Westlaw

--- P.3d ----, 2011 WL 3849504 (Wash.)
(Cite as: 2011 WL 3849504 (Wash.))

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Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Loretta Lynn ERIKSEN, Petitioner.

No. 80653–5.
Sept. 1, 2011.

Background: Defendant, a non-native American, was convicted in the Superior Court, Whatcom County, Leon F. Henley, Jr., J., of driving under the influence (DUI) in connection with an incident in which she was detained by a tribal police officer who pursued her beyond the borders of an Indian reservation after observing alleged traffic infractions. Defendant moved for discretionary review.

Holding: On reconsideration, the Supreme Court, Fairhurst, J., held that tribal police officer lacked the inherent authority to stop and detain defendant on ordinary state land outside Indian reservation.

Reversed and remanded.

Opinion, 170 Wash.2d 209, 241 P.3d 399, superseded.

Alexander, J., dissented, with opinion.

Owens, J., dissented, with opinion, in which Charles W. Johnson and Chambers, JJ., joined.

West Headnotes

[1] Criminal Law 110 ⚿0

110 Criminal Law
Supreme Court accepts unchallenged findings of fact as verities on appeal.

[2] Indians 209 ⚿0

209 Indians
Tribal police officer lacked the inherent authority to stop and detain defendant, a non-native American who officer had observed commit traffic infractions within the boundaries of an Indian reservation, on ordinary state land outside the reservation, as the land outside the reservation was beyond the limits of the tribe's territorial jurisdiction.

[3] Arrest 35 ⚿0

35 Arrest
As a general rule, a valid arrest may not be made outside the territorial jurisdiction of the arresting authority. U.S.C.A. Const.Amend. 4.

[4] Indians 209 ⚿0

209 Indians
Indian tribes possess a unique and limited sovereignty that exists unless withdrawn by treaty, statute, or as a necessary result of the tribes' dependence on the United States.

[5] Indians 209 ⚿0

209 Indians
Indian tribes retain the inherent sovereign power to promulgate criminal laws and enforce them against tribal members.

[6] Indians 209 ⚿0

209 Indians
Indian tribes retain the right to create a traffic code and enforce it on the reservation against tribal members.

[7] Amicus Curiae 27 ⚿0

27 Amicus Curiae
Supreme Court need not address issues raised only by amici curiae.

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[8] Criminal Law 110 ⚿0

110 Criminal Law

Supreme Court, on reconsideration of its decision on defendant's petition for discretionary review of her conviction for driving under the influence (DUI), would not consider state's argument that defendant's stop and detention was justified under the citizen's arrest doctrine, where the state did not seek cross review of this determination or mention the issue of citizen's arrest in its answer to defendant's motion for discretionary review.

Appeal from Whatcom County Superior Court; 06–1–00516–6, Honorable Leon F. Henley Jr, Judge.William Joseph Johnston, Attorney at Law, Bellingham, WA, for Petitioner.

Ann Lindsay Stodola, Attorney at Law, Bellingham, WA, for Respondent.

Mary Michelle Neil, Attorney at Law, Bellingham, WA, for Amicus Curiae on behalf of Lummi Nation.

FAIRHURST, J.

*1 ¶ 1 We granted reconsideration to again consider whether a tribal police officer who observed Loretta Lynn Eriksen commit a traffic infraction on the Lummi Reservation could validly stop her outside the reservation and detain her until county police arrived. We conclude that the tribe's inherent sovereign powers did not authorize this extraterritorial stop and detention.

I. FACTUAL HISTORY

[1] ¶ 2 At approximately 1:30 a.m. on August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department was driving east on Slater Road within the Lummi Reservation [FN1] when he saw a vehicle approaching him with its high beams activated. McSwain flashed his high beams to alert the approaching vehicle that its high beams were on, but the vehicle did not dim its lights in response. McSwain slowed down and prepared to turn around so that he could stop the vehicle for failure to dim its lights.[FN2] At that point, the approaching vehicle drifted across the center line, "coming within a couple of feet" of McSwain's patrol car. Clerk's Papers (CP) 23. McSwain came to a stop and prepared to swerve if necessary, but the vehicle drifted back into the westbound lane of travel. McSwain then observed a second vehicle following closely behind the drifting vehicle. He turned around, activated his overhead lights, and followed the two westbound vehicles.

¶ 3 Both vehicles stopped at a gas station located off the Lummi Reservation. The second vehicle broke off and drove behind a building, out of sight, while the first vehicle stopped where McSwain could see it. McSwain observed a passenger jump out of the vehicle and run around the front, while the driver moved into the passenger seat. McSwain ordered the driver and passenger to stop moving and then called for a back-up officer.

¶ 4 When a back-up officer arrived, McSwain approached the driver, whom he later identified as Eriksen. He asked her why she had moved into the passenger seat. She responded that she had not been driving. McSwain observed that Eriksen smelled strongly of intoxicants, had bloodshot and watery eyes, and spoke in slightly slurred speech. McSwain determined that Eriksen was not a tribal member, then called for a Whatcom County deputy sheriff.

¶ 5 While waiting for the deputy to arrive, McSwain asked Eriksen to step out of the car. She had difficulty keeping her balance and walking, and she swayed back and forth when asked to stop and face him. Without being asked, Eriksen told McSwain she would not do any sobriety tests. McSwain did not request or perform any. Instead, he detained Eriksen and put her in the back of his patrol car until the Whatcom County deputy sheriff arrived. The deputy arrested Eriksen.

II. PROCEDURAL HISTORY

¶ 6 Eriksen was charged with driving under the

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influence (DUI) in the Whatcom County District Court. She moved to suppress [FN3] on the basis that McSwain did not have the authority to stop and detain her off the reservation. The district court denied the motion and Eriksen was convicted as charged. On appeal, the Whatcom County Superior Court upheld the conviction. We granted review of the superior court's decision.

***2** ¶ 7 In 2009, we affirmed Eriksen's conviction. Eriksen moved for reconsideration, and the State joined the motion with regard to our statutory analysis. We granted reconsideration and withdrew our opinion. In 2010, the court again affirmed Eriksen's conviction, and she moved to reconsider a second time. We granted reconsideration and withdrew the second opinion.

III. ANALYSIS

[2][3] ¶ 8 As a general rule, "a valid arrest may not be made outside the territorial jurisdiction of the arresting authority." Cohen's Handbook of Federal Indian Law § 9.07, at 763 (2005) (citing Wayne R. LaFave et al., Criminal Procedure § 1.3(e) n. 2 (West 3d ed.2000)). This principle of territorial jurisdiction has long been accepted in Washington State. *See, e.g., State v. Barker,* 143 Wash.2d 915, 920–21, 25 P.3d 423 (2001); *City of Wenatchee v. Durham,* 43 Wash.App. 547, 549–50, 718 P.2d 819 (1986); *Irwin v. State,* 10 Wash.App. 369, 371, 517 P.2d 619 (1974).

¶ 9 *Barker* illustrates how law enforcement officers may be limited by territorial jurisdiction. In *Barker,* an Oregon police officer observed a driver speeding, making unsafe lane changes, and following too closely in Oregon near the Washington State border. 143 Wash.2d at 918, 25 P.3d 423. The officer pursued the driver into Washington, where the officer stopped and detained the driver until Washington police arrived and arrested him for DUI. *Id.* We held that the stop and detention were " 'without authority of law' " under article I, section 7 of the Washington State Constitution [FN4] because the Oregon officer was not authorized by statute or common law to act outside her jurisdiction. *Barker,* 143 Wash.2d at 922, 25 P.3d 423 (quoting Const. art. I, § 7). The exclusionary rule required suppression of the fruits of the unlawful stop and detention. *Id.*

[4][5][6] ¶ 10 Here, although McSwain's stop and detention of Eriksen took place outside the Lummi Nation's territorial jurisdiction, the State argues the stop and detention were justified by the tribe's inherent sovereign authority. Indian tribes possess a "unique and limited" sovereignty that exists unless withdrawn by treaty, statute, or as a necessary result of the tribes' dependence on the United States. *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Indian tribes retain the inherent sovereign power to promulgate criminal laws and enforce them against tribal members. *Id.* at 322; *see also Strate v. A–1 Contractors,* 520 U.S. 438, 459, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). Tribes also retain the right to create a traffic code and enforce it on the reservation against tribal members. *See Confederated Tribes of Colville Reservation v. Washington,* 938 F.2d 146 (9th Cir.1991).

¶ 11 In *State v. Schmuck,* 121 Wash.2d 373, 850 P.2d 1332 (1993), we held that a tribe's inherent authority allowed a tribal officer to stop a non-Indian driver on a public road within the reservation and detain him until state officers arrived. We reasoned that the tribe's inherent authority included the ability to stop the driver because:

> ***3** Only by stopping the vehicle could [the tribal officer] determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless. It would also run contrary to the "well-established federal policy of furthering Indian self-government."

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Id. at 383, 850 P.2d 1332 (internal quotation marks omitted) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 62, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). The ability to detain was supported in large part by a treaty provision requiring the tribe to deliver " 'offenders against the laws of the United States' " to the authorities for trial and the tribe's traditional authority to exclude unwanted persons from tribal land. *Schmuck,* 121 Wash.2d at 383–90, 850 P.2d 1332 (quoting Treaty between the United States and the Dwámish, Suguámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. IX, 12 Stat. 927, 929 (hereinafter Treaty of Point Elliott)).

¶ 12 In *Settler v. Lameer,* 507 F.2d 231 (9th Cir.1974), the Ninth Circuit held that a tribe retained the inherent authority to arrest tribal members at usual and accustomed fishing sites outside the reservation for violation of tribal fishing regulations. A treaty explicitly secured to the tribe " 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.' " *Id.* at 232 (quoting Treaty with the Yakama Nation, June 9, 1855, art. III, 12 Stat. 951, 953). The Ninth Circuit reasoned that the tribe's explicit treaty power to regulate fishing contained the right to arrest tribal members at usual and accustomed fishing sites for violating the regulations, because "[t]he power to regulate is only meaningful when combined with the power to enforce." *Id.* at 238.

¶ 13 The State argues that *Schmuck* establishes the Lummi Nation's inherent sovereign power to stop and detain offenders on the reservation, while *Settler* shows that this enforcement power may extend beyond reservation boundaries. We disagree.

¶ 14 The inherent sovereign power identified in *Schmuck* does not logically extend beyond reservation boundaries. The State is correct that preventing tribal police from stopping and detaining drivers off the reservation would "undercut the Tribe's ability to enforce tribal law" by encouraging drivers to race for the reservation border and escape detention. *Schmuck,* 121 Wash.2d at 383, 850 P.2d 1332. While this is troubling on a policy level, the concept of territorial jurisdiction necessarily limits any sovereign's ability to fully enforce its laws. For example, Oregon's ability to enforce its traffic code was undercut when we held that an Oregon officer could not stop and detain an offender who crossed the state border. *Barker,* 143 Wash.2d 915, 25 P.3d 423. That impediment to enforcement alone did not mean that Oregon's sovereignty was compromised. Rather, the limitation on Oregon's authority to enforce its laws flowed necessarily from Oregon's own geographic boundaries.

***4** ¶ 15 While *Settler* did allow for certain off-reservation arrests, it does not justify a tribal officer's traffic stop on ordinary state land. The *Settler* court noted that:

> Our holding that the Yakima Indian Nation may enforce its fishing regulations by making arrests and seizures off the reservation is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations. The arrest and seizure of fishing gear must be made at "usual and accustomed places" of fishing.

507 F.2d at 240. Here, the stop and detention were made on ordinary state land, over which the Lummi had no special legal rights.

¶ 16 Moreover, *Settler* relied on an express treaty provision giving the tribe the right to regulate fishing at usual and accustomed off-reservation fishing sites. *Id.* at 231. In contrast, the Treaty of Point Elliott, which created the Lummi Reservation, does not explicitly grant the tribe the right to regulate or enforce traffic laws beyond its borders. [FN5] The Treaty of Point Elliott does state that the "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." Treaty of Point Elliott, art. IX, 12 Stat. 927, 929. We have said that this provision "appears to reflect a common concern of the federal government during treaty negotiations in the mid–1800's to prevent non-Indians

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from hiding out on reservations in the mistaken belief that they would be free from prosecution for their crimes." *Schmuck,* 121 Wash.2d at 385, 850 P.2d 1332 (citing H.R.Rep. No. 474, at 98 (1834)). While that concern was implicated in *Schmuck,* which dealt with the tribe's detention of offenders on the reservation, Article IX bears no relation to detaining persons who leave the tribe's territorial jurisdiction and are fully subject to state prosecution. Eriksen was off the reservation when McSwain stopped her. Article IX is irrelevant.

¶ 17 The dissent cites the second exception of *Montana v. United States,* 450 U.S. 544, 566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), as a source of the tribe's inherent authority to stop and detain Eriksen. Dissent (Owens, J.) at 4, 6. *Montana* held that tribes retain the inherent authority to exercise civil regulatory authority over the conduct of non-Indians on fee lands within the reservation when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. *Montana* delineated the scope of a tribe's civil regulatory jurisdiction within the reservation. The rules applicable in that context do not naturally extend to Eriksen's case, which involves the powers of tribal law enforcement officers outside the reservation. We conclude that the Lummi Nation did not have inherent authority to stop and detain Eriksen on ordinary state land outside the reservation, beyond the limits of the tribe's territorial jurisdiction.

***5** ¶ 18 The Lummi Nation stresses the limited nature of the power to stop and detain offenders off-reservation until State authorities arrive, describing this power as merely "assisting the State in asserting *its* regulatory and adjudicatory authority." Br. of Amicus Curiae Lummi Nation at 9. This characterization ignores the fact that Washington recently established certain training and liability requirements for tribal officers to become general authority Washington peace officers, with the power to arrest in fresh pursuit on Washington land. *See* RCW 10.92.010; RCW 10.93.070(6), .120. Creating a doctrine of fresh pursuit based only on a tribe's inherent authority would effectively abrogate this statutory scheme, undermining Washington's sovereign authority to regulate arrests in the state. Certainly, Washington's sovereignty cannot extinguish the Lummi Nation's sovereign powers. Rather, we simply note that the unwarranted extension of the Lummi Nation's powers would not be an enhancement of Washington's sovereign rights, but an impingement of them.

[7] ¶ 19 While the territorial limits on the Lummi Nation's sovereignty create serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border, the solution does not lie in judicial distortion of the doctrine of inherent sovereignty. Instead, these issues must be addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts, to ensure that all law enforcement officers have adequate authority to protect citizens' health and safety in border areas. We urge the Lummi Nation and Whatcom County to work together to solve the problems made evident by this case; but if they can or will not do so, we will not manipulate the law to achieve a desirable policy result.[FN6]

[8] ¶ 20 The State contends that even if the Lummi Nation's inherent sovereign authority did not justify McSwain's stop and detention of Eriksen, the doctrine of citizen's arrest does. In its oral decision, the superior court concluded that McSwain's detention of Eriksen was not a valid citizen's arrest. Verbatim Report of Proceedings at 2–3. The State did not seek cross review of this determination or mention the issue of citizen's arrest in its answer to Eriksen's motion for discretionary review. In *Barker,* we declined to reach the State's citizen's arrest argument when the State did not file an answer to the defendant's petition for review. 143 Wash.2d at 919–20, 25 P.3d 423. Similarly, we decline to reach the tardily-raised citizen's arrest issue here.

IV. CONCLUSION

¶ 21 The Lummi Nation's inherent sovereign

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powers do not include the authority to stop and detain outside the tribe's territorial jurisdiction for a traffic infraction. Accordingly, McSwain's stop and detention of Eriksen were invalid. We reverse the superior court's decision and remand to the district court for proceedings consistent with this opinion.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, JAMES M. JOHNSON, DEBRA L. STEPHENS and CHARLES K. WIGGINS, Justices.

ALEXANDER, J. (dissenting).

*6 ¶ 22 I would affirm Loretta Eriksen's conviction on the basis that Tribal Officer Mike McSwain's brief detention of Eriksen at a location outside the boundaries of the Lummi Indian Reservation was a valid citizen's arrest.

¶ 23 It is well settled that under the common law an individual citizen can affect an arrest of a person who is committing a felony or a misdemeanor in the citizen's presence if the offense is a breach of the peace.[FN1] *State v. Malone,* 106 Wash.2d 607, 609 n. 1, 724 P.2d 364 (1986) (citing *State v. Miller,* 103 Wash.2d 792, 698 P.2d 554 (1985); *State v. Gonzales,* 24 Wash.App. 437, 604 P.2d 168 (1979)). In my view, a peace officer should be able to exercise the same authority outside of that officer's jurisdiction, provided the officer does not exploit the color of his or her office in doing so. Indeed, in *Malone,* we indicated that a Kootenai County sheriff's deputy who had followed a speeding truck from Idaho into Washington State in a marked police car with lights and siren activated had authority to arrest the driver of the truck under a citizen's arrest theory.

¶ 24 The situation here is very similar to that in *Malone,* the record showing that Tribal Officer McSwain stopped and detained Eriksen slightly outside his jurisdiction after he observed her driving within the tribal jurisdiction in a manner that caused him reasonably to believe that she was driving while under the influence of intoxicants. Driving under the influence (DUI) is a gross misdemeanor. RCW 46.61.502. I believe we should join courts in other jurisdictions in recognizing DUI as a breach of the peace. *E.g., Heck v. State,* 507 S.W.2d 737 (Tex.Crim.App.1974); *State ex rel. State v. Gustke,* 205 W.Va. 72, 81, 516 S.E.2d 283 (1999). Such a ruling would be consistent with the *Restatement (Second) of Torts* § 116 (1965), which defines "breach of the peace" as "a public offense ... causing or likely to cause an immediate disturbance of public order." Those who drive while under the influence characteristically do so in an erratic manner that carries with it the potential to cause serious injury or death to other drivers or pedestrians. Such conduct clearly disturbs public order.

¶ 25 Even though it is my view that Tribal Officer McSwain observed the commission of an offense that constitutes a breach of the peace, I must still confront the question of whether his actions are barred from qualifying as a citizen's arrest under the "color of office" doctrine. Under that doctrine a peace officer is prohibited from utilizing his official position to gather evidence. Even though Washington courts have not yet confronted this issue, I find the analysis of the Supreme Court of Appeals of West Virginia in the *Gustke* opinion persuasive. The court there said that an officer is only barred by the doctrine from " *collect[ing] evidence that a private citizen would be unable [to] gather.* " *Gustke,* 205 W.Va. at 81, 516 S.E.2d 283; *see also State v. Phoenix,* 428 So.2d 262, 266 (Fla.App.1982). In *Gustke,* a uniformed off-duty officer, who was outside his jurisdiction, was driving home from work when he observed a car being driven erratically and weaving on the road. After using his siren to stop the car, the officer detained the driver until an officer from the proper jurisdiction arrived. The *Gustke* court found that since the officer had not investigated beyond merely asking for the driver's identification, he did not violate the under color of office doctrine. Here, like the situation in *Gustke,* McSwain observed Eriksen's driving pattern before stopping her and he ceased his investigation of the possible DUI after he checked Eriksen's identification and determined that she was

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not a tribal member and that her vehicle was outside the boundary of the Lummi Reservation. Any observations McSwain made about Eriksen's behavior after the stop and up to the time he checked her identification could have been made by a private citizen, as easily as they were made by McSwain. Under these facts, the color of office doctrine should not serve as a bar to McSwain's authority to affect a valid citizen's arrest.

***7** ¶ 26 I would affirm Eriksen's conviction on the basis that McSwain's extraterritorial stop and detention of Eriksen was a valid citizen's arrest.
OWENS, J. (dissenting).

¶ 27 This case concerns an Indian tribe's authority to detain a non-Indian who threatens the health and welfare of a tribe and its members until state law enforcement officers arrive. The general power of a tribe to do so is well established. *See, e.g., State v. Schmuck,* 121 Wash.2d 373, 390–91, 850 P.2d 1332 (1993). The unique aspect of this case is that, in the process of pulling over the driver who threatened the tribe's health and welfare, the driver and tribal law enforcement officer crossed the reservation's border. Under my reading of applicable precedent, the tribe possesses authority to detain a non-Indian driver who violated the law while on the tribe's reservation and whose conduct continues to directly threaten the health or welfare of the tribe. *See Montana v. United States,* 450 U.S. 544, 566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Schmuck,* 121 Wash.2d at 391, 850 P.2d 1332. The majority disagrees.

¶ 28 Accordingly, I respectfully dissent.

I. Facts

¶ 29 The facts set forth by the majority are accurate as far as they go, but several additional facts are relevant. Slater Road lies entirely within, and constitutes the northern boundary of, the Lummi Reservation. While patrolling this area of the reservation in the early hours of August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department was driving east on Slater Road. After an oncoming car failed to dim its high-beam lights in response to Officer McSwain flashing his own high-beam lights, Officer McSwain prepared to make a U-turn and contact the driver of the vehicle. As he did so, the oncoming vehicle drifted across the center of the road and came within several feet of Officer McSwain's police car before drifting back into the appropriate westbound lane. At this point Officer McSwain discovered that a second vehicle was following the first. Officer McSwain then turned around, activated his car's overhead lights, and caught up to the vehicles as they approached the intersection of Slater Road and Elder Road. This intersection forms a T; Elder Road runs north from Slater Road, which continues both east and west from that point. On the northwest corner of the intersection is a gas station and minimarket. The two vehicles pulled off the road to the right (i.e., north) and into the gas station's parking lot, which is immediately adjacent to Slater Road. Officer McSwain pulled in behind the first vehicle while the second vehicle pulled around the side of the gas station out of Officer McSwain's view. Immediately thereafter, the driver of the first vehicle, Loretta Eriksen, moved from the driver's seat, over the center console, and into the passenger seat while the passenger attempted to run around the front of the car to the driver's seat. Officer McSwain ordered Eriksen and the passenger to put their hands on the dashboard and the hood, respectively, while he waited for additional units to respond.

***8** ¶ 30 After additional Lummi officers arrived and verified that the second vehicle had left the scene, Officer McSwain approached Eriksen. While talking to Eriksen, Officer McSwain smelled an odor of alcohol on her and observed that her eyes were bloodshot and watery, her speech was slurred, and she staggered as she walked. Upon discovering that Eriksen was not a tribal member, Officer McSwain requested that Whatcom County send a deputy sheriff. In the meantime, Officer McSwain informed Eriksen that she would be detained until the deputy arrived.

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II. The Lummi Nation's Inherent Authority Justified Eriksen's Detention

¶ 31 An Indian tribe possesses authority to stop vehicles that violate tribal laws while on the tribe's reservation. *Schmuck,* 121 Wash.2d at 380, 850 P.2d 1332. This authority flows from the tribe's inherent "power to prescribe and enforce internal criminal and civil laws" and applies even where the driver of the vehicle stopped turns out to be a non-Indian. *Id.* If the driver does turn out to be a non-Indian, the tribe lacks jurisdiction to prosecute the driver, *see Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), but may detain the driver until "he or she can be turned over to state authorities," *Schmuck,* 121 Wash.2d at 392, 850 P.2d 1332; *accord United States v. Terry,* 400 F.3d 575, 580 (8th Cir.2005).

¶ 32 A tribe's power to detain a non-Indian derives from two sources. First, that power is a component of the tribe's inherent authority to exclude trespassers. *Schmuck,* 121 Wash.2d at 389–90, 850 P.2d 1332 (quoting *Ortiz–Barraza v. United States,* 512 F.2d 1176, 1179 (9th Cir.1975)). Second, and more relevant to the present case, the power to detain is, in certain instances, a component of the tribe's inherent authority to regulate conduct of non-Indians that "threatens or has some direct effect on the ... health or welfare of the tribe." *Montana,* 450 U.S. at 566. This is commonly referred to as the "second *Montana* exception." In *Schmuck,* this court recognized that drunk driving threatens a tribe's health and welfare and therefore held that tribal police officers had inherent authority to detain a person suspected of drunk driving until state authorities arrived. 121 Wash.2d at 391–92, 850 P.2d 1332.

¶ 33 The majority suggests that the tribe's inherent authority to detain a non-Indian disappears the moment the non-Indian crosses the boundary of the reservation, notwithstanding that a violation of the law took place on the reservation and notwithstanding the continuing existence of a threat to the tribe's health and welfare. The present case is illustrative. While on the Lummi Reservation, Eriksen came within several feet of colliding with Officer McSwain's car, which was already pulled to the side of the road in preparation for a U-turn. In response to Officer McSwain's activation of his car's overhead lights, Eriksen pulled into a gas station immediately adjacent to Slater Road. She did not leave the area. Had Officer McSwain been unable to detain her, nothing would have prevented Eriksen from simply returning to Slater Road (i.e., the reservation), at which point Officer McSwain could have again activated his overhead lights and begun the process anew. Though I understand the majority's desire for a bright-line rule, its proposed standard is untenable.

***9** ¶ 34 A hypothetical further illustrates the absurdity of the majority's proposed rule. Suppose a tribal law enforcement officer observes an arsonist attempting to set a fire in a wooded area of the reservation. The officer commands the would-be arsonist to "Stop in the name of the law!" The arsonist flees across the border of the reservation and immediately begins setting fire to the same forest, a fire that will inevitably and quickly spread to the reservation, sweeping through Indian homes and land. Must the tribal law enforcement officer stand on the reservation side of the boundary and fiddle with his radio while the reservation burns? According to the majority's interpretation of inherent tribal authority, it appears so.

¶ 35 The better rule is that, under the second *Montana* exception, where an individual (1) violates the law while on an Indian reservation and (2) continues to pose a direct and immediate threat to the health or welfare of the tribe, the tribe may stop and detain that individual, notwithstanding that he or she may have traveled beyond the reservation's border. The instances in which this rule will justify off-reservation detention are apt to be few and far between. If an individual has crossed the reservation's border and is driving away from the reservation, the danger that individual poses to the tribe's health or welfare will generally be neither immedi-

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ate nor direct. It will therefore not justify an off-reservation detention. Here, however, a dangerous and inebriated driver remained in her car immediately adjacent to the reservation. The tribe had inherent authority under the second *Montana* exception to detain Eriksen based on the direct and immediate threat she posed to the health and welfare of the tribe.[FN1]

¶ 36 The majority suggests that a contrary interpretation of the tribe's inherent power is necessary in order to avoid abrogating the State of Washington's statutory scheme governing fresh pursuit. While I disagree that allowing a tribe to detain persons threatening the health and welfare of the tribe abrogates the State's statutory scheme, this is, in the end, irrelevant. We should not be interpreting the tribe's inherent authority in the light of state statutes; to the contrary, we should be interpreting state statutes in light of a tribe's inherent authority. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). Only Congress can deprive tribes of their sovereign authority. *Schmuck,* 121 Wash.2d at 393, 850 P.2d 1332.

¶ 37 Ultimately, the majority's holding undermines our decision in *Schmuck.* Under the majority's rule, the Lummi Tribe is effectively unable to stop vehicles traveling west on Slater Road, no matter how great the danger they pose, because the moment the vehicles pull over to the right they will have crossed the border of the Lummi Reservation. I do not find this absurd result to be compelled by federal or state case law interpreting a tribe's inherent authority.

***10** ¶ 38 I respectfully dissent.

WE CONCUR: CHARLES W. JOHNSON and TOM CHAMBERS, Justices.

FN1. In the courts below, Eriksen tried to establish that the entire incident occurred outside the Lummi Reservation. The district court held that at least part of the initial incident took place on the reservation, and the superior court affirmed. In this court, Eriksen describes the initial traffic infraction as occurring on the reservation. *E.g.,* Pet. for Review at 3. She also does not assign error to the lower courts' determinations that the incident began within the reservation. We accept unchallenged findings of fact as verities on appeal. *State v. Hill,* 123 Wash.2d 641, 644, 870 P.2d 313 (1994). Therefore, we assume the incident began on the reservation.

FN2. The Lummi Nation Code of Laws 6.04.050(a), requires drivers to use low beams within 500 feet of oncoming vehicles.

FN3. The district court characterized the proceeding as a "[m]otion to [d]ismiss for lack of jurisdiction." CP at 17. The State now characterizes the proceeding as a "motion to suppress/dismiss the case for lack of jurisdiction." Resp't's Br. at 3.

FN4. Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

FN5. Like the treaty in *Settler,* the Treaty of Point Elliot contains an explicit provision giving tribes "[t]he right of taking fish at usual and accustomed grounds and stations." Treaty of Point Elliott, art. V, 12 Stat. 927, 928. This provision is clearly not at issue here, where no fishing was involved.

FN6. The problematic policy implications of today's holding, while significant, are likely far narrower than the dissent implies. The dissent offers a hypothetical in which an arsonist flees across the reserva-

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tion border and, while a police officer helplessly observes, sets a fire that threatens Indian land and lives. Dissent (Owens, J .) at 5. At common law, police officers could stop and arrest outside their territorial jurisdiction when in fresh pursuit of one who had committed a felony. *See, e.g., Barker,* 143 Wash.2d at 921, 25 P.3d 423. Arson is a felony. RCW 9A.48.020(2) (first-degree arson is a class A felony), .030(2) (second-degree arson is a class B felony). Assuming the continuing validity of the common-law doctrine, the officer would be empowered to stop and arrest the arsonist in fresh pursuit.

Amicus Lummi Nation raised the doctrine of fresh pursuit as a source of McSwain's authority to stop and detain Eriksen. Br. of Amicus Curiae Lummi Nation at 12–20. The State has never advanced the doctrine of fresh pursuit in this case, and it concedes that Eriksen's stop and detention were not authorized under any Washington fresh-pursuit statute. Resp't's Br. at 6–7. We need not address issues raised only by amici. *Accord State v. Gonzalez,* 110 Wash.2d 738, 752 n. 2, 757 P.2d 925 (1988). We therefore decline to reach the fresh-pursuit argument except to note that, unlike arson, Eriksen's DUI conviction was a misdemeanor. Former RCW 46.61 .502(5) (1998) (DUI is a gross misdemeanor); Lummi Nation Code of Laws 6A.02.090(d), 6A.01.020(a)(2) (DUI is a class B offense subject to 30–90 days in jail and a fine of $250–$1,250).

FN1. Pursuant to RCW 9A.04.060, provisions of the common law relating to the commission of crime are applicable where they are not repugnant to the state constitution or statutes.

FN1. The majority's implication that this approach is a "judicial distortion of the doctrine of inherent sovereignty," majority at 11, substantially misses the mark. *See, e.g.,* Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty,* 55 S.D. L.Rev. 48, 50 (2010). ("[T]he [United States Supreme] Court changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians.") The doctrine of inherent sovereignty, as interpreted by the United States Supreme Court, does not yet preclude tribes from protecting the health and welfare of their members by briefly detaining non-Indians in the circumstances present in this case.

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--- P.3d ----, 2011 WL 3849504 (Wash.)

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Westlaw

241 P.3d 399
170 Wash.2d 209, 241 P.3d 399
(Cite as: 170 Wash.2d 209, 241 P.3d 399)

Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Loretta L. ERIKSEN, Petitioner.

No. 80653–5.
Argued May 12, 2009.
Decided Oct. 14, 2010.

Background: Defendant, a non–Indian, was convicted in the Superior Court, Whatcom County, David M. Grant, J., of driving under the influence (DUI) in connection with an incident in which she was detained by a tribal police officer who pursued her beyond the reservation border after observing alleged traffic infractions. Defendant moved for discretionary review.

Holding: The Supreme Court, Sanders, J., as matter of first impression, held that tribal officers have authority to continue fresh pursuit of motorists who break traffic laws on reservation and subsequently drive beyond reservation boundaries, and to detain such individuals until authorities with jurisdiction arrive.

Affirmed.

Opinion, 166 Wash.2d 953, 216 P.3d 382, superseded.

Fairhurst, J., filed a dissenting opinion, in which Barbara A. Madsen, C.J., And Gerry L. Alexander, J., concurred.

West Headnotes

[1] Indians 209 ⇐270

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k270 k. In general. Most Cited Cases
Jurisdictional disputes on Indian reservations involve overlapping federal, state, and tribal jurisdiction.

[2] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases
Jurisdiction is a matter of law that the Supreme Court reviews de novo when the location of a crime is not in dispute.

[3] Criminal Law 110 ⇐1129(1)

110 Criminal Law
110XXIV Review
110XXIV(H) Assignment of Errors
110k1129 In General
110k1129(1) k. Necessity. Most Cited Cases
The Supreme Court considers unchallenged findings of fact verities on appeal.

[4] Indians 209 ⇐270

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k270 k. In general. Most Cited Cases
Whether a tribe has authority to stop and detain an individual necessarily involves an analysis of the limited sovereignty the tribe retains; in order to determine whether tribes retain their sovereign powers, the Supreme Court must look to the character of the power that the tribe seeks to exercise, not merely the location of events.

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[5] Indians 209 ⚿103

209 Indians
209I In General
209k102 Status of Indian Nations or Tribes
209k103 k. In general. Most Cited Cases

Indians 209 ⚿260

209 Indians
209VII Offenses and Prosecutions
209VII(A) In General
209k260 k. In general. Most Cited Cases

Indians 209 ⚿270

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k270 k. In general. Most Cited Cases
Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system.

[6] Indians 209 ⚿103

209 Indians
209I In General
209k102 Status of Indian Nations or Tribes
209k103 k. In general. Most Cited Cases
Indian tribes have a unique dependent relationship with the United States, in that the sovereign authority possessed by Indian tribes is less than that of nondependent sovereigns.

[7] Indians 209 ⚿109

209 Indians
209I In General
209k107 Constitutional and Statutory Provisions
209k109 k. Purpose and construction. Most Cited Cases

Indians 209 ⚿124

209 Indians
209II Treaties in General
209k124 k. Construction and operation. Most Cited Cases
Treaties, agreements, and statutes must be liberally construed in favor of an Indian tribe, and all ambiguities are to be resolved in its favor.

[8] Indians 209 ⚿124

209 Indians
209II Treaties in General
209k124 k. Construction and operation. Most Cited Cases
Congress may constitutionally execute provisions of a treaty with an Indian tribe even if doing so affects state interests.

[9] Indians 209 ⚿106

209 Indians
209I In General
209k106 k. Authority over and regulation of tribes in general. Most Cited Cases
Congress's authority over Indian affairs is plenary and exclusive.

[10] Indians 209 ⚿274(5)

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k271 Indian Defendant
209k274 Crime Committed in Indian Country or on Reservation
209k274(5) k. Concurrent jurisdiction. Most Cited Cases
As sovereigns, tribes exercise at least concurrent jurisdiction over all crimes committed by Indians in Indian country.

[11] Indians 209 ⚿210

209 Indians

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209V Government of Indian Country, Reservations, and Tribes in General
209k210 k. In general. Most Cited Cases

Indians 209 ⚿270

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k270 k. In general. Most Cited Cases

Tribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal laws, including a traffic code; fundamental to enforcing any traffic code is the authority by tribal officers to stop vehicles violating that code on roads within a reservation.

[12] Automobiles 48A ⚿349(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(12) k. Place and time. Most Cited Cases

Given the inherent mobility of a driving offense, the fresh pursuit doctrine is a necessary means of cooperatively enforcing traffic laws to ensure public safety.

[13] Automobiles 48A ⚿349(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(12) k. Place and time. Most Cited Cases

Indians 209 ⚿270

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce Criminal Laws
209k270 k. In general. Most Cited Cases

Tribal officers have the authority to continue the fresh pursuit of motorists who break traffic laws on the reservation and subsequently drive beyond the reservation boundaries, and to detain those individuals until authorities with jurisdiction arrive.

****400** William Joseph Johnston, Attorney at Law, Bellingham, WA, for Petitioner.

Ann Lindsay Stodola, Attorney at Law, Bellingham, WA, for Respondent.

Mary Michelle Neil, Attorney at Law, Bellingham, WA, amicus counsel for Lummi Nation.

SANDERS, J.

***212** ¶ 1 A Lummi Nation tribal police officer, while patrolling the reservation, witnessed a car drift across the center divider with its high-beam headlights ***213** activated. Did the officer have authority to pursue this vehicle across the reservation border and then detain the non–Indian driver on suspicion of driving under the influence (DUI) until authorities with jurisdiction to arrest arrived? This question is an extension of the issue we faced in *State v. Schmuck,* 121 Wash.2d 373, 850 P.2d 1332 (1993), where we held that tribal officers have authority to stop and detain non–Indian offenders on-reservation ****401** until state authorities could assume custody. We hold today that tribal officers have authority to continue fresh pursuit of motorists who break traffic laws on the reservation and subsequently drive beyond the reservation boundaries. We affirm the trial court.

FACTS

¶ 2 While patrolling the Lummi reservation sometime after 1:30 a.m. on August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department (LNPD) observed a vehicle coming toward him on Slater Road with its high beams glaring. McSwain flashed his headlights to remind the driver (later identified as Loretta Eriksen) to dim

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the high beams, but the driver did not comply. McSwain slowed his patrol car to prepare to turn around and pursue the car. [FN1] But "as the vehicle approached, it drifted across the center line into my lane of travel coming within a couple feet of my vehicle," McSwain testified. Clerk's Papers (CP) at 23 (Tr. (Jan. 26, 2006) at 8). "At that point, you know, I came to an immediate stop, getting ready to swerve in case it continued." *Id.* As the vehicle drifted back into its lane, McSwain observed a second car following very closely behind the drifting vehicle. McSwain turned his patrol car around, activated his emergency lights, and began pursuing both cars westbound on Slater Road.

> FN1. Under Lummi Nation Code of Laws, Traffic Code, 6.04.050(a), all drivers must use low-beams within 500 feet of oncoming cars. *Accord* RCW 46.37.220, .230.

¶ 3 After traveling approximately a quarter mile the cars turned into a gas station located off the Lummi reservation. ***214** The second car broke off, went around the west side of the station, and disappeared from McSwain's line of sight. McSwain stopped behind the first car and observed the passenger exit the vehicle and run to the driver's side, while the driver—soon to be identified as Eriksen—hopped over the center console and into the passenger's seat. McSwain commanded Eriksen and the passenger to stop moving and put their hands where he could see them. Then he called for backup. Two LNPD patrol cars arrived less than five minutes later.[FN2]

> FN2. LNPD officers complete training at either the Washington State Police Academy or the Federal Law Enforcement Training Academy and the Basic Law Enforcement Equivalency Academy provided by the Washington State Criminal Justice Training Commission. Br. of Amicus Curiae Lummi Nation, App. I (Aff. of Chief Gary James) at A–2. The commission, established in 1974, provides law enforcement training for all criminal justice personnel in Washington. *See* RCW 43.101.200; 1978 Letter Op. Att'y Gen. No. 18, at 5 (affirming commission authorized to train tribal police). All law enforcement officers must also obtain certification as peace officers from the commission, but until 2006 tribal law enforcement could not obtain this certification. *See* RCW 43.101.095, .157 (authorizing tribal governments to obtain certification by entering into written agreements with the commission).

¶ 4 McSwain then asked Eriksen why she had jumped into the passenger seat. In slightly slurred speech, Eriksen said she had not been driving. McSwain warned her about making false statements. He also observed that her eyes were watery and bloodshot and she smelled strongly of alcohol. McSwain determined neither woman was a tribal member, so he contacted the Whatcom County Sheriff's Office, which is standard procedure for stops involving nontribal members.

¶ 5 McSwain asked Eriksen to step out of her car and follow him to his patrol vehicle. He noticed that "she was having difficulty keeping her balance and walking" and that "she began to sway back and forth ... [as he] started to explain to her what was going on...." CP at 32 (Tr. (Jan. 26, 2006) at 17). McSwain advised Eriksen that she would be detained but not arrested and a sheriff's deputy would make a final determination. McSwain did not administer any sobriety tests and testified Eriksen would not take any tests. He then handcuffed Eriksen and placed her in the ***215** back of his patrol car until a Whatcom County sheriff's deputy arrived. McSwain remained at the scene until the deputy arrested Eriksen for DUI.

¶ 6 The trial court convicted Eriksen of DUI and denied her motion for reconsideration. The court reasoned that the Lummi Nation's inherent sovereign power—which includes enforcing internal criminal laws—authorizes tribal police to continue pursuing ****402** offenders who drive off the re-

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servation. The court concluded that it would be inconsistent with this power, and Washington's policy of authorizing officers to cross jurisdictional boundaries when in "fresh pursuit," for "somebody [to] just cross the line and be scot-free." Verbatim Report of Proceedings (VRP) (Aug. 20, 2007) at 40–41. We granted Eriksen's motion for discretionary review to resolve this issue of first impression.

ANALYSIS

I. Tribal Authority

[1][2][3] ¶ 7 Jurisdictional disputes on Indian reservations involve overlapping federal, state, and tribal jurisdiction. *Schmuck,* 121 Wash.2d at 380, 850 P.2d 1332.[FN3] Jurisdiction is a matter of law that we review de novo when the location of a crime is not in dispute.[FN4] *State v. Waters,* 93 Wash.App. 969, 976, 971 P.2d 538 (1999) (citing *State v. L.J.M.,* 129 Wash.2d 386, 396, 918 P.2d 898 (1996)).

FN3. *See also generally* U.S. Attys., U.S. Dep't of Justice, *Jurisdictional Summary, Title 9, Criminal Resource Manual* 689, http:// www. usdoj. gov/ usao/ eousa/ foia_ reading_ room/ usam/ title 9/ crm 00689. htm (last visited Oct. 12, 2010).

FN4. The trial court noted, "[T]here has been for many years a dispute between the County and the Tribe as to the boundaries of the Reservation...." CP at 86 (Tr. (Jan. 26, 2006) at 71). The Lummi Nation considers both lanes of Slater Road to be within the reservation, while the county apparently claims the boundary runs down the middle of the road. Eriksen did not assign error to findings that the incident began on the reservation. This court considers unchallenged findings of fact verities on appeal. *State v. Hill,* 123 Wash.2d 641, 647, 870 P.2d 313 (1994). Therefore, we assume "the incident occurred or some portion of the incident occurred within the boundaries of the reservation"; the issue is whether the tribal officer had authority to pursue and detain off the reservation when the violation occurred on the reservation. VRP (Aug. 22, 2007) at 38–39.

[4][5] ***216** ¶ 8 Whether a tribe has authority to stop and detain an individual necessarily involves an analysis of the limited sovereignty the tribe retains. *Schmuck,* 121 Wash.2d at 380, 850 P.2d 1332. To determine whether tribes retain their sovereign powers, we must "look[ ] to the character of the power that the tribe seeks to exercise, not merely the location of events." *John v. Baker,* 982 P.2d 738, 752 (Alaska 1999). Tribes are " unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). "Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system." *Ortiz–Barraza v. United States,* 512 F.2d 1176, 1179 (9th Cir.1975).

[6] ¶ 9 However, Indian tribes have a unique dependent relationship with the United States. *See, e.g., Duro v. Reina,* 495 U.S. 676, 697, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990). Because of this dependent status, the sovereign authority possessed by Indian tribes is less than that of nondependent sovereigns. *Nevada v. Hicks,* 533 U.S. 353, 378–79, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, J., concurring); *Duro,* 495 U.S. 676, 110 S.Ct. 2053; *Montana v. United States,* 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Thus, the United States Supreme Court has held that tribal sovereignty over nonmembers is not an inherent power retained by Indian tribes. *See, e.g., South Dakota v. Bourland,* 508 U.S. 679, 695 n. 15, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) ("tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' " (quoting *Montana,* 450 U.S. at 564, 101 S.Ct. 1245)).

¶ 10 The United States Supreme Court has held that the dependent nature of Indian tribes has implicitly divested some powers traditionally associated

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with sovereignty. *Hicks,* 533 U.S. at 378–79, 121 S.Ct. 2304 (Souter, J., concurring); *Duro,* 495 U.S. 676, 110 S.Ct. 2053; *Montana,* 450 U.S. at 564, 101 S.Ct. 1245; *Oliphant,* 435 U.S. at 195, 98 S.Ct. 1011. This divestiture includes all criminal jurisdiction and ***217** nearly all civil jurisdiction over non–Indians. However, powers lost through dependent sovereign status can be restored through positive federal law, such as treaty provisions or acts of Congress.

****403** ¶ 11 The United States Supreme Court has limited tribal authority over non–Indians. In *Oliphant,* the Supreme Court stated, "We granted [review of the present case] to decide whether Indian tribal courts have criminal jurisdiction over non–Indians. We decide that they do not." 435 U.S. at 195, 98 S.Ct. 1011. In *Montana,* the Court held that the Crow Tribe could not prohibit on-reservation fishing and hunting by non–Indians. The Court endorsed the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565, 101 S.Ct. 1245 (citing *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 147, 3 L.Ed. 162 (1810)). The Court noted two exceptions to this rule: (1) tribes may regulate the activities of nonmembers who enter consensual relationships with the tribe and (2) tribes may exercise civil authority over non–Indians' conduct on land "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." *Id.* at 565–66, 101 S.Ct. 1245.

¶ 12 The Court has since held that the *Montana* exceptions are to be narrowly construed. In *Strate v. A–1 Contractors,* 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), the Court made clear that the second *Montana* exception included a necessity requirement. In that case, the Court considered the *Montana* exceptions in the context of alleged tribal jurisdiction over a car accident on a state highway running through tribal lands. After deciding that the first exception was inapplicable, the Court turned to the question of maintaining tribal safety. The Court emphasized that this power did not extend " 'beyond what is necessary to protect tribal self-government or to control internal relations.' " *Strate,* 520 U.S. at 459, 117 S.Ct. 1404 (quoting *Montana,* 450 U.S. at 564, 101 S.Ct. 1245).

[7] ***218** ¶ 13 Treaties, agreements, and statutes must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor. *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431–32, 63 S.Ct. 672, 87 L.Ed. 877 (1943) ("[T]reaties are construed more liberally than private agreements.... Especially is this true in interpreting treaties and agreements with the Indians[, which are to be construed] 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians].' " (quoting *Tulee v. Washington,* 315 U.S. 681, 684–85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942))).

¶ 14 The parties agree on appeal that the incident began on the Lummi Reservation; therefore the narrow issue before us is whether McSwain had authority to stop a non–Indian driver, who pulled over *after* she crossed the reservation boundary, and then detain her until a deputy with jurisdiction to arrest arrived.[FN5]

> FN5. The State does not argue that even if the pursuit and detention were unlawful, the illegal arrest would not prevent subsequent prosecution. *Cf. State v. Barker,* 143 Wash.2d 915, 922 n. 4, 25 P.3d 423 (2001) (suppressing evidence obtained unlawfully in fresh pursuit across state borders yet leaving undecided whether the exclusionary rule applies to Washington's fresh pursuit statute). Accordingly we decide the case only on the basis of the issue set forth by the parties in their briefs. RAP 12.1(a).

II. Stop and Detention

¶ 15 Tribal police officers are often first responders when problems arise on reservations, but

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it is not always apparent during the investigation stage whether the tribe possesses jurisdiction over the offender.[FN6] In recognition of this problem, the United States Supreme Court has consistently affirmed that tribal police have authority to stop and detain non–Indian offenders until they can be turned over to authorities with jurisdiction. *See, e.g., Duro,* 495 U.S. at 697, 110 S.Ct. 2053 ("Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to ***219** detain the offender and transport him to the proper authorities."); *Strate,* 520 U.S. at 456 n. 11, 117 S.Ct. 1404 ("We do not here question the authority of tribal police ... to detain and turn over to state officers nonmembers****404** stopped on the highway for conduct violating state law." (quoting *Schmuck,* 121 Wash.2d at 390, 850 P.2d 1332)); *see also Oliphant,* 435 U.S. at 208, 98 S.Ct. 1011.

FN6. *See generally* Stewart Wakeling et al., Office of Justice Progs., U.S. Dep't of Justice, *Policing on American Indian Reservations: A Report to the National Institute of Justice* (July 2001), *available at* http:// www. ncjrs. gov/ pdffiles 1/ nij/ 188095. pdf.

¶ 16 This court, along with the Eighth and Ninth Circuit Courts of Appeals, has also held tribal police have inherent authority to stop non–Indians who violate the law on public roads within the reservation and detain them until they can be turned over to state authorities. *See, e.g., Schmuck,* 121 Wash.2d at 396, 850 P.2d 1332; *Ortiz–Barraza,* 512 F.2d at 1180 (holding that a tribal officer was authorized to stop and search non–Indian driver on the reservation); *United States v. Terry,* 400 F.3d 575, 579–80 (8th Cir.2005) (upholding overnight detention of a non–Indian in a tribal jail when state law enforcement officials could not take custody until the next morning). [FN7] The superior court therefore correctly looked to this court's analysis in *Schmuck* as a starting point.

FN7. Tribal jurisdiction also occasionally extends beyond Indian country in other contexts. In *John v. Baker,* 982 P.2d 738, 752 (Alaska 1999), the Alaska Supreme Court upheld a tribal court's authority to adjudicate a child custody dispute—arising outside Indian country—between members of two separate tribes: "[I]n 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." In *Settler v. Lameer,* 507 F.2d 231, 239–40 (9th Cir.1974), the Ninth Circuit Court of Appeals recognized the power of tribes in Washington to regulate their off-reservation hunting and fishing rights reserved by treaty.

¶ 17 In *Schmuck* we held:

> Indian tribes are limited sovereigns which retain the power to prescribe and enforce internal criminal and civil laws. This power necessarily includes the authority to stop a driver on the reservation to investigate a possible violation of tribal law and determine if the driver is an Indian, subject to the jurisdiction of that law.

Schmuck, 121 Wash.2d at 380, 850 P.2d 1332. As in *Schmuck,* the Lummi Nation does not assert authority to arrest and prosecute Eriksen for DUI but merely claims the power to *stop and* ****220*** *detain* her until she could be turned over to Whatcom County officials. *Schmuck,* 121 Wash.2d at 379, 850 P.2d 1332.[FN8]

FN8. *See* Br. of Amicus Curiae Lummi Nation at 5 ("The Nation is asserting a sovereign interest in the act of stopping and detaining any person who violates the law while on the Lummi Reservation, even if the tribal police officer cannot complete the stop until after the motorist has driven beyond the Reservation boundaries.").

[8][9] ¶ 18 Absent controlling federal law,

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tribes retain jurisdiction over events in Indian country: "Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.' " COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] at 206 (2005) (quoting *United States v. Wheeler,* 435 U.S. 313, 322–23, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). Therefore, Congress may constitutionally execute provisions of a treaty even if doing so affects state interests. *Antoine v. Washington,* 420 U.S. 194, 203–05, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975) (absence of state as party to hunting and fishing agreements did not detract from validity). Congress's authority over Indian affairs is "plenary and exclusive," which refers to supremacy of federal over state law. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 470–71, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). In *Schmuck,* we recognized that tribes retain their existing sovereign powers until Congress acts, 121 Wash.2d at 380, 850 P.2d 1332, even though the nature of tribes' sovereign powers is necessarily reduced by virtue of their dependent status.

[10][11] ¶ 19 As sovereigns, tribes exercise at least concurrent jurisdiction over all crimes committed by Indians in Indian country. *See Wheeler,* 435 U.S. at 328–29, 98 S.Ct. 1079. Tribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal laws, including a traffic code. *Schmuck,* 121 Wash.2d at 381–82, 850 P.2d 1332 (citing *Wheeler,* 435 U.S. at 326, 98 S.Ct. 1079). "Fundamental to enforcing any traffic code is the authority by tribal officers to stop vehicles**405 *221 violating that code on roads within a reservation." *Id.* at 382, 98 S.Ct. 1079. In *Schmuck* we stated:

> Only by stopping the vehicle could [the officer] determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non–Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless.
>
> *Id.* at 383, 850 P.2d 1332.

¶ 20 *Schmuck* therefore recognized that stops are essential components of the tribe's sovereign power to make and enforce its own traffic laws against its own members. While *Strate* later narrowed *Montana*'s second exception to those cases where the tribe's actions are " 'necessary to protect tribal self-government or to control internal relations,' " here the Lummi Nation seeks to do exactly that. *Strate,* 520 U.S. at 459, 117 S.Ct. 1404 (quoting *Montana,* 450 U.S. at 564, 101 S.Ct. 1245). To stop offending motorists, the tribe calls upon " 'the right of reservation Indians to make their own laws and be ruled by them.' " *Id.* (quoting *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)). For the tribe to make and enforce its own laws, it must necessarily be able to stop drivers who offend the tribe's traffic code to see if they fall under the tribe's jurisdiction. This requirement fits squarely into *Montana*'s second exception.

¶ 21 Regarding the authority to detain, after a stop is made an express treaty provision requires tribal officers to detain non–Indian offenders until state authorities are able to assume custody. In 1855, the Lummi Nation and the United States entered into the Treaty of Point Elliott, which established the Lummi Reservation. Treaty between the United States and the Dwámish, Suguámish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. 9, 12 Stat. 927 ***222** (hereinafter Treaty of Point Elliott). [FN9] Article 9 of the treaty expressly provides that the tribes shall turn over to government authorities anyone who violates United States law: "[T]he said tribes agree not to shelter or conceal offenders

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against the laws of the United States, but to deliver them up to the authorities for trial." Thus the Lummi Nation is obliged by treaty to turn over lawbreakers rather than create safe havens for them to act with impunity. *See Schmuck,* 121 Wash.2d at 384–85, 850 P.2d 1332 (noting article 9 reflected concern that non–Indians would attempt to avoid prosecution by hiding out on reservations (citing H.R.Rep. No. 474, 23d Cong., 1st Sess., at 98 (1834))). Accordingly, the Lummi Nation is empowered by the terms of the Treaty of Point Elliott to detain offenders until state officials can take custody. *See Schmuck,* 121 Wash.2d at 383–86, 850 P.2d 1332.[FN10] The Lummi Nation therefore has authority to stop, under its sovereign authority, and detain, pursuant to the Treaty of Point Elliott, non–Indian offenders who violate traffic laws until state authorities can assume custody.

> FN9. The United States Senate ratified more than 400 treaties with Indian nations until 1871, when the Congress prohibited further treaty-making. Cohen's Handbook of Federal Indian Law § 4.05[1], at 276. These treaties are both a source of federal law and tribal law in areas such as tribal boundaries and use of natural resources. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (upholding treaty right to off-reservation hunting and fishing).
>
> FN10. As we noted in *Schmuck,* requiring tribal officers to release non–Indians suspected of drunk driving would also be absurd:
>
> > "To hold that an Indian police officer may stop offenders but upon determining they are non–Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non–Indians to act unlawfully, with impunity, on Indian lands."
> >
> > 121 Wn.2d at 392 (quoting *State v. Ryder,* 98 N.M. 453, 456, 649 P.2d 756, *aff'd on other grounds,* 98 N.M. 316, 648 P.2d 774 (1982)).

III. Fresh Pursuit

[12] ¶ 22 "Given the inherent mobility of a driving offense, the fresh pursuit doctrine is a necessary means of cooperatively enforcing traffic laws to ensure public safety." ****406*223***Vance v. Dep't of Licensing,* 116 Wash.App. 412, 416, 65 P.3d 668 (2003) (citing *City of Tacoma v. Durham,* 95 Wash.App. 876, 881, 978 P.2d 514 (1999)). It follows that the fresh pursuit doctrine applies to the Lummi Nation because it is a necessary means of actualizing the tribe's power to enforce its internal laws. The "power to regulate is only meaningful when combined with the power to enforce." *Settler v. Lameer,* 507 F.2d 231, 238 (9th Cir.1974).[FN11]

> FN11. Similarly, District of Columbia courts have held that United States Capitol Police have authority to continue pursuits that begin and go beyond the Capitol grounds. *In re C.A.P.,* 633 A.2d 787 (D.C.1993) (officers who initiate stops on Capitol grounds may continue to pursue the motorists under doctrine of fresh pursuit); *Andersen v. United States,* 132 A.2d 155 (D.C.), *aff'd,* 102 U.S.App. D.C. 313, 253 F.2d 335 (1957) (authorizing Capitol Police to arrest outside of their jurisdiction if circumstances leading to arrest were immediately connected to their duties within the boundaries), *cert. denied,* 357 U.S. 930, 78 S.Ct. 1375, 2 L.Ed.2d 1372 (1958).

¶ 23 Division Three of the Court of Appeals, the Lummi Nation, and the Ninth Circuit have all allowed nontribal law enforcement officers to cross jurisdictional boundaries into Indian reservations when in fresh pursuit of suspects. *Waters* held that Omak Police Department officers had authority under the fresh pursuit doctrine to arrest an enrolled member of the Colville Confederated Tribes on the Colville Reservation. 93 Wash.App. at 977–78, 971

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P.2d 538. The officers had seen Thomas Waters's car peel away from a stoplight and cross the center line toward police. *Id.* at 973, 971 P.2d 538. When the officers activated their vehicle's emergency lights, Waters led them on a high-speed chase and finally stopped on tribal reservation property, where they arrested him for felony eluding, DUI, resisting arrest, and driving with a suspended license.[FN12] *Id.* Division Three rejected Waters's argument that the officers lacked jurisdiction to stop him: "Everybody, with or without probable cause for arrest, is required to stop for the police. RCW 46.61.024. Once the police car displayed its flashing lights, Mr. Waters was required to stop, even in the absence of an infraction." *Id.* at 978, 971 P.2d 538.

FN12. Although two of the officers were commissioned tribal officers, the Court of Appeals considered the fresh pursuit an independent and sufficient basis for their authority to arrest on the reservation. *Waters,* 93 Wash.App. at 973, 978, 971 P.2d 538.

***224** ¶ 24 Under the doctrine of "hot pursuit," the Ninth Circuit upheld the jurisdiction of a sheriff's deputy who followed a tribal member who had been "tailgating" the deputy's marked patrol car on a state highway in Indian country. *United States v. Patch,* 114 F.3d 131, 132–34 (9th Cir.), *cert. denied,* 522 U.S. 983, 118 S.Ct. 445, 139 L.Ed.2d 381 (1997). Taylor Patch, a member of the Colorado River Indian Tribe, argued that the deputy was trespassing when he followed him to his home in Indian country. The court held that the deputy had observed Patch's reckless driving and had authority to conduct a *Terry* [FN13] stop to determine if Patch was a tribal member and whether the deputy had jurisdiction to issue a citation. *Id.* at 134 (citing *Schmuck,* 121 Wash.2d at 382–83, 850 P.2d 1332 for the proposition that a tribal officer may stop a speeding vehicle if the driver is a tribal member).

FN13. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

¶ 25 The Lummi Tribal Court also recognized the authority of a Whatcom County sheriff's deputy to come onto the reservation in pursuit of a tribal member who allegedly stole from a convenience store outside the reservation. *Lummi Nation v. Scarborough,* No.2008–CRCO–2084, Dec. & Order at 1–4 (Lummi Tribal Court Jan. 5, 2009).[FN14] The tribal member filed a motion to dismiss, arguing that the deputy did not have jurisdiction to investigate criminal activity on tribal land and that the officer was not covered under the Lummi Nation Code of Laws, Code of Offenses, 5.07.055, which deals with obstructing a public servant as a "Law Enforcement Officer." *Id.* at 2. The court denied the motion, reasoning that the deputy was "attempting to investigate a crime that had taken place off the reservation by unknown individuals. He had no way of knowing whether those individuals were Lummi, ****407** non-Native Lummi, or non-Native." *Id.* at 3. Moreover, the court noted that "[t]here are many situations that can arise that would result in an officer from a jurisdiction other than Lummi being on the reservation. It stands to reason that those officers should not be ***225** obstructed in carrying out their responsibilities any more than a Lummi officer." *Id.* at 3–4.

FN14. *See* Br. of Amicus Curiae Lummi Nation, App. II at A–5.

¶ 26 The doctrine of fresh pursuit has also arisen in cross-jurisdictional cases across national borders.[FN15] None of the settled law in these areas may be wholly applicable to tribes, however, which are dependent sovereign entities, sometimes subject to the jurisdiction of the State but also not subject to federalism. In sum, the doctrine of fresh pursuit authorizes nontribal police to cross jurisdictional boundaries into Indian country; the same policy justifying this practice applies to tribal police departments as well.

FN15. "Hot pursuit" of unauthorized oceangoing vessels across *national* borders is an ancient doctrine of the law of nations. *See* Glanville L. Williams, *The Juridical*

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Basis of Hot Pursuit, 20 BRIT. Y.B. INT'L L L. 83, 84 (1939). Although no customary right of hot pursuit across national *land* borders evolved as it did for territorial waters, the United States Supreme Court has acknowledged that international hot pursuit across land borders did occur. *See In re Kaine,* 55 U.S. (14 How.) 103, 113, 14 L.Ed. 345 (1852) (noting the necessity of hot pursuit across the border between United States and British possessions in America based on treaty of 1842). Notwithstanding those realities on the ground, the doctrine of hot pursuit across national land borders never became a customary right of international law. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432(2) (1987) (nation's law enforcement officers may exercise their functions in the territory of another nation only with the consent of the other state).

¶ 27 Eriksen argues that authorizing Indian tribes to engage in fresh pursuit without compliance with RCW 10.92.020 would nullify Washington's power to make and enforce its own laws (e.g., RCW 10.93.070, .120). Pet'r's Reply Br. at 5–8. This argument misses the mark. RCW 10.92.020 provides a mechanism through which tribal police may become "general authority Washington peace officers." Attaining this characterization would permit those tribal officers to engage in *statutory* fresh pursuit under RCW 10.93.070(6). However, failure to achieve recognition as a general authority Washington peace officer does not bar tribal police officers from fresh pursuit on the grounds articulated above. Similarly RCW 10.93.120(1) permits "[a]ny peace officer who has authority under Washington law to make an arrest" to "proceed in fresh pursuit" in order to effectuate that arrest. It does not, however, explicitly bar ***226** tribal officers from fresh pursuit to complete a stop initiated on the reservation.[FN16]

FN16. RCW 10.93.120(1) is codified in the Washington Mutual Aid Peace Officer Powers Act of 1985. Accordingly it must be " *liberally construed* to effectuate the intent of the legislature to modify current restrictions upon the limited territorial and enforcement authority of general authority peace officers and *to effectuate mutual aid* among agencies." RCW 10.93.001(3) (emphasis added). The act was passed to allow courts to consider " 'the Legislature's *overall intent to use practical considerations* in deciding whether a particular arrest across jurisdictional lines was reasonable.' " *Vance,* 116 Wash.App. at 416, 65 P.3d 668 (emphasis added) (quoting *Durham,* 95 Wash.App. at 881, 978 P.2d 514).

¶ 28 Accordingly, tribal, treaty, and statutory authority do not conflict. If a tribal police officer chooses to become recognized as a general authority Washington peace officer, it would add a statutory justification for fresh pursuit. But tribal police officers may rely on the grounds listed herein to engage in fresh pursuit of suspected drunk drivers first encountered on the reservation.

¶ 29 Our decision today harmonizes with common sense and sound policy. To allow drunk drivers to escape the law by crossing a reservation boundary would unnecessarily endanger lives by incentivizing high-speed dashes for the border. We decline to embrace such a ludicrous result.

CONCLUSION

[13] ¶ 30 The Lummi Nation Police Department has authority to enforce its laws by continuing the fresh pursuit of suspected drunk drivers off the reservation and then detaining those individuals until authorities with jurisdiction arrive.

¶ 31 We affirm the trial court.

****408** WE CONCUR: CHARLES W. JOHNSON, TOM CHAMBERS, SUSAN OWENS, JAMES M.

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JOHNSON, and DEBRA L. STEPHENS, Justices.

FAIRHURST, J. (dissenting).

¶ 1 This case presents the difficult question of whether tribal police have the authority to stop and detain a non–Indian for a violation of tribal and *227 state law on a reservation after the alleged offender has evaded tribal police and left reservation boundaries. I join that part of the majority's analysis that finds, pursuant to inherent tribal sovereignty, that Lummi Nation Tribal Police Officer Mike McSwain had authority to stop Loretta Eriksen outside the reservation to determine whether she was a tribal member over whom McSwain had jurisdiction. However, because I cannot find any applicable authority under which McSwain had the power to detain Eriksen once he determined she was not a tribal member, I am ultimately forced to dissent.

¶ 2 The majority finds two sources of law that it claims authorized McSwain to detain Eriksen until Whatcom police arrived: the common law doctrine of fresh pursuit and the Treaty of Point Elliott. Treaty between the United States and the Dwámish, Suguámish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. 9, 12 Stat. 927 (hereinafter Treaty of Point Elliott). A careful examination leads me to the conclusion that neither provides McSwain with the authority necessary to detain a non–Indian outside the reservation for offenses committed within the reservation's boundaries. I am mindful that, as the majority points out, this result is ludicrous. However, it is also a result compelled by the applicable law.

¶ 3 Fresh pursuit is inapplicable to this case. McSwain did not have authority to stop or detain Eriksen pursuant to *statutory* fresh pursuit because he is not a general authority Washington peace officer. *See* RCW 10.92.020; RCW 10.93.070(6), .120. Thus, any fresh pursuit authority must come from the common law. However, at common law, fresh pursuit was available only for suspected felonies. *See State v. Barker,* 143 Wash.2d 915, 921, 25 P.3d 423 (2001); *City of Wenatchee v. Durham,* 43 Wash.App. 547, 550–51, 718 P.2d 819 (1986). Driving under the influence (DUI) is not a *228 felony.[FN1] RCW 46.61.502(5) (DUI is a gross misdemeanor); *accord* LUMMI NATION CODE OF LAWS CRIMINAL TRAFFIC CODE 6A.01.020(a)(2); 6A.02.090(d) (DUI is a class B offense subject to 30–90 days in jail and a fine of $250–$1,250). That RCW 10.93.120 expanded the definition of *statutory* fresh pursuit has no bearing on the common law definition, under which McSwain had no authority to stop or detain Eriksen.

> FN1. According to the statute in effect at the time of Eriksen's incident, a driver who "willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop" is guilty of a class C felony. Former RCW 46.61.024(1) (2003). However, the record contains no factual findings concerning Eriksen's manner of driving after McSwain signaled her to pull over. Without a finding that Eriksen drove recklessly after McSwain signaled for her to stop, Eriksen could be convicted only of failure to obey a police officer, which is a misdemeanor. RCW 46.61.022.

¶ 4 The majority claims that article 9 of the Treaty of Point Elliott requires Lummi Nation tribal police to detain a nontribal offender outside the reservation until an officer with jurisdiction arrives. TREATY OF POINT ELLIOTT, *supra,* 12 Stat. 929. That is not the case. Article 9 reads in part, "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." *Id.* "This provision appears to reflect a common concern of the federal government during treaty negotiations in the mid–1800's to prevent non–Indians from hiding out on reservations in the mistaken belief that they would be free from prosecution for their crimes." *State v. Schmuck,* 121 Wash.2d 373,

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385, 850 P.2d 1332 (1993) (citing H.R. REP. NO. 474, 23d Cong., 1st Sess., at 98 (1834)). As Eriksen was already off the reservation when McSwain stopped her, the fear of offenders hiding out on reservations was not directly implicated.

¶ 5 It is true that treaties are to be interpreted liberally, and ambiguities resolved in **409 favor of the tribes. *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 195 n. 5, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). However, that liberal construction is supposed to determine how the Indians would have interpreted a treaty provision *at the time the treaty was signed.* *229*Tulee v. Washington,* 315 U.S. 681, 684–85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). It is not a blank check to rewrite the language of a treaty, even to avoid injustice. *Nw. Bands of Shoshone Indians v. United States,* 324 U.S. 335, 353, 65 S.Ct. 690, 89 L.Ed. 985 (1945). At the time of the treaty's signing, I find it highly unlikely that anyone would have read article 9 as the majority does. In fact, article 9 opens with the express premise that "[t]he said tribes and bands acknowledge their dependence on the government of the United States." TREATY OF POINT ELLIOTT, *supra,* 12 Stat. 929. The article was meant to *limit* tribal authority, and to read article 9 as an affirmative acknowledgment of tribal authority outside the reservation is to effectively rewrite it.

¶ 6 We, as a state court, do not have the power to imbue a treaty between an Indian tribe and the federal government with a meaning it never had. Article 9 of the Treaty of Point Elliott does not address tribal authority outside the reservation's boundaries, and not detaining Eriksen would not "shelter" or "conceal" her from the laws of the United States or the state of Washington—she would clearly remain subject to stop and arrest by local police. *Id.* McSwain certainly had the authority, perhaps even the duty, to notify the Whatcom County Sheriff's Office that an individual who appeared to be impaired was driving a car fitting the description of Eriksen's car in the vicinity of the location in which Eriksen was first stopped. However, the treaty does not contain the authority necessary for McSwain to detain her until Whatcom police arrived.

¶ 7 I again stress that I am as troubled by this case as the majority. It is ludicrous that a suspected drunk driver who has been stopped outside a reservation's boundaries by a tribal police officer must be allowed to get back on the road if she is not a tribal member. It creates perverse incentives for non–Indians to evade tribal police who attempt to stop them for traffic offenses within the reservation's boundaries. However, I cannot avoid my duty to faithfully interpret the law, and I can find no source of law under which McSwain had authority to detain Eriksen in this case.

¶ 8 *230 To avoid similar results in the future, several approaches might be taken. The most obvious is that tribal police departments could participate in the program outlined in chapter 10.92 RCW, which provides a mechanism by which tribal police officers can be authorized to act as general authority Washington peace officers, including the power to engage in statutory fresh pursuit. The legislature may also choose to expand statutory fresh pursuit authority to include tribal police officers regardless of a tribe's participation in the chapter 10.92 RCW program. However, I do not believe that any existing source of law authorizes the result reached by the majority.

¶ 9 I regret that I must dissent. Although McSwain had authority to determine whether Eriksen was a tribal member, he did not have authority to detain her once he learned she was not a tribal member. Under the facts of this case, it is unclear when McSwain knew or should have known that Eriksen was not a tribal member. Observations McSwain made after he knew or should have known that Eriksen was not a tribal member are inadmissible and should have been suppressed.

¶ 10 I would reverse and remand for further proceedings.

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WE CONCUR: BARBARA A. MADSEN, Chief Justice, and GERRY L. ALEXANDER, Justice.

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166 Wash.2d 953, 216 P.3d 382
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Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Loretta L. ERIKSEN, Petitioner.

No. 80653-5.
Argued May 12, 2009.
Decided Sept. 17, 2009.
Reconsideration Granted, June 9, 2010.

Background: Defendant, a non-Indian, was convicted in the District Court, Whatcom County, David M. Grant, J., of driving under the influence (DUI) in connection with incident in which he was detained by a tribal police officer who pursued him beyond reservation border after observing alleged traffic infractions. Defendant appealed. The Superior Court, Whatcom County, Charles M. Snyder, J., affirmed. Defendant moved for discretionary review.

Holdings: The Supreme Court, Sanders, J., held that:
(1) in a matter of first impression, tribal officer had inherent sovereign authority to continue fresh pursuit of driver who broke traffic laws on reservation, and
(2) tribal officer had statutory authority to continue fresh pursuit of driver who broke traffic laws on reservation.

Affirmed.

****384** William Joseph Johnston, Bellingham, WA, for Petitioner.

Ann Lindsay Stodola, Bellingham, WA, for Respondent.

Mary Michelle Neil, Bellingham, WA, for Amicus Curiae on behalf of Lummi Nation.

SANDERS, J.

***956** ¶ 1 A Lummi Nation tribal police officer witnessed a motorist on the reservation driving at night with high beams and drifting across the center divider. Did the officer have authority to continue pursuing this vehicle ***957** Beyond the reservation's borders and then detain the non-Indian driver until authorities with jurisdiction to arrest for DUI [FN1] arrived? This is an issue of first impression. We hold tribal officers have 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. Therefore we affirm the trial court.

FN1. Driving under the influence.

FACTS

¶ 2 Officer Mike McSwain of the Lummi Nation Police Department (LNPD) was patrolling the Lummi reservation sometime after 1:30 a.m. on August 10, 2005 when he observed a vehicle driving toward him on Slater Road with its high beams glaring. Officer McSwain flashed his headlights to remind the driver (later identified as Loretta Eriksen) to dim the brights, but the driver did not comply. Officer McSwain slowed his patrol car to prepare to turn around and pursue the driver.[FN2] But "as the vehicle approached, it drifted across the center line into my lane of travel coming within a couple feet of my vehicle," Officer McSwain testified. Clerk's Papers (CP) at 23 (Tr. (Jan. 26, 2006) at 8). "At that point, you know, I came to an immediate stop, getting ready to swerve in case it continued." *Id.* As the vehicle drifted back into its lane, Officer McSwain observed a second car following very closely behind the drifting vehicle. Officer McSwain turned his patrol car around, activated his emergency lights, and began pursuing both cars westbound on Slater Road.

FN2. Under Lummi Nation Code of Laws 6.04.050(a), all drivers must use low beams within 500 feet of oncoming cars.

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Accord RCW 46.37.220, .230.

¶ 3 After traveling roughly a quarter mile the cars turned into a gas station located off the Lummi reservation. The second car broke off, went around the west side of the ***958** Station, and disappeared from Officer McSwain's line of sight. Officer McSwain pulled behind the first car and observed the passenger jump from the vehicle and run to the driver's side, while the driver-soon to be identified as Eriksen-hopped over the center console and into the passenger's seat. Officer McSwain commanded Eriksen and the passenger to stop moving and put their hands where he could see them. Then he called for backup. Two LNPD patrol cars arrived less than five minutes later.[FN3]

> FN3. LNPD officers complete either the Washington State Police Academy or the Federal Law Enforcement Training Academy and the Basic Law Enforcement Equivalency Academy provided by the Washington State Criminal Justice Training Commission. Br. of Amicus Curiae Lummi Nation, App. I (Aff. of Chief Gary James) at A-2. The commission, established in 1974, provides law enforcement training for all criminal justice personnel in Washington. *See* RCW 43.101.200; 1978 Letter Op. Att'y Gen. No. 18, at 5 (affirming commission authorized to train tribal police). All law enforcement officers must also obtain certification as peace officers from the commission, but until 2006 tribal law enforcement could not obtain this certification. *See* RCW 43.101.095, .157 (authorizing tribal governments to obtain certification by entering into written agreements with the commission).

****385** ¶ 4 Officer McSwain then asked Eriksen why she had jumped into the passenger seat. Eriksen said-in slightly slurred speech-she had not been driving, so Officer McSwain warned her about making false statements. He also observed her eyes were watery and bloodshot and she smelled strongly of alcohol. Officer McSwain determined neither woman was a tribal member so he contacted the Whatcom County Sheriff's Office, which is standard procedure for stops involving nontribal members.

¶ 5 Officer McSwain asked Eriksen to step out of her car and follow him to his patrol vehicle. He noticed "she was having difficulty keeping her balance and walking," and "she began to sway back and forth ... [as he] started to explain to her what was going on...." CP at 32 (Tr. (Jan. 26, 2006) at 17). Officer McSwain advised Eriksen that she would be detained but not arrested and a sheriff's deputy would make a final determination. McSwain did not administer any sobriety tests and testified Eriksen would not take any tests. He then handcuffed Eriksen and placed her in the back of his patrol car until the Whatcom County sheriff's ***959** Deputy arrived. Officer McSwain remained on the scene until the deputy arrested Eriksen for DUI.

¶ 6 The trial court convicted Eriksen of DUI and denied her motion for reconsideration. The court reasoned the Lummi Nation's inherent sovereign power-which includes enforcing internal criminal laws-authorizes tribal police to continue pursuing offenders who drive off the reservation. The court concluded it would be inconsistent with this power, and Washington's policy of authorizing officers to cross jurisdictional boundaries when in "fresh pursuit," for "somebody [to] just cross the line and be scott-free." Verbatim Report of Proceedings (VRP) (Aug. 20, 2007) at 40-41. We granted Eriksen's motion for discretionary review to resolve this issue of first impression.

STANDARD OF REVIEW

¶ 7 Jurisdictional disputes on Indian reservations involve overlapping federal, state, and tribal jurisdiction. *State v. Schmuck,* 121 Wash.2d 373, 380, 850 P.2d 1332 (1993).[FN4] Jurisdiction is a matter of law which we review de novo when the location of a crime is not in dispute. [FN5] *State v. Waters,* 93 Wash.App. 969, 976, 971 P.2d 538 (1999) (citing *State v. L.J.M.,* 129 Wash.2d 386,

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396, 918 P.2d 898 (1996)).

FN4. *See also generally* U.S. Dep't of Justice, "Jurisdictional Summary," U.S. Attorneys' Manual, Title 9, Criminal Resource Manual 689, http:// www. usdoj. gov/ us ao/eousa/foia_reading_ room/ usam/title9/crm00689.htm (last visited Sept. 10, 2009).

FN5. The trial court noted, "[T]here has been for many years a dispute between the County and the Tribe as to the boundaries of the Reservation...." CP at 86 (Tr. (Jan. 26, 2006) at 71). The Lummi Nation considers both lanes of Slater Road to be within the reservation, while the County apparently claims the boundary runs down the middle of the road. Eriksen did not assign error to findings that the incident began on the reservation. This court considers unchallenged findings of fact verities on appeal. *State v. Hill,* 123 Wash.2d 641, 647, 870 P.2d 313 (1994). Therefore we assume "the incident occurred or some portion of the incident occurred within the boundaries of the reservation"; the issue is whether the tribal officer had authority to pursue and detain off the reservation when the violation occurred on the reservation. VRP (Aug. 22, 2007) at 38-39.

¶ 8 Whether a tribe has authority to stop and detain an individual necessarily turns on an analysis of the limited ***960** sovereignty the tribe retains. *Schmuck,* 121 Wash.2d at 380, 850 P.2d 1332. Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). "Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system." ****386***Ortiz-Barrazaa v. United States,* 512 F.2d 1176, 1179 (9th Cir.1975). Tribal sovereignty is preserved unless Congress's intent to the contrary is clear and unambiguous. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Treaties, agreements, and statutes must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor. *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943) ("[T]reaties are construed more liberally than private agreements.... Especially is this true in interpreting treaties and agreements with the Indians[, which are to be construed] 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians].' " (quoting *Tulee v. Washington,* 315 U.S. 681, 684-85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942))).

ANALYSIS

¶ 9 The parties agree on appeal that the incident began on the Lummi Reservation; therefore the narrow issue before us is whether Officer McSwain had authority to stop a non-Indian driver, who pulled over *after* she crossed the reservation's boundary, and then detain her until a deputy with jurisdiction to arrest arrived.[FN6]

FN6. The State does not argue even if the pursuit and detention were unlawful, the illegal arrest would not prevent subsequent prosecution. *Cf. State v. Barker,* 143 Wash.2d 915, 922 n. 4, 25 P.3d 423 (2001) (suppressing evidence obtained unlawfully in fresh pursuit across state borders yet leaving undecided whether the exclusionary rule applies to Washington's fresh pursuit statute). Accordingly we decide the case only on the basis of the issue set forth by the parties in their briefs. RAP 12.1(a).

***961** I. Lummi Nation Has Sovereign Authority and U.S. Treaty Obligation To Stop and Detain Lawbreakers on the Reservation

¶ 10 Tribal police officers are often first responders when problems arise on reservations, but it is not always apparent during the investigation stage whether the tribe possesses jurisdiction over the offender. [FN7] In recognition of this problem the Supreme Court has consistently affirmed tribal po-

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lice have authority to detain non-Indian offenders until they can be turned over to authorities with jurisdiction. *Duro v. Reina,* 495 U.S. 676, 697, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990); *Strate v. A-1 Contractors,* 520 U.S. 438, 456 n. 11, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (citing *Schmuck,* 121 Wash.2d at 390, 850 P.2d 1332).

> FN7. *See generally* Stewart Wakeling et al., U.S. Dep't of Justice, *Policing on American Indian Reservations: A Report to the National Institute of Justice* (July 2001), *available at* http:// www. ncjrs. gov/ pdffiles 1/ nij/ 188095. pdf.

¶ 11 This court-along with the Ninth and Eighth Circuit Courts of Appeals-has also held tribal police have inherent authority to stop non-Indians who violate the law on public roads within the reservation and detain them until they can be turned over to state authorities. *See, e.g., Schmuck,* 121 Wash.2d at 396, 850 P.2d 1332; *Ortiz-Barraza,* 512 F.2d at 1180 (holding tribal officer was authorized to stop and search non-Indian driver on the reservation); *United States v. Terry,* 400 F.3d 575, 579-80 (8th Cir.2005) (upholding overnight detention of a non-Indian in a tribal jail when state law enforcement officials could not take custody until the next morning). [FN8] The superior court therefore correctly looked to this court's analysis in *Schmuck* as a starting point.

> FN8. Tribal jurisdiction also occasionally extends beyond Indian country in other contexts. In *John v. Baker,* the Alaska Supreme Court upheld a tribal court's authority to adjudicate a child custody dispute-arising outside of Indian country-between members of two separate tribes: "[I]n 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." 982 P.2d 738, 752 (Alaska 1999). In *Settler v. Lameer,* 507 F.2d 231, 239-40 (9th Cir.1974), the Ninth Circuit Court of Appeals recognized the power of tribes in Washington to regulate their off-reservation hunting and fishing rights reserved by treaty.

***962** ¶ 12 As in *Schmuck* the Lummi Nation does not assert authority to arrest and prosecute Eriksen for DUI but merely claims the power to *stop and detain* her until she could be turned over to Whatcom County officials. *Schmuck,* 121 Wash.2d at 379, 850 P.2d 1332. "The Nation is asserting a sovereign interest ****387** in the act of stopping and detaining any person who violates the law while on the Lummi Reservation, even if the tribal police officer cannot complete the stop until after the motorist has driven beyond the Reservation boundaries." Br. of Amicus Curiae Lummi Nation at 5.

¶ 13 Absent a controlling congressional statute, tribes retain jurisdiction over events in Indian country: "Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.' " COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] at 206 (2005) (quoting *United States v. Wheeler,* 435 U.S. 313, 322-23, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). Therefore Congress may constitutionally execute provisions of a treaty even if so doing affects state interests. *Antoine v. Washington,* 420 U.S. 194, 203-05, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975) (absence of State as party to hunting and fishing agreements did not detract from validity). Congress's authority over Indian affairs is "plenary and exclusive," which refers to supremacy of federal over state law. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 470-71, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). In *Schmuck* we recognized that tribes retain their existing sovereign powers until Congress acts. 121 Wash.2d at 380, 850 P.2d 1332.

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¶ 14 In 1855 the Lummi Nation and the United States entered into the Treaty of Point Elliott, which established the Lummi Reservation. 12 Stat. 927 (1855).[FN9] Article 9 of ***963** the treaty *expressly* provides that the tribes shall turn over to government authorities anyone who violates United States law: "[T]he 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." Thus the Lummi Nation is obliged by treaty to turn over lawbreakers rather than create safe havens for them to act with impunity. *Schmuck,* 121 Wash.2d at 385, 850 P.2d 1332 (noting Article 9 reflected concern that non-Indians would attempt to avoid prosecution by hiding out on reservations (citing H.R.Rep. No. 474, 23rd Cong., 1st Sess., at 98 (1834))).

FN9. The United State Senate ratified more than 400 treaties with Indian nations until 1871 when the Congress prohibited further treaty-making. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[1] at 276. These treaties are both a source of federal law and tribal law in areas such as tribal boundaries and use of natural resources. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (upholding treaty right to off-reservation hunting and fishing).

¶ 15 As sovereigns, tribes exercise at least concurrent jurisdiction over all crimes committed by Indians in Indian country. *Wheeler,* 435 U.S. at 328-29, 98 S.Ct. 1079. Tribes have an inherent power of self-governance, which includes the power to prescribe and enforce internal criminal laws. *Schmuck,* 121 Wash.2d at 381-82, 850 P.2d 1332 (citing *Wheeler,* 435 U.S. at 326, 98 S.Ct. 1079). "Given the inherent mobility of a driving offense, the fresh pursuit doctrine is a *necessary means* of cooperatively enforcing traffic laws to ensure public safety." *Vance v. Dep't of Licensing,* 116 Wash.App. 412, 416, 65 P.3d 668 (2003) (emphasis added) (citing *City of Tacoma v. Durham,* 95 Wash.App. 876, 881, 978 P.2d 514 (1999)). It follows the fresh pursuit doctrine must apply to tribes because the doctrine is a *necessary means* of actualizing the tribe's inherent power to enforce its internal laws. The "power to regulate is only meaningful when combined with the power to enforce." *Settler v. Lameer,* 507 F.2d 231, 238 (9th Cir.1974); *accord Schmuck,* 121 Wash.2d at 382, 850 P.2d 1332 (holding "[f]undamental to enforcing any traffic code is the authority by tribal officers to stop vehicles violating that code....").[FN10]

FN10. Similarly, District of Columbia courts have held United States Capitol Police have authority to continue pursuits beginning on the Capitol grounds and then crossing the boundary. *In re C.A.P.,* 633 A.2d 787 (D.C.1993) (officers who initiate stops on Capitol grounds may continue to pursue the motorists under doctrine of fresh pursuit); *Andersen v. United States,* 132 A.2d 155(D.C), *aff'd,* 102 U.S.App. D.C. 313, 253 F.2d 335 (1957), *cert. denied,* 357 U.S. 930, 78 S.Ct. 1375, 2 L.Ed.2d 1372 (1958) (authorizing Capitol Police to arrest outside of their jurisdiction if circumstances leading to arrest were immediately connected to their duties within the boundaries).

****388 *964** ¶ 16 In *Schmuck* we looked to *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) to determine whether a tribe had inherent sovereign power over non-Indians. 121 Wash.2d at 391, 850 P.2d 1332. *Montana* held the Crow Tribe could not prohibit fishing and hunting by non-Indians because those activities did not "so threaten the Tribe's political or economic security as to justify tribal regulation"; the non-Indians owned the land in fee and were fishing from land owned by the State. *Montana,* 450 U.S. at 566-67, 101 S.Ct. 1245. The Court asserted as a general proposition the "inherent sovereign powers of an Indian tribe do not extend to the

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activities of nonmembers of the tribe" but also announced two exceptions to this proposition:

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

Id. at 565-66, 101 S.Ct. 1245 (citations omitted). *Strate,* 520 U.S. at 456, 117 S.Ct. 1404, held this test also applies to a tribe's inherent authority over nonmembers' conduct on state highways on the reservation.

¶ 17 Applying *Montana* to this case, we conclude pursuing those who break traffic laws on the reservation bears a "clear relationship to tribal self-government or internal relations" and is therefore part of the Lummi Nation's inherent sovereign authority. *Montana,* 450 U.S. at 564-65, 101 S.Ct. 1245. This inherent power to pursue lawbreakers does not reach " 'beyond what is necessary to protect tribal self-government or to control internal relations.' " ***965***Strate,* 520 U.S. at 459, 117 S.Ct. 1404 (quoting *Montana,* 450 U.S. at 564, 101 S.Ct. 1245). To the contrary, the right to pursue and detain those who break civil and criminal traffic laws on the reservation "is *needed* to preserve 'the right of reservation Indians to make their own laws and be ruled by them.' " *Id.* (emphasis added) (quoting *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)). "The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless." *Schmuck,* 121 Wash.2d at 383, 850 P.2d 1332. Such a situation clearly fits within the second exception in *Montana* because it would threaten the health and welfare of the tribe:

> Allowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.[FN11]

> FN11. According to the Lummi Tribal Vital Statistics Office, the LNPD issued 252 citations for DWI from 2003-2005, and there were 28 motor vehicle accidents involving injuries and 3 involving fatalities. Jennie R. Joe et al., Native Am. Research & Training Council, *Final Report: Participatory Evaluation of the Lummi Nation's Community Mobilization Against Drugs Initiative/Bureau of Justice Assistance's Indian Alcohol and Substance Abuse Demonstration Project* 48 (Mar.2008) (unpublished report, on file with the U.S. Dep't of Justice), *available at* http:// www. ncjrs. gov/ pdffiles 1 / nij/grants/222741.pdf.

Id. at 391, 850 P.2d 1332. Here, Officer McSwain suspected Eriksen was driving under the influence after she drifted across the center line and came within two feet of his patrol car. McSwain testified that he ascertained Eriksen was a non-Indian only after he stopped her because he had no way of learning such information without stopping her. In *Schmuck* we discuss the absurd result of holding tribal officers need to release all non-Indian offenders:

> "To hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous****389*** state of affairs which ***966*** would permit non-Indians to act unlawfully, with impunity, on Indian lands."

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Id. at 392, 850 P.2d 1332 (quoting *State v. Ryder,* 98 N.M. 453, 456, 649 P.2d 756, *aff'd,* 98 N.M. 316, 648 P.2d 774 (1982)). Indeed, if we were to hold Officer McSwain and other officers cannot detain non-Indians who elude their authority by crossing reservation boundaries, we would enable similarly absurd results. Although *Schmuck* involved a DUI detention within the reservation, the court contemplated the possibility of drivers simply "refus [ing] to stop if pulled over by a tribal officer," when it rejected equating the tribal officer's authority to that of a citizen's arrest.[FN12] *Id.* at 392, 850 P.2d 1332.

> FN12. The Whatcom County Prosecutor asks us in the alternative to uphold Eriksen's arrest on a citizen's arrest theory. We need not reach this issue because we hold the LNPD had authority to pursue Eriksen across the reservation boundary and stop and detain her until authorities with jurisdiction arrived.

¶ 18 The superior court correctly extended *Schmuck* to the facts at hand; if non-Indians could elude tribal officers' inherent authority to stop and detain simply by beating them across reservation boundaries, it would effectively gut this court's holding. To determine whether tribes retain their sovereign powers, we must "look[ ] to the character of the power that the tribe seeks to exercise, not merely the location of events." *John v. Baker,* 982 P.2d 738, 752 (Alaska 1999).

II. Police Have Well-Established Authority To Continue "Fresh Pursuit" onto Reservations and across Jurisdictional Boundaries

¶ 19 Division Three of the Court of Appeals, the Lummi Nation, and the Ninth Circuit have all allowed nontribal law enforcement to cross jurisdictional boundaries into Indian reservations when in "fresh pursuit" of suspects. *Waters* held Omak Police Department officers had authority under the fresh pursuit doctrine to arrest an enrolled member of the Colville Confederated Tribes on the Colville Reservation. 93 Wash.App. at 977-78, 971 P.2d 538. The officers had seen Thomas Waters's car peel away from a stoplight and cross ***967** the center line toward police. *Id.* at 973, 971 P.2d 538. When the officers activated their vehicle's emergency lights, Waters led them on a high-speed chase and finally stopped on tribal reservation property, where they arrested him for felony eluding, DWI, resisting arrest, and driving with a suspended license.[FN13] *Id.* Division Three rejected Waters's argument that the officers lacked jurisdiction to stop him: "Everybody, with or without probable cause for arrest, is required to stop for the police. RCW 46.61.024. Once the police car displayed its flashing lights, Mr. Waters was required to stop, even in the absence of an infraction." *Id.* at 978, 971 P.2d 538.

> FN13. Although two of the officers were commissioned tribal officers, the Court of Appeals considered the "fresh pursuit" an independent and sufficient basis for their authority to arrest on the reservation. *Waters,* 93 Wash.App. at 973, 978, 971 P.2d 538.

¶ 20 Under the doctrine of "hot pursuit," the Ninth Circuit upheld the jurisdiction of a sheriff's deputy who followed a tribal member who had been "tailgating" the deputy's marked patrol car on a state highway in Indian country. *United States v. Patch,* 114 F.3d 131, 132-34 (9th Cir.), *cert. denied,* 522 U.S. 983, 118 S.Ct. 445, 139 L.Ed.2d 381 (1997). Taylor Patch, a member of the Colorado River Indian Tribe, argued the deputy was trespassing when he followed him to his home in Indian country. The court held the deputy had observed Patch's reckless driving and had authority to conduct a *Terry* [FN14] stop to determine if Patch was a tribal member and whether the deputy had jurisdiction to issue a citation. *Id.* at 134 (citing *Schmuck,* 121 Wash.2d at 382-83, 850 P.2d 1332 for the proposition that a tribal officer may stop a speeding vehicle if the driver is a tribal member).

> FN14. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

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¶ 21 The Lummi Tribal Court also recognized the authority of a Whatcom County sheriff's deputy to come onto the reservation in pursuit of a tribal member who allegedly stole from a convenience store outside the reservation. *Lummi Nation v. Scarborough,* No. 2008-CRCO-2084, slip ***968** op. at 1-4 (Jan. ****390** 5, 2009).[FN15] The tribal member filed a motion to dismiss, arguing the deputy did not have jurisdiction to investigate criminal activity on tribal land and the officer was not covered under the Lummi Code of Laws 5.07.055, which deals with obstructing a public servant as a "Law Enforcement Officer." *Id.* at 2. The court denied the motion, reasoning the deputy was "attempting to investigate a crime that had taken place off the reservation by unknown individuals. He had no way of knowing whether those individuals were Lummi, non-Native Lummi, or non-Native." *Id.* at 3. Moreover, the court noted "[t]here are many situations that can arise that would result in an officer from a jurisdiction other than Lummi being on the reservation. It stands to reason that those officers should not be obstructed in carrying out their responsibilities any more than a Lummi officer." *Id.* at 3-4.

FN15. *See* Br. of Amicus Curiae Lummi Nation, App. II at A-5.

¶ 22 The doctrine of fresh pursuit has also arisen in cross-jurisdictional cases across national borders.[FN16] None of the settled law in these areas may be wholly applicable to tribes, however, which are sovereign entities, sometimes subject to jurisdiction of the state but also not subject to federalism.

FN16. "Hot pursuit" of unauthorized oceangoing vessels across *national* borders is an ancient doctrine of the law of nations. *See* Glanville L. Williams, *The Juridical Basis of Hot Pursuit,* 20 Brit. Y.B. Int'l L. 83, 84 (1939). Although no customary right of hot pursuit across national *land* borders evolved as it did for territorial waters, the United States Supreme Court has acknowledged international hot pursuit across land borders did occur. *See In re Kaine,* 55 U.S. (14 How.) 103, 113, 14 L.Ed. 345 (1852) (noting the necessity of hot pursuit across the border between United States and British possessions in America based on treaty of 1842). Notwithstanding those realities on the ground, the doctrine of hot pursuit across national land borders never became a customary right of international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432(2) (1987) (nation's law enforcement officers may exercise their functions in the territory of another nation only with the consent of the other state).

¶ 23 In sum, the doctrine of "fresh pursuit" authorizes nontribal police to cross jurisdictional boundaries into Indian country; the same policy justifying this practice applies to tribal police departments as well.

***969** III. Washington Mutual Aid Peace Officers Powers Act Authorizes Tribal Police Departments To Continue "Fresh Pursuit" across Jurisdictional Boundaries

¶ 24 In addition to the Lummi Nation's inherent authority to enforce its laws, which necessitates authority to continue the "fresh pursuit" of suspects, Washington state law also grants tribal police departments the power to continue pursuing beyond their jurisdiction "[i]n response to an emergency involving an immediate threat to human life or property" or when in "fresh pursuit." RCW 10.93.070(2), (6). As aforementioned fresh pursuit is a common law *and* statutory exception to territorial jurisdiction allowing law enforcement to pursue suspects across jurisdictional boundaries.

¶ 25 Until the legislature passed the Washington Mutual Aid Peace Officers Powers Act of 1985, chapter 10.93 RCW, peace officers had no authority to arrest offenders outside their municipality's geographic boundary. *See, e.g., City of Wenatchee v. Durham,* 43 Wash.App. 547, 549, 718 P.2d 819

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(1986). A Seattle peace officer, for example, could not have made an arrest in Tacoma. Chapter 10.93 RCW modified these "artificial barriers to mutual aid and cooperative enforcement of the laws ..." RCW 10.93.001(2), by empowering "general authority Washington peace officer[s]" to exercise authority outside their jurisdictions "[i]n response to an emergency involving an immediate threat to human life or property" or "when ... in fresh pursuit, as defined in RCW 10.93.120." RCW 10.93.070(2), (6).

¶ 26 Eriksen argues RCW 10.93.120 prevents *tribal* officers from engaging in a "fresh pursuit" off the reservation for traffic infractions or crimes committed on the reservation. Pet. for Review at 4. She points to RCW 10.93.120(1) to argue the doctrine applies only to peace officers with authority to *make an arrest* and here the tribal officer was clear he had no authority to arrest because Eriksen was non-Indian. This argument**391 is not well-founded because RCW 10.93.120(1) must not be read in isolation from the *970 rest of the Washington Mutual Aid Peace Officers Powers Act of 1985-especially the legislature's statement of intent and construction in RCW 10.93.001. Indeed, RCW 10.93.120(1) refers to "[a]ny peace officer who has authority under Washington law to *make an arrest* ...." (Emphasis added.) But this subsection governs "fresh pursuit" *arrests.* It does not follow that RCW 10.93.120(1)-which outlines when an *arresting* officer may proceed in fresh pursuit-precludes officers from completing stops initiated on the reservation. Moreover, it is RCW 10.93.120(2), that contains the actual *definition* of "fresh pursuit" to which the operative section, RCW 10.93.070(6), refers.

¶ 27 This definition of "fresh pursuit"-in RCW 10.93.120(2)-*broadens* the common-law doctrine, which previously applied only to felonies, to include all traffic or criminal law violations: "The term 'fresh pursuit,' as used in this chapter, includes, *without limitation,* fresh pursuit as defined by the *common law.* " (Emphasis added.) The common law definition employed five criteria for analysis of fresh pursuit, none of which included authority to arrest.[FN17]

> FN17. The requirements included: (1) a felony occurred within the jurisdiction; (2) the individual sought knew he is being pursued; (3) the police pursued without unnecessary delay; (4) the pursuit was continuous and uninterrupted; and (5) there was a relationship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect. *City of Wenatchee v. Durham,* 43 Wash.App. at 550-51, 718 P.2d 819 (citing *United States v. Santana,* 427 U.S. 38, 43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)). Authority to *arrest* was not an enumerated requirement at common law.

¶ 28 Most importantly, RCW 10.93.120(1) is part of the Washington Mutual Aid Peace Officers Powers Act of 1985; it therefore must be " *liberally construed* to effectuate the intent of the legislature *to modify current restrictions* upon the limited territorial and enforcement authority of general authority peace officers and *to effectuate mutual aid* among agencies." RCW 10.93.001(3) (emphasis added). The act was passed to allow courts to consider " 'the Legislature's *overall intent to use practical considerations* in deciding whether a particular arrest across jurisdictional lines was reasonable.' " *Vance,* 116 Wash.App. at 416, 65 P.3d 668 (emphasis added) (quoting *Durham,* 95 Wash.App. at 881, 978 P.2d 514).

*971 ¶ 29 RCW 10.93.070(6) is the section of the act which authorizes all "general authority Washington peace officer[s] [to] enforce the traffic or criminal law[ ] ... [w]hen the officer is in fresh pursuit, as defined *in* RCW 10.93.120 " (emphasis added). The issue is whether the LNPD falls within the definition of "general authority Washington law enforcement agency" in RCW 10.93.020, *not* whether its officers have power to arrest.[FN18] "General authority Washington peace officer"

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means "any ... officer of a *general authority Washington law enforcement agency* who is commissioned to enforce the criminal laws of the state of Washington *generally.* " RCW 10.93.020(3) (emphasis added). "General authority Washington law enforcement agency" means:

> FN18. *Cf. State v. Malone,* 106 Wash.2d 607, 610 n. 1, 612, 724 P.2d 364 (1986) (holding an Idaho police officer had authority to pursue a suspect into Washington under common law "fresh pursuit" doctrine-even though the officer had no authority to arrest under Idaho law-because eluding an officer was a felony under Washington law).

> any agency, department, or division of a municipal corporation, [or] *political subdivision,* or other unit of local government of this state, and any agency, department, or division of state government, having as its *primary function the detection and apprehension* of persons committing infractions or violating the traffic or criminal laws in general....

RCW 10.93.020(1) (emphasis added). While this statute is not unambiguous, the Lummi Nation-like all federally recognized tribes-is unquestionably a political entity. Chief Justice Marshall classified Indian tribes as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian," *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), and the Supreme Court has consistently recognized Indian tribes as "political communities." *See* ****392***McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 168, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (citing *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)). *But see* ***972***Yukon-Kuskokwim Health Corp. v. Nat'l Labor Relations Bd.,* 344 U.S. App. D.C. 133, 234 F.3d 714 (2000) (holding the National Labor Relations Board did not act arbitrarily in determining exemption from coverage for states or political subdivisions did not apply to tribes with respect to activities conducted off-reservations). Moreover, the LNPD's primary function is to detect and apprehend Indians who violate the law on the reservation and to detect and apprehend non-Indians who violate the law on the reservation and then turn them over to local authorities. CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, art. VI, § 1; TREATY OF POINT ELLIOTT art. 9, 12 Stat. 927 ("[T]he said tribes agree not to shelter or conceal offenders ... *but to deliver them up to the authorities for trial.* " (emphasis added)).

¶ 30 Any interpretation of the Washington Mutual Aid Peace Officers Powers Act of 1985 that would limit the Lummi Nation's tribal sovereignty must be construed strictly:

> When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (second alteration in original) (quoting *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)). Under such a construction-which resolves ambiguities in RCW 10.93.020(1), (3) in favor of the Lummi Nation-the LNPD is a "general authority Washington law enforcement agency" and therefore its officers may engage in "fresh pursuit" as defined in RCW 10.93.120(2). *McClanahan,* 411 U.S. at 174, 93 S.Ct. 1257 (" '[d]oubtful expressions are to be resolved in favor [of the Indian tribe]' ") (quoting *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930)); *Blackfeet Tribe,* 471 U.S. at 766, 105 S.Ct. 2399 ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.").

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***973** ¶ 31 The LNPD is the primary responder to all dispatch calls within the Lummi Reservation, regardless of Indian status. Br. of Amicus Curiae Lummi Nation, App. I (Aff. of Chief Gary James) at A-3.[FN19] The reservation is located on a peninsula and has many non-Indian residences. *Id.* It also contains the only public access to Lummi Island, an island beyond the reservation and home to many non-Indians. *Id.* Lummi Nation police officers therefore *generally* enforce Washington criminal law within the meaning of RCW 10.93.020(3) whenever they arrest lawbreakers on their reservation who are Indian, or stop and detain lawbreakers who are non-Indian and then transfer them to local authorities for prosecution.[FN20]

FN19. The State lacks jurisdiction over Indians who breaks laws on reservations, except for eight exceptions under RCW 37.12.010 in which the State has concurrent jurisdiction. *State v. Cooper,* 130 Wash.2d 770, 774, 928 P.2d 406 (1996); *State v. Pink,* 144 Wash.App. 945, 952, 185 P.3d 634 (2008). The Lummi Nation therefore enforces criminal law in the majority of cases arising from the tribe itself.

FN20. Effective July 1, 2008, tribal officers have been able to expand this law enforcement power to also include the power to make arrests on the reservation by taking a series of steps including completing requirements in RCW 43.101.157 and executing an interlocal agreement pursuant to chapter 39.34 RCW. RCW 10.92.020.

¶ 32 In sum, LNPD officers may exercise authority outside their jurisdictions when continuing in "fresh pursuit" of a suspect because these officers are general authority Washington peace officers within the meaning of the Washington Mutual Aid Peace Officers Powers Act of 1985. RCW 10.93.070, .001; *accord* 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 3108, at 49 n. 2 (3d ed. Supp.2008-09) (referring to "tribal police officer[s]" as "general authority Washington peace officer[s] with authority to enforce****393** the criminal and traffic laws of the state").

CONCLUSION

¶ 33 The Lummi Nation Police Department has authority under the Lummi Nation's sovereign authority and ***974** under the Washington Mutual Aid Peace Officers Powers Act of 1985, chapter 10.93 RCW, to enforce its laws by continuing the "fresh pursuit" of suspects off the reservation and then detaining these suspects until authorities with jurisdiction arrive.

¶ 34 We affirm the trial court.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON , MADSEN, CHAMBERS, OWENS, FAIRHURST , J. JOHNSON, and STEPHENS, JJ.

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