No. 21-35036

Panel: Judges Paez, Nguyen, and Tunheim

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY ELLERY SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Portland Division
Case No. 3:16-cr-00436-JO
Related Case No. 3:20-cv-01951-JO
The Honorable Robert E. Jones

APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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Statement Of Reasons For Rehearing En Banc

The Court should grant rehearing en banc to review the panel's memorandum opinion holding that the Assimilative Crimes Act confers federal jurisdiction to prosecute Indians within Indian country for minor state law crimes through the General Crimes Act. The panel in this 28 U.S.C. § 2255 case relied on the earlier published decision in Mr. Smith's direct appeal, *United States v. Smith*, 925 F.3d 410, 415 (9th Cir. 2019) (*Smith I*), which found federal jurisdiction despite the lack of statutory references to Indians or Indian country in the Assimilative Crimes Act and despite the federal government's promised "exclusive use" of reservation lands to the Confederated Tribes of Warm Springs in 1855. *United States v. Smith*, No. 21-35036, 2022 WL 3102454 (9th Cir. Aug. 4, 2022) (*Smith II*). Rehearing en banc is warranted because the panel decisions are inconsistent with two recent Supreme Court opinions on criminal jurisdiction in Indian country, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Oklahoma v. Castro-Huerta*, 142 S. Ct. 1612 (2022), and the intrusion of federal jurisdiction on tribal land to enforce state criminal law against tribal members raises exceptionally important questions of tribal sovereignty and the federal government's obligation to abide by treaty promises.[1]

[1] "Indian" is used here as the term of art in federal statutes and case law. "Tribes" refers to the Confederated Tribes of Warm Springs, comprised of the Warm Springs, Wasco, and Paiute Tribes.

A. The Panel Decisions Conflict With Two Decisions Of The Supreme Court (FED. R. APP. P. 35(b)(1)(A)).

Before *McGirt* and *Castro-Huerta*, *Smith I* concluded that the Warm Springs reservation constituted a federal enclave under the Assimilative Crimes Act, allowing federal enforcement of minor state law crimes involving Indian defendants. *Smith I*, 925 F.3d at 415. The panel acknowledged that "[t]he plain text of the Assimilative Crimes Act lacks any express reference to Indians or Indian country." *Smith*, 925 F.3d at 415. The panel asserted that *United States v. Williams*, 327 U.S. 711 (1946), supported the application of the Assimilative Crimes Act to Indians within Indian country. *Id.* at 416.

After *McGirt*, the absence of express language in the Assimilative Crimes Act addressing Indians and Indian country forecloses its application to Indian country in derogation of treaty rights to exclusive use. The Supreme Court in *McGirt* rejected reliance on historical context as evidence of congressional intent. Instead, "[i]f Congress wishes to withdraw its promises, it must say so." 140 S. Ct. at 2482.

In *Castro-Huerta*, the Court took the "first hard look" at the scope of state court jurisdiction under the General Crimes Act for crimes committed in Indian country by a non-Indian against an Indian. 142 S. Ct. at 2499. The Court's opinion in *Castro-Huerta* undermines *Smith* in four ways. First, the Court reaffirmed *McGirt's* rejection of extra-textual intrusions on tribal sovereignty. Second, the

Court made clear that Indian country is not "the equivalent of a federal enclave for jurisdictional purposes," contrary to *Smith I*'s reasoning that the jurisdictional provisions of 18 U.S.C. § 7 make the Assimilative Crimes Act applicable to Indian country. *Id.* at 2496.

Third, the Supreme Court's reasoning cannot be reconciled with both *Smith* panels' conclusion that the Assimilative Crimes Act applies to Indian country through the General Crimes Act. The Supreme Court concluded that the General Crimes Act only extends general federal criminal laws to Indian country, but does not expand federal jurisdiction. *Id.* at 2495. Fourth, the Supreme Court's treatment of *Williams*, dismissing it as "pure dicta" that "did not even purport to interpret the text of the General Crimes Act," is incompatible with *Smith I*'s repeated citation to *Williams* and its progeny. *Id*. at 2497-99.

This Court is bound by the reasoning as well as the holding of intervening Supreme Court authority. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."). Because both panel opinions perpetuate reasoning and results rejected by, and incompatible with, intervening Supreme Court authority, this Court should grant rehearing en banc.

B. Governmental Intrusion On Tribal Sovereignty And Abrogation Of Treaty Rights Are Issues Of Exceptional Importance (FED. R. APP. P. 35(b)(1)(B)).

In addition to addressing the superseding reasoning from the Supreme Court, the Court should grant rehearing en banc because this case raises exceptionally important questions regarding treaty promises and tribal sovereignty. Even before *McGirt*, Judge Canby pointed out that, if the Assimilative Crimes Act applied to Indians in Indian country, "the full panoply of state law governing victimless crimes would be applied to tribal Indians." William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL, at 190-95 (7th ed. West Acad. Pub.). "The result is *an enormous intrusion on tribal authority* over Indian affairs." *Id*. (emphasis added). Noting the decision in *Smith*, Judge Canby found it "difficult to see . . . why punishment of Indians for these crimes should be covered by federal law when they fall within the tribe's power of self-government." *Id*. at 192-93; *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 9.02[1][c], at 742-44 (Nell Jessup Newton ed. 2019) (COHEN) ("Under the analysis in *Quiver* [*v. United States*, 241 U.S. 602 (1916)], these [victimless] crimes should be subject to tribal, not federal, jurisdiction.").

These pre-*McGirt* and *Castro-Huerta* concerns are super-magnified now that the Supreme Court has clarified that tribal sovereignty cannot be infringed without express congressional intent, even when historical practice indicates otherwise. The

rights at issue from the Treaty of 1855 are the same as or similar to other treaties throughout the country. The Court has an obligation to hold the government to its treaty promises. To do otherwise "would be the rule of the strong, not the rule of law." *McGirt,* 140 S.Ct. at 2474.

Relevant Factual And Procedural History

A. Statutes On Federal Criminal Jurisdiction, The Treaty Of 1855, And The Supremacy Clause

Johnny Smith is an enrolled member of the Confederated Tribes of Warm Springs. In 2016, Mr. Smith eluded tribal police on the Warm Springs reservation, which is Indian country under 18 U.S.C. §§ 1151 and 1162(a). Warm Springs Tribal Code § 310.520 expressly forbids eluding the police. On November 1, 2016, the government indicted Mr. Smith in federal court for the state crime of eluding, in violation of Oregon Revised Statutes 811.540(1), asserting jurisdiction by operation of the Assimilative Crimes Act (18 U.S.C. § 13) and the General Crimes Act (18 U.S.C. § 1152), also known as the Indian Country Crimes Act.[2]

The Treaty of 1855 created the Warm Springs reservation. Treaty With The Tribes Of Middle Oregon, 12 Stat. 963 (1855). In exchange for the Tribes' agreement to "cede to the United Sates all their right, title, and claim to all and every

[2] The Supreme Court opinions call § 1152 the General Crimes Act, while the panel opinions reference the statute as the Indian Country Crimes Act.

part of" 10 million acres of land claimed by the Tribes, the United States agreed to create a 640,000 acre reservation, "[a]ll of which shall be set apart, and, so far as necessary, surveyed and marked out *for their exclusive use*[.]" Art. 1, paras. 1-5, 12 Stat. 963 (emphasis added). Under the Supremacy Clause of the Constitution, all Treaties made under the authority of the United States "shall be the supreme Law of the Land." U.S. CONST. art. IV, cl. 2. The exclusive use promise made in the Treaty of 1855 has never been abrogated by Congress.

The Assimilative Crimes Act applies to offenses that occur on federal enclaves, also known as the special maritime and territorial jurisdiction of the United States, as defined in 18 U.S.C. § 7. 18 U.S.C. § 13. The ACA's basic purpose is to borrow state law to fill gaps in the federal criminal law that applies on federal enclaves. *Lewis v. United States*, 523 U.S. 155, 160-61 (1998). The enclave statute's definitional list of areas where the ACA applies includes vessels on the high seas, aircraft, forts, guano islands, and arsenals. 18 U.S.C. § 7. The statute does not mention Indian country, only referencing "lands reserved or acquired for the use of the United States[.]" 18 U.S.C. § 7(3).

The General Crimes Act extends "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" to Indian country. 18 U.S.C. § 1152. The general

laws of the United States include specific federal offenses such as drug trafficking, bank robbery, and fraud. The General Crimes Act excludes from its coverage "offenses committed by one Indian against the person or property of another Indian" and "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

The Major Crimes Act establishes federal jurisdiction over twelve listed offenses committed within Indian country by Indians "against the person or property of another Indian or other person[.]" 18 U.S.C. § 1153(a). Such individuals "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." *Id*. Where the listed offense is not defined and punished under federal law, the offense "shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense." 18 U.S.C. § 1153(b). Eluding the police is not an offense listed under the Major Crimes Act.

B. Mr. Smith's Direct Appeal And Subsequent 28 U.S.C. § 2255 Motion Challenging Federal Court Jurisdiction

After being indicted in federal court for a state crime committed on his reservation, Mr. Smith filed a motion to dismiss for lack of jurisdiction, asserting that the plain meaning of the relevant statutes did not confer federal jurisdiction over minor state crimes committed by a tribal member within Indian country. The district

court denied the motion, and Mr. Smith appealed, arguing that the federal enforcement of minor state-law crimes in Indian country broke treaty promises and was impermissible in the absence of express statutory language. He also argued that the language upon which the district court primarily relied to find federal jurisdiction in *United States v. Williams*, 327 U.S. 711 (1946), constituted dicta.

In *Smith I*, the panel held that Indian reservations are federal enclaves as "lands reserved or acquired for the use of the United States." 925 F.3d at 415-17 (quoting § 7(3)). In reaching that holding, the panel acknowledged that the Assimilative Crimes Act does not refer to Indians or Indian country at all:

> The plain text of the ACA lacks any express reference to Indians or Indian country. The statute on its face also contains no limitation based on the status of the defendant, to include whether he is Indian or non-Indian.

Smith I, 925 F.3d at 415. In the absence of textual support, the panel disposed of Mr. Smith's arguments through reliance on the fluctuating legal history defining Indian country in other contexts. *Id.* at 416-17. The panel concluded that, over time, an understanding "emerged" that Indian country was land that had been set aside for the use of the federal government. *Id.* at 417. The panel backed up this extra-textual approach by citing *Williams* and its progeny. *Id.* at 414-15.

Aside from federal jurisdiction based on the direct application of the Assimilative Crimes Act, the panel also found that the General Crimes Act "supports

the applicability of the ACA to Indian country," because the ACA is part of the "general laws of the United States" that the General Crimes Act makes applicable to Indian country. *Id*. at 418. The panel rejected the argument that the Major Crimes Act, by explicitly abrogating tribal sovereignty over specific crimes, foreclosed federal prosecution for minor state crimes. *Id.* at 421-22.

Judge Fisher concurred, but expressed concerns whether the Assimilative Crimes Act applies to Indian country of its own force. *Id.* at 423 (applying the ACA to Indian country would be "inconsistent with the policy of leaving tribes free of general federal criminal laws, except as expressly provided.") (quoting COHEN § 9.02 n.19). Rather, Judge Fisher agreed that the Assimilative Crimes Act applied to Indian country as part of the "general laws of the United States" referenced in the General Crimes Act. *Id.*

After the Supreme Court decided *McGirt*, Mr. Smith returned to the district court with a motion under 28 U.S.C. § 2255. Mr. Smith asserted that the earlier panel decision upholding his conviction on direct appeal had been superseded because its extra-textual analysis was irreconcilable with *McGirt*'s central holding: "If Congress wishes to withdraw its promises, it must say so." 140 S. Ct. at 2482. The district court denied relief.

Once more, Mr. Smith appealed, arguing that *Smith I* was no longer good law based on *McGirt* and the absence of any express mention of Indians and Indian country in the Assimilative Crimes Act to nullify the Treaty promise of "exclusive use." Opening Brief of Appellant, *United States v. Smith*, No. 21-35036, Docket No. 5 (9th Cir. April 26, 2021). After oral argument, when the Supreme Court decided *Castro-Huerta*, Mr. Smith submitted a Rule 28(j) letter stating that the intervening decision foreclosed both direct application of the Assimilative Crimes Act and indirect application through the General Crimes Act. *Id*. at Docket No. 34 (9th Cir. July 5, 2022).

The panel affirmed in a memorandum opinion in *Smith II*, adhering to the previous published *Smith I*, concluding that it was not clearly irreconcilable with the intervening Supreme Court authority. By footnote, the panel recognized that *Smith I*'s stand-alone application of the Assimilative Crimes Act to Indian country may have been undermined by both *McGirt* and *Castro-Huerta*, but declined to reach the question. *Id*. at n.1. Instead, the panel relied solely on *Smith I*'s application of the Assimilative Crimes Act to Indian country through the General Crimes Act. Thus, *Smith I* remains as precedential published authority. *See Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994) ("In this circuit, once a published opinion is

filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court."), *vacated*, 47 F.3d 1015 (9th Cir. 1995).

Reasons For Granting The Petition

A. The Court Should Review The Reach Of Federal Jurisdiction To Enforce State Laws Against Indians Within Indian Country Based On The Intervening Authority Of *McGirt* And *Castro-Huerta*.

The Supreme Court has provided two opinions regarding criminal jurisdiction within Indian country that are inconsistent with the reasoning of the previous panel opinions. The holdings and reasoning underlying *McGirt* and *Castro-Huerta* cannot be reconciled with the reasoning of the *Smith* panel opinions that permit Indians to be prosecuted for state crimes within Indian country by treating the Warm Springs reservation as a federal enclave. The plain words of the Supreme Court in reaching its conclusions in two landmark decisions on criminal jurisdiction in Indian country supersede the *Smith* opinions.

1. *McGirt* Requires Express Statutory Language To Abrogate Treaty Rights And Precludes Reliance On Historical Practice, Contrary To The Reasoning Of *Smith I*.

In *McGirt*, the Supreme Court held that, after review of treaty language and legislation pertinent to the reservation, much of Oklahoma constitutes Indian country based on the absence of explicit congressional abrogation of treaty rights. 140 S. Ct. at 2459. The Court rejected Oklahoma's arguments based on historical practice and

inferences from legislation because, "[i]f Congress wishes to withdraw its promises, it must say so." *Id*. at 2482. The Court's shift toward the explicit language of treaties and statutes represented "a new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent." *Id.* at 2487 (Roberts, C.J., dissenting); *see also Oneida Nation v. Village of Hobart*, 968 F.3d 664, 685 (7th Cir. 2020) (stating that *McGirt* adjusted Indian law to require a "more textual approach").

The Court's reasoning in *McGirt* rejects two complementary aspects of the *Smith* panels' reasoning: in the absence of explicit congressional language, treaty rights control; and treaty rights cannot be abrogated by inferences and history. In *Smith I*, the panel began by acknowledging that "[t]he plain text of the ACA lacks any express reference to Indians or Indian country." *Id*. at 415. Similarly, the panel acknowledged that 18 U.S.C. § 7(3), like the ACA itself, also lacks any explicit reference to Indian country or Indian reservations. *Id.* These concessions demonstrate that *McGirt* superseded the reasoning of the prior case. After *McGirt,* there is only one way for Congress to withdraw treaty promises made to Indian tribes: Congress must clearly say so. *McGirt,* 140 S. Ct. at 2482.

Smith I relied on inferences from history rather than express statutory language to conclude that Indian country qualifies as a federal enclave for purposes

of the ACA. *McGirt*'s "new approach" undermines that reasoning and the conclusions derived therefrom.

2. *Castro-Huerta* Further Undermined *Smith I* By Making Clear That Indian Country Is Not A Federal Enclave For Purposes Of The General Crimes Act.

In *Castro-Huerta*, the Court gave a "first hard look" at the General Crimes Act and held that state and federal governments have concurrent jurisdiction over crimes committed by non-Indians against Indians within Indian country. 142 S. Ct. at 2449. Mr. Castro-Huerta, a non-Indian, claimed he could not be prosecuted in state court because the crime occurred in Indian country, a federal enclave, where state law did not apply to crimes against Indians. The Supreme Court held that, for non-Indians, concurrent state and federal jurisdiction applied where the victim was an Indian. In so holding, the Court held that reservations are *not* federal enclaves for jurisdictional purposes, reaching four conclusions that undercut *Smith I*'s reasons for concluding that the Warm Springs reservation should be treated as a federal enclave.

First, *Castro-Huerta* reaffirmed *McGirt's* rejection of extra-textual approaches to intrusions upon tribal sovereignty: "[T]he text of a law controls over purported legislative intentions unmoored from any statutory text." 142 S. Ct. at 2496. Second, *Castro-Huerta* held that Indian country is not a federal enclave such

as "military bases and national parks," contradicting *Smith I's* holding that the Warm Springs reservation is a federal enclave as described in 18 U.S.C. § 7(3). *Id.* at 2495.

Third, in construing the General Crimes Act, *Castro-Huerta* explained that it describes the laws which are "'extended' to Indian country[.]" *Id.* It does not describe "'the *jurisdiction extended over* the Indian country.'" *Id*. (emphasis added) (citing *In re Wilson*, 140 U.S. 575, 578 (1891)). "In short, the General Crimes Act does not treat Indian country as the equivalent of a federal enclave for jurisdictional purposes." *Id*. at 2496. This understanding of the General Crimes Act is inconsistent with the panels' alternative conclusion that, even if the Assimilative Crimes Act does not apply to Indian country on its face, it is applicable to Indian country as one of the "general laws" referenced in the General Crimes Act. The ACA is an interstitial jurisdictional law, not a general law describing criminal offenses.

Fourth, *Castro-Huerta* confirmed what Mr. Smith asserted from the very beginning—*Williams*' discussion of jurisdiction in Indian country is "pure dicta" and "tangential dicta." *Id.* at 2498-99 ("But the Court's dicta, even if repeated, does not constitute precedent and does not alter the plain text of the General Crimes Act, which was the law passed by Congress and signed by the President.").

By granting en banc review, the Court would have the opportunity to correct clear errors in reasoning that *McGirt* and *Castro-Huerta* brought to light, without

deference to earlier panel precedent. For example, *Smith I* repeatedly relied on *Williams*, without resolving the argument that its language was mere dicta. *Castro-Huerta* reveals that reasoning to be in error. And *Smith I* reasoned that Indian country is a federal enclave subject to direct application of the Assimilative Crimes Act. Again, *Castro-Huerta* reveals that holding to be in error. The Court should grant en banc review to address the scope of federal criminal jurisdiction over Indian country anew, with the guidance provided by intervening landmark Supreme Court authority that was not previously available.

B. The Court Should Review The Exceptionally Important Issues Regarding Abrogation Of Treaty Rights And Tribal Sovereignty Raised By Federal Prosecution Of Tribal Members For Violations Of Minor State Crimes Within Indian Country.

Respect for treaty rights and tribal sovereignty require the Judiciary's careful protection against erosion by state and federal authorities acting without express congressional authority. By importing state law into federal court for enforcement against tribal members for acts within Indian country, the government disrespects tribal sovereignty without Congress ever having abrogated treaty protections against such intrusions.

In the seminal case of *Ex parte Crow Dog*, the Supreme Court held that, in the absence of explicit contrary legislation, sovereign tribal authority "excludes from the jurisdiction of the United States the case of a crime committed in the Indian

country by one Indian against the person or property of another Indian." 109 U.S. 556, 570 (1883). In response, Congress passed the Major Crimes Act, which explicitly assumed federal jurisdiction and incorporated state law over listed offenses, none of which cover eluding the police.

The same tribal sovereignty underlying *Crow Dog* protects Mr. Smith from application of state criminal law by the federal government within Indian country. *McGirt*, 140 S. Ct. at 2477 ("[T]his Court has long 'require[d] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands.") (quoting *Crow Dog*, 109 U.S. at 572). Even though the General Crimes Act had been in effect since 1834, federal courts lacked jurisdiction over offenses considered purely the bailiwick of tribal authorities. The Warm Springs treaty promise of "exclusive use" of the reservation encompasses as a fundamental aspect of tribal sovereignty exclusive jurisdiction over minor crimes – those not covered by the Major Crimes Act or the general federal criminal code – committed by tribal members within the reservation.

The Tribes' exclusive ability to regulate and punish the conduct of their members is at the core of tribal sovereignty. As the Supreme Court stated in *Quiver*, "[T]he relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when

Congress expressly or clearly directs otherwise." 241 U.S. at 605-06. Criminal law is squarely within tribal sovereignty: "The power of a tribe to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indian implicitly lost by virtue of their dependent status." *Duro v. Reina*, 495 U.S. 676, 686 (1990); *see United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members . . . with the power of regulating their internal and social relations.") (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1978) (internal quotation marks omitted)).

Since the Treaty of 1855's promise of the Warm Springs reservation's "exclusive use" for the Tribes, Congress has reaffirmed and expanded on the promise of sovereignty. The Indian Reorganization Act empowered the Tribes to create their own constitutions and bylaws. *McGirt*, 140 S. Ct. at 2467. The Tribes took Congress up on its invitation and organized a governing body and adopted a constitution. Const. and Bylaws of the Confederated Tribes of Warm Springs Reservation of Oregon (1938). Among other things, the Warm Springs constitution empowered the Tribes to create criminal ordinances, tribal courts, and a tribal police force. Since then, the Tribes have established their own criminal justice system, including punishment of the identical conduct charged in federal court in this case.

No explicit congressional action diminished the exclusive use promise that ensures sovereignty over the conduct of tribal members on the Warm Springs reservation.

The protection of tribal sovereignty presents an exceptionally important question that affects both individual tribal members and the integrity of the Tribes themselves. Through the federal prosecution in this case, the government has enforced a state law against a tribal member for conduct that occurred entirely within Indian country. Such dilution of tribal authority violates "[t]he policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in this Nation's history." *McGirt*, 140 S. Ct. at 789 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

The Judiciary has historically played a special role in protecting tribal sovereignty against the brute power of state and federal governments to erode tribal prerogatives. Without the guidance provided by *McGirt* and *Castro-Huerta*, the panel opinions in *Smith I* and *Smith II* permitted diminishment of Treaty rights and tribal sovereignty protected by the exclusive use promised in the 1855 Treaty. The Court should rehear this case en banc to address the exceptionally important issue of "hold[ing] the government to its word." *McGirt*, 140 S. Ct. at 2459.

Conclusion

For the foregoing reasons, the Court should grant the petition for rehearing en banc, vacate the panel decision, and set for such further briefing and oral argument as the Court sees fit.

Respectfully submitted this 19th day of September, 2022.

/s/ Conor Huseby
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NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY ELLERY SMITH, Defendant-Appellant.	No. 21-35036 D.C. Nos. 3:20-cv-01951-JO 3:16-cr-00436-JO-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted February 7, 2022
Portland, Oregon

Before: PAEZ and NGUYEN, Circuit Judges, and TUNHEIM,** District Judge.

Defendant Johnny Ellery Smith, an enrolled member of the Confederated Tribes of Warm Springs, appeals the district court's denial of his 28 U.S.C. § 2255 motion. We previously affirmed Smith's convictions on direct appeal, holding that the federal government had jurisdiction to prosecute him for violations of Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

law committed on the Warm Springs Reservation because the Assimilative Crimes Act ("ACA") applies to Indian country. *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019). Smith now seeks to vacate his convictions on the ground that the Supreme Court's subsequent decisions in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) and *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) are "clearly irreconcilable" with our prior holding. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

In *Smith*, we held that the ACA applies to Indian country via the Indian Country Crimes Act ("ICCA"). 925 F.3d at 418. The ICCA extends to Indian country 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." 18 U.S.C. § 1152. We reasoned in *Smith* that the "general laws" referred to in the ICCA are the laws governing federal enclaves. 925 F.3d at 418. Therefore, "[t]he ACA, as a federal enclave law, . . . applies to Indian country by operation of the ICCA." *Id.*

Castro-Huerta is not clearly irreconcilable with that holding. Smith does not dispute that the "general laws" extended to Indian country by the ICCA are the "federal laws that apply in federal enclaves." *Castro-Huerta*, 142 S. Ct. at 2495. Rather, he contends that the ACA is not among such "general laws" because "the ACA is not a federal criminal law." That question, however, was not decided in

Castro-Huerta, which made no mention of the ACA. The relevant portion of *Castro-Huerta* focused instead on whether the text of the ICCA rendered Indian country the equivalent of a federal enclave such that the federal government had exclusive jurisdiction to prosecute criminal offenses committed there. *Id.*

Finally, we also reject as unpersuasive Smith's contention that *McGirt* is clearly irreconcilable with our prior holding that his prosecution was not prohibited by the third exception to the ICCA's scope, which applies when a treaty stipulation reserves for a tribe "exclusive jurisdiction over [the relevant] offenses." *See Smith*, 925 F.3d at 420 (quoting 18 U.S.C. § 1152).[1] *McGirt* does not address the ICCA exceptions, and its reasoning does not undermine *Smith*'s analysis of them. *See id.* at 420–21.

AFFIRMED.

[1] *Smith* also held that the ACA applies to Indian country by its own terms (and not just via the ICCA). *See* 925 F.3d at 415–18. We reasoned that Indian country qualifies as a "federal enclave" under the ACA, and thus the ACA's provisions apply there. *Id.* Smith contends that this holding is undermined by *McGirt* because there is no clear expression of congressional intent to apply the ACA to the Reservation, and by *Castro-Huerta* because it implicitly held that Indian country and federal enclaves are not equivalents. We need not reach these arguments in light of our conclusion that the ACA applies to Indian country via the ICCA.

925 F.3d 410
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Johnny Ellery SMITH, Defendant-Appellant.

No. 17-30248
|
Argued and Submitted October 10, 2018 Portland, Oregon
|
Filed May 28, 2019

Synopsis

Background: Defendant Indian member of Confederated Tribes of Warm Springs was convicted in the United States District Court for the District of Oregon, Anna J. Brown, J., of fleeing or attempting to elude police officer under Assimilative Crimes Act (ACA) and Indian Country Crimes Act (ICCA). Defendant appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:

ACA applied to Indian country;

Indian-on-Indian exception in ICCA did not preclude application of ACA to all "victimless" crimes, and certainly not to offense of fleeing and eluding police; and

federal prosecution of defendant was not unlawful intrusion into tribal sovereignty.

Affirmed.

Fisher, Circuit Judge, filed concurring opinion.

Procedural Posture(s): Appellate Review; Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

Attorneys and Law Firms

***412** Conor Huseby (argued), Assistant Federal Public Defender, Office of the Federal Public Defender, Portland, Oregon, for Defendant-Appellant.

Paul T. Maloney (argued), Assistant United States Attorney; Kelly A. Zusman, Appellate Chief; Billy J. Williams United States Attorney; United States Attorney's Office, Portland, Oregon; for Plaintiff-Appellee.

Veronica C. Gonzales-Zamora, Brownstein Hyatt Farber Schreck LLP, Albuquerque, New Mexico; Barbara L. Creel, Southwest Indian Law Clinic, University of New Mexico School of Law, Albuquerque, New Mexico; for Amicus Curiae Southwest Indian Law Clinic.

Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding, D.C. No. 3D.C. No. 3:16-cr-00436-BR-1

Before: Raymond C. Fisher, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges.

Concurrence by Judge Fisher

OPINION

CALLAHAN, Circuit Judge:

Defendant-appellant Johnny Ellery Smith appeals from his district court conviction, ***413** by guilty plea, of two counts of fleeing or attempting to elude a police officer in violation of Oregon Revised Statutes (ORS) § 811.540(1), as assimilated by 18 U.S.C. § 13, the Assimilative Crimes Act (ACA), and 18 U.S.C. § 1152, the Indian Country Crimes Act (ICCA). Smith argues that the federal government lacked jurisdiction to prosecute him for his violation of state law in Indian country because the ACA does not apply to Indian country. While previous decisions may state otherwise, Smith argues that these cases merely assumed the applicability of the ACA to Indian country and did not directly address it, and thus do not control. Second, Smith contends that even if the ACA applies generally to Indian country, federal prosecution under the ACA was barred in his case because he could have been prosecuted under tribal law for the same offense. Third, Smith asserts that 18 U.S.C. § 1153, the Major Crimes Act (MCA), "occupies the field of federal court jurisdiction over Indian country violations of state laws" and thus precludes federal prosecution of his assimilated state crime.

We do not find Smith's arguments persuasive. To the extent that this issue was not settled by the Supreme Court decision in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778,

90 L.Ed. 962 (1946), and our decision in *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977), we confirm that the ACA applies to Indian country, through the operation of 18 U.S.C. § 7 and § 1152. The district court had jurisdiction over Smith's offenses under the ACA and the ICCA, and accordingly we affirm his convictions.

I.

Smith is an enrolled Indian member of the Confederated Tribes of Warm Springs. In September 2016, Smith fled in his vehicle from Warm Springs police officers when they tried to initiate a traffic stop, leading the officers on a high-speed pursuit. During this chase, Smith drove at speeds exceeding 77 miles per hour, crossed over the fog line multiple times, and traveled in the opposing lane of traffic for approximately 100 yards. He eventually turned onto an unpaved dirt path, at which point the officers stopped their pursuit for safety reasons.

Less than two months later, Smith again fled from Warm Springs police officers when they attempted to conduct a traffic stop after observing him speeding. During this pursuit, Smith drove up to 120 miles per hour, failed to stay in the proper lane, drove into the opposite lane of travel, and at one point, slammed on his brakes, causing a pursuing patrol vehicle to rear-end his vehicle. Eventually the officers forced Smith's vehicle off the road, where he exited his vehicle and attempted to flee on foot, but was ultimately stopped and arrested. Both incidents occurred on the Warm Springs Indian Reservation within the State of Oregon.

Smith was charged in federal district court with two counts of fleeing or attempting to elude a police officer, in violation of ORS § 811.540(1), as assimilated by the ACA and the ICCA. Smith was not charged in tribal court for fleeing or attempting to elude a police officer based on these incidents.

Smith filed a motion to dismiss the indictment on the ground that the government lacked jurisdiction to charge him in federal court for a state law violation alleged to have been committed by an Indian in Indian country. The district court denied the motion, after which Smith pled guilty to the two counts in the indictment, while reserving his right to appeal the district court's decision on the jurisdictional issue.

*414 II.

We review de novo jurisdictional issues over criminal offenses. *United States v. Begay*, 42 F.3d 486, 497 (9th Cir. 1994).

Smith's primary jurisdictional challenge to his convictions is that the ACA does not apply to Indian country, despite the line of cases that have suggested or stated otherwise. The original, and most commonly cited, precedent for the proposition that the ACA applies to Indian country is *Williams*, wherein the Supreme Court stated:

> It is not disputed that this Indian reservation is "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," or that it is "Indian country" within the meaning of [the ICCA]. This means that many sections of the Federal Criminal Code apply to the reservation, including ... the Assimilative Crimes Act ....

327 U.S. at 713, 66 S.Ct. 778 (footnotes omitted) (quoting 18 U.S.C. § 451, the predecessor to 18 U.S.C. § 7). In *Marcyes*, we relied on *Williams* in rejecting an argument raised by amicus curiae against the applicability of the ACA to Indian country, which was virtually identical to the challenge Smith raises here:

> Amicus' argument that the [Supreme Court in *Williams*] merely assumed [the ACA's] applicability without deciding the question is belied by the court's own words ....
>
> We would also note that the *Williams* court's ultimate decision ... would never had been reached had the court felt that the A.C.A. did not apply to any crime committed upon Indian lands. *Our own review* of the language of 18 U.S.C. § 13 and 18 U.S.C. § 1152 convinces us that the district court was correct in holding that the A.C.A., by its own terms and through § 1152, is applicable to Indian country.

557 F.2d at 1365 n.1 (emphasis added). In several other decisions, we have upheld or asserted the applicability of the ACA in Indian country. [1] Other circuits are in accord. [2]

1 *E.g.*, *Acunia v. United States*, 404 F.2d 140, 142 (9th Cir. 1968) ("[T]he [ACA] is among the general

laws which the first paragraph of [the ICCA] extends to Indian territory."); *United States v. Kaufman*, 862 F.2d 236, 237-38 (9th Cir. 1988) (per curiam) (upholding appellant's conviction under the ACA for pointing a firearm at another person in violation of an Oregon statute while "at the Chemawa Indian School construction site, which is within a federal enclave"); *United States v. Errol D., Jr.*, 292 F.3d 1159, 1164 (9th Cir. 2002) ("[T]he government could have charged Errol D. under [the ICCA], which, by extending the [ACA] to Indian territory, would have rendered him criminally liable for a 'like offense' and a 'like punishment' under state law."); *United States v. Bare*, 806 F.3d 1011, 1016-17 (9th Cir. 2015) (holding that, under the ICCA, appellant "is subject to punishment in Indian Country—by the United States—which incorporates in the federal offense the elements of Arizona's disorderly conduct statute under the ACA").

2 *E.g.*, *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950) (citing *Williams* to hold that "the [ACA] ... has been conclusively held applicable to the Indian country"); *United States v. Thunder Hawk*, 127 F.3d 705, 707 (8th Cir. 1997) (stating that the ACA "is one of the federal enclave laws made applicable to Indian country by the ICCA"); *United States v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979) (concluding that the ACA "assimilates state traffic laws and others into federal enclave law" and "reaches activities on Indian reservations").

These prior decisions indicate that the ACA applies to Indian country. Smith alleges, however, that the jurisdictional question was never directly at issue in those other cases but merely assumed, ***415** such that we are not bound by those decisions. We do not need to address that contention. Because the jurisdictional question is now directly before us, we expressly hold that the ACA applies to Indian country, based both on precedent and our own analysis of the ACA and the ICCA.

A. The Assimilative Crimes Act

As with all questions of statutory interpretation, we turn first to the text of the statute. The ACA states in part:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. § 7] ... 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, 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.

18 U.S.C. § 13(a). The plain text of the ACA lacks any express reference to Indians or Indian country. The statute on its face also contains no limitation based on the status of the defendant, to include whether he is Indian or non-Indian. Instead, it begins with the all-encompassing term "[w]hoever" in regards to whom it might apply—so long as this person commits the offense "within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. § 7]." *Id.*

Hence, the jurisdictional "hook" of the ACA is the situs of the offense, which hinges on the ACA's reference to 18 U.S.C. § 7. This federal criminal statute defines areas within the "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7, which are often referred to as "federal enclaves." *See* *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992) ("[F]ederal enclave laws are a group of statutes that permits the federal courts to serve as a forum for the prosecution of certain crimes when they occur within the '[s]pecial maritime and territorial jurisdiction of the United States', 18 U.S.C. § 7; this jurisdiction includes federal land, and property such as federal courthouses and military bases.") (alteration in original). If an offense is committed in a federal enclave *and* there is no federal statute defining that offense (i.e., an offense "not made punishable by any enactment of Congress"), the federal government may nonetheless prosecute the offense through the ACA by assimilating a "like offense" and "like punishment" from the law of the state in which the federal enclave is situated. *See*

Lewis v. United States, 523 U.S. 155, 160, 118 S.Ct. 1135, 140 L.Ed.2d 271 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves.").

Our first question then is whether "Indian country"—or more specifically, the Warm Springs Indian Reservation where Smith's offenses occurred—qualifies as one of these "places ... reserved or acquired as provided in [18 U.S.C. § 7]." *See* 18 U.S.C. § 13(a). Smith contends that Indian country does not fall within the meaning of 18 U.S.C. § 7 because the section lacks any reference to Indian country or Indian reservations. Despite the apparent absence of the term "Indian" however, 18 U.S.C. § 7(3) defines federal territorial jurisdiction to include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." Based on a plain reading of this text, any Indian reservation or land that is (1) "reserved or acquired for the use of the United States," and (2) ***416** "under the exclusive or concurrent jurisdiction thereof" falls within the ambit of 18 U.S.C. § 7.

Turning first to whether Indian country is "reserved or acquired for the use of the United States," we have stated that the meaning of this phrase in section 7(3) "is plain enough. Courts have demonstrated their faith in the words' clarity by skipping over them without explication." *United States v. Corey*, 232 F.3d 1166, 1176 (9th Cir. 2000). In cases such as *Williams*, *Marcyes*, and others, courts have readily accepted that Indian reservations are "reserved or acquired for the use of the United States" within the meaning of 18 U.S.C. § 7(3) without much discussion. *See, e.g.*, *Guith v. United States*, 230 F.2d 481, 482 (9th Cir. 1956) ("[A]ppellant's ranch, being located in 'Indian country', is on 'lands reserved ... for the use of the United States, and under exclusive ... jurisdiction thereof', within 18 U.S.C. § 7(3)."); *Pino*, 606 F.2d at 915 ("The [ACA] reaches activities on Indian reservations since such areas are 'reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof.' ").

Smith argues that tribal lands were not "reserved or acquired for the use of the United States" by referencing two specific treaties between the federal government and Indian tribes in Oregon and Washington that "cede[d] certain lands to the United States while reserving lands for 'exclusive use' by tribes." But for lands to be "reserved or acquired for the use of the United States" under 18 U.S.C. § 7(3), "[t]here is no requirement that the United States be an owner, or even an occupant, so long as the land has been set aside for the use of an instrumentality of the federal government." *Corey*, 232 F.3d at 1177. In the 1850s, when "the federal government began frequently to reserve public lands from entry for Indian use," "the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians." *Cohen's Handbook of Federal Indian Law* § 3.04 at 190 (Nell Jessup Newton ed., 2017) (citations omitted). "This use of the term 'reservation' from public land law soon merged with the treaty use of the word to form a single definition describing federally protected Indian tribal lands without depending on any particular source." *Id.* at 191. Contrary to Smith's claim, the treaties he cites provide specific examples of how Indian reservations were "reserved or acquired" by the United States for the federal purpose of protecting Indian tribes, which traditionally were considered "wards of the nation" under federal law. *See generally* *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).

Second, we turn to whether Indian country falls "under the exclusive or concurrent jurisdiction" of the United States. This phrase in section 7(3) "refers to 'legislative jurisdiction,' " which means "the state's authority 'to make its law applicable to the activities, relations, or status of persons' " within a territory. *Corey*, 232 F.3d at 1177–78 (quoting the *Restatement (Third) of the Foreign Relations Law of the United States* § 401 (1987)). Given this, the United States' jurisdiction over Indian country—if measured by its authority to legislate with regard to Indian territories and the activities within—seems apparent. The Supreme Court has long recognized Congress' "broad general powers" under the Constitution to regulate with respect to Indian affairs —"powers that [have been] consistently described as 'plenary and exclusive.' " ***417** *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (quoting *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470–71, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103, 113 S.Ct.

1119, 122 L.Ed.2d 457 (1993); *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)).

The history of 18 U.S.C. § 7 and other statutes by which Congress defined Indian country and asserted federal criminal jurisdiction over newly acquired territories, to include tribal lands, also supports this view. "As the United States acquired new possessions, Congress extended federal criminal jurisdiction with the boundaries of the young republic[,]" and "did so by reference" to federal criminal jurisdiction in federal enclaves. *Corey*, 232 F.3d at 1174, 1175. The original Federal Crimes Act of 1790 referred to federal enclaves as "any fort, arsenal, dock-yard, magazine, or ... any other place or district of country, under the sole and exclusive jurisdiction of the United States," 1 Stat. 112, § 3 (1790), and the Indian Boundaries Act of 1817[3] and the Indian Intercourse Act of 1834[4] similarly referred to crimes committed in places "under the sole and exclusive jurisdiction of the United States." As the statutory definition of federal enclave jurisdiction evolved into what is now the ACA in 18 U.S.C. §§ 7 and 13,[5] the language used to describe and define federal criminal definition of federal jurisdiction in Indian country was likewise updated. When Congress enacted the ACA and the ICCA as part of the revised and consolidated federal criminal code in 1948, it also codified the definition of Indian country as "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government*." 18 U.S.C. § 1151(a) (emphasis added). In that sense, perhaps the most direct indicator that Indian country, as currently defined in the federal criminal ***418** code, falls within the "jurisdiction of the United States" comes from the express language of the statutory definition itself.

3 Titled "An Act to Provide for the Punishment of Crimes and Offences Committed Within the Indian Boundaries," the statute provided for the punishment of crimes committed by "any Indian or other person or persons ... within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offence, or misdemeanor, which if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other punishment ...." Act of March 3, 1917, ch. 92, § 1, 3 Stat. 383 (1817). Section 2 of the act gave federal courts jurisdiction to hear and try these offenses, with the exception of "any offence committed by one Indian against another, within any Indian boundary." *Id*. § 2, 3 Stat. 383.

4 Section 25 provided that the "punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country" except for "crimes committed by one Indian against the person or property of another Indian." *See* An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers, ch. 161, § 25, 4 Stat. 733 (1834).

5 In the Federal Crimes Act of 1825, Congress broadened the definition of federal enclaves, *see* An Act More Effectually to Provide for the Punishment of Certain Crimes against the United States and for Other Purposes, ch. 65, § 1, 4 Stat. 115 (1825), and also enacted the provision that "provided the basis from which has grown the Assimilative Crimes Act now before us." *See id.* § 3, 4 Stat. 115; *United States v. Sharpnack*, 355 U.S. 286, 290, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958). In 1909, Congress consolidated various criminal jurisdictional provisions into a single statute, wherein its definition of federal enclaves included "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof. ..." *See* Act of March 4, 1909. ch. 321, § 272, 35 Stat. 1088, 1143. This precursor to 18 U.S.C. § 7(3) was expanded in 1940 to include land over which the federal government had "concurrent" jurisdiction. *See* Act of June 11, 1940, ch. 323, 54 Stat. 304 (1940).

In light of the above, we hold that the ACA applies to Indian country by virtue of 18 U.S.C. § 7.

B. The Indian Country Crimes Act

Our review of the ICCA (sometimes referred to as the General Crimes Act) further supports the applicability of the ACA to Indian country. The ICCA states:

> 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.

> This section 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.

18 U.S.C. § 1152.

Courts have repeatedly interpreted the "general laws of the United States" in the ICCA to refer to "federal enclave laws," meaning those laws passed by the federal government in exercise of its police powers in areas of exclusive or concurrent federal jurisdiction as defined in 18 U.S.C. § 7. *E.g.*, *Begay*, 42 F.3d at 498 ("[U]nder § 1152, Congress mandated that the 'general laws' of the United States applicable in federal enclaves, such as national parks, military bases, veterans' hospitals, federal buildings, and federal prisons, apply in Indian country ...."); *United States v. Strong*, 778 F.2d 1393, 1396 (9th Cir. 1985) ("[The ICCA] applies only to 'federal enclave law'—law in which the situs of the offense is an element of the crime."); *United States v. Torres*, 733 F.2d 449, 454 (7th Cir. 1984) ("In order to prosecute under 18 U.S.C. § 1152, the Government must prove, as a jurisdictional requisite, that the crime was in violation of a Federal enclave law ....").

The ACA, as a federal enclave law, thus also applies to Indian country by operation of the ICCA. Many prior cases uphold the applicability of an ACA violation in Indian country on this basis. *E.g.*, *United States v. Burland*, 441 F.2d 1199, 1200 (9th Cir. 1971) (finding "[o]ne of the 'general laws' referred to [in the ICCA] is the [ACA]," which "makes the Montana statute that prohibits passing forged checks ... part of the federal law applicable on the Fort Peck reservation"); *Acunia*, 404 F.2d at 142 (holding "the [ACA] is among the general laws which the first paragraph of section 1152 extends to Indian territory"); *Thunder Hawk*, 127 F.3d at 707 (stating the ACA "is one of the federal enclave laws made applicable to Indian country by the ICCA").

Accordingly, we hold that the ACA applies to Indian country, by operation of both 18 U.S.C. § 7 and 18 U.S.C. § 1152.

III.

Having recognized the general applicability of the ACA to Indian country, we turn next to whether the ACA is subject to any limitations when applied to Indian country, and if so, whether those limitations precluded jurisdiction in Smith's case. Smith argues that even if the ACA may generally apply to Indian country, the federal government cannot invoke the ACA to prosecute a state crime that is already defined under tribal law. To do so, Smith alleges, would defeat the "gap-filling" purpose of the ACA, since there is no ***419** gap in criminal jurisdiction for the ACA to fill. This argument misconstrues the purpose of the ACA, which is aimed at "gaps in the federal criminal law"—not gaps in overall criminal jurisdiction—and simply allows the federal government to adopt state criminal law in order to prosecute violations on federal enclaves that are not specifically defined in the federal criminal code.

Nonetheless, we agree that the ACA may have a more limited reach in Indian country than it would in other federal enclaves, and, in particular, may be subject to the exceptions in the ICCA. In addressing this question, we recognize that our holdings above may present a seeming tension. If, on one hand, the ACA extends to Indian country through the ICCA, then naturally the ACA would be subject to the exceptions of the ICCA; but if the ACA applies to Indian country through 18 U.S.C. § 7, a provision independent of the ICCA, then shouldn't we reasonably find that the ACA can be invoked in Indian country without any regard to the ICCA's exceptions?

Our statutory review leads us to conclude that the ACA, when invoked in Indian country, is subject to the exceptions set forth in the ICCA. Several principles inform this determination. First, in our interpretation of the applicability of the ACA to Indian country, we are mindful that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). The Supreme Court has "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.' " *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) (alterations in original); *see also* *Bryan v. Itasca Cty.*, 426 U.S. 373,

392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) ("[W]e must be guided by that 'eminently sound and vital canon' that 'statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' ") (citation omitted).

Second, we recognize that Congress' intent for the ACA to apply generally to federal enclaves within the meaning of 18 U.S.C. § 7 is not necessarily at tension with—or exclusive of—Congress' intent or ability to expand, limit, or otherwise modify the precise contours of the ACA's reach in specific types of federal enclaves by other statutes. Given that the ICCA is one of the primary laws enacted by Congress to "balance the sovereignty interest of Indian tribes and the United States' interest in punishing offenses committed in Indian country," *Begay*, 42 F.3d at 498, we find that Congress intended to impose its express limitations on all federal enclave laws in Indian country, including the ACA. This conclusion is consistent with precedent and with our view that the ACA extends to Indian country by virtue of the ICCA. *See Acunia*, 404 F.2d at 142 ("[I]t is clear that Congress did not intend that the [ACA] should apply to situations wherein, under the second paragraph of 18 U.S.C. § 1152, the extension to Indian country of the general laws of the United States for federal enclaves is specifically removed."); *United States v. Welch*, 822 F.2d 460, 463 (4th Cir. 1987) ("The [ACA] does not apply to crimes committed by one Indian against another Indian in Indian country ...."); *United States v. Wadena*, 152 F.3d 831, 840 n.13 (8th Cir. 1998) ("[U]nder the Assimilative Crimes Act, the exception involving ***420** Indian-against-Indian crimes would still apply." (citing *Thunder Hawk*, 127 F.3d at 706–08)).

Thus, the federal government may not invoke the ACA to prosecute cases in Indian country that the ICCA specifically excepts, namely: (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," or (3) "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152. Here, these limitations did not prohibit the federal government's prosecution of Smith.

On this point, however, amicus argues that the Indian-on-Indian exception in the ICCA prohibits application of the ACA to "victimless" crimes in Indian country, which would include the Oregon crime of fleeing and eluding police in this case. Amicus cites *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1196 (1916), where the Supreme Court dismissed a federal charge for adultery between two Indians in Indian country as barred by the ICCA's Indian-on-Indian exception. The government had argued that the ICCA exception did not apply because adultery "is a voluntary act on the part of both participants, and, strictly speaking, not an offense against the person of either." *Id.* at 605, 36 S.Ct. 699. The Court rejected that argument in light of "the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]" *Id.* at 605–06, 36 S.Ct. 699.

We do not read *Quiver*'s emphasis on Congress' policy from "an early period" to "permit the personal and domestic relations of the Indians with each other to be regulated ... according to their tribal customs and laws" to mean that the ICCA's Indian-on-Indian exception prohibits federal prosecution of any "victimless" crimes. *Id.* at 603–04, 36 S.Ct. 699. Federal policy towards the exercise of tribal sovereignty has evolved and fluctuated over time, particularly since *Quiver* was decided in 1916. *See United States v. Lara*, 541 U.S. 193, 202, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("From the Nation's beginning ... the Government's Indian policies ... of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time. And Congress has in fact authorized at different times very different Indian policies .... Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty.") (citation omitted). The laws passed by Congress to effectuate its policies on criminal jurisdiction in Indian country have never placed any explicit emphasis on the "victimless" nature of a crime.

The Eighth Circuit, in considering similar challenges to a federal prosecution of an Indian for driving under the influence in Indian country, reached the same conclusion. *See Thunder Hawk*, 127 F.3d at 709 ("We do not believe ... that *Quiver* stands for the proposition that the 'Indian versus Indian' exception applies to every 'victimless' crime involving Indians."). As the Eighth Circuit reasoned:

> *Quiver* involved domestic relations, an area traditionally left to tribal self-government. In such a case, including "victimless" crimes within the "Indian versus Indian" exception preserves the tribe's exclusive jurisdiction over domestic matters. Here, in contrast, the prohibition of and punishment for driving under the influence has not traditionally ***421** been within the exclusive jurisdiction of Indian tribes. Rather, the ACA "assimilates state traffic laws and others into federal enclave law in order 'to fill in the gaps in the Federal Criminal Code, where no action of Congress has been taken to define the missing offense.' " Moreover, the offense of driving under the influence is more akin to an offense against the public at large, both Indian and non-Indian, rather than a true "victimless" crime.

127 F.3d at 709 (citations omitted). Likewise, Smith's offense of fleeing and eluding the police is a public safety offense, rather than a true "victimless" crime, and falls well outside the area of domestic relations "traditionally left to tribal self-government." *Id.* Thus, we join the Eighth Circuit's view that the Indian-on-Indian exception in the ICCA does not preclude application of the ACA to all "victimless" crimes, and certainly not to the offense in this case.

Smith also asserts that because he *could* have been prosecuted in tribal court for the same conduct, his prosecution by the federal government under the ACA "was a needless and unlawful intrusion into tribal sovereignty." Smith provides no legal authority for the proposition that the federal government may not prosecute where the tribe also has the authority to do so, nor do we find it supported by the text or purpose of the ACA or the ICCA. The second exception in the ICCA plainly refers to "any Indian ... who *has* been punished by the local law of the tribe," not any Indian who *could* be punished by the law of the tribe. 18 U.S.C. § 1152 (emphasis added). By excluding from federal prosecution only Indian defendants who have already been punished by their tribe, this provision aptly strikes at the "balance" that Congress sought to achieve with the ICCA between "the sovereignty interest of Indian tribes and the United States' interest in punishing offenses committed in Indian country." *Begay*, 42 F.3d at 498. It both defers to tribal criminal proceedings and allows for federal prosecution where a tribe might choose not to exercise its authority.

We also note that, in some instances, even the dual prosecution by both federal and tribal authorities for the same conduct has been upheld as constitutionally permissible. *See* *Wheeler*, 435 U.S. at 314, 98 S.Ct. 1079 (holding that "the prosecution of an Indian in a federal district court under the Major Crimes Act, 18 U.S.C. § 1153, when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident" is not barred by the Double Jeopardy Clause). Contrary to Smith's contention then, the federal prosecution in this case was not an "unlawful intrusion into tribal sovereignty," but rather a permissible exercise of concurrent jurisdictional authority often held by different sovereigns in Indian country. *See* *Duro v. Reina*, 495 U.S. 676, 680 n.1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (explaining how jurisdiction in Indian country "is governed by a complex patchwork of federal, state, and tribal law"). Given that none of the ICCA's exceptions apply in this case, the district court had jurisdiction over Smith's offenses under the ACA.

IV.

Finally, we reject Smith's claim that the MCA, 18 U.S.C. § 1153, precludes the federal government from prosecuting any "state crimes" in Indian country that are not listed in the MCA, such as Smith's offense of fleeing and attempting to elude the police as defined under Oregon law.

The MCA provides for federal jurisdiction over a list of enumerated crimes committed by Indians "against the person or ***422** property of another Indian or other person" within Indian country. 18 U.S.C. § 1153(a). In *Begay*, we already rejected the argument "that Indians may not be charged for *any* criminal conduct beyond those crimes enumerated in [the MCA]." 42 F.3d at 498 (emphasis in original). Similarly, neither the text nor history of these statutes supports Smith's assertion that the MCA limits federal jurisdiction over any "violations of state law" in Indian country outside those listed in that statute. The text of the MCA lacks any express reference to, much less any limitation of, other laws—such as the ICCA or the ACA—that establish federal authority to prosecute crimes in Indian country.

Furthermore, the MCA was enacted as "a direct response" to the Supreme Court's interpretation of the ICCA, or more accurately, its predecessor in Revised Statutes §§ 2145 and

2146.[6] *Keeble v. United States*, 412 U.S. 205, 209, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883) ... [where we held] that a federal court lacked jurisdiction to try an Indian for the murder of another Indian ... in Indian country."). "The prompt congressional response—conferring jurisdiction on the federal courts to punish certain offenses—reflected a view that tribal remedies were either nonexistent or incompatible with principles that Congress thought should be controlling." *Id.* at 210, 93 S.Ct. 1993. Because the ICCA did not "extend to offenses committed by an Indian against another Indian, nor to any Indian ... who has been punished for that act by the local law of the tribe," 18 U.S.C. § 1152, the MCA "partially abrogated [this exception in the ICCA] by creating federal jurisdiction over fourteen enumerated crimes committed by Indians against Indians or any other person in Indian country." *United States v. Male Juvenile*, 280 F.3d 1008, 1013, 1019 (9th Cir. 2002) ("The MCA was enacted after the [ICCA] ... as an exception to or abrogation of the [ICCA]."); *Donnelly*, 228 U.S. at 269–70, 33 S.Ct. 449 (explaining that the MCA of 1885 did not repeal the entire ICCA predecessor but instead "manifestly repeal[ed] in part the limitation that was imposed" by the specific exceptions).

6 Revised Statutes §§ 2145 and 2146, later codified in 25 U.S.C. §§ 217 and 218, were the direct progenitor for the ICCA enacted in 1948. Section 2145 asserted federal criminal jurisdiction over violations of the "general laws of the United States" in Indian country, while § 2146 provided for certain exceptions that were virtually identical to the exceptions in the current ICCA.

Thus, rather than limit federal authority over crimes by Indians in Indian country, the MCA extended it to specific "major crimes," thereby partially withdrawing the exclusive authority of tribes over Indian-on-Indian crimes previously afforded by the ICCA. The MCA did not otherwise affect the federal criminal jurisdiction that was already established by the ICCA for violations of the ACA and other federal enclave laws in Indian country. For these reasons, the MCA does not preclude the application of the ACA to Smith's offenses.

V.

We hold that the Assimilative Crimes Act applies to crimes in Indian country, and that neither the Indian Country Crimes Act nor the Major Crimes Act precluded the federal government from exercising its jurisdiction to prosecute Smith for his violations of Oregon Revised Statutes § 811.540(1) under the Assimilative Crimes Act. We uphold the district court's ***423** denial of the motion to dismiss for lack of jurisdiction and **AFFIRM** Smith's conviction.

FISHER, Circuit Judge, concurring:

I agree with the majority that the Assimilated Crimes Act (ACA) applies to "Indian country" subject to the Indian Country Crimes Act (ICCA)'s three exceptions. *See* 18 U.S.C. § 1151 (defining "Indian country"); *id.* § 1152 (providing that the ICCA "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").

There are two ways to arrive at that result. One is to hold that the ACA applies to Indian country only through the ICCA, not on its own terms – i.e., that the ACA is part of "the general laws of the United States" under the ICCA, *id.* § 1152, but Indian country is not among the "lands reserved or acquired for the use of the United States" under the ACA, *id.* §§ 7(3), 13. A second way to arrive at this result (the one adopted by the majority) is to hold that the ACA applies to Indian country on its own terms – i.e., that Indian country *is* among the "lands reserved or acquired for the use of the United States" under § 7(3) – but that Congress nonetheless intended the ACA's application to Indian country to be subject to the ICCA's three exceptions.

I have some reservations about the majority's chosen approach. *See Cohen's Handbook of Federal Indian Law* § 9.02 n.19 (Nell Jessup Newton ed., 2017) ("Only one court stated that the ACA applied of its own force within Indian country, in a case in which the point was not in issue. *United States v. Marcyes*, 557 F.2d 1361, 1365 n.1 (9th Cir. 1977). The statement is inconsistent with the policy of leaving tribes free of general federal criminal laws, except as expressly provided."). Under either approach, however, the

bottom line is the same: the ACA applies to Indian country subject to the ICCA's three exceptions. Accordingly, I concur.

All Citations

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1855 WL 10418(Trty.)
(TREATY)

TREATY WITH THE TRIBES OF MIDDLE OREGON, 1855.

June 25, 1855.

Articles of agreement and convention made and concluded at Wasco, near the Dalles of the Columbia River, in Oregon Territory, by Joel Palmer, superintendent of Indian affairs, on the part of the United States, and the following-named chiefs and headmen of the confederated tribes and bands of Indians, residing in Middle Oregon, they being duly authorized thereto by their respective bands, to wit: Symtustus, Locks-quis-sa, Shick-a-me, and Kuck-up, chiefs of the Taih or Upper De Chutes band of Walla-Wallas; Stocket-ly and Iso, chiefs of the Wyam or Lower De Chutes band of Walla-Wallas; Alexis and Talkish, chiefs of the Tenino band of Walla-Wallas; Yise, chief of the Dock-Spus or John Day's River band of Walla-Wallas; Mark, William Chenook, and Cush-Kella, chiefs of the Dalles band of the Wascoes; Toh-simph, chief of the Ki-gal-twal-la band of Wascoes; and Wal-la-chin, chief of the Dog River band of Wascoes. [FNA][FNB]

ARTICLE 1

The above-named confederated bands of Indians cede to the United States all their right, title, and claim to all and every part of the country claimed by them, included in the following boundaries, to wit: [FNC]

Commencing in the middle of the Columbia River, at the Cascade Falls, and running thence southerly to the summit of the Cascade Mountains; thence along said summit to the forty-fourth parallel of north latitude; thence east on that parallel to the summit of the Blue Mountains, or the western boundary of the Sho-sho-ne or Snake country; thence northerly along that summit to a point due east from the head-waters of Willow Creek; thence west to the head-waters of said creek; thence down said stream to its junction with the Columbia River; and thence down the channel of the Columbia River to the place of beginning. Provided, however, that so much of the country described above as is contained in the following boundaries, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation, to wit: [FND][FNE]

Commencing in the middle of the channel of the De Chutes River opposite the eastern termination of a range of high lands usually known as the Mutton Mountains; thence westerly to the summit of said range, along the divide to its connection with the Cascade Mountains; [FNF] thence to the summit of said mountains; thence southerly to Mount Jefferson; thence down the main branch of De Chutes River; heading in this peak, to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning. All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent. [FNG]

The said bands and tribes agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the United States other than is provided for by this treaty; and, until the expiration of the time specified, the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all white citizens the right to enter upon and occupy as settlers any lands not included in said reservation, and not actually inclosed by said Indians. Provided, however, That prior to the removal of said Indians to said reservation, and before any improvements contemplated by this treaty shall have been commenced, that if the three principal bands, to wit: the Wascopum, Tiah, or Upper De Chutes, and the Lower De Chutes bands of Walla-Wallas shall express in council, a desire that some other reservation may be selected for them, that the three bands named may select each three persons of their respective bands, who with the superintendent of Indian affairs or agent, as may by him be directed, shall proceed to examine, and if another location can be selected, better suited to the condition and wants of said Indians, that is unoccupied by the whites, and upon which the board of commissioners thus selected

may agree, the same shall be declared a reservation for said Indians, instead of the tract named in this treaty. Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them. And provided, also, That if any band or bands of Indians, residing in and claiming any portion or portions of the country in this article, shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such parr of the several and other payments herein named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid, as consideration and payment in full for the tracts in said country claimed by them. And provided, also, That where substantial improvements have been made by any members of the bands being parties to this treaty, who are compelled to abandon them in consequence of said treaty, the same shall be valued, under the direction of the President of the United States, and payment made therefor; or, in lieu of said payment, improvements of equal extent and value at their option shall be made for them on the tracts assigned to each respectively. [FNH][FNI][FNJ][FNK] [FNL][FNM]

ARTICLE 2

In consideration of, and payment for, the country hereby ceded, the United States agree to pay the bands and tribes of Indians claiming territory and residing in said country, the several sums of money following, to wit: [FNN]

Eight thousand dollars per annum for the first five years, commencing on the first day of September, 1856, or as soon thereafter as practicable.

Six thousand dollars per annum for the term of five years next succeeding the first five.

Four thousand dollars per annum for the term of five years next succeeding the second five; and

Two thousand dollars per annum for the term of five years next succeeding the third five.

All of which several sums of money shall be expended for the use and benefit of the confederated bands, under the direction of the President of the United States, who may from time to time, at his discretion determine what proportion thereof shall be expended for such objects as in his judgment will promote their well-being and advance them in civilization; for their moral improvement and education; for building, opening and fencing farms, breaking land, providing teams, stock, agricultural implements, seeds, &c.; for clothing, provisions, and tools; for medical purposes, providing mechanics and farmers, and for arms and ammunition. [FNO]

ARTICLE 3

The United States agree to pay said Indians the additional sum of fifty thousand dollars, a portion whereof shall be applied to the payment for such articles as may be advanced them at the time of signing this treaty, and in providing, after the ratification thereof and prior to their removal, such articles as may be deemed by the President essential to their want; for the erection of buildings on the reservation, fencing and opening farms; for the purchase of teams, farming implements, clothing and provisions, tools, seeds, and for the payment of employees; and for subsisting the Indians the first year after their removal. [FNP]

ARTICLE 4

In addition to the considerations specified the United States agree to erect, at suitable points on the reservation, one sawmill and one flouring-mill; suitable hospital buildings; one school-house; one blacksmith-shop with a tin and a gunsmith-shop thereto attached; one wagon and plough maker shop; and for one sawyer, one miller, one superintendent of farming operations, a farmer, a physician, a school-teacher, a blacksmith, and a wagon and plough maker, a dwelling house and the requisite outbuildings for

each; and to purchase and keep in repair for the time specified for furnishing employees all necessary mill-fixtures, mechanics' tools, medicines and hospital stores, books and stationery for schools, and furniture for employees. [FNQ]

The United States further engage to secure and pay for the services and subsistence, for the term of fifteen years, of one farmer, one blacksmith, and one wagon and plough maker; and for the term of twenty years, of one physician, one sawyer, one miller, one superintendent of farming operations, and one school teacher. [FNR]

The United States also engage to erect four dwelling-houses, one for the head chief of the confederated bands, and one each for the Upper and Lower De Chutes bands of Walla-Wallas, and for the Wascopum band of Wascoes, and to fence and plough for each of the said chiefs ten acres of land; also to pay the head chief of the confederated bands a salary of five hundred dollars per annum for twenty years, commencing six months after the three principal bands named in this treaty shall have removed to the reservation, or as soon thereafter as a head chief should be elected: And provided, also, That at any time when by the death, resignation, or removal of the chief selected, there shall be a vacancy and a successor appointed or selected, the salary, the dwelling, and improvements shall be possessed by said successor, so long as he shall occupy the position as head chief; so also with reference to the dwellings and improvements provided for by this treaty for the head chiefs of the three principal bands named. [FNS][FNT]

ARTICLE 5

The President may, from time to time, at his discretion, cause the whole, or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for these Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege, and locate[FNU] thereon permanently. To a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons, and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres for each additional three members. And the President may provide such rules and regulations as will secure to the family in case of the death of the head thereof the possession and enjoyment of such permanent home and the improvement thereon; and he may, at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years and shall be exempt from levy, sale, or forfeiture, which condition shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the State shall remove the restrictions. Provided, however, That no State legislature shall remove the restrictions herein provided for without the consent of Congress. And provided, also, That if any person or family shall at any time neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place indicating a desire to abandon his home, the President may, if the patent shall have been issued, revoke the same, and if not issued, cancel the assignment, and may also withhold from such person, or family, their portion of the annuities, or other money due them, until they shall have returned to such permanent home and resumed the pursuits of industry, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation. [FNV][FNW][FNX]

ARTICLE 6

The annuities of the Indians shall not be taken to pay the debts of individuals. [FNY]

ARTICLE 7

The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredation on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians except in self-defence, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents for decision, and abide thereby; and if any of the said

Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the case of depredations against citizens; said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians. [FNZ][FNAA] [FNBB]

ARTICLE 8

In order to prevent the evils of intemperance among said Indians, it is hereby provided, that if any one of them shall drink liquor to excess, or procure it for others to drink, his or her proportion of the annuities may be withheld from him or her for such time as the President may determine. [FNCC]

ARTICLE 9

The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interest may require it, that all roads, highways, and railroads shall have the right of way through the reservation herein designated, or which may at any time hereafter be set apart as a reservation for said Indians. [FNDD]

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNEE]

In testimony whereof, the said Joel Palmer, on the part of the United States, and the undersigned, chiefs, headmen, and delegates of the said confederated bands, have hereunto set their hands and seals, this twenty-fifth day of June, eighteen hundred fifty-five.

Joel Palmer, Superintendent of Indian Affairs, O.T. (L.S.)

18 U.S.C. § 7

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act-

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

18 U.S.C. § 13

§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district 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, 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.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2)(A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if-

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term “minor” means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district

that it would lie within if the boundaries of such State, Commonwealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

18 U.S.C. § 1151

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1152

§ 1152. Laws governing

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.

This section 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.

18 U.S.C. § 1153

§ 1153. Offenses committed within Indian country

(a) 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, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1162

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General-

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.