No. ____________________

IN THE SUPREME COURT
OF THE UNITED STATES

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's controlling precedent requires a clear congressional statement to confer federal jurisdiction over crimes by Indians in Indian country. In the Major Crimes Act, Congress explicitly provided federal jurisdiction over specified offenses, none of which include fleeing from police officers, and described when state law applied. Johnny Smith, an enrolled member of the Confederated Tribes of Warms Springs, fled from tribal police on two occasions while driving a car on the Warm Springs Reservation, an offense specifically punishable under the Warm Springs tribal code but not the federal criminal code. The federal courts below permitted federal prosecution of Mr. Smith for a violation of the Oregon state offense of fleeing a police officer, under Or. Rev. Stat. § 811.540(1), through the Assimilative Crimes Act, which confers jurisdiction over crimes on federal enclaves. The question presented is:

> Did the federal government's prosecution of an Indian for violation of state law in Indian country violate federal statutes and tribal sovereignty retained by Treaty because neither the Assimilative Crimes Act nor any other federal statute includes an explicit congressional statement defining the Warm Springs Reservation, or any other Indian country, as a federal enclave or otherwise subjecting Indian country to federal criminal jurisdiction for prosecution of a state offense not specifically covered by the federal criminal code?

TABLE OF CONTENTS

Page

Table Of Authorities iii

Opinions Below 1

Jurisdictional Statement 2

Constitutional And Statutory Provisions 2

Statement Of The Case 5

Reasons For Granting The Writ 7

Argument 12

I. The Ninth Circuit's Holding That Indian Reservations Constitute Federal Enclaves Within The Meaning Of 18 U.S.C. § 7 Conflicts With This Court's Controlling Indian Law Rules Of Statutory Construction And Tribal Sovereignty Under The Relevant Treaty. 12

II. Only This Court Can Resolve The Entrenched Errors In Interpreting The Relevant Statutes Because, Based On Language In This Court's Decision In A Case Involving A Non-Indian Who Raised No Jurisdictional Issues, The Courts Of Appeals Consider The Question Settled. 17

III. The Jurisdictional Issue Is Exceptionally Important Because The Ninth Circuit's Ruling Expands Federal Jurisdiction Over Crimes By Indians In Indian Country In A Manner That Denigrates Tribal Sovereignty, With No Concomitant Express Congressional Authorization, In Violation Of Basic Rules Of Statutory Interpretation. 22

1. Congress Knows How To Confer Federal Jurisdiction Over Indian Crimes And Did Not Do So Here. 23

2. Congress Made No Clear Statement As Is Required For Expanded Federal Jurisdiction Over Local Crime 25

3. The Associated Statutory Words Do Not Include Indian Country Under The Rule Of *Noscitur A Sociis* 27

4. The History Of The Statutes Demonstrates No Intent To Expand Federal Jurisdiction Over State Crimes By Indians In Indian Country. 29

5. Any Ambiguity Must Be Resolved In Favor Of The Individual Indian. 34

Conclusion 35

INDEX TO APPENDIX

Ninth Circuit opinion filed May 28, 2019 1

District Court opinion filed August 15, 2017 27

Indictment filed November 1, 2016 44

Treaty between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon 46

18 U.S.C. § 7 54

TABLE OF AUTHORITIES

Page

SUPREME COURT OPINIONS

Bond v. United States,
134 S. Ct. 2077 (2014) 25, 27

Bond v. United States,
572 U.S. 844 (2014) 11

Bryan v. Itasca Cnty., Minnesota,
426 U.S. 373 (1976) 9, 13, 32

Bosse v. Oklahoma,
137 S. Ct. 1 (2016) 21

Clark v. Martinez,
543 U.S. 371 (2005) 21

Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,
502 U.S. 251 (1992) 35

Dean v. United States,
137 S. Ct. 1170 (2017) 24

Duro v. Raina,
495 U.S. 676 (1990) 8

Greenlaw v. United States,
554 U.S. 237 (2008) 19

Gregory v. Ashcroft,
501 U.S. 452 (1991) 25

Hagans v. Lavine,
415 U.S. 528 (1974) 19

Honeycutt v. United States,
137 S. Ct. 1626 (2017) 23-24

Ex parte Kan-gi-shun-ca,
109 U.S. 556 (1883) 3, 17

Jones v. United States,
529 U.S. 848 (2000) 26

Lagos v. United States,
138 S. Ct. 1684 (2018) 11, 24, 28

Leocal v. Ashcroft,
543 U.S. 1, 11-12 n.8 (2004) 21

Lewis v. United States,
523 U.S. 155 (1998) 24, 30

McClanahan v. State Tax Comm'n of Arizona,
411 U.S. 164 (1973) 13, 32, 33

Michigan v. Bay Mills Indian Cmty.
572 U.S. 782 (2014) 22

Montana v. Blackfeet Tribe of Indians,
471 U.S. 759 (1985) 35

Nat'l Aeronautics & Space Admin. v. Nelson,
562 U.S. 134 (2011) 19

Nevada v. Hicks,
533 U.S. 353 (2001) 14

Ramah Navajo Sch. Board v. Bur. of Revenue,
458 U.S. 832 (1982) 9

Russello v. United States,
464 U.S. 16 (1983) 11, 23

Talton v. Mayes,
163 U.S. 378 (1896) 8

Texas v. Cobb,
532 U.S. 162 (2001) 19

United States v. Bass,
404 U.S. 336 (1971) 26, 27, 34

United States v. Davis,
139 S. Ct. 2319 (2019) 34

United States v. Hatter,
532 U.S. 557 (2001) 21

United States v. Lara,
541 U.S. 193 (2004) 12-13, 15, 30

United States v. Morrison,
529 U.S. 598 (2000) 26

United States v. Press Pub. Co.,
219 U.S. 1 (1911) 30

United States v. Quiver,
241 U.S. 602 (1916) 32

United States v. Santos,
553 U.S. 507 (2008) 35

United States v. Thompson/Center Arms Co.,
504 U.S. 505 (1992) 21

United States v. Wheeler,
435 U.S. 313 (1978) 9, 26, 34

United States v. Wiltberger,
18 U.S. 76 (1820) 34

Wash. State Dept. of Social and Health Serv. v. Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 28

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) 14

Williams v. United States,
327 U.S. 711 (1946) .... *passim*

Worcester v. Georgia,
31 U.S. 515 (1832) 15, 32

Yates v. United States,
135 S. Ct. 1074 (2015) 28

FEDERAL COURT OPINIONS

Iowa Tribe of Indians of Kan. and Neb. v. Kansas,
787 F.2d 1434 (10th Cir. 1986) 20

Jones v. United States,
846 F.3d 1343 (Fed. Cir. 2017) 20

Pueblo of Santa Ana v. Hodel,
663 F. Supp. 1300 (D.D.C. 1987). 18, 32-33

United States v. Bruce,
394 F.3d 1215 (9th Cir. 2005) 16

United States v. John,
587 F.2d 683 (5th Cir. 1979) 20

United States v. Marcyes,
557 F.2d 1361 (9th Cir. 1977) 20

United States v. Prentiss,
206 F.3d 960 (10th Cir. 2000) (en banc) 16

United States v. Smith,
925 F.3d 410 (9th Cir. 2019) 2, 16

United States v. Sosseur,
181 F.2d 873 (7th Cir. 1950) 20

United States v. Thunderhawk,
127 F.3d 705 (8th Cir. 1997) 20

United States v. Torres,
733 F.2d 449 (7th Cir. 1984) 16

UNITED STATES CODE

18 U.S.C. § 7 .... 4, 8, 11, 12, 22, 28

18 U.S.C. § 13 .... 4, 6

18 U.S.C. § 1151 3

18 U.S.C. § 1152 .... 5, 6, 16, 20

18 U.S.C. § 1153 .... 3, 31-32

18 U.S.C. § 1162(a) 3, 8, 31

25 U.S.C. § 1301(2) 15

25 U.S.C. § 1302(b) 6

28 U.S.C. § 1254(1) 2

OTHER

HON. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW, (6th ed. 2014) 30, 32

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18 Ariz. L. Rev. 503 (1976) 8, 16

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Barbara L. Creel, *The Right To Counsel For Indians Accused Of Crime: A Tribal And Congressional Imperative*,
18 Mich. J. Race & L. 317 (2013) 2

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The petitioner, Johnny Ellery Smith, an enrolled member of the Confederated Tribes of Warm Springs, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 28, 2019, affirming his conviction for violation of state law in Indian country for an offense neither covered by the Major Crimes Act nor specifically proscribed by the federal criminal code.

Opinions Below

The district court denied defendant's motion to dismiss in an unpublished opinion on August 15, 2017 (Appendix 27). The Ninth Circuit affirmed the denial of the motion to

dismiss in a published opinion on May 28, 2019, reported as *United States v. Smith*, 925 F.3d 410 (9th Cir. 2019) (Appendix 1).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions

The Treaty between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon, signed in 1855 and ratified in 1859, described the Warm Springs Reservation and conditionally dedicated the land for exclusive tribal use:

> 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: [description of the reservation lands]. 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.

Treaty with the Tribes of Middle Oregon, 1855, art. 1, June 25, 1855, 12 Stat. 963 (ratified Mar. 8, 1859). In article 7 of the Treaty, "said Indians further engage[d] to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians."[1] The Treaty is set out in full at Appendix 46.

The Warm Springs Reservation is statutorily defined as "Indian country":

> 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

[1] This petition uses the term "Indian" throughout because "it has become a term of art from historical use in Federal Indian law, history, and statutes." Barbara L. Creel, *The Right To Counsel For Indians Accused Of Crime: A Tribal And Congressional Imperative*, 18 Mich. J. Race & L. 317, 318 n.1 (2013).

> 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. § 1151; *see* 18 U.S.C. § 1162(a) (excepting the Warm Springs Reservation from state jurisdiction over offenses by or against Indians in Indian country). After this Court held in *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 572 (1883), that the federal government lacked jurisdiction over murder of an Indian by an Indian in Indian country, Congress expressly conferred jurisdiction over such offenses in the Major Crimes Act, which in its present form states:

> 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.

18 U.S.C. § 1153(a). The statute also explicitly describes the circumstances under which state laws are permitted to be applied in Indian country:

> 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. § 1153(b).

The federal enclave statute provides for federal criminal jurisdiction over nine specific places and types of locations described as the "special maritime and territorial jurisdiction of the United States," including lands "reserved or acquired for the use of the United States":

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
>
> * * *
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, 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.

18 U.S.C. § 7. The full federal enclave statute is set out at Appendix 54. The Assimilative Crimes Act describes the application of state law on federal enclaves where the crime is "not made punishable by any enactment of Congress," but would be punishable under the state law where the enclave is located:

> 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.

18 U.S.C. § 13. In the Indian Country Crimes Act, Congress extended the general laws of the United States to Indian country:

> 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.

The Warm Springs Tribal Code proscribes fleeing from officers as follows:

> A driver of a motor vehicle commits the crime of fleeing or attempting to elude a police officer if, when given visual or audible signal to bring the vehicle to a stop, he knowingly flees or attempts to elude a pursuing police officer. The signal given by the police officer may be by hand, voice, emergency light or siren.

Warm Springs Tribal Code § 310.520. The Oregon criminal code, but not the federal general criminal code, also proscribes fleeing from the police in similar language:

> A person commits the crime of fleeing or attempting to flee a police officer if: (a) The person is operating a motor vehicle; and (b) A police officer who is in uniform and prominently displaying the police officer's badge of office or operating a vehicle appropriately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren, and . . . (A) The person, while still in the vehicle, knowingly flees or attempts to elude a pursuing officer . . .

Or. Rev. Stat. § 811.540(1).

Statement Of The Case

The jurisdictional issue raised on appeal involves simple facts applied to the statutory framework for federal court jurisdiction. Johnny Smith is an enrolled member of

the Confederated Tribes of Warm Springs. On November 1, 2016, a federal grand jury indicted Mr. Smith for two counts of fleeing or attempting to elude tribal police on the Warm Springs Reservation. Specifically, the indictment charged Mr. Smith with violating Or. Rev. Stat. § 811.540(1), through the Assimilative Crimes Act (18 U.S.C. § 13) and the Indian Country Crimes Act (18 U.S.C. § 1152). Appendix 44. The Oregon state statute makes it a crime for the driver of a motor vehicle to elude the police after being given a visual or audible signal to stop. A Warm Springs tribal code provision punishes the same conduct. There is no federal statute prohibiting eluding the police, and eluding the police is not a crime listed for assimilation under the Major Crimes Act.

Mr. Smith filed a motion to dismiss the indictment for lack of jurisdiction on May 23, 2017. After further pleadings, the district court held a hearing regarding the motion on August 10, 2017. The district court denied the motion by written Opinion and Order on August 15, 2017. Appendix 27. The district court held that, based on this Court's ruling in a case involving a non-Indian, and cases following the assumption regarding jurisdiction in that case, the Assimilative Crimes Act is applicable to Indian reservations through the Indian Country Crimes Act. Appendix at 34-37 (citing *Williams v. United States*, 327 U.S. 711, 712-13 (1946)). Mr. Smith then entered a guilty plea on August 16, 2017, stating his intention to appeal the district court's jurisdictional holding orally and in writing. On November 30, 2017, the district court sentenced Mr. Smith to 19 months and 1 day imprisonment, followed by a three-year term of supervised release, a sentence within the maximum permitted in tribal court under 25 U.S.C. § 1302(b).

On appeal, supported by amicus curiae advocates for Indian rights, Mr. Smith asserted that statutes and the relevant Treaty foreclosed application of state law against an Indian in Indian country for an offense not specifically named in the United States criminal code. Mr. Smith pointed out that this Court never addressed the statutory and treaty issues in *Williams* and that the important jurisdictional rights at stake were not resolved by assumptions regarding distinguishable facts: the prosecution of a non-Indian for statutory rape in Indian country. The Ninth Circuit affirmed in a divided opinion. Appendix 1. The majority found that, under *Williams* and its independent analysis, the federal enclave statute included the Warm Springs reservation and that the gap in federal criminal law could be filled by prosecution under the state statute. The concurring judge expressed doubt whether Indian country constituted a federal enclave, but decided that the Indian Country Crimes Act sufficed to confer jurisdiction. Appendix 25.

Reasons For Granting The Writ

This case involves three core reasons for this Court's exercise of its review authority:

- The Courts of Appeals are failing to follow this Court's Indian law rules of statutory construction that require clear statements for the exercise of federal criminal jurisdiction over Indians in Indian country;
- Only this Court can resolve the statutory and treaty questions because the Courts of Appeals are generally deferring to this Court's assumption regarding jurisdiction in *Williams*, a case involving a non-Indian in which the parties did not address and litigate jurisdictional questions;

- The question is exceptionally important because, by treating Indian country as federal enclaves under 18 U.S.C. § 7, the federal government has expanded its criminal jurisdiction to include state crimes committed by Indians in Indian country, in violation of this Court's rules of construction and the constitutionally-based sovereignty rights of Indians and Indian tribes.

Tribal criminal jurisdiction over tribal members, as an aspect of tribal sovereignty, predates the Constitution and does not depend upon it. *Talton v. Mayes*, 163 U.S. 378, 383-84 (1896). Federally recognized tribes continue to retain those aspects of sovereignty that are "needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro v. Raina,* 495 U.S. 676, 685-86 (1990). "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." *Id.* at 686 (citations and internal quotation marks omitted); *see* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: Journey Through A Jurisdictional Maze*, 18 Ariz. L. R. 503, 522 (1976) ("The Indian tribes, in negotiating treaties with the federal government, generally reserved tribal sovereignty and jurisdiction over intratribal matters.").

Mr. Smith is a member of an Indian tribe that retains those aspects of sovereignty governing law enforcement in Indian country. *See* 18 U.S.C. § 1162(a) (excepting the Warm Springs Reservation from state jurisdiction over offenses committed by or against Indians in Indian country). Federally recognized tribes have not been divested of the authority to promulgate laws and to punish criminal offenses committed by tribal members, which is an exclusive expression of sovereignty in the absence of express statutory

withdrawal. *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Federal statutes that purport to intrude into tribal sovereignty must be construed narrowly, subject to the requirement of a clear statement by Congress. *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 389 (1976); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2.02, at 114 (Nell Jessup Newton ed., 2012) (hereinafter, COHEN'S HANDBOOK) (tribal sovereignty rights preserved "unless Congress's intent to the contrary is clear and unambiguous."). In the absence of a clear congressional statement conferring federal jurisdiction, both this Court's rules of statutory construction and the Treaty underlying the Warm Springs reservation foreclose federal criminal prosecution of state crimes committed by an Indian within the boundaries of the Warm Springs Reservation. *Wheeler*, 435 U.S. at 322; *see Ramah Navajo Sch. Board v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) ("We have 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).

The courts below have failed to respect the Indian canons of construction that apply to the sovereignty of Indian tribes. Instead, the lower courts have deferred to an opinion from this Court in which the parties did not engage on the jurisdictional question and that did not even involve an Indian, so the rules of construction applicable to this Court's Indian jurisprudence were also not at issue. *Williams*, 327 U.S. at 713 (Indian country as a federal enclave "is not disputed"). In *Williams*, this Court addressed the issue of whether a non-Indian, who did not dispute the application of the Assimilated Crimes Act in Indian

country, should be prosecuted under federal law, not state law, for the statutory rape of an Indian in Indian country. *Williams*, 327 U.S. at 712-13. In holding that federal law applied, the Court never had to address the broader jurisdictional and tribal sovereignty issues raised if state law had applied. *Id.* at 717.

Because lower courts must defer to this Court, they have been constrained in their approach to the statutory construction and Treaty rights at stake. Although this Court's rules on precedent do not make *Williams* controlling, only this Court is in a position to redirect lower courts that are uniformly ignoring rules of construction that protect tribal sovereignty against the type of creeping federal intrusion authorized by the decision below. "[T]he analytical underpinnings of this extension of federal jurisdiction have never been thoroughly considered by any court, so the issue should not be regarded as settled." COHEN'S HANDBOOK § 9.02[1][c] at 741.

This Court should protect the basic tribal sovereignty underlying the jurisdictional dispute. In the treaty between the United States and the Confederated Tribes and Bands of Indians of Middle Oregon, the only exception that allows for federal intrusion into self-government must be express. Consistently with this Court's Indian law rules of statutory construction recognized in *Bryan*, Indians in Indian country must only submit to rules that "may be prescribed by the United States *for the government of said Indians*." Appendix 49 (emphasis added). There is nothing in the text or history of the Assimilated Crimes Act that makes the statute one prescribed for the government of Indians. This Court should reject the erosion of tribal sovereignty endemic to an interpretation of a statute directed at federal

enclaves – like forts, shipyards, and post offices – to implicitly give federal prosecutors free rein to prosecute Indians for violations of state law in Indian country.

Even applying the Court's ordinary rules of statutory construction, neither the Assimilative Crimes Act, nor any other statute, confers federal jurisdiction over state crimes committed by an Indian in Indian country:

- Under the rules on *inclusio unius est exclusio alterius*, the Major Crimes Act demonstrates that Congress knows precisely how to assume federal jurisdiction over crimes by Indians in Indian country as well as how to describe when and how to apply state law. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

- Under the rules limiting expansion of federal criminal jurisdiction at the expense of another sovereign, which this Court has held includes Indian tribes for the purposes of criminal prosecutions, the Court requires a clear statement before ordinary crime becomes federalized. *See Bond v. United States*, 572 U.S. 844, 848 (2014) ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.").

- Under the rules on related groups of words, the federal statute, 18 U.S.C. § 7, lists out the types of federal locations that constitute federal enclaves for the purposes of the Assimilated Crimes Act, with all examples relating to core governmental functions and none relating to Indian country. *See Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018) ("*[N]oscitur a sociis* [is the] the well-worn Latin phrase that tells us that statutory words are often known by the company they keep.").

- To the extent legislative history is considered, nothing in the history of the Assimilative Crimes Act reflects an intent to apply it to Indian

country, and nothing in the Indian Country Crimes Act indicates an intention to expand federal jurisdiction beyond interracial crime.

- To the extent ambiguity remains, the Court's rules on both lenity in general and Indian jurisprudence in particular would require resolution in favor of the Indian defendant.

This Court provides the only effective protection against the erosion of tribal sovereignty and the unwarranted aggrandizement of federal criminal jurisdiction that is at stake in this case. An Indian in Indian country is being prosecuted under state law by the federal government in the absence of any express congressional authorization. This Court's tradition as a protector of tribal sovereignty and Indian rights against intruding forces calls for the grant of a writ of certiorari to vindicate Treaty and statutory rights. Without this Court's intervention, Indian sovereignty and individual rights will be diminished by state and federal power being asserted against Indians with no adequate judicial check on expansion of state and federal power at the expense of Indians and their sovereign political entities.

ARGUMENT

I. The Ninth Circuit's Holding That Indian Reservations Constitute Federal Enclaves Within The Meaning Of 18 U.S.C. § 7 Conflicts With This Court's Controlling Indian Law Rules Of Statutory Construction And Tribal Sovereignty Under The Relevant Treaty.

The premise for the Ninth Circuit's jurisdictional ruling violates this Court's Indian law canons of statutory construction on the respect due to Indian tribal sovereignty. *See United States v. Lara*, 541 U.S. 193, 206 (2004) ("'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by

Congress."). The federal enclave statute, which says nothing about Indian country, and lists locations that have nothing to do with Indian reservations, cannot be the basis for prosecuting an Indian in Indian country for a state crime because this Court requires a clear statement in the statute for jurisdiction over Indians to be exercised. *Bryan,* 426 U.S. at 389 ("Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws."); *see McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170-71 (1973) ("'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'") (citation omitted). In the Major Crimes Act, Congress expressly conferred federal jurisdiction over a limited number of crimes by Indians in Indian country, including a description of when state law could apply. As in *Bryan*, Congress's demonstrated knowledge of how to expand federal jurisdiction forecloses the strained reading that the same authority is conferred by statutes that include no such express authorization.

In *Bryan,* this Court addressed whether the State of Minnesota could impose a personal property tax on the sale of a mobile home on tribal land. The question presented to the Court was whether a statute applying the civil laws "of general application to private persons or property" to Indian country swept in state tax laws. *Id.* at 378. This question is closely analogous to the question whether the term "the general laws of the United States" contained in the Indian Country Crimes Act makes the Assimilative Crimes Act applicable to Indians in Indian country. The Court in *Bryan* held that the term "civil laws . . . of general

application" did *not* make state tax laws applicable to Indian country. *Id.* at 375; *see Nevada v. Hicks*, 533 U.S. 353, 362 (2001) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)).

In so holding, this Court noted that, in various other statutes, Congress had used express language when its intent was to subject Indian country to state laws. *Id.* at 389. The express language contained in other statutes was "cogent proof that Congress knew well how to express its intent directly when that intent was to subject the reservation Indians to the full sweep of state laws . . . ." *Id.* In the criminal context, the Major Crimes Act provides the "cogent proof" of the express language needed to confer federal jurisdiction, under state law, over Indians in Indian country. If *Williams* actually stood for the proposition that "the general laws of the United States" makes Indians in Indian country subject to state criminal law through the Assimilative Crimes Act, it would be irreconcilable with the Court's determination in *Bryan* that the phrase civil laws "of general application" did not include tax laws because the language was not sufficiently express and clear to warrant an intrusion into tribal sovereignty.

Just as this Court in *Bryan* refused to view civil laws of "general application" as sufficiently express to intrude on tribal sovereignty, the absence of any express conferral of federal jurisdiction over state law crimes by Indians in Indian country rules out the government's attempt to expand its jurisdiction. Without any express conferral of

jurisdiction over Indians in Indian country for violations of state law, the Courts of Appeals have treated Treaty-created reservations as federal enclaves, despite the absence of any express language in the federal enclave statute or the Assimilative Crimes Act authorizing such diminution of Indian rights. This Court's jurisprudence respecting the sovereignty of Indian tribes, while subject to fluctuating policies, has its roots in the preconstitutional respect for Indian nations, with Treaty commitments protected on a constitutional level. *Lara*, 541 U.S. at 201-02; *see* 25 U.S.C. § 1301(2) ("[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means *the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians*.") (emphasis added).

As Justice Marshall wrote in 1832, "[t]he constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties." *Worcester v. Georgia,* 31 U.S. 515, 559 (1832). The Court noted that "Indian nations have always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial[.]" *Id.* It is from this early conception of tribal sovereignty that this Court's Indian law rules regarding the interpretation of statutes arise.

The federal enclave statute makes no reference to Indians and Indian country, and, as the Ninth Circuit below had to admit, "The plain text of the [Assimilated Crimes Act] lacks any express reference to Indians and Indian country." *Smith,* 925 F.3d at 415. Similarly, the Indian Country Crimes Act offers no clear language to imply the broad application of state criminal laws to Indian country under the Assimilative Crimes Act. Indeed, in the first place, "[i]t is not clear whether the ACA is one of the 'general laws of the United States' within the intended scope of the ICCA, at least as it applies to Indians." COHEN'S HANDBOOK § 9.02[(1)][(c)][(ii)], at 740. Furthermore, "the coverage of section 1152 is far more limited than the language suggests" due to "the numerous situations excepted from coverage." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 524 (1976).

Far from authorizing sweeping jurisdiction to criminally prosecute Indians in Indian country under state law, the ICCA "reaches only interracial crimes in which either the defendant or the victim is an Indian." COHEN'S HANDBOOK § 902[(1)][(d)][(i)], at 744; *accord United States v. Bruce*, 394 F.3d 1215, 1219 (9th Cir. 2005) ("[section] 1152 establishes federal jurisdiction over interracial crimes only."); *United States v. Prentiss*, 206 F.3d 960, 966 (10th Cir. 2000) (en banc) ("This jurisdictional statute essentially makes a crime occurring within Indian country a federal crime only if the crime occurred between an Indian and a non-Indian; i.e., the crime must be what courts have termed 'interracial.'"); *United States v. Torres,* 733 F.2d 449, 458 n.10 (7th Cir. 1984) ("[F]or purposes of 18 U.S.C. § 1152, the Government must satisfy the first condition and prove that the crime

was interracial.") (internal quotations omitted). Congress has not in the Indian Country Crimes Act offered a clear statement that would justify the application of state criminal law to Indians who commit crimes in Indian country.

By allowing intrusion into tribal sovereignty without express language from Congress, the court below violated this Court's clear laws of statutory construction regarding Indians that are designed to protect against unwarranted expansion of federal regulation of Indian tribes and their affairs. This Court should grant review to vindicate its Indian law jurisprudence protecting tribal rights to self-government, which includes "the maintenance of order and peace among their own members." *Kan-gi-shun-ca*, 109 U.S. at 568; *see* COHEN'S HANDBOOK § 4.01[2][d] at 218 (Unless this power of self-government "is removed by explicit federal legislation," "exclusive tribal judicial jurisdiction over reservation affairs is retained.").

II. Only This Court Can Resolve The Entrenched Errors In Interpreting The Relevant Statutes Because, Based On Language In This Court's Decision In A Case Involving A Non-Indian Who Raised No Jurisdictional Issues, The Courts Of Appeals Consider The Question Settled.

The lower courts have relied either directly on *Williams*, or on cases derived from *Williams*, to find jurisdiction for federal prosecution of Indians in Indian country for state crimes. But *Williams* did not and could not address the arguments made by the Indian in the present case. In *Williams,* this Court held that the Assimilative Crimes Act did not make an Arizona statutory rape statute applicable to a non-Indian in Indian country because there already existed a federal statute punishing the specific acts to which the Arizona crime

applied. *Williams,* 327 U.S. at 717-18. The *Williams* court assumed, without deciding, that the Assimilative Crimes Act applied in Indian country, while holding that a broader state law definition of a crime could not be assimilated because Congress had defined a similar federal crime. *Id.* The more sweeping jurisdictional issues raised in this case, as well as the more specific jurisdictional issues regarding Indian defendants, were never briefed or addressed in *Williams*, because the defendant was not an Indian.

As the court recognized in *Pueblo of Santa Ana v. Hodel*, "the [*Williams*] Court never directly addressed whether the [Assimilated Crimes] Act should apply to Indian lands." 663 F. Supp. 1300, 1309 (D.D.C. 1987). Rather, "the Court presumed that it applied, but then focused its analysis upon the preemptive application of the federal statutory rape law and concluded that the more lenient federal law superseded the state law." *Id.* In fact, "no court has carefully scrutinized whether Congress intended that the ACA be applied to Indian lands." *Id.* With the Circuits entrenched in decisions based on *Williams*, this Court should now grant certiorari to provide the careful scrutiny to the relevant Treaty and statutes that has been absent in the judicial expansion of federal jurisdiction to allow federal prosecution of state crimes committed by Indians in Indian country.

Under this Court's rules on precedent, *Williams* does not constitute controlling authority because the jurisdictional issue was neither raised nor resolved. This Court's adherence to the party presentation principle, which relies on "the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties

present[,]" means that this Court would be ruling in the first instance, not overturning *Williams* as precedent. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); *see Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."). A corollary of the party presentation principle forecloses preclusive effects of cases on jurisdictional questions, such as the one presently before the Court: "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974).

Williams never addressed the jurisdictional issues raised in this case, but assumed jurisdiction for purposes of addressing a separate issue. When a court assumes a legal principle, "there *is* no applicable rule of law that is settled." *Nat'l Aeronautics & Space Admin. v. Nelson,* 562 U.S. 134, 163 (2011) (Scalia, J., concurring) (emphasis in original). "A further reason [cases that assume legal principles] are not entitled to *stare decisis* effect is" that such opinions do not "suppl[y] any coherent reason" for why a legal principle may or may not be valid. *Id.* at 164. This Court should not treat *Williams* and its progeny as having resolved whether the Assimilative Crimes Act is applicable to Indian country. The *Williams* case provides no basis for a jurisdictional holding regarding Indians in Indian country, especially when compared with *Bryan*'s requirement of unambiguously clear language from Congress authorizing intrusions upon tribal sovereignty.

Despite the fact that *Williams* never resolved a contested jurisdictional issue, lower courts continue to rely on *Williams* as having resolved the important tribal sovereignty issues presented by this case. The Fifth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits have each expressly relied on *Williams* to support the Assimilative Crimes Act's jurisdictional application to Indian country, some in cases involving Indians, others non-Indians: *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950) (under *Williams*, the Assimilative Crimes Act "has been conclusively held applicable to the Indian country"); *United States v. Marcyes*, 557 F.2d 1361, 1365 n.1 (9th Cir. 1977) ("[T]he threshold question [of *Williams*] necessarily decided whether the ACA even applied to Indian Country"); *United States v. John*, 587 F.2d 683, 688 n.7 (5th Cir. 1979) ("The Assimilative Crimes Act was held applicable to crimes committed by non-Indians within Indian country in *Williams*."); *Iowa Tribe of Indians of Kan. and Neb. v. Kansas*, 787 F.2d 1434 (10th Cir. 1986) (citing *Williams* to recognize that, "[a]pparently, it was not until 1946 that it became clear that the Assimilative Crimes Act does apply to 'Indian country'"); *United States v. Thunderhawk*, 127 F.3d 705, 707 (8th Cir. 1997) (citing *Williams* for the proposition that the Assimilative Crimes Act "is one of the federal enclave laws made applicable to Indian country by the ICCA"); *Jones v. United States*, 846 F.3d 1343, 1357 (Fed. Cir. 2017) (citing *Williams* for the proposition that "[t]he 'general laws of the United States' in § 1152, as it existed in 2007, included what is now the Assimilative Crimes Act").

The lower courts' fealty to the *Williams* assumption, even though it involved a non-Indian, and even though jurisdiction was not disputed, is understandable given the

deference required to this Court's holdings. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("[I]t is this Court's prerogative alone to overrule one of its precedents.") (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). But *Williams* did not involve a holding resolving a dispute regarding jurisdiction, nor did it address the rules of construction that especially apply to Indians. And where construction of a statute also potentially applies to Indian sovereignty, this Court's precedent requires that the rules applicable to Indian law are determinative because "[t]he lowest common denominator, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004), and *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 and n.10 (1992)). Just as the rule of lenity applies where a statute has both criminal and civil applications, the lower courts should be applying the special clear statement rules required by Indian law, but, in deference to *Williams*, they are not.

Only this Court can address and resolve the misdirection provided to the Courts of Appeals by the *Williams* assumption. This Court should grant the writ of certiorari to decide, for the first time, the important federal question whether, under the Treaty and this Court's precedent on Indian law, federal prosecutors lack jurisdiction to prosecute an Indian in Indian country for violation of a state public safety law not covered by the Major Crimes Act.

III. The Jurisdictional Issue Is Exceptionally Important Because The Ninth Circuit's Ruling Expands Federal Jurisdiction Over Crimes By Indians In Indian Country In A Manner That Denigrates Tribal Sovereignty, With No Concomitant Express Congressional Authorization, In Violation Of Basic Rules Of Statutory Interpretation.

This Court considers as "an enduring principle of Indian law: Although Congress has plenary control over tribes, courts will not lightly assume Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.* 572 U.S. 782, 790 (2014). But that is exactly what happens when federal authorities convict an Indian of a non-major state crime committed in Indian country. *See* COHEN'S HANDBOOK § 2.02[1], at 114 n.5 (tribal sovereignty is "preserved unless Congress's intent to the contrary is clear and unambiguous."). This Court should exercise its historical role as a check against state and federal infringement on the rights of Tribes and individual Indians. The Treaty between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon explicitly states that reservation lands "shall be set apart, and, so far as necessary, surveyed and marked out for their *exclusive* use[.]" Appendix 46 (emphasis added). Thus, by Treaty, the Warm Springs reservation was acquired for the exclusive use of *tribal members*, not "for the use of the United States" as required by § 7 to constitute a federal enclave.

Under this Court's Indian law jurisprudence exemplified by *Bryan*, the absence of express congressional authorization vindicates Mr. Smith's position. None of the nine areas listed in the federal enclave statute include mention of Indians or Indian country; the Assimilative Crimes Act includes no such reference. But even employing normal rules of

statutory construction, Indian country does not constitute a federal enclave under this Court's standard rules on statutory construction. No treaty or statute has provided express authorization for such a diminution of tribal authority.

1. Congress Knows How To Confer Federal Jurisdiction Over Indian Crimes And Did Not Do So Here.

The Major Crimes Act specifically and clearly lists the major crimes committed by tribal members in Indian country that may be the subject of federal prosecution, then describes circumstances under which state law will be assimilated on Indian country. By expressly listing certain major crimes for federal jurisdiction and the operation of state law assimilation, Congress demonstrated an intent to occupy the field and, by necessary implication, foreclosed federal prosecution of tribal members for non-major state law crimes committed in Indian country under the general application of the *inclusio unius est exlusio alterius* canon of construction. *Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Eluding the police is not one of the crimes listed in the Major Crimes Act, and no statute expressly provides for assimilation of state law for the offense. Under this Court's precedent applying the canon, the express conferral of federal jurisdiction over Indians in Indian country, and the express description of when to apply state law, forecloses judicial construction to read the same language into statutory silence. *See, e.g.*, *Honeycutt v. United*

States, 137 S. Ct. 1626, 1634 (2017); *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017); *Lagos*, 138 S. Ct. at 1689-90. Because Congress demonstrated precisely how to incorporate state criminal law in Indian country in the Major Crimes Act, the absence of such language in the Assimilative Crimes Act or elsewhere demonstrates the lack of federal jurisdiction over the indictment charging Mr. Smith with the state crime of eluding the police.

And the statutory silence in the Assimilative Crimes Act makes perfect sense. In *Lewis v. United States*, this Court held that assimilation under the Assimilative Crimes Act is not proper where "federal statutes reveal an intent to occupy so much of a field as would exclude the use of the particular state statute at issue," where "its application would interfere with the achievement of federal policy," or where state law has been "displaced by specific laws enacted by Congress." 523 U.S. 155, 164-165 (1998). The Major Crimes Act is a federal statute that occupies the field of federal court jurisdiction over Indian country violations of state laws. With the Major Crimes Act, Congress passed a very specific statute defining when the federal government has authority to assimilate state law crimes committed by tribal members in Indian country. Under the Treaty and pre-existing tribal sovereignty, there is no absence of local law-and-order authority in Indian country. *See* COHEN'S HANDBOOK § 4.01[1][c], at 212 ("The powers of Indian tribes over their own members are broad and generally exclusive of both federal and state power.").The statutory scheme does not require or allow assimilation of minor state public safety crimes like eluding the police that, when involving an Indian in Indian country, are exclusively within the bailiwick of the tribal court.

2. *Congress Made No Clear Statement As Is Required For Expanded Federal Jurisdiction Over Local Crime.*

When ruling on the delicate interaction between federal criminal jurisdiction and another sovereign's criminal jurisdiction, this Court also applies the clear statement rule. *Bond v. United States*, 134 S. Ct. 2077 (2014). In *Bond,* the Court applied the clear statement rule to curb federal jurisdiction under a broadly worded statute over matters properly relegated to local law enforcement. *Bond* involved a federal prosecution under the chemical weapons treaty of a wife who placed a caustic substance in a location where it was likely to be touched by her husband's lover. *Id.* at 2833. As in the present case, the offense was fully capable of being prosecuted by local authorities, and Congress had not clearly stated an intention for federal prosecutors to intrude into a traditional area of local authority.

The Court narrowly construed the federal chemical weapons statute to foreclose the federal prosecution in light of the federal government's limited role in local law enforcement: "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* The Court relied on the "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the 'usual constitutional balance of federal and state powers.'" *Id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

Although *Bond* addressed the relationship between federal and state powers, "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*" *Wheeler*, 435 U.S. at 323 (quoting the 1945 version of COHEN'S HANDBOOK) (emphasis in original)). "Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *Id.* "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* Just as the dual sovereignty doctrine applied to the States, this Court applied dual sovereignty to tribal prosecutions in the context of the Sixth Amendment's former jeopardy protection. *Id.* at 329-30 ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred.").

For the same reasons as in *Bond*, construing the Assimilative Crimes Act to expand federal jurisdiction into areas typically reserved to tribal sovereignty must be rejected absent language clearly and expressly conveying that intent. *Id.* at 2089-90 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971), *Jones v. United States*, 529 U.S. 848, 850 (2000), and *United States v. Morrison*, 529 U.S. 598, 618 (2000)). The same principle applies where the balance is between federal and tribal powers. As with States, the federal government's relationship to Indian tribes is firmly rooted in the Constitution: "[W]hen legislation 'affect[s] the federal balance, the requirement of clear statement assures that the

legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Bond,* 134 S. Ct. at 2089 (quoting *Bass*, 404 U.S. at 349).

Just as an expansive reading of the statute at issue in *Bond* would have changed the "sensitive relation" between state and federal law enforcement, the Ninth Circuit's expansive reading of the Assimilative Crimes Act to incorporate minor state law crimes into Indian country for federal prosecution radically upsets the sensitive relationship between tribes and the federal government regarding federal criminal jurisdiction in Indian country. Only the Major Crimes Act includes such a clear statement; the Assimilative Crimes Act does not. In the absence of a clear statement from Congress, the Ninth Circuit's opinion represents an unauthorized intrusion on tribal sovereignty.

3. The Associated Statutory Words Do Not Include Indian Country Under The Rule Of Noscitur A Sociis.

This Court's rules on grouped terms foreclose the lower courts' construction of the Assimilated Crimes Act. Section 7 describes federal enclaves by listing specific places as the "special maritime and territorial jurisdiction." The terms in the statute have no relation to Indian country: the high seas, vessels voyaging on the Great Lakes, airplanes, certain rocks and islands, forts, and arsenals. Not only is there no express conferral of federal jurisdiction in Indian country, the general phrase "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," when read in the context of the other terms, cannot mean "Indian country."

This Court in *Lagos* rejected a broader interpretation of a general statute based on application of "*noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep." *Lagos*, 138 S. Ct. at 1688-89. This Court considered the statutory phrase that lists three specific items that must be reimbursed – namely, lost income, child care, and transportation – and then adds the words "and other expenses." *Lagos* at 1688 (quoting § 3663A(b)(4)). In narrowly reading the last term, the Court concluded that the statutory words indicate "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Id.*

As in *Lagos*, the application of *noscitur a sociis* limits the scope of the federal enclave statute. The absence of accompanying language pertaining to Indians and Indian country, and the presence of specific locations that are identified as federal grounds for maritime, military, postal, and other such core government functions, preclude an inference that Congress intended to legislate an application of state law to Indians in Indian country. Given the general provision in § 7(c), surrounded with specific locations that are not analogous to Indian country, this Court's application of the principle of *ejusdem generis* also militates against treatment of Indian country as a federal enclave. *See Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) ("Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (quoting *Wash. State Dept. of Social and Health Serv. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). Under this Court's application of *noscitur a sociis* and *ejusdem generis*,

one of these statutory things – Indian country – is not like the others, which forecloses the silent expansion of federal jurisdiction even aside from the special rules requiring protection of Indian rights.

4. *The History Of The Statutes Demonstrates No Intent To Expand Federal Jurisdiction Over State Crimes By Indians In Indian Country.*

The legislative history of the Assimilative Crimes Act demonstrates that the Act cannot serve as the basis for the Ninth Circuit's expansion of federal jurisdiction over crimes committed by Indians in Indian country. Congress passed the original Assimilative Crimes Act out of concern that minor crimes committed in federal enclaves, such as dockyards or forts, were going unpunished because (1) the federal criminal code only covered a few major crimes, and (2) *no other sovereign had any jurisdiction to punish offenses in those areas*. 40 ANNALS OF CONG. 929 (1823); 41 ANNALS OF CONG. 528 (1824) (emphasis added). By its text, the original Act only applied to "any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of, the United States, or on the site of any lighthouse, or other needful building belonging to the United States." Federal Crimes Act of 1825, ch. 65, § 1, 5 Stat. 115.[2]

[2] At its next reenactment, the Act simply referred to "any place which has been, or shall hereafter be, ceded to, and under the jurisdiction of the United States." Act of Apr. 5, 1866, ch. 24, § 2, 14 Stat. 12. In the following reenactment, the Act covered "any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure." Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717.

Within these forts and military installments there existed a need to fill the gaps in the law so as not to create lawless enclaves where a wide swath of minor crimes would escape punishment altogether. *See Lewis*, 523 U.S. at 160-61.[3]

There is no need to "fill the gaps" in criminal jurisdiction over tribal members in Indian country. Judge Canby aptly summarized the absence of a "gap" in criminal jurisdiction for Indian defendants:

> The Indian who commits a crime in Indian country is subject to the comprehensive criminal jurisdiction of the tribe and, for a few specified crimes, of the federal government under the Major Crimes Act. There is no criminal law vacuum for the Indian (as there was for the non-Indian) and therefore no need to import a body of criminal law by way of the General Crimes Act and Assimilative Crimes Act. To do so merely displaces tribal law that is far more appropriate for governing the conduct of the Indian.

HON. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 181 (6th ed. 2014) (hereinafter, CANBY). Similarly, the legislative history of the Indian Country Crimes Act indicates no intention to go beyond punishing interracial offences. *Id.* ("The primary need filled by the [ICCA] was that of a body of law to punish non-Indian crime."); *see also United States v. Lara*, 541 U.S. 193, 204-05 (2004) (recognizing that tribes have continued to possess inherent sovereign power to exercise criminal jurisdiction over tribal members, subject only to Congressional restriction or expansion).

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[3] The drafters of the Assimilative Crimes Act justified the application of state law by the fact that those living in federal enclaves who occupied the land before it was ceded "would not view it as any hardship that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession." *United States v. Press Pub. Co.*, 219 U.S. 1, 12-13 (1911).

Furthermore, when Congress has determined that a gap in law enforcement on Indian reservations exists, Congress has passed legislation expressly modifying criminal jurisdiction in Indian country rather than assuming that the Assimilative Crimes Act fills any gaps. *See, e.g.*, Public Law 280, Pub. L. No. 83-280, 67 Stat. 588, *codified at* 18 U.S. § 1162 (1953) (transferring Federal criminal jurisdiction on Indian Lands to certain state governments); The Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat 2467 (expressly assimilating state gambling offenses into federal law and applying them to Indian country); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (the so-called "*Duro* fix" expanding tribal jurisdiction to include Indian members of another tribe); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (expanding tribal court jurisdiction to permit lengthier tribal sentences); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54 (granting tribal courts jurisdiction over certain domestic violence crimes committed by non-Indians). Again, when Congress wants to expand federal or tribal jurisdiction in Indian country, it does so in express and clear language. In contrast, no such express congressional language confers general federal jurisdiction over Indians in Indian country for violating state laws.

Further evidence of Congress' intent not to apply the Assimilative Crime Act to Indian country comes from the reenactment of the Major Crimes Act, passed alongside the 1948 reenactment of the Indian Country Crimes Act and Assimilative Crimes Act. 18 U.S.C. § 1153 (1948) (providing that "the offenses of burglary and rape shall be defined and punished in accordance with the laws of the State in which such offenses were

committed"). The reenactment of these statutes in 1948 indicated that "Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws." *Bryan*, 426 U.S. at 389. It is also telling that, while Congress reenacted the Major Crimes Act, Indian Country Crimes Act, and Assimilative Crimes Act at the same time, in the legislative history, Congress never mentioned applying state law to the tribes via double derivative incorporation through the Indian Country Crimes Act and Assimilative Crimes Act, nor did it expressly include language to that effect.

Finally, Congress clearly would not have intended to apply the Assimilative Crimes Act to Indian country by way of the Indian Country Crimes Act because the prevailing federal policy at the time of its original passage involved insulating tribes from state interference. *See Worcester*, 31 U.S. at 561 (reinforcing the right of tribes to be free from State inference while affirming the exclusive right of the federal government to regulate relations between tribes and outsiders); CANBY, at 155 ("For fifty years, Marshall's view [in *Worcester*] that state law and power could not intrude into Indian country held sway."); *see also McClanahan*, 411 U.S. at 168 ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history."); *United States v. Quiver*, 241 U.S. 602, 605-06 (1916) ("[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."); *Pueblo of Santa Ana*, 663 F. Supp. at 1310 ("The long-standing policy which insulated the Indians from state control,

is patently incompatible with the proposition that Congress intended to utilize the ACA to enforce state criminal laws on Indian lands.").

The Ninth Circuit below cited legislative history but failed to identify any express legislative pronouncements or history to suggest that Indian country constitutes a federal enclave. *Smith*, 923 F.3d at 417-19. On the contrary, the Ninth Circuit failed to address the legislative history arguments presented by the defense, including the repeated explicit congressional authorizations for Indian country prosecutions in specific statutory expansions of federal prosecutorial authority. The Ninth Circuit's approach ignored "[t]he policy of leaving Indians free from state jurisdiction and control" that "is deeply rooted in the nation's history," *McClanahan*, 411 U.S. at 168, and that is reflected in the absence of express words in the text or legislative history of the relevant statutes. Neither text nor intent deviates for the foundational principle that, in general, state law does not apply in Indian country.

In this case, the Tribe's sovereign prerogatives regarding decisions of when to strip one of its own members of his or her freedom, and for how long, are at issue. This Court should not allow federal prosecutors to intrude on tribal sovereignty in the realm of criminal laws by enforcing state laws against Indians in Indian country that are not listed in the Major Crimes Act. Neither the text of the Assimilative Crimes Act nor its legislative history indicate that the statute, or any other statute, was intended to permit federal prosecutors to enforce state public safety laws against Indians in Indian country.

5. *Any Ambiguity Must Be Resolved In Favor Of The Individual Indian.*

The provisions of the relevant Treaty, the Indian canons of construction applicable to provisions in derogation of tribal sovereignty, and the traditional rules of statutory interpretation foreclose the Ninth Circuit's expansion of federal jurisdiction to enforce state law enforced against Indians in Indian country. If after applying these authorities ambiguity remained, both the rule of lenity and the special Indian rules of construction would require that such ambiguity must be resolved in favor of Mr. Smith.

The rule of lenity is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The rule "is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *Wiltberger*, 18 U.S. at 95). The rule fully applies where the jurisdictional scope of criminal statutes "define[s] as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349. Or, in the present context, readily denounced under tribal law that proscribes the exact same conduct. *Wheeler*, 435 U.S. at 329-30 (recognizing the dual sovereignty of federal and tribal law and order provisions). The purposes of the rule of lenity apply fully to the present case:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best

> induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008). Based on the lack of clarity in the statutory scheme, this Court resolves ambiguity in penal statues in favor of individual freedom, requiring Congress to speak more clearly if authorizing criminal sanctions under state law.

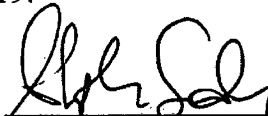
A parallel rule applies to ambiguity in legislation encroaching on Indian rights. "When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Under the relevant Treaty and the language of the relevant statues, the district court lacked jurisdiction over violations of state law by Indians in Indian country. To the extent any ambiguity remains, the Court resolves such unclear jurisdictional bases against the government and in favor of the Indian defendant.

Conclusion

The Ninth Circuit's opinion violated this Court's requirement that intrusions into tribal sovereignty occur only after an unambiguously clear statement from Congress. Additionally, the opinion compounded the problem of the Courts of Appeals misapplying

this Court's opinion in *Williams* in a manner that represents an unwarranted expansion of federal jurisdiction to cover Indians in Indian country violating state law. This Court's precedent forecloses exercise of federal prosecutorial power to enforce state law against an Indian in Indian country. For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 26th day of August, 2019.



Stephen Sady

Conor Huseby
Attorneys for Petitioner

No. ___________________

IN THE SUPREME COURT
OF THE UNITED STATES

JOHNNY ELLERY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Conor Huseby, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by hand-delivery on August 26, 2019, an exact and full copy thereof addressed to:

Paul T. Maloney
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Kelly A. Zusman
Assistant U.S. Attorney
1000 SW Third, Suitc 600
Portland, Oregon 97204

and by depositing in the United States Post Office, in Portland, Oregon on August 26, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

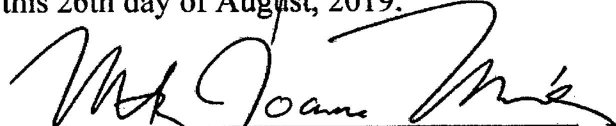
Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 26th day of August, 2019, with first-class postage prepaid.

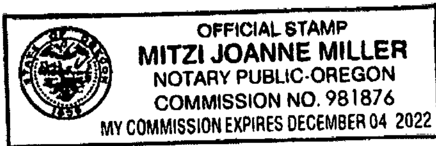
Additionally, I electronically filed the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI by the using the Supreme Court's Electronic filing system on August 26, 2019.

Dated this 26th day of August, 2019.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 26th day of August, 2019.





Notary Public of Oregon

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHNNY ELLERY SMITH, *Defendant-Appellant.*	No. 17-30248 D.C. No. 3:16-cr-00436-BR-1 OPINION

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted October 10, 2018
Portland, Oregon

Filed May 28, 2019

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

Opinion by Judge Callahan;
Concurrence by Judge Fisher

SUMMARY*

Criminal Law

The panel affirmed a conviction for two counts of fleeing or attempting to elude a police officer in violation of Oregon Revised Statutes § 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).

The panel held that the ACA applies to Indian country, by operation of both 18 U.S.C. § 7 (concerning land "reserved or acquired for the use of the United States" and "under the exclusive or concurrent jurisdiction thereof") and the ICCA (concerning "federal enclave" laws).

The panel held that the ACA, when invoked in Indian country, is subject to the exceptions set forth in the ICCA, namely: (1) "offenses committed by one Indian against the person or property 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." The panel held 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. Noting that the ICCA excludes from federal prosecution only Indian defendants who have already been punished by their tribe, the panel rejected the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

defendant's contention that because he *could* have been punished in tribal court for the same conduct, his prosecution under the ACA was a needless and unlawful intrusion into tribal sovereignty.

The panel rejected the defendant's claim that 18 U.S.C. § 1153, the Major Crimes Act (MCA), precludes the 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.

Concurring, Judge Fisher agreed with the majority that the ACA applies to "Indian country" subject to the ICCA's three exceptions. Observing that there are two ways to arrive at that result, he wrote that he has some reservations about the majority's chosen approach – that the ACA applies to Indian country on its own terms subject to the ICCA's exceptions.

COUNSEL

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.

OPINION

CALLAHAN, Circuit Judge:

Defendant-appellant Johnny Ellery Smith appeals from his district court conviction, 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 (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.

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 (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]

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, 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.

---

[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").

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 (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) "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 (1913); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. 515 (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.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *United States v. Wheeler*, 435 U.S. 313, 323 (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

[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).

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 code, falls within the "jurisdiction of the United States" comes from the express language of the statutory definition itself.

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

[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 (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).

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 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 (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 (1982) (alterations in original); *see also Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (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 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 (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. 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.

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. 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 (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 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 (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 (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 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 (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 (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

[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.

nonexistent or incompatible with principles that Congress thought should be controlling." *Id.* at 210. 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 (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).

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 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.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHNNY ELLERY SMITH,

Defendant.

3:16-CR-00436-BR

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Defendant Johnny

Ellery Smith's Motion (#12) to Dismiss the Indictment for lack of jurisdiction.

For the reasons that follow, the Court **DENIES** Defendant's Motion.

BACKGROUND

On November 1, 2016, Defendant, a Native American, was indicted in this Court on two counts of Fleeing or Attempting to Elude a Police Officer in violation of Oregon Revised Statutes § 811.540(1) while on the Warm Springs Indian Reservation on September 2, 2016, and October 23, 2016. The Indictment is brought pursuant to the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and the Indian Country Crimes Acts (ICCA), 18 U.S.C. § 1152 (also sometimes referred to as the General Crimes Act (GCA)). Defendant was not charged or prosecuted in any state or tribal court for these alleged crimes.

On May 23, 2017, Defendant filed a Motion to Dismiss. On August 10, 2017, the Court heard oral argument and took Defendant's Motion under advisement.

STATUTORY AUTHORITY

The following statutory authorities govern the issues raised by Defendant.

The ACA provides:

> 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.

18 U.S.C. § 13(a).

The ICCA provides:

> 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.

The Major Crimes Act (MCA) provides:

> (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. § 1153.

DISCUSSION

Defendant contends this Court does not have federal jurisdiction to prosecute him on the grounds that (1) the ACA on its face does not apply to Indian country; (2) the MCA precludes application of the ACA to crimes in Indian country that are not major crimes; and (3) even if the ACA applies to Indian country, it does not apply to "victimless" crimes or any other crime that does not involve a non-Native American.

The government contends this Court has federal jurisdiction over this matter on the grounds that (1) the crimes were committed by a Native American in Indian country; (2) the assimilated crime of Fleeing or Attempting to Elude Police Officers does not fall within one of the three exceptions articulated in the ICCA; and (3) Oregon law is properly assimilated through the ACA because there is not any federal law that prohibits Fleeing or Attempting to Elude Police Officers.

I. Assimilative Crimes Act (ACA) is not ambiguous.

A. The Parties' Arguments

Defendant contends the government lacks jurisdiction to prosecute him for the stated charges because the ACA on its face does not apply to Indian country. In addition, even if the ACA were ambiguous as to this issue, Defendant contends Congress has not clearly expressed an intent to apply the ACA to Indian country through the ICCA, and ambiguous statutes must be construed in favor of preserving tribal sovereignty.

Defendant also argues tribal lands are not "acquired for the use of the United States" pursuant to 18 U.S.C. § 7(3), which defines the "places" where the ACA applies. Moreover, Defendant argues if the ACA on its face applied to Indian country, the ICCA extending federal enclave crimes to Indian country would be surplusage.

Finally, Defendant contends Congress did not intend to give states legislative authority under the ACA over crimes committed by Native Americans in Indian country. Defendant argues Congress passed the ACA out of concern that minor crimes committed in federal enclaves were going unpunished because the federal criminal code only covered a few major crimes and no other sovereign had jurisdiction to punish offenses in those places. In particular, Defendant asserted at oral argument the ACA does not apply to Defendant's alleged crimes because the ACA only

applies when there is not any pertinent law, and there is an applicable tribal law in these circumstances.

In response the government contends the ICCA gives the government the authority to prosecute the "general laws of the United States" within Indian country, and the ACA is a general law of the United States. Moreover, the government emphasized at oral argument its position that the ACA allows assimilation of state law when there is a "gap" in existing federal law and the existence of a similar tribal law is irrelevant.

B. Analysis

Principles of federal Indian law require a clear statement of congressional intent to intrude on a tribe's sovereign rights to regulate its own domestic affairs. Although tribes do not enjoy full territorial sovereignty, they retain those aspects of sovereignty that are "needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro v. Reina*, 495 U.S. 676, 685-86 (1990). Criminal laws are an expression of social values and community values, and tribes have not been divested of the authority to promulgate and to punish criminal offenses committed by their tribal members. Accordingly, federal statutes that purport to intrude into tribal sovereignty must be narrowly construed. *United States v. Quiver*, 241 U.S. 602, 605-06 (1916)("[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.").

"Under the ACA, if conduct prohibited by state law occurs on federal land, the state criminal law is assimilated into federal law unless the conduct is already governed by federal law." *United States v. Thunder Hawk*, 127 F.3d 705, 707 (8th Cir. 1997). Thus, the ACA "fills gaps in the law applicable to federal enclaves, ensures uniformity between criminal prohibitions applicable within the federal enclave and within the surrounding state, and provides residents of federal enclaves with the same protection as those outside its boundaries." *United States v. Hall*, 979 F.2d 320, 322 (3d Cir. 1992). *See also United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977)("Thus, the ACA establishes uniformity in a state's prohibitory laws where such conduct is not made penal by federal statutes.").

The Tenth Circuit has specifically found the ACA assimilates traffic laws and other state laws 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." *United States v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979). *See also United States v. Sosseur*, 181 F.2d 873, 875 (7th Cir. 1950); *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966).

Defendant argues pursuant to *Sosseur* there must be a "total gap" before assimilating state law; *i.e.*, the ACA would

assimilate state law only when no other law applies to Defendant's conduct. The defendant in *Sosseur* was charged with operating slot machines on an Indian reservation in violation of state law. The court stated there was not any federal law applicable to the defendant's conduct in that case "[n]or ha[d] the Tribal Council for defendant's tribe ever adopted any ordinance with respect thereto."[1] 181 F.2d at 874. Defendant's reliance on the court's comment, however, is misplaced. Earlier in its opinion the court stated:

> Among the general laws of the United States referred to in [the ICCA] is the Assimilative Crimes Act which, by a recent decision of the United States Supreme Court, has been conclusively held applicable to the Indian country.

Id. (citing *Williams v. United States,* 327 U.S. 711 (1946)). The court approved the finding of the trial court that the ACA "has a natural place to fill, through its supplementation of the criminal code. [The ACA] permits the use of local State Statutes to fill in the gaps in the Federal Criminal Code, where no action of Congress has been taken to define the missing offense. It was enacted to supplement the offenses with the penal code of the State in which the Reservation may be situated, and is a part of the general laws of the United States relating to the punishment

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[1] The court, however, noted there was a Tribal Code provision that controlled gambling on the reservation. This was in contrast to the state statute prohibiting any form of gambling.

of offenses committed within the Indian country." *Id.* at 875.

This Court notes the ICCA makes the ACA applicable to Indian reservations. In *Williams v. United States*, 327 U.S. 711, 712-13 (1946), the court observed an Indian reservation is "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof" pursuant to 18 U.S.C. § 7(3). The court concluded: "This means that many sections of the Federal Criminal Code apply to the reservation, including . . . the Assimilative Crimes Act." *Williams*, 327 U.S. at 713. *See also Acunia v. United States*, 404 F.2d 140, 142 (9th Cir. 1968)(noting the ACA is among the general laws that the first paragraph of the ICCA extends to Indian territory).[2]

The Defendant contends the court in *Williams* did not explicitly decide whether the ACA is applicable to Indian country, and, therefore, *Williams* and its progeny do not have any precedential value. In *United States v. Marcyes*, however, the Ninth Circuit noted the *amicus* brief in that case included an identical argument regarding the applicability of *Williams*. 557 F.2d. 1361 (9th Cir. 1977). The Ninth Circuit stated in a footnote:

> The Supreme Court's initial statement [in *Williams*] was

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[2] In *Acunia* the court ultimately held the Native American-defendant's conviction for incest upon his daughter committed in Indian country fell within the exception of the ICCA for crimes committed by one Native American against another. At the time incest was not included in the provisions of the MCA.

> '[t]his case turns upon the applicability of the assimilative Crimes Act, . . .' Since it was undisputed that the act took place within an Indian reservation, the threshold question necessarily decided was the whether the A.C.A. even applied to Indian country. Amicus' argument that the court merely assumed its applicability without deciding the question is belied by the court's own words. . . . Our own review of the language of [the ACA] and [the ICCA] 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.

"The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Lewis v. U.S.*, 523 U.S. 155, 160 (1998). The *Lewis* court explained:

> In our view, the ACA's language and its gap-filling purpose taken together indicate that a court must first ask the question that the ACA's language requires: Is the defendant's "act or omission . . . made punishable by *any* enactment of Congress." 18 U.S.C. § 13(a) (emphasis added). If the answer to the question is "no," that will normally end the matter. The ACA presumably would assimilate the statute.

Id. at 164.

In *U.S. v. Errol D., Jr.*, the Ninth Circuit concluded the MCA did not give jurisdiction to the federal government to prosecute a Native American juvenile for burglarizing a federal building on a reservation nor did the MCA give the district court jurisdiction to adjudge him as a delinquent. 292 F.3d 1159 (2002). The court, however, stated:

> In holding that federal jurisdiction does not extend to crimes against government entities under the MCA, we do

> not mean to suggest that a loophole exists in the panoply of federal criminal statutes, governing Indian country. To the contrary, we believe, first, that the government could have charged [Defendant] under the [ICCA], which, by extending the Assimilative Crimes Act ("ACA") . . . to Indian territory, would have rendered him criminally liable for a "like offense and a "like punishment" under state law . . . .

Id. at 1164.

Based on *Williams* and *Marcyes* the Court concludes the ACA is not ambiguous and finds it constitutes a "general law of the United States" that is applicable to Indian country pursuant to the ICCA.

II. <u>The MCA does not preclude assimilation</u>.

A. <u>The Parties' Arguments</u>

Defendant contends the MCA precludes application of the ACA to crimes in Indian country that are not major crimes because the MCA provides an exclusive list of state-law crimes punishable in Indian country. Defendant argues the MCA is intended to "occupy" the field of federal major crimes punishable in Indian country and specifically excludes assimilation of victimless crimes such as an attempt to elude a police officer. Because there is not a federal attempt-to-elude statute and because there is tribal criminal law in place for an attempt to elude, Defendant contends there is not a "gap" requiring assimilation of state law.

According to the government, however, the MCA does not preclude application of the ACA in these circumstances. The government asserts Congress passed the MCA to address specific

egregious federal crimes and the "Indian-versus-Indian" exception of the ICCA. The MCA does not "occupy" the field of punishable crimes committed by Native Americans in Indian country and does not bar assimilation under the ACA. Thus, the government contends a crime that does not fall within the category of crimes enumerated in the MCA and that is not defined in federal law is definitely within the ACA's assimilation of state-law crimes.

B. <u>Analysis</u>

The MCA partially abrogated the ICCA by extending federal jurisdiction over Native Americans in Indian country for the commission of certain specifically enumerated crimes. *United States v. Begay*, 42, F.3d 486, 498 (9th Cir. 1994). Congress passed the MCA in response to *Ex Parte Crow Dog*, 109 U.S. 556 (1893), in which the court overturned the conviction of a Native American for the murder of another Native American in Indian country due to lack of federal jurisdiction under the ICCA. The MCA "reflected a view that tribal remedies were either nonexistent or incompatible with the principles that Congress thought should be controlling." *United States v. Male Juvenile*, 280 F.3d 1008, 1020 (9th Cir. 2002)(citing *Keeble v. United States*, 412 U.S. 205, 210 (1973)).

As the government points out, if the MCA occupied the field of crimes committed by Native Americans in Indian country and precluded application of the ACA, numerous crimes that are not

reflected in the MCA would remain unpunishable. Instead, as has been established, when there is not a federally defined corresponding crime, the ACA assimilates state law to "fill the gap."

For these reasons, the Court concludes the MCA does not preclude application of the ACA to non-major crimes committed in Indian country.

III. <u>The ACA applies to "victimless" crimes</u>.

A. <u>The Parties' Arguments</u>

Defendant contends even if the ACA applies to Indian country, it does not apply to "victimless" crimes or any other crime that does not involve a non-Native American. Defendant argues crimes that involve only Native Americans are matters wholly internal to the tribes, and tribal jurisdiction is exclusive. Defendant asserts importing all state laws governing victimless crimes would be an intrusion on tribal authority over Native American affairs. The government, however, contends assimilation of state law for federal prosecution of "victimless" crimes under the ICCA and ACA is proper to punish such crimes against the public at large.

B. <u>Analysis</u>

In *Thunderhawk* the Eighth Circuit found the assimilation of state law for federal prosecution under the ICCA and ACA is proper to enforce "victimless crimes." 127 F.3d 705 (8th Cir.

1997). In that case the defendant, a Native American, crashed his vehicle on the reservation while intoxicated and injured his minor daughter who was a passenger in his vehicle. The defendant was charged with operating a motor vehicle under the influence of alcohol in violation of South Dakota law as assimilated by federal law. The defendant moved to dismiss for lack of jurisdiction on the ground that the ICCA barred the exercise of federal jurisdiction over offenses committed by one Native American against the person or property of another Native American. After denial of his motion to dismiss, the defendant conditionally pled guilty to the charge. The Eighth Circuit affirmed the defendant's conviction and reasoned even though the defendant's daughter was a Native American and was injured during the offense, the crime of DUI was not an "Indian versus Indian" crime because injury to a victim was not an element of the crime. The DUI, therefore, did not fit within one of the three prohibitions to using the ICCA as a jurisdictional basis for prosecuting the crime. *Id.* at 708. The court stated:

> This case illustrates how the ACA fills gaps in the law. There is no specific federal law that criminalized [the defendant's] actions in driving under the influence of alcohol in the circumstances of this case. To fill this gap in the law, the prosecution used the ACA to assimilate the South Dakota DUI statute into federal law.

Id.

Although the Ninth Circuit has not specifically addressed

this issue, in *United States v. Errol D., Jr.* the court, as noted, held federal jurisdiction under the MCA did not extend to crimes against government entities. In a footnote the majority found the dissent's concern that the court's holding created a "loophole" in federal criminal statutes governing Indian country was not well-taken, and the majority cited with approval the decision in *Thunder Hawk* allowing the government to charge a Native American with a victimless crime under the ACA and ICCA.

In response, Defendant relies on *United States v. Quiver*, 241 U.S. 602 (1916), to support his opposition to the government's arguments. In *Quiver* the Supreme Court held the government did not have federal jurisdiction to prosecute a Native American for the consensual crime of adultery under the ICCA. Although adultery did not fall under the ICCA's "Indian-against-Indian" exception, the court held it was without jurisdiction based on the congressional policy 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" unless Congress directs otherwise. The defendant in *Thunderhawk* made a similar argument.

The Eighth Circuit, however, rejected that argument:

> We do not believe, however, that *Quiver* stands for the proposition that the "Indian versus Indian" exception applies to every "victimless" crime involving Indians. *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 been withing 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 offence.'" *United States v. Pino,* 606 F.2d 908, 915 (10th Cir. 1979) (citations omitted).

127 F.3d at 709.

The Court notes the Ninth Circuit has addressed the principle of assimilation of state law pursuant to the ACA. *See United States v. Kiliz,* 694 F.2d 628, 629 (9th Cir. 1982)(ACA assimilated state law prohibiting operating a motor vehicle without a license on a naval base). It has not, however, addressed the principle of assimilation in the context of the ICCA.

This Court finds persuasive the reasoning of *Thunderhawk* and, therefore, concludes the ACA applies to "victimless" crimes such as the one at issue in this case.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#12) to Dismiss.

IT IS SO ORDERED.

DATED this 15th day of August, 2017.

s/ Anna J. Brown
ANNA J. BROWN
United States Senior District Judge

FILED 1 NOV '16 14:49USDC-ORP

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA

v.

JOHNNY ELLERY SMITH,

Defendant.

3:16-CR-00436-BR

INDICTMENT

18 U.S.C. §§ 13, 1152
ORS 811.540(1)

THE GRAND JURY CHARGES:

COUNT 1
(Fleeing or Attempting to Elude Police Officer)
(18 U.S.C. §§ 13 and 1152 and ORS 811.540(1))

On or about September 2, 2016, in the District of Oregon, in Indian Country, on the Warm Springs Indian Reservation within the special maritime and territorial jurisdiction of the United States, defendant **JOHNNY ELLERY SMITH**, an Indian male, being the operator of a motor vehicle upon a public highway and premises open to the public, and having been given a visible and audible signal to stop by a police officer who was in uniform and prominently displaying the police officer's badge and operating a vehicle appropriately marked showing it to be an official police vehicle, did knowingly, while still in the vehicle, flee and attempt to elude a pursuing police officer;

In violation of ORS 811.540(1) and 18 U.S.C §§ 13 and 1152.

COUNT 2
(Fleeing or Attempting to Elude Police Officer)
(18 U.S.C. §§ 13 and 1152 and ORS 811.540(1))

On or about October 23, 2016, in the District of Oregon, in Indian Country, on the Warm Springs Indian Reservation within the special maritime and territorial jurisdiction of the United States, defendant **JOHNNY ELLERY SMITH**, an Indian male, being the operator of a motor vehicle upon a public highway and premises open to the public, and having been given a visible and audible signal to stop by a police officer who was in uniform and prominently displaying the police officer's badge and operating a vehicle appropriately marked showing it to be an official police vehicle, did knowingly, while still in the vehicle, flee and attempt to elude a pursuing police officer;

In violation of ORS 811.540(1) and 18 U.S.C §§ 13 and 1152.

Dated this 1st day of November 2016.

A TRUE BILL.

OFFICIATING FOREPERSON

Presented by:

BILLY J. WILLIAMS
United States Attorney

PAUL T. MALONEY, OSB #013366
Assistant United States Attorney

TREATY WITH THE TRIBES OF MIDDLE OREGON, 1855.

June 25, 1855. | 12 Stats., 963. | Ratified Mar. 8, 1859. | Proclaimed Apr. 18, 1859.

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 head-men 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.

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:
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:
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;

[*715]

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.
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 ay 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,* Th at 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 part 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.

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:
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.

[*716]

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.

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.

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 ploughmaker 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 ploughmaker, 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.
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.
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.

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

[*717]

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.

ARTICLE 6.

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

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.

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.

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.
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.

[*718]

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.]
Wasco:
Mark, his x mark. [L. S.]
William Chenook, his x mark. [L. S.]
Cush Kella, his x mark. [L. S.]
Lower De Chutes:
Stock-etley, his x mark. [L. S.]
Iso, his x mark. [L. S.]
Upper De Chutes:
Simtustus, his x mark. [L. S.]
Locksquissa, his x mark. [L. S.]
Shick-ame, his x mark. [L. S.]
Kuck-up, his x mark. [L. S.]
Tenino:
Alexsee, his x mark. [L. S.]
Talekish, his x mark. [L. S.]
Dog River Wasco:
Walachin, his x mark. [L. S.]
Tah Symph, his x mark. [L. S.]
Ash-na-chat, his x mark. [L. S.]
Che-wot-nleth, his x mark. [L. S.]
Te-cho, his x mark. [L. S.]
Sha-qually, his x mark. [L. S.]
Louis, his x mark. [L. S.]
Yise, his x mark. [L. S.]
Stamite, his x mark. [L. S.]
Ta-cho, his x mark. [L. S.]
Penop-teyot, his x mark. [L. S.]
Elosh-kish-kie, his x mark. [L. S.]
Am. Zelic, his x mark. [L. S.]
Ke-chac, his x mark. [L. S.]
Tanes Salmon, his x mark. [L. S.]
Ta-kos, his x mark. [L. S.]
David, his x mark. [L. S.]
Sowal-we, his x mark. [L. S.]
Postie, his x mark. [L. S.]
Yawan-shewit, his x mark. [L. S.]
Own-aps, his x mark. [L. S.]
Kossa, his x mark. [L. S.]
Pa-wash-ti-mane, his x mark. [L. S.]

Ma-we-nit, his x mark. [L. S.]
Tipso, his x mark. [L. S.]
Jim, his x mark. [L. S.]
Peter, his x mark. [L. S.]
Na-yoct, his x mark. [L. S.]
Wal-tacom, his x mark. [L. S.]
Cho-kalth, his x mark. [L. S.]
Pal-sta, his x mark. [L. S.]
Mission John, his x mark. [L. S.]
Le Ka-ya, his x mark. [L. S.]
La-wit-chin, his x mark. [L. S.]
Low-las, his x mark. [L. S.]
Thomson, his x mark. [L. S.]
Charley, his x mark. [L. S.]
Copefornia, his x mark. [L. S.]
Wa-toi-mettla, his x mark. [L. S.]
Ke-la, his x mark. [L. S.]
Pa-ow-ne, his x mark. [L. S.]
Kuck-up, his x mark. [L. S.]
Poyet, his x mark. [L. S.]
Ya-wa-clax, his x mark. [L. S.]
Tam-cha-wit, his x mark. [L. S.]
Tam-mo-yo-cam, his x mark. [L. S.]
Was-ca-can, his x mark. [L. S.]
Talle Kish, his x mark. [L. S.]
Waleme Toach, his x mark. [L. S.]
Site-we-loch, his x mark. [L. S.]
Ma-ni-nect, his x mark. [L. S.]
Pich-kan, his x mark. [L. S.]
Pouh-que, his x mark. [L. S.]
Eye-eya, his x mark. [L. S.]
Kam-kus, his x mark. [L. S.]
Sim-yo, his x mark. [L. S.]
Kas-la-chin, his x mark. [L. S.]
Pio-sho-she, his x mark. [L. S.]
Mop-pa-man, his x mark. [L. S.]
Sho-es, his x mark. [L. S.]
Ta-mo-lits, his x mark. [L. S.]
Ka-lim, his x mark. [L. S.]
Ta-yes, his x mark. [L. S.]
Was-en-was, his x mark. [L. S.]
E-yath Kloppy, his x mark. [L. S.]
Paddy, his x mark. [L. S.]
Sto-quin, his x mark. [L. S.]
Charley-man, his x mark. [L. S.]
Ile-cho, his x mark. [L. S.]
Pate-cham, his x mark. [L. S.]
Yan-che-woc, his x mark. [L. S.]
Ya-toch-la-le, his x mark. [L. S.]
Alpy, his x mark. [L. S.]
Pich, his x mark. [L. S.]
William, his x mark. [L. S.]
Peter, his x mark. [L. S.]
Ischa Ya, his x mark. [L. S.]

George, his x mark. [L. S.]
Jim, his x mark. [L. S.]
Se-ya-las-ka, his x mark. [L. S.]
Ha-lai-kola, his x mark. [L. S.]
Pierro, his x mark. [L. S.]
Ash-lo-wash, his x mark. [L. S.]
Paya-tilch, his x mark. [L. S.]
Sae-pa-waltcha, his x mark. [L. S.]
Shalquilkey, his x mark. [L. S.]
Wa-qual-lol, his x mark. [L. S.]
Sim-kui-kui, his x mark. [L. S.]
Wacha-chiley, his x mark. [L. S.]
Chi-kal-kin, his x mark. [L. S.]
Squa-yash, his x mark. [L. S.]
Sha Ka, his x mark. [L. S.]
Keaui-sene, his x mark. [L. S.]
Che-chis, his x mark. [L. S.]
Sche-noway, his x mark. [L. S.]
Scho-ley, his x mark. [L. S.]
We-ya-thley, his x mark. [L. S.]
Pa-leyathley, his x mark. [L. S.]
Keyath, his x mark. [L. S.]
I-poth-pal, his x mark. [L. S.]
S. Kolps, his x mark. [L. S.]
Walimtalin, his x mark. [L. S.]
Tash Wick, his x mark. [L. S.]
Hawatch-can, his x mark. [L. S.]
Ta-wait-cla, his x mark. [L. S.]
Patoch Snort, his x mark. [L. S.]
Tachins, his x mark. [L. S.]
Comochal, his x mark. [L. S.]
Passayei, his x mark. [L. S.]
Watan-cha, his x mark. [L. S.]
Ta-wash, his x mark. [L. S.]
A-nouth-shot, his x mark. [L. S.]
Hanwake, his x mark. [L. S.]
Pata-la-set, his x mark. [L. S.]
Tash-weict, his x mark. [L. S.]
Wescha-matolla, his x mark. [L. S.]
Chle-mochle-mo, his x mark. [L. S.]
Quae-tus, his x mark. [L. S.]
Skuilts, his x mark. [L. S.]
Panospam, his x mark. [L. S.]

[*719]

Stolameta, his x mark. [L. S.]
Tamayechotote, his x mark. [L. S.]
Qua-losh-kin, his x mark. [L. S.]
Wiska Ka, his x mark. [L. S.]
Che-lo-tha, his x mark. [L. S.]
Wetone-yath, his x mark. [L. S.]
We-ya-lo-cho-wit, his x mark. [L. S.]
Yoka-nolth, his x mark. [L. S.]

Wacha-ka-polle, his x mark. [L. S.]
Kon-ne, his x mark. [L. S.]
Ash-ka-wish, his x mark. [L. S.]
Pasquai, his x mark. [L. S.]
Wasso-kui, his x mark. [L. S.]
Quaino-sath, his x mark. [L. S.]
Cha-ya-tema, his x mark. [L. S.]
Wa-ya-lo-chol-wit, his x mark. [L. S.]
Flitch Kui Kui, his x mark. [L. S.]
Walcha Kas, his x mark. [L. S.]
Watch-tla, his x mark. [L. S.]
Enias, his x mark. [L. S.]

Signed in presence of——

Wm. C. McKay, secretary of treaty, O. T.
R. R. Thompson, Indian agent.
R. B. Metcalfe, Indian sub-agent.
C. Mespotie.
John Flett, interpreter.
Dominick Jondron, his x mark, interpreter.
Mathew Dofa, his x mark, interpreter.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

18 U.S.C.A. § 7

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

Effective: October 26, 2001
Currentness

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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 685; July 12, 1952, c. 695, 66 Stat. 589; Pub.L. 97-96, § 6, Dec. 21, 1981, 95 Stat. 1210; Pub.L. 98-473, Title II, § 1210, Oct. 12, 1984, 98 Stat. 2164; Pub.L. 103-322, Title XII, § 120002, Sept. 13, 1994, 108 Stat. 2021; Pub.L. 107-56, Title VIII, § 804, Oct. 26, 2001, 115 Stat. 377.)

Notes of Decisions (176)

18 U.S.C.A. § 7, 18 USCA § 7
Current through P.L. 116-41.

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