

## CHAPTER 5

### INDIAN COUNTRY CRIMINAL JURISDICTION

#### Reporters' Introductory Note About Indian Country Criminal Jurisdiction

1           Professor and tribal judge Robert N. Clinton famously described Indian country criminal  
2 jurisdiction as a “maze.” Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey*  
3 *Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

4           The United States Department of Justice maintains an informal but helpful chart to assist  
5 the public on the “maze” of Indian country criminal jurisdiction. (See chart on next two pages.)

**INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART**

for crimes committed within Indian Country as defined by 18 U.S.C. § 1151(a), (b) & (c) -  
 (a) formal [recognized treaty boundaries] & informal [tribal trust lands] reservations (including rights-of-way/roads),  
 (b) dependent Indian communities, & (c) Indian allotments held in trust or restricted status (including rights-of-way/roads).  
 (where no congressional grant of jurisdiction to state government over the Indian country involved exists)

**INDIAN OFFENDER:**

**1. VICTIM CRIMES: FOR OFFENSES AGAINST A VICTIM'S PERSON OR PROPERTY**

| <i>WHO IS THE VICTIM?</i>   | <i>WHAT WAS THE CRIME?</i>   | <i>JURISDICTION</i> |
|---|--|---------------------|
| <b>INDIAN</b><br>(enrolled or recognized as Indian by a government entity and possessing some degree of Indian blood) | <b>Major Crimes Act crimes:</b><br>Murder; manslaughter; kidnapping; maiming; sexual abuse/assault under Ch. 109-A; <u>incest</u> ; assault with intent to commit murder or in violation of 18 U.S.C. § 2241 or §2242; assault with intent to commit any felony; assault with a dangerous weapon; assault resulting in serious bodily injury; assault resulting in substantial bodily injury of a spouse, intimate partner or dating partner; assault on a person under 16 years old; assault of a spouse, intimate partner or dating partner by strangulation; <u>felony child abuse</u> or neglect; arson; <u>burglary</u> ; robbery; felony theft under 18 U.S.C. § 661. (Authority: Major Crimes Act - 18 U.S.C. § 1153 & state code where underlined) | <b>FEDERAL</b>      |
|   | <b>All remaining crimes contained in tribal code:</b><br>(Authority: tribal code or 25 CFR Pt. 11, if a CFR Court of Indian Offenses)  | <b>TRIBAL *</b>     |
| <b>NON-INDIAN</b>   | <b>Major Crimes Act crimes:</b><br>Murder; manslaughter; kidnapping; maiming; sexual abuse/assault under Ch. 109-A; <u>incest</u> ; assault with intent to commit murder or in violation of 18 U.S.C. § 2241 or §2242; assault with intent to commit any felony; assault with a dangerous weapon; assault resulting in serious bodily injury; assault resulting in substantial bodily injury of a spouse, intimate partner or dating partner; assault on a person under 16 years old; assault of a spouse, intimate partner or dating partner by strangulation; <u>felony child abuse</u> or neglect; arson; <u>burglary</u> ; robbery; felony theft under 18 U.S.C. § 661. (Authority: Major Crimes Act - 18 U.S.C. § 1153 & state code where underlined) | <b>FEDERAL</b>      |
|   | <b>Other federal crimes (unless tribe has punished Indian defendant), including crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act:</b><br>(Authority: General Crimes Act - 18 U.S.C. §§ 1152 and 13)  | <b>FEDERAL</b>      |
|   | <b>All remaining crimes contained in tribal code:</b><br>(Authority: tribal code or 25 CFR Pt. 11, if a CFR Court of Indian Offenses)  | <b>TRIBAL *</b>     |

**2. VICTIMLESS CRIMES: NO VICTIM'S PERSON OR PROPERTY INVOLVED IN CRIME**

(e.g., traffic offenses, disorderly conduct, prostitution, etc.)

|  |                 |
|--|-----------------|
| a. Crimes in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act. (Authority: 18 U.S.C. §§ 1152 and 13) | <b>FEDERAL</b>  |
| b. Crimes in tribal code. (Authority: tribal code or 25 CFR Pt. 11, if CFR Court)  | <b>TRIBAL *</b> |

\* limited to 1 year sentence & \$5,000. fine, unless tribe approved under Tribal Law & Order Act for 3 yr. felonies.

**3. GENERAL FEDERAL CRIMES: OTHER FEDERAL CRIMES OF GENERAL**

**APPLICABILITY (Affecting Interstate Commerce or a Federal Interest)**

**FEDERAL**

(Federal prosecution based on federal interest, not based on territorial jurisdiction over location of crime) (e.g., drug offenses, firearms offenses, mail fraud, embezzlement or theft from tribal organization, theft from casino, failure to report child abuse, etc.) (Authority: individual federal statute)

**NON-INDIAN OFFENDER**

**1. VICTIM CRIMES: AN OFFENSE AGAINST A VICTIM'S PERSON OR PROPERTY**

| <i>WHO IS THE VICTIM?</i>  | <i>WHAT WAS THE CRIME?</i>  | <i>JURISDICTION</i>    |
|--|---|------------------------|
| INDIAN<br>(enrolled or recognized as Indian by a government entity and possessing some degree of Indian blood) | <b>Indian Country Crimes Act Crimes:</b><br>All federal crimes which apply to the "special maritime and territorial jurisdiction of the United States under the U.S. Code." (Authority: General Crimes Act- 18 U.S.C. § 1152)   | <b>FEDERAL</b>         |
|  | <b>All remaining crimes contained in state code (where there is no federal statute for the category of offense) under the Assimilative Crimes Act.</b> (Authority: General Crimes Act - 18 U.S.C. §§ 1152 & 13)   | <b>FEDERAL</b>         |
|  | <b>Domestic Violence, Dating Violence, or Violation of Protection Order offenses [when defendant: 1) resides in Indian country, 2) works in Indian country, or 3) is a spouse or partner of a member of a participating tribe or is an Indian residing in Indian country of a participating tribe]</b><br>(Authority: tribal code and 25 U.S.C. § 3101) | <b>TRIBAL *<br/>**</b> |
| NON-INDIAN   | <b>All crimes contained in state code.</b><br>(Authority: <i>United States v. McBratney, 104 U.S. 621 (1881)</i> )  | <b>STATE</b>           |

\* limited to 1 year sentence & \$5,000. fine, unless tribe approved under Tribal Law & Order Act for 3 yr. felonies.

\*\* effective after 3/7/15 if the tribe provides U.S. Constitutional protections in tribal court.

**2. VICTIMLESS CRIMES: NO VICTIM'S PERSON OR PROPERTY INVOLVED IN CRIME**

(e.g., traffic offenses, disorderly conduct, prostitution, etc.)

**STATE ONLY**

**3. GENERAL FEDERAL CRIMES: OTHER FEDERAL CRIMES OF GENERAL APPLICABILITY (Affecting Interstate Commerce or a Federal Interest)**

(Federal prosecution based on federal interest, not based on territorial jurisdiction over location of crime) (e.g., drug offenses, firearms offenses, mail fraud, embezzlement or theft from tribal organization, theft from casino, failure to report child abuse, etc.) (Authority: individual federal statute)

**FEDERAL**

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1    **§ 100. Indian Country**

2           **In Indian country, federal and state criminal jurisdiction in most cases depend on**  
3    **the location of the crime.**

4    **Comment:**

5           *a. In general.* Indian country is codified at 18 U.S.C. § 1151. See § 3 of this Restatement.

6           *b. Element of the crime.* In certain federal criminal prosecutions, Indian country location  
7 is considered an element of the offense and must be proven beyond a reasonable doubt.

8           *c. Contrast to civil jurisdiction.* In non-Public Law 280 jurisdictions, unlike civil  
9 jurisdiction questions where courts primarily distinguish between Indian and non-Indian lands,  
10 see §§ 15-16, the codified definition of “Indian country” defines the geographic scope of  
11 criminal jurisdiction. In Public Law 280 jurisdictions, the “Indian country” definition also  
12 defines the scope of state civil jurisdiction. See § \_\_ [in Chapter 3, Subchapter 1, to come] of this  
13 Restatement; 28 U.S.C. § 1360.

14           *d. Criminal conduct occurring within and without Indian country.* Some crimes occur  
15 partially within and partially without Indian country. In such circumstances, federal, state, and  
16 tribal jurisdiction is determined by assessing the elements of the charged offenses and  
17 determining the location of each element. In general, when a crime occurs both inside and  
18 outside of Indian country, state courts acquire concurrent jurisdiction with federal and tribal  
19 courts over the crimes that occurred at least partially within the state’s territorial jurisdiction

**REPORTERS’ NOTES**

20           *Comment a.* The statute, 18 U.S.C. § 1151, provides:

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

1           The primary federal statutes authorizing federal criminal prosecution authority in Indian  
2 country are the Major Crimes Act, 18 U.S.C. § 1153, the Indian Country Crimes Act, 18 U.S.C.  
3 § 1152, and the Assimilative Crimes Act, 18 U.S.C. § 13.

4           18 U.S.C. § 1153(a) provides in relevant part:

5           Any Indian who commits against the person or property of another Indian or other  
6 person any of the following offenses, namely, murder, manslaughter, kidnapping,  
7 maiming, a felony under chapter 109A, incest, a felony assault under section 113,  
8 an assault against an individual who has not attained the age of 16 years, felony  
9 child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of  
10 this title within *the Indian country*, shall be subject to the same law and penalties  
11 as all other persons committing any of the above offenses, within the exclusive  
12 jurisdiction of the United States.

13 (emphasis supplied).

14 Further, 18 U.S.C. § 1152 provides:

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

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

24 (Emphasis supplied).

25 Finally, 18 U.S.C. § 13 provides:

26           (a) Whoever within or upon any of the places now existing or hereafter reserved  
27 or acquired as provided in section 7 of this title, or on, above, or below any  
28 portion of the territorial sea of the United States not within the jurisdiction of any  
29 State, Commonwealth, territory, possession, or district is guilty of any act or  
30 omission which, although not made punishable by any enactment of Congress,  
31 would be punishable if committed or omitted within the jurisdiction of the State,  
32 Territory, Possession, or District in which such place is situated, by the laws  
33 thereof in force at the time of such act or omission, shall be guilty of a like  
34 offense and subject to a like punishment.

35           (b)

36           (1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that  
37 which may or shall be imposed through judicial or administrative action under the  
38 law of a State, territory, possession, or district, for a conviction for operating a

1 motor vehicle under the influence of a drug or alcohol, shall be considered to be a  
2 punishment provided by that law. Any limitation on the right or privilege to  
3 operate a motor vehicle imposed under this subsection shall apply only to the  
4 special maritime and territorial jurisdiction of the United States.

5 (2)

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

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

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

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

20 (c) Whenever any waters of the territorial sea of the United States lie outside the  
21 territory of any State, Commonwealth, territory, possession, or district, such  
22 waters (including the airspace above and the seabed and subsoil below, and  
23 artificial islands and fixed structures erected thereon) shall be deemed, for  
24 purposes of subsection (a), to lie within the area of the State, Commonwealth,  
25 territory, possession, or district that it would lie within if the boundaries of such  
26 State, Commonwealth, territory, possession, or district were extended seaward to  
27 the outer limit of the territorial sea of the United States.

28 There are many other federal statutes criminalizing certain acts that involve Indian tribes,  
29 Indian people, and Indian country.

30 *Comment b.* The leading case is *United States v. John*, 437 U.S. 634, 650 (1978) (holding  
31 that the Major Crimes Act provides a proper basis for federal prosecution of a crime occurring on  
32 lands held in trust by the federal government for the Mississippi Band of Choctaw Indians). See  
33 also *United States v. Roberts*, 185 F.3d 1025, 1031-1032 (10th Cir. 1999); *United States v.*  
34 *Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (“Indian trust land, although not within the boundaries  
35 of the Turtle Mountain Reservation, can be classified as a de facto reservation, at least for  
36 purposes of federal criminal jurisdiction.”); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir.  
37 1985) (affirming the district court’s exercise of federal criminal jurisdiction because “whether

1 lands are merely held in trust for the Indians or whether the lands have been officially  
2 proclaimed a reservation, the lands are clearly Indian country”).

3 An early Supreme Court case applying “Indian country” as an element of a federal  
4 prosecution under the Major Crimes Act, 18 U.S.C. § 1153, is *United States v. Kagama*, 118  
5 U.S. 375 (1886). The case holds that the Major Crimes Act was a valid exercise of Congress’s  
6 plenary power over Indian affairs. The Court found that Congress can only prosecute crimes  
7 enumerated in the act committed by one Indian against another in Indian country. Thus, crimes  
8 committed outside of Indian country by an Indian against another, or against a non-Indian, would  
9 be adjudicated in the state system.

10 The above enactment is clearly separable into two distinct definitions of  
11 the conditions under which Indians may be punished for the same crimes as  
12 defined by the common law. The first of these is where the offense is committed  
13 within the limits of a territorial government, whether on or off an Indian  
14 reservation. In this class of cases the Indian charged with the crime shall be  
15 judged by the laws of the territory on that subject, and tried by its courts. This  
16 proposition itself is new in legislation of congress, which has heretofore only  
17 undertaken to punish an Indian who sustains the usual relation to his tribe, and the  
18 offense is committed in the Indian country, or on an Indian reservation, in  
19 exceptional cases; as where the offense was against the person or property of a  
20 white man, or is some violation of the trade and intercourse regulations imposed  
21 by congress on the Indian tribes. It is new, because it now proposes to punish  
22 these offenses when they are committed by one Indian on the person or property  
23 of another. The second is where the offense is committed by one Indian against  
24 the person or property of another, within the limits of a state of the Union, but on  
25 an Indian reservation. In this case, of which the state and its tribunals would have  
26 jurisdiction if the offense was committed by a white man outside an Indian  
27 reservation, the courts of the United States are to exercise jurisdiction as if the  
28 offense had been committed at some place within the exclusive jurisdiction of the  
29 United States. The first clause subjects all Indians, guilty of these crimes  
30 committed within the limits of a territory, to the laws of that territory, and to its  
31 courts for trial. The second, which applies solely to offenses by Indians which are  
32 committed within the limits of a state and the limits of a reservation, subjects the  
33 offenders to the laws of the United States passed for the government of places  
34 under the exclusive jurisdiction of those laws, and to trial by the courts of the  
35 United States. This is a still further advance, as asserting this jurisdiction over the  
36 Indians within the limits of the states of the Union.

37 *Id.* at 377-378.

38 *Comment d.* Cases in which state jurisdiction was upheld when a criminal transaction  
39 occurred within both state and tribal territories include *Brown v. Burns*, 996 F.2d 219 (8th Cir.

1 1993) (drunk driver who crossed from state lands to tribal lands and arrested in Indian country);  
2 *State v. Harrison*, 238 P.3d 869, 874 (N.M. 2010) (same).

3 Cases in which federal jurisdiction was upheld in cross-border cases include *United*  
4 *States v. Van Chase*, 137 F.3d 579 (9th Cir. 1998) (allowing evidence of non-Indian country  
5 criminal acts in federal prosecution for Indian country crimes).

6 See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.06, at 771 (2012 ed.);  
7 Conference of Western Attorneys General, *American Indian Law Deskbook* § 4:18 (May 2018).

8 Leading scholarship on the application of doctrines of fresh pursuit includes  
9 *Developments in the Law: Fresh Pursuit from Indian Country: Tribal Authority to Pursue*  
10 *Suspects onto State Land*, 129 HARV. L. REV. 1685 (2016).

## 11 § 101. Indian Status

12 **Federal, state, and tribal criminal jurisdiction often depend on whether the accused**  
13 **and/or victims are Indians. For criminal-jurisdiction purposes, Indian status is defined by**  
14 **case law as requiring:**

15 **(a) proof of some quantum of Indian blood, whether or not that blood derives**  
16 **from a member of a federally recognized tribe; and**

17 **(b) proof of membership in, or affiliation with, a federally recognized tribe.**

### 18 **Comment:**

19 *a. In general.* The Major Crimes Act, 18 U.S.C. § 1153, and the Indian Country Crimes  
20 Act, 18 U.S.C. § 1152, two important sources of federal criminal jurisdiction in Indian country,  
21 authorize jurisdiction over Indian perpetrators and/or victims, but do not define “Indian.” The  
22 Indian Civil Rights Act, 25 U.S.C. § 1301(4), cross-referencing § 1153, acknowledges tribal  
23 criminal jurisdiction over all “Indians.”

24 *b. Element of the crime.* In federal criminal prosecutions, Indian status of relevant  
25 criminal defendants and victims is considered an element of the offense and must be proven  
26 beyond a reasonable doubt.

27 *c. Contrast to civil jurisdiction.* Unlike civil-jurisdiction questions, which distinguish  
28 between tribal members and nonmembers, criminal-jurisdiction issues distinguish between  
29 Indian and non-Indian status.