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## I. INTRODUCTION

This *amicus curiae* is filed by the Tulalip Tribes (the “Tulalip” or “Tribes”). Tulalip supports Petitioner’s request for Supreme Court review of *State v. Clark* to determine whether the Court of Appeals erred in finding that the State has jurisdiction to independently issue and execute a search warrant on trust land within the Colville Reservation. Tulalip urges the Court to reverse the Court of Appeals decision because (1) it is in conflict with well-established principles limiting State jurisdiction on Indian trust lands, and (2) the Court’s errors will do harm to recent gains in cooperative state- tribal law enforcement arrangements that provide for more effective policing on checkerboard reservations.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Tulalip Tribes consists of a confederation of several Coast Salish Tribes signatory to the 1855 Treaty of Point Elliott. The Tulalip community is located on a 22,000 acre Reservation bordering the Puget Sound 40 miles north of Seattle. Due to a history of the federal government creating allotments, the Reservation today consists of a checkerboard of Indian and non-Indian fee land ownership that is common to most Reservations in Washington State. The Tulalip Tribes has in recent years re-acquired a great deal of its Reservation land, and today the Tribes or Tribal members hold approximately 60% of the Reservation lands.

### III. PL 280, RETROCESSION AND COOPERATIVE LAW ENFORCEMENT

Indian reservation checkerboard land status has resulted in overlapping criminal jurisdiction between tribal, federal, and state law enforcement agencies. Criminal jurisdiction became even more complex in 1963 when Washington asserted nonconsensual civil and criminal jurisdiction pursuant to PL 280<sup>1</sup> over: (1) off-reservation Indian country; (2) Indian reservations, but not to Indians when on trust or restricted lands within reservations; and (3) Indians on trust or restricted lands within reservations in eight subject-matter areas.<sup>2</sup> See RCW 37.12 et. seq.

Due to meager federal and tribal resources available for Reservation law enforcement in the 1950's, Tulalip and several other tribes requested full state jurisdiction under PL 280. Unfortunately, state jurisdiction failed to yield better law enforcement or safety for the tribal community. Crimes rates remained high and county law enforcement was ineffective on the Reservation. *Tribal Courts and the Administration of Justice in Indian Country: Before the Senate Comm. on Indian Affairs*, 110th Cong., at 82 (July 24, 2008) (statement of Theresa Pouley, Judge, Tulalip Tribal Court).<sup>3</sup> Additionally, decades of conflict and mistrust between Indians and state

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<sup>1</sup> PL 280 is a federal law passed in 1953 delegating authority to certain states to assume criminal and civil jurisdiction in Indian country. Washington authorized assumption of PL 280 jurisdiction in 1957 for Tribes that requested it (consensual jurisdiction) and mandated partial jurisdiction over all Reservations in 1963 under RCW 37.12 et. seq.)

<sup>2</sup> RCW 37.12.010. Compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles upon the public streets, alleys, roads, and highways.

<sup>3</sup> The testimony can be found at [http://www.indian.senate.gov/public/\\_files/July242008.pdf](http://www.indian.senate.gov/public/_files/July242008.pdf) at p.26

agencies over fishing and other treaty rights left the Tulalip people with little trust in state law enforcement's ability to effectively work with and police tribal communities.

The Tulalip Tribes began the process of seeking retrocession of state criminal jurisdiction in 1996. Eventually, through a concerted government-to government lobbying efforts, Tulalip was able to gain state and federal support to obtain retrocession of state criminal jurisdiction in 2001. 65 Fed.Reg. 77905.

Criminal law enforcement improved dramatically since the Tribes took over primary criminal jurisdiction. *See Statement of Judge Pouley, Senate Comm. on Indian Affairs Comm., supra.* The Tulalip Tribes have worked hard to forge a new cooperative working relationship with county law enforcement to improve policing in both jurisdictions. The Tribes originally entered into officer cross-commissioning agreements with Snohomish County which authorized tribal officers to be commissioned as county officers and vice versa. Recently, in 2011, the Tulalip-Snohomish Cooperative Law Enforcement Agreement was updated to reflect the changes in State Law, RCW 10.92, which authorized tribal officers to become certified as general authority Washington peace officers; the cross-commissions and general peace officer certifications have further reduced the jurisdictional conflicts and greatly aided law enforcement on the Reservation.

Building trust is an essential element of cooperative law enforcement, and these agreements have provided for much better communication and coordination between county and tribal law enforcement. The law enforcement gains made by the Tulalip criminal justice system in assuming primary law enforcement authority on the Tulalip Reservation are wholly consistent with state and federal legislative policies recognizing

tribal governmental authority over tribal members and tribal lands. *See* RCW 37.12.100-.140 (voluntary retrocession); *State v. Schmuck*, 121 Wn.2d 373, 392, 850 P.2d 1332 (1993) (recognizing “Congress’ well-established policy of promoting tribal self-government.”); *see also Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985). The Washington State Legislature’s enactment of RCW 10.92 (discussed above) reflects the State’s policy of recognizing tribal law enforcement authority while encouraging inter-jurisdictional cooperation.

The Court of Appeals’ holding—that Omak police officers may unilaterally search Tribal trust lands and homes without any coordination with Tribal justice systems—departs dramatically from this Court’s precedent recognizing Tribal authority over tribal members and lands. Furthermore, while the State has set a legislative framework for recognition of tribal justice systems and greater state–tribal cooperation in law enforcement, the *Clark* decision promotes just the opposite—state officers entering and searching Tribal member Indian trust lands without the requirement for any engagement of tribal criminal justice systems to obtain tribal search warrants.

The Tulalip Tribes has a strong interest in this case. The Court of Appeals decision clearly disregards sovereign tribal governmental powers and undermines well-established public policies of promoting tribal self-government for all tribes in the State of Washington. If allowed to stand, the decision will be a major step back towards the days of mistrust and conflict between Indians and state police. The Court of Appeals decision will also give license to state law enforcement to circumvent tribal search warrant procedures, contrary to the Legislature’s intent in providing for greater tribal

assumption of criminal jurisdiction and more cooperation between state and tribal justice systems. This issue is of substantial interest that should be decided by this Court.

#### IV. LEGAL ARGUMENT

##### A. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DECISIONS OF THE COURT OF APPEALS [RAP 13.4(b)(1)-(2)].

Review is warranted because the decision below conflicts with decisions of this Court and the Court of Appeals regarding state jurisdiction over Indians within Indian country. In *Powell v. Farris*, 94 Wn.2d 782, 784, 620 P.2d 525 (1980), this Court recognized that it is “axiomatic that state power over Indians on a reservation is limited to the power granted by Congress in [P. L. 280].” Furthermore, where state assertions of jurisdiction within Indian country implicate both state and tribal interests, the Court has applied the “infringement test” articulated in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), to determine the limits of state authority. *Powell*, 94 Wn.2d at 786. The infringement test looks to “whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.” *Id.* (quoting *Williams*, 358 U.S. at 220); see also *Maxa v. Yakima Petroleum Inc.*, 83 Wn. App. 763, 924 P.2d 372 (1996) (“the essential question is whether state assumption of jurisdiction would interfere with reservation self-government”) (citing *Williams*, 358 U.S. at 220).

In the instant case, the Court of Appeals’ reliance on dicta from *Hicks* rather than this Court’s rule in *Powell* is unwarranted and incorrect. *Hicks* involved the issue of tribal assertions of authority over non-members. *E.g.*, *Hicks*, 533 U.S. at 355 (“This case presents the question whether a tribal court may assert jurisdiction over civil claims

against state officials who entered tribal land to execute a search warrant . . .”). This case raises a wholly different jurisdictional issue—the State’s authority to enter and search tribal member homes located on Reservation trust lands in contravention of the requirements of tribal laws.<sup>4</sup> The holding in *Hicks* did not decide this issue.

Indeed, other decisions from the Court of Appeals and from other jurisdictions strongly suggest *Hicks*, should not be extended to govern exercises of state authority over Indians in Indian country. See, e.g., *Young v. Duenas*, 164 Wn. App. 343, 350-51, 262 P.3d 527 (2011) (“[I]t is not the Puyallup tribe attempting to assert any regulatory authority over a nonmember, but instead . . . a nonmember, attempting to sue the tribe in a civil suit in state court.”); According to *Powell*, in the absence of state jurisdiction under P.L. 280, the court must examine whether exercise of state jurisdiction “infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.” 94 Wn.2d at 786 (quoting *Williams*, 358 U.S. at 220); see also *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1508 (S.D. Cal. 1992) (“a judicial officer’s writ cannot run outside of the officer’s jurisdiction.”).

The Tulalip Tribes, like Colville and other tribes that have retained criminal jurisdiction, have detailed procedures for issuance of search warrants that are applicable to trust lands. See TTC 2.25.030<sup>5</sup>. By permitting local law enforcement to ignore tribal search warrant legal requirements, the *Clark* decision is directly contrary to clearly established federal law that state laws are pre-empted where they interfere with a tribe’s

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<sup>4</sup>*Hicks* is inapposite for these reasons, but it should be noted that, unlike here, the Nevada game warden obtained a tribal court search warrant and executed it in conjunction with tribal police. *Hicks*, 533 U.S. at 356.

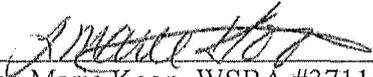
<sup>5</sup> Tulalip Tribal Code can be found at <http://www.codepublishing.com/wa/Tulalip/>

right to enact its own laws and be ruled by them. See *Williams v. Lee*, 358 U.S. 217, *supra*.

Requiring county and city officers to comply with basic tribal warrant procedures will not impair effective law enforcement. Instead, it will help support existing cooperative law enforcement efforts that have only been possible because of mutual respect for each government's law enforcement and judicial authority. The cooperative law enforcement agreements entered into by Colville and Tulalip, and that are promoted and authorized by the State legislature under RCW 10.92, provide an effective and constructive means for law enforcement to continue to work together to ensure search warrants are issued promptly by the appropriate Court.

#### V. CONCLUSION

For the reasons stated above, the Tulalip Tribes respectfully requests that the Court grant the petition for review and reverse the decision in the above-captioned case.

  
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**To:** Lisa Koop  
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Rec. 7-10-12

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**From:** Lisa Koop [<mailto:lkoop@tulaliptribes-nsn.gov>]  
**Sent:** Tuesday, July 10, 2012 4:41 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
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Dear Court Clerk,

Please accept the attached documents for filing in State v. Clark, No. 87376-3. These documents are being submitted on behalf of the Tulalip Tribes.

The attached documents are: (1) Tulalip Tribes' Motion for Leave to File Amicus Curiae Briefs, and (2) Brief of the Tulalip Tribes in Support of Petition for Review.

Sincerely,

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