

INDIAN LAW

Native Americans are a unique minority in this country. Their relations with the United States government have been turbulent—particularly so since the nineteenth century period of westward expansion.¹ During the twentieth century, war lances and winchesters have been traded for law books, with varying degrees of success from the Indians' perspective.²

American Indian law has developed from a patchwork conglomeration of treaties, constitutional mandates, administrative regulation, public law and judicial decision.³ Government Indian policies and the judicial treatment of Indian problems have vacillated between the contrary objectives of assimilation with and separation from the dominant white culture.⁴ This has not been a recent development.⁵ Over the past several decades these conflicting goals of blending the Indians into the white American mainstream and preserving their unique cultural heritage have led to inconsistent federal-tribal relationships.⁶

Originally tribes were treated as sovereign nations⁷ with whom the federal government was required to regulate trade and commerce.⁸ With expansion of the country westward, tribes became increasingly enveloped by the dominant culture leading to a characterization of Indians as "domestic dependent nations"⁹ and yet, at the same time "distinct political communities."¹⁰ As land was set aside for Indian territory, mostly west of the Mississippi River, the tribes that moved there became subject to federal as well as tribal authority.¹¹ Another more radical change occurred

1. See, e.g., V. DELORIA, *BURY MY HEART AT WOUNDED KNEE* (1970).

2. See Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 444, 456-71 (1970).

3. Note, 21 STAN. L. REV. 1236, 1237 (1969).

4. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1838-41 (1968).

5. Note, 21 STAN. L. REV. 1326, 1237-40 (1969).

6. See also D. GETCHES, D. ROSENFELT, & C. WILKINSON, *FEDERAL INDIAN LAW* 29 (1979).

7. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953 (1975).

8. U.S. DEP'T OF THE INTERIOR, *FEDERAL INDIAN LAW* 373-75 (1958) [hereinafter cited as *FEDERAL INDIAN LAW*]. This book represents an updating from the original work, *Handbook of Federal Indian Law*, written by Felix Cohen in 1940.

9. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

10. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L.L. REV. 357, 359 (1978).

11. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 482 (1979).

as the vestiges of the open West were diminishing rapidly. Enclaves of tribes existing on identifiable tracts or reservations were given certain acreages of land by the General Allotment Act of 1887.¹² This Act provided each male member of a tribe with a parcel of land to farm, presumably to facilitate their assimilation into the traditional mold of agrarian lifestyle.¹³ This was decidedly antitribal in purpose and the first coherent assimilative policy of extinguishment of the tribe as a distinct entity.¹⁴

The allotment scheme distributed land to individual Indians within the reservation and the surplus was retained by the government for sale and distribution to homesteaders.¹⁵ But this led to an undesirable checkerboarding of Indian jurisdiction over the land retained and federal jurisdiction over the land which was sold off or leased to homesteaders.¹⁶ To counter this a new policy was formulated by the Indian Reorganization Act of 1934.¹⁷ It brought the alienation of Indian land to a halt and as such was a great deal more pro-tribal or antiassimilationist in effect.¹⁸ Its basic purpose was the revitalization of tribal self-government by placing tribal government within a federal framework under written codes.¹⁹ It seemed that with the passage of this Act the urge to "civilize" the Indian, and the resulting hardships to the Indian identity²⁰ was being successfully resisted.²¹ But this attitude lasted only a few years until a return to assimilation occurred in the early 1950s in the form of Public Law 280,²² infamously known to Indians as Termination.²³ This law's objective was to affirmatively terminate the special status Indians had developed in relation to the federal gov-

12. 25 U.S.C. §§ 331-358 (1976); see FEDERAL INDIAN LAW, *supra* note 8, at 116-17.

13. See Comment, *Tribal Sovereignty and the Supreme Court's 1977-78 Term*, 1978 B.Y.U. L. REV. 911, 919 n.43 (1978).

14. D. Getches, D. Rosenfelt, & C. Wilkinson, *supra* note 6, at 69-70; see Note, 21 STAN. L. REV. 1236, 1239 (1969); Note, 13 CREIGHTON L. REV. 1001, 1007-09 (1979).

15. 25 U.S.C. § 331 (1976).

16. See Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507-13 (1976).

17. 25 U.S.C. § 461 (1976) (also known as the Wheeler-Howard Act).

18. *Fisher v. District Court*, 424 U.S. 383, 387 (1976).

19. D. GETCHES, D. ROSENFELT, & C. WILKINSON, *supra* note 6, at 79-83; see FEDERAL INDIAN LAW, *supra* note 8, at 777.

20. Note, 21 STAN. L. REV. 1236, 1237 (1969).

21. See note 19 and accompanying text *supra*.

22. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (codified in scattered sections of 18, 28 U.S.C.).

23. See D. GETCHES, D. ROSENFELT, & C. WILKINSON, *supra* note 6, at 86-87. Termination was an appropriately chosen term since the policy was one of termination of federal civil and criminal jurisdiction over reservation lands and a transfer to state jurisdiction in California, Nebraska, Wisconsin, Minnesota and Oregon. In 1958, Alaska was later included by Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1976)).

ernment by declaring Indians to be on a social parity with other state citizens and consequently that they should be "released from second-class citizenship as well as [from] the paternalistic supervision of the BIA [Bureau of Indian Affairs]."24

Recently, however, this assimilationist policy has begun to ebb once more and contemporary trends would seem to indicate a greater catering to specific Indian needs than seen in the heyday of termination.²⁵

Throughout, a general recognition that Indians enjoy a special status because of their position in the federal system remains²⁶ even though that status may at times be ill-defined, existing somewhere between the extremes represented by the General Allotment Act and the Indian Reorganization Act.²⁷

PREFERENTIAL TREATMENT OF INDIANS IN GOVERNMENT SERVICE

The Indian Reorganization Act of 1934 established a policy of employment opportunities for Indians where Indians benefited from preferential hiring in the BIA.²⁸ In *Morton v. Mancari*,²⁹ the Supreme Court upheld this preferential treatment against a charge that it violated the due process clause of the fifth amendment,³⁰ and contravened the Equal Employment Opportunity Act of 1972.³¹ In so holding the Supreme Court reaffirmed the special status of Indians as unique legal entities within the federal sys-

24. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 543 (1975).

25. See Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 818 at 1830-32 (1968); Note, 13 CREIGHTON L. REV. 1001, 1008-10 (1979).

26. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

27. Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193, 234 (1959).

28. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 715 (8th Cir. 1979) (relying on 25 U.S.C. § 472 (1976)). The 1976 edition of the United States Code deleted the reference to "civil service laws" although it appeared in the Eighth Circuit opinion. 603 F.2d at 715. It should be noted that, according to the codification explanation following section 472, this was omitted as obsolete since preferential hiring within the Bureau of Indian Affairs is now covered by Schedule A of the Civil Service Rules.

29. 417 U.S. 535 (1974).

30. *Id.* at 555.

31. *Id.* at 547. The Supreme Court noted that the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 5, 42 U.S.C.) specifically exempted the mandate against racial discrimination insofar as their preferential hiring on or near reservations was concerned. 417 U.S. 545. Further, it was held that these exemptions, revealing as they did, a clear Congressional policy of preferential Indian hiring, were not modified by the 1972 legislation. *Id.* at 548.

tem.³²

Preferential treatment was also a central issue in *Oglala Sioux Tribe of Indians v. Andrus*.³³ The Eighth Circuit dealt with two principal issues in this case: first, the applicability of general civil service regulations to Indian employees vis-a-vis the mandates of the Indian Reorganization Act,³⁴ and second, an examination of the deference that should be accorded an agency's interpretations of its own regulations when in conflict with promulgated agency guidelines.³⁵

Anthony Whirlwind Horse was appointed superintendent of the Oglala Tribe at Pine Ridge, South Dakota. His brother, Elijah, was subsequently elected tribal president. In response to inquiries made by the defeated presidential candidate as to the propriety of such a close relationship between superintendent and president, the Bureau of Indian Affairs sought to transfer Whirlwind Horse from Pine Ridge.³⁶ The BIA relied upon established guidelines for its operation which cautioned against actions which could create the appearance of a conflict of interest as well as regulations allowing them to transfer civil servants such as Whirlwind Horse.³⁷ The tribe appealed this decision and after their administrative remedies had been exhausted,³⁸ filed suit in district court for injunctive and declaratory relief.³⁹ This was denied by the district court. The Eighth Circuit Court of Appeals reversed.⁴⁰

An important element of the tribe's case was its reliance on section 12 of the Indian Reorganization Act,⁴¹ which states that the Secretary of the Interior shall establish job standards for Indian employees without regard to civil service laws.⁴² Whirlwind Horse, who entered this case as an intervenor, first attempted to argue this exception for Indian employees in a post-trial brief filed in dis-

32. See *id.* at 546-47.

33. 603 F.2d 707, 716 (8th Cir. 1979).

34. *Id.* at 716.

35. *Id.* at 718.

36. *Id.* at 709-10.

37. *Id.* at 715.

38. *Id.* at 713. The government had argued as a threshold matter, that the suit for injunctive relief was premature since Whirlwind Horse had not exhausted his administrative remedies and was unable to show irreparable injury to justify judicial intervention beforehand. The court distinguished *Sampson v. Murray*, 415 U.S. 61 (1974), cited by the government in support of this proposition, as being factually different. Notwithstanding its applicability, or lack thereof, the court pointed out that Whirlwind Horse need not have exhausted his remedies since the tribe had. 603 F.2d at 712-13.

39. *Id.* at 711.

40. *Id.* at 722.

41. See *id.* at 714.

42. See note 28 *supra*.

strict court. The district court declined to consider this issue on procedural grounds.⁴³ The Eighth Circuit dealt with that holding by reliance on Rule 54(c) of the Federal Rules Civil Procedure which provides that judgment should grant the relief to which a party is entitled, even if the party has not demanded it in the pleadings.⁴⁴

The application of civil service regulations can be invalid if frustrating to congressional policy underlying a statute,⁴⁵ in this case section 12 of the IRA.⁴⁶ To identify what the congressional policy of the IRA was, the court looked to two leading cases in Indian law.⁴⁷ Finding that the blind transfer of federal civil service standards to the context of Indian employment was precisely what section 12 of the IRA was to guard against,⁴⁸ the court held that the BIA decision on Whirlwind Horse had been arbitrary and capricious within the meaning of the Administrative Procedure Act.⁴⁹

DEFERENCE ACCORDED TO AGENCY'S INTERPRETATION OF ITS OWN GUIDELINES

A second question the court examined was to what degree an agency's interpretation of its own guidelines may be accorded deference by the reviewing court.⁵⁰ The tribe claimed the BIA guide-

43. 603 F.2d at 712. This decision was based upon the ground that since it was not pleaded in the amended complaint in intervention nor previously raised by the tribe in the lawsuit, it was not properly before the court. *Id.* at 714.

44. *Id.* The court ruled to hold otherwise would be to return to a theory of the pleadings doctrine which has been abolished under the federal rules. *Id.*

45. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *NLRB v. Brown*, 380 U.S. 278, 291 (1965). In *Brown* workers striking against a multiemployer bargaining group requested a determination that the lockout of regular employees and the use of temporary replacements violated section 8(a)(1) and (3) of the National Labor Relations Act. The NLRB agreed with the strikers but the court of appeals refused to enforce the Board's decision. In affirming the lower court, the Supreme Court held that "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.* at 291.

46. 603 F.2d at 715-16.

47. *Id.* at 716 (citing *Freeman v. Morton*, 499 F.2d 494, 500 n.11 (D.C. Cir. 1974); *Morton v. Mancari*, 417 U.S. 535 (1974)). "The purpose of these preferences . . . has been to give Indians a greater participation in their own self government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42 (emphasis added).

48. 603 F.2d at 716. See generally Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285 (1977).

49. 603 F.2d at 714. The Administrative Procedure Act is codified at 5 U.S.C. §§ 551-59, 701-06 (1976).

50. 603 F.2d at 718.

lines specifically allowed tribal input and participation in decisions regarding the superintendent's hiring, firing and transfer.⁵¹ Specifically, the BIA's guidelines for prior consultation with the tribe as set forth in paragraph eight were at issue⁵² since the tribe had been granted an audience with Washington officials to discuss the matter only *after* the final decision-making process was effectively at an end.⁵³

The structure of the Eighth Circuit's analysis in reviewing this contention was patterned after the seminal opinion of current administrative law,⁵⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁵⁵ Essentially, *Overton Park* directs a reviewing court to decide whether the agency acted within the scope of its statutory discretion and if so, to determine whether its actual choice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"⁵⁶ and whether the agency followed the necessary procedural requirements of both the Administrative Procedure Act and the agency's own internal procedures.⁵⁷

The BIA argued for an interpretation suggesting that the guidelines in question apply only to the initial selection of a superintendent but not to his reassignment. The court noted that an agency's interpretation of its own guidelines and regulations is entitled to great deference but also that this principle is not abso-

51. 603 F.2d at 717-18. Of principal importance to this inquiry was the BIA publication *Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs*.

52. *Id.* at 719.

53. *Id.* at 720 (citing *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974)). See also *Kelly v. United States Dept. of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972). In this case involving regulations and guidelines similar to those involved in *Oglala Sioux*, the court said, "permitting this . . . procedure would thwart the clear purpose [of the guidelines], to afford interested persons an opportunity for airing their view before the regulation is officially adopted. We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *fait accompli*." *Id.*

54. See 603 F.2d at 713-14.

55. 401 U.S. 402 (1971). This case concerned the petition of a citizens' group to halt construction of a six-lane highway through Overton Park in Memphis. *Id.* at 406. Petitioners contended that the Secretary of Transportation had exceeded his authority by approving the plans without making a formal finding of their feasibility; lower courts held that such formal findings were not necessary and that affidavits alone were a sufficient basis for judicial review, but the Supreme Court reversed. *Id.* at 407-09.

56. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

57. *Id.* at 415-17. "The purpose of the APA is to impose procedural safeguards against bureaucratic abuses of the vast powers that have been accumulated by federal agencies." Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285, 296 (1977).

lute.⁵⁸ Viewing the guidelines as a whole, the court determined that a violation existed in the letter as well as the spirit of the agency's internal procedures.⁵⁹

The tribe received little notice of the adverse affects which the BIA's conflict of interest rules could have on them. Further, enforcement of a blanket per se conflict of interest rule between close relatives within the context of Indian employment on a reservation failed to take into account the adverse effect this would have on availability of otherwise qualified Indians for positions of responsibility.⁶⁰ The number of reservation Indians with the appropriate skills for government service is limited and the chances of these people being related is high.⁶¹

By establishing a policy calling for tribal participation in the decision making process, the BIA had created a justified expectation that these people would be given such a chance to defend Whirlwind Horse. Although the BIA had taken the matter under consideration after having met with the tribe in Washington, it had merely reconsidered the facts and had not evaluated the wisdom of the application of its interpretation to those facts.⁶² This was the gravamen of the Indians' contention—that they had not been heard in a meaningful way.⁶³ The court agreed saying the tribe had had a justified expectation of a meaningful opportunity to be heard. Disappointment of this expectation violated recognized principles governing the administrative decision making process.⁶⁴ More importantly, it violated the trust necessary in the government's dealings with the Indians.⁶⁵

CRIMES COMMITTED IN INDIAN COUNTRY: THE JURISDICTIONAL MAZE REVISITED.

Originally, Congress treated Indians as semiindependent, self-governing entities subject to the federal government's right as a

58. 603 F.2d at 718. (citing *United States v. Larionoff*, 431 U.S. 864 (1977)). In *Larionoff* the Supreme Court stated a general principle to be followed in cases dealing with administrative procedures: the administrative interpretation is controlling unless it is clearly wrong or inconsistent with the regulation under which it was promulgated. If the procedure is wrong or inconsistent or operates to deprive affected parties of fair notice, then that procedure is invalid. *Id.* at 872-73.

59. 603 F.2d at 718-19.

60. *Id.* at 716-17.

61. *Id.* at 716 n.11.

62. *Id.* at 720-21.

63. *Id.* at 711.

64. *Id.* at 721. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

65. *Id.* at 721 (citing *United States v. Caceres*, 99 S. Ct. 1465 (1979); *Morton v. Ruiz*, 415 U.S. 199 (1974)).

conquering power to regulate relations with non-Indians.⁶⁶ For example, an early statute specifically exempted application of federal criminal law when a crime was committed in Indian country where both perpetrator and victim were Indian.⁶⁷ But the Major Crimes Act⁶⁸ changed this in 1885. This was the precursor of the present statute which has extended federal jurisdiction over various enumerated major crimes committed by Indians in Indian country.⁶⁹

Essentially federal jurisdiction in Indian country extends to all tracts of land included within an original reservation unless separated therefrom by a specific act of Congress.⁷⁰

There is tripartite jurisdiction on reservations today where Indian defendants are prosecuted under federal, state or tribal law depending on the nature of the crime.⁷¹ The defendants in *United States v. Wounded Knee*⁷² were tried under federal law.⁷³

In this case, two defendants, Spencer Wounded Knee and Nathan With Horn were accused of rape.⁷⁴ The issue of appropriate jurisdiction was brought into question by the defendants since the situs of the crime was on land taken by Congress to construct the Big Bend Dam on the Missouri River.⁷⁵ The defendants contested federal jurisdiction by claiming the land was no longer a part of the reservation and hence, subject to state jurisdiction since other reservation lands taken for substantially similar reasons had resulted in the diminishment of reservation status in those affected areas.⁷⁶

66. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

67. Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733.

68. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385.

69. Indian Crimes Act, 18 U.S.C. § 1153 (1976). The expansive term Indian country is defined in 18 U.S.C. § 1151 (1976).

[T]he 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 [sic] 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.

Id.

70. *See Seymour v. Superintendent*, 368 U.S. 351, 357-58 (1962).

71. Note, 21 STAN. L. REV. 1236, 1241 (1969).

72. 596 F.2d 790 (8th Cir. 1979).

73. *Id.* at 792-96. South Dakota is not one of the states included in the provisions of Public Law 280, "Termination." See notes 22-23 and accompanying text *supra*.

74. 596 F.2d at 791.

75. *Id.* at 792.

76. *Id.* at 792-93. This contention was viewed within the context of the following land appropriation statutes: Act of Sept. 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (Cheyenne River Reservation—Oake Dam project); Act of Sept. 2, 1958, Pub. L. No.

The government conceded that the legislation cited by the defendants had effectively stripped those relevant areas from the reservation.⁷⁷ However, it was pointed out that two key words "as diminished", which were present in the other statutes cited by defendants, had been deleted from the legislation taking land on the Crow Creek Reservation where the rape occurred. Therefore, the government asserted, Congress must have intended that this land was to remain part of the reservation and, a fortiori subject to federal jurisdiction for the crime of rape committed upon it.⁷⁸ The Eighth Circuit agreed.⁷⁹

The court was guided by a number of general principles encountered in Indian law litigation where jurisdiction is disputed.⁸⁰ Of controlling importance was the underlying premise that congressional intent will control.⁸¹ Once a reservation has been established, congressional intent to disestablish it must be either expressed openly on the face of the act or clearly discernible from surrounding circumstances.⁸² A second guideline followed by the court⁸³ was expressed in *McClanahan v. Arizona State Tax Commission*⁸⁴ which enunciated a general rule that doubtful expres-

85-915, 72 Stat. 1766 (Crow Creek Sioux Reservation—Fort Randall Dam); Act of Sept. 2, 1958, Pub. L. No. 85-923, 72 Stat. 1773 (Lower Brule Sioux Reservation—Fort Randall Dam). 596 F.2d at 792-93. Land was taken under these statutes pursuant to a comprehensive flood control program along the Missouri River authorized by the Flood Control Act of Dec. 22, 1944, ch. 204, 58 Stat. 887. 596 F.2d at 793.

77. See 596 F.2d at 793.

78. 596 F.2d at 792-93. Rape is one of the enumerated major crimes over which the federal government would have jurisdiction. See note 57 *supra*.

The article at 21 STAN. L. REV. 1236 (1969), discusses *Gray v. United States*, 394 F.2d 96 (9th Cir. 1968), which is a rape case involving similar jurisdictional questions. That article is a good general source for discussion of criminal jurisdiction and potential constitutional problems relating to crime and Indian country.

79. 596 F.2d at 794.

80. *Id.* at 793-94.

81. *Id.* at 793.

82. *Id.* at 793-94 (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 89-90 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977)). In *Lafferty v. State*, 80 S.D. 411, 125 N.W.2d 171 (1963), a rape case similar to *Wounded Knee*, the court held that extraneous circumstances are pertinent as aids in statutory construction only if the statute under consideration is so doubtful that the court is compelled to avail itself of extrinsic aids in reaching a conclusion. *Id.* at —, 125 N.W.2d at 174. Extraneous pertinent matter detailed by the court in *Wounded Knee* included legislative debates, official correspondence with respect to a proposed statute, administrative treatment of the area (e.g. who offered police and fire protection), and the historical context in which the statute was passed. 596 F.2d at 794. This search was mandated by *Rosebud*. *Id.* at 794. See generally *City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) (where diminishment of the Fort Berthoud Indian reservation was in question).

83. 596 F.2d at 793.

84. 411 U.S. 164 (1973).

sions of intention are to be resolved in favor of the Indians.⁸⁵ A third general principle was that the mere fact that a reservation had been opened to settlement does not necessarily mean that the area has lost its reservation status.⁸⁶

Among the cases supporting this third guideline is *Seymour v. Superintendent of Washington State Penitentiary*.⁸⁷ In that decision the Supreme Court relied on two factors to determine diminishment questions: first, whether or not the act expressly or by implication restored the land to the public domain;⁸⁸ secondly, whether subsequent treatment of the reservation indicates it has been so restored.⁸⁹ In *Wounded Knee* the subsequent treatment of the reservation showed that the tribe alone had provided police and fire protection services on the land in question; the Army Corps of Engineers refused to control or assist in the control of the area.⁹⁰ The court found in these circumstances at least tacit recognition by the state and federal governments of continued reservation status.⁹¹

The significance of the missing words "as diminished" is evidenced in the court's analysis of whether there was a *clear* expression of an intent to diminish.⁹² But the court emphasized that this issue was not dispositive and that the historical context and other factors ought to be considered.⁹³

85. *Id.* at 174. This case concerned the validity of a state tax on income received by a reservation Indian which originated solely from reservation sources. *Id.* at 165. The Supreme Court held that the income was nontaxable by the State because such taxation interfered with matters under exclusive federal jurisdiction according to relevant treaties and statutes. *Id.* Nontaxability resulted despite the fact that taxation was not mentioned in the treaty with the Navajos because "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," *id.* at 168, and "doubtful expressions are to be resolved in favor of the [Indians]." *Id.* at 174; see *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 688-89 (8th Cir. 1973).

86. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977); *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); 596 F.2d at 793-94. In *Mattz* an Indian's conviction for violation of the state game and fish laws was reversed because the land on which the violation occurred still had reservation status and had not been diminished by an executive order opening the reservation to settlement. *Id.* at 504-05. The Supreme Court noted that opening land to settlement does not automatically end reservation status absent a clear intent to do so. *Id.* at 505. Furthermore, the passage of a congressional act referring to a reservation in the past tense does not indicate "any clear purpose to terminate the reservation directly or by innuendo." *Id.* at 498-99.

87. 368 U.S. 351 (1962).

88. *Id.* at 355.

89. *Id.* at 356.

90. 596 F.2d at 795.

91. *Id.* at 796.

92. *Id.* at 794-95.

93. *Id.* at 794 n.7.

Finally, the court examined the consequences of holding that the reservation had been diminished as other reservations had been by similar dam projects.⁹⁴ The resulting checkerboard jurisdiction would, however, result in having to conduct a survey each time a crime was committed near the reservation border to determine who would have jurisdiction.⁹⁵ The court declared that this was "wholly incompatible with common logic and the orderly administration of justice."⁹⁶

The court in *Wounded Knee* followed the traditional approaches to the determination of jurisdictional questions including the general rule of resolving close questions in favor of the tribes, tempered by proper consideration of congressional intent. The case law noted by the court raised the presumption that unless the congressional intent was clearly expressed, the land could not be deemed to have left the Crow Creek Reservation and the jurisdictional umbrella of the federal and tribal governments as it had in other similar cases.⁹⁷ In this regard the missing words of termination, "as diminished", were dispositive.

*United States v. Dupris*⁹⁸ gave the Eighth Circuit Court of Appeals a chance to review again the issue of jurisdiction over crimes committed by Indians in Indian country.⁹⁹ Glen Durpis, an Indian, had been charged with burglary and larceny.¹⁰⁰ The government appealed the district court's granting of the defendant's motion to dismiss on grounds that federal jurisdiction was lacking.¹⁰¹ The district court refused to follow two previous cases, *United States v. Long Elk*¹⁰² and *United States ex rel. Condon v. Erickson*,¹⁰³ which would have been dispositive of the issue of jurisdiction.¹⁰⁴

Erickson was a habeas corpus proceeding by a state prisoner in South Dakota.¹⁰⁵ The Eighth Circuit held that a 1908 Act of Congress which opened portions of the Cheyenne River Reservation to white settlement, the same area at issue in *Dupris*, did not dimin-

94. *Id.* at 794-95.

95. *Id.* at 795 n.9.

96. *Id.* But see *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 502 (1979). Washington reversed a Ninth Circuit holding that such checkerboarding is invalid on its face, at least under the Equal Protection Clause. *Id.* at 502.

97. 596 F.2d at 795-76.

98. No. 78-1575 (8th Cir. Nov. 27, 1979).

99. *Id.* slip op. at 1.

100. *Id.*

101. *Id.* at 1-2.

102. 564 F.2d 1032 (8th Cir. 1977).

103. 478 F.2d 684 (8th Cir. 1973).

104. No. 78-1575, slip op. at 2.

105. 478 F.2d at 685.

ish the boundaries of the reservation.¹⁰⁶ Therefore, the state had no jurisdiction to try the defendant.¹⁰⁷ The case was very similar to *Wounded Knee* in factual setting, disposition, and judicial rationale,¹⁰⁸ and reiterated that diminishment of the reservation had to be clearly expressed in the Act and that such diminishment would not be found absent such an expression.¹⁰⁹ The same structure of analysis was used in *Long Elk* where it was contended that a 1913 Act of Congress diminished the Standing Rock Reservation.¹¹⁰

The dissent argued that since *Rosebud Sioux Tribe of Indians v. Kneip*,¹¹¹ the trend of relying on a clear expression of intent to diminish, or absence thereof as seen in the latter two cases, had shifted.¹¹² *Rosebud* held that a portion of the Rosebud Sioux Reservation had been diminished by early twentieth century statutes even though no clear expression was found on the face of the statute authorizing it.¹¹³ It reached this result by a thorough examination of, among other factors, the legislative and historical context.¹¹⁴ The dissent in *Dupris* considered this a mandate to do likewise.¹¹⁵ But the majority disposed of the contention that *Rosebud* demanded abandonment of the *Long Elk*, and *Erickson* decisions in very short order, noting that no prior or subsequent decision of the Supreme Court mandated such a result.¹¹⁶ However, *Erickson* was cited with approval by the Supreme Court.¹¹⁷ The balance of the majority's opinion addressed the arguments raised by the dissent.¹¹⁸

According to the dissent, courts have traditionally undertaken an analysis of six factors to determine the intent of Congress in legislation which affects the reservation boundaries: 1) the historical context of the statute; 2) the language of the statute and specifically the use of the term "cede" therein; 3) the role of the government in whether the Indians were paid a sum certain; 4) the

106. *Id.* at 689.

107. *Id.*

108. Both cases turned upon whether or not the area at issue was "Indian Country" as it is presently defined by statute, see note 69 *supra*, and not necessarily whether title has been statutorily surrendered. In addition, both cases relied upon the requirements of a clear expression to disestablish the affected area.

109. 478 F.2d at 688-89.

110. 565 F.2d at 1039-40.

111. 430 U.S. 584 (1977).

112. No. 78-1575, slip op. at 14.

113. 430 U.S. at 613-14.

114. *Id.*

115. No. 78-1575, slip op. at 14-15.

116. *Id.* at 3.

117. *Mattz v. Arnett*, 412 U.S. at 505.

118. No. 78-1575, slip op. at 4-10.

legislative history; 5) whether an actual agreement was reached with the Indians; and 6) the jurisdictional treatment of the area since it had been opened to settlement.¹¹⁹

The dissent was of the opinion that the language of the statute, the role of the government in whether the Indians were paid a sum certain, and whether an agreement was actually reached with the Indians, were irrelevant to the boundary issue and consequently, relied upon other factors in analyzing the case.¹²⁰

In analyzing the dissent's six factors one by one, the majority first addressed the historical context argument.¹²¹ They conceded that South Dakota Congressmen and Senators, as well as most state leaders, ardently sought the opening of all reservations in the state to white settlement in order that the Indians might "readily acquire white man's civilization and industrious habits."¹²² But *Rosebud* requires that each act of Congress be individually examined to determine whether there was a clearly expressed intent to actually disestablish or *diminish* the reservation.¹²³ Noting that opening a reservation and diminishing it are not necessarily synonymous, the majority refused to rely on the historical context.¹²⁴

The language of the statute was the second factor listed by the dissent.¹²⁵ The dissent concluded that actual use or absence of the word cede in statutory language should not be considered in the disestablishment issue,¹²⁶ principally because its use has occasionally been without precision¹²⁷ and therefore its presence or absence would be irrelevant to Congressional intent.¹²⁸ The majority conceded that perhaps too much weight has been given to the word cede but refused to agree that its presence or absence is made irrelevant by the historical context.¹²⁹

Irrelevant also to the issue of disestablishment, according to the dissent, is specific payment of sums to the Indians for their lands and the role of the government.¹³⁰ In other words, the issue

119. *Id.* at 15-16.

120. *Id.* at 16.

121. *Id.* at 5-6.

122. *Id.* at 6.

123. 430 U.S. at 614.

124. No. 78-1575, slip op. at 6.

125. *Id.* at 22.

126. *Id.* at 36.

127. *Id.* at 23. See generally, Comment, *New Town et al: The Future of an Illusion*, 18 S.D.L. Rev. 85 (1973).

128. No. 78-1575, slip op. at 36.

129. *Id.* at 6-7.

130. *Id.* at 39. *Rosebud* discussed the *DeCoteau* courts reliance on the payment issue but added that they now considered this to be one of several factors to be considered. 430 U.S. at 596 n.18, 598 n.20.

of whether the government was a sales agent or actual purchaser should not be relevant to reservation status.¹³¹ The majority did not respond directly to this contention and it seems reasonable to assume that this omission is equivalent to agreement, especially in light of the clear language of *Rosebud*.¹³²

The fourth factor cited by the dissent was the legislative history.¹³³ This was said to shed considerable light on the interrelationship of all statutes opening South Dakota reservations and the term "cession".¹³⁴ The reports from a Department of the Interior official, McLaughlin, who was sent to the reservation to explain the meaning of the 1908 Act to the Indians were quoted at length throughout the dissenting opinion.¹³⁵ From these and other historical sources the dissent sought to show that the effect of the 1908 Act was equivalent to other similar statutes where disestablishment has been found.¹³⁶ The majority reiterated that, because no new specific statements from the Congressional record were cited, they were left to conclude, as they had with the historical context argument, that it was simply not clear that Congress *shared* in the intent to disestablish as expressed by South Dakota officials.¹³⁷

As to the issue of whether or not an agreement had been actually reached with the Indians indicating specific intent to diminish the reservation, the dissent declined to hold its absence was relevant.¹³⁸ Instead, a statement by McLaughlin was cited to the effect that "the general sentiment of the Indians in council with me . . . was in favor of the relinquishment."¹³⁹ The majority opined that such self-serving statements cannot be the functional equivalent of clear congressional intent.¹⁴⁰

Finally, the majority pointed out that jurisdictional treatment of the relevant portion of the reservation, subsequent to the passage of the act, can be read "in about any way the reader likes."¹⁴¹ The civil and criminal jurisdiction of the area of the reservation where Dupris was arrested has fluctuated between state and federal control since 1908.¹⁴² But *Erickson* finally ended this by hold-

131. 430 U.S. at 617 (Marshall, J., dissenting).

132. See 478 F.2d at 687.

133. No. 78-1575, slip op. at 39.

134. *Id.* at 40.

135. *Id.* at 17 *passim*.

136. *Id.* at 40.

137. *Id.* at 8.

138. *Id.* at 41.

139. *Id.* at 41-42.

140. *Id.* at 8.

141. *Id.* at 9. However, subsequent jurisdictional treatment was given some weight in *Wounded Knee*. 596 F.2d at 795-96.

142. No. 78-1575, slip op. at 9, 45.

ing that the reservation had not been diminished and consequently, that the federal government had jurisdiction.¹⁴³ In refusing to overrule *Erickson* and the subsequent conforming opinion in *Long Elk*, the majority refused to find prior exercise of civil and criminal jurisdiction by South Dakota to be relevant.¹⁴⁴ Additionally, it was noted that in refusing to overrule these prior opinions, the problem of checkerboard jurisdiction is avoided by clearly delineating the jurisdiction over the land in question.¹⁴⁵ Retaining federal jurisdiction over random plots of land, those which are dependent Indian communities or allotments, would be the result of holding otherwise.¹⁴⁶ But the dissent in *Dupris* argued that this checkerboarding is an unfortunate but inevitable result mandated by the statutory definition of Indian country.¹⁴⁷ However, the majority felt its position was consistent with decisions of the Supreme Court which have demanded clear and unambiguous language to effect diminishment.¹⁴⁸

This opinion thus represents an eloquent challenge to the demand for a clear and unambiguous expression *on the face* of an act which is argued as diminishing a reservation. The dissent, in elaborate fashion, followed the mandate of *Rosebud* in looking to historical context, legislative history, and other factors to determine the congressional intent. But the reliance on a "clear expression" of that intent by the majority (and indeed its opinion of the criteria of what is clear) suggests that the Eighth Circuit is not yet willing to retreat from the requirement of a literal expression in a statute before reservation lands are to be considered terminated. It remains to be seen whether, in light of the dissent's strong opinion, that reliance will continue as steadfast in future Eighth Circuit decisions.

Erik D. Nilsson—'81

143. 478 F.2d at 689.

144. No. 78-1575, slip op. at 9.

145. *Id.* at 9.

146. *Id.*

147. *Id.* at 50, n.28; 18 U.S.C. § 1151 (1976); see note 69 *supra*.

148. No. 78-1575, slip op. at 9.