barrier to service of the process on Clark, and no basis for excluding the evidence seized in the search.

**B. EXTRA-CONSTITUTIONAL STUMBLING BLOCKS
SHOULD NOT BE PLACED BEFORE POLICE OFFICERS
WHO ARE SEEKING WARRANTS**

Both this Court and the United States Supreme Court "have consistently, in sitting on search warrant cases, adhered to a policy which encourages peace officers in the discharge of their duties to apply for judicial authority to make a search rather than proceed without the intervention of the

courts.” *State v. Patterson*, 83 Wn.2d 49, 60-61, 515 P.2d 496 (1973).
Accord United States v. Ventresca, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L.
Ed. 2d 684 (1965). Rules regarding search warrants must be directed, not to
legal scholars but to lay men as warrants “are normally drafted by
nonlawyers in the midst and haste of a criminal investigation.” *Id.*

The ACLU and CTT are asking this Court to adopt a policy that
would discourage officers from obtaining search warrants. They would
require state officers to obtain not one, but two warrants, before conducting
a search.

Moreover, the amici positions create a potential problem for state
court officers who mistake the tribal warrant for constitutional authority to
search. A state officer who entered a Washington home solely pursuant to a
search warrant issued by a tribal court judge would not be acting in
accordance “with authority of law” under Article 1, section 7. A general
authority Washington police officer, such as the City of Omak officers in this
case, are commissioned to enforce state and municipal law. *See* RCW
10.93.020. A general authority Washington police officer is not authorized
to enforce the laws of any tribal government.

Moreover, a general authority Washington police officer is trained to
enforce state and municipal laws in compliance with the United States

Constitution and the Washington Constitution.² The constitutions and statutes that guide state officers require them to obtain a search warrant from a “magistrate.” *See, e.g.*, RCW 10.79.015. Tribal court judges are not included in the state law definition of magistrate. *See* RCW 2.20.020.³ Court rules, moreover, currently limit the issuance of search warrants to the “courts of general jurisdiction of the State of Washington”, CrR 1.1 and CrR 2.3(a), or to any Washington “court of limited jurisdiction, CrRLJ 1.4(a) and CrRLJ 2.3(a). Those courts only act through state court judges and commissioners.

Seeking a tribal warrant is fraught with further problems for officers. A search warrant may only issue “upon probable cause, supported by Oath or affirmation”. U.S. Const. amend. IV. The “oath or affirmation” protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information. *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, 478 (Wis. 2001). The “oath or affirmation” requirement is

²Neither constitution applies to tribal governments and/or tribal courts. *See, e.g., Settler v. Lameer*, 507 F.2d 231, 241-42 (9th Cir. 1974); *Young v. Duenas*, 164 Wn. App. 343, 356,262 P.3d 527 (2011), *review denied*, 173 Wn.2d 1020 (2012).

³A judge from another jurisdiction may be authorized by law to issue a warrant, but the authority must be explicitly granted in court rule or statute. *See, e.g., Fed. Rules Criminal Procedure Rule 41(b)(1)* (“(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government: (1) a magistrate judge with authority in the district--or if none is reasonably available, a judge of a state court of record in the district--has authority to issue a warrant to search for and seize a person or property located within the district;”).

not satisfied if perjury charges cannot be brought when a material allegation contained in the search warrant application is false. *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004), *cert. denied*, 543 U.S. 1129 (2005). But a state officer is not subject to criminal perjury prosecution by tribal court. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) (as a result of their status within the United States, Indian Tribes do not have inherent jurisdiction to try and punish non- Indians). Thus, an oath administered by a tribal court judge or false statements made in the context of a tribal court proceeding create a cloud over the validity of the warrant because it will not support prosecution under state law for perjury. *See* RCW 9A.72.010(3) and (4); RCW 9A.04.110(8) and (13).

Ultimately, the ACLU and CTT are asking this Court to adopt a policy that would increase the possibility of evidence being destroyed or perpetrators escaping by requiring officers to go to not one court for a warrant, but two. A state police officer facing the imminent destruction of evidence or the flight of a suspect, may obtain a search warrant telephonically. *See* CrR 2.3(c); CrRLJ 2.3(c). It is unclear which, if any, of Washington's 29 federally recognized tribes have the capability and/or procedures authorizing the issuance of warrants outside of the court's normal business hours and/or courtroom.

A state police officer may, to protect an investigation, obtain a state court order that restricts public access to applications for search warrants and search warrants must sometimes be delayed until the filing of charges to protect an investigation. *See Seattle Times v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981). It is unclear which, if any, of Washington's 29 federally recognized tribes offer similar protection to an on-going investigation.

The ACLU and CTT would also require every state officer⁴ to become versed in the ordinances governing all 29 federally recognized tribes. There is, however, no single source for such ordinances or court rules. *See* WAPA Amicus Brief, at 18. There is not even a current list of court hours or after hour contact information for the judicial officers for all of the courts of Washington's federally recognized tribes.⁵

The ACLU and CTT's tribal court warrant in addition to a state court warrant rule, could place certain evidence beyond the reach of any court. CTT's search warrant ordinance that was in effect on January 5, 2010, only authorized a tribal court warrant when the offense was "against the Tribes".

⁴*See* RCW 10.93.070(5) (a general authority Washington peace officer may execute a search warrant anywhere within the territorial bounds of this state).

⁵The State recognizes that this Court has taken steps to foster cooperation by publishing an on-line directory of Washington Tribal Courts. This directory is available at http://www.courts.wa.gov/court_dir/orgs/134.html (Last visited Jan. 10, 2013).

Former Colville Tribal Code 2-1-35. Similar language exists in other current tribal court codes. See, e.g., Makah Law and Order Code § 2.2.05. Available at <http://narfl.securesites.net/nill/Codes/makahcode/makahlawt2.htm#2title> (last visited Dec. 13, 2012).

One can easily imagine a murder being committed at a location that is outside the exterior boundaries of the offender's reservation. The offender, if an Indian, could return with the murder weapon and other evidence to his reservation trust property residence. In such a case, no crime has been committed against the tribe and no warrant can be validly issued by the tribal court. The safety of both Indians and non-Indians, reservation residents and non-reservation residents, are undermined in such cases.

CCT grudgingly acknowledges some of these difficulties by positing that a watered-down reasonable efforts rule might be a reasonable substitute for a hard and fast two warrant rule. This proposal, however, is unworkable. Who is to judge whether the police's efforts were reasonable? Are doubts to be resolved in favor of the warrant? See *State v. Woodall*, 100 Wn.2d 74, 78, 666 P.2d 364 (1983) ("search warrants must be tested in a commonsense manner rather than hypertechnically and that doubts should be resolved in favor of the warrant"). If state court service of process is invalid on trust property within the reservation, how does either party produce evidence of a

particular tribe's ordinances, court procedures, and customs?⁶ This proposal promises endless litigation.

It is well established that “the complicated jurisdictional scheme that exists in Indian country ... has a significant negative impact on the ability to provide public safety to Indian communities.” Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2262 (2010). Adding an additional extra-constitutional two search warrant requirement to the current morass will only frustrate legislative and executive branch efforts to respond to attempts to reduce the significantly higher rates of violent crimes, rape, and domestic violence within our nations' reservations. *See generally* Tribal Law and Order Act of 2010, P.L. 111-211, 124 Stat. 2262;⁷ Chapter 10.92 RCW.

C. SUPPRESSION OF EVIDENCE IS NOT APPROPRIATE
TO VINDICATE A VIOLATION OF ANOTHER'S RIGHTS

Cooperation and coordination between state and tribal government

⁶Tribal court staff, tribal police officers, and tribal prosecutors would all be logical witnesses. Absent their voluntary attendance in state court or their voluntary production of evidence, all of these tribal officials would be able to assert the tribe's sovereign immunity to state process. *See generally* *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 147 P.3d 1275 (2006), *cert. dismissed*, 550 U.S. 931 (2007); *Young v. Duenas*, 164 Wn. App. 343, 262 P.3d 527 (2011), *review denied*, 173 Wn.2d 1020 (2012).

⁷In the three years leading up to the passage of the Tribal Law and Order Act of 2010, Congress held 17 hearings on various aspects of violence on Indian lands from domestic and sexual violence against women and children to drug smuggling and gang activity. These hearings revealed that Indian reservations nationwide face violent crime rates more than 2.5 times the national rate. Some reservations face more than 20 times the national rate of violence. More than 1 in 3 American Indian and Alaska Native women will be raped in their lifetimes, and 2 in 5 will face domestic or partner violence. *See* Pub. L. No. 111-211, § 202(a)(2), 124 Stat. 2262 (2010).

should be encouraged and fostered. Both sovereigns need to be respectful of the other. When, as here, an opportunity for cooperation is missed, the executive branches should meet and determine how to do better in the future. A slight to one sovereign, however, does not confer a remedy to an individual whose state and federal constitutional rights were honored. *Cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006) (the violation of the duty owed to Mexico pursuant to the Vienna Convention⁸ does not provide a basis to suppress evidence in a criminal trial); *State v. Jamison*, 105 Wn. App. 572, 20 P.3d 1010, *review denied*, 144 Wn.2d 1018 (2001) (suppression of statements given voluntarily after a valid waiver of *Miranda* rights was not a remedy for violation of Vienna Convention on Consular Relations).

Clark is not the CCT. The duties and obligations created by treaties, executive orders, and congressional acts belong to the tribe, not to individual members. A tribe and tribal officials enjoy sovereign immunity from lawsuits. Individual tribal members do not. A tribe has an enforceable interest in a proportionate share of the fishing harvest. An individual tribal member does not. *United States v. Gallaher*, 275 F.3d 784, 789 (9th Cir. 2001) (“The treaty rights allegedly abridged belong to the tribe as a whole

⁸ Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

and not to any one individual.”). This distinction between a tribal member and the tribe and tribal government appears throughout the training materials utilized by Washington prosecutors and police officers. These materials indicate that tribal warrants will be needed when a suspect is in tribal custody or when the evidence being sought is tribal records or property. In other cases, state warrants are adequate.⁹ *See generally* Pamela B. Loginsky, *Criminal Jurisdiction Issues in Indian Country*, Newly Elected Sheriff Course, at 8-10 (December 6, 2010);¹⁰ Pamela B. Loginsky, *Confessions, Search, Seizure, and Arrest a Guide for Police Officers and Prosecutors*, at 186 and 339 (June 2012).¹¹

The entity that claims to be harmed by the Omak Police Officer’s constitutionally appropriate action of obtaining and executing a state court

⁹WAPA does remind attorneys and officers that

Washington tries to be respectful of Tribal Governments. *See generally* Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington (Aug. 4, 1989). When the integrity of the State’s investigation will not be unduly compromised, state officers should consider coordinating with Tribal police officers prior to executing warrants. State officers may also wish to consider obtaining a parallel Tribal search warrant. Officers should consult their supervisors and/or legal advisors for guidance in this sensitive area.

Pamela B. Loginsky, *Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors*, at 186 (June 2012).

¹⁰A copy of these materials is contained in appendix A.

¹¹This document is available at <http://www.waprosecutors.org/MANUALS/search/May%202012%20%20final%20Search%20Seizures%20and%20Confessions.pdf> (last visited Jan. 10, 2012).

search warrant was the CCT. But as *Hicks* recognizes, there is no constitutionally significant harm to a tribe by the state's service of criminal process when the state has subject matter jurisdiction over a crime. *Hicks*, 533 U.S. at 364. ("The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.") Moreover, the CCT's stated goal is not to provide immunity prosecution for Clark. CCT Amicus Brief at 20.

Granting Clark's motion to suppress, moreover, is inconsistent with the rule that one person cannot assert the rights of another. The remedy for the unlawful seizure of evidence is suppression in any case in which the wronged person is a party. The evidence may, however, still be admitted in cases in which the wronged person is not a party. *See, e.g., State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998) (evidence obtained in violation of the husband's constitutional rights was still admissible against his wife); *State v. Picard*, 90 Wn. App. 890, 895-97, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998) (space heater that was seized in violation of the defendant's mother's Fourth Amendment rights could be utilized by the State in its arson prosecution of the defendant).

Here, Clark's constitutional rights were all honored. The search warrant was fully supported by probable cause. The search warrant was

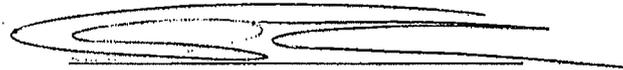
issued by a state court judge. The warrant describing the place to be searched and the things to be seized with particularity. The search warrant was served by police officers from the agency that obtained the warrant. Clark's motion to suppress evidence was properly denied. His conviction must be affirmed.

IV. CONCLUSION

State court process, including search warrants, is valid throughout an Indian reservation so long as the state courts have jurisdiction over the criminal action. Clark conceded jurisdiction over the criminal charge, his conviction must be affirmed.

Respectfully submitted this 10th day of January, 2013.

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APPENDIX A

CRIMINAL JURISDICTION ISSUES IN INDIAN COUNTRY

Newly Elected Sheriff Course, December 6, 2010

By Pamela B. Loginsky, Staff Attorney¹

I. INTRODUCTION

Jurisdiction over criminal offenses committed in Indian country is a function of the severity of the offense, whether the offense is criminal or a civil infraction, the status of the land upon which the crime occurred, and whether the offender is an Indian or non-Indian. Frequently, two separate jurisdictions, tribal and state or tribal and federal, will have jurisdiction over the very same offense. The confusing tangle of jurisdiction--federal, state and tribal--which governs law enforcement in Indian country, has prompted one commentator to state that the subject of regulation of unusual activity on federal Indian reservations is one of the most intricate of Indian affairs issues. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. Kan. L. Rev. 387 (1974).

Congress recently found that “the complicated jurisdictional scheme that exists in Indian country (A) has a significant negative impact on the ability to provide public safety to Indian communities; (B) has been increasingly exploited by criminals; and (C) requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials.” Tribal Law and Order Act of 2010; P.L. 111-211, Title II, § 202(a)(4), 124 Stat. 2262. Congress responded to these challenges by enacting the Tribal Law and Order Act of 2010. This new Act compliments recent efforts undertaken by the Washington Legislature.

These materials contain a basic summary of the existing rules regarding jurisdiction over criminal offenses in Indian Country, a summary of recent legislative actions, and a discussion of two recurring issues.

II. BASIC LAW

A. DEFINITIONS

1. What is Indian Country

“Indian country” is a term of art that is defined in 18 U.S.C. § 1151 as follows:

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The views expressed are those of the author. They do not necessarily represent the views of the Washington Association of Prosecuting Attorneys.

Except as otherwise provided in sections 1154 and 1156 of this title [18 USCS §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Patented lands are included within a reservation regardless of whether the patents are issued to Indians or non-Indians. Lands are included in a reservation even if they are owned in fee simple by non-Indians, towns, or the state. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962); *United States v. Grey Bear*, 636 F. Supp. 1551 (N.D. 1986).

2. Who are Indians

The term "Indian" may be used in an ethnological or in a legal sense. The term may be defined one way by a tribe for purposes of determining its own membership, and differently by Congress for administrative purposes. Congress has defined the term "Indian" for a wide variety of purposes, including eligibility for social programs, matters, preference in governmental hiring, and administration of tribal property.

For the purposes of criminal jurisdiction, a person is an Indian if he has (1) a substantial percentage of Indian blood and (2) tribal or federal recognition as an Indian. *See, e.g., State v. Daniels*, 104 Wn. App. 271, 278, 16 P.3d 650 (2001); *Goforth v. State*, 644 P.2d 114, 116 (Okla. Ct. App. 1982). At least one court has held that the ethnicity prong, as a matter of law, requires the person to have more than one-eighth Indian blood. *Vialpando v. State*, 640 P.2d 77, 80 (Wyo. 1982). This view, however, is not universally held. *See Scully v. United States*, 195 F. 113 (8th Cir. 1912). Early Washington criminal laws defined Indians as persons with greater than one-eighth Indian blood. *See State v. Nicolls*, 61 Wash. 142, 112 P. 269 (1910) (crime of selling liquor to an Indian).

"The second prong of this test, recognition as an Indian, has also been stated as 'a sufficient non-racial link to a formerly sovereign people.'" *State v. LaPier*, 242 Mont. 335, 790 P.2d 983, 986 (1990), quoting *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D. S.D. 1988). Courts look at the following factors to determine whether a defendant has satisfied the "recognition" prong of the test:

In a declining order of importance, these factors are: 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person with assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life. These factors do not establish a precise formula for determining who is an Indian. Rather they merely guide the analysis of whether a person is recognized as an Indian.

Daniels, 104 Wn. App. at 279, quoting *St. Cloud*, 702 F. Supp. at 1461 (footnote omitted).

Enrollment in a tribe will generally, but not always, establish that a person is an "Indian" for criminal law purposes. See, e.g., *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978) (enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members); *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988); *State v. LaPier*, 242 Mont. 335, 790 P.2d 983, 986 (1990).

The tribe in which a person is enrolled must be federally recognized. A person is not an Indian for purposes of criminal law jurisdiction if they are a member of a terminated tribe or a member of a tribe that is not recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs ("BIA"). *United States v. Antelope*, 430 U.S. 641, 646-47 n. 7, 51 L. Ed. 2d 701, 97 S. Ct. 1395, 1399 n. 7 (1977); *St. Cloud v. United States*, supra; 25 U.S.C. § 479; *State v. Dennis*, 67 Wn. App. 863, 840 P.2d 909 (1992); *Daniels*, 104 Wn. App. at 280. A list of all federally recognized tribes can be found in the Federal Register and on the BIA web site at: <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>.

Early Washington cases and cases from other jurisdictions generally place the burden upon the defendant to establish that he is an Indian, and thus not subject to state criminal law jurisdiction by a preponderance of the evidence. See, e.g., *State v. Williams*, 13 Wash. 335, 43 P. 15 (1895); *State v. Klindt*, 782 P.2d 401 (Okl. Ct. App. 1989); *State v. St. Francis*, 151 Vt. 384, 563 A.2d 249 (1989). See also, *State v. Courville*, 36 Wn. App. 615, 622, 676 P.2d 1011 (1983) (assertion of treaty rights as an affirmative defense must be proved by the defendant by a preponderance of the evidence).

More recent cases merely place the "burden of contesting" the State's jurisdiction upon the defendant. This burden "requires only that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction." *State v. L.J.M.*, 129 Wn.2d 386, 395, 918 P.2d 898 (1996) (footnote omitted); accord *Daniels*, 104 Wn. App. at 274-75. The case law is unclear on whether a judge or jury makes the credibility determination when the facts are disputed.

An Indian criminal defendant can challenge state jurisdiction at any time: arraignment, plea, sentencing, or in a collateral attack on the conviction. *Arquette v. Schneckloth*, 56 Wn.2d 178, 179-80, 351 P.2d 921 (1960). A guilty plea will not bar a later challenge to jurisdiction. *Wesley v. Schneckloth*, 55 Wn.2d 90, 93, 346 P.2d 658 (1959); *Daniels*, 104 Wn. App. at 275.

B. FEDERAL JURISDICTION

Congress has broad power to define whether tribal, federal, or state courts may punish crimes that occur within Indian country. In exercising this power, Congress has enacted the Major Crimes Act, the Indian Country Crimes Act, and the Assimilative Crimes Act.

The Major Crimes Act, 18 U.S.C. 1153, gives the federal government jurisdiction over fifteen enumerated offenses. The Major Crimes Act applies to offenses committed by an Indian

against the person or property of another Indian or non-Indian. The fifteen crimes are (1) murder; (2) manslaughter; (3) kidnapping; (4) maiming; (5) aggravated sexual assault as defined by 18 U.S.C. §§ 2241 et seq; (6) incest; (7) assault with intent to commit murder; (8) assault with a dangerous weapon; (9) assault resulting in serious bodily injury as defined in 18 U.S.C. § 1365; (10) an assault against an individual who has not attained the age of 16 years; (11) felony child abuse or neglect; (12) arson; (13) burglary; (14) robbery; and (15) embezzlement or theft as defined by 18 U.S.C. § 661. Federal jurisdiction under the Major Crimes Act is concurrent with state jurisdiction for offenses committed on or after July 29, 2010, if: (A) the Indian tribe requests concurrent jurisdiction; and (b) the Attorney General consents to concurrent jurisdiction. 25 U.S.C. § 1321(a)(2).

The Indian Country Crimes Act, 18 U.S.C. 1152, is more commonly referred to as the General Crimes Act. It was primarily enacted to punish interracial crimes, and it provides that the criminal laws enacted by Congress for federal enclaves shall also apply to Indian Reservations. The Act does not apply to (1) offenses committed by one Indian against another Indian, or (2) offenses committed by an Indian against a non-Indian when the Indian is punished by the tribe, or (3) offenses over which a treaty gives the tribe exclusive jurisdiction. 18 U.S.C. 1152. The Act also does not apply to offenses committed by one non-Indian against another non-Indian, *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1882); rather states are generally considered to have exclusive jurisdiction over offenses by non-Indians against non-Indians in Indian country. In addition, most courts have ruled that the Act does not apply to “victimless crimes”, such as DUI and drug possession, committed by non-Indians in Indian Country. *See, e.g., State v. Herber*, 123 Ariz. 214, 598 P.2d 1033 (App. 1979); *State v. Snyder*, 807 P.2d 55 (Idaho 1991); *State v. Thomas*, 233 Mont. 451, 760 P.2d 96 (1988); *State v. Jones*, 92 Nev. 116, 546 P.2d 235 (1976); *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963). Federal jurisdiction under the Indian Country Crimes Act is concurrent with state jurisdiction for offenses committed on or after July 29, 2010, if: (A) the Indian tribe requests concurrent jurisdiction; and (b) the Attorney General consents to concurrent jurisdiction. 25 U.S.C. § 1321(a)(2).

The Assimilative Crimes Act, 18 U.S.C. 13, requires federal courts to apply state criminal laws to conduct occurring on-reservation not punishable by any federal criminal law, but which would be punishable under the laws of the state where the reservation is located if the conduct occurred off-reservation. Thus, the Assimilative Crimes Act is intended to fill any gaps which might exist in the federal criminal law. Federal jurisdiction under the Assimilative Crimes Act is exclusive and not concurrent with state jurisdiction. *Arquette v. Schneckloth*, 56 Wn.2d 178, 182-83, 351 P.2d 921 (1960). Civil regulatory laws, such as speeding laws, cannot be applied to offenses committed on federal enclaves under the Assimilative Crimes Act. *United States v. Carlson*, 900 F.2d 1346 (9th Cir. 1990).

In addition to the authority provided by the Major Crimes Act, the Indian Country Crimes Act, and the Assimilative Crimes Act, the federal government may punish Indians and non-Indians who commit acts in Indian Country which violate general federal criminal laws of nationwide applicability. *See United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994); *see also United States v. Errol D., Jr.*, 292 F.3d 1159, 1164-65 (9th Cir. 2002) (stating that 18 U.S.C. § 641, which prohibits the theft of government property, applies to Indians in Indian country); *United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991) (holding that 18 U.S.C. § 111, which prohibits assaults

on federal officers; 18 U.S.C. § 922(g), which prohibits the possession of a firearm by a convicted felon; and 18 U.S.C. § 924(c), which penalizes the use of a firearm during a crime of violence; are all federal laws of nationwide applicability that may be applied to Indians in Indian country); William C. Canby, *American Indian Law* 153 (4th ed. 2004) (citing more examples). Laws of "nation-wide applicability" are laws "that make actions criminal wherever committed." *Begay*, 42 F.3d at 498.

C. STATE JURISDICTION

Criminal jurisdiction in Indian Country was initially limited to crimes committed by non-Indians against non-Indians, or "victimless offenses". *E. g.*, *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S. Ct. 307, 90 L. Ed. 261 (1946); *Washington v. Lindsey* 133 Wash. 140, 233 P. 327 (1925) (violation of state prohibition laws). The state also generally had jurisdiction to try Indian offenders for crimes committed outside reservation boundaries. *E.g. State ex rel. Best v. Superior Court for Okanogan County*, 107 Wash. 238, 181 P. 688 (1919); *State v. Williams*, 13 Wash. 335, 43 P. 15 (1895). But if the crime was by or against an Indian within the reservation, tribal jurisdiction or that expressly conferred on other courts by Congress remained exclusive. *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

In 1953 Congress enacted Public Law 280, which delegated to the state power to impose state laws, both civil and criminal, within the reservations. The criminal provision appears in 18 U.S.C. § 1162. Public Law 280 was enacted by Congress to deal with the lawlessness on some reservations, to reduce the economic burdens associated with federal jurisdiction on reservations, and to respond to a perceived hiatus in law enforcement protections available to tribal Indians. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 498, 58 L. Ed. 2d 740, 99 S. Ct. 740, 760 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 379, 48 L. Ed. 2d 710, 96 S. Ct. 2102, 2106 (1953).

The Washington Legislature initially reacted to Public Law 280 by obligating this state to assume civil and criminal jurisdiction over Indians and Indian territory, reservations, country and lands within the state if and when the tribe or its governing body adopted a resolution asking the state to do so. Laws 1957, chapter 240. A total of ten tribes asked the state to assume full criminal jurisdiction over their reservations. The United States, however, accepted retrocessions by the state of its criminal and civil jurisdiction over some of these tribes and their reservations. The following four tribes are still subject to full state criminal jurisdiction: Muckleshoot, Nisqually, Skokomish, and Squaxin Island.

In 1963, the Washington Legislature obligated the state to

... assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been

invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways. . . .

RCW 37.12.010.

The effect of RCW 37.12.010 was to assume civil and criminal jurisdiction over Indians and Indian territory within the state. But, except in eight listed subject matter areas, jurisdiction would not extend to Indians on trust or restricted lands unless the affected Indian tribe requested it. *State v. Flett*, 40 Wn. App. 277, 281, 699 P.2d 774 (1985). The Supreme Court upheld the constitutionality of this partial assumption of jurisdiction under Public Law 280. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979). Later federal court decisions, however, have narrowed the state's extension of civil jurisdiction within the eight listed subject matter areas. *See, e.g., Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (1991), *cert. denied*, 503 U.S. 997 (1992) (State of Washington not allowed to enforce its speeding laws, which are civil infractions, upon public roads within the Colville Reservation).

Congress narrowed the state's power under Public Law 280 in 1968 with the passage of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321. This statute provides that a state may not assume criminal jurisdiction without the consent of the tribe. The requirement of tribal consent, however, was not made retroactive, and any cessation of jurisdiction made prior to 1968 was not displaced. *State v. Hoffman*, 116 Wn.2d 51, 68-69, 804 P.2d 577 (1991), quoting *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 150-51, 81 L. Ed.2d 113, 104 S. Ct. 2267 (1984). In addition, land added after the 1968 amendment to a reservation that belongs to one of the tribes that previously yielded criminal jurisdiction to the state is still subject to full state criminal jurisdiction. *See State v. Squally*, 132 Wn.2d 333, 344, 937 P.2d 1069 (1997) (Nisqually reservation). Five reservations were formed after 1968, and their membership never elected to come under state jurisdiction. The Jamestown-Klallam, Nooksack, Sauk Suiattle, Snoqualmie, and Upper Skagit reservations are not subject to RCW 37.12.010.

If a tribe has not requested or consented to the assumption of state jurisdiction, the title status or the property where the offense was committed determines state authority to prosecute. If the property is tribal or allotted land within the reservation and is either held in trust by the United States or subject to a restriction against alienation imposed by the United States, the Washington courts do not have jurisdiction. "Tribal lands" for the purpose of applying state jurisdiction has been generally defined in *Someday v. Rhay*, 67 Wn.2d 180, 184, 406 P.2d 931 (1965) as "lands within the boundaries of an Indian reservation held in trust by the federal government for the Indian tribe as a community. . ." "[A]llotted land" (which is commonly known as "individual trust land") is:

grazing and agricultural lands within a reservation, which are apportioned and distributed in severalty to tribal members, title to the allotted lands being held in trust and subject to restrictions against alienation for varying periods of time.

Somday, 67 Wn.2d at 184. Resolution of the jurisdictional issues usually requires a determination of whether the alleged offense occurred on fee or nonfee land. *State v. Flett*, 40 Wn. App. 277, 283, 699 P.2d 774 (1985).

Put conversely, state jurisdiction generally applies to all crimes committed by Indians upon fee simple property. An exception may apply to certain parcels located within the Tulalip Reservation as Congress created a special class of ownership ---restricted fee--- that exists no where else in Washington. *See* 25 U.S.C. § 403a-2.

The quickest way to determine whether a parcel is trust or fee is to check the tax status with the county assessor. Trust property is tax exempt and the United States Government rather than the person who is actually occupying the parcel will appear as the tax payer. Because trust property is tax exempt, when such a parcel loses its trust status through inheritance or sale, the new owner may not immediately notify the county assessor about the change. Additional follow-up may be necessary before determining that the State does not have jurisdiction over crimes committed by an Indian on a particular parcel.

Determining the trust/fee status of some pieces of property can be complex, but the following issues appear to be resolved:

- A tribe's grant of a highway easement, to the State, does not terminate the tribe's interest in the property. A tribal member's commission, upon such an easement, of a non-traffic offense, will be treated as if the offense was committed on trust property. *See State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008). Except for the Jamestown-Klallam, Nooksack, Sauk Suiattle, Snoqualmie, and Upper Skagit reservations, traffic offenses committed upon such an easement are subject to state prosecution. *See generally State v. Abrahamson*, 157 Wn. App. 672, 238 P.3d 533 (2010).²
- Land that is acquired and incorporated into a reservation after a tribe elected full state criminal jurisdiction will be subject to state jurisdiction. *See State v. Squally*, 132

²The county road department and/or the Washington State Department of Transportation can assist an officer in determining the status of the land beneath the highway. A stretch of highway between two on-ramps can lie upon property to which an easement was granted by the tribe, property that was bought out-right by the state, and property to which an easement was granted by a private individual. If the offense involves the possession of a firearm or drugs, and the vehicle containing the suspect crossed over any segment of highway that lies upon property owned outright by the state or subject to an easement granted by an entity other than the tribe, the state can exercise jurisdiction over the offense. *See generally, State v. Lane*, 112 Wn.2d 464, 468, 476, 771 P.2d 1150 (1989) (state can exercise jurisdiction if any element of an offense occurs in Washington, outside of a federal enclave); RCW 9A.04.030 (courts may exercise jurisdiction whenever an essential element of the offense occurred within the state).

Wn.2d 333, 344, 937 P.2d 1069 (1997) (Nisqually reservation).

- Trust property located outside of an established reservation is subject to state jurisdiction regardless of when the property was placed into trust status. *See State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996).
- An enrolled member of the Yakima Nation, who is fishing at the off-reservation Maryhill Treaty Fishing Access Site, is not subject to state law. This site is treated as if it were reservation trust property. *State v. Jim*, 156 Wn. App. 39, 230 P.3d 1080 (2010), *review granted* Nov. 2, 2010.

There is an argument to be made under the plain language of RCW 37.12.010 that an Indian who commits a crime on trust property within an established reservation of another Indian tribe is subject to state criminal jurisdiction. *Cf. Bercier v. Kiga*, 127 Wn. App. 809, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005) (an Indian who sold tobacco products at a smokeshop on a tribe reservation where he was not a tribal member was required to pay state taxes).

1. Search Warrants

Recently, the United States Supreme Court resolved the question of whether a state court issued search warrant for trust property located within the boundary of a reservation is valid. In *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), a plurality of the Court recognized that an Indian reservation is ordinarily considered part of the territory of the state and that states have criminal jurisdiction over crimes committed off reservation. *Hicks*, 121 S. Ct. at 2311-12. This jurisdiction, the Court holds, allows states to execute process (*i.e.* search warrants and arrest warrants) related to off-reservation violations of state laws on tribal lands. *Hicks*, 121 S. Ct. at 2313.

This rule should also apply to process related to on-reservation violations of state laws that occur on lands subject to state court jurisdiction under RCW 37.12.010. *See Hicks*, 121 S. Ct. at 2312-13. The reason for the rule is simple: "[T]he reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" *Hicks*, 121 S. Ct. at 2312, quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533, 29 L. Ed. 264, 5 S. Ct. 995 (1885).

Subsequent to the issuance of *Hicks*, the Ninth Circuit heard a case involving a state search warrant for a tribal casino's personnel records. The Ninth Circuit held in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002), that "execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" *Bishop Paiute Tribe*, 291 F.3d at 558 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)). The Supreme Court accepted review of the Ninth Circuit's case, and ultimately vacated the Ninth Circuit's opinion on the grounds that the tribe was not a "person" under 42 U.S.C. § 1983. *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003). The Court remanded the case to the Ninth Circuit to determine whether the tribe's claims fell under any federal law, or whether the case must be dismissed due to a lack of federal court jurisdiction. The Ninth Circuit, however, did

not issue a published opinion on remand. Nonetheless, it is appropriate when seeking a search warrant for tribal property or tribal records to consider obtaining a parallel tribal court order or inquiring whether the tribe might provide the evidence or records without a warrant.

2. Arrest Warrants

State process (*i.e.* arrest warrants) may be executed on tribal lands regardless of whether the subject of the warrant is an Indian or a non-Indian if the warrant is related to an off-reservation violation of state laws or to a crime committed within the reservation at a location where the state exercises criminal jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 2313, 150 L. Ed. 2d 398 (2001); *see also* RCW 10.93.070(5) (officer may make arrest on state warrant anywhere within the jurisdiction of the state); *Washington v. Lindsey*, 133 Wash. 140, 233 P. 327 (1925) (State court prosecution/jurisdiction exists over all non-Indians); *Somday v. Rhay*, 67 Wn.2d 180, 181, 406 P.2d 931 (1965) (deputy sheriff authorized to arrest individuals found upon lands within the geographic boundaries of a reservation that are subject to state jurisdiction under Chapter 37.12 RCW).

Whether the rule announced in *Nevada v. Hicks* would apply to a suspect who is actually in a tribal jail pursuant to a tribal court order is unknown. Such an intrusion would appear to violate the tribe's sovereignty. If the suspect is in a tribal jail, recourse to the tribes extradition procedures is strongly recommended.

All of the treaties that are applicable in Washington contain a provision in which the tribes or bands "agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." *See* Treaty with the Dwamish, Suquamish, etc. (Treaty of Point Elliott), Article 9 (1855); Treaty with the Quinaielt, etc. (Quinault and Quileute Treaty), Article 8 (1855); Treaty with the Makah, Article 9 (1855); Treaty with the Nisqualli, Puyallup, etc. (Treaty of Medicine Creek), Article 8 (1854); Treaty with the Skallam (Treaty of Point-no-Point), Article 9 (1855); Treaty with the Yakima, Article 8 (1855).

Many tribal governments have adopted provisions dealing with the extradition of Indians to State or federal jurisdiction. Pre-*Hicks* law mandated that these extradition procedures be complied with, except in cases of hot pursuit, when an Indian was located within the geographic boundaries of a reservation upon property that is not subject to State jurisdiction. *See State v. Waters*, 93 Wn. App. 969, 980, 971 P.2d 538 (1999); RCW 10.89.010; *see also United States v. Patch*, 114 F.3d 131 (9th Cir.), *cert. denied*, 522 U.S. 983 (1997).

A State officer's failure to follow the tribe's extradition procedure will not deprive the State court of jurisdiction. *See generally United States v. Alvarez-Machain*, 504 U.S. 655, 119 L. Ed. 2d 441, 112 S. Ct. 2188 (1992) (The fact of respondent's forcible abduction in Mexico does not prohibit his trial in a United States court for violations of this country's criminal laws); *State v. Blanchey*, 75 Wn.2d 926, 454 P.2d 481 (1969); *Davis v. Rhay*, 68 Wn.2d 496, 413 P.2d 654 (1966) (power of court to try person is not impaired by fact that he has been brought within court's jurisdiction by reason of forcible abduction); *State v. Arizona*, 181 Ariz. 211, 889 P.2d 4 (Ariz. App. 1994), *review denied* (Feb. 22, 1995). Evidence obtained from the arrest may, however, be subject to suppression. *See State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), *cert. denied*, 500 U.S. 928

(1991).

A tribe's refusal to comply with the requirements of the treaty by turning over a fugitive is reviewable by the federal courts. *See generally, Puerto Rico v. Branstad*, 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987). The State may have to exhaust its claim through the tribal appellate courts prior to turning to the federal courts.

When seeking the extradition of an individual who is currently in a tribal correctional facility, the individual will generally not be turned over until s/he completes his or her tribal court sentence. If this happens, the State should be prepared to resist any motions to dismiss state charges on speedy trial grounds. The State should be able to demonstrate its good faith and due diligence in bringing the defendant to trial by making the extradition request and placing a "hold" on the suspect so that he is released into state custody at the completion of his tribal sentence.

The State has no legal authority to interrupt the tribal sentence. A tribal correctional facility is not "a penal or correctional facility of this state" for purposes of the intrastate detainer act, Chapter 9.98 RCW. In addition, an Indian Tribe is a separate sovereign. A tribe's incarceration of an individual is less comparable to an incarceration of an individual pursuant to a Washington court order and is more similar to the plight of an individual who is incarcerated pursuant to another state's court order. With regard to other states, Washington and many other jurisdictions have entered into an agreement on detainers. Washington's statute, which is codified at Chapter 9.100 RCW, does not expressly include Indian Tribes as a jurisdiction whose prisoners may invoke the law. Absent such an express statement, binding Washington precedent establishes that the law is inapplicable to someone who is serving a sentence in a tribal facility. *See State v. Moses*, 145 Wn.2d 370, 374-75, 37 P.3d 1216 (2002); *Queets Band of Indians v. State*, 102 Wn.2d 1, 4-5, 682 P.2d 909 (1984).

3. Double Jeopardy

Both the State and a tribe may prosecute an Indian for offenses for which each has jurisdiction without violating the constitutional prohibition against double jeopardy or the state statutory prohibition against double jeopardy. *State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002).

4. Treaty Hunting and Fishing

Outside of Indian reservations, Indians are presumed to be subject to state law absent express federal law to the contrary. A treaty or statute may be such express federal law. "An ethnic Indian who is not a member of a tribe with reserved fishing rights is in the same position with respect to Washington fish and game laws as any other citizen of the state." *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1130 (9th Cir. 1978), *vacated on other grounds, sub. nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The Indians' rights under the treaties belong to tribal groups, not to individual persons of Indian ancestry. *E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Conley v. Ballinger*, 216 U.S. 84, 90-91 (1910); *Blackfeather v. United States*, 190 U.S. 368, 377 (1903); *United States v. Washington*, 641 F.2d 1368 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. (1982); *Whitefoot v. United States*, 293 F.2d 658, 663, 155 Ct. Cl. 127 (1961), *cert. denied*, 369 U.S.

818 (1962). This means that an individual Indian may have his or her ability to fish restricted by a state court, when such restriction is imposed as a crime-related prohibition or sentence restriction. *See State v. Cayenne*, 165 Wn.2d 10, 195 P.3d 521 (2008).

The treaty rights of hunting, gathering, and grazing apply only to "open and unclaimed" lands. A tribal member hunting in an area that is not "open and unclaimed" is not exercising a treaty right and is subject to state laws regulating hunting. *See United States v. Hicks*, 587 F. Supp. 1162, 1167 (W.D. Wash. 1984); *State v. Buchanan*, 138 Wn.2d 186, 211, 978 P.2d 1070, 1082 (1999), *cert. denied*, 528 U.S. 1154 (2000).

Public lands not put to a use inconsistent with hunting, such as National Forest lands where active logging is not occurring, may be "open and unclaimed." *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967); *State v. Buchanan*, 138 Wn.2d 186, 211, 978 P.2d 1070, 1082 (1999), *cert. denied*, 528 U.S. 1154 (2000); *State v. Arthur*, 74 Idaho 251, 261, 261 P.2d 135, 141, *cert. denied*, 347 U.S. 937 (1953). Public land used in a manner inconsistent with hunting, such as a National Park, however, may not be "open and unclaimed." Private homesteads are not "open and unclaimed." *Hicks*, 587 F. Supp. at 1165-66.

The Idaho Court of Appeals has held that privately-owned commercial timber land is, as a matter of law, not "open and unclaimed." *State v. Simpson*, 54 P.3d 456 (Idaho Ct. App. 2002), *cert. denied*, 538 U.S. 911 (2003). The Oregon Court of Appeals ruled consistently, though more narrowly, than did the Idaho Court of Appeals. *See State v. Watters*, 211 Ore. App. 628, 156 P.3d 145, *review denied*, 165 P.3d 371 (2007) (privately owned land that shows signs of habitation (such as cabins), that includes signs announcing its ownership, and that has other indicia of ownership (such as cattle guards and gated roads) is not open and unclaimed). No Washington appellate court has yet addressed this issue.

Only lands within the area ceded in a tribe's treaty and lands where the tribe traditionally hunted may be subject to that tribe's treaty hunting right. *State v. Buchanan*, 138 Wn.2d 186, 203-207, 978 P.2d 1070, 1079-81 (1999), *cert. denied*, 528 U.S. 1154 (2000). A tribal member hunting outside his or her tribe's ceded area or traditional hunting ground is not exercising a treaty right, even if the place is "open and unclaimed."

The treaty "right of taking fish" applies only to "usual and accustomed" grounds and stations or places. A tribal member fishing at a place that is not a usual and accustomed fishing place of his or her tribe is not exercising a treaty right and is subject to state laws regulating fishing. *United States v. Washington*, 384 F. Supp. 312, 408 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

The Washington Territorial Supreme Court held in 1887 that "usual and accustomed" grounds and stations or places are particular places where Indians traditionally fished before the treaties were executed. *United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887), *enforced*, 44 F. 2 (C.C.D. Wash. 1890). Other courts have followed that interpretation. *E.g.*, *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (Yakama); *United States v. Winans*, 198 U.S. 371 (1905) (Yakama); *United States v. Washington*, 730 F.2d 1314 (9th Cir. 1984) (Makah); *United States v. Washington*, 384 F. Supp. 312,

332, 353 (W.D. Wash. 1974) (14 tribes), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States v. McGowan*, 2 F. Supp. 426 (W.D. Wash. 1931) (Quinault). "Usual and accustomed grounds" may include depths to which humans did not have access until modern technology became available, however. *United States v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

A party seeking to establish that a place is a tribe's "usual and accustomed place" must show the "tribe's (or its predecessors') regular and frequent treaty-time use of that area for fishing purposes." *United States v. Washington*, 626 F. Supp. 1405, 1531 (W.D. Wash. 1985). Evidence that individual tribal members may have used a place at treaty time by virtue of marriage into other tribes does not establish that a place was a usual and accustomed place of the tribe itself. *United States v. Washington*, 873 F. Supp. 1422, 1447 (W.D. Wash. 1994) (Yakama Nation failed to prove usual and accustomed shellfishing places in western Washington). A place that was an "unfamiliar location," or "used infrequently or at long intervals and extraordinary occasions," or "where use was occasional or incidental," is not a usual and accustomed place. *United States v. Washington*, 384 F. Supp. 312, 332, 353 (FF 14), 356 (FF 23) (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

The testimony of an expert anthropologist, based on documentary evidence, can establish that a place was a tribe's treaty-time usual and accustomed fishing place. Tribal elder testimony may bolster such evidence, but may be insufficient by itself. *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975); *State v. Courville*, 36 Wn. App. 615, 623, 676 P.2d 1011 (1983); *see State v. James*, 72 Wn.2d 746, 748, 435 P.2d 521 (1967). The testimony of a few tribal members that they fished at a place during the twentieth century is not enough to show that the place was a usual and accustomed fishing place of their tribe in 1855. *United States v. Washington*, 764 F.2d 670, 674 (9th Cir. 1985) (tribal elder testimony about fishing activity in early 1900s could not support finding about treaty time fishing places); *United States v. Washington*, 730 F.2d 1314, 1315, 1318 (9th Cir. 1984) (discounting elder testimony about fishing during the 1900s); *see State v. Pettit*, 88 Wn.2d 267, 272-73, 558 P.2d 796 (1977) (Utter, J., dissenting) (describing testimony that majority had held insufficient to show that a place was a usual and accustomed place).

In Western Washington, treaty tribes' usual and accustomed grounds and stations have been specifically determined in the "Boldt decision" and subsequent litigation. *United States v. Washington*, 384 F. Supp. 312, 359-81 (W.D. Wash. 1974) ("Boldt decision") (Hoh, Lummi, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Upper Skagit, Yakama), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 459 F. Supp. 1020, 1049, 1066-69 (W.D. Wash. (1975) (Lower Elwha, Nooksack, Suquamish, Swinomish, Makah, Stillaguamish); *United States v. Washington*, 626 F. Supp. 1405, 1441-43, 1486 (W.D. Wash. 1981-1984) (Nisqually, Puyallup, Squaxin Island, Jamestown S'Klallam, Port Gamble S'Klallam); *United States v. Washington*, 626 F. Supp. 1405, 1466-68 (W.D. Wash. 1982), *aff'd*, 730 F.2d 1314 (9th Cir. 1984) (Makah); *United States v. Washington*, 626 F. Supp. 1405, 1527-32 (W.D. Wash. 1985), *aff'd*, 841 F.2d 317 (9th Cir. 1988) (Tulalip); *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990) (Suquamish); *United States v. Washington*, 873 F. Supp. 1422, 1447-50 (W.D. Wash. 1994) (Yakama, Upper Skagit), *aff'd*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999); *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (Swinomish, Lummi); *Muckleshoot Indian Tribe v. Lummi*

Indian Nation, 234 F.3d 1099 (9th Cir. 2000) (Lummi); *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) (Muckleshoot), *cert. denied*, 534 U.S. 950 (2001); *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (Lummi). The only major unresolved question is the seaward extent of the ocean usual and accustomed grounds of the Quileute, Hoh, and Quinault Tribes. See *Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

The State may regulate the exercise of off-reservation treaty fishing and hunting rights where reasonable and necessary for the conservation of fish or game. *Tulee v. Washington*, 315 U.S. 681, 684 (1942) (fishing); *Antoine v. Washington*, 420 U.S. 194, 207 (1977) (hunting—Colville); *State v. Miller*, 102 Wn.2d 678, 686-88, 689 P.2d 81, 86 (1984) (hunting). “Conservation” means “perpetuation of the species.” *United States v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (1975), *cert. denied*, 423 U.S. 1086 (1976); see *id.* at 342, 415. “[R]easonable” means that a specifically identified conservation measure is appropriate to its purpose; and “necessary” means that such purpose in addition to being reasonable must be essential to conservation.” *U.S. v. Washington*, 384 F. Supp. at 342; see *United States v. Oregon*, 657 F.2d 1009, 1012, 1017 (9th Cir.) (upholding order enjoining Yakama fisheries on spring chinook); *Department of Game v. Puyallup Tribe, Inc.*, 86 Wash.2d 664, 667, 685, 688, 548 P.2d 1058 (1976), *aff’d*, 433 U.S. 165, 177 (1977) (fishing regulation was necessary for conservation). State regulations must also be nondiscriminatory and must meet appropriate procedural standards. *E.g.*, *Puyallup Tribe v. Washington Game Dep’t (Puyallup III)*, 433 U.S. 165, 177 (1977) (regulations allocating 45% of harvestable steelhead run to tribal fishery met “conservation necessity” standards), *aff’g* 86 Wn.2d 664, 548 P.2d 1058 (1976); *Antoine v. Washington*, 420 U.S. 194, 207 (1977); *Washington Game Dep’t v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44, 48 (1973) (regulation banning Indian gear was discriminatory toward Indians); *Puyallup Tribe v. Washington Dep’t of Game (Puyallup I)*, 391 U.S. 392, 399 (1968); *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951); *United States v. Washington*, 384 F. Supp. 312, 342, 401-02 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Sohappy v. Smith*, 302 F. Supp. 899, 907-12 (D. Or. 1969). The treaties preempt state regulation of treaty fishing and hunting that is not “necessary for conservation.” *United States v. Washington*, 520 F.2d 676, 684-86 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

The State may be able to apply health and safety regulations to treaty fishing and hunting where the regulations do not otherwise impede the exercise of the right. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400, 1423 (W.D. Wis. 1990); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1238-39 (W.D. Wis. 1987); *State v. Matthews*, 248 Wis.2d 78, 81, 635 N.W.2d 601, 602-03 (Wis. Ct. App. 2001); see *State v. Big John*, 146 Wis. 741, 751-52, 432 N.W.2d 576 (1988); but see *State v. Lemieux*, 110 Wis. 2d 158, 327 N.W.2d 669 (1983) (loaded-firearm law was an impermissible regulation of Indian hunting). In the case of treaty shellfishing in Washington, the parties worked out a consent decree addressing food safety regulation. *United States v. Washington*, No. 70-9213 Phase I, Subproceeding No. 89-3, *Consent Decree Regarding Shellfish Sanitation Issues* (W.D. Wash. May 4, 1994). See WAC 246-282.

Where state license fees are involved, the treaties preempt state law to a somewhat greater extent than they preempt state laws regulating the time, place, and manner of fishing: the treaty right of taking fish preempts state fishing license fees where such fees are “not indispensable to the

effectiveness of a state conservation program.” *Tulee v. Washington*, 315 U.S. 681, 685 (1942), *rev'g* 7 Wn.2d 124, 109 P.2d 280 (1941); *cf. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (Yakama Treaty preempts state truck license fees).

In Western Washington, licensing of vessels used in treaty fisheries is governed by a consent decree. *United States v. Washington*, No. 9213-Phase I, Subproceeding No. 88-1, *Consent Decree* (W.D. Wash. Nov. 28, 1994). Implementing rules appear at WAC 308-93-700 through 308-93-770. In general, tribes license their members' vessels.

Treaty rights constitute an affirmative defense which must be proved by the one who asserts it. *State v. Petit*, 88 Wn.2d 267, 269, 558 P.2d 796 (1977); *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971), *cert. denied*, 406 U.S. 910 (1972); *State v. Courville*, 36 Wn. App. 615, 622, 676 P.2d 1011 (1983). First, a defendant must show that he or she is a member of a Tribe entitled to exercise treaty rights. *See U.S. v. Washington*, 459 F. Supp. at 1037; *U.S. v. Washington*, 384 F. Supp. at 409. A defendant seeking to establish that he or she was exercising a treaty fishing right must show by a preponderance of the evidence that the place where he or she was fishing was a usual and accustomed fishing place of the Tribe of which the defendant is a member. *State v. Petit*, 88 Wn.2d 267, 269-70, 558 P.2d 796 (1977); *State v. Courville*, 36 Wn. App. 615, 623, 676 P.2d 1011 (1983); *see State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971), *cert. denied*, 406 U.S. 910 (1972). A defendant seeking to establish that he or she was exercising a treaty hunting right must show by a preponderance of the evidence that the place where he or she was hunting was within the ceded area or traditional hunting grounds of the tribe of which the defendant is a member. *See State v. Buchanan*, 138 Wn.2d 186, 208, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (2000).

A non-Indian defendant who is seeking immunity from state prosecution on the grounds that s/he was assisting a treaty Indian in the exercise of the treaty Indian's fishing rights must demonstrate all of the above and must establish that they are related to the treaty Indian as a spouse, child, sibling, grandchild, or forebear and that the treaty Indian was actually present. *See generally State v. Price*, 87 Wn. App. 424, 942 P.2d 377 (1997); RCW 77.15.570(3)(a). The presence of the treaty Indian will be excused, if the relevant tribal code allows a nonmember spouse to fish on behalf of the member without that member present in the boat. *See State v. Guidry*, 153 Wn. App. 774, 223 P.3d 533 (2009), *review denied*, 168 Wn.2d 1041 (2010).

If the defendant demonstrates that he or she was exercising a treaty right, the burden shifts to the State to show that the state regulation can validly be enforced against Indians exercising treaty rights. To show that a state regulation can be so enforced, the State must “introduce clear and convincing evidence that the regulation was reasonable and necessary for conservation purposes.” The State meets that standard by showing that the conservation measure chosen “was appropriate to the conservation goal and necessary to protect the native [salmon] run from serious harm.” The fact that a federal court has approved the regulation is evidence of conservation necessity. *State v. Reed*, 92 Wn.2d 271, 276, 595 P.2d 916, *cert. denied*, 444 U.S. 930 (1979); *see State v. James*, 72 Wn.2d 746, 753, 435 P.2d 521 (1967). The State may meet its burden of establishing that a state law is necessary for conservation by showing that a defendant's tribal law contains a similar provision. *State v. McCormack*, 117 Wn.2d 141, 143-46, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111 (1992); *United States v. Williams*, 898 F.2d 727, 729-30 (9th Cir. 1990); *State v. Bronson*, 122 Or. App. 493, 496, 858 P.2d 467, 468-69 (1993).

In addition, in a hunting case, the State has the burden to show that the land on which the defendant was hunting had outward indications, observable to a reasonable person (fences, buildings, or "No Trespassing" signs), that the land was not "open and unclaimed." *State v. Chambers*, 81 Wn.2d 929, 934-36, 506 P.2d 311, *cert. denied*, 414 U.S. 1023 (1973).

Even while exercising his or her treaty hunting and fishing rights, an Indian remains subject to state firearm laws of general applicability. See *State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003), *review denied*, 151 Wn.2d 1001 (2004) (RCW 77.15.460 which prohibits the carrying of a loaded weapon in a vehicle applies to all persons, including Indians exercising their treaty hunting privileges). The same principle probably applies to the use of off-road vehicles, snowmobiles, airplanes, and other similar machines.

D. INDIAN JURISDICTION

An Indian tribe's power to punish members who commit crimes within Indian country is a fundamental attribute of the tribe's sovereignty. *United States v. Wheeler*, 435 U.S. 313, 326-27, 55 L. Ed. 2d 303, 98 S. Ct. 1079, 1087-88 (1978). This power was not taken away by the adoption of Public Law 280. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560-61 (9th Cir. 1991); *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990); *State v. Schmuck*, 121 Wn.2d 373, 394-95, 850 P.2d 1332 (1993). The tribe's power extends to the regulation of its own members when they exercise off-reservation usufructuary rights. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

A tribe's inherent power to try and punish non-Indian violators of tribal laws was surrendered when they submitted to the sovereignty of the United States. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 55 L. Ed. 2d 209, 98 S. Ct. 1011, 1021 (1978). The Supreme Court held in 1990 that a tribe could not exercise criminal jurisdiction over a non-member Indian, *Duro v. Reina*, 495 U.S. 676, 109 L. Ed. 2d 693, 110 S. Ct. 2053, 2065-66 (1990), but Congress legislatively abrogated this case, see Public Law 102-137, 105 Stat. 646, codified at 25 U.S.C. § 1301(2). Federal common law now recognizes the inherent tribal power to prosecute tribal members and nonmembers for criminal conduct. The constitutionality of this common law rule and the post-*Duro* statute has yet to be decided by the United States Supreme Court. See *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). The Ninth Circuit, however, has upheld the constitutionality of the post-*Duro* statute. See *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006).

Tribal law enforcement authorities have the power to restrain non-Indians who disturb public order on the reservation and, if necessary to eject them. *Duro v. Reina*, 495 U.S. 676, 109 L. Ed. 2d 693, 110 S. Ct. 2053, 2065-66 (1990); *State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993). An Indian tribe may employ police officers to aid in enforcement of tribal law and in the exercise of its exclusion power. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). Tribal police officers have the power to investigate any on-reservation violations of state and federal law, where the exclusion of the non-Indian offender might be contemplated. *Ortiz-Barraza*, 512 F.2d at 1180. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities. *Duro*, 110 S. Ct. at 2065-66; *accord*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 55 L. Ed. 2d 209, 98 S. Ct. 1011, 1020 (1978) (Indian authorities to

"promptly deliver up any non-Indian offender, rather than try and punish him themselves"). A tribal officer, who is in fresh pursuit of an offender, may lawfully stop the offender outside the reservation. *See State v. Ericksen*, 170 Wn.2d 209, ___ P.3d ___ (2010). The propriety of the tribal officer's detention of the non-Indian will be tested under Fourth Amendment case law. *See generally United States v. Becerra-Garcia*, 397 F.3d 1167 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1463 (2006).

The penalty that may be imposed in tribal court was limited by the Indian Civil Rights Act of 1968 (codified at 25 U.S.C. § 1302 (1982), as amended by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, s 4217, 100 Stat. 3207 (1986)) to a maximum of one year in jail, a \$5,000 fine, or both. The Indian Civil Rights Act of 1968 also extended to persons affected by tribal ordinances and actions statutory rights that are similar to the constitutional rights contained in the Bill of Rights and the Fourteenth Amendment. The Act provided, among other things, that a tribe cannot (1) conduct unreasonable searches or seizures, (2) place a person in double jeopardy, (3) violate the right against self-incrimination, (4) deny a person the right to a speedy public trial, to confront witnesses, to have compulsory process for obtaining favorable witnesses, and to have counsel at his or her own expense, (5) inflict cruel or unusual punishment, (6) deny any person the right to equal protection of the law or deprive any person of liberty or property without due process of law, (7) pass any bill of attainder or ex post facto law, or (8) deny any person charged with an offense punishable by imprisonment the right to a jury of at least six persons. 25 U.S.C. § 1302(a). The 1968 Act, however, does not provide a right to counsel at tribal expense. Persons detained by order of an Indian tribe may file a habeas corpus action in the federal courts. 25 U.S.C. § 1303.

The Tribal Law and Order Act of 2010 increased the available penalties for certain offenses to a maximum of three years in jail, a \$15,000 fine, or both. To be eligible for the increased penalties, the defendant must have been previously convicted of the same or a comparable offense by any jurisdiction in the United States, or the current offense must be comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States. 25 U.S.C. § 1302(a)(7) and (b). A tribe that wishes to impose the greater punishment must extend additional procedural safeguards to defendants. Specifically, the tribe must

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--
(A) has sufficient legal training to preside over criminal proceedings; and
(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

25 U.S.C. § 1302(c).

Sentences of more than one year that is imposed by a tribal court may be served in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in the nearest appropriate Federal facility, or “in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government”. 25 U.S.C. § 1302(d). A tribe may also identify alternatives to confinement. *Id.* The Attorney General has a specific fund to pay for the costs of incarceration. *See* 42 USCS § 13709.

2. Arrest Warrants

Tribal courts will issue arrest warrants for fugitives. These warrants are not enforceable by state officers because any arrest based upon a foreign jurisdiction’s warrant is considered a “warrantless arrest” in Washington. *See* RCW 10.88.330. The Uniform Criminal Extradition Act, Chapter 10.88 RCW, which authorizes “warrantless arrests” based upon a warrant issued by a foreign jurisdiction limits such arrests to an accused who stands “charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year.” RCW 10.88.330. This Act does not mention Indian Tribes in the list of jurisdictions to which it applies. *See* RCW 10.88.200. Binding Washington case law indicates that this means Indian Tribes are not covered by the law. *See Queets Band of Indians v. State*, 102 Wn.2d 1, 4-5, 682 P.2d 909 (1984). Even if the Act applied to Indian Tribes a “warrantless arrest” would still not be permissible as the maximum punishment a tribal court could impose prior to July 29, 2010, was limited by the Indian Civil Rights Act of 1968, 25 U.S.C. §. 1302(7), to a maximum of one year of incarceration.

While a state court may issue a state warrant of arrest in response to a warrant issued by another jurisdiction under the Uniform Criminal Extradition Act, Chapter 10.88 RCW, this Act does not include Indian Tribes in the list of jurisdictions to which it applies. The omission of Indian Tribes is consistent with the fact that Article IV, Section 2, Clause 2 of the United States Constitution which imposes upon the governor of each state a duty to deliver up fugitives charged with a crime in a sister state does not define the reach of that jurisdiction. The federal statute that seeks to implement the provisions of Article IV, Section 2, 18 U.S.C. § 3182, has been interpreted as not including Indian Tribes. *See Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883) (Cherokee nation was not a “territory” under the federal extradition statute); *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571P.2d 689, 694 (Ariz. Ct. App. 1977) (Indian reservations have never been considered a “territory” within the meaning of the laws of the United States); *see also* F. Cohen, *Handbook of Federal Indian Law* 383 (1982) (it is unlikely that the federal extradition statute includes Indian tribes); *cf. Wilson v. Marchington*, 127 F.3d 805, 808-09 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (Indian tribes are generally not considered “territories or possessions” of the United States as Congress has enacted a number of special statutes that separately list “territory or possession of the United States” and “Indian tribes”).

Some states, such as Montana (M.C.A. § 46-30-101) and South Dakota (S.D.C.L. § 23-24B), have specially enacted statutory provision dealing with extradition between the state and Indian tribes. Absent such legislation in Washington, neither state officers, state courts, nor the governor may act upon tribal arrest warrants.

3. Search Warrants

While tribal court judges may issue search warrants, such warrants are probably not enforceable outside the territorial boundaries of the reservation. Tribal judges are not included in the state statutory definition of magistrate. *See* RCW 2.20.020. The standards governing the issuance of tribal search warrants are different from that governing state search warrants. Search warrants issued by tribal judges must satisfy the Indian Civil Rights Act. *See* 25 U.S.C. § 1302 (2) (“No Indian tribe in exercising powers of self-government shall ... violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized”). This standard is comparable to Fourth Amendment, *see United States v. Becerra-Garcia*, 397 F.3d 1167 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1463 (2006); *United States v. Lester*, 647 F.2d 869 (8th Cir. 1981), but is not co-extensive with the requirements of Washington Const. art. I, § 7. State officers should not, therefore, become involved in serving search warrants issued by a tribal court.

State officers may respond to a scene after a tribal warrant is served by tribal officers in order to take into custody any non-Indians who are found on site and who were found to be engaged in conduct that constitutes a violation of state criminal law. *See generally State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993). Evidence seized by the tribal officers is admissible in Washington courts if: (1) there was no participation from local officials; (2) the agents of the foreign jurisdiction did not gather the evidence with the intent that it would be offered in state court rather than in their jurisdiction; and (3) the agents of the foreign jurisdiction complied with the laws governing their conduct. *See generally, State v. Brown*, 132 Wn.2d 529, 586-87, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

VI. RECENT LEGISLATIVE INITIATIVES

A. Federal Action

Between 2007 and 2010, Congress held 17 hearings on various aspects of violence on Indian lands from domestic and sexual violence against women and children to drug smuggling and gang activity. On June 23, 2010, the Senate passed the Tribal Law and Order Act, as an amendment to H.R. 725, by unanimous consent.

Indian reservations nationwide face violent crime rates more than 2.5 times the national rate. Some reservations face more than 20 times the national rate of violence. More than 1 in 3 American Indian and Alaska Native women will be raped in their lifetimes, and 2 in 5 will face domestic or partner violence. The crisis is the result of a broken and underfunded system of justice.

Federal laws limit the authority of Indian tribes to punish Indian offenders to no more than 1-year imprisonment, and force reservation residents to rely on Federal (and in some cases State) officials to investigate and prosecute violent crimes on Indian lands. However, over the past 5 years, Federal officials have declined to prosecute 50% of alleged violent crimes in Indian country, including 75% of alleged sex crimes against women and children.

Less than 3,000 Bureau of Indian Affairs and tribal police patrol more than 56 million acres of Indian lands. Foreign drug cartels are aware of the lack of police presence on Indian lands and are targeting some reservations to distribute and manufacture drugs.

The Tribal Law and Order Act takes a comprehensive approach at addressing these shortfalls by increasing coordination and communication among Federal, State, tribal, and local law enforcement agencies, and increasing the collection and sharing of criminal data among the different jurisdictional entities.

Some major provisions of the Tribal Law and Order Act include:

Enhanced Powers for Tribal Courts and Tribal Police Officers:

- Amends to the Indian Civil Rights Act to enhance sentencing authority of all Federally recognized Indian tribes to up to 3 years in jail per offense and clarifies that tribal courts can subject offenders to multiple charges (9-year maximum per trial). The enhanced sentencing authority requires the tribe to provide licensed legal counsel to the defendant, a law trained and licensed judge, published criminal laws, rules of evidence and procedures, and an audio or video record of the criminal trial. (Section 304).
- Enhances deputizations of tribal police officers to enforce violations of Federal law in Indian Country. The Special Law Enforcement Commissions will be preceded by regional trainings and the entry of MOAs between interested tribes and the Bureau of Indian Affairs. Tribal police who obtain deputizations will gain authority to cite all offenders (Indian and non-Indian) of Federal law on tribal lands, to issue citations for non-violent crimes, and to make warrantless arrests when the officer has probable cause to believe a crime has occurred in a broader array of cases. (Section 301)
- Clarifies that tribal police are “authorized law enforcement official[s]” for purposes of access to all Federal criminal history databases. (Section 303). Grants tribal police access to the National Gang Intelligence Center database and to the Department of Justice Criminal History Record Improvement grants. (Sections 501 and 502).
- Authorizes a tribe to request the U.S. Attorneys to prosecute on-reservation crimes involving Indian offenders when the state or local government does not have the resources to investigate or prosecute violent reservation crimes. (Section 201).

Increased Federal Accountability, Consultation, and Coordination

- Requires the FBI and U.S. Attorneys to maintain data when declining to prosecute a violent crime in Indian country. Both the FBI and U.S. Attorneys are hat decline to prosecute a violent crime in keep maintain data ection 102 requires U.S. Attorneys must share evidence with tribal prosecutors to aid cases in tribal courts. (Sections 102).
- Authorizes appointment of tribal prosecutors as Special Assistance U.S. Attorneys to prosecute minor crimes and crimes not subject to tribal court authority in Federal court. (Section 103). An example would be non-Indian domestic violence.
- Requires U.S. Bureau of Prisons to notify tribal authorities when releasing a sex offender, who will work or reside in Indian Country. (Section 601)
- Requires federal officers working in Indian Country to receive training in handling domestic violence and sexual assault cases to improve interview techniques and crime scene/evidence handling. (Section 602).
- Codifies the use of Tribal Liaisons at each Federal District with Indian country, and requires Liaisons to consult and coordinate with tribal justice officials, and provide technical assistance to improve the ability of tribes to respond to reservation crime. (Section 103).
- Makes permanent the Office of Tribal Justice within the Department of Justice to serve as the policy advisor to the Attorney General to uphold the Government's treaty, trust, and statutory obligations to Indian Tribes. (Section 104).
- Requires the Department of Justice and the Bureau of Indian Affairs, in coordination with Tribes, to develop a long-term plan for the construction, maintenance, and operation of tribal adult and juvenile detention and alternative rehabilitation centers and/or for the entry of agreements with state and local facilities. (Sections 101 and 405).
- Authorizes the Attorney General to "provide technical and other assistance to State, tribal, and local governments that enter into cooperative agreements, including agreements relating to mutual aid, hot pursuit of suspects, and cross-deputization for the purposes of- (1) improving law enforcement effectiveness; (2) reducing crime in Indian country and nearby communities; and (3) developing successful cooperative relationships that effectively combat crime in Indian country and nearby communities." (Section 222, codified at 25 U.S.C. § 2815).

Increased Resources

- Reauthorizes and amends the Indian Alcohol and Substance Abuse Act, which authorizes grants for summer youth programs, development of tribal juvenile codes,

and construction of shelters and detention and treatment centers for at risk youth. (Section 401).

- Authorizes the appointment of Indian country residents to serve as assistant Federal probation officers to monitor offenders living on or reentering Indian lands. (Section 405).
- Provides funding for tribal court judicial personnel, public defenders, court facilities, records management systems, tribal jails and justice centers, Bureau of Indian Affairs and tribal officer training opportunities, and the hiring of additional police officers. (Sections 301, 402, 403, 405).

B. State Action

In 1985, the Legislature enacted the Washington Mutual Aid Peace Officer Powers Act. This Act was intended to remove “ current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies.” RCW 10.93.001(2). The Act, however, did not include tribal officers or tribal police agencies. *See generally* RCW 10.93.020.

The Legislature has gradually acted to extend the public safety benefits that the Mutual Aid Peace Officer Powers Act conferred upon state and local communities to tribal communities. In 2006, the Legislature adopted a procedure by which a tribal government could voluntarily request certification for their police officers from the Criminal Justice Training Commission (“CJTC”). Any agreement between a tribe and the CJTC must require the tribal law enforcement agency and its officers to comply with all of the requirements for granting, denying, and revoking certification as those requirements are applied to other peace officers certified in the state. In addition, all officers applying for certification as tribal police officers must meet the same CJTC requirements required for the certification of other peace officers employed in Washington. An application for certification as a tribal police officer must be accepted and processed in the same manner as those for certification of peace officers. *See* Laws of 2006, Ch. 22, codified at RCW 43.101.085 and RCW 43.101.157.

Once a mechanism was in place to ensure that tribal officers could be certified by the CJTC as having the same level of training as other officers within the state, the Legislature explored various means of commissioning tribal police officers to enforce state laws within reservation boundaries. An effort to make the Washington State Patrol the commissioning authority failed, just as prior bills to assign this responsibility to sheriffs failed. *See, e.g.,* HB 2013 (2007) and SB 5867 (2007); HB 1936 (2003). The opposition of both the sheriffs and the Washington State Patrol was fueled, in part, by the potential liability that could be incurred by commissioning tribal officers.

Ultimately, in 2008, the Legislature sidestepped the issue of state commissioning entirely, and adopted Laws of 2008, ch. 224. This act, which is codified in Chapter 10.92 RCW allows a tribal officer to act as general authority Washington peace officers within the exterior boundaries of the reservation when the officer is certified by the CJTC pursuant to RCW 43.101.157, is commissioned by the appropriate sovereign nation, and the appropriate sovereign tribal nation maintains proper liability insurance. RCW 10.92.020(2). While such officers may also render

mutual aid beyond the borders of the reservation in accordance with RCW 10.93.070, the law does not expand the jurisdiction of any tribal court or other tribal authority. *See* RCW 10.92.020(4) and (5).

Another requirement for commissioning of certified tribal officers as general authority Washington peace officers is entry by the sovereign tribal nation into an interlocal agreement with the appropriate local government in the context of the concurrent jurisdiction of the tribal nation and the local government on the tribal reservation. If the tribal nation and the local government reach such an agreement, and the tribal nation and certified tribal officers have met all the other requirements of the act, then the certified tribal officers are by law commissioned as general authority peace officers. RCW 10.92.020(10). WASPC is in the process of preparing a sample interlocal agreement.

If the tribal nation and the appropriate local government are unable to reach an interlocal operations agreement by June 1, 2009, the parties are required by the act to enter binding arbitration. Each party must select an arbitrator, and the two arbitrators selected by the parties must agree on a third arbitrator. After submission by the parties of their respective best offers, the three-person arbitration panel must select the offer that best implements the provisions of the act. RCW 10.92.020(10). To date, no arbitrations have been held.

The act does not impair, nullify, or limit the authority of a county sheriff to cross-commission a duly commissioned state or federally certified tribal police officers as a deputy sheriff. *See* RCW 10.92.020(8). Many counties have successfully engaged in this practice. There are, however, some liability issues that require careful consideration. These liability issues arise because the tribes have sovereign immunity from lawsuits, and the Federal Tort Claims Act may not be available to pay any judgments arising from the acts of a cross-deputized tribal officer. *See, e.g., Herbert v. United States*, 438 F.3d 483 (5th Cir. 2006) (tribal officers, who were named as defendants in a civil rights lawsuit, were not entitled to indemnification under the FTCA). A sheriff, who is considering cross-deputization of tribal officers, may wish to seek technical assistance from the United States Attorney General. *See* 28 U.S.C. § 2815.

Chapter 10.92 RCW attempts to avoid the liability issues by specifying that

For purposes of civil liability under this chapter, a tribal police officer shall not be considered an employee of the state of Washington or any local government except where a state or local government has deputized a tribal police officer as a specially commissioned officer. Neither the state of Washington and its individual employees nor any local government and its individual employees shall be liable for the authorization of tribal police officers under this chapter, nor for the negligence or other misconduct of tribal officers. The authorization of tribal police officers under this chapter shall not be deemed to have been a nondelegable duty of the state of Washington or any local government.

RCW 10.92.020(6). The effectiveness of this declaration is currently untested.

V. RECURRING ISSUES

A. TRAFFIC INFRACTIONS

Many non-Indian citizens have been issued tribal traffic citations by tribal police. Many Indians who belong to tribes with comprehensive traffic codes, have been issued State traffic citations for violations occurring within the geographic boundaries of a reservation. Both of these situations should be avoided.

1. Issuance of State Traffic Citations to Indians

Although RCW 37.12.010(8) provides that the State assumes civil and criminal jurisdiction over all Indians and all Indian Country for acts related to the “[o]peration of motor vehicles upon the public streets, alleys, roads and highways”, the Ninth Circuit in *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (1991), *cert. denied*, 503 U.S. 997 (1992), held that the State of Washington could not enforce its statute prescribing speed limits for motor vehicles operated upon public roads within, and thus a part of, the reservation against Indians. The Court’s reasoning depended, in part, on the fact that the Confederated Tribes of Colville was able to show that its own highway safety laws and institutions are adequate for self-government. *Id.*, at 149; *see also County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985) (tribe had no tradition of self-government in the area of traffic regulation).

When a State officer stops an individual for a traffic infraction committed within the geographic boundaries of a reservation, any issued infraction that is filed in the state courts will have to be dismissed and referred to the tribal prosecutor for handling under tribal law if: (1) the individual establishes that s/he is an Indian; and (2) the individual establishes that the tribe has a tradition of self-government in the area of traffic regulation.

2. Issuance of Tribal Traffic Citations to Non-Indians

Tribal officers have limited authority under *State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993), to stop and detain non-Indians who have committed a crime until a State officer can respond. No case or statute, however, authorizes tribal officers to cite non-Indians with civil violations of the tribe’s traffic codes.

Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). Where nonmembers are concerned, the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana*, 450 U.S. at 564. As a general rule, the United States Supreme Court has rejected tribal authority to regulate nonmembers’ activities on land over which the tribe could not assert a landowner’s right to occupy or exclude. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). Tribes do not possess a landowner’s right to occupy or exclude over state, county, federal, or municipal highways that pass through the reservations. *See Strate v. A-1 Contractors*, 520 U.S. 438, 456, 117 S. Ct. 1404, 137 L.

Ed. 2d 661 (1997) ("So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude"); *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) (rights-of-way through a reservation are the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's regulatory jurisdiction); *cf. State v. Schmuck*, 121 Wn.2d 373, 390, 850 P.2d 1332, 1341, *cert. denied*, 510 U.S. 931 (1993)(recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an unlimited authority to regulate the right of the public to travel on the Reservation's roads").

Montana recognizes two possible exceptions to the general rule:

(1) "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements"; and (2) "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Montana, 450 U.S. at 565.

The first *Montana* exception would not apply to a non-Indian motorist who is traveling upon a state, county, federal, or city maintained road. The Supreme Court has given *Montana's* second exception a narrow construction, *see Strate v. A-1 Contractors*, 520 U.S. 438, 458-59, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997), and *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998), and only allows a tribe to do "what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459.

In *Strate*, the United States Supreme Court considered whether a tribal court exceeded its adjudicative jurisdiction³ by entertaining a tort claim arising out of an accident that occurred on a portion of a state highway that crossed through Indian trust land. *See Strate*, 520 U.S. at 442. The Court held that the second *Montana* exception did not allow the tribe to exercise jurisdiction over the non-Indian driver who allegedly caused the accident. The following statement clearly demonstrates what the Court's holding would be with regard to whether tribal traffic infractions satisfy the second *Montana* exception:

Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule.

³Although the Court was considering only a tribe's adjudicative jurisdiction in *Strate*, it also was careful to point out that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," implying that the *Strate* analysis is equally applicable to a tribe's legislative and regulatory authority. *Strate*, 520 U.S. at 453.

Strate, 520 U.S. at 458.

In a post-*Strate* case, the Ninth Circuit determined that a tribe's bare interest in the safety of its members cannot confer jurisdiction over a non-Indian's activities on a public right of way. See *Burlington Northern Railroad v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000).

This does not mean that non-Indians who are signaled to pull over by a tribal officer may ignore the officer's directions. *State v. Malone*, 106 Wn.2d 607, 724 P.2d 364 (1986), is instructive. In *Malone*, an Idaho Sheriff's deputy pursued the defendant into Washington. Spokane County charged the defendant with eluding under RCW 46.61.024. The superior court dismissed for failure to state a charge. The Washington Supreme Court rejected the defense claim that the statute was not violated because the officer was without jurisdiction and reinstated the charge:

[T]he issue under RCW 46.61.024 is the nature of the defendant's behavior after the police initiate a stop, not whether the officer has authority to make the stop. *State v. Brown*, 40 Wn. App. 91, 94, 697 P.2d 583 (1985). "The modern trend has been toward requiring submission to a known peace officer, even when the arrest is unlawful, in the interest of keeping the peace." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* § 26, at 156 (5th ed. 1984).

Malone, 106 Wn.2d at 611; see also *State v. Duffy*, 86 Wn. App. 334, 339-41, 936 P.2d 444 (1997) (reaffirming that the legality of the stop is not an element of eluding).

Given that citizens essentially have no right to resist unauthorized tribal police action, two questions arise: (1) what can a county prosecutor or sheriff do to curb the practice, and (2) what can an unlawfully cited or arrested citizen do to obtain relief?

The State is unlikely to obtain any kind of *enforceable* injunction against an Indian tribe that cites non-Indians. The State can ameliorate the impact a tribal infraction has upon a non-Indian by refusing to include such infractions in the non-Indian's state driving record. The State can attempt to negotiate an agreement with the tribe whereby tribal officers who are confronted with non-Indians who violated civil traffic infractions will forward a report of the incident to the county prosecutor's office and the county prosecutor will charge the non-Indian motorist with a violation of the appropriate state law. See IRLJ 2.2(b)(2) (prosecuting attorney may issue a notice of infraction). Finally, in appropriate circumstances, the local sheriff can cross-deputize a tribal officer so the tribal officer can issue state citations to non-Indians who violate traffic laws.

A non-Indian who has been issued a tribal traffic citation may seek relief in federal court. The Supreme Court has ruled that federal courts have the authority to determine whether a tribal court has exceeded the limits of its jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). However, the Court also instructed the federal courts to follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court. *Id.*, 471 U.S. at 856-57. The *National Farmers Union* exhaustion rule allows a party to challenge a tribal court's assertion of jurisdiction in federal court only after that party has exhausted the remedies available in the tribal court system.

Alternatively, it appears that the aggrieved non-Indian *may* be able to sue the officers *individually*. Some courts have held that tribal immunity does not extend to police officers unless they can show that they were performing some discretionary or policy-making function on behalf of the tribe at the time of the allegedly tortious conduct. *Turner v. Martire*, 99 Cal. Rptr. 2d 587, 595 (2000). Additionally, even if the officer's actions were discretionary, immunity does not apply unless the officer was acting within the scope of his or her authority. *Id.*, 99 Cal. Rptr. 2d at 596. It can be argued that issuing a tribal citation to a non-Indian whom the officer knew or should have known s/he lacked jurisdiction over, would not be within the scope of the officer's authority. *See also Suarez v. Newquist*, 70 Wn. App. 827, 831, 855 P.2d 1200 (1993) (if tribal officer were to arrest non-Indian, he would be acting outside the scope of his authority and would not be immune from suit).

Finally, a non-Indian citizen who has been assessed a fine by a tribal court pursuant to a tribal traffic infraction may choose to contest the validity of the debt with the collection agency that attempts to secure payment. If the collection agency is a non-tribal business that is subject to state court jurisdiction, then judicial intervention may be possible to clear the debt from the non-Indian citizen's credit report.

The most important thing for sheriffs and prosecutors to stress to citizens is that the place to challenge jurisdiction is the courtroom, not the roadside. All motorists should pull over when signaled to do so by any officer, tribal or state commissioned.

B. FULL FAITH AND CREDIT TO DOMESTIC VIOLENCE PROTECTION ORDERS

As a response to the "escalating problem of violence against women" and in recognition of the severe toll such crimes have on our society in terms of "health care, criminal justice, and other social costs," Congress enacted in 1994 the Violence Against Women Act ("VAWA"). S. Rep. No. 103-138, at 37, 41 (1993); *see* Pub. L. No. 103-322, 108 Stat. 1796, 1902-55 (1994). Among numerous other provisions, VAWA provided that any valid protection order issued by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe. *See* VAWA § 2265. The full benefit of this section was dependent upon the adoption of implementing legislation in each State or Indian tribe.

Washington joined the vast majority of states by adopting implementing legislation in the 1999 Legislature. *See* Laws of 1999, ch. 184. The implementing legislation, which is properly cited as the "Foreign Protection Order Full Faith and Credit Act" is codified as Chapter 26.52 RCW. The Act defines "foreign protection order" as follows:

"Foreign protection order" means an injunction or other order related to domestic or family violence, harassment, sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person issued by a court of another state, territory, or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or any United States military tribunal, or

a tribal court, in a civil or criminal action.

RCW 26.52.010(3).

The Foreign Protection Order and Full Faith and Credit Act criminalizes a knowing violation of a provision of a valid protection order entered by another state court, a court in a federal territory, or an Indian tribal court that:

- prohibits the person under restraint from contacting or communicating with another person; or
- prohibits the person under restraint from going to a residence, workplace, school, or day care; or
- prohibits the person under restraint from knowingly coming within or knowingly remaining within a specified distance of a location such as the person entitled to protection's residence, workplace, school, or daycare
- specifically indicates that a violation of the provision will be a crime.⁸

RCW 26.52.070.

A knowing violation of the above-listed provisions of a foreign protection order will be punished as a gross misdemeanor unless:

- The violation is accompanied by an assault of any degree or any conduct that is reckless and creates a substantial risk of death or serious physical injury. *See* RCW 26.50.110(4); *State v. Azpitarte*, 140 Wn.2d 138, 995 P.2d 31 (2000); or
- The violation is the defendant's third violation of the no-contact provisions of an order issued under the laws of any jurisdiction, regardless of whether the previous convictions involve the same victim or other victims. *See* RCW 26.50.110(5).

A felony violation of a foreign protection order is a level "V" offense.⁹

A foreign protection order is valid if the court that entered the order had both subject matter and personal jurisdiction. RCW 26.52.020. Subject matter jurisdiction is determined by reference

⁸This provision will generally apply to a prohibition upon possessing firearms.

⁹A particular egregious violation of a foreign protection order may constitute a federal crime if the defendant "travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner." *See* 18 U.S.C. § 2261. Individual prosecutors will need to contact their local United States Attorney if they believe the facts of a particular case may merit federal intervention in order to determine whether the case satisfies the United States Attorney's charging guidelines.

to the statutes, court rules, and regulations governing the particular jurisdiction. Personal jurisdiction is determined by reference to whether the individual who was subject to restraint received constitutionally adequate notice of the proceeding and an opportunity to be heard.

Personal jurisdiction with respect to tribal court orders present unique issues. As a general rule, a tribal court will have personal jurisdiction to enter an order restraining the conduct of an Indian, whether a member of the specific tribe or of another tribe. A tribal court may only restrict the conduct of a non-Indian when the non-Indian is a party of an action that Congress has expressly authorized a tribal court to hear, (*i.e.* Indian Child Welfare proceeding). Over half of tribes located in Washington will not issue orders restraining the conduct of non-Indians. For tribes that will enter such orders, State prosecutors are urged to contact the tribe and invite them to identify the basis upon which they exercised personal jurisdiction over the non-Indian.

A foreign protection order will expire on the date listed in the order or, if the order contains no date, in accordance with the statute or court rule that authorized the order. A foreign protection order may only be amended or modified by the issuing court.¹⁰

Individuals who have a foreign protection order that may need to be enforced in Washington have the option of filing the order with any Washington court. RCW 26.52.030. Filing the foreign protection order will result in the order being entered into the state computer based criminal intelligence information system. RCW 26.52.030(2); RCW 26.52.040. Neither filing nor entry of the foreign protection order into the computer system is a prerequisite to enforcement of the foreign protection order in Washington state. *See* RCW 26.52.030(2). Counties are urged to develop procedures whereby orders entered by tribes located within Washington's borders may be filed with a State court without the person who is protected by the order having to travel from the tribal court to the State court. A community that is interested in setting up such a procedure may wish to contact the Snohomish County Clerk's Office to discuss their successful relationship with the Tulalip Tribal Court.

Police officers are expected to take action upon a foreign protection order if the order appears to be "authentic on its face." RCW 26.52.020. An order will satisfy this definition if the name of the court appears on the order, the order has a signature on the judge's line, there is a cause number on the order, the order bears a clerk's stamp or is certified, and the text of the order indicates that the court had the authority to enter the order. Tribal court orders entered by most Washington tribes have a similar format to the forms used by Washington courts. Prosecution under tribal court orders is possible even if the orders do not include warnings that are required on Washington orders under RCW 26.50. *See State v. Esquivel*, 132 Wn. App. 316, 132 P.3d 751 (2006).

Peace officers and peace officer's legal advisors have immunity from criminal and civil actions so long as they act in good faith and without malice. Officers who are confronted in the field

¹⁰The only exception to this rule is that a Washington State Superior Court may modify a provision in a foreign protection order that deals with custody of children, residential placement of children, or visitations with children, if the Washington State Superior Court obtains jurisdiction over these issues under chapter 26.27 RCW and/or the parental kidnapping prevention act, 28 U.S.C. 1738A. RCW 26.52.080.

with a foreign protection order should not hesitate to contact the prosecutor or city attorney for assistance.

Many violations of tribal orders may be committed partially within Indian Country and partially within the greater state. If the suspect is an Indian and the suspect initiated the call or sent the letter from Indian Country to a location outside the reservation, both the tribal court and the state courts will have jurisdiction to try the case.

A dialogue with the tribal prosecutor is suggested to determine the most appropriate forum. Issues to be considered include:

- Sanctions available under each system.
- Treatment and supervision options available under each system.
- The victim's wishes and whether the victim is an Indian.
- Whether any judicial proceedings are pending in either jurisdiction regarding the defendant's children.
- How integrated the defendant is within the tribal community.

When prosecuting such cross-jurisdictional offenses in state court, the jury should be instructed as follows:

A crime may be committed in more than one location. A crime is committed in any [state] [city] [or] [county] in which the defendant commits any act that constitutes part of the crime.

[A person who sends a [letter] [electronic message] [telegram] [fax] is considered to have performed the act both where the [letter] [electronic message] [telegram] [fax] originates and where the [letter] [electronic message] [telegram] [fax] is received.]

[A person who telephones another person is considered to have performed the act both where the call is placed or dialed and where the call is received [or the message is retrieved].]

This instruction will be appearing as WPIC 4.27 in the next edition of the WPIC. Until that edition is published, you may not tell the court that it is a "WPIC". You may, however, cite to the cases that are listed in the following comment in support of your proposed instruction.

COMMENT

Background. Many crimes, including violations of protection orders,

communication with a minor, and harassment, are based upon a communication between the defendant and another person. Threats and other statements may be communicated by mail, over the telephone, and through a variety of other media. In these cases, a court's jurisdiction requires the application of certain statutes, court rules, and common law principles to the facts presented to the jury.

Statutes and court rules. A criminal prosecution that is based, in part, upon a written or oral communication may be prosecuted by a Washington court if the communication was received, written, or sent inside Washington. See RCW 9A.04.030(1), (5) (jurisdiction exists for offenses in which the defendant commits acts in this state or commits acts in another state that affect persons in this state); RCW 9.61.250 (the crime of telephone harassment is committed at the place where the call is either made or received); RCW 9.61.260 (the crime of cyberstalking is committed at the place where the communication is either made or received); RCW 9A.46.030 (harassment offenses are committed at the place where threats are either made or received); see also CrR 5.1(b) and CrRLJ 5.1(c) (each providing that, when there is reasonable doubt whether an offense was committed in one jurisdiction or another, venue exists in either jurisdiction).

Case law. Communication by a telephone call is deemed to have occurred both where the call is placed and where the call is received. See *State v. Dent*, 123 Wn.2d 467, 481, 869 P.2d 392 (1994) (holding that prosecution is proper in county where letter was received in conspiracy case, and citing with approval a federal case holding that the prosecution would be proper in either county).

Communication by a letter is deemed to have occurred both where the letter is written or posted and where the letter is received. See generally *State v. Dent*, 123 Wn.2d at 481 (holding that prosecution is proper in county where letter was received in conspiracy case, and citing with approval a federal case holding that the prosecution would be proper in either county); *State v. Bogart*, 21 Wn.2d 765, 770-72, 153 P.2d 507 (1944) (prosecution proper in county where minor received a letter that was written by the defendant in another county).

Instructing a jury of the legal significance of sending a letter from one county to another county was held proper in *State v. Bogart*, 21 Wn.2d at 770.

Jurisdiction in a criminal case must be proven beyond a reasonable doubt. *State v. Norman*, 145 Wn.2d 578, 589, 40 P.3d 116 (2002). The "to convict" instruction must always include an element addressing the court's jurisdiction or power to hear and determine the case. See *State v. Lane*, 112 Wn.2d 464, 468, 476, 771 P.2d 1150 (1989).

VI. SUGGESTED RESOURCES

A. TRADITIONAL

For a scholarly discussion of Indian country jurisdiction, see Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 505 (1976)

Strickland, ed., *Cohen's Handbook of Federal Indian Law* (2005)

Canby, *American Indian Law in a Nutshell*

Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Rights in Conflict*, 22 U.Kan.L.Rev. 387 (1974)

B. INTERNET

Governor's Office of Indian Affairs <<http://www.goia.wa.gov>>

This web site contains a current directory of all Washington Tribal governments, copies of all treaties entered into with Washington Tribes, and some excellent links to other resources.

Bureau of Indian Affairs <<http://www.doi.gov/bureau-indian-affairs.html>>

Native American Constitution and Law Digitization Project <<http://thorpe.ou.edu/>>

This web site has the full text of the 1945 edition of Cohen's Handbook of Federal Indian Law, numerous tribal constitutions and codes, text of all federal laws that ceded property to tribes between 1784 and 1894, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, and treaties.

PROOF OF SERVICE

I, Shauna Field, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters state herein.

On the 10th day of January, 2013, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Timothy Woolsey, WSBA #33208
Dana Cleveland, WSBA #40285
Office of the Reservation Attorney
PO Box 150
Nespelem, WA 99155

On the 10th day of January, 2013, I also emailed a copy of the document to which this proof of service is attached to **Supreme@courts.wa.gov** to be filed, as well as to the following recipients:

Lisa M. Koop at lkoop@tulaliptribes-nsn.gov

Saza Osawa at sosawa@tulaliptribes-nsn.gov

Stephen Graham at steve@grahamdefense.com

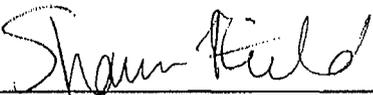
Brian Gruber at bgruber@zcvbs.com

Joshua Osborne-Klein at joshok@zcvbs.com

Pam Loginsky at pamloginsky@waprosecutors.org

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 10th day of January, 2013, at Okanogan, Washington.



Shauna Field, Legal Secretary

OFFICE RECEPTIONIST, CLERK

To: Shauna Field-Larson; Supreme@courts.wa.gov.
Subject: RE: Michael Clark 87376-3

Rec'd 1-10-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Shauna Field-Larson [<mailto:sfieldlarson@co.okanogan.wa.us>]
Sent: Thursday, January 10, 2013 2:11 PM
To: Supreme@courts.wa.gov.
Subject: Michael Clark 87376-3

State of Washington v. Michael Clark
87376-3
Stephan Bozarth, WSBA No. 29931
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