

VOLUME NO. 37

OPINION NO. 7

CRIMINAL LAW - Canadian Indians, state jurisdiction over offenses committed within the state; INDIANS - Criminal law, state jurisdiction over Canadian Indians committing offenses within the state; INDIAN RESERVATIONS - State jurisdiction over Canadian Indians.

HELD: The State of Montana has jurisdiction over the prosecution of offenses committed by Canadian Indians within the Fort Peck Indian Reservation when such offenses are committed against a non-Indian.

1 March 1977

James A. McCann, Esq.
Roosevelt County Attorney
Roosevelt County Courthouse
Wolf Point, Montana 59255

Dear Mr. McCann:

You have requested my opinion on the following question:

Does the State of Montana have jurisdiction over the prosecution of offenses committed by Canadian Indians against non-Indians within the Fort Peck Indian Reservation?

The Montana Supreme Court has recently stated (Old Elk v. District Court, 33 St. Rptr. 637, 639 (1976)):

Very simply, most matters within the exterior boundaries of an Indian reservation are within the exclusive jurisdiction of the trial courts or federal courts unless falling within the state's jurisdiction as directed or allowed by an act of Congress.

The Congressionally-provided procedure for imposition of state criminal jurisdiction within Indian reservations is found in 25 U.S.C.A., sections 1321, et. seq. Without an analysis of those provisions, it is sufficient to note that neither the State of Montana nor the Fort Peck Tribes has acted to extend or accept state criminal jurisdiction. Cf., Kennerly v. District Court, 400 U.S. 423 (1971). Even so, the jurisdictional rules as to non-Indians, as discussed below, are well established. Draper v. U.S., 164 U.S. 240, 247 (1896).

The federal courts have exclusive criminal jurisdiction over major crimes committed on a reservation by an Indian against an Indian or "other person." 18 U.S.C., sections 1153. Except as withdrawn by Congress, the jurisdiction over other crimes committed by Indians on a reservation rests with the tribal court. Glover v. U.S., 219 F. Supp. 19, 20 (D. Mont. 1963); U.S. v. LaPlant, 156 F. Supp. 660, 662 (D. Mont. 1957). The tribes possess the power to create and administer criminal justice systems (Ortiz-Barraza v. U.S., 512 F.2d 1176, 1179 (9th Cir. 1975), and tribal criminal jurisdiction is "to a considerable extent, exclusive. This is the normal rule as to criminal offenses." Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965). Federal criminal law, except as specifically provided in 18 U.S.C., section 1153, does not extend to on-reservation offenses committed by one Indian against another, to any Indian who has been punished by tribal law, or to any case where exclusive jurisdiction is retained by the tribe. 18 U.S.C., section 1152. Such offenses are exclusively cognizable by tribal courts.

Nonetheless, it is settled that the jurisdiction over crimes committed by non-Indians against non-Indians on a reservation rests with the state. Williams v. Lee, 358 U.S. 217, 220 (1959); U.S. v. Dodge, 538 F.2d 770 (8th Cir. 1976); U.S. v. Cleveland, 503 F.2d 1067 (9th Cir. 1974); Nepstad v. Danielson, 149 Mont. 438 (1967). The state similarly has jurisdiction over offenses committed by an Indian off the reservation. Petition of Boe, 516 Mont. 303 (1971); State v. Phelps, 93 Mont. 277 (1932). See, Davis, Criminal Jurisdiction over Indian Country in Arizona, 1 Ariz. L.R. 62 (1959).

This being the case, it is necessary to determine who are "Indians" within the rules establishing exclusive federal-tribal criminal jurisdiction as noted above. The federal regulations establishing the courts of Indian offenses give jurisdiction over offenses committed by "any Indian, within the reservation." (25 C.F.R., section 11.2(a).) The term "Indian" is defined as "...any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction..." (25 C.F.R., section 11.2(c).) A similar definition, applicable to non-criminal statutes, is found in 25 U.S.C., section 479. These definitions would specifically exclude, by their terms, Canadian Indians since Canadian Indian tribes are clearly not "under Federal jurisdiction." Thus as to criminal offenses committed by Canadian Indians against the person or property of non-Indians within the Fort Peck Reservation, jurisdiction rests in the State of Montana. Alien nationals are subject to the criminal laws of this State when within its borders. See 3 Am.Jur.2d, "Aliens and Citizens," section 42.

It is further established that the State does not have jurisdiction over on-reservation offenses committed by non-Indians against Indians. Williams v. U.S., 327 U.S. 711, 714 (1946); Mill v. U.S., 402 F.2d 571, 573 (9th Cir. 1968); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954). Since Canadian Indians are not "Indians" under federal law, this rule applies and rests such jurisdiction in tribal and federal courts.

THEREFORE, IT IS MY OPINION:

The State of Montana has jurisdiction over the prosecution of offenses committed by Canadian Indians within the Fort Peck Indian Reservation when such offenses are committed against a non-Indian.

Very truly yours,

MIKE GREELY
Attorney General