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FLEEING EAST FROM INDIAN COUNTRY: *STATE V. ERIKSEN* AND TRIBAL INHERENT SOVEREIGN AUTHORITY TO CONTINUE CROSS-JURISDICTIONAL FRESH PURSUIT

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Abstract: In *State v. Eriksen*, the Washington State Supreme Court held that Indian tribes do not possess the inherent sovereign authority to continue cross-jurisdictional fresh pursuit and detain a non-Indian who violated the law on reservation land. This Comment argues the *Eriksen* Court's reliance on RCW 10.92.020 is misplaced. RCW 10.92.020 is irrelevant to a consideration of sovereign authority. States do not have the authority to unilaterally define tribal power. A tribe retains sovereign powers not taken by Congress, given away in a treaty, or removed by implication of its dependent status. The *Eriksen* Court also misinterpreted the state statute as a limit on tribal authority to enforce laws and incorrectly dismissed the validity of cross-jurisdictional fresh pursuit of a non-felon. *Eriksen* guts the ability of tribes to enforce their sovereign right to uphold the law and safety on the reservation. To reinforce tribal power, Congress should enact legislation similar to the "*Duro* Fix," a statutory recognition of inherent sovereign authority.

INTRODUCTION

On September 1, 2011, the Washington State Supreme Court decided *State v. Eriksen* (*Eriksen III*).[1] Writing for the majority, Justice Fairhurst held that a tribal police officer lacked the inherent sovereign authority[2] to stop and detain a non-Indian defendant outside the tribe's territorial

1. 172 Wash. 2d 506, 259 P.3d 1079 (2011).

2. Inherent sovereign authority is defined as "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978) (citation omitted), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004). *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[1], at 222–23 (Nell Jessup Newton et al., eds., 2012) [hereinafter COHEN]. Cohen's Handbook provides the legal basis for inherent authority: (1) consistent with Supreme Court precedent, prior to European contact, a tribe possessed the powers of any sovereign state; (2) consistent with Supreme Court precedent, the tribe's presence within the United States "subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe;" and, as a result, (3) tribes retain internal sovereignty for all powers not diminished by treaties or by express legislation of Congress. *Id.* Since Cohen first published his handbook in 1941, the Supreme Court added the third way a sovereign power is removed from a tribe: as a necessary implication of its dependent status. *See Wheeler*, 435 U.S. at 323. Inherent powers are not delegated to tribes by Congress, but are powers that have never been extinguished. COHEN, *supra*, § 4.01[1][a], at 207.

jurisdiction, even though pursuit began within the reservation.[3] *Eriksen III* mandates that tribal officers who are not certified to enforce Washington law under RCW 10.92.020 release non-Indian law violators who have fled the reservation with officers in fresh pursuit.[4] In effect, *Eriksen III* permits non-Indians to act with impunity on tribal land as long as they can successfully evade tribal officers.[5]

The *Eriksen III* holding will harm tribal interests. Tribes allow a large number of non-Indian visitors to enter their reservations on a daily basis to further economic development. Twenty-two of Washington's twenty-nine federally-recognized tribes operate casinos.[6] There are also other retail establishments located within reservations that draw visitors. The level of non-Indian traffic is extraordinary. The Tulalip reservation alone receives 42,000 guests on a weekday and over 60,000 on a weekend day.[7] In the face of this level of ingress, tribes without state approval to enforce state law are now limited in their ability to ensure health and safety on the reservation.

This unpalatable result should not stand because *Eriksen III* flies in the face of established law. Part I of this Comment provides an overview of the federal government's "plenary and exclusive" authority to define

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3. 172 Wash. 2d at 515, 259 P.3d at 1084.

4. *Id.* at 514–15, 259 P.3d at 1083–84.

5. *Id.* at 520–21, 259 P.3d at 1086 (Owens, J., dissenting).

6. GOVERNOR'S OFFICE OF INDIAN AFFAIRS, WASHINGTON STATE TRIBAL DIRECTORY 1–3 (Nov. 2011), *available at* http://www.goia.wa.gov/Tribal-Directory/TribalDirectory.pdf; WASH. STATE GAMBLING COMM'N TRIBAL & TECHNICAL GAMBLING DIV., TRIBAL CASINOS IN WASHINGTON STATE (Nov. 2010), *available at* http://www.wsgc.wa.gov/docs/tribal/tribal_casinos.pdf. There are twenty-eight tribal casinos. Tribe (Name of Casino(s)): Colville (Coulee Dam Casino; Mill Bay Casino; Okanogan Bingo-Casino); Chehalis (Lucky Eagle Casino); Jamestown S'Klallam (7 Cedars Casino); Kalispel (Northern Quest Casino); Lummi Nation (Silver Reef Casino); Muckleshoot (Muckleshoot Casino; Muckleshoot Casino II); Nisqually (Red Wind Casino); Nooksack (Nooksack River Casino); Port Gamble (The Point Casino); Puyallup (Emerald Queen Casino at I-5; Emerald Queen Casino at Fife); Quinault (Quinault Beach Resort); Skokomish (Lucky Dog Casino); Shoalwater Bay (Shoalwater Bay Casino); Snoqualmie (Casino Snoqualmie); Spokane (Chewelah Casino; Two Rivers Casino); Squaxin Island (Little Creek Casino); Stilliguamish (Angel of the Winds Casino); Suquamish (Clearwater Casino); Swinomish (Northern Lights Casino); Tulalip (Tulalip Resort Casino; Quil Ceda Creek Casino); Upper Skagit (Skagit Valley Casino Resort); and Yakama Nation (Legends Casino). *Id.*

7. Interview with Rep. John McCoy, 38th Legislative District, in Olympia, Wash. (Feb. 14, 2012) (on file with University of Washington Law Review). However, not all reservations receive that volume of visitation. For example, the Cowlitz Indian Tribe estimates it will see between 16,000 and 19,000 vehicle trips each day to its proposed casino near La Center, WA. Thacher Schmid, *In $1 Million Document, Cowlitz Tribe Defends Casino's Potential Environmental Impact*, THE DAILY NEWS (Longview, Wash.) (June 29, 2008), http://tdn.com/business/local/in-million-document-cowlitz-tribe-defends-casino-s-potential-environmental/article_ce80ab50-6681-5cd2-af07-48cc00323d86.html.

inherent sovereign authority. Part II outlines the legal analysis the Washington State Supreme Court used in recognizing tribal power to stop and detain non-Indians who violate the law on the reservation in *State v. Schmuck*.[8] Part III demonstrates that Washington statutes have removed jurisdictional barriers from officers pursuing law violators. The final background section, Part IV, lays out *Eriksen III*'s procedural history and legal arguments. This Comment argues in Part V that the *Eriksen III* decision is a misunderstanding of the analysis for inherent sovereign authority, a misapplication of the canons of construction for tribal treaties and statutes, a misinterpretation of the statute authorizing certification of tribal officers to enforce state law, a misappropriation of precedents and statutes regarding barriers to fresh pursuit, and a misalignment with public policy. To limit the precedential effect of *Eriksen III*, this Comment suggests in Part VI that Congress should use its exclusive power to define inherent sovereign authority and statutorily recognize the right of tribal officers to protect safety on their reservation through cross-jurisdictional fresh pursuit of non-Indians who break the law on tribal land.

I. CONGRESS HAS "EXCLUSIVE AND PLENARY AUTHORITY" TO DEFINE A TRIBE'S INHERENT SOVEREIGN AUTHORITY AND DELEGATE JURISDICTION OVER TRIBAL RESERVATIONS

Congress has the sole discretion to define tribal authority and to delegate jurisdiction within Indian Country.[9] Congress's supremacy in

8. 121 Wash. 2d 373, 850 P.2d 1332 (1993).

9. *See* United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restriction on tribal sovereign authority."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The whole intercourse between the United State and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States."), *abrogation recognized in* Nevada v. Hicks, 533 U.S. 353 (2001); State v. Comenout, 173 Wash. 2d. 235, 238, 267 P.3d 355, 357 (2011) ("'[S]tates . . . lack . . . criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary.' Significantly, Congress enacted a law[,] . . . Public Law 280, which authorized Washington among a few other states to assume jurisdiction over Indian country by statute without the consent of the tribe.") (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 604[1], at 537 (Nell Jessup Newton et al., eds., 2005)). *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (declaring that Congress has the "plenary" right to abrogate Indian Treaties), *abrogated by* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); *and* United States v. Winans, 198 U.S. 371, 384 (1905) (stating that the equal footing doctrine does not supersede the federal government's recognition of a tribe's right to fish at usual and accustomed locations).

Indian affairs is founded in the Indian Commerce Clause[10] and the Treaty Clause[11] of the Constitution.[12] On this basis, the United States Supreme Court has stated repeatedly that Congress's power is "plenary and exclusive" in Indian matters.[13] The Court has also stated that Congress's termination of the practice of entering treaties with tribes[14] does not diminish its legislative authority.[15] This conclusion rests in part upon the historical view that Indian relations are not domestic issues, but fall under the military and foreign policy powers "necessarily inherent in any Federal Government."[16] Therefore, defining a tribe's inherent sovereign authority is a federal question, not a state issue.[17] In *United States v. Wheeler*,[18] the Court reiterated that a state's interests are not a factor in determining the extent of tribal inherent sovereign authority:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[19]

In this vein, the Court once held that "the laws of [a State] can have no force" within a reservation.[20] While this bar on state power is no

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10. U.S. CONST. art. I, § 8, cl. 3.

11. U.S. CONST. art. II, § 2, cl. 2.

12. *Lara*, 541 U.S. at 200.

13. *Id.* ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'") (citations omitted); *see also* Negonsott v. Samuels, 507 U.S. 99, 103 (1993) ("Congress has plenary authority to alter these jurisdictional guideposts . . . .") (citation omitted).

14. 25 U.S.C. § 71 (2006) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.").

15. *Lara*, 541 U.S. at 201 (quoting Antoine v. Washington, 420 U.S. 194, 203 (1975)).

16. *Id*.

17. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (stating that "state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject"); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

18. 435 U.S. 313 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

19. *Id.* at 323 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

20. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogation recognized in* Nevada v. Hicks, 533 U.S. 353 (2001).

longer binding, a state's interests still cannot dominate a tribe's interest in maintaining sovereignty over its members and its territory, or usurp the power of Congress to define tribal authority.[21]

As part of its purview, Congress can delegate its authority to regulate a tribe.[22] For instance, Congress has ceded control over criminal and civil jurisdiction in Indian Country to a few states.[23] In 1953, Congress mandated that six states assume jurisdiction over Indian Country[24] under Public Law 280.[25] Congress also authorized any other state to assume the same jurisdiction.[26] With the law, Congress hoped to both combat perceived lawlessness on reservations and diminish tribal dependence on federal resources.[27] Initially, Public Law 280 did not require states to seek permission from tribes before assuming jurisdiction.[28] Congress amended Public Law 280 in 1968 so that any subsequent assertion of jurisdiction over Indian Country required assent from the relevant tribes, but Congress did not require states to retroactively seek permission from tribes already under state authority.[29] However, Congress did expressly authorize retrocession of jurisdiction back to the federal government.[30] In total, state jurisdiction over Indian affairs within Indian Country requires Congress's permission.[31]

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21. *Bracker*, 448 U.S. at 141–42, 151.

22. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975) (The Court rejected an unconstitutional delegation of powers argument because "[i]t is necessary only to state that the independent tribal authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes'") (quoting U.S. CONST. art. I, § 8, cl. 3).

23. 18 U.S.C. § 1162(a) (2006).

24. Indian Country is defined as "all land within the limits of any Indian reservation . . . all dependent Indian communities . . . [and] all Indian allotments, the Indian titles to which have not been extinguished." *Id.* § 1151.

25. *Id.* § 1162; 28 U.S.C. § 1360 (2006). The six states were California, Wisconsin, Alaska, Minnesota, Oregon, and Nebraska. *Id.*

26. 25 U.S.C. § 1321 (2006).

27. S*ee* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1418 (1997) (arguing that Public Law 280, although intended to address perceived lawlessness on reservations, actually compounded the problem by creating jurisdictional gaps in which no authority either could, or was willing to, enforce the law).

28. *Id.* at 1406–07.

29. 25 U.S.C. §§ 1321–1323.

30. *Id.*

31. Nevada v. Hicks, 533 U.S. 353, 365 (2001) ("The States' inherent jurisdiction on reservations can of course be stripped by Congress . . . .") (citing Draper v. United States, 164 U.S. 240, 242–43 (1896)); Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979) ("As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and

Prior to the amendment, in 1963, Washington assumed jurisdiction over Indian Country within the state.[32] Washington still holds this jurisdictional power but affords tribes the option to request retrocession.[33]

II. THE WASHINGTON STATE SUPREME COURT HAS FOUND THAT NEITHER CONGRESS NOR THE TREATY OF POINT ELLIOTT HAS EXPRESSLY DIVESTED TRIBES OF THE POWER TO DETAIN NON-INDIANS

As stated in *Wheeler*, tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[34] In 1993, the Washington State Supreme Court decided *State v. Schmuck*.[35] In that case, the question before the Court was whether a tribal officer[36] had the inherent authority to stop and detain a non-Indian driving on a public road.[37] To answer this question, the Court undertook the analysis the U.S. Supreme Court mandated in

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exclusive power over Indian affairs has expressly provided that State laws shall apply.") (citations omitted) (internal quotation marks omitted); State v. Comenout, 173 Wash. 2d 235, 238, 267 P.3d 355, 357 (2011) ("[S]tates . . . lack . . . criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary. Significantly, Congress enacted a law[,] . . . Public Law 280, which authorized Washington among a few other states to assume jurisdiction over Indian country by statute without the consent of the tribe.") (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 604[1], at 537 (Nell Jessup Newton et al., eds., 2005)). States have jurisdiction over non-Indian/non-Indian crime throughout the territorial bounds of the state. United States v. McBratney, 104 U.S. 621, 624 (1881).

32. WASH. REV. CODE § 37.12.010 (2010) ("The state of Washington hereby obligates and binds itself 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 State given by [Public Law 280], 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 . . . 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 . . . .").

33. ESHB 2233, ch. 48 § 1, 62nd Leg., Reg. Sess. (Wash. 2012) (codified as WASH. REV. CODE §§ 37.12.160–.180 (2012)). Among other steps, the statute requires the governor to approve the retrocession. *Id.*

34. United States v. Wheeler, 435 U.S. 313, 323 (1978) (citation omitted), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004); *see supra* note 2.

35. 121 Wash. 2d 373, 850 P.2d 1332 (1993).

36. *See infra* Part III.C for a discussion of Washington's recognition of tribal officers in WASH. REV. CODE § 10.92.020 (2010).

37. *Schmuck*, 121 Wash. 2d at 379, 850 P.2d at 1335.

Wheeler.[38]

A. The Federal Government Permits Tribes to Exercise Jurisdiction over Non-Members and Non-Indians Under Certain Circumstances

In theory, the colonial process and westward expansion deprived tribes of their external sovereignty but left internal sovereignty intact.[39] Their internal authority is an aspect of sovereignty that has never been extinguished.[40] For instance, tribes have the inherent right to govern themselves and their territory.[41] However, due to the diminishment of their external sovereignty, tribes do not have criminal jurisdiction over non-Indians and only possess civil jurisdiction where there is a sufficient nexus between the action and the tribe's internal interests.[42]

Notwithstanding the power to create and enforce an internal code,[43] tribes do not have criminal jurisdiction over non-Indians.[44] The U.S. Supreme Court expounded on this principle in three cases: *Oliphant v. Suquamish Indian Tribe*,[45] *Wheeler*,[46] and *Duro v. Reina*.[47] In *Oliphant*, the Court concluded there was no evidence indicating federal recognition of tribal jurisdiction over non-members in either judicial

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38. *Id.* at 380, 850 P.2d at 1335–36; *see supra* note 19 and accompanying text.

39. *See* COHEN *supra* note 2, § 4.02[1], at 222–23.

40. *See id.*, §4.01[1][a], at 207.

41. Williams v. Lee, 358 U.S. 217, 223 (1959) ("[T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.") (citations omitted).

42. Duro v. Reina, 495 U.S. 676, 677 (1990) (holding that the Salt River Pima-Maricopa Indian Community could not prosecute a non-member Indian who shot and killed a member on the Salt River Indian Reservation), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004); Montana v. United States, 450 U.S. 544, 563 (1981) (stating that a tribe's inherent sovereign authority does not sustain its attempts to regulate non-Indian hunting and fishing on non-Indian lands within the reservation).

43. United States v. Wheeler, 435 U.S. 313, 323–24 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

44. 25 U.S.C. § 1301(2) (2006).

45. 435 U.S. 191, 212 (1978) (holding that tribes do not have the sovereign authority to prosecute non-Indians), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

46. 435 U.S. 313 (holding that because the ability of a tribe to prosecute tribal members was inherent, and not a delegated power, subsequent federal prosecution was not double jeopardy).

47. 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

precedents or legislative history.[48] As the Court made explicit in *Wheeler*, a tribe's diminished status meant it retained only jurisdiction over tribal members, unless Congress expressly redefined the limits of tribal jurisdiction.[49] The Court again affirmed that tribes lack criminal jurisdiction over non-members in *Duro*.[50] Congress superseded *Duro* by amending the Indian Civil Rights Act[51] to grant tribes criminal jurisdiction over all Indians (known as the "*Duro* Fix").[52] However, the amendment failed to grant criminal jurisdiction over non-Indians.[53]

While tribes do not have criminal jurisdiction over non-Indians, they do have civil jurisdiction over non-Indians in rare instances known as the *Montana* exceptions.[54] In *Montana v. United States*,[55] the United States filed suit to quiet title over a riverbed within the Crow Indian Reservation and to establish both the Crow Tribe of Montana and the federal government as the only authorities over game within the reservation.[56] The Crow Tribe sought to prevent non-members from fishing and hunting within the reservation based on both the tribe's inherent sovereign authority to regulate actions on tribal land and the provisions of the treaties that created the reservation.[57] However, Montana refused to acquiesce to the tribe's desire to regulate non-member behavior because title over the riverbed in question was disputed and numerous non-members owned land within the reservation.[58] The Supreme Court held that the tribe's inherent sovereignty did not authorize it to regulate non-Indian hunting and fishing on land within the reservation held in fee by non-Indians.[59] The

48. 435 U.S. at 203–11.

49. 435 U.S. at 322–23.

50. 495 U.S. at 677. However, both *Oliphant* and *Duro* indicate tribes may and should detain law violators and transfer them to the proper authorities. *Oliphant*, 435 U.S. at 208; *Duro*, 495 U.S. at 696–97.

51. 25 U.S.C. §§ 1301–1303 (2006).

52. *Id.* § 1301(2) ("'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe . . . and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.").

53. *Id.* §§ 1301–1303.

54. Montana v. United States, 450 U.S. 544, 564 (1981).

55. 450 U.S. 544 (1981).

56. *Id.* at 544.

57. *Id.*

58. *Id.*

59. *Id.* "[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent

Court recognized two exceptions to this general denial of tribal civil jurisdiction over non-Indians.[60] The tribe can: (1) regulate the activities of non-members who "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) "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."[61]

After *Montana*, courts have cautioned against applying the exceptions too broadly.[62] For example, the Ninth Circuit, in *County of Lewis v. Allen*,[63] stated that a broad application of the second exception would lead to absolute jurisdiction by tribes.[64] In the court's opinion, any activity on a reservation is conceivably linked to the vitality of a tribe's political, economic, health, or welfare interests.[65] Echoing this concern, the U.S. Supreme Court noted that the "second exception . . . is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government."[66]

The Supreme Court narrowed the application of the exceptions in *Strate v. A-1 Contractors*[67] and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.[68] The Court stressed that a balance must be upheld between protecting tribal self-government and unduly

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status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564 (citations omitted).

60. *Id.* at 565–66.

61. *Id.* (citations omitted).

62. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 n.12 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (stating that the *Montana* exceptions did not apply because both parties in the civil suit were non-members and opening tribal courts for use by the plaintiff in this case is not required to protect tribal self-government); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989) (holding that the exceptions did not apply to instances of zoning fee lands owned by non-members in "open" areas, but did in areas closed to the general public. Opening the land to the public diminished the interest of the tribe); Cnty. of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998) (holding that a tribal requirement that county law enforcement officers be subjected to tribal court jurisdiction was not a sufficient component of tribal self-government to allow the interference of a state's decision to require adjudication in state courts).

63. 163 F.3d 509 (9th Cir. 1998).

64. *Id.* at 515.

65. *Id.*

66. *Atkinson Trading Co.*, 532 U.S. at 657 n.12 (citation omitted).

67. 520 U.S. 438, 459 (1997); *see supra* note 62.

68. 492 U.S. 408, 431 (1989); *see supra* note 62.

interfering with a state's interests.[69] Specifically, the second exception only applies when tribal jurisdiction is required to ensure the tribe's right to govern itself.[70] A lower court interpreted the Supreme Court as having indicated that a threat to tribal interest need not necessarily come from within the reservation.[71] However, the Court has stated that the threat must constitute an attack on the continued viability of the tribe's sovereignty.[72]

Following this mandate, the Ninth Circuit found that the right to make laws and enforce them is an essential element of sovereignty.[73] In *Settler v. Lameer*,[74] the court held that the Yakima Indian Nation had the right to enforce fishing regulations through arrest and seizure at its treaty-preserved fishing sites located off-reservation.[75] The court decided it is difficult to enforce regulations without the ability to arrest: "the power to regulate is only meaningful when combined with the power to enforce."[76] The Ninth Circuit continued this line of reasoning in *Ortiz-Barraza v. United States*.[77] The *Ortiz-Barraza* court acknowledged that a tribe has the power to create laws and the right to exclude violators who have been trespassed.[78] Lacking the power to prosecute, tribes can only enforce their right by delivering violators to state law enforcement.[79]

The Washington State Supreme Court applied this federally-created standard in *State v. Schmuck*.[80] Similar to both *Settler* and *Ortiz-Barraza*,

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69. *Strate*, 520 U.S. at 457–58; *Brendale*, 492 U.S. at 431.

70. *Strate*, 520 U.S. at 459.

71. John v. Baker, 982 P.2d 738, 752 (Alaska 1999) ("Thus, in determining whether tribes retain their sovereign powers, the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events.").

72. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (citing Montana v. United States, 450 U.S. 544, 566 (1981)); Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 943 (9th Cir. 2009) (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 n.12 (2001)).

73. *See* Settler v. Lameer, 507 F.2d 231, 239 (9th Cir. 1974).

74. 507 F.2d 231 (9th Cir. 1974).

75. *Id.* at 239.

76. *Id.* at 238.

77. 512 F.2d 1176 (9th Cir. 1975).

78. *Id.* at 1179; *see also* Duro v. Reina, 495 U.S. 676, 696–97 (1990) ("The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. . . . [A]nd if necessary, to eject them.") (citations omitted), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004); United States v. Wheeler, 435 U.S. 313, 323 (1978) (stating that tribes retain the inherent authority to "prescribe laws for their members and to punish infractions of those laws"), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

79. *Ortiz-Barraza*, 512 F.2d at 1179.

80. 121 Wash. 2d 373, 381–83, 850 P.2d 1332, 1336–37 (1993).

the Court stated that a fundamental aspect of creating a legal code is the ability to stop violators.[81] In particular, a tribal officer's inability to pull drivers over would render a tribal traffic code "virtually meaningless," allowing non-Indians to act with impunity upon a reservation.[82] The Court followed the U.S. Supreme Court's guidance in *Oliphant* and *Duro*, stating that detention by tribal officers is "a tribe's proper response to crime committed by a non-Indian on the reservation."[83] The *Schmuck* Court also indicated that no court has ever held that a state's assumption of jurisdiction under Public Law 280 precludes the concurrent authority of tribes to stop law violators.[84] Furthermore, under a *Montana* analysis, the ability to detain drivers—in particular, drunk drivers—significantly affects the health and welfare of the tribe.[85] Neither the removal of a tribe's external authority nor an express provision of Congress prevented a tribe from exercising its sovereign right to enforce law through traffic stops.[86]

B. The Treaty of Point Elliott Mandates that the Party Tribes Transfer Violators to State Authorities

Another method to define inherent sovereign authority is to look at the provisions of the relevant tribal treaty.[87] As the *Wheeler* Court mandated, courts must look to express language in federal statutes and treaties.[88] A treaty is viewed as a grant of rights from the tribe to the United States, and aboriginal powers are reserved unless expressly relinquished in the treaty.[89]

However, when a Washington court analyzes an issue of Indian law, it is guided by two different standards.[90] On one hand, because

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81. *Id.* A tribe's grant of a highway easement to a state does not extinguish the tribe's interests in the land. *See* State v. Pink, 144 Wash. App. 945, 947, 185 P.3d 634, 635 (2008) (declaring that the state did not have jurisdiction to prosecute a violator for unlawfully possessing a firearm on a road running through tribal land because the violation was not a traffic violation).

82. *Schmuck*, 121 Wash. 2d at 381–83, 850 P.2d at 1336–37.

83. *Id.* at 386–87, 850 P.2d at 1339 (citations omitted); *see supra* note 50.

84. 121 Wash. 2d at 395–96, 850 P.2d at 1344 (quoting Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990)).

85. *Id.* at 391, 850 P.2d at 1341.

86. *Id.* at 381–83, 386–91, 850 P.2d at 1336–37, 1338–42.

87. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

88. *See id.*

89. *Schmuck*, 121 Wash. 2d at 384, 850 P.2d at 1338.

90. *Compare* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their

Washington assumed jurisdiction under Public Law 280, Washington can pass statutes affecting its own criminal and civil jurisdiction on the reservation.[91] When interpreting a state statute, a Washington court must give effect to the intent of the state legislature demonstrated through the plain and ordinary meaning of the language unless related statutes reveal contrary legislative intent.[92] On the other hand, when a court attempts to interpret an Indian treaty or a federal statute governing tribal affairs, it must construe the language as the Indians would naturally have understood the words, with any ambiguities resolved liberally in favor of the tribes.[93] These canons of interpretation compensate for the presumed inferior bargaining power and knowledge of the Indians at the time of negotiation, and reinforce the special duty the United States government owes to tribes.[94]

In *Schmuck*, the Washington State Supreme Court quashed this interpretive dilemma when evaluating the power of a tribal officer to detain non-Indian law violators.[95] The Court determined that Washington's assumption of jurisdiction under Public Law 280 cannot undermine the provisions of the Treaty of Point Elliott (Point Elliott).[96]

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benefit . . . .") (citations omitted), *with* Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 11, 43 P.3d 4, 10 (2002) ("[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent . . . . [I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.") (citations omitted).

91. WASH. REV. CODE § 37.12.010 (2010).

92. *Campbell & Gwinn, LLC*, 146 Wash. 2d at 11, 43 P.3d at 10; Burns v. City of Seattle, 161 Wash. 2d 129, 140, 164 P.3d 475, 481 (2007) ("Plain meaning is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole.") (citing *Campbell & Gwinn, LLC*, 146 Wash. 2d at 11, 43 P.3d at 10).

93. State v. Buchanan, 138 Wash. 2d 186, 202, 978 P.2d 1070, 1078 (1999); *Blackfeet Tribe of Indians*, 471 U.S. at 766.

94. *Schmuck*, 121 Wash. 2d at 385, 850 P.2d at 1338; *see also* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

95. 121 Wash. 2d at 393–96, 850 P.2d at 1342–44.

96. *Id.* Many tribal reservations in Northwest Washington were created as a result of the 1855 Treaty of Point Elliott. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927 [hereinafter Point Elliott]; *see also* Krista J. Kapralos & Eric Stevick, *Treaty's Key Points of Contention—Document That Established Indian Reservations Still Debated*, EVERETT HERALD (Oct. 22, 2006, 12:01 a.m.), *available at* http://www.heraldnet.com/article/20061022/NEWS01/610220766/0/rss01 [hereinafter Kapralos and Stevick].

In the treaty, northwest tribes, including the Duwamish, Suquamish, Snoqualmie, Snohomish, Lummi, Skagit, and Swinomish, ceded their land to the U.S. government. The treaty was part of a large-scale effort on the part of the U.S. government to concentrate Indians on reservations where they could be acculturated into civilized society. Under the guidance of an agent, the Indians

In regard to cross-jurisdictional authority, Article IX of the treaty states, "[a]nd the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."[97] The Court stated that, under the Indian canons of interpretation, Article IX requires the detention and transfer of non-members to state authorities.[98] A state cannot diminish rights reserved in a treaty,[99] and Congress did not expressly divest tribes of the right to detain and transfer in Public Law 280.[100] Nothing in Public Law 280 precludes concurrent jurisdiction between states and tribes.[101] Such an interpretation is in line with Congress's stated goal: to improve law enforcement on reservations.[102] A court cannot read state statutes to exceed statutory grants of power and undermine related federal policies.[103] Therefore, tribes have the right to stop and detain non-Indians who violate the law within a reservation.[104]

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received allotments of land, upon which they were to farm, as opposed to hunt and gather. The Indians were also expected to attend church and school. As one annual report of the Commissioner on Indian Affairs described, the U.S. supplied the tribes "with agricultural implements, mechanical tools, domestic animals, instructors in the useful arts, teachers, physicians, and Christian missionaries . . . ." ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 80–84 (2d ed. 2010) (reproducing a series of annual reports from the Commissioner of Indian Affairs describing the effort to civilize Indian tribes).

Point Elliott created what is today called the Tulalip Reservation, and a few other temporary reservations. Point Elliott, *supra*, art. II–III; Kapralos and Stevick, *supra*. However, the temporary reservations have morphed into permanent reservations like the Lummi Reservation. *Lummi Reservation*, THE BELLINGHAM HERALD, Sep. 11, 2007, *available at* http://www.bellinghamherald.com/2007/09/11/178500/lummi-reservation.html.

97. Point Elliott, *supra* note 96, art. IX. ("The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.").

98. *Schmuck*, 121 Wash. 2d at 384–85, 850 P.2d at 1338.

99. *Id.* at 393, 396, 850 P.2d at 1343–44.

100. *Id.* at 396, 850 P.2d at 1344.

101. *Id.* at 395, 850 P.2d at 1343 (quoting Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990)).

102. *Id.* at 394–96, 850 P.2d at 1343–44.

103. *Id.* at 395–96, 850 P.2d at 1344.

104. *Id*. at 396, 850 P.2d at 1343.

III. WASHINGTON STATUTES AUTHORIZE OFFICERS TO ENGAGE IN CROSS-JURISDICTIONAL FRESH PURSUIT

The Court held in *Schmuck* that a tribal officer may detain non-Indians for law violations that occur within the boundaries of the reservation.[105] However, *Schmuck* did not involve cross-jurisdictional pursuit.[106] To evaluate the authority of a tribal officer to detain non-Indians outside of the reservation, one must consider the effects of the Washington Mutual Aid Peace Officers Powers Act,[107] the Uniform Act on Fresh Pursuit,[108] and RCW 10.92.020.

A. The Washington Mutual Aid Peace Officers Powers Act Removed the Requirement That the Underlying Crime Be a Felony for Fresh Pursuit

The purpose of the Washington Mutual Aid Peace Officers Powers Act (Powers Act) is to remove the "artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies."[109] Once certified as a general authority peace officer,[110] an officer can enforce Washington traffic and criminal laws throughout the state so long as that officer has the consent of the jurisdiction in which the exercise of authority occurs, is transporting a prisoner, responding to an emergency, or executing a warrant.[111]

Another instance in which officers can arrest outside their jurisdiction

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105. *Id.*

106. *Id.* at 377–78, 850 P.2d at 1333–34.

107. WASH. REV. CODE §§ 10.93.001–.900 (2010).

108. WASH. REV. CODE §§ 10.89.010–.080 (2010).

109. WASH. REV. CODE § 10.93.001(2).

110. The Powers Act distinguishes between a "general authority Washington law enforcement agency," whose primary function is the detection of law violations (State Patrol, Department of Fish and Wildlife), and a "limited authority Washington law enforcement agency" that enforces laws as only one of its functions (the State Gambling Commission or Parks and Recreation Commission). A "general authority Washington peace officer" is any full-time, fully compensated employee of a general authority law enforcement agency, but a "limited authority Washington peace officer" can serve as a general authority peace officer if qualified under other sections of the act. WASH. REV. CODE § 10.93.020.

111. WASH. REV. CODE § 10.93.070. WASH. REV. CODE § 10.93.070 specifies that a general authority peace officer can enforce the laws of the state "throughout the territorial bounds of this state" in the following instances: (1) with written consent of the sheriff or chief of police in whose jurisdiction the "exercise of powers" occurs; (2) when responding to an emergency involving immediate threat to human life or property; (3) if requested to aid pursuant to a mutual assistance agreement by the agency or officer with enforcement authority; (4) when transporting a prisoner; (5) when executing a warrant; or (6) when in fresh pursuit as defined in WASH. REV. CODE § 10.93.120.

is in fresh pursuit.[112] Prior to the Powers Act, an officer could only engage in cross-jurisdictional fresh pursuit when pursuing a suspected felon.[113] The Powers Act broadened the instances in which an officer can engage in this type of pursuit:

> Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.[114]

Thus, a peace officer can pursue an individual who violates a traffic law throughout the State of Washington.[115]

B. An Officer Does Not Need to Be Certified to Enforce Washington Law to Engage in Cross-Jurisdictional Fresh Pursuit

In 1943, Washington adopted the Uniform Act on Fresh Pursuit (Uniform Act).[116] The Uniform Act authorizes any peace officer of another state to continue fresh pursuit into Washington and make a valid arrest for violations of that state's laws.[117] The officer must only take the arrested individual before a Washington magistrate to evaluate the lawfulness of the arrest and initiate extradition.[118] The original 1943 statute only authorized cross-jurisdictional fresh pursuit of suspected felons, but, in 1998, the legislature expanded the grant of authority to cover "driving while intoxicated, driving under the influence of drugs or alcohol, driving while impaired, [and] reckless driving[.]"[119]

The 1998 amendment to the Uniform Act clarified the cross-jurisdictional rights of foreign officers in matters of drunk driving.[120] For

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112. WASH. REV. CODE § 10.93.070(6). "Fresh pursuit" is not necessarily immediate pursuit, but is pursuit without unreasonable delay. WASH. REV. CODE § 10.93.120. It can also be defined by the common law. *Id.*

113. City of Wenatchee v. Durham, 43 Wash. App. 547, 550, 718 P.2d 819, 821–22 (1986), *superseded by statute*, WASH. REV. CODE §§ 10.93.001–.900, *as recognized in* Vance v. State, 116 Wash. App. 412, 65 P.3d 668 (2003).

114. WASH. REV. CODE § 10.93.120(1).

115. WASH. REV. CODE § 10.93.120.

116. WASH. REV. CODE §§ 10.89.010–.080 (2010); 1943 Wash. Sess. Laws ch. 261, § 1.

117. WASH. REV. CODE § 10.89.010.

118. WASH. REV. CODE § 10.89.020.

119. *Compare* 1943 Wash. Sess. Laws ch. 261, § 1, *with* 1998 Wash. Sess. Laws ch. 205, § 1.

120. *Compare In re* Richie, 127 Wash. App. 935, 113 P.3d 1045 (2005), *and* State v. Steinbrunn, 54 Wash. App. 506, 510–12, 774 P.2d 55, 58–59 (1989) (holding that a Washington peace officer could arrest an unconscious defendant in an Oregon hospital pursuant to the Uniform Act), *with*

instance, take the conflicting results of *In re Richie*[121] and *State v. Barker*.[122] In *Richie*, Division 3 of the Washington Court of Appeals indicated that an officer can lawfully arrest a drunk driver who was taken from Washington to an Idaho hospital.[123] The key for the *Richie* court was the location of the violation.[124] Conversely, in *Barker*, the Washington State Supreme Court held that an Oregon officer lacked authority to arrest a drunk driver who was apprehended after entering Washington.[125] The officer lacked the authority to arrest because she had not completed the training program required under RCW 10.93.090.[126] However, the Court was not reviewing whether the officer had statutory authority to arrest the defendant in Washington under the Uniform Act.[127] In a footnote, the Court explicitly recognized that the 1998 amendment to the Uniform Act "clearly authorized" the officer in this case to pursue a person she believed to be driving under the influence and driving recklessly.[128] Thus, both the *Ritchie* and *Barker* courts have indicated drunk driving is a sufficient basis to justify fresh pursuit into a foreign jurisdiction.[129]

C. RCW 10.92.020 Extends the Rights of Washington Officers to Certified Tribal Officers

Another way the Washington State Legislature broke down territorial barriers to fresh pursuit is the extension of a peace officer's authority to tribal officers.[130] The legislature distinguishes between a general authority Washington peace officer, who is authorized to enforce the State's laws, and a "tribal police officer," who enforces the criminal laws of a federally-recognized tribe.[131] To improve law enforcement on reservations, the legislature enacted RCW 10.92.020, authorizing tribal

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State v. Barker, 143 Wash. 2d 915, 25 P.3d 423 (2001).

121. 127 Wash. App. 935, 113 P.3d 1045 (2005).

122. 143 Wash. 2d 915, 25 P.3d 423 (2001).

123. 127 Wash. App. at 942–43, 113 P.3d at 1049.

124. *Id.*

125. 143 Wash. 2d at 917–18, 25 P.3d at 424.

126. *Id.* at 922, 25 P.3d at 426.

127. *Id.* at 920 & n.1, 25 P.3d at 425 & n.1. The State did not file an answer to the defendant's petition for discretionary review. *Id.* at 920, 25 P.3d at 425.

128. *Id.* at 920 n.1, 25 P.3d at 425 n.1.

129. *Id.*; *Richie*, 127 Wash. App. at 942–43, 113 P.3d at 1049.

130. WASH. REV. CODE § 10.92.020 (2010).

131. WASH. REV. CODE § 10.92.010.

officers to become general peace officers.[132] Under the statute, a tribal officer can make arrests under the color of Washington law.[133]

For the statute to apply, three things must occur. First, the tribe must request the State of Washington to certify its law enforcement agents as tribal officers.[134] Second, the tribal government must submit proof of public liability and property damage insurance.[135] Third, the tribe must reach an interlocal agreement with a local government law enforcement agency for cooperative law enforcement.[136]

RCW 10.92.020 affords tribal officers the same powers as general authority peace officers.[137] Therefore, a tribal officer can enforce the laws of Washington throughout the state in the instances enumerated in RCW 10.93.070, one of which is fresh pursuit.[138] The statute is clear that the grant of power to tribes in no way expands tribal authority or allows for tribal arrests outside of reservation land apart from the instances outlined in RCW 10.93.070.[139] However, the statute explicitly states that nothing in it altered the inherent sovereign authority of the State's tribes.[140] It only extended to tribal officers the authority of a general authority Washington peace officer to enforce Washington law.[141]

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132. Interview with Rep. John McCoy, *supra* note 7 ("[Tribes] needed law enforcement just on the reservation . . . . [Bad actors] would [leave] the reservation, [violate the law,] then come back . . . . [T]here was difficulty [prosecuting] the [bad actors] because they were bouncing back and forth [between jurisdictions] . . . . [After I was elected,] I started working on [tribal law enforcement legislation and,] . . . now that there is cross-deputization[,] . . . it's easier to make an arrest and get a conviction.").

133. WASH. REV. CODE § 10.92.020.

134. *Id.* To accomplish this, the tribal government must enter a written agreement with the Washington State Criminal Justice Training Commission. WASH. REV. CODE § 43.101.157(1) (2010). The Training Commission provides law enforcement training for all criminal justice personnel in Washington. WASH. REV. CODE § 43.101.200. To be certified as a tribal officer, one must meet the same requirements as an individual who seeks certification as a general authority peace officer. WASH. REV. CODE § 43.101.157(1)–(2). The applicant must also undergo a background check, psychological examination, and a polygraph test. WASH. REV. CODE § 43.101.095.

135. WASH. REV. CODE § 10.92.020(2)(a).

136. WASH. REV. CODE § 10.92.020(10).

137. WASH. REV. CODE § 10.92.020(1).

138. WASH. REV. CODE § 10.93.120(5) (2010); WASH. REV. CODE § 10.93.070(6); *see supra* note 111.

139. WASH. REV. CODE § 10.92.020(4); *see supra* note 111.

140. WASH. REV. CODE § 10.92.020(7).

141. WASH. REV. CODE § 10.92.020(1).

IV. WITHIN THIS FRAMEWORK OF FEDERAL AND STATE LAW, THE WASHINGTON STATE SUPREME COURT DECIDED THE THREE *ERIKSEN* CASES

The question of a tribal officer's inherent authority to continue cross-jurisdictional fresh pursuit arose in *State v. Eriksen*.[142] On August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department was patrolling the Lummi Reservation when an approaching vehicle with its high beams on swerved across the center line and almost struck the officer's marked car.[143] Officer McSwain turned his car around, activated his overhead lights, and followed the other car.[144] The pursued vehicle did not stop until arriving at a gas station located off the reservation.[145] As Officer McSwain approached the vehicle, he observed the driver, Loretta Lynn Eriksen, switch places with the front seat passenger in an attempt to evade detection.[146] After asking for Eriksen's license, Officer McSwain determined she was not a tribal member.[147] He noted that Eriksen "smelled strongly of intoxicants, had bloodshot and watery eyes, and spoke in slightly slurred speech."[148] Officer McSwain promptly called for a Whatcom County deputy sheriff.[149] While waiting for the deputy sheriff to arrive, he asked Eriksen to step from the car and, without performing any sobriety tests or collecting any evidence, put her in the back of his patrol car.[150] When the deputy sheriff arrived, the sheriff arrested Eriksen.[151]

After a trial in Whatcom County District Court, a jury convicted Eriksen of driving under the influence.[152] At trial, she moved to suppress evidence and dismiss the case for lack of jurisdiction on the grounds that Officer McSwain did not have the authority to stop and detain her off tribal land.[153] No party questioned the presence of probable cause for a

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142. State v. Eriksen (*Eriksen III*), 172 Wash. 2d 506, 507, 259 P.3d 1079, 1079–80 (2011).

143. *Id.* at 507–08. The Lummi Nation Code of Laws 6.04.050(a) (2008) mandates that drivers use low beams within 500 feet of oncoming vehicles.

144. *Eriksen III*, 172 Wash. 2d at 508, 259 P.3d at 1080.

145. *Id.* Under Lummi law, eluding an officer is a Class B offense, one step below a felony. Lummi Nation Code of Laws 6A.02.110 (2008); Lummi Nation Code of Laws 5.10.090 (2008).

146. *Eriksen III*, 172 Wash. 2d at 508, 259 P.3d at 1080.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 508–09, 259 P.3d at 1080.

151. *Id.* at 509, 259 P.3d at 1080.

152. *Id.*

153. *Id.*

Terry stop,[154] or that the Lummi tribe lacked criminal jurisdiction over Eriksen.[155] The district court denied the motion, and, on appeal, the Whatcom County Superior Court upheld the conviction.[156] Both courts reasoned that the Lummi Nation's inherent sovereign power authorizes tribal police to enforce internal criminal laws by pursuing offenders who leave the reservation.[157]

A. In Eriksen I, *the Washington State Supreme Court Upheld the Arrest Because the Canons of Interpretation and a Tribe's Inherent Sovereign Authority Mandate Its Ability to Enforce Its Own Laws*

In 2009, the Washington State Supreme Court granted discretionary review of the Whatcom County Superior Court's decision to affirm Eriksen's conviction in the first *State v. Eriksen* (*Eriksen I*).[158] A unanimous court upheld the arrest.[159] Justice Sanders, writing for the Court, held that "tribal officers have the inherent sovereign authority and statutory authority to continue fresh pursuit of motorists who break traffic laws on the reservation and then drive off the reservation."[160] The Court based its decision on a tribe's inherent power to uphold the law on the reservation and the legislature's effort to improve cross-jurisdictional crime prevention.[161]

Based on *Schmuck* and *Ortiz-Barraza*, the Court stated that tribes have the power to detain non-Indians who violate the law on public roads within the reservation.[162] A tribe's authority over events occurring on its land is an inherent power that has never been extinguished.[163] Thus, tribes have an inherent interest in protecting self-government

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154. Terry v. Ohio, 392 U.S. 1, 30 (1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . [the officer can] make[ ] reasonable inquiries.").

155. *See* Brief for Lummi Nation as Amicus Curiae Supporting the State at 2, State v. Eriksen (*Eriksen I*), 166 Wash. 2d 953, 216 P.3d 382 (2009), *superseded by*, State v. Eriksen (*Eriksen II*), 170 Wash. 2d 209, 241 P.3d 399 (2010) (No. 80653-5); *Eriksen III*, 172 Wash. 2d at 507, 259 P.3d at 1079–80.

156. *Eriksen III*, 172 Wash. 2d at 509, 259 P.3d at 1080.

157. *Eriksen I*, 166 Wash. 2d at 959, 216 P.3d at 385.

158. 166 Wash. 2d 953, 959, 216 P.3d 382, 385 (2009), *superseded by*, State v. Eriksen (*Eriksen II*), 170 Wash. 2d 209, 241 P.3d 399 (2010).

159. *Id.* at 957, 974, 216 P.3d at 384, 393.

160. *Id.* at 957, 216 P.3d at 384 (internal quotation marks omitted).

161. *Id.* at 973–74, 216 P.3d at 393.

162. *Id.* at 961, 216 P.3d at 386 (citations omitted).

163. *Id.* at 962, 216 P.3d at 387.

through the creation and enforcement of an internal criminal code.[164] In fact, tribal parties to Point Elliott affirmatively agreed to deliver law-breakers to the proper authorities.[165] In the particular instance of a fleeing drunk driver, it is only through detaining violators that a tribe can simultaneously protect its own interests and uphold its duty to aid law enforcement.[166]

The Court next applied the second *Montana* exception.[167] The Court expressly identified that an inability to enforce a traffic code is a direct threat to a tribe's political integrity.[168] The inherent power of self-governance is only practical if the tribe can enforce its internal laws.[169] The Court reasoned that if it authorized non-Indians to escape prosecution simply by successfully winning a race to the reservation boundary, it would undermine the holding from *Schmuck*.[170]

In the last part of its analysis, the Court found that the Powers Act gives tribes the statutory authority to enforce their internal laws in the event of fresh pursuit off the reservation.[171] The Court contended that a general authority Washington law enforcement agency is any "political subdivision . . . having as its primary function the detection and apprehension of persons committing infractions or violating the traffic or criminal laws in general . . . ."[172] Because the legislature directed courts to "liberally construe" the provisions of the Powers Act,[173] tribal officers were general authority officers and could cross-jurisdictional boundaries when in fresh pursuit.[174]

B. In Eriksen II, *the Court Upheld the Arrest Because a Tribe Retains Its Inherent Sovereign Authority to Enforce Its Own Laws.*

In 2010, Ms. Eriksen petitioned for reconsideration[175] and the Court

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164. *Id.* at 963, 216 P.3d at 387.

165. *Id.* at 962–63, 216 P.3d at 387 (citing State v. Schmuck, 121 Wash. 2d 373, 385, 850 P.2d 1332, 1338 (1993)).

166. *Id.* at 965–66, 216 P.3d at 388–89.

167. *Id.* at 964, 216 P.3d at 388 (citing Montana v. United States, 450 U.S. 544, 566 (1981)).

168. *Id.* at 965, 216 P.3d at 388.

169. *Id.* (quoting *Schmuck*, 121 Wash. 2d at 392, 850 P.2d at 1342).

170. *Id.* at 966, 216 P.3d at 389.

171. *Id.* at 972–74, 216 P.3d at 392–93.

172. *Id.* at 971, 216 P.3d at 391(emphasis omitted) (quoting WASH. REV. CODE § 10.93.120(1) (2010)).

173. WASH. REV. CODE § 10.93.001(3).

174. *Eriksen I*, 166 Wash. 2d at 973–74, 216 P.3d at 393.

175. Motion to Reconsider of Petitioner at 1, *Eriksen I*, 166 Wash. 2d 953, 216 P.3d 382 (No. 06-

granted review in the second *State v. Eriksen* (*Eriksen II*).[176] Justice Sanders, writing for a 6-3 court,[177] again affirmed the conviction, holding that tribal officers possess the inherent authority to continue fresh pursuit off reservation land.[178]

Justice Sanders replicated much of the Court's analysis from *Eriksen I*.[179] In *Eriksen II*, the Court also explained that a determination of inherent sovereign power is based on "the character of the power that the tribe seeks to exercise, not merely the location of events."[180] It is the vital nature of a tribe's ability to enforce the law, protect the safety of tribal members, and control events on tribal land that mandates the recognition of the inherent sovereign authority to continue fresh pursuit of a suspected criminal, in particular a drunk driver.[181] However, in a reversal from *Eriksen I*, the Court did not assert that a tribal officer is by definition a general authority Washington peace officer under the Powers Act.[182] The Court only noted that the Powers Act does not explicitly bar a tribal officer's authority to detain after fresh pursuit.[183]

Justice Fairhurst authored the dissenting opinion.[184] Although the dissenters agreed that a tribal officer may pursue a driver off the reservation, they argued that there is no authority to support a subsequent detention once a lack of tribal status is ascertained.[185] The mandate to interpret treaties liberally and resolve ambiguities in favor of

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1-00516-6) (Eriksen argued the Court incorrectly equated the Lummi tribal police to a general authority Washington law enforcement agency under WASH. REV. CODE § 10.93.020(1) because the tribe is not a political subdivision of the state, nor does it enforce state laws. Furthermore, like the Oregon police officer in *Barker*, the tribe decided not to comply with the certification requirements under Chapter 10.93, thus limiting its ability to continue fresh pursuit.). The Washington State Supreme Court will grant a motion for reconsideration if the party has demonstrated the Court overlooked or misapprehended the law or a fact. WASH. R. APP. P. 12.4.

176. 170 Wash. 2d 209, 215, 241 P.3d 399, 402 (2010), *superseded by*, State v. Eriksen (*Eriksen III*), 172 Wash. 2d 506, 259 P.3d 1079 (2011).

177. *Id.* at 226, 241 P.3d at 408 (joined by Justices C. Johnson, Chambers, Owens, J. Johnson, and Stephens).

178. *Id.* at 226, 241 P.3d at 407.

179. *See supra* Part IV.A for Justice Sanders's analysis in *Eriksen I*, 166 Wash. 2d 953, 216 P.3d 382. Among other determinations, the Court recognized both a tribe's right to protect self-government by enforcing law within the reservation and the duty created under Point Elliott.

180. 170 Wash. 2d at 216, 241 P.3d at 402 (quoting John v. Baker, 982 P.2d 738, 752 (Alaska 1999)).

181. *Id.* at 218–22, 241 P.3d at 403–05 (citations omitted).

182. *Id.* at 225–26, 241 P.3d at 407.

183. *Id.* (citing WASH. REV. CODE § 10.93.120(1) (2010)).

184. *Id.* at 226–30, 241 P.3d at 408–09 (Fairhurst, J., dissenting) (joined by Chief Justice Madsen and Justice Alexander).

185. *Id.* at 227, 241 P.3d at 409.

tribes is "not a blank check to rewrite the language of a treaty, even to avoid an injustice."[186] The tribal officer may only notify a general authority Washington peace officer that a car with a particular description is travelling down a road.[187] The dissenters acknowledged that their conclusion requires an officer to allow a drunk driver to continue driving, but stressed that current law dictated invalidating the arrest.[188] To prevent this result in the future, they recommended that either tribes have their officers certified under RCW 10.92.020 or the legislature extend statutory fresh pursuit to tribal officers.[189]

C. In Eriksen III, *the Court Declared the Arrest Invalid Because Tribal Officers Lack the Authority to Detain Outside the Territorial Limits of Their Jurisdiction*

In 2011, Ms. Eriksen moved for reconsideration a second time,[190] and the Washington State Supreme Court granted review in *Eriksen III*.[191] For Eriksen, the third time was the charm, as Justice Fairhurst, writing for a 5-4 court,[192] invalidated the conviction and held that fresh pursuit off tribal land is not within the inherent sovereign power of an Indian tribe.[193]

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186. *Id.* at 229, 241 P.3d at 409 (citing Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945)).

187. *Id.*

188. *Id.*

189. *Id.* at 230, 241 P.3d at 409.

190. Motion to Reconsider of Petitioner at 1, *Eriksen II*, 170 Wash. 2d 209, 241 P.3d 399 (No. 80653-5) (Eriksen argued there was no factual support for the application of common law fresh pursuit as the justices only assumed felony eluding a police officer occurred here. Without a felony—and reckless driving is not one—there were no grounds to allow cross-jurisdictional pursuit. Because a Lummi officer is not a general authority Washington police officer, the Court could not find statutory basis to allow fresh pursuit, and, as Eriksen asserted, common law fresh pursuit does not survive WASH. REV. CODE § 10.92.020. Also, she claimed that *Eriksen II* frustrates the purpose of that statute because it would not hold tribal officers to the same training standards as general authority Washington police officers. Next, she contended the application of the second *Montana* exception was misplaced because the regulation of fishing at issue in that case was still within the boundaries of Indian Country. Non-tribal land within a reservation is different from non-tribal land outside a reservation. And finally, she posited that the Treaty of Point Elliott did not expressly authorize the detention of non-members off Indian land.).

191. 172 Wash. 2d 506, 509, 259 P.3d 1079, 1081 (2011).

192. *Id.* at 506, 516, 259 P.3d at 1079, 1084 (joined by Chief Justice Madsen, Justices J. Johnson, Stephens, and Wiggins).

193. *Id.* at 515–16, 259 P.3d at 1084. In the time between *Eriksen II* and *Eriksen III*, the only change on the Court was that Justice Wiggins replaced Justice Sanders (who wrote the majority opinions in *Eriksen I* and *Eriksen II*), and he voted to overturn the conviction. Besides this single personnel change, Justices J. Johnson and Stephens shifted from upholding the arrest to invalidating

The Court reversed the conviction for three main reasons: (1) "the concept of territorial jurisdiction necessarily limits" the tribe's authority to enforce tribal law and protect the safety of tribal members; (2) Washington provides an avenue through which tribal officers can be certified as general authority Washington peace officers with the authority to continue fresh pursuit of violators; and (3) Article IX of Point Elliott is designed to prevent tribes from granting safe harbor to non-Indians seeking asylum from criminal prosecutions and does not pertain to persons who leave tribal jurisdiction before detention.[194] The Court cited *Barker* for the proposition that territorial boundaries limit law enforcement officers when neither statute nor common law authorizes cross-jurisdictional pursuit.[195] Additionally, the Court contended *Settler* only supports off-reservation arrests for violations of tribal fishing regulations at "usual and accustomed fishing sites" reserved in Point Elliott.[196] If the officer had detained Eriksen on the reservation, then the provisions of Point Elliott would govern the detention of non-members as in *Schmuck*.[197] The Court next dismissed the application of the second *Montana* exception because that case was about civil, not criminal, jurisdiction.[198] Finally, echoing the dissent in *Eriksen II*, the Court acknowledged the negative policy results of its decision, but reasoned that the relevant law required this outcome.[199]

Justice Owens authored a dissenting opinion.[200] In the opinion, the

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it, while Justice Alexander went the opposite direction. *Compare Eriksen II*, 170 Wash. 2d at 212, 226, 230, 241 P.3d at 400, 408–09, *with Eriksen III*, 172 Wash. 2d at 516, 523, 259 P.3d at 1084, 1087.

194. *Eriksen III*, 172 Wash. 2d at 509–14, 259 P.3d at 1081–83.

195. *Id.* at 510, 512, 259 P.3d at 1081–82 (citations omitted).

196. *Id.* at 512–13, 259 P.3d at 1082 (citing Settler v. Lameer, 507 F.2d 231, 231 (9th Cir. 1974)).

197. *Id.* at 513, 259 P.3d at 1082–83.

198. *Id.* at 513–14, 259 P.3d at 1083.

199. *Id.* at 514–15, 259 P.3d at 1083.

200. *Id.* at 518–23, 259 P.3d at 1085–87 (Owens, J., dissenting) (joined by Justices C. Johnson and Chambers). Justice Alexander dissented separately. *Id.* at 516–18, 259 P.3d at 1084–85 (Alexander, J., dissenting). In his opinion, the conviction should be affirmed because the officer's detention of Eriksen was a valid citizen's arrest. *Id.* at 518, 259 P.3d at 1085. He cited *State v. Malone*, 106 Wash. 2d 607, 609 n.1, 724 P.2d 364, 365 n.1 (1986) as support for the well-settled common law standard that an individual can arrest "a person who is committing a felony or a misdemeanor in the citizen's presence if the offense is a breach of the peace." *Eriksen III*, 172 Wash. 2d at 516, 259 P.3d at 1084 (footnote omitted) (citing *Malone*, 106 Wash. 2d at 609 n.1, 724 P.2d at 365 n.1). In *Malone*, an officer from Idaho pursued a driver into Washington in a similar manner to Officer McSwain's pursuit of Eriksen and the Court deemed the subsequent detention a valid citizen's arrest. *Id.* In Justice Alexander's opinion, driving under the influence is a breach of peace because the act creates the risk of serious harm. *Id.* at 516–17, 259 P.3d at 1084–85. Furthermore, Justice Alexander argued the arrest was valid because the tribal officer did not gather

dissenters argued that the ability of a tribe to detain a non-Indian who threatens the welfare of tribal members is well established in state and federal law.[201] The dissenters noted that a court must not interpret inherent tribal authority in terms of state statutes, but interpret statutes in relation to the tribe's inherent authority.[202] Therefore, the majority's decision undermines the federal and state legal foundations of inherent sovereign authority.[203]

V. *ERIKSEN III* IS BOTH CONTRARY TO STATE AND FEDERAL GUIDELINES AND DETRIMENTAL TO PUBLIC POLICY AND SAFETY

The Washington State Supreme Court's decision in *Eriksen III* contains flawed legal analysis and ignores the public policy directives of the Washington State Legislature. First, a court cannot read a state statute to limit a tribe's inherent sovereign authority.[204] The Court did this when it stated that a tribal officer cannot continue fresh pursuit if the tribe fails to achieve certification under RCW 10.92.020.[205] A tribe retains all rights not relinquished in a treaty, expressly taken by Congress, or inconsistent with its status as a domestic dependent nation.[206] Neither a Congressional statute nor Point Elliott has removed the power of detention from tribes. In fact, Point Elliott placed this burden upon them.[207] Second, the Court's interpretation of RCW

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any evidence besides what an average citizen could in a similar situation. *Id.* at 517–18, 259 P.3d at 1084–85.

201. *Eriksen III*, 172 Wash. 2d at 518, 520, 259 P.3d at 1085–87 (citations omitted). For this proposition, Justice Owens cited to the cases covered throughout this Comment, including *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332 (1993), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004). *Eriksen III*, 172 Wash. 2d at 518–19, 259 P.3d at 1085–86 (citations omitted).

202. *Eriksen III*, 172 Wash. 2d at 522, 259 P.3d at 1087 (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)).

203. *See id.* at 522–23, 259 P.3d at 1087.

204. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42, 151 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980); United States v. Winans, 198 U.S. 371, 384 (1905).

205. *Eriksen III*, 172 Wash. 2d at 514, 259 P.3d at 1083.

206. United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

207. *See Schmuck*, 121 Wash. 2d 373, 384–85, 850 P.2d 1332, 1338 (stating that Article IX requires tribes to detain and transfer non-member violators to state authorities); Point Elliott, *supra* note 96, art. IX.

10.92.020 as a limitation on tribal police power runs counter to the statute's express language and the legislature's intent. Third, the Court's contention that territorial boundaries necessarily limit jurisdiction is unfounded within the precedent the Court cited. Finally, *Eriksen III* incentivizes all non-Indian violators, not just drunk drivers, to attempt flight from pursuing tribal officers. This can lead to high-speed pursuit, endangering the lives of citizens both on and off the reservation. Based on these four points, it is evident the Court both performed the wrong analysis for inherent sovereign authority and should have upheld the arrest and conviction of Loretta Lynn Eriksen.[208]

A. Federal Law Does Not Limit a Tribe's Authority to Pursue a Non-Indian Violator, Providing No Basis for a State to Restrict This Ability

A tribe retains the inherent sovereign authority to enforce laws and ensure safety on its reservation.[209] A state's interests, even if it has assumed jurisdiction over tribal reservations under Public Law 280, do not destroy a tribe's sovereignty over both its members and its territory.[210] By definition, tribes maintain their inherent authority over the aspects of self-government not expressly given away by treaty, taken by Congressional statute, or implicitly removed as a result of their dependent status.[211] The authority to continue fresh pursuit off a reservation, ascertain the status of the violator, and then contact a state law enforcement officer, has never been expressly removed, and is consistent with both the reserved right to protect member safety and the nature of being a dependent nation.[212]

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208. It is not clear why the conviction of Eriksen was invalid once the arrest was declared invalid. An unlawful arrest does not necessarily derail a conviction. It is the inadmissibility of any evidence gathered pursuant to that arrest that can ruin a conviction. *See* State v. Melrose, 2 Wash. App. 824, 828, 470 P.2d 552, 555 (1970). Officer McSwain did not gather any evidence beyond simple observation before the deputy sheriff arrived and placed Eriksen under arrest. *See Eriksen III*, 172 Wash. 2d at 508–09, 259 P.3d at 1080. The deputy sheriff performed all sobriety tests. *See id.* The majority did not address this issue in *Eriksen III*. *See id.* at 506–16, 259 P.3d at 1079–84.

209. Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."); Montana v. United States, 450 U.S. 544, 566 (1981) (recognizing the second exception).

210. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980); United States v. Mazurie, 419 U.S. 544, 557 (1975).

211. United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in Lara*, 541 U.S. 193.

212. *See infra* Parts V.A.1–.3.

1. The Tribal Parties to the Treaty of Point Elliot Did Not Cede the Ability to Protect Safety on Their Reservations or Aide States in Enforcing the Law

The *Eriksen III* majority suggested that the only concern addressed in Article IX of Point Elliott is the fear that American criminals would seek asylum on reservations.[213] The Court also insinuated that only those rights expressly reserved in a treaty are protected rights.[214] While Justice Fairhurst is correct that the Indian canons of interpretation are "not a blank check to rewrite the [treaty],"[215] a court should not then read concessions of rights not stated in the treaty. According to federal law, absent an explicit provision, courts must liberally construe treaties in favor of the Indians and as the tribes would have understood them.[216] In 1832, twenty-three years prior to Point Elliott, the U.S. Supreme Court suggested that the correct interpretation of treaties is as grants of rights by the tribes.[217] Rights not expressly given to the United States are reserved to tribes.[218] Nowhere in Point Elliott do the tribes expressly relinquish the right to inform U.S. officials of law violations; in fact, they affirmatively agreed to this burden.[219]

Courts must interpret Point Elliot from the perspective of how the tribes understood it.[220] According to the terms of the treaty, the tribes agreed to relocate to reservations, ceding their claims to the land they

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213. 172 Wash. 2d at 513, 259 P.3d at 1082.

214. *See id.* at 512–13, 259 P.3d at 1082–83.

215. State v. Eriksen (*Eriksen II*), 170 Wash. 2d 209, 229, 241 P.3d 399, 409 (2010) (Fairhurst, J., dissenting) (citing Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945)), *superseded by*, State v. Eriksen (*Eriksen III*) 172 Wash. 2d 506, 259 P.3d 1079 (2011).

216. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); State v. Buchanan, 138 Wash. 2d 186, 202, 978 P.2d 1070, 1078 (1999); State v. Schmuck, 121 Wash. 2d 373, 385, 850 P.2d 1332, 1338 (1993); *see* text accompanying *supra* notes 93–94 for discussion about the liberal canons of interpretation for Indian treaties.

217. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552–54 (1832), *abrogation recognized in* Nevada v. Hicks, 533 U.S. 353 (2001); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 402 (1993) ("[In *Worcester*, Chief Justice Marshall] conceptualized an Indian treaty as a grant of rights from a tribe to the United State, rather than a cession of all tribal rights to the United States, which then granted back certain concessions to the tribe.").

218. Frickey, *supra* note 217, at 402.

219. *See Schmuck*, 121 Wash. 2d at 384–86, 850 P.2d at 1338 (stating that Article IX requires tribes to detain and transfer non-member violators to state authorities); Point Elliott, *supra* note 96, art. IX.

220. *Schmuck*, 121 Wash. 2d at 385, 850 P.2d at 1338; *see* text accompanying *supra* notes 93–94 for discussion about the liberal canons of interpretation for Indian treaties.

occupied, and in return received the protection of the United States,[221] monetary payments, the guarantee of land, and access to traditional fishing and hunting grounds.[222] The agreement to not "shelter or conceal" law violators is part of a larger section in which the tribes accepted the U.S. government as an arbitrator in their tribal disputes and consented to report all crimes to the government's agent.[223] Tribal acceptance of U.S. guardianship, and agreement to reveal law violators, was a way of showing allegiance.[224] The protection of U.S. law would have been of little comfort to the tribes if a violator escaped liability simply by fleeing to U.S. soil.[225]

Contemporary concepts of criminal jurisdiction within Indian Country support this interpretation of tribal understanding. For example, Congress enacted the Indian Country Crimes Act,[226] which created federal jurisdiction over any cross-racial crimes in Indian Country.[227] This law was a direct descendant of the Trade and Intercourse statutes that attempted to control lawless whites and ensure peaceful relations on the Western frontier.[228] Rather than focus solely on asylum seekers, these statutes sought to limit gaps in prosecutions for cross-racial crimes.[229] It is clear that Congress directed efforts toward curtailing lawlessness within tribal territory.[230]

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221. *See generally* Point Elliott, *supra* note 96. "The said tribes . . . promise to be friendly with all citizens [of the United States], and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned . . . . And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens." *Id.* art. IX.

222. *Id.* art. III, V, VII.

223. *Id.* art. IX; *see supra* note 97 for full text of Article IX.

224. *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, 569 (1883) (The bad men clauses are an "acknowledgment of their allegiance, as Indians, to the laws of the United States, made or to be made in the exercise of legislative authority over them as such."), *superseded by statute*, 18 U.S.C. § 1153 (2006), *as recognized in* United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005). *See supra* note 96 for background on the establishment of reservations.

225. This is in line with *Duro*, and many other cases, in which the Court said tribes must maintain the power to detain non-members to prevent impunity for lack of criminal jurisdiction. Duro v. Reina, 495 U.S. 676, 696–97 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

226. 18 U.S.C. § 1152 (2006).

227. *Id.*

228. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 92 (1984).

229. *See generally Kan-gi-shun-ca*, 109 U.S. 556; United States v. Kagama, 118 U.S. 375 (1886).

230. *See* Major Crimes Act, 18 U.S.C. § 1153 (extending federal criminal jurisdiction to cover crimes committed by one Indian against another); 18 U.S.C. § 1162; 28 U.S.C. § 1360 (2006).

Other tribal treaties offer examples of intentions to protect law and order upon tribal land.[231] In 1868, the Navajo agreed to relocate to a reservation.[232] As part of the agreement, the U.S. government promised to punish violators of U.S. laws, either white or Indian, if they committed a cross-racial crime.[233] This so-called "bad men clause" reflects the ideas expressed in the Indian Country Crimes Act. The understanding was that violators of U.S. law on reservation land faced criminal prosecution.[234] Because concerns of lawlessness pervaded the period, a court should view Article IX as a shorthand version of similar efforts to enforce law within Indian Country.

Furthermore, the language of Article IX does not support *Eriksen III*'s interpretation.[235] The treaty requires tribes to identify violators but does not geographically limit this duty. The language in no way limits its application to situations of persons seeking asylum within the reservation. The treaty did not expressly remove the power to report crime; in fact, the tribes expressly accepted the burden.[236] As the Washington State Supreme Court stated in *Schmuck*, Article IX instructs tribes to detain non-Indian law violators and transfer them to state officers.[237] This conclusion is founded in both the language of the treaty and in an analysis under the Indian canons of interpretation.[238]

Nowhere in Point Elliott do the party tribes relinquish the right to pursue law violators. In fact, they took on the burden of reporting crime to the United States. Without express relinquishment, tribes retain aspects of sovereign power. Only a subsequent express act of Congress can remove the reserved right to "deliver [violators] up to the authorities for trial."[239]

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231. *See* Treaty with the Cherokees, art. V, Dec. 29, 1835, 7 Stat. 478; Treaty with the Choctaw, art. XIII, Oct. 18, 1820, 7 Stat. 210; Treaty with the Wyandots, Delawares, Shawanoes, Ottawa, Chipewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, art. VI, Aug. 3, 1795, 7 Stat. 49; Treaty with the Chickasaws, art. V, Jan. 10, 1786, 7 Stat. 24.

232. Treaty with the Navajo, art. II, June 1, 1868, 15 Stat. 667.

233. *Kan-gi-shun-ca*, 109 U.S. at 557–58.

234. 18 U.S.C. § 1152; Treaty with the Navajo, *supra* note 232, art. I.

235. *See supra* note 97 for full text of Article IX.

236. Point Elliott, *supra* note 96, art. IX.

237. 121 Wash. 2d 373, 387, 850 P.2d 1332, 1339 (1993).

238. *See generally Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332.

239. Point Elliott, *supra* note 96, art. IX; United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

2. Congress Has Not Limited a Tribal Officer's Ability to Detain Violators and Transfer Them to Proper Authorities

A tribe retains powers not ceded in a treaty unless Congress explicitly removes that right or abrogates the treaty.[240] Until Congress speaks on the matter, a party tribe to Point Elliot retains the right and the obligation to help the United States identify law violators.[241] Washington cannot remove reserved treaty rights from a tribe that Congress itself has not taken, nor can the State undermine Congressional goals in Indian affairs.[242] Congress has not explicitly restricted a tribe's authority to detain individuals who violated law on the reservations simply because pursuit continued off-reservation. Congress has only expressly acknowledged a need to improve law enforcement within Indian Country.[243]

One example of Congress's efforts to improve law and order within Indian Country is Public Law 280.[244] In 1953, Congress sought to combat perceived lawlessness on reservations by authorizing states to assume criminal and (limited) civil jurisdiction over reservations within their borders.[245] Prior to Public Law 280, there were prosecutorial gaps for criminal offenses on reservations.[246] Federal prosecutors were not geared to handle minor criminal prosecutions,[247] and tribes only had

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240. *See supra* Part I; *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903), *abrogated by* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).

241. *See supra* Part V.A.1.

242. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42, 151 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980); United States v. Winans, 198 U.S. 371, 384 (1905).

243. *See supra* Part V.A.1; *see also* Major Crimes Act, 18 U.S.C. § 1153 (2006) (extending federal criminal jurisdiction to cover crimes committed by one Indian against another); 18 U.S.C. § 1162; 28 U.S.C. § 1360 (2006). *See generally* Goldberg-Ambrose, *supra* note 27 (outlining Congressional efforts to use Public Law 280 to combat lawlessness on Indian reservations).

244. 18 U.S.C. § 1162 and 28 U.S.C. § 1360; *see* text accompanying *supra* notes 23–30 for discussion of the enactment of Public Law 280.

245. *See* Goldberg-Ambrose, *supra* note 27, at 1406.

246. *See id.* at 1412–13, 1416. However, an unintended result of Public Law 280 may have been to increase the lawlessness on the reservation because many states were unwilling to pick up the duties once the federal government stopped providing law enforcement. *Id.* at 1416–18, 1441.

247. Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976) ("Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated."), *rev'd*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

jurisdiction over Indian violators.[248] Compounding the problem, tribes often lacked the resources to prosecute major offenses and could only render limited sentences under the Indian Civil Rights Act.[249] Congress's solution was to substitute state authority for federal.[250] This interpretation of the intent behind Public Law 280 is in line with Washington case law.[251]

The enactment of Public Law 280 is not the only evidence of Congress's goal to improve law and order on reservations. In her article, *Public Law 280 and the Problem of Lawlessness in California Indian Country*,[252] Professor Carole Goldberg-Ambrose argued that states that have assumed jurisdiction under Public Law 280 are reluctant to direct their full effort toward combating crime in Indian Country.[253] Furthermore, the states and tribes do not receive pre-Public Law 280 levels of financial support from the federal government because that money is concentrated on law enforcement efforts in states lacking jurisdiction over Indian Country.[254] The lack of funding is particularly evident in tribal law enforcement and tribal courts.[255] Because state jurisdiction only exacerbated lawlessness on reservations,[256] Congress has recognized the ability of states to retrocede jurisdiction to the federal government.[257]

While Professor Goldberg-Ambrose's study focused on California, Washington State has also felt the negative effects of continued jurisdictional gaps.[258] To alleviate this problem, the Washington State

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248. Goldberg-Ambrose, *supra* note 27, at 1415.

249. 25 U.S.C. § 1302(a)(7)(B)–(D) (2006) (limiting the extent of punishment a tribal court can mete out for any one crime to one year or a fine of $5000 for first time offenders and minor crimes, and three years or a fine of $15,000 for repeat offenders or major offenses).

250. Goldberg-Ambrose, *supra* note 27, at 1415.

251. State v. Schmuck, 121 Wash. 2d 373, 394, 850 P.2d 1332, 1343 (1993).

252. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

253. *Id.* at 1416–18, 1441 (suggesting that there were direct and indirect negative effects on the nature of law enforcement within Indian Country as a result of Public Law 280).

254. *Id.* at 1417.

255. *Id.* at 1418.

256. *Id.* at 1416–19.

257. 25 U.S.C. § 1323 (2006).

258. Interview with Rep. John McCoy, *supra* note 7. According to Representative McCoy:

> [Tribes, like the Tulalip, were] working with county sheriffs on law enforcement issues. . . . [On the Tulalip Reservation,] there was only one [state] officer in the whole north country sector at night. During day time, there might be two officers in the whole north country sector. . . . That's a lot of ground to cover . . . . That one officer's doing the best he could but [there were] still issues. . . . [Bad actors] would [leave] the reservation, [violate the law,] then come back . . . .

Legislature sought to improve law enforcement upon tribal land within the state.[259] For instance, the impetus behind RCW 10.92.020 was three-fold: (1) to prevent criminals from hopping between jurisdictions to avoid prosecution; (2) to remove reliance on the availability of peace officers to arrest violators; and (3) to force local law enforcement agencies to negotiate interlocal agreements with tribes.[260] The legislature, too, has created a process through which tribes can request retrocession of jurisdiction.[261]

Congress has not expressly addressed the question of tribal cross-jurisdictional fresh pursuit. What Congress has expressly demonstrated is intent to improve law enforcement within reservations.[262] Public Law 280 illustrates this effort.[263] States cannot contravene Congressional goals without express permission.[264] Therefore, the State of Washington

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> . . . [Also,] Domestic Violence . . . was a big problem because of the mixed relationships [between] a non-Indian and an Indian. . . . [For instance, if] an Indian female [was] getting beat up by a [non-Indian, the tribe could not] do anything about it. . . . [Tribes, in general, also] had major drug [trafficking] problems. . . .
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> . . . [In the instance of a traffic stop,] before cross-deputization, if there was a non-Indian involved, the only thing [tribal officers] could do [was] detain, and then . . . call the Sheriff's Department or State Patrol [to inform them that a non-Indian had been] apprehended. Could have been a DUI or speeding or whatever, but if [the state officer was] busy and nobody came, well, [a tribal officer] can't detain forever. All [the tribal officer] can do is record . . . the stop and let the [non-Indian] go . . . .

Id.

259. *See supra* Part III.C for discussion of the Washington State Legislature's efforts to improve law enforcement on Indian reservations, in particular, its enactment of WASH. REV. CODE §§ 10.92.010–.020 (2010).

260. Interview with Rep. John McCoy, *supra* note 7. Representative McCoy described the impetus behind WASH. REV. CODE § 10.92.020:

> [In WASH. REV. CODE § 10.92.020,] there is a process that if [a local] sheriff fails to negotiate [an interlocal agreement with a neighboring tribe] fairly and equally, . . . a mechanism . . . triggers [as a legal hammer]. . . . [Outside of that, the] impetus [behind] the bill was [tribes had] bad actors that were bouncing back and forth [between jurisdictions], trying to use the shield of [tribal] trust land [to prevent successful prosecutions] . . . .
>
> . . . [Also], now that there is cross-deputization, . . . it's easier to make an arrest and get a conviction. . . . [B]efore cross-deputization, if there was a non-Indian involved, the only thing [tribal officers] could do [was] detain, and then . . . call to the Sheriff's Department or State Patrol [to inform them that a non-Indian had been] apprehended. Could have been a DUI or speeding or whatever, but if [the state officer was] busy and nobody came, well, [a tribal officer] can't detain forever. All [the tribal officer] can do is record . . . the stop and let the [non-Indian] go, which was serving no one's best interests.

Id.; *see infra* Part V.B.

261. ESHB 2233, ch. 48 § 1, 62nd Leg., Reg. Sess. (Wash. 2012) (codified as WASH. REV. CODE §§ 37.12.160–.180 (2012)). The governor has discretion to accept or decline the tribal request within one year of the request. *Id.*

262. *See, e.g.*, 18 U.S.C. §§ 1152–1153, 1162 (2006); 28 U.S.C. § 1360 (2006).

263. *See* Goldberg-Ambrose, *supra* note 27, at 1406.

264. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42, 151 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

cannot limit a tribe's inherent sovereign authority to detain and reveal non-Indian violators unless such a right is removed as a consequence of the tribe's dependent status.[265]

3. In the Absence of Congressional Action, a Court Must Analyze the Importance of the Right in Question and Its Relation to a Tribe's Dependent Status

The last way to define a tribe's inherent sovereign authority is to analyze whether the right is inconsistent with its dependent status. The U.S. Supreme Court indicated in *Oliphant* that a tribe is implicitly divested of a right when that right is inconsistent with an overriding federal interest.[266] Additionally, in *Montana*, the Court stated that tribal authority does not cover rights that are unnecessary to safeguard self-government or regulate internal relations.[267] However, the Court did declare two exceptions, the second of which instructs that tribes retain authority over actions that "threaten[ ] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[268] Without the ability to detain violators, tribes are deprived of their basic right to determine the conditions upon which a person can enter a reservation and to exclude people who violate those terms.[269] This right is necessary to the survival of tribal government and is not implicitly removed by dependent status.[270]

A tribe possesses the ability to enforce their own law. As described above in Part V.A.2, improving law enforcement within Indian Country is an overriding federal interest. Therefore, a tribe's interest in upholding law and order is consistent with a federal interest. Also, a tribe's inability to prevent drunk driving is detrimental to both its self-government and safety because it would render its legal code "virtually meaningless."[271] Granted, the U.S. Supreme Court in *Strate* indicated that mere "careless" driving is not sufficient to register as a threat to

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265. United States. v. Wheeler, 435 U.S. 313, 323 (1978) (citation omitted), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

266. 435 U.S. 191, 209 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in*. *Lara*, 541 U.S. 193.

267. 450 U.S. 544, 564 (1981).

268. *Id.* at 566; *see* text accompanying *supra* notes 62–72 for a discussion of the post-*Montana* case history regarding the second exception.

269. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179–80 (9th Cir. 1975).

270. *Id.* at 1179.

271. State v. Schmuck, 121 Wash. 2d 373, 381–83, 850 P.2d 1332, 1336–37 (1993).

tribal autonomy.[272] However, limiting a tribe's ability to prevent *criminal* driving undermines the integrity of tribal sovereignty.[273] Thus, a tribe's authority to enforce the law is one of the most important rights it retains.[274]

Furthermore, the second *Montana* exception simply provides guidance as to the outer extent of a tribe's retention of authority to regulate on-reservation conduct of non-Indians.[275] Despite being a criminal matter, cross-jurisdictional fresh pursuit of a drunk driver implicates interests that can extend beyond artificial borders.[276] *Eriksen III*'s encouragement of non-Indian flight for reservation boundaries seriously undermines a tribe's ability to manage its territory.[277] Nothing prevents a released violator from returning to a reservation. It was incorrect for the *Eriksen III* Court to flatly dismiss the second *Montana* exception. A tribe's interest in upholding law and order on its reservation is not limited to its territorial jurisdiction.[278] The ability to

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272. 520 U.S. 438, 457–58 (1997); *see* text accompanying *supra* notes 69–70 for discussion of how *Strate* narrowed the application of the second *Montana* exception.

273. *See Schmuck*, 121 Wash. 2d at 381, 383, 850 P.2d at 1336–37. Courts have previously granted exceptions to federal Indian law tenets in order to prevent drunk drivers. *Compare* United States v. Quiver, 241 U.S. 602, 605–06 (1916) (holding that because the federal government lacks jurisdiction to prosecute Indian-on-Indian crime, it also lacked jurisdiction where there was no non-Indian victim, i.e. victimless crimes), *with* United States v. Thunder Hawk, 127 F.3d 705, 709 (8th Cir. 1997) (holding that *Quiver* should be limited to only domestic relations, and allowing for federal prosecution of a drunk driver).

274. *See* Oliphant v. Schlie, 544 F.2d 1007, 1012–13 (9th Cir. 1976), *rev'd*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004); *see also Ortiz-Barraza*, 512 F.2d at 1179.

275. *See Schmuck*, 121 Wash. 2d at 391, 850 P.2d at 1341.

276. *See In re* Richie, 127 Wash. App. 935, 942–43, 113 P.3d 1045, 1049 (2005) (recognizing that a Washington officer can arrest a suspected drunk driver in Idaho); s*ee also* City of Wenatchee v. Durham, 43 Wash. App. 547, 550, 718 P.2d 819, 821 (1986), *superseded by statute*, WASH. REV. CODE §§ 10.93.001–.900 (2010), *as recognized in* Vance v. State, 116 Wash. App. 412, 65 P.3d 668 (2003).

277. *See Schmuck*, 121 Wash. 2d at 381–83, 386–91, 850 P.2d at 1336–42; *see* text accompanying *supra* notes 80–86 for discussion of the *Schmuck* Court's finding that a tribe must be able to enforce its laws or else non-Indians can act with impunity upon a reservation; *see infra* Part V.D.

278. *See* Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974) ("The mere fact that the fishing may take place off the reservation does not make the regulation of treaty fishing any less an internal matter. The locus of the act is not conclusive.") (citing Littell v. Nakai, 344 F.2d 486, 490 (9th Cir. 1965)). At least one federal court has stated that tribes have the inherent power to uphold law and safety within their borders through cross-jurisdictional fresh pursuit of law violators. *See* United States v. Medearis, 236 F. Supp. 2d 977, 981–82 (D.S.D. 2002) (ruling that an arrest by tribal officers that occurred outside the Rosebud Sioux reservation was unlawful because the car was parked at a convenience store and the driver was not attempting to evade police).

prevent crime on the reservation, even if done through off-reservation detention, is a right consistent with a tribe's dependent status.

Under the U.S. Supreme Court's *Wheeler* analysis, neither Congress nor Point Elliott indicates tribal officers do not have the authority to continue cross-jurisdictional fresh pursuit and detain law violators. Also, the ability to uphold internal law is consistent with a tribe's dependent status, implicating vital tribal interests that can extend beyond concepts of territorial limits. A court must view any state statute against this background.

B. RCW 10.92.020 Does Not Inhibit a Tribe's Authority to Detain a Non-Member Violator

The Washington State Supreme Court must interpret state statutes to give effect to the plain meaning of the words and the intent of the legislature as either explicitly expressed or as gathered throughout related statutes.[279] This canon of interpretation directs the Court to find that RCW 10.92.020 sought to expand a tribal officer's authority, not reduce it.

The plain language of the statute mandates the Court to view RCW 10.92.020 as an effort to improve law enforcement upon reservations by increasing a tribal officer's authority. The statute states, "nothing . . . impairs or affects the existing status and sovereignty of those sovereign tribal governments."[280] Therefore, by its own terms, the statute does not modify a tribal officer's inherent sovereign authority. The act only created an avenue through which tribal officers could enforce state law.[281]

The legislative intent and stated purpose behind RCW 10.92.020 supports this interpretation. Representative John McCoy, 38th Legislative District,[282] drafted and sponsored the bill that became RCW 10.92.020. According to Representative McCoy, the bill was a reaction to inefficient and ineffective law enforcement measures within reservations.[283] Due to their limited jurisdiction and resources, tribes relied on state officers to help enforce the law.[284] This often meant tribes

279. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash. 2d 1, 11–12, 43 P.3d 4, 10 (2002).

280. WASH. REV. CODE § 10.92.020(7) (2010).

281. WASH. REV. CODE § 10.92.070(6); WASH. REV. CODE § 10.92.020(1), (4)–(5).

282. The 38th District consists of parts of Snohomish County, including Everett, Marysville, and the Tulalip Indian Reservation. *Find Your Legislator*, WASH. ST. LEGISLATURE, http://apps.leg.wa.gov/DistrictFinder/Default.aspx?district=38 (last visited Oct. 3, 2012).

283. Interview with Rep. John McCoy, *supra* note 7.

284. *Id.*

were at the mercy of the availability of a local peace officer.[285] If a peace officer could not come to the site of a detention, tribal officers were forced to release law violators.[286] Also, local law enforcement agencies often assigned only one peace officer to the reservation, further limiting the resources available.[287] The same law enforcement agencies were unwilling to negotiate interlocal agreements with tribal governments and refused to extend full faith and credit to tribal officer-initiated detentions.[288] Gaps in criminal jurisdiction[289] compounded the lack of law enforcement as violators could hop between jurisdictions, easily falling through the gaps.[290] RCW 10.92.020 forces local police agencies to negotiate with tribes and aims to establish more cohesive crime prevention throughout all levels of government.[291] The legislative intent of the statute was to make it easier for tribal officers to make arrests that courts would later uphold, and for the state as a whole to maintain law and order.[292]

Related statutes also suggest the Washington State Supreme Court should only interpret RCW 10.92.020 as an extension of a tribal officer's authority. Washington statutes that address tribal officers evince a goal to improve law enforcement while respecting the self-government of tribes.[293] At a basic level, the legislative creation of the status of "tribal officer"[294] is an acknowledgment of the position's legitimacy within the state. To receive state recognition as a "tribal officer," the officer must undergo the same training as a peace officer,[295] ensuring a minimum

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285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Goldberg-Ambrose, *supra* note 27, at 1418 ("[Public Law 280 created] jurisdictional vacuums or gaps . . . . Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory has no institutional support or incentive for the exercise of that authority.").

290. In particular, instances of Domestic Violence and Drug Trafficking were, and continue to be, problematic. For example, in mixed relationships (meaning only one spouse was a member of the tribe) if the non-member was the abuser, there were limited circumstances in which the state law system would step in, leaving many occurrences unprosecuted. Interview with Rep. John McCoy, *supra* note 7.

291. *Id.*; WASH. REV. CODE § 43.19.003 (2010).

292. Interview with Rep. John McCoy, *supra* note 7.

293. *See, e.g.*, WASH. REV. CODE § 10.92.010 (2010); WASH. REV. CODE § 10.92.020; WASH. REV. CODE § 43.101.157 (2010).

294. WASH. REV. CODE § 10.92.010(2).

295. WASH. REV. CODE § 43.101.157(1); *see supra* note 134 for an outline of the training requirements.

standard of law enforcement upon reservations. Furthermore, Washington's assertion of jurisdiction over reservations under Public Law 280,[296] and subsequent efforts at retrocession,[297] indicate a continued intent to combat lawlessness while supporting tribal interests in self-government. Such goals are accomplished by affording tribal officers more power, not less.

Because this is an issue of first impression in Washington, it is helpful to examine how another state has interpreted a similar statute. Under Nebraska law, a tribal officer can receive certification to arrest for violations of state law.[298] Similar to Washington,[299] the certification only authorizes tribal officers to enforce state laws for violations on reservation lands.[300] The location of the offense was the dispositive issue in *Young v. Neth*,[301] one of the few cases nationally that interprets the authority of tribal officers in cross-jurisdictional issues. In *Young*, the court invalidated a certified tribal officer's arrest of a drunk driver who violated the law off the tribal officer's reservation.[302] The tribal officer acted outside his authority because: (1) the officer was not in fresh pursuit following the commission of the charged crime, (2) the crime occurred off the reservation, and (3) the tribal officer was the arresting officer who conducted the field sobriety tests.[303] However, the Nebraska State Supreme Court recognized the tribal officer would have been within his rights if the officer observed the drunk driving on the reservation, engaged in fresh pursuit, and only detained until proper authorities arrived.[304] The Court stated that this held true even for non-certified tribal officers.[305] Citing the Washington case, *State v. Schmuck*, the Nebraska court reiterated that the "tribe's proper response to a crime committed by a non-Indian on the reservation is for the tribal police to detain the offender and deliver him or her to the proper authorities."[306]

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296. WASH. REV. CODE § 37.12.010 (2010).

297. ESHB 2233, ch. 48 §§ 1–3, 62nd Leg., Reg. Sess. (Wash. 2012) (codified as WASH. REV. CODE §§ 37.12.160–.180 (2012)).

298. NEB. REV. STAT § 81-1414(2) (2008); NEB. REV. STAT § 84-106 (2008); 79 NEB. ADMIN. CODE §§ 10-001 to 10-009 (2005).

299. WASH. REV. CODE § 10.92.010.

300. 79 NEB. ADMIN. CODE § 10-008.

301. 637 N.W.2d 884 (Neb. 2002).

302. *Id.* at 889–90.

303. *Id.* at 886–87, 889.

304. *Id.* at 889.

305. *Id.*

306. *Id.* (quoting State v. Schmuck, 121 Wash. 2d 373, 387, 850 P.2d 1332, 1339 (1993)).

The *Young* decision instructs an interpretation that the Nebraska statute only affects a tribal officer's ability to arrest for violations of state law.[307]

The canons of statutory interpretation mandate that the Washington State Supreme Court read RCW 10.92.020 only as an extension of the authority to enforce state law. Persuasive authority from another jurisdiction supports this interpretation. The legislature did not intend to limit a tribe's ability to ensure safety on the reservation through the detention of non-Indian violators.

C. The Precedent the Eriksen III *Majority Cites For the Necessary Limits of Territorial Jurisdiction Is Distinguishable*

The Court in *Eriksen III* stated that the boundaries of territorial jurisdiction "necessarily limit" a tribe's authority to continue fresh pursuit off a reservation unless in pursuit of a suspected felon.[308] This is founded in a general principle that officers can only make valid arrests within their jurisdictions.[309] The majority cites three cases to support its concept of impermeable borders between territorial jurisdictions: *State v. Barker*, *City of Wenatchee v. Durham*,[310] and *Irwin v. State*.[311] However, the Powers Act[312] superseded two of the three cases (*Wenatchee* and *Irwin*),[313] while *Barker* did not consider the applicability of the Uniform Act.[314] Both the Powers Act and the Uniform Act allow for fresh pursuit of drunk drivers.[315] Therefore, the *Eriksen III* majority fails to prove its contention that territorial boundaries ban an officer's ability to pursue

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307. "[T]he tribal officer's status as a special deputy state sheriff would authorize the fresh pursuit and arrest of persons outside the reservation, whether Indian or non-Indian, in accordance with Nebraska law." Auth. of Tribal Police Officers Cross-Designated as Special Deputy State Sheriffs, Neb. Op. Att'y Gen. No. 02009, 2002 WL 470823, at *4 (Mar. 25, 2002).

308. State v. Eriksen (*Eriksen III*), 172 Wash. 2d 506, 512, 259 P.3d 1079, 1082 (2011).

309. *Id.* at 509, 259 P.3d at 1081 (citations omitted).

310. 43 Wash. App. 547, 549–50, 718 P.2d 819, 821 (1986), *superseded by statute*, WASH. REV. CODE §§ 10.93.001–.900 (2010), *as recognized in* Vance v. State, 116 Wash. App. 412, 65 P.3d 668 (2003).

311. 10 Wash. App. 369, 371, 517 P.2d 619, 621 (1974), *superseded by statute*, WASH. REV. CODE § 10.31.100 (2010), *as recognized in* State v. Barker, 143 Wash. 2d 915, 25 P.3d 423.

312. WASH. REV. CODE §§ 10.93.001–.900 (2010).

313. *See* State v. Barron, 139 Wash. App. 266, 272 n.2, 160 P.3d 1077, 1079 n.2 (2007); State v. Barker, 143 Wash. 2d 915, 921–22, 25 P.3d 423, 426 (2001).

314. *Barker*, 143 Wash. 2d at 920 n.1, 25 P.3d at 425 n.1; WASH. REV. CODE §§ 10.89.010–.080 (2010).

315. *See supra* Parts III.A–.B for discussion on the authorization of pursuit of drunk drivers under the Powers Act and the Uniform Act.

drunk drivers across jurisdictional boundaries.

All three cases cited in *Eriksen III* acknowledge that an exception to the limits of territorial jurisdiction is an instance of fresh pursuit.[316] As indicated in *Wenatchee*, common law cross-jurisdictional fresh pursuit required a felony committed within the pursuing officers' jurisdiction.[317] However, the Powers Act explicitly expanded a Washington officer's authority to pursue persons "reasonably believed to have committed a violation of traffic or criminal law."[318] Admittedly, tribal officers do not inherently have the power to arrest under Washington law as is required for authority under the Powers Act. But banning fresh pursuit because the violation was not a felony is no longer the standard.[319]

Additionally, the Washington State Legislature has authorized officers from other states to continue cross-jurisdictional pursuit into the state.[320] The Uniform Act permits officers from a foreign jurisdiction, whether they receive certification from Washington, to arrest in Washington as long as it is pursuant to fresh pursuit.[321] Also, the Uniform Act specifically authorizes the pursuit of intoxicated or reckless drivers.[322] Therefore, officers from outside of Washington's jurisdiction may come into the state and arrest for violations of another state's traffic code.[323] The Uniform Act means there is no longer a categorical ban of fresh pursuit based on certification to enforce Washington law.[324]

The combined effect of the Powers Act and the Uniform Act is recognized in the only case the *Eriksen III* majority explores in depth: *Barker*.[325] In *Barker*, the Washington State Supreme Court held that an out-of-state officer without special certification from Washington State had no common law or statutory authority to pursue a drunk driver across state lines based solely upon probable cause for a

316. *See Barker*, 143 Wash. 2d at 921, 25 P.3d at 425; *City of Wenatchee*, 43 Wash. App. at 550, 718 P.2d at 821; *Irwin*, 10 Wash. App. at 370, 517 P.2d at 620.

317. 43 Wash. App. at 550, 718 P.2d at 821–22.

318. WASH. REV. CODE § 10.93.120(1) (2010).

319. *See id.* (expanding the authorized instances of fresh pursuit to non-felonies). The legislature abrogated reliance upon the limits of common law fresh pursuit. Vance v. State, 116 Wash. App. 412, 415–16, 65 P.3d 668, 670 (2003).

320. WASH. REV. CODE § 10.89.010 (2010).

321. *See supra* Part III.B for discussion of the Uniform Act and its effect on cross-jurisdictional fresh pursuit.

322. WASH. REV. CODE § 10.89.010.

323. *Id.*

324. *Id.*; State v. Barker, 143 Wash. 2d 915, 920 n.1, 25 P.3d 423, 425 n.1 (2001).

325. *Eriksen III*, 172 Wash. 2d 506, 509–10, 259 P.3d 1079, 1081 (2011).

misdemeanor.[326] The Court did not analyze this issue under the Uniform Act because the State did not file an Answer to Barker's Petition for Review.[327] This meant the Court was not reviewing the trial court's determination that the officer lacked the legal authority to arrest in Washington.[328] Thus, the Washington State Supreme Court was only evaluating the case under the common law standard of fresh pursuit and within the framework of the Powers Act, which required authorization to arrest under Washington law.[329] In a footnote, the Court made it clear that the Uniform Act authorized this arrest.[330] Because the Uniform Act negates the precedential value of *Barker*, the *Eriksen III* majority's reliance on it is misplaced.

The *Eriksen III* Court's misuse of these precedents undermines its decision. The Court fails to support its contention that territorial boundaries "necessarily" limit jurisdiction. Furthermore, both the Powers Act and the Uniform Act expressly allow for fresh pursuit of drunk drivers.[331] Thus, the Court should not have dismissed the pursuit of Loretta Eriksen simply because it was a misdemeanor. The Court's failure to prove this point weakens its decision.

D. The Inability of Tribal Officers to Detain Non-Members Without Certification Will Endanger General Public Safety

While the legal foundations of *Eriksen III* are suspect, the decision is also an affront to public policy and safety. As Justice Owens indicated in dissent, the majority's holding illogically restricts a non-certified tribal officer's ability to uphold law and order.[332] Non-Indians, in particular drunk drivers, are encouraged to engage in a high-speed chase to reach the borders of the reservation before tribal officers can impede their progress. This not only may result in harm to others on the reservation,[333] but a high-speed escapee is still driving drunk on the

326. 143 Wash. 2d at 922, 25 P.3d at 426.

327. *Id.* at 920 & n.1, 921–22, 25 P.3d at 425 & n.1, 426.

328. *Id.*

329. *Id.* at 921–22, 25 P.3d at 425–26; WASH. REV. CODE § 10.93.070 (2010).

330. *Barker*, 143 Wash. 2d at 920 n.1, 25 P.3d at 425 n.1.

331. *See supra* Parts III.A–.B for discussion on the authorization of pursuit of drunk drivers under the Powers Act and the Uniform Act.

332. *Eriksen III*, 172 Wash. 2d 506, 520–21, 259 P.3d 1079, 1086 (2011) (Owens, J., dissenting).

333. The fact that crashes and traffic-related deaths are already disproportionately high among Native American populations compounds the negative effects stemming from the encouragement of high-speed chases on reservations. In a 2009 agreement with the Tribes of Washington State, the Washington Traffic Safety Commission noted that, in the state, Native Americans die in traffic

roads of Washington. It is entirely possible that the driver will injure citizens of the state.[334] Therefore, this is an issue of protecting the safety of all Washingtonians.

The restrictions placed on a non-certified tribal officer are misguided and inconsistent with other legislative efforts. The State of Washington emphasizes drunk-driving prevention.[335] For instance, in 2004, the legislature found the rate of drunk driving to be "unacceptable" and strengthened the laws surrounding blood alcohol tests.[336] To "convey the seriousness with which the legislature views this problem[,]"[337] a driver's refusal to take a test is admissible as evidence in a criminal trial, and is sufficient to warrant the State's revocation of driving privileges for at least one year.[338] Additionally, in 2011, the legislature passed "Hailey's Law," which orders police to impound vehicles of DUI suspects for twelve hours.[339] After *Eriksen III*, an uncertified tribal officer cannot even force the drunk driver to walk home.[340] Nothing prevents the driver from continuing down the road or reentering the reservation and harming other citizens. Such a result runs counter to the

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accidents at a rate roughly 3.17 times higher than the combined average of all other racial groups. Between 1999 and 2007, Native Americans suffered 32.95 traffic fatalities per 100,000 people (the next highest were Hispanics at 15.31). If the data is restricted to drunk-driver related traffic fatalities, Native Americans suffer fatal accidents 4.2 times more frequently (17.78 per 100,000) than the average of other races (Hispanics were again second highest at 6.83). The Safety Commission acknowledges the numbers could actually be worse because crash data upon reservations is underreported. Centennial Accord Agreement, State of Washington (Washington Traffic Safety Commission)-the Tribes of Washington State, Mar. 1, 2009, 1–3, available at http://www.wtsc.wa.gov/wp-content/uploads/downloads/2010/03/cen_accord0509.pdf. A combination of a high propensity of drunk-driver related fatalities and high-speed pursuits stemming from evasion of tribal officers cannot equal good results for tribal safety.

334. Sovereign immunity insulates tribes from private tort litigation for serving alcohol to a drunk driver who subsequently hurts an innocent bystander. Foxworthy v. Puyallup Tribe of Indians Ass'n, 141 Wash. App. 221, 223, 169 P.3d 53, 54 (2007).

335. *See, e.g.*, *Legislature Passes DUI Impound Bill Dubbed 'Hailey's Law,'* KOMO NEWS (Apr. 14, 2011, 10:36 a.m.), http://www.komonews.com/news/local/119860664.html; David Ammons, *Gregoire Wants Traffic Sobriety Checkpoints*, SEATTLE POST-INTELLIGENCER, Jan. 7, 2008, http://www.seattlepi.com/local/article/Gregoire-wants-traffic-sobriety-checkpoints-1260954.php; Curt Woodward, *Gregoire Signs Tougher DUI Law*, SEATTLE POST- INTELLIGENCER, Mar. 15, 2006, http://www.seattlepi.com/local/article/Gregoire-signs-tougher-DUI-law-1198561.php.

336. 2004 Wash. Sess. Laws ch. 68, § 1; *see generally* WASH. REV. CODE § 46.20.308 (2010).

337. 2004 Wash. Sess. Laws ch. 68, § 1.

338. WASH. REV. CODE § 46.20.308(2)(a)–(b).

339. WASH. REV. CODE §§ 46.55.350–.360 (Supp. 2011). "Hailey's Law" was a direct result of an incident where a cited drunk driver struck Hailey Huntley head-on. In this instance, the police officer had forced the drunk driver to walk home, but the driver managed to find her way back to her car. *Legislature Passes DUI Impound Bill*, *supra* note 335.

340. 172 Wash. 2d 506, 514–15, 259 P.3d 1079, 1083 (2011).

efforts of the legislature to curtail drunk driving and risks exacerbating the problem by encouraging drivers to engage in flight for the border. Beyond the insult to tribal sovereignty, this decision places all people of the state in harm's way.

VI. CONGRESS SHOULD EXPRESSLY RECOGNIZE A TRIBE'S AUTHORITY TO PROTECT ITS INTERESTS ACROSS TERRITORIAL BOUNDARIES

Only Congress can define tribal inherent sovereign authority.[341] Unfortunately, after *Eriksen III*, the State did not file a writ of certiorari with the U.S. Supreme Court. Now other states may follow Washington's lead and restrict the authority of tribal officers to enforce tribal law and safety. To remedy *Eriksen III*, and to prevent other states from following suit, Congress should step in to define tribal authority and prevent states from usurping this traditional federal power.

Congress has expressly defined tribal sovereignty before. In 1990, the U.S. Supreme Court held in *Duro v. Reina* that the Salt River Pima-Maricopa Indian Community could not prosecute a non-member Indian.[342] Afterward, Congress enacted the "*Duro* Fix."[343] Congress amended the Indian Civil Rights Act to redefine a tribe's "powers of self-government . . . [as including] the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[344] Such legislation restructured the entire analysis in tribal criminal jurisdiction. Congress acted within its "exclusive and plenary" authority in Indian law to define tribal sovereignty.[345]

Here, Congress should similarly step in to relax restrictions on tribal jurisdiction. A parallel addendum to the Indian Civil Rights Act, or even enacting separate legislation, will expressly define a tribe's "powers of self-government." The legislation would recognize the tribe's right to protect its sovereign interest in maintaining law and safety through the exercise of its right to detain non-Indians. Additionally, Congress should declare that artificial territorial boundaries do not limit a tribe's interest

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341. *See supra* Part I.

342. 495 U.S. 676, 679 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

343. 25 U.S.C. §§ 1301–1303 (2006). See text accompanying *supra* notes 51–53 for a discussion of the "*Duro* Fix" and its role in the development of Indian jurisdiction.

344. 25 U.S.C. § 1301(2). The U.S. Supreme Court upheld Congress's power to define the restrictions on a tribe's criminal jurisdiction in *Lara*, 541 U.S. at 200.

345. *Lara*, 541 U.S. at 200 (upholding Congress's right to relax restrictions on a tribe's criminal jurisdiction over nonmember Indians).

in protecting its political integrity, economic security, and health or welfare. By couching the authority within the terms of the second *Montana* exception,[346] Congress would ensure a nexus to on-reservation interests in self-government and internal relations. Congress's express recognition of tribal self-governmental powers could even limit a tribe's exercise of extra-jurisdictional detention to instances of fresh pursuit originating on the reservation and stemming from a non-Indian's violation of the tribal legal code. The key is that Congress explicitly acknowledges a tribe's interest in exercising its rights is not limited to a reservation. This proposed legislation will prevent states from unilaterally defining tribal rights and afford tribal interests proper protection.

CONCLUSION

The Washington State Supreme Court's ruling in *Eriksen III* suffers from several fundamental flaws. First, the Court incorrectly analyzed a tribe's inherent sovereign authority in terms of a state statute. The legislature's enactment of RCW 10.92.020 is irrelevant to a court's consideration of a tribe's authority to enforce laws and protect safety. A state cannot unilaterally define tribal powers. A tribe retains those powers of sovereignty not expressly removed by statute or treaty, or by implication of the tribe's dependent status. Congress has never removed, nor did the tribal parties to Point Elliott relinquish, the authority to detain non-Indian law violators. Courts have even held that it is a tribe's affirmative duty to detain violators and deliver the individuals to state officers. Where the officer detains a law violator does not change where the non-Indian broke the law or the internal tribal interests involved. The ability to enforce laws is a vital part of self-government that can extend beyond borders. Second, the Court misinterpreted RCW 10.92.020 as a limit on tribal authority to enforce laws. The plain meaning of the statute, and the legislative intent, indicate an effort to increase law enforcement on reservations by allowing tribal officers authority to arrest for violations of state law. This interpretation is in line with related statutes and a similar jurisdiction. Third, the Court also misapplied the precedent it cited as support for the impermeability of territorial boundaries. None of the cases the majority cited actually prove this contention, nor do they directly apply to the situation at hand. Reliance on them as sole support for the proposition that tribes cannot

346. Montana v. United States, 450 U.S. 544, 564–66 (1981); s*ee* text accompanying *supra* note 61.

have interests outside their reservation boundaries is misplaced. Finally, *Eriksen III* flouts public safety and legislative efforts to prevent drunk driving, encouraging drivers to engage in a high-speed race for the reservation border.

Congress should pass legislation to explicitly recognize a tribe's sovereign authority to protect internal self-government and public safety through cross-jurisdictional pursuit of non-Indian law violators. Through this legislation, Congress would offer an express statement that resolves without question this jurisdictional gap and statutorily overrules *Eriksen III*.