667 Assimilative Crimes Act, 18 U.S.C. § 13

The Assimilative Crimes Act, 18 U.S.C. § 13, makes state law applicable to conduct occurring on lands reserved or acquired by the Federal government as provided in 18 U.S.C. § 7(3), when the act or omission is not made punishable by an enactment of Congress.

Prosecutions instituted under this statute are not to enforce the laws of the state, but to enforce Federal law, the details of which, instead of being recited, are adopted by reference. In addition to minor violations, the statute has been invoked to cover a number of serious criminal offenses defined by state law such as burglary and embezzlement. However, the Assimilative Crimes Act cannot be used to override other Federal policies as expressed by acts of Congress or by valid administrative orders.

The prospective incorporation of state law was upheld in *United States v. Sharpnack*, 355 U.S. 286 (1957). State law is assimilated only when no "enactment of Congress" covers the conduct. The application of this rule is not always easy. In *Williams v. United States*, 327 U.S. 711, 717 (1946), prosecution of a sex offense under a state statute with a higher age of consent was held impermissible, but a conviction for a shooting with intent to kill as defined by state law was upheld, despite the similarity of provisions of 18 U.S.C. § 113. *Fields v. United States*, 438 F.2d 205 (2d Cir.), *cert. denied*, 403 U.S. 907 (1971); *but see Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970). *See also United States v. Bowers*, 660 F.2d 527 (5th Cir. 1981) (child abuse); *United States v. Smith*, 574 F.2d 988 (9th Cir. 1978)(sodomy). There seems to be a definite trend to construe 18 U.S.C. § 13 liberally to provide complete coverage of criminal conduct within an enclave, even where the offense is generally covered by Federal law. *See, e.g., United States v. Johnson*, 967 F.2d 1431 (10th Cir. 1992)(aggravated assault); *United States v. Griffith*, 864 F.2d 421 (6th Cir. 1988)(reckless assault); *United States v. Kaufman*, 862 F.2d 236 (9th Cir. 1988)(assault); *Fesler v. United States*, 781 F.2d 384 (5th Cir.), *cert. denied*, 476 U.S. 1118 (1986)(child abuse).

The Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 801 *et seq.*, because of its unlimited applicability, is not considered an "enactment of Congress" within the meaning of 18 U.S.C. § 13. *See United States v. Walker*, 552 F.2d 566 (4th Cir. 1977), *cert. denied*, 434 U.S. 848 (1977)(drunk driving). *See also Franklin v. United States*, 216 U.S. 559 (1910). Military personnel committing acts on an enclave subject to Federal jurisdiction which are not made an offense by Federal statutes other than the U.C.M.J. may therefore be prosecuted in district court for violations of state law assimilated by 18 U.S.C. § 13, even though they are also subject to court martial. However, dual prosecution, it should be noted, is constitutionally precluded by the Double Jeopardy Clause. *See Grafton v. United States*, 206 U.S. 333 (1907).

Section 13 of Title 18 does not assimilate penal provisions of state regulatory schemes. *See United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). Nor does it incorporate state administrative penalties, such as suspension of drivers licenses. *See United States v. Rowe*, 599 F.2d 1319 (4th Cir. 1979); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978). Section 13(b) allows suspension of licenses within the enclave.

Federal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law. *See United States v. Adams*, 502 F. Supp. 21 (S.D.Fla. 1980)(carrying concealed weapon in federal courthouse); *United States v. Woods*, 450 F. Supp. 1335 (D.Md. 1978)(drunken driving on parkway). In *Adams*, 502 F. Supp. 21, the defendant was charged with carrying a concealed weapon in a United States Courthouse in violation of 18 U.S.C. § 13 and the pertinent Florida felony firearms statute. In dismissing the indictment, the Adams court concluded that a General Services Administration (GSA) petty offense weapons regulation (41 C.F.R. § 101-20.313), explicitly provided for by statute, 40 U.S.C. § 318a, amounted to an enactment of Congress within the meaning of 18 U.S.C. § 13 and, therefore, the defendant could not be

prosecuted by the assimilation of state law which prohibited the same precise act.

It is important to note, however, that a critical provision of the GSA regulations apparently was not considered in *Adams*. *See* 41 C.F.R. § 101-20.315 which provides in part:

> Nothing in these rules and regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated.

This non-abrogation provision arguably would permit the assimilation of appropriate state firearms laws or other state statutes notwithstanding the existence of the GSA regulations. It appears that this language has never been considered in any reported case. Moreover, no discussion of the meaning of this language appears in the pertinent parts of the Federal Register, 43 Fed.Reg. 29001, July 5, 1978; 41 Fed.Reg. 13378, March 30, 1976. We believe it would be reasonable to interpret this non-abrogation provision as permitting the government, in its discretion, to proceed under 18 U.S.C. § 13 and appropriate state firearms laws, rather than under the GSA weapons regulation.

674 Indian Country -- Introduction

Criminal jurisdiction in the "Indian Country," 18 U.S.C. § 1151, is allocated among federal, state and tribal courts. Most federal criminal law for the Indian country is set forth in 18 U.S.C. §§ 1151-1170. Sections 1152 and 1153 are the most important. Jurisdiction over particular cases in the Indian country depends in general upon three factors: the nature of the offense, whether any jurisdiction has been conferred on the state, and whether the perpetrator or victim is an Indian. The charts in this Manual at 689 are a synopsis of the law presently applicable in the Indian country and reflect the statutes, court decisions and current Department policy. *See also Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990); 25 U.S.C. § 1301(4).

---

675 Investigative Jurisdiction

The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153 as well as most other crimes in the Indian country. Frequently, by the time the FBI arrives on the reservation, some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and United States Attorneys are free to ask for FBI investigation in all cases where it is felt that this is required. However, United States Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where it is felt a sufficient investigation can be undertaken by BIA or tribal law enforcement officers.

The Indian Law Enforcement Reform Act (ILERA), Pub. L. 101-379, August 18, 1990, codified at 25 U.S.C. §§ 2801-2809, established within the BIA of the Department of the Interior, a Division of Law Enforcement Services (DLES) to carry out the Secretary's responsibility to provide and assist in the provision of law enforcement services in Indian country. The ILERA directed the Secretary to establish a Branch of Criminal Investigations within the DLES with responsibility for the investigation and presentation for prosecution of violations of 18 U.S.C. §§ 1152 and 1153, under agreement with the Department of Justice, and subject to guidelines to be adopted by the United States Attorneys. A Memorandum of Understanding (MOU) has been signed by the Attorney General and the Secretary of the Interior. United States Attorneys are free to assign investigative responsibilities in accordance with guidelines previously issued, or which they now care to issue. The ILERA also authorizes the Secretary of the Interior, after consultation with the Attorney General, to promulgate regulations relating to the exercise of this law enforcement authority and relating to the consideration of applications for law enforcement contracts under the Indian Self Determination Act, P.L. 93-638, 25 U.S.C. § 450 *et seq.*

---

677 Indian Country Defined

"Indian country" is defined in 18 U.S.C. § 1151 as including (1) federal reservations, whether created by statute or Executive Order, *see Donnelly v. United States*, 228 U.S. 243 (1913), including fee land, *see United States v. John*, 437 U.S. 634 (1978); *Seymour v. Superintendent*, 368 U.S. 351 (1962); (2) dependent Indian communities, *see Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)(land that is neither a reservation nor an allotment which has been validly set aside for the use of the Indians as Indian land, and under the superintendence of the government); and (3) Indian allotments to which title has not been extinguished, *see United States v. Pelican,* 232 U.S. 442 (1914), and *United States v. Ramsey*, 271 U.S. 467 (1926). Although not specifically mentioned in section 1151, land held in trust by the United States for a tribe or individual Indian is also accorded Indian country status. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991). Acquisition of land in fee by a tribe, despite the restraint on alienation imposed by 25 U.S.C. § 177, has been held insufficient standing alone to create Indian country. *Buzzard v. Oklahoma Tax Comm'n*, 922 F.2d 1073 (10th Cir. 1993). Indian country status is not lost by cession to, or acquisition by, a state of civil and criminal jurisdiction pursuant to Pub. L. 83-280 ("Public Law 280") or similar act of Congress. *See California v. Cabazon Band of Indians*, 480 U.S. 202, 207 n.5 and text (1987).

Disputes frequently arise as to whether federal reservation status still attaches to lands that were opened to settlement. The resolution is very complex. *See Solem v. Bartlett*, 465 U.S. 463 (1984). The assistance of the Field Solicitor of the Department of the Interior should be sought in the first instance.

United States Attorneys should attempt to familiarize themselves with the boundaries of their reservations and off-reservation allotments with the assistance of the Field Solicitor. They should also be aware of the extent to which jurisdiction over all or some of the reservations in their districts has been transferred to the state under Public Law 280 (currently codified at 18 U.S.C. § 1162 and 25 U.S.C. §§ 1321-1326) or similar legislation, *see, e.g.*, 18 U.S.C. § 3243 (Kansas), Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa), and 25 U.S.C. § 232 (New York). *See* this Manual at 688.

678 The General Crimes Act -- 18 U.S.C. § 1152

Under 18 U.S.C. § 1152 the "general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, . . . extend to the Indian country." The "laws" thus extended are those applicable within the Special Maritime and Territorial Jurisdiction of the United States, as defined in 18 U.S.C. § 7, popularly known as "federal enclave laws." *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1991), *cert. denied*, *sub nom. Beglen v. United States*, 113 S. Ct. 1065 (1993). Among these statutes are: arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; theft, 18 U.S.C. § 661; receiving stolen property, 18 U.S.C. § 662; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112, and sexual offenses, 18 U.S.C. § 2241 *et. seq*. The Assimilative Crimes Act, 18 U.S.C. § 13, is also one of those extended to the Indian country by 18 U.S.C. § 1152, allowing the borrowing of state law when there is no applicable federal statute. *Williams v. United States*, 327 U.S. 711 (1946); *Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990).

There are four exceptions to the coverage of § 1152, three of them legislative and the fourth judicially created. The second paragraph of 18 U.S.C. § 1152 specifies the three legislative exceptions:

This section shall not extend [1] to offenses committed by one Indian against the person or property of another Indian, nor [2] to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or [3] to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

It should be emphasized that these exceptions apply only to those laws extended to Indian country by section 1152--the so-called "federal enclave laws." The exceptions do not exempt Indians from the general criminal laws of the United States that apply to acts that are federal crimes regardless of where committed, such as bank robbery, counterfeiting, sale of drugs, and assault on a federal officer. *See United States v. Young*, 936 F.2d 1050 (9th Cir. 1991)(assault on federal officer and firearms); *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983)(narcotics); *United States v. Smith*, 562 F.2d 453 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (assault on federal officer). Despite the explicit holdings in three Circuits that jurisdiction exists over violation of statutes of general applicability, one court of appeals recently held that such statutes do not automatically apply to offenses in Indian country involving only Indians unless there is an independent federal interest to be protected. *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992), *cert. denied*, *sub nom.*, *Beglen v. United States*, 113 S. Ct. 1065 (1993). The court went on to hold that each of the statutes charged in the case, 18 U.S.C. § 1163 (theft of tribal funds), 18 U.S.C. § 844(i) (arson of property in interstate commerce), 18 U.S.C. § 1513 (witness tampering), 18 U.S.C. § 402 (contempt), 18 U.S.C. § 1621 (perjury), and 18 U.S.C. § 2101 (riot), reflected such an independent interest or that its violation had not occurred in Indian country. *Markiewicz* was explicitly rejected in *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994), which held that 18 U.S.C. § 371 (conspiracy) applied in Indian country even though it is not a crime enumerated in 18 U.S.C. § 1153. *See also United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994)(18 U.S.C. § 922).

The exceptions stated in the second paragraph of § 1152 also do not apply to violations of § 1153, *United States v. Wheeler*, 435 U.S. 313 (1978), or the liquor law provisions, 18 U.S.C. §§ 1154, 1161. *United States v. Cowboy*, 694 F.2d 1234 (10th Cir. 1982).

The fourth exception to the broad coverage of § 1152 was created by the Supreme Court. Notwithstanding its literal terms, the Supreme Court significantly narrowed the reach of 18 U.S.C. § 1152 in *United States v. McBratney*, 104 U.S. 621 (1882), holding that, absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in the Indian country by a non-Indian against another non-

Indian. *Accord*, *Draper v. United States*, 164 U.S. 240 (1896). Subsequent decisions have acknowledged the rule. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 325 n. 21 (1978); *United States v. Antelope*, 430 U.S. 641, 643 n. 2 (1977); *Williams v. United States*, 327 U.S. 711, 714 (1946).

679 The Major Crimes Act -- 18 U.S.C. § 1153

Section 1153 of Title 18 grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses, regardless of whether the victim is an Indian or non-Indian. *See United States v. John*, 437 U.S. 634 (1978). It remains an open question whether federal jurisdiction is exclusive of tribal jurisdiction. *Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990). *See also Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995). The enumerated offenses are, for the most part, defined by distinct federal statutes. Those offenses which are not defined and punished by federal law are to be defined and punished in accordance with the law of the state where the crime was committed. *See* 18 U.S.C. § 1153(b).

The precursor to 18 U.S.C. § 1152 was section 25 of the Act of June 30, 1834, 4 Section 733, and it was not until 1885 that federal legislation was enacted granting federal courts jurisdiction over certain major crimes committed by an Indian against another Indian. Prior to 1885, such offenses were tried in tribal courts. *See Ex parte Crow Dog*, 109 U.S. 556 (1883)(federal court had no jurisdiction to try an Indian for the murder of another Indian). Section 1153 is predicated on the Act of March 3, 1885, § 8, 23 Stat. 385, and former sections 548 and 549, 18 U.S.C. (1940 ed.). The Major Crimes Act was passed in reaction to the holding of *Crow Dog*, *see Keeble v. United States*, 412 U.S. 205, 209-12 (1973), and *United States v. Kagama*, 118 U.S. 375, 383 (1886). Under 18 U.S.C. § 1153, federal courts have jurisdiction exclusive of the states over offenses enumerated in the section when committed by a tribal Indian against the person or property of another tribal Indian or other person in Indian country. *United States v. John*, 437 U.S. 634 (1978). Legislative history indicates that the words "or other person" were incorporated in the 1885 Act to make certain the Indians were to be prosecuted in federal court. 48th Cong., 2d Sess., 16 Cong. Rec. 934 (1885).

Although the scheme of felony jurisdiction which has arisen is complex in origin, it is not irrational in light of the historical settings in which the predecessor statutes of 18 U.S.C. §§ 1152 and 1153 were passed. Major felonies involving an Indian, whether as victim or accused, are matters for federal prosecution. Because of substantial non-Indian populations on many reservations crimes wholly between non-Indians are left to state prosecution. It is, moreover, significant that the historical practice has been to regard *United States v. McBratney*, 104 U.S. 621 (1882), as authority for the states' assertion of jurisdiction with regard to a variety of "victimless" offenses committed by non-Indians on Indian reservations. *See* this Manual at 683.

In *United States v. Antelope*, 430 U.S. 641 (1977), the Supreme Court in essence upheld the constitutionality of the plan contained in 18 U.S.C. §§ 1152 and 1153 by rejecting a challenge on equal protection grounds raised against 18 U.S.C. § 1153. It was held that the Constitution was not violated by federal prosecution of an Indian for the murder of a non-Indian on the reservation under a theory of felony-murder. The defendant argued that had he been prosecuted in state court under Idaho state law for the same act, the felony-murder doctrine would not have applied because Idaho does not recognize it. The Court acknowledged the disparity in treatment, but nonetheless reasoned that the Major Crimes Act, like all federal regulation of Indian affairs, is not based upon an impermissible racial classification, but "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians." *See also Morton v. Mancari*, 417 U.S. 535 (1974).

680 Lesser Included Offenses Under 18 U.S.C. § 1153

In *Keeble v. United States*, 412 U.S. 205 (1973), the Supreme Court held that an Indian defendant charged with a major crime violation under 18 U.S.C. § 1153, was entitled to request and receive an instruction on a lesser included offense not enumerated in that section, even though he could not have been charged with such an offense in the first instance. The Court felt this result was compelled by 18 U.S.C. § 3242, which provides that Indians charged with violations of 18 U.S.C. § 1153 shall be "tried in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States."

If the jury returns a verdict of guilt upon the lesser offense, the court has jurisdiction to impose sentence for the lesser offense even though it would not have had jurisdiction over the offense initially. The rationale is that this result must have been intended by the Supreme Court when it handed down the ruling in *Keeble*. *See United States v. Bowman*, 679 F.2d 798 (9th Cir.), *cert. denied*, 459 U.S. 1210 (1983); *United States v. John*, 587 F.2d 683 (5th Cir. 1979); *United States v. Felicia*, 495 F.2d 353, 355 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974). *See also United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1818 (1993), holding that the court, after dismissing the felony count under Fed. R. Crim. P. 29(a), retained jurisdiction over a lesser included misdemeanor, and properly submitted it to the jury.

---

681 Indian Jurisdiction -- Tribal Options

Unless the governing body of the tribe exercising jurisdiction over the situs of the crime has elected for their application, neither the death penalty provision, the "three strikes" provision, nor the enhanced juvenile transfer provision of Pub. L. 103-322, enacted September 23, 1994, applies to offenses for which the sole basis for federal jurisdiction is that the offense was committed in Indian country. *See* 18 U.S.C. §§ 3598, 3559(c) and 5032 § 8214, respectively.

---

682 Successive Prosecutions

The second paragraph of 18 U.S.C. § 1152 specifically provides that the section "does not extend" to an Indian "who has been punished by the local law of the Tribe." Section 1153, however, does not contain such a limitation. The Supreme Court has held that the Double Jeopardy Clause of the Fifth Amendment to the Constitution does not bar prosecutions of violations of § 1153 in federal court following prosecutions in tribal court for violations of tribal law involving the same conduct. The Court reasoned that the courts are arms of separate sovereigns and prosecution is not "for the same offense." *See United States v. Wheeler*, 435 U.S. 313 (1978). Although departmental approval is not required before a subsequent federal prosecution is undertaken, one should not be undertaken unless there is a compelling federal interest. *Cf.* USAM 9-2.031, I. A, B, and C(1) (Petite Policy). In determining whether federal interests have been satisfied, consideration should be given to the limitations on tribal sentencing power measured against the seriousness of the offense. *See also United States v. Lester*, 992 F.2d 174 (8th Cir. 1993)("Petite policy" creates no rights enforceable by defendant). The Court in *Wheeler* left open the question whether the "dual sovereignty" ruling would apply to "Courts of Indian Offenses," also known as "CFR Courts." 435 U.S. at 327 n. 26. *See* this Manual at 687.

October 1997 **Criminal Resource Manual 682**

683 "Victimless Crimes"

A. **Committed by Indians:** Some crimes committed by Indians on reservations do not really involve offenses against the person or property of non-Indians or other Indians. Such offenses typically involve crimes against public order and morals. Examples are traffic violations, prostitution or gambling. Federal prosecutions in these cases can be based on 18 U.S.C. § 1152 and the Assimilative Crimes Act (18 U.S.C. § 13). *See, e.g., Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (1993)(fireworks); *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977)(fireworks); *United States v. Sosseur*, 181 F.2d 873 (7th Cir.1950) (gambling); United States Attorneys should give serious consideration to prosecution in such cases where prosecution by the tribe is not forthcoming or is inadequate.

B. **Committed by Non-Indians:** The question of jurisdiction over victimless crimes by non-Indians received considerable attention in the Department following the Supreme Court's holding in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), that tribal courts do not have jurisdiction over non-Indians. The Office of Legal Counsel (OLC) prepared an extensive memorandum dated March 21, 1979, concluding that in most cases, the states have jurisdiction over victimless crimes by non-Indians. The OLC memorandum was reprinted in the August 1979 issue of Indian Law Reporter (6 ILR K-15ff) and copies are available from the Department. The conclusion of OLC is, that in the absence of a true victim, *United States v. McBratney*, 104 U.S. 621 (1882), would control, leaving the states with jurisdiction. There must be a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) before federal jurisdiction can be said to attach. Thus, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling, which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim" and therefore to fall exclusively within state competence.

In certain other cases, however, a more direct threat to Indian persons or property may be sufficient to bring an ordinarily "victimless" crime within federal jurisdiction. One example would be crimes calculated to obstruct or corrupt the functioning of tribal government. This could include bribery of tribal officials, which in some circumstances is now covered by 18 U.S.C. § 666, and in others might be reached under §§ 1152 and 13, provided state law is drafted in suitable terms. *Cf. United States v. Tonry*, 837 F.2d 1281 (5th Cir. 1988)(conduct held not covered by state commercial bribery statute) with *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996)(conviction under 18 U.S.C. § 1952). Another sort of conduct, adversely affecting the tribal community, consists of consensual crimes committed by non-Indian offenders with Indian participants, where the participant, although willing, is within the class of persons which a particular state or federal statute is specifically designed to protect. Thus, there is federal jurisdiction under 18 U.S.C. § 1152 and Chapter 109A for the statutory rape of an Indian girl, and over a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. §§ 1152 and 13.

A third group of offenses which may be punishable under the law of individual states assimilated into federal law would be cases where an Indian victim is actually identified. Examples would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the tribe. In certain other cases, conduct, which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals, may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school, homosexual activity in the same area, an obvious attempt to scatter Indians collected at a tribal gathering, or a breach of peace that borders on an assault, may in unusual circumstances be seen as sufficiently serious to warrant federal

prosecution.

In 1979, the Office of Legal Counsel provided Deputy Attorney General Benjamin Civiletti with the following memorandum setting forth the opinion of the Department of Justice regarding the jurisdiction of the State and Federal government over victimless offenses by non-Indians in Indian country.

JURISDICTION OVER "VICTIMLESS" OFFENSES COMMITTED BY NON-INDIANS

On March 21, 1979 the Office of Legal Counsel responded to a request from the Deputy Attorney General, Benjamin R. Civiletti, for our opinion on the question whether so-called "victimless" offenses committed by non-Indians on Indian reservations fall within the jurisdiction of the state or federal courts. Several days earlier the Department of Justice filed in the United States District Court for New Mexico a memorandum in support of a motion for summary judgment in a case styled *Mescalero Apache Tribe v. Bell* in which the Tribe has sought to require the United States to enforce the New Mexico state traffic codes against non-Indians operating vehicles on the Reservation. The following is a summary of the principal conclusions set forth in the opinion and in the memorandum:

1. Most traffic offenses and other crimes and offenses in which there is not a plainly identifiable "victim" are within the exclusive jurisdiction of the states when that offense is committed by a non-Indian.

2. Where, however, there is an identifiable Indian victim, or where the conduct in question posed an immediate and direct threat to Indian persons, property, or to specific tribal community interest there is, under the Assimilative Crimes Act, a basis for asserting federal jurisdiction.

3. Although the issue is not at all free from doubt, it is our judgment that in cases in which there is as discussed in (2) above, a basis for federal jurisdiction the states would not be ousted from jurisdiction, i.e., the jurisdiction of the state and Federal government in these cases would be concurrent.

These conclusions were reached after consultation with the Office of the Solicitor of Interior and with representatives of the Native American Rights Fund and the Litigation Committee of the National Congress of American Indians. These conclusions represent the beginning point, rather than the culmination, of the Department of Justice's efforts to provide coherent and effective law enforcement in those areas left uncertain after the Supreme Court's decision last term in *Oliphant v. Suquamish Tribe*, 435 U.S. 191(1978). We anticipate working closely with Interior, the Indian Community, the United States Attorneys, and state law enforcement officials both in the implementation of this opinion, and in considering whether some form of legislative change in the controlling statutes should be proposed.

684 Memorandum for Benjamin R. Civiletti Re Jurisdiction Over "Victimless" Crimes Committed by Non-indians on Indian Reservations

This responds to your request for our opinion, whether so-called "victimless" crimes committed by non-Indians on Indian reservations fall within the exclusive jurisdiction of the state or federal courts, or whether jurisdiction is concurrent. The question posed is a difficult one whose importance is far from theoretical. We understand that in the wake of *Oliphant v. Suquamish Tribe*, 435 U.S. 191(1978), serious concern exists as to the adequacy of law enforcement on a number of reservations. While many questions of policy may be involved in allocating law enforcement resources, you have asked--as an initial step--for our legal analysis of the jurisdictional limitations.

In an opinion to you dated June 19, 1978, we expressed the view that, although the question is not free from doubt, as a general matter existing law appears to require that the states have exclusive jurisdiction with regard to victimless offenses committed by non-Indians. At your request, we have carefully reexamined that opinion. We have discussed the legal issue raised with others in the Department, and with representatives of the Department of Interior. We have also had the opportunity to discuss this question with Indian representatives, and have carefully considered the thoughtful submission prepared by the Native American Rights Fund on behalf of the Litigation Committee of the National Congress of American Indians.

Our further consideration of the question has led us to conclude that our earlier advice fairly summarizes the essential principles. There are, however, several significant respects in which we wish to expand upon that analysis. There are also several caveats that should be highlighted in view of the large number of factual settings in which these jurisdictional issues might arise. We also note, prefatorily, that there are now several cases pending in courts around the country in which aspects of these jurisdictional issues are being, or are likely to be litigated, and we may therefore anticipate further guidance in the near term in applying the central principles discussed in this memorandum.

I. INTRODUCTION

Two distinct competing approaches to the legal question you have posed are apparent. First, it may be contended that pursuant to 18 U.S.C. § 1152, with only limited exceptions, offenses committed on Indian reservations fall within the jurisdiction of the federal courts. The Supreme Court's determination in *United States v. McBratney*, 104 U.S. 621 (1882), that the states possess exclusive jurisdiction over crimes by non-Indians against non-Indians committed on such enclaves, it is said, was based on an erroneous premise that § 1152 does not control; at best, the argument goes, *McBratney* creates a narrow exception to the plain command of the statute; this decision should therefore be given only limited application and should not be deemed to govern the handling of other crimes which have no non-Indian victim. A related argument might also be advanced: with rare exceptions "victimless" crimes are crimes against the whole of the populace; unlike offenses directed at particular non-Indian victims which implicate the Indian community only incidentally, or accidentally, on-reservation offenses without a particular target necessarily affect Indians and therefore fall outside the limited *McBratney* exception and squarely within the terms of § 1152.

On the other hand, it may be argued that *McBratney* was premised on a view of the states' right to control the conduct of their citizenry generally anywhere within their territory; their presence or absence of a non-Indian jurisdiction has been recognized with regard to offenses committed by or against Indians

on a reservation, victimless crimes, by definition, involve no particularized injury to Indian persons or property and therefore, under the *McBratney* rationale, exclusive jurisdiction remains in the states.

We have carefully considered both of these thesis and, in our opinion, the correct view of the law fall somewhere between them. The *McBratney* rationale seems clearly to apply to victimless crimes so as, in the majority of cases, to oust federal jurisdiction. Where however, a particular offense poses a direct and immediate threat to Indian persons, property or specific tribal interests, federal jurisdiction continues to exist, just as is the case with regard to offenses traditionally regarded as having their victim an Indian person or property. While it has heretofore been assumed that as between the states and the United States, jurisdiction is either exclusively state or exclusively federal, we also believe that a good argument may be made for the proposition that even where federal jurisdiction is thus implicated, the states may nevertheless be regarded as retaining the power as independent sovereigns to punish non-Indian offenders charged with "victimless" offenses of this sort.

II. Section 1152 of title 18 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. . . .

Given its full sweep, this provision would require that federal law generally applicable on federal enclaves of various sorts would be equally applicable on Indian reservations. Thus, federal law with regard to certain defined crimes such as assault, 18 U.S.C. § 113, and arson, 18 U.S.C. § 81, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, which renders acts or omissions occurring in areas within federal jurisdiction federal offenses where they would otherwise be punishable under state law.

Notwithstanding the provision's broad terms, the Supreme Court has significantly narrowed § 1152's application. Thus, where a crime is committed on a reservation by a non-Indian, against another non-Indian, exclusive jurisdiction lies in the state absent treaty provisions to the contrary. *United States v. McBratney*, *supra*; *Draper v. United States*, 164 U.S. 240(1896). Subsequent cases have, for the most part, carefully repeated the precise McBratney formula -- non-Indian perpetrator and non-Indian victim -- and have not elaborated on whether the status of the defendant alone or his status in conjunction with the presence of a non-Indian victims is critical. However, the *McBratney* rule was given an added gloss by *New Yorker ex rel. Ray v. Martin*, 326 U.S. 496(1946). The Supreme Court in that case characterized its prior decisions as "standing for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding [18 U.S.C. § 1152]" 326 U.S. at 500. Summarily, in *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930), the Court spoke in the following broad terms: "[Indian reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within their limits, save that they can have only restricted application to the Indian wards." The Court's rationale thus appears to be rooted at least to some extent in basic notions of federalism.

It is, moreover, significant that the historical practice--insofar as we have found evidence on this matter--has been to regard *McBratney* as authority for the states' "victimless" offenses committed by non-Indians on Indian reservations. Examination of the limited available precedent provided by turn of the century state appellate court decision reveals that state jurisdiction was upheld with regard to non-Indian offenders charged with violating state fish and game laws while on an Indian reservation. *See Ex parte Crosby*, 38 Nev. 389, 149 P. 989(1915). An early Washington state case held that a non-Indian charged with the "victimless" crime of manufacturing liquor on an Indian reservation was also held to be properly within the jurisdiction of the state's courts. *See State v. Lindsey*, 133 Wash. 140, 233 P.327 (1925). State jurisdiction has also been upheld at least as to a woman regarded by the court as a non-Indian who had been charged with adultery; the charge against the other alleged participant on this consensual offense, an

Indian man, was dismissed as failing outside the court's jurisdiction. *See State v. Campbell*, 53 Minn. 354, 55 N.W. 553 (1893). More recent decisions, while not examining the question in depth, have upheld state jurisdiction as to possessory drug offenses, *State v. Jones*, 92 Nev. 116, 546 P.2d 235 (1976), and as to traffic offenses by non-Indian on Indian reservations, *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963).

At the same time as *McBratney* has been given such broad application, however, the courts have carefully recognized that federal jurisdiction is retained with regard to offenses against Indians. The Court in both *McBratney* and *Draper* was careful to limits its holdings to the precise facts presented, reserving the question whether state jurisdiction would also be found with regard to the "punishment of crimes committed by or against Indians, [and] the protection of the Indians in their improvements." *See* 104 U.S. at 624. Subsequent decisions have expressly recognized that where a crime is committed in Indian country by a non-Indian against the person or property of an Indian victim, federal jurisdiction will lie. *United States v. Chavez*, 290 U.S. 357 (1933)(theft); *United States v. Ramsey*, 271 U.S. 467 (1926) (murder); *Donnelly v. United States*, 228 U.S. 243 (1913)(murder). Insight concerning the significance of and reasoning behind this exception to *McBratney's* broad sweep is provided by *United States v. Bridleman*, 7 F. 894 (1881), a decision of the federal district court for Oregon. The case involved the theft, on the Umatilla reservation, of an Indian's blanket by a white man. Judge Deady, writing without the benefit of the *McBratney* decision decided the same year, upheld federal jurisdiction, reasoning that while the admission of Oregon into the Union in 1859 ousted general territorially-based jurisdiction previously asserted by the federal government, "the jurisdiction which arises out of the subject--the intercourse between the inhabitants of the state and the Indian tribes therein--remained as if no change had taken place in the relation of the territory to the general government." *Id.* at 899. He therefore concluded that to the extent that § 1152 provided for punishment or persons "for wrong or injury done to the person or property of an Indian, and *vice versa*," it remained in force. *Id.*

Bridleman and the numerous subsequent cases thus support the view that federal jurisdiction exists with regard to offenses committed by non-Indians on the reservation against the person or property of Indians.

The principle that tangible Indian interests--in the preservation of person and property--should be protected dates from the earliest days of the republic when it was embodied in the Trade and Intercourse Acts. To say that these tangible interests should be protected is not, however, necessarily to say that a generalized interest in peace and tranquility is sufficient to trigger continuing federal jurisdiction. *McBratney* itself belies that view since the commission of a murder on the reservation--a much more significant breach of the peace than simple vagrancy, drug possession, speeding, or public drunkenness--provided no basis for an assertion of federal jurisdiction. Indeed, as the reasoning of *Bridleman* suggests, it is necessary that a clear distinction be made between threats to an Indian person or property and mere disruption of a reservation's territorial space.

We therefore believe that a concrete particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) is necessary before federal jurisdiction can be said to attach. In the absence of a true victim, unless it can be said that the offense peculiarly affects an Indian or the Tribe itself, *McBratney* would control, leaving in the states the exclusive jurisdiction to punish offenders charged with "victimless" crimes. Thus, in our view, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim," and therefore to fall exclusively within state competence.

In certain cases, however, a sufficiently direct threat to Indian persons or property may be stated to bring an ordinarily "victimless" crime within federal jurisdiction. Certain categories of offenses may be identified that routinely involve this sort of threat to Indian interests. One such category would be crimes calculated to obstruct or corrupt the functioning of tribal government. Included in this category would be bribery of tribal officials in a situation where state law in broad terms prohibits bribery of public officials;

such an offense would cause direct injury to the Tribe and cannot therefore be regarded as truly "victimless." A second group of offenses that may directly implicate the Indian community are consensual crimes committed by non-Indian offenders in conjunction with Indian participants, where the Indian participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. Thus, federal jurisdiction will lie under 18 U.S.C. § 2032 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. § 13. A third group of offenses which may be punishable under the law of individual states and assimilated into federal law pursuant to the Assimilative Crimes Act would also seem intrinsically to involve the sort of threat that would cause federal jurisdiction to attach where an Indian victim may in fact be identified. Such crimes would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the Tribe.

In certain other cases, conduct which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school or in an obvious attempt to scatter Indians collected at a tribal gathering, and a breach of the peace that borders on an assault may in usual circumstances be seen to constitute a federal offense.

III. Whatever the contours of the area in which federal jurisdiction may be asserted, a final critical question remains to be considered: whether state authorities may also legally charge a non-Indian offender with commission of an offense against state law or whether federal jurisdiction, insofar as it attaches, is exclusive. This issue is an exceedingly difficult one and many courts, without carefully considering the question, have assumed that federal jurisdiction whenever it obtains is exclusive. We nevertheless believe that it is a matter which should not be regarded as settled before it has been fully explored by the courts. Although *McBratney* firmly establishes that state jurisdiction, where it attaches because of the absence of a clear Indian victim, is exclusive, we believe that, despite Supreme Court dicta to the contrary, it does not necessarily follow that, where an offense is stated against a non-Indian defendant under federal law, state jurisdiction must be ousted.

The exclusivity of federal jurisdiction vis-avis the states with regard to 18 U.S.C. § 1153, the Major Crimes Act, has been recognized, *see, e.g.*, *Seymour v. Superintendent*, 368 U.S. 351 (1962), but has only formally been addressed and decided in the last year. *See United States v. John*, 98 S. Ct 2547, 2550 (1978). The Court in *John* relied on notions of preemption and the slight evidence provided by the legislative history of this provision to reach a result that had long been assumed by the lower courts.

Section 1152 has likewise been viewed as ousting state jurisdiction where Indian defendants are involved. Supreme Court dicta, moreover, suggest that federal jurisdiction may similarly be exclusive where offenses by non-Indians against Indians within the terms of § 1152 are concerned. Square holdings to this effect are, however, rare. The Supreme Court of North Dakota has held that state jurisdiction is ousted where federal jurisdiction under § 1152 is seen to exist in cases where non-Indians have committed offenses against Indians on the reservations. At least, three other earlier cases suggest a contrary result, however, recognizing that, as in *McBratney*, the states have a continuing interest in the prosecution of offenders against state law even while federal prosecution may at the same time be warranted.

Although it would mean that § 1152 could not be uniformly applied to provide for exclusive federal jurisdiction in all cases of interracial crimes, a conclusion that both federal and state jurisdiction may lie where conduct on a reservation by a non-Indian which presents a direct and immediate threat to an Indian person or property constitutes an offense against the laws of each sovereign could not be criticized as inconsistent or anomalous. Section 1153 was enacted many years after § 1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no state

jurisdiction over such crimes was contemplated. Consistent with this purpose, § 1152 may properly be read to preempt state attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The state interest in such cases, as recognized by *McBratney* is strong. Section 1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian, federal jurisdiction is to be exercised only where the offender is not prosecuted in his own tribal courts. But in no event would the state courts have jurisdiction in such a case absent a separate grant of jurisdiction such as that provided by Public Law No. 280. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the federal interest is not to preempt the state courts, but only to retain authority to prosecute to the extent that state proceedings do not serve the federal interest.

This result follows from the preemption analysis set forth in *Williams v. Lee*, where the court recognized that, in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect Indian interests in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under state law for conduct occurring in the reservation, no equivalent damage would be done if state as well as federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other federal enclaves. It is generally recognized that a state may condition its consent to a cession of land involving government purchase or condemnation by reserving jurisdiction to the extent consistent with the federal use. *Kleppee v. New Mexico*, 426 U.S. 529, 540 (1976); *Paul v. United States*, 371 U.S. 245, 265 (1963). Although Indian reservations are in many respects unique insofar as they in most cases existed prior to statehood rather than arising as a result of a cession agreement or condemnation proceedings, an analogy may nevertheless serve.

Since, in most cases, states may retain concurrent jurisdiction except to the extent that would interfere with the federal use, they may do so here as well by prosecuting non-Indian offenders while federal jurisdiction at the same time remains as needed to protect Indian victims in the event that a state prosecution is not undertaken or is not prosecuted in good faith. For these reasons, therefore, we believe that a strong possibility exists that prosecution may be commenced under state law against a non-Indian even in cases where, as a result of conduct on the reservation which represents a direct and immediate threat against an Indian person or property, federal jurisdiction may also attach.

IV. CONCLUSION

In sum, although we understand that in many cases commission by non-Indians of crimes traditionally regarded as victimless touches in a significant way upon the peace and tranquility of Indian communities, as a general rule we believe that such offenders fall within the exclusive jurisdiction of state courts. A more limited class of crimes involving direct injury to Indian interests should, however, be recognized as having Indian victims--whether the Tribe itself, an Indian who falls within the class of persons to whom certain statutes are particularly designed to afford protection, or an individual Indian or group of Indians who are victimized by conduct which either as a matter of law or as a matter of fact constitutes a direct and immediate threat to their safety. In such cases, federal law enforcement officers may properly prosecute non-Indian offenders in the federal courts. We also believe that despite the common understanding that jurisdiction over crimes on Indian reservations is either exclusively state, or exclusively federal, a substantial case can be made for the proposition that the states are not ousted from jurisdiction with regard to offenses committed by non-Indian offenders which pose a direct and substantial threat to Indian victims but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable state law as well.

686 Who is an "Indian"?

The status of the defendant or victim as an Indian is a material element in most Indian country offense prosecutions. The issue is generally not contested, but occasionally a serious question may be posed. When substantial doubt exists as to whether the defendant is an Indian, indictment can be sought under both 18 U.S.C. §§ 1152 and 1153, provided, of course, that the other conditions for indictment under those statutes are present. *See United States v. Driver*, 755 F. Supp. 885 (D.S.D.), *aff'd*, 945 F.2d 1410 (8th Cir. 1991).

To be considered an Indian, one generally has to have both "a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes. *See, e.g.*, *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846); *United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979). *See also United States v. Driver*, 755 F. Supp. 885 (D.S.D.), *aff'd*, 945 F.2d 1410 (8th Cir. 1991). A threshold test, however, is whether the tribe with which affiliation is asserted is a federally acknowledged tribe. *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993)(member of a tribe that had never been "acknowledged" or "recognized" by the federal government, was properly prosecuted in state court as a non-Indian for an assault upon a non-Indian on the Blackfoot Reservation). Federal acknowledgment or recognition of a tribe is a "prerequisite to . . . [federal] protection, services and benefits . . . immunities and privileges . . . responsibilities and obligations." 25 CFR § 83.2. Lists of acknowledged tribes are periodically published in the Federal Record by the Secretary of the Interior pursuant to the mandate of 25 CFR § 83.6(b). *See* 53 Fed. Reg. 52829 (December 29, 1988). Although a few tribes have been recognized since publication of this list, "it appears to be the best source to identify acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993). The Bureau of Indian Affairs (BIA) can identify currently recognized tribes and provide testimony on that issue.

Tribal membership can generally be established through BIA or tribal records. Enrollment "has not been held to be an absolute requirement for federal jurisdiction." *United States v. Antelope*, 430 U.S. 641, 647 n. 7 (1977). It is, however, "the common evidentiary means of establishing Indian status, but it is not the only means, nor is it necessarily determinative." *United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979).

Canadian tribes are not federally acknowledged and it has been held that their members are not to be treated as Indians, either as perpetrators or victims, under 18 U.S.C. §§ 1152 or 1153. *See United States v. Dennis*, No. CR91-99WD (W.D. Wash. June 21, 1991)(dismissing case against a Canadian Nootka charged with stabbing his Lummi wife on the Lummi Reservation where they both resided.) Dennis had previously secured dismissal of his case in state court on the basis of his status as an Indian. The state's effort to reprosecute was thwarted by the Washington Court of Appeals holding that reprosecution was barred by the state's failure to appeal the dismissal. *Washington v. Dennis*, No. 29131-9-1 (Wash.Ct.App. Dec. 7, 1992), 20 ILR 5009.

The termination of federal recognition of a tribe similarly deprives its members of Indian status for purposes of prosecution for offenses committed in Indian country. *See United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988).

The requirement that an Indian be a member or affiliate of a federally recognized tribe is grounded in the doctrine that providing benefits to Indians or imposing obligations upon them is legitimate only when based upon the governmental relationship between the federal government and the tribes, so that the difference in treatment is not race-based but arises from "political status." *See United States v. Antelope*, 430 U.S. 641

687 Tribal Court Jurisdiction

As an incident of sovereignty, Indian tribes are empowered to create tribal courts. For many years their sentencing powers were limited to a maximum of imprisonment for a term of six months, fines of up to $500 or both. These limits were increased in 1986 by Pub.L. 99-570 to imprisonment for a term of one year, a fine of $5,000, or both. 25 U.S.C. § 1302(7).

The Supreme Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S 191 (1978), that the tribes lost authority to try non-Indians when they became dependents of the United States. The Court extended this disability to prosecution of Indians who were non-members of the tribe in *Duro v. Reina*, 495 U.S. 676 (1990). Congress promptly overruled *Duro* by temporary legislation which was subsequently replaced by permanent legislation. *See* 25 U.S.C. § 1301(2) and (4). It has been held that tribal court jurisdiction is not preempted by 18 U.S.C. § 1153. *See Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995). It has also been held that 18 U.S.C. § 1162 does not deprive tribal courts of jurisdiction. *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990).

The Secretary of the Interior is authorized to promulgate a law and order code and to establish Courts of Indian Offenses, "CFR Courts," with powers and limitations similar to those of a tribal court, where necessary. *See* 25 U.S.C. §§ 1301(3), 1311; 25 C.F.R. 11. Whether the Double Jeopardy Clause precludes federal prosecution after prosecution in a CFR Court remains an open question. *See United States v. Wheeler*, 435 U.S. 313, 327 n. 26 (1978).

---

685 Exclusive Federal Jurisdiction Over Offenses by Non-Indians Against Indians

As noted in this Manual at 678, jurisdiction over offenses committed by non-Indians against non-Indians are within the exclusive jurisdiction of the states. *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896). Non-Indians are immune from tribal court jurisdiction. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Except for those exempted by *McBratney*, the Federal government has jurisdiction over non-Indian offenders. 18 U.S.C. § 1152. Despite some Supreme Court dicta (and state and federal district court holdings) to the contrary, it was the Department's opinion that federal jurisdiction was not exclusive of state jurisdiction. *See* Office of Legal Counsel Memorandum, dated March 21, 1979, reprinted at 6 ILR K-15, 1820 (August 1979). This is no longer the case in as much as the Solicitor General has taken the position that federal jurisdiction is exclusive in an amicus brief recommending that certiorari be denied in *Arizona v. Flint*, 492 U.S. 911 (1989). Concurrent state jurisdiction has, moreover, been rejected by the appellate courts of four states with substantial expenses of Indian country within their borders. *See State v. Larson*, 455 N.W.2d 600 (S. Ct. S.D. 1990); *State v. Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct.App. Az. 1988), *cert. denied*, 492 U.S. 911 (1989); *State v. Greenwalt*, 204 Mont. 196, 663 P.2d 1178 (S. Ct. Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531 (S. Ct. N.D. 1954).

United States Attorneys have, therefore, a very important role to play in reacting to crimes by non-Indians against Indians. It is their responsibility to make sure that the tribal community is protected from crimes by persons over whom neither the tribe nor the state has jurisdiction.

(1977); *Morton v. Mancari*, 417 U.S. 535 (1974).

688 State Jurisdiction

Except for non-Indian against non-Indian offenses falling under the rule of *McBratney*, 104 U.S. 621 (1882), States have no criminal jurisdiction in the Indian country unless expressly conferred by an act of Congress. *See* this Manual at 678.

A number of states have been given criminal jurisdiction over all or some of the reservations within their borders by Public Law 280 (1953), now codified at 18 U.S.C. § 1162(a). On those reservations neither 18 U.S.C. §§ 1152 nor 1153 apply. 18 U.S.C. § 1162(c).

Other states, *e.g.*, Kansas, Iowa, and New York, acquired jurisdiction by other enactments. 18 U.S.C. § 3243 (Kansas), Pub.L. 80-846 (Iowa), and 25 U.S.C. § 232 (New York). The law is now settled that those states have plenary jurisdiction but that jurisdiction under 18 U.S.C. §§ 1152 and 1153 may be exercised concurrently by the federal government. *Negonsott v. Samuels*, 507 U.S. 99 (1993); *United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir.), *cert. denied*, *sub nom. Tarbell v. United States*, 500 U.S. 941 (1991). The same has been held true for the so-called "option states" -- those which assumed jurisdiction pursuant to Public Law 280 after its enactment -- since § 1162(c) refers only to the so-called "mandatory states" listed in § 1162(a). *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990). Many option states assumed less than plenary criminal jurisdiction. *See, e.g.*, *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S 463 (1979). Whatever the degree of cession of authority to the state, the reservations remain "Indian country" for most purposes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

The Supreme Court has held that the cession of criminal (and civil) jurisdiction by Public Law 280 did not authorize the state to apply its tax or other "regulatory" laws in Indian country. *Bryan v. Itasca County*, 426 U.S. 373 (1976). The distinction is drawn between criminal/prohibitory laws which prohibit and punish conduct offensive to a state's public policy, and those which are civil/regulatory, where the conduct is regulated and enforced by criminal penalties. The latter may not be enforced by a Public Law 280 state in Indian country. *Bryan v. Itasca County* was followed in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (California bingo laws are regulatory and unenforceable). By virtue of the same analysis, such regulatory statutes may also not be enforceable through 18 U.S.C. § 1152 and the Assimilative Crimes Act on federal reservations. *See Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (1993)(California fireworks laws are criminal and state may enforce); *St. Germaine v. Circuit Court for Vilas County*, 938 F.2d 75 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1704 (1992)(Wisconsin multiple offender vehicle law is criminal and may be enforced by state); *Confederated Tribes of the Colville Res. v. Washington*, 938 F.2d 146 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1704 (1992)(Washington's decriminalized vehicle code is unenforceable); *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977)(Washington fireworks laws are criminal and United States may enforce); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987) (Secretary of the Interior justifiably withheld approval of dog track where track operation would violate the Assimilative Crimes Act since dog racing was criminally prohibited by New Mexico).

690 Embezzlement and Theft from Tribal Organization

Section 1163 of Title 18 makes embezzlement, theft, criminal conversion, and wilful misapplication of funds belonging to a tribal organization a crime. It is a felony if the amount taken exceeds $100, and is subject to imprisonment for a maximum of 5 years, a fine pursuant to 18 U.S.C. § 3571, or both. If less than $100 is involved, the maximum penalty is one year, and/or a fine under 18 U.S.C. § 3571. This statute applies to both Indians and non-Indians, and need not be committed in Indian country. The second paragraph of 18 U.S.C. § 1152 does not shield an Indian who has committed the offense on a reservation. *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992); *United States v. McGrady*, 508 F.2d 13 (8th Cir.), *cert. denied*, 420 U.S. 797 (1975). Neither is tribal sovereignty a shield against a grand jury investigation and subpoena. *See United States v. Boggs*, 439 F. Supp. 1050 (D.Mont. 1980). In addition, 18 U.S.C. § 666, which proscribes theft and embezzlement of more than $5000 from federally funded governmental and nongovernmental organizations by their agents, and bribery of, or acceptance of bribes by, their officials, was amended on November 10, 1986, to cover Indian tribes, overruling the decision in *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986).

---

691 Indian Gaming

A. Introduction

In 1981, the Fifth Circuit ruled that Florida, a "Public Law 280 state," could not enforce its bingo laws--which restricted bingo to licensed charitable gaming with severe hour and pot limits--against the high-stakes bingo operations of the Seminole Tribe, because they were "civil/regulatory" laws. For several years the Congress labored to come up with legislation that would accommodate the conflicting interests of law enforcement agencies, opponents of Indian gaming, champions of tribal sovereignty, and those who saw gaming as a solution to the enormous economic problems of the Indian tribes. It ultimately enacted the Indian Gaming Regulatory Act (IGRA) in October 1988. Shortly before enactment of the IGRA, the Supreme Court, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), upheld a decision of the Ninth Circuit, in accord with the decision of the Fifth Circuit's decision in the Seminole bingo case, distinguishing between criminal and regulatory laws. To a significant extent the IGRA embraces the *Cabazon* rationale. The regulatory provisions of the IGRA are codified at 25 U.S.C. § 2701 *et seq.*, and the criminal provisions at 18 U.S.C. §§ 1166-1168. Section 1166 assimilates all state gaming laws, including regulatory laws, into federal law, and vests "exclusive jurisdiction" in the United States. Sections 1167 and 1168 create new theft and embezzlement offenses.

The congressional findings and policies explicitly set forth in the IGRA and implicit in its regulatory scheme are strongly supportive of the Indian tribes' right as governments to raise badly needed revenue through gaming, while recognizing the need for regulation to prevent infiltration by organized crime.

The IGRA divides gaming into three classes subject to differing regulatory controls. Class 1, primarily social gaming, is left to the exclusive jurisdiction of the Indian tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class 11, include in bingo and a few other games, e.g., pulltabs and punchboards, may be conducted under tribal regulation pursuant to tribal ordinance approved by the chairman of the National Indian Gaming Commission (NIGC) and under Commission oversight. 25 U.S.C. §§ 2703(7)(A), 2710(a)(2), (b) and (c). Class III gaming, consisting of all other forms of gaming, notably slot and video machines and banking card games, such as blackjack, may be conducted only if the chairman of the NIGC approves the authorizing tribal ordinance and the tribe negotiates a compact with the state which gains the approval of the Secretary of the Interior. 25 U.S.C. §§ 2703(8), 2710(d)(1). This trifurcated compromise recognized that most states allowed bingo and that several Indian tribes had successfully conducted high stakes bingo operations, while neither the tribes nor the federal government had the expertise to regulate more sophisticated forms of gaming allowed in some states.

B. Criminal Enforcement of the IGRA

1. Gaming Offenses

Section 1166(a) assimilates all state gaming laws, including regulatory laws, into federal law, and vests "exclusive jurisdiction" in the United States. 18 U.S.C. § 1166(d). In other words, any gaming in Indian country--tribal or otherwise--which is not in accord with state law, whether characterized as "criminal/prohibitory" or "civil/regulatory," is a federal crime unless it is conducted in accordance with the prescriptions of the IGRA. This means that: Class I, II and III gaming must comport with tribal law; Class II gaming must also comport with NIGC regulations; and Class III must, in addition, comport with a valid compact of the state and tribe. Familiarity with

state gaming laws is therefore essential when investigating violations of this statute.

Several courts have held that states that have criminal jurisdiction under Public Law 280 or similar legislation have lost that jurisdiction with respect to criminal gaming offenses because Sec. 1168(d) says that the "United States shall have exclusive jurisdiction." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994); *Rhode Island v. Narragansett Tribe*, 19 F.3d 685 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 298 (1994); *Lac du Flambeau Band of Lk. Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D.Wis. 1990), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992).

2. Theft and embezzlement offenses

Section 1167(a) punishes stealing $1,000 or less from an operation run by or licensed by a tribe with the concurrence of the Commission by a maximum of a year's imprisonment, a $100,0000 fine, or both. Subsection (b) increases the maximum penalties to 10 years, $250,000, or both, if the theft is of more than $1,000.

Section 1168 provides that where the perpetrator is an officer, employee or licensee of the gaming establishment, the maximum penalty is five years, a fine of $250,000, or both, for taking $1,000 or less; and a maximum of 20 years, and/or a fine of $1,000,000, if more than $1,000 is embezzled.