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OPINION NO. 2012-01

LAW ENFORCEMENT; JURISDICTION;
TRIBAL RESERVATIONS: When the State has jurisdiction over a crime committed by an Indian off of a reservation, who then flees onto a reservation, a state peace officer may give fresh pursuit wherever the suspect goes within the State so long as the crime is a felony or was committed in the officer's presence.

Kenneth E. Mayer, Director
Nevada Department of Wildlife
1100 Valley Road
Reno, Nevada 89512

Dear Mr. Mayer:

This opinion addresses whether a peace officer, specifically a Nevada Department of Wildlife game warden,¹ may pursue an Indian suspect onto tribal land while in fresh pursuit.

QUESTION ONE

May a Nevada Department of Wildlife game warden give fresh pursuit onto an

¹ Game wardens are category 1 peace officers. NRS 289.280; NRS 289.460; NRS 289.470; and NRS 601.375.

Indian colony or reservation when the fleeing suspect is Indian² and the subject is either suspected of committing a felony or did commit a crime in the warden's presence?

ANALYSIS

Every person who commits a crime in this State is subject to punishment by the laws of this State. NRS 171.010. This includes Indians who commit off-reservation crimes. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001) ("It is ... well established in our precedent that States have criminal jurisdiction over reservation [tribal members] for crimes committed off the reservation").

Warrantless arrest of an individual who commits a crime is authorized when the crime is either a felony or gross misdemeanor, NRS 171.136(1); or was committed in the arresting officer's presence. NRS 171.136(2)(b). *See also Lofton v. Warden, Nev. State Prison*, 83 Nev. 356, 358, 431 P.2d 981, 982 (1967). *But see State v. Bayard*, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003) holding that "full custodial arrest" for minor traffic violations is improper under Nevada law unless objectively identifiable reasons exist to support it.

If a criminal suspect flees, a peace officer may pursue, even into a private residence. *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (when an arrest is set in motion in a public place, the police may pursue a retreating suspect into a private residence, even if the offense is a mere misdemeanor). In the common law, the fresh pursuit doctrine includes an extrajurisdictional aspect when the crime committed is a felony. *See e.g. Gattus v. State*, 105 A.2d 661, 666 (1954). In some jurisdictions, there is "another common law doctrine of fresh pursuit whereby a peace officer may arrest, without a warrant, for misdemeanors committed in his presence within a reasonable time thereafter." *Id.*

Nevada has statutorily authorized and defined fresh pursuit both within the state, NRS 171.166—176 (Uniform Act on Intrastate Fresh Pursuit), and out of state. NRS 171.156—164 (Uniform Act on Interstate Fresh Pursuit). Further, Nevada permits any officer or agent of the Bureau of Indian Affairs or tribal policemen to pursue any person, while in fresh pursuit, from tribal land onto non-tribal land in Nevada, and make arrests. NRS 171.1255. *See also Op. Nev. Att'y Gen.* 2003-07 (Oct. 23, 2003) (concluding that arrest authority includes citation authority).

² Although variously defined, Congress has defined the term "Indian" to mean "all persons of Indian descent who are members of any recognized Indian tribe . . . under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

In some jurisdictions, the common law extrajurisdictional fresh pursuit doctrine is limited to felonies and will not support the arrest of a “misdemeanant suspect outside an officer’s geographical jurisdiction.” *State v. Tingle*, 477 N.W. 2d 544, 547 (Neb. 1991). But no such limitation attends Nevada’s definition for intrastate fresh pursuit. Nevada’s definition enlarges the doctrine in its intrastate application by authorizing fresh pursuit for misdemeanors that are committed in the presence of an arresting officer.

“Fresh pursuit” [in-state] shall include fresh pursuit as defined by the common law and also the pursuit of a person who has committed a felony or is reasonably suspected of having committed a felony in this state, *or who has committed or attempted to commit any criminal offense in this state in the presence of the arresting officer* referred to in NRS 171.172 [authorizing arrest] or for whom such officer holds a warrant of arrest for a criminal offense

NRS 171.168 (emphasis added). *Accord, Incorporated County of Los Alamos*, 776 P.2d 1252, 253 (N.M. 1989) (“[w]e believe the legislature intended in [New Mexico’s Fresh Pursuit Act] to expand the fresh pursuit and territorial arrest powers of county sheriffs and municipal police officers. . . .”).

Nevada’s statute does not expressly reference colonies or reservations within the State. However, “an Indian reservation is considered part of the territory of the State.” *Hicks*, 533 U.S. at 361-62. Therefore, it necessarily follows that Nevada’s intrastate fresh pursuit statutes—authorizing pursuit for both felonies and lesser crimes—apply when a suspect flees onto a reservation.

In addition, decisions from other jurisdictions are pertinent to the question you have asked. In *United States v. Patch*, 114 F.3d 131, 134 (9th Cir. 1997), arising out of Arizona, the Ninth Circuit held that under the doctrine of “hot pursuit,” a police officer who observes a traffic violation committed off of tribal land may pursue the offender onto tribal land to make an arrest. Consistently with Nevada’s law, *Patch* requires that state officers must observe a misdemeanor offense when it occurs within state boundaries.

Relying on *Patch*, the Montana Supreme Court likewise held that a state officer is authorized to pursue a driver onto tribal land when the officer observed a traffic offense within state boundaries and attempted to stop the driver. *City of Cut Bank v. Bird*, 38 P.3d 804, 807 (Mont. 2001).³

³ But see *State of South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004) (declining to depart from the earlier holding in *State v. Spotted Horse*, 462 N.W.2d 263 (S.D. 1990), that fresh pursuit onto a reservation is not authorized).

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CONCLUSION

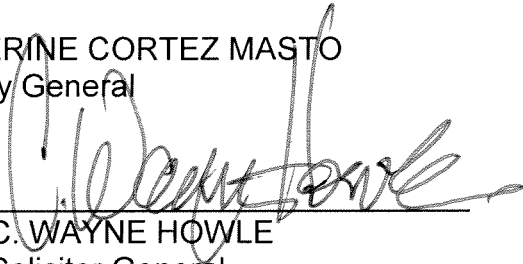
When the State has jurisdiction over a crime committed by an Indian off of a reservation, who then flees onto a reservation, a state peace officer may give fresh pursuit wherever the suspect goes within the State so long as the crime is a felony or was committed in the officer's presence.

We note that entry onto a reservation might, in a given case, "infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure." *New Mexico v. Harrison*, 238 P.3d 869, 872 (N.M. 2010). To avoid this possibility, and in the interest of comity with tribes, we strongly recommend the use of cooperative agreements authorized by NRS 277.080-.170 to address such issues before they arise.

Sincerely,

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CWH/RMH