FRESH PURSUIT: A SURVEY OF LAW AMONG STATES WITH LARGE LAND BASED TRIBES

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INTRODUCTION

Generally, an officer may not make a valid arrest outside the territorial jurisdiction of his or her arresting authority.[1] Fresh pursuit is an exception to this rule. Fresh pursuit refers generally to those pursuits of fleeing suspects who cross jurisdictional boundaries.[2] Fresh pursuit laws are numerous and differ substantially in language and effect throughout states, tribes, and the world. However, their overarching goal is to extend the authority of an officer when necessary in order to achieve safety and avoid lawlessness.[3] At best, the patchwork of jurisdictional authority between the state, tribal, and federal sovereigns is confusing. Furthermore, any exceptions to this jurisdictional patchwork, such as the doctrine of fresh pursuit, can leave even the best of legal scholars baffled.[4] The determination of which sovereign has jurisdiction depends on a variety of context-dependent circumstances such as: where the offense was committed, who is suspected of committing the offense, the gravity of the offense, and who the potential victim is.[5] This article looks at how states with large land based tribes have developed the fresh pursuit law for state and tribal officers, in

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[1] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.07 (2012).

[2] Fennessy & Joscelyn, *A National Study of Hot Pursuit*, 48 DEN. L.J. 389, 390 (1972). 'Hot pursuit' is the more famous term associated with this police activity; however, 'hot pursuit' generally refers to the immediate and continuous pursuit of a fleeing violator, without the issue of crossing jurisdictional lines. *Id.* This activity has also been called 'close pursuit.' However, 'fresh pursuit' is the term associated with this police activity that crosses jurisdictional lines. *Id.* As this paper is concerned with the authority of officers as they cross from state to tribal land, and vice-versa, the author will use the term 'fresh pursuit' throughout.

[3] *See* Judith V. Royster, *Fresh Pursuit Onto Native American Reservations: State Rights 'To Pursue Savage Hostile Indian Marauders Across the Border' an Analysis of the Limits of State Intrusion into Tribal Sovereignty*, 59 U. COLO. L. REV. 191 (1988).

[4] State courts have split on how to treat the actions of tribal police officers who proceed off the reservation. Courts have also split on the authority of state officers to pursue Indian offenders from state jurisdiction into Indian country. COHEN'S HANDBOOK § 9.07 (2012).

[5] Royster, *supra* note 3, at 196.

order to showcase the complexity and chaos created and suggest a uniform federal law of fresh pursuit.

In part I, this article will provide a brief and basic overview of the patchwork of criminal jurisdiction necessary to understand the doctrine of fresh pursuit as related to state, tribal, and federal jurisdiction. Part II will examine how states and tribes have dealt with the narrow issue of an arresting officer's authority to pursue a suspect from within their territorial jurisdiction into another when the officer has reason to believe the suspect has committed a victimless crime.[6] The focus will be specifically on how this doctrine works in states with large land-based tribes,[7] looking at both state officers'[8] and tribal officers''[9] authority to engage in fresh pursuit.[10] Finally, part III urges Congress to enact a uniform fresh pursuit law applicable to both tribes and states to alleviate the problems that arise from varying fresh pursuit exceptions.

I. A BRIEF HISTORY: HOW DID WE GET INTO THIS MESS?

This section provides a brief history of the complex patchwork of criminal jurisdiction and lays out general jurisdictional principles necessary to understand the situations discussed in the subsequent section.

Indian Tribes retain inherent sovereign authority over their territory and members as sovereign entities that pre-existed the formation of the United

[6] A "victimless crime" applies to "a crime which generally involves only the criminal, and which has no direct victim." BLACK'S LAW DICTIONARY 1567–68 (1990). For a complete discussion of "victimless crimes" see COHEN'S HANDBOOK § 9.02[1][C][III] (2012).
[7] Large, land-based tribes include tribes residing within states that have a significant Indian population and a large Indian Country. The author's discretion in choosing these states was based on the 2005 United States Department of Interior Bureau of Indian Affairs' American Indian Population and Labor Force Report, available at http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf (last visited October 5, 2014), and excluded, outright, as beyond the narrow of scope this article tribes within the states of Alaska and Oklahoma.
[8] For ease of reference, the author hereinafter will refer collectively to state, county, and local peace officers as "state officers."
[9] For ease of reference, the author will not distinguish out different Tribes within states, but refer generally to "tribal officers."
[10] This article will focus on fresh pursuit after the passage of Public Law 280 and will not address those jurisdictions that use cross-deputization agreements, where the fresh pursuit doctrine generally will no longer be at issue. *See generally*, Walking on Common Ground: Cooperation Agreements http://www.walkingoncommonground.org/state.cfm?topic=12&state=MI (last visited October 5, 2014).

States.[11] However, the Constitution also vests authority in the Federal government, which generally results in concurrent jurisdiction over Indians in Indian Country for crimes that are not included in the Major Crimes Act.[12] States also do not have authority unless or until Congress vests power to them.[13]

Congress, perceiving a particular lawlessness in Indian Country, enacted Public Law 83-280 (Public Law 280) in 1953.[14] Public Law 280 transferred jurisdiction from the federal government to six specific states that had a significant number of federally recognized tribes—called "mandatory states."[15] The law also transferred criminal and limited civil jurisdiction over Indians and non-Indians on reservations to the mandatory states.[16] In non-Public Law 280 states, the Federal government still retains criminal jurisdiction over crimes committed by or against Indians under the Major Crimes Act and Indian General Crimes Act; however, the non-Public Law 280 states do not hold such authority.[17] As originally adopted, Public Law 280 also contained a provision for other states to assume the same jurisdiction conferred on the mandatory states mentioned—called "option states."[18] In 1968, Congress enacted provisions to limit the scope of Public Law 280, requiring tribal consent before states assumed jurisdiction over Indian Country and authorizing states that already had Public Law 280 jurisdiction to retrocede such

[11] "'[A]n Indian tribe's power to punish tribal offenders is part of its own retained sovereignty. . . ." United State v. Wheeler, 435 U.S. 313, 328 (1978).
[12] *Id.* For a more complete discussion of how this concurrent jurisdiction has been limited in territory and as to type of crime, see Royster, *supra* note 3, at 204-209.
[13] *Wheeler*, 435 U.S. 313; COHEN'S HANDBOOK § 9.03[1] (2012).
[14] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953); Carole Goldberg and Duane Champagne, *Law Enforcement and Criminal Justice Under Public Law 280*. FINAL REPORT FOR NATIONAL INSTITUTE OF JUSTICE. Nov 1, 2007.
[15] 18 U.S.C. §1162 (1958) transferred federal jurisdiction to Alaska (added when it became a state), California, Minnesota, Nebraska, Oregon, and Wisconsin. Act of Aug. 8, 1958, Pub.L. 85-615, § 1, 72 Stat. 545
[16] 18 U.S.C. §1162 (2012) also suspended the enforcement of the Major Crimes Act, 18 U.S.C. §1153 (2012), and the General Crimes Act, 18 U.S.C. §1152 (2012), in those areas. The General Crimes Act extended federal criminal jurisdiction to crimes between Indians and non-Indians. *Id.* Under the General Crimes Act, tribes still retained preemptive jurisdiction over crimes by Indians. *Id.* The Major Crimes Act enumerated certain serious felonies committed by Indians that are subject to federal jurisdiction. 18 U.S.C. §1153. However, the maximum penalty a tribe may enforce is a fine of $5,000 or six months imprisonment, or both. 25 U.S.C. §1302(7) (2012).
[17] 25 U.S.C. §1152 (2012); 25 U.S.C. §1153 (2012).
[18] *See generally* Washington v. Yakima Indian Nation, 439 U.S. 463 (1979). In these states, the federal government retains concurrent jurisdiction to prosecute under the Major and General Crimes Act. *See* United States v. High Elk, 902 F.2d 660 (8th Cir. 1990); *cf* United States v. Burch, 169 F.3d 666 (10th Cir. 1999).

jurisdiction to the Federal government.[19] Today, states with Public Law 280 jurisdiction presumably have authority not only within the courts, but also hold law enforcement authority on reservations within that Indian country.[20]

Below is a table of jurisdiction principles:[21]

Suspect	Victim	Jurisdictional Principle
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	"Mandatory" states have exclusive jurisdiction from federal and tribal sovereigns. "Option" states share jurisdiction with the federal government. No tribal jurisdiction exists
Indian	Non-Indian	"Mandatory" states have exclusive jurisdiction of the Federal government, but not necessarily exclusive of the tribe. "Option" states have concurrent jurisdiction with the Federal government.
Indian	Indian	"Mandatory" states have exclusive jurisdiction of the Federal government, but not necessarily exclusive of the tribe. "Option" states have concurrent jurisdiction with the Federal government for those crimes listed in 18 U.S.C. §1153 (2014).
Non-Indian	Victimless	State jurisdiction is exclusive. Federal jurisdiction may attach in an "option" state if there is a clear impact on an individual Indian or tribal interest.

[19] 25 U.S.C. §1323 (1982); 25 U.S.C. §1326 (1982). Tribal consent required a majority vote by the adult members. *Id.*
[20] *See* Royster, *supra* note 3, at 218; Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557 n.281 (1976) (citing 4 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 4, 40 (1974)); COHEN'S HANDBOOK § 9.07 (2012).
[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, 9-689, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm (last visited October 5, 2014).

Indian	Victimless	There may be concurrent state, tribal, and, in an option state, federal jurisdiction;[22] however, there is no state regulatory jurisdiction.

II. THE DOCTRINE OF FRESH PURSUIT IN STATES WITH LARGE LAND-BASED TRIBES

This section surveys the law of fresh pursuit in states with large land-based tribes, looking at both state and tribal officers' authority to engage in fresh pursuit. It focuses generally on common law and statutory authority, but will not discuss the specific cross-deputization agreements or extradition agreements between each municipal authority and tribal sovereign.

A. Arizona

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Arizona gave its state officers authority to engage in fresh pursuit onto tribal land in 1994 when the Arizona Court of Appeals upheld an arrest of a tribal member on a reservation after a fresh pursuit began on state land.[23] The court looked almost exclusively at the effects of its decision on the Tribe's sovereignty.[24] Furthermore, the court found no tribal laws regarding the state's authority or lack thereof to arrest a tribal member in such a situation.[25] Based on the lack of an extradition agreement and lack of tribal law on the relevant matter, the court

[22] Most courts considering the question have applied the *McBratney* principle to determine that the state government, not the federal government, possesses jurisdiction over non-Indians who commit crimes within Indian country are truly victimless, in which neither an Indian nor Indian property is involved, such as a traffic offense. COHEN'S HANDBOOK § 9.03[1] (2012). A number of state courts have concluded that they possess jurisdiction over victimless crimes committed by non-Indians on Indian country. *Id.*

[23] State v. Lupe, 889 P.2d 4 (1994). Previously, the Court of Appeals held that absent any potential conflict of jurisdiction, state law enforcement officers have right to arrest a non-Indian whom they have pursued onto an Indian reservation. State v. Herber, 598 P.2d 1033 (1979).

[24] *Lupe*, 889 P.2d at 7.

[25] *Id.*

concluded that granting state officers this authority would not interfere with the Tribe's self-governing powers.[26]

Furthermore, in *United States v. Patch*, the Ninth Circuit upheld the authority of a county Sheriff's deputy who pursued an Indian from an Arizona State Highway located within Indian Country to his residence in Indian Country.[27] After defendant Patch had been "tailgating" the deputy's marked patrol car, the deputy activated his sirens.[28] After Patch refused to stop, the deputy followed him to his home on the reservation.[29] Patch pushed the deputy, who subsequently arrested Patch on his front porch.[30] Regardless of whether the state highway was within Indian Country, the court found that that the deputy had authority to engage in fresh pursuit and pursue an offender from the state's jurisdiction of the Highway into Indian Country to make an arrest.[31]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

While it does not appear that Arizona courts have dealt with the issue of whether a tribal officer can engage in fresh pursuit, there is reason to believe the Arizona courts would find that tribal officers also have the authority to engage in fresh pursuit.[32] In *State v. Nelson*, the court considered whether a tribal officer, certified by the Arizona Peace Officer Standards and Training Board (AZ POST), could stop and detain a suspect off reservation when the officer was neither cross-deputized or engaged in fresh pursuit.[33] While the court held that the certified officer had authority, it limited its ruling to AZ POST certified officers, stating "[b]ecause the officer involved in this case was AZ POST certified, we express no

[26] *Id.* at 7-8.
[27] United States v. Patch, 114 F.3d 131,132-134, (9th Cir. 1997), *cert. denied*, 522 U.S. 983 (1997).
[28] *Id.* at 133.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 134. The court recognized that the deputy's pursuit did not start outside of Indian country, but the court believes that this does "not diminish the officer's right to continue his otherwise valid attempt to question Patch." *Patch*, 114 F.3d at 134, n.4.
[32] *See generally* State v. Nelson, 90 P.3d 206 (2004); *Patch*, 114 F.3d at 132-134.
[33] *Nelson*, 90 P.3d 206. The court found that the tribal officer had authority primarily because the officer has been appointed by the Bureau of Indian Affairs, relying on ARS Section 13–3874(A), which provides: "[w]hile engaged in the conduct of his employment any Indian police officer who is appointed by the bureau of Indian affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards adopted pursuant to §41–1822 shall possess and exercise all law enforcement powers of peace officers in this state."

opinion as to whether a non-certified tribal officer could make a valid stop off the reservation."[34] Despite this limitation, the court reiterated *Patch* to hold that "[u]nder the doctrine of hot pursuit, a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into *[or off]* Indian country to make the arrest."[35] The officer in *Patch* was a state officer engaged in fresh pursuit onto a reservation.[36] Significantly, the *Nelson* court added the words "or off" to its recitation,[37] thereby construing Patch as authority for either a state or tribal officer to engage in fresh pursuit.

B. California

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Pursuant to Public Law 280, Congress granted California general concurrent criminal jurisdiction over Indian Country.[38] Therefore, with regard to state law enforcement officers, there is no fresh pursuit issue. State officers are free to enforce criminal, prohibitory laws throughout the state, even in Indian Country.[39]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

It does not appear that California has dealt with this specific issue by legislation or judicial precedent.

C. Minnesota

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Minnesota is a Public Law 280 state. Congress authorized Minnesota to exercise criminal jurisdiction over "[a]ll Indian country within the state, except the Red Lake Reservation."[40] The state still does not have jurisdiction over the Red Lake Reservation and does not engage in fresh pursuit onto the

[34] *Nelson*, 90 P.3d at 210, n.2.
[35] *Id.* at 209-210 (emphasis added) (quoting, *Patch*, 114 F.3d at 134).
[36] *Patch*, 114 F.3d at 134.
[37] Nelson, 90 P.3d. at 209-210.
[38] *See* 18 U.S.C. §1162 (2012).
[39] *See* 18 U.S.C. §1162 (2012); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
[40] *See* 18 U.S.C. §1162 (2012).

Reservation.[41] In 1973, the state retroceded all criminal jurisdiction for the Bois Forte Indian Reservation at Net Lake back to the Federal Government.[42] Thus, with the exception of the Red Lake Reservation and the Bois Forte Indian Reservation at Net Lake, there is no fresh pursuit issue with regard to state law enforcement officers.

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

Minnesota, by state statute, gives the option for tribes to engage in cross-deputization agreements that would create concurrent jurisdiction eliminating any fresh pursuit issue.[43] However the state has yet to deal with the specific issue of fresh pursuit when no agreement exists.

D. Montana

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

In 1963, Montana assumed criminal jurisdiction over the Flathead Reservation under the authority delegated by Public Law 280.[44] Therefore,

[41] While it does not appear that any courts have issued opinions on the issue of fresh pursuit on the Red Lake Reservation, it has been suggested that no fresh pursuit exists onto the reservation. *See generally* Brad Swenson, *Beltrami County Commissioners Adopt Policy to end Sheriff's Pursuits at Red Lake Reservation Border*, INFORUM, (July 10, 2009), https://secure.forumcomm.com/?publisher_ID=1&article_id=246324 ("pursuits onto the reservation are no longer allowed. . . ."You must terminate the pursuit at the reservation line. If you are pursuing toward Red Lake, notify [the tribe's] dispatcher as soon as is possible and they will send officers, if available.").

[42] State v. Stone, 572 N.W.2d 725, 728, n.3 (Minn. 1997). Under the authority of 25 U.S.C. §1323 (1970) Minnesota retroceded its criminal jurisdiction of this reservation. Act of May 23, 1973, ch. 625, 1973 Minn. Laws 1500.

[43] Minn. Stat. §626.93 (2014).

[44] MONT. CODE. ANN. (MCA) § 2-1-301 (1963) states:

> The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session).

The Supreme Court of Montana held that this statute (formerly R.C.M. 83-801(1947)) relating to criminal offenses by Indians on the Flathead Indian Reservation constituted a valid and binding consent of the people of the state to assumption of criminal jurisdiction by state courts over Indians committing criminal offenses on such reservation, and that no Constitutional amendment was required to validly obtain jurisdiction. State ex rel. McDonald v. District Court of Fourth Judicial Dist. In and For Missoula County, 496 P.2d 78 (1972). The court further held that under the version of

Montana has general concurrent criminal jurisdiction over Flathead Indian County and no issue of fresh pursuit exists within the Flathead Reservation.

While Montana does not maintain criminal jurisdiction over any other reservation within the state,[45] the Montana Supreme Court alleviated any fresh pursuit issue involving the remaining reservations in *City of Cut Bank v. Bird*. In *City of Cut Bank v. Bird*, the court recognized the authority of state officers to arrest a suspect on Indian Reservations under the doctrine of fresh pursuit.[46] The court found that the initial traffic offense was committed within the state officer's jurisdiction, and relying exclusively on the authority set out by the Ninth Circuit in *Patch*,[47] found that the officer had authority to engage in fresh pursuit when the defendant drove erratically and sped across the jurisdictional border.[48] Thus, Montana officers may use the doctrine of fresh pursuit to make arrests on reservations within Montana, but may make arrests on the Flathead Reservations regardless of fresh pursuit because they have general jurisdiction.

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

It does not appear that Montana has dealt with this specific issue by legislation or judicial precedent.

E. New Mexico

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

In New Mexico, state officers may engage in fresh pursuit to determine whether they have authority; however, they may not make an arrest if it interferes

Public Law 280 that this statute was passed under, no consent was required but was granted out of courtesy, and that Tribal Resolution 1973 of June 22, 1966 and Tribal Resolution 2318 on September 15, 1967 were ineffective and invalid withdrawals of consent. *Id.* However, under MCA 2-1-306 (1963) (the Confederated Salish and Kootenai tribes, which are located on the Flathead Reservations, may, by tribal resolution and after consulting with local government officials concerning its implementation, may withdraw consent to be subject to the criminal misdemeanor jurisdiction of the state). They have not done so.

[45] MCA §2-1-102(2014)("The sovereignty and jurisdiction of this state extend to all places within its boundaries as established by the constitution, excepting such places as are under the exclusive jurisdiction of the United States.").

[46] City of Cut Bank v. Bird, 38 P.3d 804 (2001).

[47] *See Patch*, 114 F.3d at 133.

[48] *Bird*, 38 P.3d 804.

with tribal sovereignty.[49] In *Benally v. Marcum* (*Benally I*), the Supreme Court of New Mexico found that a state officer who pursued an Indian from state jurisdiction into Indian Country and arrested him after suspecting the driver was driving under the influence[50] violated the tribal sovereignty of the Navajo Nation "because it circumvented and was contrary to" the Nation's extradition procedures in its Tribal Code.[51] The court recognized the state's statutory fresh pursuit doctrine, but noted that the Legislature codified it from the common law fresh pursuit doctrine, which only applied to felonies, making it inapplicable in this case.[52]

In *City of Farmington v. Benally* (*Benally II*), under similar facts as *Benally I*, the Supreme Court of New Mexico again found that regardless of whether or not a state officer is in fresh pursuit, an arrest cannot be valid on Indian Country when valid extradition procedures exist.[53] In *Benally II*, New Mexico had altered its fresh pursuit statutes to include the lawful fresh pursuit of suspects engaged in misdemeanors.[54] Still, the court invalidated the arrest, finding that the tribal extradition procedures, which were substantially the same as in *Benally I*, outweighed any state interest.[55]

The New Mexico Supreme Court again addressed the issue of fresh pursuit in *State v. Harrison*. In *Harrison*, the court found that state officers engaging in fresh pursuit can lawfully pursue a suspect into Indian Country to stop the suspect and determine whether they have authority.[56] If the suspect is an Indian, the officer can detain them until tribal police can assume jurisdiction.[57] Additionally, the *Harrison* court held that when tribal police are unable to assist, the state officer can engage in search procedures and that a defendant's voluntary compliance

[49] *See* State v. Harrison, 238 P.3d 869 (2010); Benally v. Marcum, 553 P.2d 1270 (1976) (Benally I); City of Farmington v. Benally, 892 P.2d 629, 631 (1995) (Benally II).
[50] The state police officers attempted to stop the defendant for violating city ordinances which prohibited driving under the influence, driving recklessly, and causing an accident involving damage to property, none of which, importantly, are felonies. *Benally I*, 553 P.2d at 1271.
[51] *Id.* at 1271-1273.
[52] *Id.* at 1273.
[53] *Id.* at 630-631.
[54] *Id.* at 631.
[55] *Id.*
[56] *Harrison*, 238 P.3d 869. If the suspect is a non-Indian then the officer may assume jurisdiction over the suspect. *Id.*
[57] *Id.*

with the officer's administration of field sobriety tests will not violate the tribal sovereignty of the Indian Nation.[58]

Importantly, the *Harrison* court took into account the United States Supreme Court's decision in *Nevada v. Hicks*[59] and asked whether fresh pursuit would inhibit a tribal sovereign's inherent right to self-govern.[60] The court ruled that because the tribe did not have a specific tribal procedure on field sobriety tests, "the exercise of state authority to conduct criminal investigation in Indian Country [did] not infringe on tribal sovereignty because it [did] not affect the right of Indians to make their own laws and be governed by them."[61] Holding that field sobriety tests fall within the *Hicks* court's definition of "process," the *Harrison* court gave the state authority to implement field sobriety tests according to its practices and procedures.[62]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

It does not appear that New Mexico has dealt with this specific issue by legislation or judicial precedent.

F. North Dakota

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Prior to Public Law 280, Congress relinquished criminal jurisdiction over Devil's Lake Reservation (now, Spirit Lake Reservation) to North Dakota.[63] In *State v. Hook*, the Supreme Court of North Dakota held that the "federal statute gives North Dakota criminal jurisdiction over the non-major offenses committed by

[58] *Id.* at 875-878.
[59] 533 U.S. 353 (2001).
[60] *Harrison*, 238 P.3d 869 at 878. *But cf.* State v. Cummings, 679 N.W.2d 484, 486(2004)(refusing to read *Hicks* as authority for the doctrine of fresh pursuit, finding that *Hicks* involved a Tribe attempting to assert civil jurisdiction over state officials by subjecting them to tribal courts).
[61] *Harrison*, 238 P.3d 869 at 878-879. *But cf.* Cummings, 679 N.W.2d 484 (expressly rejecting reading Hicks to allow the use of the doctrine of fresh pursuit onto tribal land).
[62] *Harrison*, 238 P.3d 869 at 878-879. *But cf.* Cummings, 679 N.W.2d 484.
[63] Act of May 31, 1946, ch. 279, 60 Stat. 229. This created concurrent federal and state jurisdiction. *Id.* North Dakota is not a Public Law 280 state. 18 U.S.C. §1162 (2012).

or against Indians on Devil Lake Indian Reservation."[64] The court refused to express an opinion on the state's jurisdiction of more serious crimes.[65] Thus, while there is no issue of fresh pursuit on the Devil's Lake Reservation for misdemeanor offenses, it does not appear that North Dakota has dealt with the issue of fresh pursuit through legislation or judicial precedent for felonies on Indian Country other than the Devil's Lake Reservation.

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

The only consideration by North Dakota courts on the authority of tribal officers to engage in fresh pursuit was when the North Dakota Supreme Court considered the legality of an arrest by a BIA officer.[66] While a BIA officer is a federal officer, not a tribal officer, the rationale the court relies on is helpful. The court found that a BIA Officer "was in fresh pursuit" from a reservation into the state.[67] Interestingly, the court did not use the doctrine of fresh pursuit to hold the arrest valid; in fact, the court found that in spite of the fresh pursuit, the officer engaged in a valid citizen's arrest.[68] It remains unclear whether a tribal officer could validly make a fresh pursuit arrest; but it does seem that tribal officers can make a valid citizen's arrest. Legislation has not addressed this question either.

G. Oregon

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Oregon is one of the mandatory states under Public Law 280.[69] Under Public Law 280, "all Indian country within the state, except the Warm Springs Reservation" falls under the state jurisdiction.[70] Therefore, the issues associated with fresh pursuit arise only on the Warm Springs Reservation. In 2011, as a matter of first impression, the Oregon State Court of Appeals held that a state officer could arrest a person for a traffic offense on the Warm Springs Reservation,

[64] State v. Hook, 476 N.W.2d 565, 571 (1991); *But cf.* Fournier v. Roed, 161 N.W.2d 458 (1968). (upholding a felony arrest by a state officer, not engaged in fresh pursuit, of an enrolled member of the Devil's Lake Sioux Tribe on an Indian reservation that was not Devil's Lake Reservation).
[65] *Hook*, 476 N.W.2d at 570, n.6 (1991).
[66] State v. Littlewind, 417 N.W.2d 361 (N.D. 1987).
[67] *Id.* at 363.
[68] *Id.*
[69] 18 U.S.C. §1162 (2012).
[70] *Id.*

"if the traffic offense was committed in the officer's presence at a place within the officer's jurisdictional authority, the officer immediately pursued the person who committed the offense, and the officer cited the person immediately upon the conclusion of the continuous pursuit."[71] In its analysis, the court interpreted provisions and legislative history of the Warm Springs Tribal Code (WSTC).[72] The WSTC had an explicit provision that granted authority to nontribal officers to make an arrest in fresh pursuit on the reservation and the court mirrored this provision in its holding.[73] Therefore, Oregon police may arrest a suspect anywhere within the state, including the Warm Springs Reservation, when the officer is engaged in fresh pursuit.[74]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

In *State v. Smith*, the court held that tribal officers may also engage in fresh pursuit.[75] The court, in analyzing the WSTC, stated that "the drafters intended the section to apply to both tribal police acting outside of their jurisdictional authority and nontribal police acting outside of their jurisdictional authority."[76] The court cited to *State v. Kurtz* for the proposition that tribal officers may also engage in fresh pursuit.[77]

In *Kurtz*, the Oregon Supreme Court decided that a Warm Springs tribal officer was authorized to arrest a person who committed a traffic violation on the reservation, but failed to stop until he was pursued off the reservation.[78] Rather than using the WSTC or Oregon's fresh pursuit statute, the court decided that tribal officers fall within Oregon's statutory definition of "police officer" and "peace officer."[79] The *Kurtz* court recognized that tribal officers share a common functional characteristic with the examples of law enforcement listed in the statute

[71] State v. Smith, 268 P.3d 644 (2011).
[72] *Id.*
[73] WSTC §310.120 (2011).
[74] *Smith*, 268 P.3d 644.
[75] *Id.*
[76] *Id.* at 648.
[77] State v. Kurtz, 249 P.3d 1271 (2011). While the *Kurtz* court does not explicitly state that they are deciding the issue as a result of the doctrine of fresh pursuit, the facts of the case would fall under the doctrine.
[78] *Id.*
[79] OR. REV. STAT. §133.430(1); *Smith*, 268 P.3d 644; *Kurtz*, 249 P.3d 1271.

and qualified as a "police officer" under the state statutes.[80] As a result of this categorization, the court granted tribal officers the authority to engage in fresh pursuit onto state lands.

H. South Dakota

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

South Dakota is not a Public Law 280 state.[81] In fact, South Dakota's constitution contains a jurisdictional disclaimer to state jurisdiction over any Native American lands.[82]

The South Dakota Supreme Court, in *State v. Spotted Horse*, held that the arrest of an Indian on a reservation by a state officer who pursued the suspect from state jurisdiction was unlawful.[83] The court found that the authority of the state's fresh pursuit statutes could not reach into the reservation because the state had not validly assumed jurisdiction pursuant to Public Law 280;[84] therefore, the state officer's arrest was illegal.[85] However, the court asserted that the trial court properly exercised jurisdiction over the defendant, relying on the Ker-Frisbie rule:

[80] *Id.* at 1278.
[81] State v. Hero, 282 N.W.2d 70, 72 (1979).
[82] S.D. Const. art. XXII, § 2.

> That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States....

Id.
[83] State v. Spotted Horse, 462 N.W.2d 463 (1990), *cert. denied*, 500 U.S. 928 (1991).
[84] Public Law 280 was originally passed in 1953, which allowed states to assume criminal and limited civil jurisdiction over reservations. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589. South Dakota failed to pass passed legislation until 1961. SDCL1-1-18, 21 (1961). However, the 1961 legislation attempted to assume partial jurisdiction over criminal offenses and civil causes of action on the highways. *Id.* After a series of cases, the Supreme Court of South Dakota finally concluded that South Dakota does not have jurisdiction over Indian Country and may not exercise partial jurisdiction over highways running through the reservation. State v. Spotted Horse, 462 N.W.2d 463, 467 (1990). *See also* In re Hankins, 125 N.W.2d 839 (1964); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979); State v. Onihan, 427 N.W.2d 365, 367 (1988); Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir.1990).
[85] *Spotted Horse*, 462 N.W.2d at 467.

> When a person accused of a crime is found within the territorial jurisdiction wherein he is so charged and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings.[86]

Therefore, despite finding the arrest illegal, the trial court could still maintain jurisdiction over the defendant, subject to limits on the admission of evidence.[87] The court allowed the trial court to admit independent evidence obtained through the officer's observations before the illegal arrest.[88] Interestingly, the South Dakota Supreme Court felt compelled to comment

> [...] on the need for a solution to this gap in criminal jurisdiction. When a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are harmed. We would hope that in this year [sic] which the Governor has proclaimed "The Year of Reconciliation," that both tribal leaders and governmental officials will sit down and work out treaties that will remedy this situation.[89]

The South Dakota Supreme Court again addressed the issue of fresh pursuit in *State v. Cummings*. In *Cummings*, the court considered "whether a state officer in fresh pursuit for a traffic violation may pursue a tribal member onto his reservation and gather evidence from the driver when the alleged crimes were committed off the reservation."[90] Relying on *Spotted Horse*, the court stated that "[i]n the absence of a compact between the Tribe and the state, the state officer was without authority to pursue Cummings onto the reservation and gather evidence without a warrant or

[86] *Id* (quoting, State v. Winckler, 260 N.W.2d 356 (1977)). The Ker–Frisbie rule, is an adaptation of the rules of Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952). *Spotted Horse*, 462 N.W.2d at 467-468.
[87] *Id.* at 469.
[88] *Id.*
[89] *Id.*
[90] *Cummings*, 679 N.W.2d at 486.

tribal consent."[91] While the state asked the court to overrule *Spotted Horse*, based on the United States Supreme Court decision in *Nevada v. Hicks*, the court refused to read *Hicks* as an authority for state officers to engage in fresh pursuit of a tribal member onto reservations.[92] The court found that *Hicks was* factually distinguishable, particularly because the tribe in *Hicks* was trying to extend its jurisdiction over state officials by subjecting them to civil actions in tribal court. [93] However, in *Cummings*, the opposite was occurring: "the state was attempting to extend its jurisdiction into the boundaries of the Tribe's Reservation without consent...or a tribal-state compact."[94] The court reaffirmed *Spotted Horse*, rejecting the use of the doctrine of fresh pursuit onto reservations in South Dakota.[95]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

South Dakota's courts have yet to examine the issue of tribal officers' authority to engage in fresh pursuit onto state land. However, a United States District Court for the Central Division of South Dakota discussed the issue.[96] The court concluded that the officers did not have jurisdictional authority to arrest the defendant, "[a]bsent hot pursuit or some kind of exigent circumstance, an extra-jurisdictional arrest is presumptively unreasonable."[97] While likely not controlling authority, the District Court does imply that tribal officers have the authority to engage in fresh pursuit.[98] The court did not find any exigent circumstances to warrant the application of a fresh pursuit exception to justify the arresting officers exceeding their territorial jurisdiction.[99] The court also relied on the Tribal Code, which "codified the authority of [tribal] officers to arrest a 'person' if they are in 'fresh pursuit' for conduct that occurred on the Reservation even if the arrest is made outside of the boundaries of the Reservation and its

[91] *Id.* at 489.
[92] Id. at 488-490. *Cf. Harrison*, 238 P.3d 869 (where the court read *Hicks* to extend the doctrine of fresh pursuit for state officers).
[93] *Cummings*, 679 N.W.2d at 488.
[94] *Id.* at 487.
[95] *Id.* at 489.
[96] U.S. v. Medearis, 236 F.Supp.2d 977 (S.D. 2002).
[97] *Id.* at 982.
[98] *Id.*
[99] *Id.* at 983.

dependent Indian communities."[100] The court also noted, without denying such facts, that officers involved admitted that,

> Rosebud police officers can only arrest a person off of the Rosebud Reservation when they are in fresh pursuit of the person from the Reservation itself; and tribal police have no authority to search, impound or seize a vehicle being driven by a non-member Indian on deeded land without *fresh pursuit.*[101]

Thus, tribal officers likely have the authority to engage in fresh pursuit.

I. Washington

1. Can State Officers Engage In Fresh Pursuit Onto State Land?

Under the Revised Code of Washington (RCW) §37.12.010, Washington State, with the consent of Congress under Public Law 280,[102] assumed criminal and limited civil jurisdiction over Indians and Indian Territory, reservations, country, and lands within the state. This jurisdiction does not apply to Indians when they are on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States.[103] It is within this law that the question of fresh pursuit arises.

According to the Washington State Court of Appeals, state officers may engage in fresh pursuit into tribal jurisdiction.[104] In *State v. Waters*, the court held that the state officers had authority under the fresh pursuit doctrine to arrest a tribal member on a reservation.[105] The court rejected Waters' claim that the state police lacked jurisdiction to stop him, and held that the officer had authority to stop him initially, engage in fresh pursuit onto the reservation, and arrest him on the reservation.[106] Thus, Washington state officers may make arrests using the fresh pursuit doctrine.

[100] *Id.* at 981 n.7.
[101] *Id.* at 981 (emphasis added).
[102] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588; 18 U.S.C. §1162.
[103] WASH. REV. CODE (RCW) §37.12.010 (2014).
[104] State v. Waters, 971 P.2d 538, 542-543 (1999).
[105] *Id.*
[106] *Id.* at 543.

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

The Washington State Supreme Court decided in 2011 that tribal officers do not have inherent authority to engage in fresh pursuit to stop and detain a defendant on state land outside of the Indian reservation.[107] However, this decision came after the State Supreme Court, in an unprecedented procedural posture, issued two prior opinions on this case.[108]

This first opinion of *State v. Eriksen* in 2009, a unanimous court held that the tribal officer had both inherent authority and statutory authority to continue fresh pursuit of a driver who broke traffic laws on the reservation.[109] The court relied on state statutes, state, tribal, and federal precedent, The Treaty of Point Elliot, and inherent tribal authority.[110] Both the State and Defendant Eriksen filed motions requesting reconsideration and the court granted their motions.[111]

In the second opinion, the court again, this time with three dissenting justices, held that the tribal officer had authority to engage in fresh pursuit.[112] The court reviewed its statutory analysis, finding an absence of statutory authority in this particular situation.[113] The court also did not find the tribal officer's authority in its inherent tribal authority, but rather extended precedent from both Washington State and the United States Supreme Court.[114] After yet another motion to reconsider, the court heard oral arguments and issued its third and final opinion. This 2011 decision is now the law of the land in Washington: tribal officers do not have inherent authority to engage in fresh pursuit outside of a reservation.[115]

However, Tribes may obtain the more general power of having the authority to make off-reservation arrests, which would include the authority to engage in fresh pursuit, by becoming a general authority Washington state peace officer.[116]

[107] State v. Eriksen, 259 P.3d 1079 (2011).
[108] State v. Eriksen, 216 P.3d 382 (2009), *opinion superseded on reconsideration*, 241 P.3d 399 (2010), *opinion superseded on reconsideration*, 259 P.3d 1079 (2011).
[109] *Eriksen*, 216 P.3d 382.
[110] *Id.*
[111] *Eriksen,* 259 P.3d -at 1080.
[112] *Eriksen*, 241 P.3d 399.
[113] *Id.* at 402-407.
[114] *Id.* at 402.
[115] *Eriksen*, 72 Wash. 2d 506.
[116] RCW §10.93.020(1) (2014); RCW §10.93.070(6) (2014).

A tribal police officer may become recognized as a general authority Washington peace officer if they meet the requirements set out by the Washington State Legislature in RCW 10.92.020(2).[117] These requirements include insurance and liability standards, training requirements, procedures for conformity with state law enforcement agencies, and interlocutory agreements with surrounding police departments.[118]

Washington State, by common law, generally does not allow tribal officers to engage in fresh pursuit, even to stop and detain a suspect.[119] However, a tribal officer, commissioned as a general authority Washington peace officer may engage in fresh pursuit, as they hold the same power as any other Washington peace officer and can make arrests for violations of state laws.[120]

J. Wisconsin

1. Can State Officers Engage In Fresh Pursuit Onto Tribal Land?

Wisconsin is a Public Law 280 state.[121] The state has general concurrent criminal jurisdiction over Indian Country, and thus there are no fresh pursuit issues for state officers.[122]

2. Can Tribal Officers Engage In Fresh Pursuit Onto State Land?

The state of Wisconsin, by statute, essentially abolished territorial and subject matter jurisdiction when an officer is in fresh pursuit.[123] Wisconsin law,

> "General authority Washington law enforcement agency" means any agency, department, or division of a municipal corporation, 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, as distinguished from a limited authority Washington law enforcement agency, and any other unit of government expressly designated by statute as a general authority Washington law enforcement agency.

RCW §10.93.020(1) (2014).

[117] RCW §10.92.020 (2014).

[118] *Id.*

[119] *Eriksen*, 259 P.3d 1079.

[120] RCW §10.92.020 (2014).

[121] 18 U.S.C. §1162 (2012).

[122] 18 U.S.C. §1162 (2012).

unlike most states, includes tribal officers in its definition of a peace officer.[124] The peace officers may follow a suspect anywhere in the state and arrest any person for any violation of law or ordinance that that officer is authorized to enforce, when they are engaged in fresh pursuit.[125]

Specifically, the statute's definition of peace officer includes any tribal law enforcement officer who is authorized to act under Wisconsin Statutes §165.92(2)(a).[126] Wisconsin Statutes §165.92(2)(a) states that the tribal officer must meet the requirements of Wisconsin Statutes §165.85(4)(a)1.,2., and 7., which consistently refers to "law enforcement *or* tribal law enforcement" throughout.[127] Thus, tribal officers may engage in fresh pursuit, as long as they comply with the statutory requirements.

III. CONCLUSION: WHERE CAN WE GO FROM HERE?

To break the limitations of territorial jurisdiction between tribes and states and enable sovereigns to effectively enforce criminal law within the context of fresh pursuit, Congress should enact a uniform fresh pursuit law applicable to both tribes and states. By constantly adding to the multitude of fresh pursuit exceptions, states have created an even more tangled patchwork of criminal jurisdiction. When analyzing a sovereign's authority, not only must one consider the traditional factors, such as where the offense was committed, who is suspected of committing the offense, the gravity of the offense, and who is the potential victim, but now one must also consider the state and tribe involved, and refer to state and tribal common law and statutory authority.

Congress alone has the power to enact a uniform law governing fresh pursuit. However, by failing to legislate on this issue, Congress has allowed states to define tribal authority. Generally, states do not have authority unless or until Congress vests power to the states;[128] however, through these state statutes and

[123] WIS. STAT. §175.40(2) (2014)("...any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for a violation of any law or ordinance the officer is authorized to enforced.").
[124] *Id.*
[125] *Id.*
[126] WIS. STAT. §175.40(c) (2014)("'Peace Officer' includes any tribal law enforcement officer who is empowered to act under s. 165.92(2)(a).").
[127] WIS. STAT. §§165.85(4)(a)1.,2.,7., and (c) (2014).
[128] U.S. CONST. art. I, § 8, cl. 3.