LETTER OPINION
93-L-244

August 31, 1993

Representative Merle Boucher
District 9
606 Highland Street
Rolette, ND 58366

Dear Representative Boucher:

Thank you for your May 25, 1993, letter requesting an opinion concerning criminal misdemeanor jurisdiction on the Turtle Mountain Indian Reservation in particular, and all Indian reservations located in North Dakota in general. Your question arises because of an increase in non-sufficient fund checks being received by businesses located on the Turtle Mountain Indian Reservation. This increase is the result, in part, of new gaming facilities located there.

Before discussing the question of federal, state, and tribal jurisdiction over criminal misdemeanor offenses, I need to point out that a special federal statute, 60 Stat. 229 (1946), covers criminal misdemeanor jurisdiction on the Devils Lake Indian Reservation. In State v. Hook, 476 N.W.2d 565 (N.D. 1991), the court determined that the statute gives the state criminal jurisdiction over misdemeanor offenses committed by or against Indians on the Devils Lake Reservation. In Negonsott v. Samuels, 113 S. Ct. 1119 (1993), the United States Supreme Court held that a nearly identical statute conferred concurrent criminal jurisdiction on the state of Kansas to prosecute crimes committed by or against Indians on reservations in Kansas. The Court reasoned that "Congress has plenary authority to alter" jurisdiction with respect to criminal offenses committed in Indian country. Thus, as a result of the 1946 federal statute, North Dakota has jurisdiction to prosecute all criminal misdemeanor offenses committed by or against Indians on the Devils Lake Reservation. However, no federal statute confers criminal jurisdiction upon North

Dakota on any other Indian reservation. The following analysis, therefore, applies to those other reservations, but not to the Devils Lake Reservation.

In determining whether the federal, state, or tribal government has jurisdiction over a particular misdemeanor crime, three questions must be answered in each case: One, was the crime committed in "Indian country"? Two, is the accused an Indian or non-Indian? Three, is the victim an Indian or non-Indian? (The rules governing jurisdiction over felonies or major crimes differ from the rules governing jurisdiction over misdemeanor or non-major crimes. Since your question concerns only the latter crimes, it is to this subject that I will confine my answer.)

INDIAN COUNTRY. The first question to be addressed in each case is whether the crime was committed in "Indian country." The state has jurisdiction to prosecute Indians for crimes committed outside of Indian country. DeCoteau v. District Court, 211 N.W.2d 843, 844 (S.D. 1973), aff'd, 420 U.S. 425, 427 n.2 (1975); St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988). 18 U.S.C.A. ? 1151 defines "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 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.

Section 1151(a) has been construed to mean that all land located within an existing reservation constitutes "Indian country" irrespective of the ownership of the tract upon which the crime is committed. Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962). Whether the land is owned in fee or in

trust is, therefore, irrelevant in determining whether a crime was committed in "Indian country" so long as the crime was committed within a reservation.

Factors relevant to determining whether a dependent Indian community exists under section 1151(b) are outlined in United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981). They include: (1) whether the United States retains title to the land which it permits Indians to occupy and has the authority to regulate; (2) the nature of the area, and the relationship between its inhabitants and the federal government; (3) the community "cohesiveness" as evidenced by economic pursuits, common interests, and needs; and (4) whether such lands have been set aside for Indians.

Section 1151(c) applies to Indian allotments for which Indian titles have not been extinguished. For example, when a reservation is diminished or disestablished certain lands within the former reservation may continue to be held in trust by the United States as allotted land for the benefit of an individual Indian. E.g., United States v. Pelican, 232 U.S. 442, 449 (1914); DeCoteau v. District County Court, 420 U.S. 425, 429 n.3 (1975).

DETERMINING INDIAN STATUS. After determining whether the crime was committed in Indian country, the next step is to determine the Indian or non-Indian status of the offender and the victim.

There is not a universally accepted definition of "Indian." Federal statutes define "Indian" for particular purposes. For example, the Indian Child Welfare Act and Indian Self-Determination Act define "Indian" as anyone who is a member of an Indian tribe. 25 U.S.C.A. ? 450b(d), 1903(3). There is not, however, a federal statute that provides a general definition of "Indian." Discussions of this subject can be found at Stephen Pevar, The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights 12-14 (2d ed. 1992); Cohen's Handbook on Federal Indian Law 19-27 (rev. ed. 1982); William Canby, American Indian Law in a Nutshell 6-8 (1981).

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To determine if a person is an Indian for criminal jurisdictional purposes, a two-part test is used. United States v. Driver, 755 F. Supp. 885, 888 (D.S.D. 1991), aff'd on other grounds, 945 F.2d 1410 (8th Cir. 1991), cert. denied, 112 S. Ct. 1209 (1992). The first part is whether the person has some Indian blood. Id. The second part looks to whether the person is recognized as an Indian. Id.

The second part of this test involves an evaluation of several factors. "The most important factor is whether the person is enrolled in a tribe." Id. Although important, this factor is not essential. Id. at 888, n.7; United States v. Antelope, 430 U.S. 641, 646 n.7 (1977). For instance, when an individual is the child of two enrolled members and lives on the reservation, but for some reason was never placed on the tribal enrollment list, that person will likely be determined to be an "Indian" for criminal jurisdictional purposes. Ex Parte Pero, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939). The second factor is whether the government has, either formally or informally, provided the person with assistance reserved only to Indians. United States v. Driver, 755 F. Supp. at 888. The final two factors are whether the person enjoys the benefits of tribal affiliation and whether he is socially recognized as an Indian because he lives on the reservation and participates in Indian social life. Id. at 889. If, however, Congress has terminated a tribe's special relationship with the federal government, individual members of that tribe are no longer Indians for purposes of federal criminal jurisdiction. United States v. Antelope, 430 U.S. 641, at 646 n.7; St. Cloud v. United States, 702 F. Supp. 1456, 1465-66 (D.S.D. 1988); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974).

Once it has been determined that a crime occurred in Indian country and the Indian or non-Indian status of the offender and victim has been established, the following jurisdictional rules apply to misdemeanor crimes committed on reservations located in North Dakota, except the Devils Lake Reservation.

NON-INDIAN OFFENDER, NON-INDIAN VICTIM. The rule is

well established that when a crime committed in Indian country involves both a non-Indian offender and a non-Indian victim, the state has exclusive jurisdiction. Duro v. Reina, 495 U.S. 676, 681 n.1 (1990); United States v. Antelope, 430 U.S. at 642-643 nn.1, 2; United States v. McBratney, 104 U.S. 621, 624 (1881). St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988); **State** v. Snyder, 807 P.2d 55, 56-57 (Idaho 1991); State v. Burrola, 669 P.2d 614, 615 (Ariz. Ct. App. 1983).

Tribes cannot prosecute non-Indians for crimes committed in Indian country. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). Tribes cannot obtain jurisdiction over non-Indians without the express consent of Congress, and Congress has never consented to this type of jurisdiction.

INDIAN OFFENDER, INDIAN VICTIM. Tribes have exclusive jurisdiction over non-major crimes committed by Indian offenders against Indian victims in Indian country. Pevar, supra at 132-34; Canby, supra at 120. See also United States v. Antelope, 430 U.S. at 642-643 nn.1, 2; United States v. Wheeler, 435 U.S. 313, 328 (1978); 18 U.S.C.A. ? 1152.

INDIAN OFFENDER, NON-INDIAN VICTIM. The tribe and the federal government have concurrent jurisdiction to prosecute crimes involving an Indian offender who harms a non-Indian. The state, however, has no jurisdiction to prosecute these cases. Pevar, supra at 132, 139-41; Canby, supra at 121. See also Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979).

The tribe may exercise criminal jurisdiction whenever an Indian offender violates tribal law, regardless of the race of the victim. Wheeler 435 U.S. at 328. The federal government has jurisdiction over misdemeanor crimes committed by Indians against non-Indians under both the General Crimes Act, 18 U.S.C.A. ? 1152, and the Assimilative Crimes Act, 18 U.S.C.A. ? 13.

VICTIMLESS CRIMES. Victimless crimes committed in Indian country by Indian offenders are subject to

either federal or tribal jurisdiction depending on the particular offense committed, but the state does not have jurisdiction over victimless crimes in Indian country involving Indian offenders. See, e.g., United States v. Blue, 722 F.2d 383, 388 n. 4 (8th Cir. 1983); Canby, supra at 120.

Victimless crimes committed by non-Indian offenders in Indian country are subject to state or federal jurisdiction depending on the particular offense, but are not subject to tribal jurisdiction. See **Oliphant, 435** U.S. at 212; McBratney, 104 U.S. at 624; State v. Thomas, 760 P.2d 96 (Mont. 1988); State v. Burrola, 669 P.2d 614, 615 (Ariz. Ct. App. 1983); 18 U.S.C.A. ? 13, 1152.

NON-INDIAN OFFENDER, INDIAN VICTIM. The General Crimes Act authorizes the federal government to prosecute nonIndians who commit crimes against Indians within Indian country. 18 U.S.C.A. ? 1152. In addition, the Assimilative Crimes Act makes all state criminal laws applicable to Indian country that are not already federal crimes. 18 U.S.C.A. 13. Together these two laws give the federal government jurisdiction over crimes committed by non-Indians against Indians in Indian country. Donnelly v. United States, 228 U.S. 243, 271-72 (1913); United States v. Chavez, 290 U.S. 357, 365 (1933).

The next question is whether the state also has jurisdiction to prosecute the non-Indians who commit crimes against Indians within Indian country.

The North Dakota Supreme Court addressed this question in State v. Kuntz, 66 N.W.2d 531, 532 (N.D. 1954). In this case Kuntz, who was white, while on the Ft. Berthold Reservation killed a cow owned by an Indian. Kuntz challenged the state's jurisdiction to prosecute him. The court determined that federal jurisdiction is exclusive and dismissed the state prosecution:

> In Williams v. United States . . . we find this statement:
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> "While the laws and courts of the State of

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Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."

> The statement of the law above quoted . . . is applicable to the jurisdiction of stale courts over offenses committed on the Fort Berthold Reservation in North Dakota by persons belonging to the classes mentioned.
>
> The courts of the State of North Dakota do not have jurisdiction over crimes committed on the Fort Berthold Reservation by one who is not an Indian against one who is an Indian. [Citations omitted.]

"The exclusive jurisdiction of the Federal courts over Indian reservations within state limits extends not only to crimes committed by an Indian, but also to crimes committed on the reservation against an Indian by a white person. [Citations omitted.]

> Kuntz, 66 N.W.2d at 532. Although Kuntz was charged with a felony, no distinction was drawn by the court between misdemeanors and felonies in ruling that the state is without jurisdiction. Its finding is broad: "It is a crime committed by a white man against an Indian on an Indian reservation and . . . is an offense over which the courts of the United States rather than those of . . . North Dakota have jurisdiction." Id. at 533.
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> Other state courts have also concluded that states do not have criminal jurisdiction over non-Indians who commit crimes against Indians. South Dakota v. Larson, 455 N.W.2d 600, 601-02 (S.D. 1990); State v. Flint, 756 P.2d 324, 325-26 (Ariz. Ct. App. 1988), cert. denied, 109 S. Ct. 3228 (1989); State v. Greenwalt, 663 P.2d 1178, 118283 (Mont. 1983) (even though the court recognized that tribal courts lack jurisdiction and "that federal authorities decline to prosecute the great majority of those offenses"). Federal courts agree with the conclusion that states are without

jurisdiction. Washington v. Yakima Indian Nation, 439 U.S. at 470; Williams v. Lee, 358 U.S. 217, 220 (1959); Williams v. United States, 327 U.S. 711, 714 (1946); United States v. Chavez, 290 U.S. 357, 365 (1933); United States v. Ramsey, 271 U.S. 467, 469 (1926); Donnelly, 228 U.S. at 271-72; St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988). See also Cohen's Handbook on Federal Indian Law 353 (rev. ed. 1982); Clinton, ''Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503, 523 n.94 (1976); Pevar, supra at 141; Canby, supra at 127.

Finally, the United States Department of Justice believes that states do not have jurisdiction. Letter dated August 16, 1993, from First Assistant United States Attorney Lynn E. Crooks to North Dakota Attorney General Heidi Heitkamp. Some courts, however, have found state jurisdiction over non-Indians by construing the violation as not against the person or property of an Indian, but as a victimless crime. E.g., State v. Schaeffer, 781 P.2d 264 (Mont. 1989).

The North Dakota Supreme Court's decision in Kuntz clearly finds that the state is without jurisdiction. Kuntz is still the law in North Dakota. It has never been reversed by the state Supreme Court nor challenged or questioned by a federal court. Therefore, the federal government has exclusive jurisdiction over crimes committed by non-Indians against Indian victims in Indian country.

I agree with you, Representative Boucher, that the best course for the state, the tribes, and the federal government is to work together on this jurisdictional issue. Any revision to the present jurisdictional scheme must be consistent with effective and uniform enforcement of criminal laws among all North Dakota citizens, and it must involve a fair allocation of the limited law enforcement resources available to all governments. I should note that an agreement allocating jurisdiction may need the approval of Congress. I will be pleased to participate in any discussions on this issue.

Sincerely,

Representative Merle Boucher
August 31, 1993

Heidi Heitkamp
ATTORNEY GENERAL

LGW/dfm
cc: Assistant U.S. Attorney Lynn Crooks
Senator Byron Dorgan
Senator Kent Conrad
Representative Earl Pomeroy