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CRIMINAL JURISDICTION IN MONTANA INDIAN COUNTRY

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I. INTRODUCTION

Criminal jurisdiction in Montana Indian country derives from an allocation of authority among federal, state, and tribal courts.[1] The allocation of authority in particular cases depends, in general, upon three factors: the subject matter of the crime, the persons involved in the crime, and the locus of the crime.[2] The basic limits of criminal jurisdiction in Indian country have been defined, but subtle ambiguities remain. These ambiguities vary among the federal circuit courts. For example, the term "Indian" generally defines a person who has some Indian blood, and is also regarded as an Indian by his community.[3] However, the First Circuit Court of Appeals held that for federal jurisdictional purposes, not only must the individual be regarded as an Indian by his community, but the person must also be considered a member of a federally-recognized tribe.[4] In contrast, the Ninth Circuit Court of Appeals held that an individual need not be formally enrolled in a recognized tribe to be regarded as an Indian for federal jurisdictional purposes.[5]

The definition of "Indian country" also lacks precision. For purposes of criminal jurisdiction,

> [T]he term "Indian country," means (a) all land within the limits

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1. This comment does not apply to Indian country over which the state has taken criminal jurisdiction pursuant to Pub. L. No. 280, 18 U.S.C. § 1162 (1968). In Montana, Pub. L. No. 280 affects only the Flathead Indian Reservation, which is specifically covered by MONT. CODE ANN. § 2-1-301 (1985), "The State of Montana hereby obligates and binds itself to assume . . . criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation . . . ." The agreement reached by Montana and the Flathead Tribe provides for concurrent Montana and tribal jurisdiction in criminal matters, in the Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, ch. 1, § 2(3)(4). Note, however, that the United States has retained jurisdiction to punish a member of the Flathead Reservation, who passed a forged check to a non-Indian while on the Fort Peck Indian Reservation, in United States v. Burland, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971).

2. UNITED STATES ATTORNEYS' MANUAL, ch. 20, at 12 (1984). The author wishes to thank both Pete Dunbar, U.S. Attorney for Montana, and Marge Brown, Acting Dean of the University of Montana Law School, for their valuable assistance.

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2, 19 (1982). See also Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) for a comprehensive overview of this topic.

4. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979).

5. United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859 (1979).

> of any Indian reservation under the jurisdiction of the United States government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof . . . (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[6]

Montana Indian country typically includes all land within reservation boundaries[7] and Indian allotments beyond reservation boundaries which are still in a trust status.[8]

Within Indian country, subject matter jurisdiction of federal, state, and tribal courts hinges on a circuit's interpretation of the nature of the crime[9] and whether the persons involved are Indian.[10] Crimes with a locus in Montana Indian country, whether major or non-major,[11] can be separated into six classifications:

(a) Indian Offender, Indian Victim
(b) Indian Offender, Non-Indian Victim
(c) Indian Offender, Victimless Crime
(d) Non-Indian Offender, Indian Victim
(e) Non-Indian Offender, Non-Indian Victim
(f) Non-Indian Offender, Victimless Crime

This comment focuses strictly on criminal case law from Montana, the Ninth Circuit, and the United States Supreme Court. It serves as a quick reference tool for determining criminal jurisdiction in Montana Indian country.

II. INDIAN OFFENDER, INDIAN VICTIM

Shortly after the American Revolution, Congress extended federal jurisdiction to non-Indians committing crimes against Indians in Indian territory, as part of the overall federal policy of providing a buffer between non-Indian and Indian populations.[12] In 1817, Congress passed the first version of the Federal Enclaves Act, which extended federal jurisdiction to cover crimes by both Indians and non-Indians in Indian country, with the key exception of

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6. 18 U.S.C. § 1151 (1949).

7. United States v. John, 437 U.S. 634 (1978). *See also* State ex rel. Irvine v. District Court, 125 Mont. 398, 413, 239 P.2d 272, 280 (1951) (all land within limits of any organized and supervised Indian reservation is "Indian Country," including patented land and rights-of-way running through reservation).

8. United States v. Ramsey, 271 U.S. 467, 471 (1926).

9. W. CANBY, AMERICAN INDIAN LAW 89 (1981).

10. UNITED STATES ATTORNEYS' MANUAL, ch. 20, at 14.

11. 18 U.S.C. § 1153 (1984).

12. 1 Stat. 138 (1790), 1 Stat. 743 (1799), 2 Stat. 139 (1802).

crimes by Indians against Indians.[13] Under the Enclaves Act, "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 shall extend to the Indian country."[14]

A broad exception to exclusive federal jurisdiction exists in section two of the Enclaves Act:

> [The Act] shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[15]

Until Congress enacted the Major Crimes Act in 1885, the exception in the Enclaves Act covered all offenses by Indians against Indians in Indian country, as made clear in a renowned case in 1883. Citing the Enclaves Act, the Supreme Court reversed a federal court conviction of an Indian for the murder of another Indian.[16] The Court in *Ex Parte Crow Dog*[17] held that federal courts had no jurisdiction over the crimes by an Indian offender against an Indian victim in Indian country. Congress quickly reacted to *Crow Dog* by passing the Major Crimes Act, which created federal jurisdiction over seven crimes (including murder) committed by Indians in Indian country, whether the victims were Indian or non-Indian.[18] Subsequent amendments have expanded the number of major crimes to sixteen:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.[19]

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13. 18 U.S.C. § 1152 (1948).
14. *Id.*
15. *Id.*
16. *Ex parte* Crow Dog, 109 U.S. 556 (1883).
17. *Id.* at 572.
18. 18 U.S.C. § 1153 (1984).
19. *Id.*

Incest, burglary, and involuntary sodomy remain the only enumerated crimes undefined by federal law, so applicable state law defines these three crimes.[20]

Under the Major Crimes Act, federal courts have jurisdiction of offenses named in the Act when committed by an Indian against the person or property of another Indian or other person in Indian country.[21] Legislative history indicates that Congress incorporated the words "or other persons" in the 1885 Major Crimes Act to make certain that Indians could be prosecuted in federal court.[22]

The following year, the United States Supreme Court approved of this federal extension into tribal affairs in *United States v. Kagama*.[23] Nearly a century later, in *United States v. Antelope*, the Court precisely reaffirmed the *Kagama* rule, and held that the Major Crimes Act grants jurisdiction to federal courts over Indians who commit any of the listed major offenses, regardless of whether the victim is also an Indian.[24] Similarly, in *State ex rel. Bokas v. District Court*,[25] the Montana Supreme Court discussed the Major Crimes Act. The *Bokas* court held that an Indian ward, while residing on and within the exterior boundaries of his Indian reservation, is under the exclusive jurisdiction of the federal government in regard to all crimes recognized and made applicable to Indian country by Congress.[26] Procedurally, Indian offenders prosecuted under the Major Crimes Act "shall be tried in the same courts, and in the same manner, as are all other persons committing such offenses within the exclusive jurisdiction of the United States."[27]

However, the United States Supreme Court held that the double jeopardy clause does not bar successive prosecutions in federal and tribal courts for violations of the Major Crimes Act and tribal law, in *United States v. Wheeler*.[28] The Court noted that the

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20. "As used in this section, the offenses of burglary, involuntary sodomy, and incest shall be defined and punished in accordance with the laws of the State in which each offense was committed . . . ." 18 U.S.C. § 1153.

21. *Id.*

22. 48th Cong., 2d Sess., 16 CONG. REC. 934 (1885).

23. 118 U.S. 375 (1886).

24. 430 U.S. 641, 649 (1977).

25. 128 Mont. 37, 270 P.2d 396 (1954).

26. *Id.* at 41, 270 P.2d at 398.

27. 18 U.S.C. § 3242 (1976). Note, Keeble v. United States, 412 U.S. 205, 216 (1973) (an Indian defendant, charged with a major crime under the Major Crimes Act, could request and receive an instruction on a lesser included offense not enumerated in that section, even though the defendant could not have been charged with such an offense in the first instance). Note also, United States v. Bowman, 679 F.2d 798 (9th Cir.), *cert. denied*, 459 U.S. 1210 (1983) (a federal court has jurisdiction to impose sentence upon an Indian offender for a lesser included offense).

28. 435 U.S. 313 (1978).

Major Crimes Act is a "carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land."[29] The *Wheeler* Court reasoned that the dependent status of Indian tribes within the territorial jurisdiction of the United States was not necessarily inconsistent with the sovereign power of a tribe to prosecute its members for tribal offenses.[30] The *Wheeler* Court also stated that the second section of the Enclaves Act specifically provides that the Enclaves Act does not extend to an Indian "who has been punished by the local law of the tribe."[31] Therefore, the Court affirmed exclusive tribal court jurisdiction for non-major crimes committed by Indians against Indians in Indian country.[32]

The Ninth Circuit Court of Appeals followed the *Wheeler* rule in *United States v. Jackson*.[33] The court held that, except for specific offenses under the Major Crimes Act, the tribal court has jurisdiction over all crimes committed by member Indians against other Indians within Indian country.[34] In addition, the court in *United States v. Johnson*[35] held, "[E]xcept for the crimes specifically enumerated in [The Major Crimes Act], the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country."[36] Previously, in *Ortiz-Barraza v. United States*,[37] the Ninth Circuit Court of Appeals had reasoned that the power to create and administer a criminal justice system is intrinsic to the sovereignty of an Indian tribe. The tribe may exercise complete criminal jurisdiction over its members, within the limits of the reservation, subordinate only to the expressed limitations of federal law.[38] For

29. *Id.* at 325 n.22 (citing United States v. Antelope, 430 U.S. 641, 643 n.1 *on remand*, 555 F.2d 1376, 1378 (9th Cir. 1977).

30. *Id.* at 324. Note, the *Wheeler* Court did not resolve whether the "dual sovereignty" ruling would apply to courts of Indian offenses, which are governed by federal government regulations rather than tribal law. *Id.* at 327 n.26. Note also, the U.S. Attorney recommends no federal prosecution following a tribal prosecution, unless "substantial federal interests were left unvindicated." UNITED STATES ATTORNEY'S MANUAL, ch. 20, at 15.

31. *Wheeler*, 435 U.S. at 326.

32. *Id.* at 332. Note, *Wheeler* overturned Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) which held that although Indian tribal courts have considerable jurisdiction over matters occurring on the reservation, including criminal offenses against Indians, the tribal courts in the Fort Belknap Indian community function as arms of the federal government, and the federal government maintains partial control over them.

33. 600 F.2d 1283 (9th Cir. 1979).

34. *Id.* at 1286. *See also Antelope*, 430 U.S. 641.

35. 637 F.2d 1224 (9th Cir. 1980)

36. *Id.* at 1231.

37. 512 F.2d 1176 (9th Cir. 1975).

38. *Id.* at 1179. This holding is in harmony with the language in *Wheeler*: 435 U.S. at 326-27,

example, the Indian Civil Rights Act of 1968 limits the penalties of tribal courts to sentences not exceeding six months' imprisonment or a $500 fine or both.[39] The Ninth Circuit Court, in *Tom v. Sutton*[40] held the guarantees of due process and equal protection under the Indian Civil Rights Act should be applied flexibly and adapted to the tribal context.

A question remains, however, regarding a tribal court's jurisdiction over *non-member* Indians. *Wheeler* repeatedly referred to the tribe's jurisdiction over *members*. Prior to *Wheeler*, tribal courts routinely assumed jurisdiction over both member and non-member Indians, because the federal statutes do not differentiate between them.[41] Upon their incorporation into the United States and their acceptance of its protection, the tribes necessarily lost some aspects of their sovereignty. In *Wheeler*, the areas in which implicit divestiture of sovereignty occur involve the relations between an Indian tribe and non-members of the tribe.[42] By its continual reference to members only, *Wheeler* may stand for a narrowing of tribal criminal jurisdiction. The jurisdictional distinction between member and non-member Indians is currently before the Ninth Circuit Court in *Duro v. Reina*.[43] In *Duro*, an Arizona federal district court ruled that the assertion of criminal jurisdiction by the Salt River Indian Community over non-member Indians violates the equal protection and due process provisions of the Indian Civil Rights Act.[44] The Ninth Circuit's decision in *Duro* may help clarify the member/non-member jurisdictional issue.

In summary, if crimes by an Indian against another Indian in Montana Indian country violate both the Major Crimes Act and tribal law, then federal jurisdiction remains primary although concurrent with tribal jurisdiction, under the *Wheeler* rule. For all other crimes by an Indian against another Indian in Montana Indian country, tribal jurisdiction is exclusive under the Enclaves Act.

> the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.

39. 25 U.S.C. § 1302(7) (1968).

40. 533 F.2d 1101, 1104 n.5 (9th Cir. 1976). Note Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (habeas corpus is the sole remedy in federal court for violations of the Indian Civil Rights Act).

41. W. CANBY, *supra* note 10, at 90.

42. *Wheeler*, 435 U.S. at 327.

43. No. 85-1718 (9th Cir. 1986).

44. *Id.*

III. INDIAN OFFENDER, NON-INDIAN VICTIM

Although the scheme of criminal jurisdiction under the Enclaves Act and Major Crimes Act seems complex in origin, it is rational in light of its historical settings because substantial non-Indian populations live on many Indian reservations.[45] In *United States v. John*,[46] the Court stated that the Major Crimes Act provides a federal forum for the prosecution of Indians charged with major crimes. This forum is necessary precisely because no state jurisdiction over such crimes was contemplated in the early Trade and Intercourse Acts and the Enclaves Act.[47] In *United States v. Antelope*,[48] the Court upheld the constitutionality of the Major Crimes Act and the Enclaves Act by rejecting an equal protection challenge to the Major Crimes Act. The *Antelope* Court stated that federal prosecution of an Indian under a theory of felony-murder, for the murder of a non-Indian on an Idaho reservation, did not violate the Constitution.[49] The Court reasoned that the Major Crimes Act, like all federal regulation of Indian affairs, is rooted in the unique status of Indians as a "separate people" with their own political institutions. Federal regulation of Indian tribes is governance of once-sovereign political communities, and is not to be viewed as impermissible legislation of a racial group consisting of Indians.[50] The Montana Supreme Court, in *State ex rel. Irvine v. District Court*,[51] has also held that exclusive jurisdiction lies in federal courts for Indian violations of the Major Crimes Act.

Similarly, the Ninth Circuit Court of Appeals has repeatedly held that federal courts have exclusive jurisdiction over Indians committing crimes in Indian country in violation of the Major Crimes Act. In *Henry v. United States*,[52] the court stated that the Major Crimes Act should control to the exclusion of the Enclaves Act where a non-Indian is the victim of a major crime by an Indian. Later, in *United States v. Broncheau*,[53] the court stated that Congress, in exercise of its plenary power, had deprived Indian tribal courts of exclusive jurisdiction over offenses covered by the Major Crimes Act. Thus, the United States District Court had ju-

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45. UNITED STATES ATTORNEYS' MANUAL, ch. 20, at 14.
46. 437 U.S. 634.
47. *Id.* at 651.
48. 430 U.S. 641.
49. *Id.* at 649.
50. *Id.* at 646.
51. 125 Mont. 398, 239 P.2d 272.
52. 432 F.2d 114 (9th Cir.), *modified*, 434 F.2d 1283 (9th Cir.), *cert. denied*, 400 U.S. 1011 (1971).
53. 597 F.2d 1260 (9th Cir. 1979).

risdiction to try an Indian defendant charged with an offense against a non-Indian under the Major Crimes Act.[54] Again, in *United States v. Johnson*,[55] the court held that crimes subject to federal jurisdiction under the Major Crimes Act include Indian against non-Indian crimes.[56]

As noted earlier, federal courts have jurisdiction over all crimes in Indian country governed by the general laws of the United States, under the Enclaves Act.[57] The Enclaves Act imports into Indian country the entire body of federal criminal law, both specific federal statute and general law related to criminal law.[58] The most important general law of the United States extended into Indian country is the Assimilative Crimes Act,[59] which applies to offenses involving Indians against non-Indians. The Assimilative Crimes Act borrows state criminal law and applies it through the Enclaves Act to Indian country.[60] Therefore, an Indian who commits a non-major crime against a non-Indian might be charged under the Enclaves Act with a violation of the Assimilative Crimes Act, but the crime would be defined and the sentence prescribed by state law.[61] In *Williams v. United States*,[62] the Supreme Court held that both the Enclaves Act and the Assimilative Crimes Act apply to offenses committed in Indian country by an Indian against a non-Indian. State law is assimilated only when no "enactment of Congress" covers the conduct.[63]

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54. *Id.* at 1265.

55. 637 F.2d 1224, 1231 (9th Cir. 1980).

56. Note Petition of Carmen, 270 F.2d 809 (9th Cir. 1958), *cert. denied*, 361 U.S. 934, *reh'g denied*, 361 U.S. 973 (1959) (an Indian shall be subject to the same laws and penalties and tried in the same courts as persons committing the same crimes within exclusive federal jurisdiction).

57. 18 U.S.C. § 1152: "[T]he 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."

58. W. CANBY, *supra* note 9, at 108.

59. 18 U.S.C. § 13 (1984) provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory or Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The referred section 7 provides, "[T]erritorial jurisdiction of the United States, as used in this title, includes: . . . (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . ."

60. W. CANBY, *supra* note 9, at 109-10.

61. *Id.*

62. 327 U.S. 711 (1946).

63. *Id.* at 717.

The Ninth Circuit Court echoed *Williams* in a Montana case, *United States v. Burland*.[64] In *Burland*, the court held that under the Enclaves Act and the Assimilative Crimes Act, federal prosecutions of non-major crimes by Indians against non-Indians, enforce federal law. The prosecutions incorporate by reference the details of state law into the federal charges.[65]

In summary, if an Indian commits a major crime against a non-Indian in Montana Indian country, then federal jurisdiction is primary under the Major Crimes Act. If the major crime also violates tribal law, then tribal jurisdiction is concurrent under the *Wheeler* rule. If the crime is non-major, federal jurisdiction is currently exclusive under the Enclaves Act, in conjunction with either a specific federal statute or the Assimilative Crimes Act.[66]

IV. Indian Offender, Victimless Crime

The first exception to the Enclaves Act has the effect of excluding from federal jurisdiction non-major crimes by Indians against Indians.[67] Similarly, victimless crimes committed by Indians in Indian country may be excluded if the crime is purely an internal tribal matter, subject to exclusive tribal jurisdiction.[68] The victimless crimes do not actually involve offenses against the person or property of either Indians or non-Indians. Rather, they typically involve crimes against public order and morals, such as traffic

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64. 441 F.2d 1199.

65. Note that a potential gap in federal jurisdiction exists under the exception for "any Indian committing any offense . . . who has been punished by the local law of the tribe." The issue remains unlitigated, but the exception may preclude subsequent federal prosecution for a non-major crime.

66. *Burland*, 441 F.2d at 1200. Note United States v. Smith, 574 F.2d 988 (9th Cir. 1978) (the court affirmed a conviction of an Indian for sodomy under state law through application of the Assimilative Crimes Act, despite the similarity of a federal statute). Note also, *In re* Little Light, 182 Mont. 52, 598 P.2d 572 (1979) (a Crow Indian was arrested by the State of Montana within the exterior boundaries of the Crow Reservation, for a state crime committed off the reservation. The court followed State *ex rel.* Old Elk v. District Court, 170 Mont. 208, 552 P.2d 1394, *dismissed*, 429 U.S. 1030 (1976), and held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest). See also High Pine v. Montana, 439 F.2d 1093, 1094 (9th Cir. 1971), where the court cited Frisbie v. Collins, 342 U.S. 519, 522 (1952): "The power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction."

67. 18 U.S.C. § 1152 provides that the Enclaves Act:

> shall not extend to offenses committed by one Indian against the person or property of another Indian, not to any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

68. W. Canby, *supra* note 10, at 111.

violations, prostitution, and gambling. However, if prosecution by the tribe is unreasonably delayed or inadequate, the federal courts will also consider prosecution.[69] The Ninth Circuit Court, in *United States v. Marcyes*[70] held that these federal prosecutions of victimless crimes may be based on the Enclaves Act and the Assimilative Crimes Act. The *Marcyes* rationale permits Enclaves Act-Assimilative Crimes Act jurisdiction where state law prohibits an activity as against public policy, as distinguished from state law which merely regulates an activity.[71] In *Donovan v. Coeur d'Alene Tribal Farm*,[72] the Ninth Circuit Court held that the tribal self-government exception to federal regulation excepts purely intramural matters, such as tribal membership and domestic relations, from the general rule which subjects Indian tribes to other applicable federal statutes.[73]

In summary, if an Indian commits a victimless crime in Montana Indian country, the tribal court has jurisdiction. If the tribe fails to prosecute, and the crime violates the Assimilative Crimes Act, then the federal court has concurrent jurisdiction under the Enclaves Act.

V. NON-INDIAN OFFENDER, INDIAN VICTIM

Crimes subject to federal jurisdiction under the Enclaves Act include non-Indian against Indian crimes.[74] In addition, federal jurisdiction is exclusive where offenses by non-Indians fall within the terms of the Act.[75] The Enclaves Act is the broadest jurisdictional statute for crimes committed in Indian country. It provides for prosecution of crimes by non-Indians against Indians and permits punishment of all crimes committed by non-Indians in Indian ter-

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69. UNITED STATES ATTORNEYS' MANUAL, at ch. 20, 16.

70. 557 F.2d 1361 (9th Cir. 1977).

71. For example, Montana *prohibits* some forms of gambling, such as slot machines, in MONT. CODE ANN. § 23-5-104 (1985); yet merely *regulates* other forms such as bingo, in MONT. CODE ANN. § 23-5-412 (1985).

72. 751 F.2d 1113 (9th Cir. 1985). Note United States v. Boggs, 493 F. Supp. 1050 (D. Mont. 1980) (tribal sovereignty is not a shield against a grand jury investigation and subpoena).

73. *Donovan*, 751 F.2d at 1117. *See also* United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1976) (a federal court had jurisdiction to try a tribal game warden for violation of a federal "felon in possession of a firearm" statute. The violation was committed by the Indian warden on the Fort Hall Indian Reservation, in the absence of any treaty right exempting the Indian from the operation of the statute).

74. United States v. Johnson, 637 F.2d at 1231 n.11. Note United States v. John, 437 U.S. at 651 (the Supreme Court established the exclusivity of federal jurisdiction with regard to the Major Crimes Act).

75. 18 U.S.C. § 1152.

ritory. In *Washington v. Yakima Indian Nation*,[76] the United States Supreme Court held that the Enclaves Act transfers into Indian country the entire body of criminal law applicable to areas under exclusive federal jurisdiction.

The Court strongly affirmed the exclusivity of federal jurisdiction over non-Indians committing offenses against Indians by ruling against a tribal court assertion of jurisdiction in *Oliphant v. Suquamish Indian Tribe*.[77] The Suquamish Indians had become dissatisfied with the federal law enforcement against non-Indians, and thus asserted tribal jurisdiction over non-Indian crimes, contending that such jurisdiction was inherent in tribal self-government. Although the Ninth Circuit Court agreed, the Supreme Court reversed.[78] It found this assertion inconsistent with the status of tribes as dependent nations. The Court expressed a century-old implicit conclusion which had been demonstrated by the shared presumption of Congress, the executive branch, and lower federal courts that tribal courts do not have the power to try non-Indians.[79] The *Oliphant* Court held that Indian tribes may not exercise both the powers of autonomous states expressly terminated by Congress and the powers inconsistent with their status.[80] Therefore, Indian tribal courts do not have inherent criminal jurisdiction over non-Indians, and may not assume such jurisdiction unless specifically authorized by Congress.[81]

A recent Montana Supreme Court case invoked the *Oliphant* rationale. In *State v. Greenwalt*,[82] the Montana Supreme Court held that Montana lost jurisdiction under the Enclaves Act when a non-Indian stole Indian livestock. The *Greenwalt* court also held that Montana lacks jurisdiction over crimes committed by non-Indians against Indians within the reservation, unless the enrolled Indians have accepted state jurisdiction.[83]

In summary federal jurisdiction is exclusive for crimes committed by non-Indian offenders against Indian victims in Montana

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76. 439 U.S. 463, 470 (1979). *See also* Williams v. United States, 327 U.S. 711, 714 (1946) (the United States had jurisdiction over the statutory rape of an Indian by a non-Indian on the Colorado River Indian Reservation via the Assimilative Crimes Act and Enclaves Act).

77. 435 U.S. 191, *on remand*, 573 F.2d 1137 (9th Cir. 1978).

78. *Id.* at 211.

79. *Id.* at 203.

80. *Id.* at 212.

81. *Id.* at 213.

82. ___ Mont. ___, 663 P.2d 1178 (1983).

83. *Id.* at ___, 663 P.2d at 1183. *See also* Kennerly v. District Court, 400 U.S. 423 (1971) (acceptance of state jurisdiction can only come about by following Pub. L. No. 280 procedures, including a special tribal election for such acceptance).

Indian country. The Enclaves Act provides the primary jurisdictional tool for prosecuting non-Indian crime in Indian country. In *Oliphant*, the Court expressly concluded that the actions of Congress demonstrated an intent to prohibit Indian tribes from imposing criminal penalties on non-Indians.[84]

VI. NON-INDIAN OFFENDER, NON-INDIAN VICTIM

Notwithstanding the broad terms of the Enclaves Act, federal courts have significantly narrowed the reach of federal jurisdiction. Over a century ago, in *United States v. McBratney*,[85] the Supreme Court held that if a non-Indian commits a crime against a non-Indian in Indian country, the state enjoys exclusive jurisdiction unless there exist treaty provisions to the contrary. In *McBratney*, a non-Indian had been convicted in federal district court of murdering another non-Indian on the Ute Reservation in Colorado. On appeal, the Supreme Court held that the federal court could only exercise criminal jurisdiction over places within the "exclusive" jurisdiction of the federal government.[86] The Court reasoned that if the state had any jurisdiction over this crime, then the federal court necessarily had none.[87] The *McBratney* Court concluded that the State of Colorado possessed jurisdiction because Congress had admitted it to the Union on an "equal footing with the original States" and Congress made no exception for jurisdiction over the Ute Reservation.[88]

Fifteen years later, a non-Indian murdered a non-Indian on the Crow Reservation in Montana. In *Draper v. United States*[89] the Supreme Court repeated the rule that the state court, not the federal court, has jurisdiction over such crimes.[90] Although Montana's Enabling Act seems to disclaim state jurisdiction by providing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States,"[91] the *Draper* Court stated that Congress could not have intended any result so drastic as the exclusion of Montana power to punish wholly non-

84. *Oliphant*, 435 U.S. at 204. Note also, "By submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210.

85. 104 U.S. 621 (1882).

86. *Id.* at 624.

87. *Id.* at 623.

88. *Id.* at 623-24.

89. 164 U.S. 240 (1896).

90. *Id.* at 247.

91. 25 Stat. 676, 677 (1889).

Indian crimes committed in Indian country.[92] In *Organized Village of Kake v. Egan*,[93] a case arising in Alaska, the United States Supreme Court subsequently explained that Montana's Enabling Act disclaimer is of title, not jurisdiction, and the provision for "absolute" federal jurisdiction does not necessarily mean "exclusive" federal jurisdiction.[94] Interestingly, the *Kake* Court also suggested that state law and state court jurisdiction could be extended to Indians as well as non-Indians in Indian country, so long as a direct interference with the tribal government itself did not occur.[95]

The Ninth Circuit Court consistently has followed the *McBratney-Draper* rule. In *United States v. Cleveland*,[96] the court held that the state in which an Indian reservation is situated has exclusive jurisdiction over crimes committed by non-Indians against non-Indians on an Indian reservation.[97] Recently, in *United States v. Johnson*,[98] the Ninth Circuit Court noted that states have jurisdiction to punish non-Indian defendants for crimes against other non-Indians.[99] The United States Supreme Court reemphasized the *McBratney-Draper* rule in *United States v. Antelope*,[100] where, absent treaty provisions to the contrary, it subjected a non-Indian charged with committing crimes against other non-Indians in Indian country to prosecution under state law.[101] More recently, in *United States v. Wheeler*,[102] the Supreme Court noted that the Major Crimes Act does not apply to crimes committed by non-Indians against non-Indians, because such crimes are subject to state jurisdiction.[103]

In summary, under the *McBratney-Draper* rule, Montana has exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Montana Indian country.

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92. *Draper*, 164 U.S. at 247.

93. 369 U.S. 60, 68 (1962).

94. *Id.*

95. *Id.* at 67-68. Note, however, that a reservation had not been created for the Alaskan Indians affected by the *Kake* decision. Subsequently, in civil cases dealing with the extension of state law into Indian country, the Supreme Court has applied either a preemption analysis, or a test balancing tribal, state, and federal interests.

96. 503 F.2d 1067 (9th Cir. 1974).

97. *Id.* at 1070.

98. 637 F.2d 1224 (9th Cir. 1980).

99. *Id.* at 1231 n.11.

100. 430 U.S. 641 (1977).

101. *Id.* at 645.

102. 435 U.S. 313.

103. *Id.* at 325 n.21.

VII. NON-INDIAN OFFENDER, VICTIMLESS CRIME

A crime in Indian country is victimless if it lacks a concrete and particularized threat to a person, to property, or to specific tribal interests.[104] When a non-Indian commits a victimless crime on Indian land, *McBratney* probably controls, granting Montana jurisdiction.[105] Thus, general offenses which do not target a definite class of Indians fall within state jurisdiction. Such offenses include traffic violations, gambling, and disorderly conduct.[106]

In *New York ex rel. Ray v. Martin*,[107] the Supreme Court held that victimless crimes committed by non-Indians in Indian country fall within the exclusive jurisdiction of the state if Indian interests are not directly affected.[108] Earlier, in *Donnelly v. United States*,[109] the Supreme Court ruled that a court need not invoke federal jurisdiction to fulfill the guardianship responsibilities of the United States if the victimless crime does not involve Indian interests.[110]

In certain other cases, however, a sufficiently direct threat to Indian persons or property may bring an ordinarily "victimless" crime within federal jurisdiction.[111] Such crimes by a non-Indian must be calculated to obstruct the functioning of tribal government, or adversely affect the tribal community.[112] In the statutory rape case of *Smayda v. United States*,[113] the federal government prosecuted a non-Indian offender, under the Assimilative Crimes Act, for a felony sex offense with a consenting under-age Indian, in violation of state law. Therefore, if a "victimless" crime by a non-Indian significantly threatens the Indian community, the jurisdiction could revert to the federal courts as if the crime were directly against an Indian.

In summary, Montana has exclusive jurisdiction over victimless crimes by non-Indians in Montana Indian country. However, if the crime directly threatens the Indian community, the crime is no longer victimless and jurisdiction reverts to the federal

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104. Office of Legal Counsel, 6 Indian L. Rep. K-15ff (1979).
105. *Id.*
106. UNITED STATES ATTORNEYS' MANUAL, ch. 20, at 16.
107. 326 U.S. 496 (1946).
108. *Id.* at 501.
109. 228 U.S. 243 (1913).
110. *Id.* at 271-72.
111. UNITED STATES ATTORNEYS' MANUAL, ch. 20, at 16.
112. *Id.* Examples of such crimes are bribery, riot, disruption of a public Indian meeting, and consensual crimes committed by non-Indian offenders with Indian participants.
113. 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966). See also United States v. Marcyes, 557 F.2d 1361 (an offense against Indian public order was federally prosecuted under the Enclaves Act and the Assimilative Crimes Act).

courts.

VIII. CONCLUSION

Criminal jurisdiction in Montana Indian country can be summarized by offender and victim:

(a) Indian Offender, Indian Victim. For major crimes, federal jurisdiction remains primary although concurrent with tribal jurisdiction.[114] For non-major crimes, tribal jurisdiction is exclusive.[115]

(b) Indian Offender, Non-Indian Victim. For major crimes, federal jurisdiction remains primary although concurrent with tribal jurisdiction.[116] For non-major crimes, federal jurisdiction is exclusive.[117]

(c) Indian Offender, Victimless Crime. Tribal jurisdiction is primary, and federal jurisdiction concurrent.[118]

(d) Non-Indian Offender, Indian Victim. Federal jurisdiction is exclusive.[119]

(e) Non-Indian Offender, Non-Indian Victim. Montana jurisdiction is exclusive.[120]

(f) Non-Indian Offender, Victimless Crime. Montana jurisdiction is exclusive, unless Indian interests are directly affected.[121]

114. Major Crimes Act, 18 U.S.C. § 1153; *Wheeler*, 435 U.S. 313.
115. Enclaves Act, 18 U.S.C. § 1152, Johnson, 637 F.2d 1224.
116. Major Crimes Act, 18 U.S.C. § 1153; *Wheeler*, 435 U.S. 313.
117. Enclaves Act, 18 U.S.C. § 1152; Assimilative Crimes Act, 18 U.S.C. § 13.
118. *Wheeler*, 435 U.S. 313, Marcyes, 557 F.2d 1361.
119. Enclaves Act, 18 U.S.C. § 1152; *Oliphant*, 435 U.S. 191.
120. *McBratney*, 104 U.S. 621; *Draper*, 164 U.S. 240.
121. *Martin*, 326 U.S. 496.